

EDITED BY

RAINER GROTE &
TILMANN J. RÖDER

Constitutionalism, Human Rights, and Islam after the Arab Spring



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CONSTITUTIONALISM,
HUMAN RIGHTS, AND ISLAM
AFTER THE ARAB SPRING

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Edited by
Rainer Grote
and
Tilmann J. Röder

Assistant Editor
Ali M. El-Haj

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Preface

This volume is the conclusion of a long journey, which started with a trip to Cairo and Benghazi in the summer of 2011 when the events of the Arab Spring had already shaken old certainties about the seemingly endless rule of the region's autocrats and the potential for democratic change appeared boundless. Suddenly, basic issues of constitutional legitimacy, the organization of political power, equal rights for all citizens, and the role of religion and the military in state and society became the subject of wide public debate, which in terms of breadth and scope had few, if any, precedents in the region. Although these debates have subsequently been stifled more or less successfully by the government in some of these countries (Bahrain, Saudi Arabia) and submerged by civil war in others (Syria, Libya, Yemen), they continue in some form or another in most of them and will shape the constitutional future of the countries concerned, as well as the destiny of the region as a whole, in the years and decades to come.

We first discussed many of these issues in a systematic manner during a conference in Heidelberg in February 2012, which covered the main issues and problems of the transition processes triggered by the Arab Spring. Several of the distinguished constitutional scholars and lawyers from North Africa and the Middle East who participated in this venture also contributed to the present volume. Other authors joined at a later stage when the need arose to cover additional topics, the relevance of which had not been fully evident at the time of the conference. We are grateful that so many authors from the region, including female scholars, have been willing to contribute their insights to this volume, despite the heavy demands on their time and energy this has entailed.

In important ways, this book also builds upon our previous publication *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press 2012). Many of the fundamental issues discussed there, namely those concerning the conditions for the realization of key aspects of contemporary constitutionalism—democracy, the separation of powers, fundamental rights, and the rule of law—in an Islamic context, are of central importance to a better understanding of the constitutional and political debates featuring prominently in and after the Arab Spring. Readers interested in a more thorough exploration of those general questions are referred to that book.

Since the start of the Arab Spring the pace of change in the region has increased dramatically. This presents a huge challenge to observers and analysts who want to keep track of relevant political and constitutional developments. The chapters in this book were last

revised and updated in the second half of 2015, when a degree of political and institutional stability seemed to have returned to some of the countries most directly affected by the Arab Spring, while in others the future appeared to be shrouded in greater uncertainty than ever before.

Many colleagues have supported us throughout this project. We are particularly grateful to Shéhérazade Elyazidi, Miriam Östreich, Victoria Otto, Elisabeth Richter, Raphael Schock, and Theodor Shulman who coordinated the editorial process at various stages. Rebekka Yates and Mohammad El-Haj translated numerous articles from French and Arabic into English. Tim Knoche accepted the difficult task of unifying the transliteration of Arabic terms and names. We cordially thank you all for your highly professional assistance.

Scores of students and interns helped us, and the authors, with literature research, proof-reading, and formatting of texts according to the publishing standards—too many, indeed, to be able to mention all of your names. But it is safe to say that without your diligent work, this book would never have seen the light of day. We are enormously indebted to all of you.

Tony Lim, Alex Flach, and John Louth of Oxford University Press supported us throughout all stages of this book project. We are deeply grateful for their encouragement and trust that the project would finally come to fruition.

Last but not least, we warmly thank all the authors for their commitment to the project and the time and energy they invested in researching and writing on their topics. Working with so many talented and committed colleagues on this project has been a most rewarding experience. This is your book!

Rainer Grote and Tilmann J. Röder (*editors*)

Ali M. El-Haj (*assistant editor*)

Heidelberg, September 2015

Editors' Note on the Transliteration

The mode of transferring words and names from Arabic and other regional languages into the Latin alphabet must, in the first line, reflect the interests of the readers. Works written for an audience with a proficiency of at least basic Arabic, Farsi, and Kurdish may strictly follow a scientific system of transliteration, while authors writing for a wider audience should make some concessions if they want to give their readers a chance to fluently read the text. We decided to modify one of the more prominent systems of transliteration as far as it was deemed wise in order to help readers intuitively pronounce the words as they should sound.

The following characters need some explanation.

ā, ī, ū; ê, î, û vowels with a line or a circumflex on top are spelled long, others short.

‘ the consonant ‘ayn (ع) may be difficult to hear and produce; it resembles an “ah” with the extreme back of the tongue held up against the roof of the mouth

’ is neither a consonant nor a vowel but represents a glottal stop as it would be used in German in “be-achten”

dh the consonant dhāl (ذ) is pronounced like a soft th in English (“mother”)

ḍ, ṣ, ṭ, ṣ the consonants ḍād, (ض), ṣād (ص), ṭā (ط), and ṣā (ظ) are pronounced as d, s, t, z in English but darken the sound of the surrounding vowels

gh the consonant ghayn (غ) is pronounced like the r in French (“au revoir”)

ḥ the consonant hā (ح) is a sharp h like in the name “Ḥasan”

ı the Turkish vowel ı is pronounced even darker than the i in “middle”

kh the consonant khā (خ) is pronounced like the j in Spanish (“mujer”) or the ch in German (“wach”)

zh the consonant zhe (ژ) exists, among others, in the Farsi alphabet and is pronounced like the j in French (“Janvier”)

All other characters directly correspond to letters in the Latin alphabet or occur very rarely.

The editors and Tim Knoche

CONSTITUTIONALISM,
HUMAN RIGHTS, AND ISLAM
AFTER THE ARAB SPRING

Introduction

RAINER GROTE AND TILMANN J. RÖDER

Since the end of 2010, popular protests, revolts, and revolutions have shaken North Africa and the Middle East. The so-called Arab Spring, which had been triggered by the desperate self-immolation of the Tunisian street vendor Muḥammad Būʿazīzī, turned into a historical opportunity for fundamental political and constitutional change. Massive uprisings erupted in Egypt, Libya, Syria, Tunisia, and Yemen, while major protests broke out in Algeria, Bahrain, Iraq, Jordan, Kuwait, Morocco, and Sudan, and minor protests occurred in Djibouti, Mauritania, Oman, Saudi Arabia, Palestine, and Western Sahara. Other countries in the region were at least indirectly affected, such as Lebanon and Turkey, which received large numbers of refugees from neighboring Syria. Some of them saw an opportunity to extend their influence abroad, often in direct competition with other states from the region. Qatar supported the Muslim Brotherhood in Egypt and rebel groups in Libya, Syria, and other countries, both financially and through its global multimedia conglomerate, Al Jazeera Media Network, while Saudi Arabia worked assiduously to counter the Brotherhood's mounting influence in the region by propping up its enemies. The Gulf monarchies denounced Iran's hand behind the stirring of Shi'ah discontent in the region, notably in Bahrain and Yemen. All of these states plus Turkey, Russia, the United States, the United Kingdom, France, and Canada actively intervened in the Syrian civil war, providing their allies with both money and weapons, and in the cases of Russia and several NATO member states, with air strikes.

In the early stages of the Arab Spring, many rulers reacted with a combination of repression and concessions to the mounting public protest ("days of wrath"). After a while, the events in the individual countries took different directions but continued to influence each other. Two monarchies and five republics receive special attention in this book in view of the important repercussions the events of the Arab Spring had on the development of their respective constitutional and political systems: Morocco, Jordan, Tunisia, Egypt, Libya, Syria, and Yemen.

The rulers of Morocco and Jordan introduced constitutional amendments that combined limited reforms with safeguards for their own power. In June 2011, King Muḥammad VI of Morocco presented his plans for constitutional reform, which included the strengthening of the

parliament and the prime minister, the introduction of a constitutional court, and an extension of civil liberties. Muḥammad VI decided, however, to retain many powers of an absolute monarch. Particularly, the powers associated with strategic policy choices, security and religious issues, and the dissolution of the parliament and dismissal of the prime minister were to remain his exclusive domain. The proposed constitution found strong popular support in a referendum held in July 2011 and was promulgated at the end of the same month. Only small groups continued their protests, demanding the establishment of a truly constitutional monarchy.

King ʿAbdullāh II of Jordan decided not to involve the citizens but only the parliament of his country in the constitutional reform process. In September 2011, both chambers of the *Majlis al-Ummah* approved amendments, which on the whole were more limited in scope than those adopted in Morocco. The most important innovation was the introduction of a constitutional court. As protests continued, the cabinet was reshuffled several times, the parliament was dissolved and a new legislature elected; additional constitutional amendments were adopted in August 2014—signs of instability in a country located awkwardly geographically speaking and which found itself in a difficult economic situation that got even more complicated when hundreds of thousands of refugees poured in from neighboring Syria as the civil war drove ever more people from their homes.

In comparison, Morocco stands as a model for the modernization of an Islamic monarchy tightly controlled from the top. However, the strengthening of the powers of parliament and of the opposition, the introduction of checks and balances between the branches of the government, and the increased protection of fundamental rights were possible primarily due to favorable conditions that cannot be reproduced easily in other parts of the Arab world. Meanwhile, five authoritarian regimes—Tunisia, Egypt, Libya, Syria, and Yemen—experienced major upheavals; of the pre-2011 leaders, only President Bashār al-Assad of Syria managed to stay in power, but in the process lost control over extended areas of the country. His effort to quell the protests with a new constitution adopted in 2012 on the one hand, and bloody repression on the other, failed. At the time of writing, an end to the civil war in Syria was not in sight. The jihadist militia that presumptuously adopted the name “Islamic State” (IS) exercised control over about half of the national territory and brutally oppressed millions of citizens. Kurdish groups established a radically different, libertarian model of self-governance in their settlement areas in northern Syria.

Yemen also fell into the abyss of civil war. After tough bargaining and the political intervention of the Gulf Cooperation Council (GCC), President ʿAlī ʿAbdullāh Ṣāliḥ withdrew; in February 2012, his former deputy ʿAbd Rabbuh Hādī Maṣṣūr became president in elections in which he was the sole candidate. A year later, a National Dialogue Conference (NDC) began in Ṣanaʿā; however, the process was marked by protests and violence throughout the country. Calls for independence grew louder in the south, which had been a socialist republic of its own until 1990, while tensions between the Zaydī Ḥūthī group that originates from the north and government-aligned forces increased and the jihadist group al-Qāʿidah on the Arab Peninsula (AQAP) continued to destabilize the country. Results reached by the NDC could not be implemented as the Ḥūthī movement revolted, took control of the capital in September 2014, and installed a Revolutionary Committee led by Muḥammad ʿAlī al-Ḥūthī. Since then, the civil war has engulfed nearly all of Yemen.

Sadly, Libya also descended into chaos. The revolutionary phase of 2011 had been promising, with an Interim Constitutional Declaration drafted by a National Transitional Council (NTC) that generated legitimacy by incorporating representatives from all parts of the country and gained wide international recognition as the *de facto* government of the country. In October 2011 militias killed the reviled “Brotherly Leader” of Libya, Muʿammar al-Qadhafi. Almost a year later, the NTC formally handed over power to the newly elected General National Congress. However, the transformation process had already gone

astray due to deep ideological divides and rivalries between different clans and political factions. Further constitutional amendments could not keep it on track. For many months, two political bodies claimed to be the legitimate representative of Libya: the internationally recognized Council of Deputies and the General National Congress, which was dissolved following the June 2014 elections but later reconvened by a minority of its members. In December 2015, the competing bodies signed a UN-brokered agreement on the formation of a unity government. However, this deal might be difficult to put into effect as tensions between the two bodies remain high and parts of the country are not under the control of either of them, but of various Islamist, rebel, and tribal militias.

While these three country examples illustrate which factors can potentially derail a political and constitutional transformation process following a popular uprising—ideological and sectarian tensions, an overly powerful regime, power vacuums that are filled by destructive militias or terrorist groups, and the lack of legitimate and integrative, reform-minded institutions or figures—the cases of Egypt and Tunisia demonstrate what diametrically different directions a transformation process can take.

In Egypt, the Supreme Council of the Armed Forces (SCAF) assumed power after President Ḥusnī Mubārak's resignation in February 2011. Despite their promises to act as a neutral arbiter, the military institution turned into being a political actor, issuing constitutional declarations, appointing interim presidents and prime ministers, and being directly involved in virtually all public affairs. Two constitutions were suspended, and two new constitutions were submitted to referenda and enacted. A candidate affiliated with the Muslim Brotherhood, Muḥammad Mursī, became the first democratically elected president of the country and the first who did not stem from the military ranks—only to be overthrown by the military after just twelve months. He was tried for various charges before criminal courts and sentenced to death in May 2015 (with the appeal still pending). Under the presidency of 'Abd al-Fatāḥ al-Sīsī, the rift between the different political groups in Egypt is wider than ever before. The Muslim Brotherhood has been outlawed as a terrorist organization, and its supporters have been killed, jailed, or driven into the underground. The military has re-established its iron grip on Egyptian politics, and the opportunity to create a pluralist democracy with a place for both Islamists and non-Islamists has been lost for probably a long time.

Only in Tunisia, the transition process led to a result that probably comes close to what most of the protesters in 2010–2011 had aspired and fought for: a democratic state that does not deny the country's Islamic tradition but provides space for much of the diversity that it comprises. The "Dignity Revolution" (*thawrat al-karāmah*), as the events were called in the country, met favorable circumstances and was prudently led. First, and most important, the military decided not to use force against the protesters and paved the way for an orderly transition process. The main opposition forces were able to form an interim National Unity Government under the chairmanship of Yadh Ben Achour, a widely respected scholar and lawyer, and the High Commission for the Realization of the Objectives of the Revolution prepared the ground for elections to a constituent assembly. The elections were held in October 2011 and resulted in the formation of an interim coalition government led by the moderate Islamists of the al-Nahḍah Party, with the participation of the center-left *Congrès pour la République* and the left-leaning al-Takattul as junior partners. Al-Nahḍah declared that it would respect the secular nature of the state and not insist on Shari'ah to become the main source of legislation in the new constitution. The constitution drafted by the Constituent Assembly is a compromise between Ennahda and the non-Islamist groups in the Assembly, brokered by Tunisia's vibrant civil society, which intervened at a crucial moment when the constitutional process seemed to have broken down. Replicating in a way the events of a century and a half before, when Tunisia was the

first Arab country to adopt a constitution in 1861, the small country thus emerged as the vanguard of constitutional change in the Arab world. Only here the *dawlah al-madaniyah* or civil state—in the sense of a constitutional democracy that is neither controlled by the military nor theocrats nor other oppressive forces—became reality. The constitutional changes after the Arab Spring, which have so far resulted in the enactment of new constitutions in Morocco (2011), Jordan (2011), Syria (2012), Egypt (2012 and 2014), and Tunisia (2013), the adoption of interim constitutions or transition agreements in Yemen (2011) and Libya (2011 and 2015), and the enactment of constitutional amendments in other Arab countries, constitute the most important legal development in this world region since the multiple state transformation processes after the disintegration of the Soviet Union in the early 1990s. So far, only a surprisingly small number of scholarly publications deal with them.¹ None of these works examine the relevance of the transformation processes for the development and future of constitutionalism in Arab countries using an integrated and multifaceted approach. The present volume shall provide this integrated analysis. It seeks to capture the constitutional trends and patterns emerging in the post-Arab Spring world. Most of its chapters were written by authors from the region, and about one-third of the contributions have been translated from Arabic or French into English. The diversity of styles also reflects the diverse backgrounds of the authors.

In seven parts, the book seeks to analyze the constitutional transformations undergone by Arab countries since 2011 from a multidisciplinary perspective, drawing on the methods and insights of comparative constitutional law, international law, Islamic law, comparative politics, jurisprudence, and legal history. The main parts of the book are preceded by a reflection on the way in which the transition processes triggered by the Arab Spring have unfolded in different countries, and a concluding chapter tries to assess the lasting impact of the Arab Spring for the advancement of (Islamic) constitutionalism, democracy, human rights, and rule of law in the region.

Part 1 of the book covers questions of the legitimacy of constitution-making processes as such. It begins with theoretical perspectives from an Islamic and international legal standpoint. Chapters examining developments in specific countries follow. The institutional changes that have taken place in the Tunisian transformation process are examined as well as the involvement of the most important authority of Sunni Islam, Al-Azhar University, in Egypt. The current civil war in Syria has raised questions about the legitimacy of constitutional change through international recognition. A chapter dealing with this subject

¹ Some of the more important works that are written in or translated into European languages are: Chibli Mallat, *Philosophy of Nonviolence: Revolution, Constitutionalism, and Justice beyond the Middle East* (Oxford University Press 2015); Mehran Kamrava, *Beyond the Arab Spring: The Evolving Ruling Bargain in the Middle East* (Barnes and Noble 2015); Antonio Abat i Ninet and Mark Tushnet, *The Arab Spring: An Essay on Revolution and Constitutionalism* (Elgar 2015); Sonia L. Alaniak, *The Transition Towards Revolution and Reform: The Arab Spring Realised?* (Edinburgh University Press 2014); Justin Frosini and Francesco Biagi, *Political and Constitutional Transitions in North Africa* (Routledge 2014); Khair El-Din Haseeb (ed.), *State and Religion in the Arab World* (Routledge 2014); Bruno Menhofer and Dirk Otto (eds.), *Recht nach dem Arabischen Frühling. Beiträge zum islamischen Recht IX* (Peter Lang 2014); Nathan J. Brown and Saïd Amir Arjomand, *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran* (SUNY Press 2013); Elizabeth F. Thompson, *Justice Interrupted: The Struggle for Constitutional Government in the Middle East* (Harvard University Press 2013); Joshua Castellino and Kathleen A. Cavanaugh, *Minority Rights in the Middle East* (Oxford University Press 2013); Bassam Tibi, *The Sharia State: Arab Spring and Democratization* (Routledge 2013); Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (5th edition, Westview Press 2012).

also examines events concerning Libya and Palestine from a comparative perspective, while another looks closely and through a comparative analysis at the competing representatives of the Syrian “sovereign.” This is followed by an evaluation of the constitutional changes that have taken place in Jordan and, moving slowly toward the Arab Gulf, on the possibilities and limits of constitutional developments in the monarchies there.

Part 2 looks at the relationship between state and religion. The prominence of parties with a moderate or radical Islamist agenda, such as in Tunisia, Egypt, and Libya, has raised the question of whether the concept of *dawlah al-madaniyah* (the civil state) can be used to reconcile Islam and modern notions of statehood and democracy. Moreover, provisions defining the Islamic character of the state and the role of Sharī‘ah as a (or the) source of legislation nowadays figure prominently in most Arab constitutions. Their application frequently raises difficult issues in practice, also because these provisions often result from complex and at times nontransparent constitutional bargaining processes between the relevant political actors and constitute an uneasy compromise between those groups which call for the establishment of a constitutional system in which political rule is based entirely on the precepts of Islam and those forces which essentially want to maintain the secular character of the main institutions of governance and thus will accept only a moderate or limited Islamization of the constitution and the legal and political system.

Part 3 focuses on the role and functions of the military in the state. It begins with an overview of the position and functions of the military in the constitutional systems of selected Arab countries, followed by a study of the changes in civil-military relationships after the Arab Spring. Little attention has been given so far to the role of the military in Mauritania, which is the subject of a separate contribution. Another chapter deals with the military’s sway over the political system of Algeria, a country that set an important precedent for the bloody repression of Islamist reform movements in the 1990s. Moving on to the Levant, the integrative function of the military in the pluralist state of the Lebanese people is examined more closely. The relevant chapter seeks to draw lessons from the Lebanese experience with regard to the role an army can play in a state plagued by sectarian conflict.

Part 4 analyzes the fragile basis of democracy and development in the Arab world. It opens with a *tour d’horizon* of the historical, political, and economic factors that have shaped the region since independence. The following chapters address key issues of democratic reform: electoral systems and decentralization. A chapter on Morocco examines the various aspects related to the constitutional modernization of a traditional Islamic monarchy. The legal status of Kurds in Iraq and Syria, which has important political and legal repercussions far beyond those two countries, is analyzed in the next chapter. A final chapter deals with the huge economic challenges faced by the constitutional transformation processes in the region.

Part 5 focuses on civil and political rights, minority rights, women’s rights, and citizenship rights, which have all been crucial issues in the context of the Arab Spring. International human rights law defines certain red lines that may not be crossed if the countries want to abide by their international commitments. One chapter looks specifically at the respect of civil and political rights as a precondition for democratic participation, followed by a study of linguistic and cultural rights in Arab constitutions. With regard to women’s rights, two chapters ask if they are at risk in Tunisia and if there is any hope for their strengthening in Yemen. The rights of religious minorities in postsecession Sudan and in Egypt, Syria, and Iraq is the subject of a separate contribution. Constitutional developments on the Arab Peninsula have largely been overshadowed by the reform processes taking part in other Arab countries, especially after the Arab Spring. They are here dealt with in separate chapters on civil and citizenship rights in the region and constitutional reform in Oman.

Part 6 takes a closer look at the establishment and strengthening of constitutional courts in Arab countries. So far, Morocco, Tunisia, Syria, and Jordan have adapted these institutions as means to uphold their constitutions and to enforce the rule of law and citizens' rights more effectively. All of these will be analyzed in the introductory chapter and subsequent country studies. A final chapter examines the concept of an International Constitutional Court, which was developed by Tunisia's post-Arab Spring President al-Munṣif al-Marzūqī and a group of international lawyers and presented at the General Assembly of the United Nations in September 2012. It demonstrates the innovative thinking that exists in one of the world's most instable regions.

Finally, Part 7 seeks to contextualize events in the Arab Spring countries by studying the wider international context of the constitutional dynamics in the region. The role occupied by international law in the newly adopted or amended Arab constitutions is discussed in the introductory chapter. The following chapters feature essays on the relevance of reform experiences and debates in Turkey, Iran, Iraq, and Palestine to the countries of the Arab Spring. Finally, the influence of international organizations on the transformation processes in the region (and its limits) is addressed in a case study on the role played by the European Union in the Arab Spring and its aftermath.

Prologue

Constitutional Debates in the Arab Spring

RAINER GROTE AND TILMANN J. RÖDER

I. INTRODUCTION

The events which would later become known as the Arab Spring raised many hopes in the Arab and in the outside world, hopes for democracy, rule of law, and a greater respect for dignity, liberty and equality. The debates on the construction of a new political order following the overthrow of the old regimes crystallized many of the hopes concerning the concepts of equal citizenship, personal dignity, governmental accountability, and rule of law.¹

While a form of general agreement about the bases on which the new constitutional order was to be built thus existed because the underlying grievances which fueled the protest movements in the various Arab countries were similar—over autocracy, corruption, the lack of economic opportunity and political participation—the way and the extent to which these shared political aspirations could be realized differed from one country to the next because in no two countries were the balance of forces, the institutional setup, nor the legacy of history identical.²

In Syria, the mass protest soon degenerated into a bloody and seemingly interminable civil war. In other countries, especially in the Gulf monarchies including Saudi Arabia, the reform movements were quashed by a mixture of heavy-handed repression and economic concessions. In a third group of countries, namely in Morocco and Jordan, the monarchical governments quelled the unrest by taking control of the reform movement and implementing limited constitutional reforms, which satisfied some of demands for greater respect of

¹ Lisa Anderson, “Authoritarian Legacies and Regime Change” in Fawaz A. Gerges (ed.), *The New Middle East—Protest and Revolution in the Arab World* (Cambridge University Press, Cambridge 2014) 41.

² Jackson Nyamuya Maogoto and Andrew Coleman, “Changing the Guard—The Price of Democracy: Lessons from the Arab Spring on Constitutionalism” in Carlo Panara and Gary Wilson (eds.), *The Arab Spring—New Patterns for Democracy and International Law* (Brill/ Nijhoff, Boston 2013) 6.

fundamental rights and the rule of law without questioning the fundamental balance of powers and the monarchical character of the regime. Only in Tunisia, Egypt, Libya, and Yemen did a constitutional moment in the form of collapse of the old regime arise.

II. ABORTED TRANSITION PROCESSES IN LIBYA AND YEMEN

In Libya, however, the transition process triggered by the fall of Mu‘ammar al-Qadhdhāfi soon went awry. The National Transitional Council (NTC), which had been formed shortly after the start of the uprising, established a “roadmap” for the transition, which provided for the formation of an interim government, the election of a constitutional assembly with the mandate to draft a new constitution, the submission of the draft constitution to a referendum, and the election of the legislative and executive organs of the country in accordance with the provisions of the new constitution within a period of twenty months, starting on the day Libya was declared liberated (October 23, 2011). The elections to the General National Congress (GNC) took place in July 2012. The NTC, whose members had agreed not to run in the elections, handed over power to the newly elected National Congress and dissolved on August 8, 2012.

The work of the GNC was paralyzed by political infighting almost from the start. In May 2013, its members, under siege of armed groups in Tripoli, passed a sweeping law banning all al-Qadhdhāfi-era officials from taking part in politics. Even the chairman of the GNC, Muḥammad Maqariyaf, who had been Libyan ambassador to India before he defected from the regime in 1980, had to resign. The so-called “political isolation” law was revoked only two years later, in March 2015.

By then, however, the whole transition process had been derailed. The main task of the GNC was the convening of an Assembly to draft a new constitution for Libya. According to the original timetable, this should have been done as early as September 2012. However, due to the infighting in the GNC, no progress was made on this front during 2012 nor the whole of 2013. Instead, a fierce power struggle erupted between the leadership of the GNC and the government led by the liberal ‘Alī Zaydān, who at one point was even briefly kidnapped by the militia in Tripoli. The paralysis of the transitional institutions pushed the country even further toward anarchy and civil strife.

It was only in February 2014 that the GNC finally held elections for a sixty-member constitutional body, with twenty members each for Tripolitania, Cyrenaica, and Fezzān. Some groups, like the Berbers and the Toubou, flatly refused to take part in the election, contributing to a significant drop in voter participation, which was just one-third of the turnout in the GNC elections in July 2012. In any case, the elections did nothing to put the transition process back on track. Quite the contrary, the interim government collapsed when Prime Minister Zaydān fled to Morocco in March 2014. The election of his successor by the GNC was declared unconstitutional by the Libyan Supreme Court (whose members hailed from the al-Qadhdhāfi era), forcing the GNC to convene fresh parliamentary elections for June 2014.

The turnout in this election was still below that for the elections of the constituent assembly, with less than 20 percent of the electorate taking part. In some places, like the Cyrenaica city of Dernah, now under control of Islamist jihadists, no voting could take place, and 12 out of the 200 seats could not be assigned through the polls. The newly elected parliament was unable to convene either in Tripoli or in Benghazi, being forced to seek shelter in Tobruq close to the Egyptian border, and thus under *de facto* protection of the Egyptian government. Militias from the powerful coastal city of Miṣrātah had brought Tripoli under their control. With the help of the Islamist forces in the former GNC, which had fared badly

in the elections, they revived the body that had run the country since August 2012, refusing to hand power to the newly elected Assembly. In November 2014, they got a boost from a ruling by the Libyan Supreme Court, which declared the amendment to the provisional constitution that had paved the way for the June elections, and thus by extension the elections themselves, to be unconstitutional.³ The country was left with two parliaments and two governments in Tripoli and Tobruk, each declaring its rival as illegitimate. An intense negotiating effort by the UN was necessary to broker an agreement paving the way for a unity government in December 2015.

The transition process in Yemen ran into similar troubles. After longtime dictator ‘Ali ‘Abdullāh Ṣāliḥ had been forced by mass protests to relinquish the presidency in November 2011, his deputy ‘Abd Rabbuh Maṣṣūr Hādī, who was confirmed as the new president in elections held a few months later, struggled to impose his authority on the security apparatus, which had long been dominated by his predecessor and his family. The “roadmap” for the transition process provided for a committee for military affairs to achieve security and stability to integrate the armed forces under a unified and professional leadership in the context of the rule of law.⁴ At the end of the transition period, new presidential elections were to take place. In the following year, Hādī made some headway in the restructuring of the armed forces, albeit under the constant threat of bloody retaliatory measures from Ṣāliḥ’s supporters.

Beginning in March 2013 a “national dialogue” was organized in which the constitutional future of the country was discussed with representatives from all sectors of Yemeni society. The “national dialogue” closed after ten months in January 2014 with the adoption of a constitutional document, which only the Ḥūthī insurgents refused to endorse. During the following year, the Constitutional Drafting Committee worked on a draft constitution, finalized on January 15, 2015.⁵ However, both the supporters of former President Ṣāliḥ, and the Ḥūthī members of the National Authority for the Monitoring of the Implementation of the National Dialogue Conference Outcomes refused to vote on the draft. Having failed to derail the transition process by other means, Ṣāliḥ had struck a deal with his former enemies, the Ḥūthī rebels, in the meantime in order to undermine the reform process. In November 2014, the UN Security Council adopted sanctions against the former president and the Ḥūthī leaders.⁶

Two days after the finalization of the draft constitution, the head of the Drafting Committee was kidnapped by members of the Ḥūthī insurgent movement.⁷ This was the prelude to full-scale assault on the government by the Ḥūthī rebels. Following the seizure of the presidential palace, residence, and key military installations on January 22, 2015,

³ “Libya supreme court rules anti-Islamist parliament unlawful,” *The Guardian* (November 6, 2014), <http://www.theguardian.com/world/2014/nov/06/libya-court-tripoli-rules-anti-islamist-parliament-unlawful>, accessed September 24, 2015.

⁴ Jean-Pierre Filiu, *From Deep State to Islamic State—The Arab Counter-Revolution and Its Jihadi Legacy* (Hurst & Company, London 2015) 197.

⁵ An English translation of the draft constitution by International IDEA was published by Constitutionnet at <http://www.constitutionnet.org/vl/item/yemen-draft-constitution>, last checked September 24, 2015.

⁶ See Security Council Press Release of November 7, 2014, Security Council 2140 Sanctions Committee Designates Three Individuals as Subject to Assets Freeze, Travel Ban, at <http://www.un.org.press/2140/sc11636.doc.htm>, September 24, 2015.

⁷ Arafat Mdabish, “Yemen: Uncertainty over new constitution continues following kidnapping, Asharq al-Awsat” (January 18, 2015), <http://english/awsat.com/2015/01/article55340536/yemen-uncertainty-over-constitution-continues-following-kidnapping>, accessed September 24, 2015.

President Maṣṣūr Hādī and his ministers resigned *en masse*. Three weeks later, the Ḥūthīs dissolved the parliament and established a Revolutionary Committee as the interim authority. On March 25, Hādī fled the country. He left behind a constitutional transition process in complete limbo.

Only in Egypt and Tunisia did the transitional processes lead to new constitutional and political frameworks. In both countries, however, the constitutional processes played out quite differently. The way in which the constitutional debates unfolded in post-Mubārak Egypt and in Tunisia following the Jasmin revolution is likely to resonate throughout the Arab world for years to come. The constitution drafting processes that took place in both countries in the wake of the Arab Spring therefore merit closer scrutiny.

III. EGYPT: THE WINNER TAKES ALL

Of the two, Egypt is by far the more important country. In contrast to Libya and other countries in the region, Egypt's identity as a nation and a polity stretches back several thousand years. It is the most populous Arab country. It is also home to Al-Azhar, the most prestigious center of teaching and learning in Sunni Islam and the spiritual homeland of the Muslim Brotherhood, the oldest and most important Islamist organization. The debate on the new constitutional order of Egypt, and particularly on the question concerning the role religion should play in a democratic Muslim polity, was therefore closely watched not only in Egypt and in the neighboring countries but also throughout the whole Arab and Islamic world.

The transition process in Egypt was triggered by the overthrow of Egypt's longtime President Ḥusnī Mubārak following two weeks of massive public protests in Tahrīr Square in Cairo and other places of the country in early 2011. As the protests continued unabated for weeks while several attempts of the government to quell the unrest through a combination of vague promises of reform and brutal intimidation of demonstrators failed, the leadership of the Egyptian armed forces decided to withdraw their support from the Mubārak regime and to assume power in the form of the Supreme Council of the Armed Forces (SCAF). The declaration of the SCAF of February 11, 2011, in which it announced that it had taken over from Mubārak and would stay in power until a new civilian government was elected later in the year, marked the end of the first phase of the revolution and the beginning of the transition period.

On February 13, 2011, the SCAF dissolved the Egyptian parliament and suspended the Constitution of 1971, which had been amended in 2007 for the last time. A Constitutional Committee, composed of legal scholars and judges from the Supreme Constitutional Court (SCC), was given the task to draw up amendments to the constitution to pave the way for free parliamentary and presidential elections. On March 19, these amendments were approved in a national referendum by three-quarters of those who participated in the vote.

However, the SCAF decided that the amendments were insufficient and issued a Constitutional Declaration on March 30, which contained additional provisions. This move was revealing, because it signaled already at this early stage the determination of the military leadership to remain firmly in charge of the transition process. The referendum was treated by the military as a merely consultative vote, which did not bar it from amending the interim constitutional framework law as it deemed appropriate. The Constitutional Declaration issued on March 30 retained a number of basic provisions of the 1971 Constitution, especially those on the political, economic, religious, and cultural foundations of the Egyptian state and the rights and duties of the citizens, and added the rules on the election of the new president and the parliament approved in the March referendum,

as well as some provisions on the powers of the provisional military government. The latter authorized the SCAF to exercise the supreme authority during the transition and gave it sweeping powers. The SCAF could make laws, determine public policies, select the prime minister and the other members of the cabinet, and make appointments to all civil and military posts. The declaration also provided that the newly elected People's Assembly and the *Shūrā* Council, parliament's upper chamber, should meet within six months following their election to select a Constitutional Commission composed of 100 members, which would have the task to prepare the text of the new constitution. The Commission was given six months to complete the draft, which had then to be approved by the people in a national referendum.⁸

During the summer, protests against the military regime intensified once again, with protesters accusing the government of obstructing real change. One key demand of the Tahrir protesters was the repeal of the State of Emergency, in force since Anwar Sādāt's assassination in 1981, to which the SCAF retorted that a repeal could only be considered once the streets were cleared of protesters. With the State of Emergency still in force, activists were routinely condemned by military courts on criminal grounds. More than 12,000 political prisoners are said to have been put on trial before military courts during this period.⁹

In November 2011, the cabinet appointed by the SCAF published a proposal of basic principles for the new constitution. These principles rejected any civilian oversight over the military and assigned to the armed forces the role of protector of constitutional legitimacy.¹⁰

A few weeks later the Freedom and Justice Party (FJP) founded by the Muslim Brotherhood emerged victorious from the parliamentary elections which took place in several stages,¹¹ winning 42 percent of the seats in the People's Assembly and 58 percent of the contested seats¹² in the *Shūrā* Council. The *Nūr* Party, the main representative of the Salafi movement, which previously had not been involved in politics at all, came second, with 21 percent in the People's Assembly and 25 percent in the *Shūrā* Council. The most successful non-Islamist party, the New Wafd Party,¹³ won only 7.5 percent of seats in the People's Assembly and 8 percent in the *Shūrā* Council.

⁸ Art. 60 of the Constitutional Declaration of March 30, 2011.

⁹ See Erin Cunningham, "Egypt considers expanded powers for military in new constitution," *Washington Post* (November 2, 2013), http://www.washingtonpost.com/world/middle_east/egypt-considers-expanded-powers-for-military, accessed September 24, 2015.

¹⁰ Bruce K. Rutherford, *Egypt after Mubarak, Liberalism, Islam and Democracy in the Arab World* (Princeton University Press, Princeton 2013) xxvi.

¹¹ The elections for the People's Assembly occurred in three stages, starting on November 28, 2011, and ending on January 11, 2012. The *Shūrā* Council elections took place in two stages, from January 29 to February 22, 2012. The reason for this drawn-out process was the requirement fixed in the Constitutional Declaration that the voting as well as the counting of the votes was to be supervised by committees manned solely by members of the judiciary. The judiciary simply did not have the manpower to supervise the conduct of the elections in all parts of the country on the same day.

¹² In accordance with Art. 35 of the Constitutional Declaration of March 30, only two-thirds of the Council's members were elected by the people, while the remaining third were to be appointed by the President of the Republic.

¹³ The New Wafd Party is the successor of Egypt's oldest party, the liberal and nationalist Wafd Party, established in 1919, which was the governing party in Egypt for much of the interwar period and had been instrumental in shaping the country's historic 1923 independence constitution; see Nathan Brown, *Constitutions in a Nonconstitutional World—Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press, New York 2002) 37–39.

One of the central tasks of the newly elected parliament was the selection of the members of the Constitutional Commission, tasked with the drafting of a new constitution. However, the Constitutional Commission chosen by parliament was dissolved even before it could begin its work by a ruling of the Higher Administrative Court in April 2012 on the ground that it included sitting members of parliament. In view of the court, only individuals from outside parliament were eligible for membership in the Constitutional Commission under Art. 60 of the Constitutional Declaration. After difficult negotiations, the different political factions arrived at a tentative agreement on the composition of a new Constitutional Commission just a week prior to the second round of the presidential elections. However, the liberal members soon withdrew from the Commission, thus nipping it in the bud. On June 14, the Supreme Constitutional Court declared the electoral law on which the election of the People's Assembly had been based unconstitutional.¹⁴ This left not only the legislative function but also the work of the Constitutional Commission, the creation of a supposedly illegal parliament, in a legal limbo.

These developments raised the stakes in the presidential elections that took place in May and June 2012 even further. In the absence of a validly elected parliament and Constitutional Commission, all the important decisions on the political and constitutional future of Egypt would fall to the newly elected president. Again, the Supreme Constitutional Court intervened at this crucial juncture, declaring a law adopted by parliament in April that barred persons who had served in senior positions under the previous regime from holding office for ten years unconstitutional on the ground that it deprived citizens of vital political rights without due process.¹⁵ This ruling allowed Aḥmad Shafiq, who had served as Mubārak's last prime minister before he resigned in early March 2011, to compete in the second round of the presidential elections against the candidate of the Freedom and Justice Party, Muḥammad Mursī, after he had come second in the first round of voting on May 23–24, obtaining 23.7 percent of the votes cast against Mursī's 24.8 percent. But in the runoff election on June 15–16, Mursī prevailed, although by a narrow margin (52 percent to 48 percent), and thus became the first freely elected president in the history of Egypt.

The SCAF reacted swiftly. Within hours of the closing of the polls in the presidential elections, it issued amendments to the Constitutional Declaration of March 30, 2011, which granted it control over all matters related to the military, as well as the power to block specific clauses in the constitution to be drafted by the Constitutional Commission. Moreover, it reserved for itself the right to appoint a new constitutional commission if the existing one failed to complete its work—a highly probable outcome, given that the decision of the SCC handed down two days earlier had called into question the validity of the Commission's legal basis. Even more strikingly, the SCAF claimed for itself the legislative authority held by the People's Assembly, whose election had been declared unconstitutional by that ruling.¹⁶

¹⁴ "Egypt court orders dissolving of Parliament," *Al-Jazeera* (June 14, 2012), <http://www.aljazeera.com/news/middleeast/2012/06/2012614124538532758.html>, accessed September 24, 2015.

¹⁵ Bruce K. Rutherford (n 10) xxiii.

¹⁶ The amended Art. 60 of the Constitutional Declaration reads as follows (text added on June 17, 2012 in italics):

The members of the first People's Assembly and the *Shūrā* Council (except the appointed members) shall meet in joint session on the invitation from the Supreme Council of Armed Forces within 6 months of their election to elect a provisional commission composed of 100 members which shall prepare a new draft constitution for the country, to be completed within 6 months of the establishment of this commission. The draft constitution shall be presented to the people for approval in a

Not surprisingly, the constitutionality of the Constitutional Commission appointed by parliament was quickly challenged in the courts again, notwithstanding the fact that together with the election of its members in response to the ruling of the Higher Administrative Court from April parliament had adopted a law (Law 79/2012) granting the new Commission immunity from dissolution. When Egypt's second Constitutional Commission met at the end of June to establish a framework for drafting the constitution for the post-Mubārak era, the threat of dissolution by court order hung over it.

Despite these dark clouds over the future of the People's Assembly and the Constitutional Commission, the transfer of the executive powers to the newly elected president went ahead. In a ceremony before judges of the Supreme Constitutional Court on June 30, Mursī was sworn in as Egypt's first democratically elected president. In his inaugural address delivered in the Grand Hall of Cairo University before members of the dissolved parliament, the members of the SCAF and foreign ambassadors he interpreted his election victory as the successful conclusion of the Egyptian revolution that had started eighteen months earlier on Tahrīr Square: "Egypt is now a real civil state. It is not theocratic, it is not military. It is democratic, free, constitutional, lawful and modern."¹⁷ Later in the day, the new president attended a ceremony held at an army base outside Cairo at which the SCAF formally handed over executive powers to him.

Mursī quickly used his new powers to issue a decree on July 8, which reconvened the dissolved People's Assembly and the *Shūrā* Council for July 10. On the following day, the SCC issued a statement reminding all state authorities that all its decisions and rulings, including the one on the unconstitutionality of the election of the People's Assembly, were binding and not subject to appeal. The Brotherhood and its Salafi allies got the message. The People's Assembly convened on July 10, but quickly adjourned after approving a proposal by the Speaker to seek advice from the Court of Cassation on how to implement the Supreme Constitutional Court's ruling on the unconstitutionality of the Assembly's election. The following day, President Mursī adopted a conciliatory tone toward the judicial authorities and the opposition groups by declaring that he would respect the Supreme Constitutional Court's decision suspending his decree to call parliament back into session

referendum within 15 days following its completion. The constitution shall take effect from the date on which the people approve the draft in the referendum.

If the constitutional commission encounters an obstacle that would prevent it from completing its work, the SCAF within a week will form a new constitutional commission to author a new constitution within three months from the day of the new assembly's formation. The newly drafted constitution will be put forward after 15 days of the day it is completed, for approval by the people through a national referendum. The parliamentary elections will take place one month from the day the new constitution is approved by the national referendum.

If the president, the head of SCAF, the prime minister, the Supreme Council of the Judiciary or a fifth of the constitutional commission find that the new constitution contains an article or more which conflict with the revolution's goals and its main principles or which conflict with any principle agreed upon in all of Egypt's former constitutions, any of the aforementioned bodies may demand that the constitutional commission revises this specific article within 15 days. Should the constitutional commission object to revising the contentious article, the article will be referred to the Supreme Constitutional Court (SCC) which will then be obliged to give its verdict within seven days. The SCC's decision is final and will be published in the official gazette within three days from the date of issuance.

¹⁷ Quoted after Ashraf Ramelah, "Egypt's Challenge: Writing a New Constitution," <http://www.gatestoneinstitute.org/4034/egypt-constitution>, accessed September 24, 2015.

and try to resolve the row over the dissolved Assembly by way of political dialogue. A stand-off between the new government and the judiciary was avoided in late July when the Higher Administrative Court postponed its ruling on the constitutionality of the election of the second Constitutional Commission until the end of September.

In early August, however, Mursī moved decisively to assert his authority over the military leadership. Seizing on the failure of the military to crush the insurgency which had spread through the Sinā'i Peninsula following the overthrow of Mubārak, Mursī reshuffled the top military personnel, asking Field Marshall Ṭaṭṭāwī to resign from his post of minister of defense and replacing him with a general in his late fifties, 'Abd al-Fatāḥ al-Sisī, who until then had served as chief of military intelligence. Mursī also used the opportunity to appoint a new army chief of staff and to replace the chiefs of the navy, the air force, and the air defense.¹⁸

A Constitutional Declaration issued by the president on August 12 abrogated the amendments to the Constitutional Declaration of March 30, 2011, decreed by the SCAF on June 17, granted the president full executive and legislative powers, and put the constitution-drafting process under his control.¹⁹ It authorized the president to appoint a new constitutional commission representing the full spectrum of society if the existing one was prevented from finishing the draft constitution on which it was working.

In September, the High Administrative Court again postponed its decision on the constitutionality of the second Constitutional Commission elected by parliament in June. At the same time, it upheld the Supreme Constitutional Court's ruling on the unconstitutionality of the People's Assembly's election and its dissolution. Clashes between opponents and supporters of President Mursī intensified when the latter tried to remove the country's prosecutor general from office after the latter failed to win a conviction in court of several Mubārak allies charged with having orchestrated an attack on protesters during the Ṭaḥrīr Square uprising. Mursī finally backed down, claiming that the decision had been based on the misunderstanding that the prosecutor general had agreed to stand down. However, the face-saving compromise did little to defuse the mounting tensions between the Mursī government and the country's powerful judiciary, which openly accused the president of tinkering with judicial independence. On October 23, the Higher Administrative Court suspended the hearing of the lawsuits that sought the

¹⁸ Jean-Pierre Filiu (n 4) 165 et seq.

¹⁹ The Constitutional Declaration of August 12, 2012, had the following wording:

- 1- The June 17, 2012 constitutional addendum is to be abrogated.
- 2- Art. 25, clause 2 of the March 30, 2011 Constitutional Declaration is to be replaced with the following text: "And he [the president] will undertake all his duties as stipulated by Art. 56 of this declaration." [Art. 56 defines the powers of the Supreme Council of the Armed Forces and grants the latter full executive and legislative authority.]
- 3- If the Constitutional commission [tasked with drafting a new constitution] is prevented from doing its duties, the president can draw up a new assembly representing the full spectrum of Egyptian society mandated with drafting a new national charter within three months of the assembly's formation. The new draft constitution is to be put before a nationwide referendum within 30 days after it is written. Parliamentary elections are to be held within two months of the public's approval of the draft constitution.
- 4- This new Constitutional Declaration is to be published in Egypt's official gazette and will be put into effect the following day.

dissolution of the Constitutional Commission and referred the law, which granted the Assembly immunity from judicial dissolution to the Supreme Constitutional Court for a ruling on its constitutionality.

It became increasingly clear during these weeks that the Constitutional Commission would not be able to overcome the deep divisions existing within Egyptian society at large to adopt a constitutional text reflecting a broad consensus among the main political currents of opinion in the country. In November, most of the secular-minded members left the Assembly, citing concerns that the Islamist forces would take advantage of their majority to push the Islamization of state institutions. In this situation President Mursī decided to issue a new Constitutional Declaration that resolved the pending constitutional issues in his favor. The declaration granted the president the power to appoint the prosecutor general from among the members of the judiciary for a term of four years. Mursī made immediate use of this power by replacing the current prosecutor, whom he had tried to remove unsuccessfully in October, with an official of his choice. Even more importantly, the declaration proclaimed the immunity from any form of judicial review, suspension or cancellation of all constitutional declarations, laws, and decrees which the president had issued since he took office. The period granted to the Constitutional Commission for the drafting of the new constitution was extended from six to eight months, and the declaration expressly prohibited the courts to dissolve the *Shūrā* Council or the Constitutional Commission.²⁰

With the Constitutional Declaration Mursī wanted to cut through the various legal and judicial entanglements bogging his reform agenda down. However, while the Brotherhood defended the Constitutional Declaration as a necessary step to root out the remnants of the old regime and to fulfill key demands of the revolutionary movement, its opponents denounced it as the thinly veiled attempt by the Muslim Brothers to monopolize political power at the expense of the other political forces in order to push through a radical Islamist agenda rejected by a majority of the people. The Supreme Judicial Council, the representative body of the country's judiciary, denounced the declaration as an unprecedented attack on the independence of the judiciary, and on November 27 tens of thousands of people in Tahrir Square called on Mursī either to withdraw the Constitutional Declaration or to resign from office. Most of Egypt's courts and all of its prosecutors went on strike.

²⁰ The relevant provisions of the Declaration of November 22 read as follows:

[...]

Article II

Constitutional declarations, laws, and decrees made by the president since he took office on June 30, 2012, until the constitution is approved and a new People's Assembly [lower house of parliament] is elected, are final and binding and cannot be appealed by any way or to any entity. Nor shall they be suspended or canceled and all lawsuits related to them and brought before any judicial body against these decisions are annulled.

[...]

Article V

No judicial body can dissolve the *Shūrā* Council [upper house of parliament] or the Constitutional Commission.

Racing against the threat of dissolution by the Supreme Constitutional Court, voting in the Constitutional Commission on the draft constitution began on November 28 and continued through Thursday night. The draft document was finally approved on November 29, drawing seething criticism from non-Islamist parties, human rights groups, and international experts. On December 15, the new constitution was duly approved by 69 percent of voters, but on a disappointingly low turnout of merely one-third of the electorate.

The constitution was a direct challenge to several crucial rulings of the SCC during the transition process. Art. 232 elevated to constitutional rank the law that had banned former leaders of the National Democratic Party from active participation in politics for a period of ten years. Art. 231 reintroduced, for the first parliamentary elections, the rule that candidates were allowed to run simultaneously for seats allocated on the basis of party lists and seats reserved for individual candidates.

Although all constitutional declarations which had been issued following the departure of Mubārak, first by the SCAF and then by Mursī, including the much-criticized declaration of November 22, went out of effect with the entry into force of the new constitution, the new basic law failed to pacify Egyptian society. Protests against the government and clashes of demonstrators with the security forces continued throughout the spring of 2013. The government was also hurt by the ongoing insurgency of Islamist militants on the Sinā'i Peninsula. Many Egyptians blamed Ḥamās, the biggest foreign ally of the Muslim Brotherhood, for the attacks, although no solid evidence was ever found. The government's difficulties were compounded by the fact that it failed to make substantial progress on the difficult economic situation of the country, which had grown even more complicated after the departure of Mubārak. The debate on potential cuts to subsidies for gas, electricity, and food in order to secure a much-needed loan from the International Monetary Fund caused considerable concern in the population, especially the poor who had been the basis for the Muslim Brotherhood's past electoral successes. A cabinet reshuffle at the beginning of May, which also brought in people from outside the Freedom and Justice Party, failed to raise the government's standing with the public.

Meanwhile, opposition leaders had launched the Tamarrud (Rebellion) movement to establish a public platform for anti-government protests. The movement's proclaimed aim was to collect 15 million signatures on a petition calling for Mursī's resignation, which would allow them to challenge the legitimacy bestowed on the elected president by more than 13 million voters in the presidential elections one year before. On June 2, the SCC declared the legal basis on which the *Shūrā* Council, parliament's upper chamber, had been elected unconstitutional. As in the case of the People's Assembly, the court argued that the law infringed Arts. 37 and 39 of the Constitutional Declaration of March 30, 2011, by allowing political parties to compete for the one-third of seats reserved for independent candidates while not allowing independents to compete for the two-third of seats reserved for party-based candidates. The ruling also declared the Constitutional Commission, whose members had been picked by the illegally elected People's Assembly and *Shūrā* Council, unconstitutional. However, the court stopped short of dissolving the *Shūrā* Council, allowing it to continue its work until fresh parliamentary elections were held.²¹ The governing Freedom and Justice Party responded to the ruling by pointing out that it had no effect on the new constitution's validity, as the latter had been adopted by popular referendum.²²

²¹ Jacques Neria, "Towards a Constitutional Crisis in Egypt?" Jerusalem Center for Public Affairs (June 5, 2013), <http://jcpa.org/towards-a-constitutional-crisis-in-egypt>, accessed September 24, 2015.

²² Ahram Online, "Egypt's constitution legitimate despite court rulings: FJP statement" (June 2, 2013), <http://english.ahram.org.eg/NewsContentPrint/1/0/72968/Egypt/0/Egypt's-constitution-legitimate-despite-court-rulin.aspx>, accessed September 24, 2015.

Things came to a head at the end of June, when hundreds of thousands of anti-government protestors marched in the streets in Cairo and other cities on the first anniversary of Mursi's presidential inauguration. On July 1, huge crowds gathered in Tahrir Square and outside the presidential palace, in Alexandria, Port Said, and Suez. The Tamarrud (Rebellion) movement claimed that it had collected more than 20 million signatures for their petition requesting Mursi's removal from office since late April and presented the president with an ultimatum to Mursi either to resign July 2 at 5 pm or face a civil disobedience movement. This was the sign for the armed forces to step into the fray. They gave the parties forty-eight hours to respond to the demands of the Egyptian people. Following the announcement by the armed forces, several ministers resigned from the cabinet, leaving the government only with members from the Freedom and Justice Party. The next day Mursi rejected the ultimatum of the armed forces, vowing that he would pursue his own plans for national reconciliation and a peaceful resolution of the political crisis. On the same day, the Court of Cassation ordered the reinstatement of the prosecutor general whom Mursi had removed from office the preceding November by using the powers he had granted himself in the controversial Constitutional Declaration of November 22.

On the evening of July 3, the leadership of the armed forces, in a joint appearance with several prominent figures representing civil society, including the Grand *Imām* of Al-Azhar and the former director of the International Atomic Energy Agency, Mohamed ElBaradei, announced that President Muḥammad Mursi had been removed from power and that the Constitution of December 2012 was suspended. At that time, Mursi had already been arrested and taken to an army base. Siṣi announced the appointment of 'Adli Maṣṣūr, president of the Supreme Constitutional Court, as interim president of Egypt and of ElBaradei as vice president.

Maṣṣūr issued a first Constitutional Declaration on July 6 ordering the dissolution of the *Shūrā* Council. The *Shūrā* Council had been the only functioning legislative body following the dissolution of the People's Assembly by the SCAF one year earlier.²³ On July 8, Maṣṣūr issued a second Constitutional Declaration containing the roadmap for the drafting of the new constitution. A committee of experts was to be established by presidential decree within fifteen days, consisting of two members of the Supreme Constitutional Court, two judges from the State Council, two ordinary judges, and four constitutional law professors from Cairo University. The members representing the judiciary were to be chosen by the Supreme Council of the Judiciary while the Supreme Council of the Universities would select the constitutional law professors. The committee of experts was given the task to propose amendments to the suspended 2012 Constitution within a period of thirty days. The proposals for the constitutional amendments would then be submitted to a fifty-member committee representing the various sectors of civil society, namely the parties, intellectuals, workers, peasants, trade unions, syndicates, professional bodies, Al-Azhar, and the churches, as well as the armed forces and the police, plus public figures including ten members from youth and women's movements. The civil society organizations, the armed forces, and the police would nominate their representatives, while the cabinet was given the right to nominate the public figures. The committee had the task of drafting the final text of the amendments to the 2012 Constitution within sixty days following the submission of the proposal by the expert committee. The interim president would then call a national referendum on the draft proposed by the commission within thirty days.²⁴

²³ Art. 230 of the 2012 Constitution.

²⁴ Arts. 28, 29 of the Constitutional Declaration of July 6, 2013.

The committee of experts set about its task in worsening circumstances. The antagonism between the Muslim Brotherhood and the other political forces that had increasingly shaped the Egyptian political landscape throughout 2012 and 2013 deepened further. The Muslim Brothers denounced the events of July 3 as a coup by the military against a democratically elected government and called its followers to the streets to protest against Mursi's removal from office. As the protests grew more violent and scores of protesters were killed by the security forces, a broad political consensus on the new constitutional order for Egypt became ever more elusive. The Freedom and Justice Party was banned and most of the leadership of the Muslim Brotherhood arrested. In December, the interim government declared the Muslim Brotherhood a terrorist organization in response to the bombing of police headquarters in Cairo, although responsibility for the bombing was later claimed by another Islamist group. The *Nūr* Party, which had originally supported Mursi's removal from office, grew more critical of the actions of the interim government, especially with regard to the abrogation of constitutional provisions promoting a strong Islamic identity, but stopped short of pulling out of the constitutional reform process altogether.

Members of the liberal establishment who dared to criticize the new regime were quickly silenced. Mohammed ElBaradei, who had been appointed vice president following Mursi's ouster, resigned in protest against the indiscriminate mass killings which took place when the army and the security forces cleared gatherings of Mursi supporters by force in Cairo in mid-August. A lawsuit was soon filed against him for "betrayal of the people's trust". By that time, however, ElBaradei had already left the country.²⁵

The committee of experts met on July 21 to begin drafting the amendments to the suspended 2012 Constitution.²⁶ It started proceedings by inviting all political forces to submit proposals for the amendment of the 2012 Constitution within one week. The deliberations within the committee itself were largely shrouded in mystery, however. No details were officially published regarding the committee's work, or on its discussion or voting process. The committee of experts finished its work on August 18.

Its proposals were taken up by the "committee of 50", which began its deliberations on September 8. Of the fifty seats on the committee, only six were allocated to the political parties. These six seats were divided among two Islamist members, two liberals, one nationalist, and one leftist.²⁷ That was quite a change from the previous Constitutional Commission that had been dominated by the Islamist parties.²⁸ There was considerable confusion surrounding the committee's precise mandate. The interim president instructed the committee to use the jurists' draft as the basis of their work. Yet in its actual operation, the committee took considerable liberty with these instructions, effectively starting from

²⁵ J  an-Pierre Filiu (n 4) 178.

²⁶ The committee's six judicial members included Mu  ammad   ayd Mahj  b, secretary-general of the Supreme Council of the Judiciary;   assan Basy  n  , a Cairo appeals judge; Mu  ammad al-Shann  w   and Mu  ammad Khayr   T  ahah, Supreme Constitutional Court deputy chairmen; and   ass  m al-D  n   abd al-  zziz and Majdi al-  j  ti, State Council deputy chairmen. The four university professors were Fath  i Fakr   of Cairo University;   amdi   Ali   Umar, dean of al-Zaq  z  q's Faculty of Law;   al  h al-D  n Fawzi of Ma  s  urah University; and   Ali   abd al-  l of   ayn Shams University.

²⁷ Yuessef Auf, "Egypt's constitutional committees," Atlantic Council (September 5, 2013), <http://atlantic-council.org/blogs/egyptsource/egypt-s-constitutional-committees>, accessed September 24, 2015.

²⁸ For a list of the names of the fifty members, see Ahram Online, "Who's Who: Members of Egypt's 50-member constitution committee," available at: <http://english.ahr.org.eg/News/80519.aspx>, accessed September 24, 2015.

scratch and writing a new constitution, rather than revising the draft amendments to the 2012 Constitution submitted by the committee of 10.²⁹

A particularly awkward debate took place on the special role and privileges claimed by the military in the new constitutional order. The military leadership held a series of closed-door meetings with the head of the committee, former foreign minister ‘Amr Mūsā, to drive home their point that the military needed extended powers, including the power to try civilians in secret military courts in order to maintain public order amid a widespread crackdown on the Muslim Brotherhood and militant Islamists.³⁰ This debate had important consequences on the related issue of fundamental rights protection, particularly political rights and fair-trial guarantees. As the final discussions in the committee took place, the interim government issued a new law on demonstrations, imposing a number of potentially far-reaching constraints on the basic freedom that had played such a central role in the uprisings against the Mubārak regime and the Mursī government.³¹ Voting on the changes and the additions to the 2012 Constitution started on November 30.

The final stage of the committee’s work was overshadowed by controversy, some members claiming that the text was changed after the committee had approved the final draft, replacing the commitment to “civilian rule” in the text of the preamble as approved by the committee with the phrase “civilian government” in the text submitted to interim President Maṣṣūr on the following day.³²

One cannot fail to note the difference in emphasis in the two preambles when it comes to describing the role of the revolutionary events since January 2011 in the formation of the new constitutional order: The preamble of the 2012 Constitution started by hailing the new constitution as the achievement of the peaceful revolution of January 2011, while in the new preamble the reference to the revolutionary events is “hidden” somewhere in the middle of a text running over several pages. These events are now called the “January 25–June 30 revolution”, putting the uprising against Mubārak and the overthrow of the elected President Mursī, triggered by the mass demonstrations of June 30, 2012, on an equal footing.

The view of the respective political and institutional actors’ roles in the revolutionary events laid down in the preamble is even more revealing. According to the drafters of the 2012 Constitution, the events of January and February 2011 had constituted a “peaceful started by Egypt’s promising youth, protected by the Armed Forces and championed by the patient Egyptians who gathered in Tahrīr Square on January 25, 2011”—the day when the mass protests against the Mubārak regime began. By contrast, the preamble in the 2014 Constitution focuses on the contribution of “our patriotic army”, which “delivered victory to the sweeping popular will in the January 25–June 30 revolution”, thus giving official recognition to the role of guardian and executor of the popular will which the armed forces claimed for themselves in the overthrow of the Mursī government. The military is placed in the role of the ultimate institutional arbiter of politics. This concept is fully consistent with

²⁹ Nathan Brown, “Egypt’s Daring Constitutional Gang of 50,” available at: http://mideastfrica.foeignpolicy.com/posts/2013/09/20/egypts_daring_constitutional_gang_of_50, accessed September 24, 2015.

³⁰ Erin Cunningham, Egypt considers expanded powers for military in new constitution, Washington Post of 2 November 2013, at: http://www.washingtonpost.com/world/middle_east/egypt-considers-expanded-powers-for-military, last visited on September 24, 2015.

³¹ For an unofficial English translation of the law, see Ahram Online, <http://english.ahram.org.eg/NewsContentPrint/1/0/87375/Egypt/0/Full-English-translation-of-Egyptys-new-protest-law.aspx>, last accessed September 24, 2015.

³² See Mariam Rizk, “Egyptian constitution changed after final vote, claim committee members,” Ahram Online, available at: <http://english.ahram.org.eg/NewsContentPrint/1/0/89390/Egypt/0/Egyptian-constitution-changed-after-final-vote-cl.aspx>, accessed September 24, 2015.

the view the military has held of its role at the top of Egypt's institutions since the times of the young officers' coup against King Fārūq in 1952.

Unlike the Tunisian Constitution, which was adopted almost at the same time as the new Egyptian Constitution, there is no direct reference in Art. 1 or the following provisions to the principle of the "civil state". The preamble speaks of a "modern democratic state with a civilian government", which the drafters intended to create. But it seems that a more strongly worded version, referring to a "democratic state with civilian rule", was ditched at the very last moment of the committee's deliberations.³³ The 2014 Constitution leaves the composition and the powers of the National Defense Council virtually unchanged. The majority of its members still belong to the security apparatus. The Council shall look into matters pertaining to the safety and security of the country and discuss the armed forces' budget. The new Art. 203 dispels any doubts which may have lingered under the 2012 Constitution concerning parliamentary oversight of the military budget by stating that, following the discussions in the National Defense Council, the armed forces' budget is incorporated as a single figure in the state budget.

On January 14 and 15, the constitution was approved by an overwhelming 98.1 percent, with an official turnout of 38.6 percent. In the elections of May 25 to 27, Sisi, after having resigned from the Ministry of Defense and retired from the army, was elected President of the Republic with a crushing 97 percent of the vote.

IV. TUNISIA: THE DIFFICULT ART OF POLITICAL COMPROMISE

The lessons of the Egyptian experience were not lost on the drafters of the new Tunisian Constitution. Tunisia had initiated the popular protest movement throughout the Arab world when President Ben 'Ali was toppled by the mass demonstrations following the death of the street vendor Muḥammad Bū'azīzī on January 14, 2011. Thus, a difficult transition process, which witnessed various ups and downs and even came close to the brink of disaster before it finally produced a new basic law which, unlike in Egypt, was able to attract the support of the major currents of public opinion, including Islamists and non-Islamists, was initiated.

On the day following Ben 'Ali's departure, Tunisia's Constitutional Council declared a permanent vacancy in the presidency of the Republic and named the Speaker of the Chamber of Deputies, Fu'ād Mebazza', acting president. An interim government under Prime Minister Muḥammad al-Ghannūshī was established, which included also members from the departed president's party, the Constitutional Democratic Rally (RCD), in key ministries. However, public protests quickly forced the resignation of its members from the government, and on February 6, the new interior minister suspended its political activities. Al-Ghannūshī himself resigned on February 27 and was replaced by the lawyer al-Bāji Qā'id al-Sabsī, who had held various important government posts during the Bourguiba (Būrqiḇa) era. The former ruling party was dissolved, and its assets and funds sequestered, by a court order of March 9. Prior to the court ruling, the previously banned political parties had been legalized by interim President Fu'ād Mebazza', using the emergency powers conferred on him by the Chamber of Deputies.

³³ Obviously the switch was designed to pave the way for the candidacy of a high-ranking member of the armed forces—Sisi himself—in the presidential elections which had to be called within ninety days of the coming into force of the new constitution (Art. 230).

A reform commission, headed by the respected constitutional law expert Yadh Ben Achour, was set up to guide the transition process and to supervise the elections to the Constituent Assembly, which was to draft Tunisia's new constitution. Initially, the elections were scheduled for July 24, but for a number of technical and logistical reasons they had to be postponed several months.

Elections finally took place on October 23, 2011. The Islamist *al-Nahḍah* Party swept the board with 37 percent of all votes cast, followed by the Congress for the Republic (CPR) with 8.7 percent, the Democratic Forum for Labor and Liberties (*al-Takattul*) with 7 percent, and the Popular Petition with 6.7 percent. In addition to its constitution-drafting task, the National Constituent Assembly was also given the task to govern the country during the transition period. *Al-Nahḍah* formed a coalition government with the CPR and *al-Takattul*, with *al-Nahḍah* secretary-general, Ḥamādī Jabālī, taking over as prime minister. It chose not to present a candidate for the presidency but instead joined the other parties in the Constituent Assembly in voting for the founder and president of the CPR, al-Munṣif al-Marzūqī.

The Constituent Assembly established working committees to draft the various chapters of the new constitution and a joint committee, responsible for coordinating the work of the drafting committees and for preparing the final draft of the constitution. Although the committees were making progress in drafting an initial version of the constitution in 2012, their work was hampered by divisions in the joint committee, some members complaining that the deliberations were dominated by *al-Nahḍah*, while their views were not taken into account. Even worse, the committee's president was accused of having made a number of important changes to the draft without consulting the relevant drafting committees. A decision was therefore taken to form a new body, known as the consensus committee, in which all political groups had equal weight. The decisions of the new committee were then submitted to the Assembly for consideration.

The discussions were further complicated by the fact that Assembly members were reluctant to grant any formal role to the country's constitutional law experts. Although many conferences and seminars were organized to inform the public on the debates in the Assembly and to give civil society organizations and individuals the opportunity to submit their views on pending constitutional issues, many Assembly members, especially those from *al-Nahḍah*, had reservations in engaging with Tunisian constitutional law scholars, many of whom were suspected of Francophile and secular leanings.³⁴

That the discussions of the new constitution did not always go smoothly is also evidenced by the fact that it took more than two years, instead of one as originally planned, to conclude the drafting of the new constitutional document. As the country's political divide deepened following the assassination of several members of the secular opposition by Islamist extremists, sixty-five members of the opposition temporarily pulled out of the Assembly meetings in the summer of 2013. At this most crucial point in the transition process, Tunisia's civil society stepped in, led by the influential trade union movement, the employers' association, the Tunisian Human Rights League (LTDH), and the country's bar association. This so-called quartet successfully organized a national dialogue to find a way out of the crisis, a crucial initiative that brought them international recognition and, two years later, the Peace Nobel Prize. The parties to the roundtable talks finally agreed on a roadmap providing for the stepping down of the *al-Nahḍah*-dominated government, led by 'Alī al-'Arayyād, and its replacement by a caretaker government composed of technocrats in the run-up to

³⁴ Zaid Al-Ali and Donia Ben Romdhane, "Tunisia's new constitution: progress and challenges to come," available at: <http://www.opendemocracy.net/print/79368>, accessed September 24, 2015.

the parliamentary elections following the successful conclusion of the talks on the constitution. On the basis of this compromise, brokered by the civil society organizations, the opposition members returned to their assembly seats and the assembly was able to start the final round of talks on the constitution in early January 2014.

The Constituent Assembly started voting on the draft constitution article by article on January 3. After the turbulent events of the previous months, the *al-Nahḍah* leadership was willing to compromise on a number of controversial issues, especially those concerning the role of Islam and the rights of women in the new constitutional order. This spirit of compromise was in part a result of the lessons learnt from the events in Egypt, where an Islamist government had fallen victim to an extremely polarized political climate which it had helped to create by trying to implement an ambitious Islamist agenda against widespread resistance in the population and in the established state institutions, namely within the armed forces and in the judiciary.

In the final vote on January 26, the Constituent Assembly approved the constitution, with the huge majority of 200 against 12 votes (and four abstentions), exceeding the required two-thirds majority for adoption without popular referendum by a wide margin. The next day, the new constitution was signed into law by President Marzūqī in a special celebratory session of the Assembly. Thus Tunisia, the country in which the Arab Spring originated, also became the first country to emerge from the ensuing difficult transition process with a new constitutional settlement reflecting a broad national consensus, a promising basis for the work of democratic renewal and economic reconstruction which lay ahead.

V. CONCLUSIONS

The transition processes in Egypt and Tunisia were triggered by the same momentous chain of events known as the Arab Spring, both started at about the same time, and both culminated in the adoption of a new constitutional framework within a matter of days in January 2014. Both processes directly and crucially influenced each other: The overthrow of Ben 'Alī in Tunisia encouraged protesters to walk in ever increasing numbers into Tahrīr Square in Cairo and to call for the resignation of Mubārak, a development which had seemed unthinkable even a few weeks before. On the other hand, the failure of the Muslim Brotherhood to prevent a sharp polarization of Egyptian public opinion, which provided the military with the opportunity to launch their coup against the elected government and to restore their dominant position in Egyptian politics, did much to convince the leadership of *al-Nahḍah* that a similar development in Tunisia had to be avoided at all costs, and that the impasse in which the constitutional drafting process had become stuck could only be resolved by way of political compromise.

Unlike their Egyptian counterparts, Tunisia's reformers succeeded in launching a genuinely inclusive transition process. Whereas in Egypt this process was controlled and at every important juncture delayed and obstructed by the SCAF, often assisted by a pliant judiciary, the Tunisian transition process, in stark contrast, took place in a civilian setting. Not a military council run by the generals but a Reform Commission headed by the widely respected constitutional lawyer Yadh Ben Achour guided the transition process and supervised the elections to the Constituent Assembly. These elections took place under a proportional voting system, denying any party or party coalition an outright majority in the Constituent Assembly and thus favoring the establishment of a coalition government. While the Islamist *al-Nahḍah* Party took almost the identical share of the vote as the Muslim Brotherhood in the elections to the People's Assembly in Egypt several weeks later, *al-Nahḍah* formed a coalition government with more secular-minded groups (the CPR and

al-Takattul), while leaving the presidency to the other parties. It joined them in voting for the founder and president of the CPR, Moncef Marzūqī.

By contrast, the Muslim Brotherhood in Egypt, operating under a majority voting system, did not see the need for compromising with non-Islamist groups in the People's Assembly or the *Shūrā* Council, as the parliamentary elections handed them and their allies from the Salafi *Nūr* Party crushing three-fourths majorities in both chambers. Feeling obstructed in the implementation of its policies through parliament and the Constitutional Commission by the judiciary and the SCAF, the Brotherhood reneged on its initial pledge not to field its own candidate in the presidential elections. As a result, parliament, as a pluralist body in which the representatives of the main currents of opinion in society sit together and try to find common ground with regard to the future constitutional framework and the big issues facing the country, did not play any major role in the Egyptian transition process. Instead, everything depended on the control of the executive power, a situation that could only intensify the winner-takes-all-mentality of political actors.

In addition, by depriving the majority, which had emerged from the ballot boxes of the ordinary legislative mechanisms for the implementation of its policies, the judiciary pushed the Brotherhood toward more drastic remedies, making questionable use of the executive powers which its candidate had won in the presidential elections. The most spectacular result of this process was Mursī's Constitutional Declaration of November 2012, which tried, by executive *fiat*, to cut through the various judicial and legal entanglements in which the constitutional reform process had gotten bogged down. But by expressly granting immunity to the president's acts and decisions against all judicial and legal challenges, the declaration contributed significantly to the delegitimization of the elected government after just four months in office.

The biggest difference with Tunisia, however, is the dominant role the military has enjoyed in Egyptian politics ever since the Free Officers toppled King Fārūq in 1952. It is highly doubtful that the military leadership ever seriously intended to relinquish this position, even when it issued declarations to the contrary. Only in the weeks following Mursī's election to the presidency was the military forced into a temporary retreat from power and to accept the reshuffle of its leadership by the first civilian president. But for the military, that reshuffle proved to be a blessing in disguise, rejuvenating its leadership and bringing one of their own to the top of the hierarchy; he proved to be much more astute at playing the political game than either his predecessors or the Brotherhood's leaders.

By contrast, the armed forces had never played a dominant role in the political system of Tunisia. Shortly after independence, Bourguiba had emasculated the military, following the failed 1962 plot. While he was as security-obsessed as other Arab rulers, he chose to act through the minister of the interior and the police networks rather than through the army, and his successor Ben 'Alī, himself a former police general, kept and refined this system. Thus, the Tunisian army had been transformed, almost by accident, into the main embodiment of a national institution that could not be identified with the ruling regime.³⁵ It stuck to that role during the transition following the ouster of President Ben 'Alī. During the protests, it refused to intervene and to fire on the protesters, thus accelerating the downfall of Ben 'Alī.³⁶

³⁵ Jean-Pierre Filiu (n 4) 231.

³⁶ Emily Parker, "Tunisia's Military: Striving to Sidestep Politics as the Challenges Mount," *tunisiaalive* (June 25, 2013), <http://www.tunisia-live.net/2013/06/25/tunisiass-military-striving-to-sidestep-politics-as-challenges-mount/>, accessed September 22, 2015.

Tunisia is in a unique position because it is the only country in which the Arab Spring gave rise to a new constitutional settlement that replaced an authoritarian regime with a democratic one in a process in which the electorate was properly represented. All other countries never even reached that stage. In Libya, seemingly intractable controversies about the composition and the election mode of the constituent assembly prevented that assembly from coming into being for almost two years. In Egypt, bitter quarrels on the appointment and the membership of the constitutional commission haunted its work from day one, with the non-Islamists complaining that the Muslim Brotherhood and its allies used their dominant position in parliament to pack the commission with their followers. As a result, the commission's work soon got bogged down in seemingly endless legal quarrels. It is telling that both in Egypt and in Libya it was not possible to reach a broad agreement among the competing political forces on the membership of the relevant assemblies, i.e., on the question who should take part in the drafting of the new constitution and what the balance between the different groups should look like. The initial goal of an inclusive constitutional process soon fell victim to increasing mutual suspicion and bitter infighting. Apart from Tunisia, the only countries in which the Arab Spring movement resulted in constitutional reforms were those where the reform process was directed by a central authority from above, with little or no direct input from the public. Only in Tunisia was civil society involved in the constitutional reform process to a significant degree and substantially contributed to its final outcome. In the other countries, the Arab Spring has often exposed deep internal rifts and divisions, which makes it difficult to imagine, at least in the short and medium term, the flourishing of a constitutional reform movement transcending partisan and sectarian political agendas.

PART

1

POWER AND
LEGITIMACY

The Legitimacy of Constitution-Making Processes in the Arab World

An Islamic Perspective

ABDULLAHI AHMED AN-NA'IM

I. INTRODUCTION

The main thesis of this chapter can be summarized as follows. First, constitution-making is not only about writing and adopting a document called a constitution but also whether the outcome is a legitimate and sustainable constitution. Legitimacy here indicates both appropriate constitutional content as well as its well-informed popular acceptance. It is also important to note that any particular stage of the constitution-making process may be a step in the right direction despite its limitations or tensions with the principles of constitutionalism. To the extent that the outcome of the process is consistent with the principles of constitutionalism, it will enable subsequent constitution-making processes to develop further in the right direction. This is what I call “incremental constitutionalism” to indicate the success of constitution-making in stages, including setbacks or apparent failures.

Constitution-making is a process of seeking to achieve the widest possible consensus among various segments of society. To the extent that such consensus is achieved over a “national settlement”, which is in accordance with the principles of constitutionalism, that society has a constitution, whether it is written, like that of India, or unwritten, like that of the United Kingdom. In all cases to varying degrees, however, efforts should continue to improve the coherence between national settlements and the principles of constitutionalism for each society within its own context. We should therefore expect that a legitimate and sustainable constitution will evolve over time, whether such developments are expressed in constitutional amendments or emerge through the practice of authoritative institutions like the Supreme Courts of India and the United States, or the Constitutional Court of Germany.

In the final analysis, however, the development and practice of constitutionalism are always achieved by citizens acting through their own normative and institutional resources in order to further develop and secure those resources over time. The underlying rationale of this approach is that constitution-making is an open-ended process of trial and error through practice, and not a once-and-for all right or wrong, good or bad outcome. The term “constitution-making” in the title of this chapter indicates the multiple locations and aspects of dynamic and multifaceted processes, over time and through various experiences and experiments, as opposed to a formalistic episode of “constitution-writing”. Moreover, the circumstances in which this process evolves will neither be perfectly conducive to success nor totally doomed to failure, but a mix of the two types of conditions.

In practice, I believe, it is the political will of citizens that makes all the difference in creating conditions that are conducive to success as well as the struggle for the best outcomes for legitimate and sustainable constitution-making for their society. The question in this regard is where the motivation for the commitment and willingness to struggle for upholding constitutional principles will come from. Whether cultural, religious, or ideological, such motivation should ultimately be directed toward constitutional principles, though their realization in practice is likely to be incremental, and not all at once.

As applied to rebellions cum revolutions in some countries of the Middle East and North Africa (hereinafter, the Arab world) since January 2011,¹ these remarkable developments should be welcome from a constitutional and democratic point of view, even if they do not seem to achieve total and sustainable transformation. From the perspective of this chapter, in order to be sustainable and successful a constitution needs to achieve Islamic legitimacy among the population at large, but it cannot qualify as a constitution at all if or to the extent it fails to uphold fundamental features of constitutionalism.

Regarding the role of Islam in these developments, the paradox to be discussed in this chapter is that of the need for Islamic legitimacy of constitution-making in the Arab region, on the one hand, and the inconsistency of certain aspects of Shari‘ah with constitutionalism, on the other. This paradox can be mediated, I will argue, through the building of a culture of constitutionalism, over time, to overcome violations like discrimination against women and non-Muslims under Shari‘ah. That long-term objective will materialize even if so-called “Islamists” come to power in any country because the practical demands of governance will expose and amplify the tensions between traditional Shari‘ah and constitutionalism, rather than resolve or suppress them.

In this chapter I will argue that the legitimacy of every constitution-making process or outcome should be evaluated in relation to its desired purpose. In particular, the idea of constitutional limitations on the will of the majority by entrenching certain principles of governance above popular political choice are necessary for the possibility of constitutionalism itself. Democratic self-governance does not only mean that the will of the majority must prevail but also that the fundamental rights of every kind of minority, including the possibility of all sorts of difference or dissent must be protected. This protection is particularly important when it is at risk of being overwhelmed by the popularity of a proposition among the relevant population which violates the fundamental rights of any citizen.

In other words, to be a constitution at all, a proposed document must respect and protect the fundamental rights of all citizens equally and without distinction on such grounds as sex, religion, race, or political opinion. In accordance with the incremental approach

¹ Whether a rebellion matures into a revolution or not can only be ascertained in retrospective and over time. The American and French revolutions started as rebellions and could have ended as such. What made them revolutions is what subsequently happened over many decades in each society.

indicated earlier, failure to fully achieve the quality of true constitutionalism in any attempt at legitimate constitution-making does not mean that that objective is impossible to achieve. Apparent failure or limitations of any attempt, I argue, are part of the incremental success of the process of legitimate constitution-making over time. The analysis of incremental constitutionalism can be applied to the experiences of various Middle Eastern and North African countries with constitutional documents since the Ottoman Reform Decrees of 1839 and 1856, and the 1857 Fundamental Pact in Tunisia,² as well as to developments in the region since January 2011.

In the first part of this chapter I will outline the requirements of a proper constitution and how they may be realized. I will also examine the relationship between the constitution-making process and incremental development of a broader and deeper culture of constitutionalism. A constitution-making process should be founded on and evaluated in terms of legitimate and sustainable constitutionalism, but this objective can only be realized as a process, over time, and should not be assumed or expected to exist at the beginning of the constitution-making process. In the second part I will apply the preceding analysis to the recent events in the Arab world and highlight some strategies for mediating competing demands of democratic self-determination and legitimate and sustainable constitutionalism. In the third part of this chapter I will argue for a secular state as a necessary framework for mediating the paradox of separation of Islam and the state in the reality of connectedness of Islam and politics.

II. CONSTITUTIONS AND CONSTITUTIONALISM

Whether based on a written document or not, the objective of constitutionalism must always be to uphold the rule of law, enforce effective limitations on government powers, and protect fundamental rights. At the same time, we should not expect any constitutional project to yield a fully fledged valid or true constitution from the start and all at once. Constitutions evolve and mature as a result of a trial-and-error process over time. The path to legitimate constitutionalism includes setbacks and failures, as well as apparently successful steps that may still not be consistently maintained in practice—the progression of the process includes instances of regression.

For example, the Constitution of the United States, including its initial Bill of Rights, accepted the institutional legality of slavery until it was formally abolished by the Thirteenth Amendment in 1865.³ That formal abolition, however, did not achieve equal citizenship for former slaves and their descendants until after the Civil Rights Movement another century later. Despite those incremental steps toward greater constitutionalism, many serious social, economic, and political problems remain closely associated with race, religion, and class.⁴

² Rainer Grote and Tilmann J. Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, Oxford 2012) 4–7.

³ See http://www.senate.gov/civics/constitution_item/constitution.htm#amdt_13_, accessed May 18, 2015.

⁴ See, for example, Noel Ignatiev, *How the Irish Became White* (Routledge, New York City 1995); Karen Brodtkin, *How Jews Became White Folks and What That Says About Race in America* (Rutgers University Press, New Brunswick 1998); Philip Jenkins, *The New Anti-Catholicism: The Last Acceptable Prejudice* (Oxford University Press, Oxford 2003); and Patrick Q. Mason, *The Mormon Menace: Violence and Anti-Mormonism in the Postbellum South* (Oxford University Press, Oxford 2011).

Constitutional governance refers to the set of principles that limit and control the powers of government in accordance with the fundamental rights of citizens and communities in order to ensure that the relationship between individuals and the state is regulated by definite legal principles of general application, rather than the despotic will of a ruling elite.⁵ I use the term “constitutionalism” to include the network of institutions, processes, and broader culture that are necessary for the effective and sustainable operation of this principle.⁶ In other words, I am more concerned with a comprehensive and dynamic set of values, as well as social and political institutions and processes, than with the formal application of abstract general principles and specific rules of constitutional law. Constitutional and legal principles are relevant and important, but the effective and sustainable implementation of these principles can only be realized through the broader and more dynamic concept of constitutionalism.

The appropriate normative purpose of a constitution-making process is therefore to maintain proper balance between majority rule and the rights of each and every individual person. Maintaining this balance is a constant challenge for every society because the shifting concerns and affiliations of individuals in need of protection make it unlikely that they will be able to protect themselves through the political process, as they tend to have shifting concerns because they belong to a marginalized ethnic, religious, or cultural group, which is likely to diminish their ability to act politically in support of their concerns. The constitutional balance should therefore be designed to protect the most vulnerable persons and groups by whatever ethnic, religious, political, or other criteria they may be identified. In other words, there should be more to legitimacy than numerical popularity, even if there is unanimous support for an opposing proposition among the general population. This is what I accept as the appropriate normative purpose of a legitimate constitution-making process.

It is also clear to me, however, that this normative purpose will be realized incrementally, over time, and not all at once. It is also clear from the study of comparative constitutionalism that every constitution-making process is by definition contingent and contested, vulnerable to challenge and regression, but also capable of effective response and progression. The constitution-making process would not be needed in the first place if a proper constitution (i.e., one that balances majority rule with protection of individual rights) of the country is already secure against challenge and regression. To understand the protracted and contingent nature of social and political transformation in any historical context, however, is to enable local actors to devise and implement effective and sustainable strategies for achieving their objectives, and not to surrender to the inevitability of the status quo. The purpose here is to avoid surrender to despair or defeat that may be due to setting unrealistic goals or failing to take pragmatic, cultural, or contextual considerations into account.

Regarding potentially transformative developments in several Arab states since January 2011, I would note that rebellions may mature into revolutions over time, in the lives of communities on the ground where native actors have been inspired to action by indigenous concerns. In the context of the modern state, sustainable and legitimate constitutions emerge from “national settlements” reached among native political forces and succeed to the extent they can mediate between domestic conflicts and tensions in political and social relations without attempting to impose preconceived rigid so-called “solutions”. For our

⁵ James T. McHugh, *Comparative Constitutional Traditions* (Peter Lang, New York 2002) 2–3.

⁶ Alan S. Rosenbaum (ed), *Constitutionalism the Philosophical Dimension* (Greenwood Press 1988) 4 et seq.; Louis Henkin, “A New Birth of Constitutionalism: Genetic Influences and Genetic Defects” in Michel Rosenfeld (ed), *Constitutionalism, Identity, Differences and Legitimacy* (Duke University Press 1994) 39–53.

purposes here in particular, to the extent that religion is integral to such conflicts, it must also be included in the process of constitutional mediation. This process of conflict mediation according to national settlements is organic to the history and context of each society and must take its own course. There are no shortcuts and no guarantees against setbacks and regression. In each rebellion/potential revolution, the people themselves must struggle to develop national settlements and pursue constitutional mediations.

Constitutionalism is a framework for the mediation of certain unavoidable conflicts in the political, economic, and social relations in every human society. This view assumes that conflict is a normal and permanent feature of human societies, and defines constitutionalism as a framework for the mediation, rather than final or permanent resolution of such conflicts. However, since competition over power and resources cannot be practically mediated by all members of any society, there has to be some form of delegation to officials and elected representatives by those who cannot practically be part of the daily and detailed processes of administration and adjudication. At the same time, those who have to delegate to others also need to ensure that their interests are served by this process by participating in the selection of delegates as well as in holding them accountable to ensure that they act according to the terms of delegation. These pragmatic considerations underlie the basic constitutional principles of representative government and bureaucratic institutions of democratic administration of public affairs which are accountable to the citizens of the country. These considerations also require the constant verification of the validity of the structure and operation of the processes of representation and accountability in order to facilitate the incremental success of constitutional governance over time.

The variety of constitution-making processes we see around the world indicate complementary approaches to an ideal, to be adapted to different conditions of time and place, rather than as representing sharp dichotomies or categorical choices. In each case, the question should be about how the country's experience relates to the underlying rationale or purpose of constitutionalism as a general principle. Since any definition of this concept is necessarily the product of the experiences of specific societies in their various settings, it is neither reasonable nor practicable to insist on a single approach to the definition or implementation of one understanding of constitutionalism to the exclusion of all others. A more globally accepted broad understanding of the term may evolve over time, but that should be the outcome of comparative analysis of practical experiences, rather than the projection of an exclusive definition based on a liberal or other ideological or philosophical tradition.

The emergence of general principles (or universal features) of this concept should emphasize their role as means to the objective of successful and sustainable constitutional governance through practical application in the context of each country. For instance, popular sovereignty and social justice as the objective of constitutional governance can be achieved through the practical application of these principles, rather than by postponing application until ideal conditions for it have been established. Conditions which are conducive to development and consolidation of constitutionalism will themselves emerge through a process of trial and error in the practical application of constitutional principles. The end of constitutional governance is realized through the means of practical experience of constitutional principles in the specific context of each society.

For the processes of constitution-making to work properly through experience in each setting, the general population must be able and willing to effectively exercise its powers of delegation as well as holding of public officials to account, whether such officials are elected or appointed. The population at large must be capable of exercising intelligent, well-informed, and independent judgment about the ability of its representatives and officials to act on its behalf, and to verify that they do in fact act in accordance with the best interest of the population. To ensure and facilitate a wide range of operations and functions

of democratic government, all citizens must enjoy certain individual and collective rights, like freedoms of expression and association, access to information, and effective remedies against excess or abuse of power by official organs. But in the final analysis, the best principles and mechanisms of constitutional governance will not operate properly without strong civic engagement by a critical mass of citizens.

The most critical aspect of constitutionalism therefore relates to the subtle and rather mysterious psychological and sociological aspects of strong civic engagement by a critical mass of citizens. These aspects are difficult to quantify or verify, but include the motivation of citizens to keep themselves well-informed in public affairs and to organize themselves in independent organizations that can act on their behalf in effective and sustainable ways. However, people are unlikely to assert and pursue accountability without the necessary material and human resources as well as the psychological and cultural orientation of confident proactive citizenship. Public officials and the agencies and institutions they operate must not only enjoy the confidence of local communities but also be accessible, friendly, and responsive. This is the practical and most foundational meaning of popular sovereignty, whereby a people can govern themselves through their own public officials and elected representatives. Constitutionalism is ultimately concerned with realizing and regulating this ideal in the most sustainable and evolving manner possible, whereby the combination of theory and practice is capable of ensuring self-government in the present, and responding to changing circumstances in the future.

In my view, the global validity and applicability of a concept like constitutionalism is now a pragmatic necessity around the world in view of the universal application of the European model of the nation-state through colonialism and postcolonial relations. It seems likely that this model will continue as the dominant form of political organization in national politics and international relations for the foreseeable future. Since postcolonial societies have chosen after independence to keep the European model of the territorial “nation” state, they should also adopt the norms and institutions that have been found by European societies to be necessary for checking excess or abuse of power by the ruling elite who control the state. The persistence of these realities require the development and implementation of concepts like constitutionalism, democracy, and human rights, which have been found to be necessary for regulating the powers of the state and organizing its relationship to individuals and communities who are subject to its jurisdiction. Should all of this change, then we can think of alternative norms and mechanisms to safeguard individual freedom and realize social justice under new systems of governance and political organization.

This view is not inconsistent with an Islamic approach to legitimacy of constitution-making, and is only the contextual practical application of that approach. To be relevant and useful, an Islamic approach must respond to the geopolitical, economic, security, and other concerns of Islamic societies. Regardless of what one may think of the legacies of European colonialism, Muslims everywhere today live subject to the jurisdiction of territorial states which control economic, political, and legal affairs of their populations.⁷ To speak of an Islamic approach to legitimacy is to take the existing model of state formation, powers, and institutions into account as the premise and starting point of the process. As

⁷ I prefer the term “territorial” over “nation” state because it is more accurate in describing the nature of the European model of the state that has been imposed by colonialism throughout the world. While all contemporary states are characterized by the territoriality of their sovereignty and identity, “nationhood” is a myth of historical unity and shared identity that is frequently cited to rationalize the persecution and forceful assimilation of ethnic, religious, linguistic, and other minorities. The alleged need for national unity is also often cited to legitimize suppression of any form of dissent or diversity within the so-called majority.

I see it, an Islamic approach to the legitimacy of constitution-making is about understanding the relevance and impact of Islam on the process in the particular history and context of the country in question, and not about an “Islamic exceptionalism” that defines analysis.

In terms of the approach proposed in this chapter, the commonality of tensions in state-society and state-individual relations around the world recommend giving theories of constitutionalism and democracy broader applicability by expanding their meaning to include the experiences of other societies now seeking to adapt the same notion to their own respective contexts. The claim about the validity of a specific meaning of constitutional concepts should be realized through internal consultation and consensus-building within each society. Principles of constitutionalism should be specified and adapted for local application in a given setting, but outcomes of adaptation efforts may be at any point in a continuum, from minor differences regarding practical arrangements to incompatibility on major difference which should be contested within the cultural or religious tradition.

In other words, differences or variations in practical arrangements for such matters as separation of powers or judicial review may be expected and acceptable, while failure to acknowledge any need for separation of powers or judicial review may be more problematic. However, if adaptation to local context violates the fundamental constitutional rights of citizens, then the outcome is no longer a constitution at all. Recalling the incremental approach indicated earlier, failure to adapt such fundamental principles of constitutionalism to local conditions can be overcome through internal debate and transformation of cultural values and institutions. In my view, this is likely to be the case regarding certain aspects of Shari‘ah, as I will try to explain in the next section.

III. ISLAMIC LEGITIMACY OF CONSTITUTION-MAKING IN THE ARAB WORLD

There are many aspects to legitimacy of a constitution in each setting, including its ability to address specific threats to human dignity and social justice in the historical context of the particular society, and to enable people to exercise genuine self-determination, as noted earlier. The focus on Islamic legitimacy in this chapter is due to the particularly important role of Islam and Islamic politics in the Arab world. By Islamic legitimacy here I mean taking local Islamic concerns and discourse into consideration in assessing the substantive and procedural legitimacy of the constitution-making process in any country. This does not mean that there is some specific “Islamic” criterion of legitimacy to be applied, as there are too many competing interpretations of Islam for there to be agreement on that. Rather, the point here is that the criterion for assessing legitimacy should be internal to each society, and should include Islam or other religions adhered to by significant segment of the population.

I see the political and constitutional developments in the Arab world since January 2011 as part of a process of maturation of rebellions into revolutions over time in the lives of local communities where native actors have been inspired to action by their own agenda and priorities. The key point here is that the contestation and mediation of power and resources among local political actors is happening on indigenous terms. Local actors are framing their own issues and setting their own agenda, instead of fighting as proxies for superpowers as used to be the case during the Cold War, or being manipulated by different factions of ruling elites.⁸ The process will be messy and outcomes uncertain, but such is the

⁸ By “ruling elites” I mean various segments of the administrative and political establishment of a country, including senior legislators and policy makers, bureaucrats, judges of courts of appeals and supreme courts, senior bureaucrats, as well as the political leadership of the day, whether elected or not.

nature of true and legitimate constitution-making for all societies everywhere in the world. Regarding the Arab region in particular, to the extent that religion is integral to such conflicts, it must also be included in the process of constitutional mediation.

As already emphasized, this process of conflict mediation according to national settlements is organic to the history and context of each society and must take its own course. There are no shortcuts and no guarantees against setbacks and regression. In each rebellion cum revolution the people themselves must struggle to develop national settlements and pursue constitutional mediation. External actors can support liberation struggles, but should not attempt to displace or impose on the independent agency of native actors. It is also important to emphasize the need for a patient, long-term view of the transformative processes we seek to achieve through rebellions/revolutions because the outcomes of such processes are contested and contingent, tentative and open to regression. While outcomes can only be appreciated in retrospect, we should try to understand the terms and context of interaction of actors and factors in current situations like those unfolding across the Arab world in order to decide, depending on who we are and where are located, what to do and how to do it.⁹ The complexity of social and political power relations and the ambiguity of mixed motivation should all be taken into account, while the focus shifts from appeals to external actors and agenda to an internal dynamic of transformation.

The implication of this view for the purposes of this chapter is that there is no preconceived script or blueprint for the constitutional course of any Arab society, no prescribed goals of transition from one point to another that must be achieved. Each society is constructing its constitutional development on its own terms. The outcomes of these processes may be analyzed as stages in the development of each society, but that should not attempt to anticipate or constrain the visions and direction of any Arab society regarding its own development.

Among the many aspects to these processes anywhere in the world, I am particularly concerned here with the role of Islam in constitution-making in the Arab world. As I have argued elsewhere,¹⁰ that role is contingent on such factors as the political history of the region with imperial or local state formations, whether prevalent practice of Islam is of Şūfī or Salafī orientation as well as socio-economic relations and trade networks. This is illustrated by comparing the role of Islam in Indonesia, Nigeria, and Senegal, or contrasting its role in India and Pakistan, which are ranked as second and third in Muslim populations after Indonesia.¹¹ The Muslims of India are thriving in a secular democratic state, while those of Pakistan are still struggling with the identity of their state since the 1950s, dealing with the question of whether it is a state for Muslims or an Islamic state.¹²

The role of Islam also varies according to context and can shift in response to regional political and security developments as can be observed in Afghanistan or the shifting levels of intensity in the Israeli-Palestinian conflict. It is misleading to assume a particular level or

⁹ Abdullahi Ahmed An-Na'im, "Islam, Sharia and Democratic Transformation in the Arab World" (2012) 87 *Die Friedens-Warte*, *Journal of International Peace and Organization* 27–41.

¹⁰ Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press, Philadelphia 2006).

¹¹ Pew Research Center, "The Future of the Global Muslim Population: Projections from 2010 to 2030" (Report) (January 27, 2011), <http://www.pewforum.org/2011/01/27/the-future-of-the-global-muslim-population/>, accessed May 18, 2015.

¹² See Jan Michiel Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Amsterdam University Press, Leiden University Press Academic, Leiden 2010) 373–432.

type of role of Islam in all Islamic societies, or expect that role to remain fixed or static in a single society over time. To accept a role for Islam in the legitimation of constitutionalism in Arab countries does not mean conceding the manipulative or confused ways in which that role in constitution-writing is usually expressed in terms of claims that “Islam is the religion of the state” and assertions that Shari‘ah is to be enforced as the law of the state. It is not possible in this limited space to review actual experiences with these processes in various Arab countries. Instead, I will present a theoretical position that I believe is supported by the experiences of countries like Iran, Pakistan, and Sudan, which attempted to apply those claims since the 1970s.¹³ It may be useful at this stage to briefly clarify the nature of Shari‘ah as commonly debated in current constitutional and political discourse in the Arab world.

What came to be known among Muslims as Shari‘ah was the product of a very slow, gradual process of interpretation of the Qur‘ān and Sunnah (traditions of the Prophet) from the seventh to the ninth centuries.¹⁴ That process took place among scholars who developed their own methodology (*uṣūl al-fiqh*) for the interpretation and classification of the Qur‘ān and Sunnah. In this way, the framework and main principles of Shari‘ah were developed as an ideal normative system by scholars who were clearly independent of the state and its institutions.¹⁵ “Although the law [Shari‘ah] is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God as humanly understood. Since the law does not descend from heaven ready-made, it is the human understanding of the law—the human *fiqh* that must be normative for society.”¹⁶ It is also clear that the state had no role in the interpretation of Shari‘ah or determination of which normative principles apply to the determination of a specific litigation.¹⁷

In light of this explanation, the position I am arguing for is not only that the apparent popularity of claims of an Islamic state to enforce Shari‘ah as law of the state does not justify their application from a constitutional point of view but also that their validity can be challenged from a historical and theological Islamic point of view.¹⁸ Islam cannot be the religion of the state because the state is a political institution that is incapable of holding belief in Islam or forming the intent to comply with religious motivated obligations. The dangers of this fallacy become clearer when the claim is seen in its true nature of enabling the ruling elite to apply their own view of Islam through state institutions. Moreover, a Shari‘ah norm will have religious value only when it is deliberately and freely observed by believers, and not when it is coercively enforced by the state. When it is claimed that norms of Shari‘ah are being coercively enforced as law of the state, they cease to be part of the religious normative system of Islam and become the political will of the state.

Another reason for the conceptual impossibility of the application of Shari‘ah as the law of the state relates to the permanent and profound difference between religious and political authority. To steal the property of another person is both a religious sin and a crime under state law, but the source of authority and process of determining such characterizations are different. A Shari‘ah norm is binding on believers as a matter of religious obligation,

¹³ Jan Michiel Otto (n 12) 319–372, 181–230.

¹⁴ Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh 1964); Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, Oxford 1964).

¹⁵ Mohammad Hashim Kamali, *Shariah Law: An Introduction* (Oneworld Publications, Oxford 2008).

¹⁶ Bernard Weiss, *The Spirit of Islamic Law* (University of Georgia Press, Athens 1998) 116, emphasis in original.

¹⁷ Knut Vikor, *Between God and Sultan: A History of Sharia* (Oxford University Press, Oxford 2005) 174–180.

¹⁸ Asma Afsaruddin, “The ‘Islamic State’: Genealogy, Facts, and Myths” (2006) 48 *Journal of Church & State* 153.

regardless of what the state is doing or failing to do. In contrast, a norm of state law is binding on all those subject to the jurisdiction because it has been established by the lawmaking process of the state, whether democratic or not, again regardless of religious obligation. The fact that these two different types of norms apply to the same human conduct does not mean that an act is a crime because it is a sin or a sin because it is a crime.

At the same time, I appreciate the role for Islam in the legitimization of the constitution-making process because of its formative influence on the ethical formation of society, as distinguished from the enforcement of Shari'ah as the law of the state. Each Muslim remains bound as a matter of personal practice by what he or she accepts as a valid interpretation of Shari'ah, but not as coercively enforced by the state. From this perspective of Shari'ah as the human interpretation and practice of the religious normative system of Islam, not the legal system of the state, Muslims can continue to debate what these norms mean in the modern context. These competing interpretations of Shari'ah remain relevant to different views on the legitimacy of the constitution-making process in each social and political context.

In these contestations, it is futile to attempt to hide or misrepresent the fact that traditional interpretations of Shari'ah are unconstitutional because they, for instance, discriminate against women and non-Muslims. When seen in their own historical context of the seventh century, I believe that traditional interpretations of Shari'ah were appropriate for the needs and expectations of human societies around the world at the time. None of the principles of constitutionalism commonly accepted today, like equality for women and freedom of religion, were known to any human society for more than a thousand years to come. I also believe in the possibility of compatibility of alternative interpretations of Shari'ah with the principles of constitutionalism as accepted today. That possibility, however, can only be founded on a clear understanding of the historical contingency of every interpretation of Shari'ah, which is always the product of a human understanding of divine sources.¹⁹

Discrimination against women and non-Muslims are so structural to the methodology and general principles of that normative system that they cannot be avoided without repudiating the integrity of the system itself. Yet, this would be totally inconsistent with the alleged religious justification of the policy. That is, one cannot claim to be implementing the will of God, while being selective about which principles to apply or withhold without justification for such selectively from a Shari'ah point of view. Moreover, when Shari'ah principles are enacted as state law, they become the secular political will of the state, and are no longer the religious law of Islam. Such contradictions, however, can be avoided by acknowledging the inherently secular nature of the state and its legislation.²⁰ Once that proposition is accepted, as I will show in the next section, it will be possible to pursue an Islamic legitimization of constitutionalism without conceding the enforcement of Shari'ah as the positive law of the state.

IV. THE SECULAR STATE AS FRAMEWORK FOR MEDIATION OF PARADOX

It seems that profound ambiguity and ambivalence about the relationship of Islam and Shari'ah with the state and politics persist among the authors of the draft constitutions in the Arab world, as I will now briefly illustrate with the case of Egypt. The same appears to be true of the 2013 Constitution of Tunisia (Arts. 1, 2, and 3) and other Muslim-majority

¹⁹ Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation* (Syracuse University Press, Syracuse 1990).

²⁰ Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia* (Harvard University Press, Cambridge 2008).

countries.²¹ I will now quote some key parts of the draft Egyptian Constitution of November 2012 (the available text at the time of writing, June 2013), and then try to explain the underlying ambiguity and ambivalence I see in such provisions.

In the “Political Principles” part of the draft Egyptian Constitution, Art. 2 provides that “Islam is the religion of the state and Arabic its official language. Principles of Islamic Shari‘ah are the principal source of legislation”. Art. 3 adds: “The canon principles of Egyptian Christians and Jews are the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders”. This draft adds a new element via Art. 4, namely, that “Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law”. At the same time, Art. 5 reads: “Sovereignty is for the people alone and they are the source of authority.” Art. 6 also provides: “The political system is based on the principles of democracy and *shūrā* (counsel), citizenship (under which all citizens are equal in rights and duties), [. . .] and respect for human rights and freedoms; all as elaborated in the Constitution.” This part on political principles closes with the statement: “All of the above is subject to law regulations.”

In a general sense, the ambiguity and ambivalence of these provisions can be explained as follows:

1. Since the state is a political institution incapable of having a religion as such, what the first part of Art. 2 means is that the ruling elite will enforce their own view of Islam. As I will now show, this problematic conclusion cannot be avoided by the rest of the relevant provisions cited below.
2. In a new attempt to be more specific about Shari‘ah as the principal source of legislation, Art. 2 specifies “principles of Shari‘ah,” but this cannot determine which of the often diametrically opposed views of Muslim scholars of the principles of Shari‘ah are to be used. In practice, therefore, that choice remains in the hands of ruling elites.
3. To say, in Art. 4, that Al-Azhar Senior Scholars are to be consulted about Shari‘ah principles neither determines which scholars, nor makes their view binding on the ruling elite. This is objectionable from a democratic point of view because Al-Azhar scholars are not elected or otherwise accountable, but then why single them out of all Muslim scholars of the country for consultation? While politicization is not new for Al-Azhar, this level of constitutional recognition will probably incite more systematic corruption and manipulation of the institution itself and of the religious legitimization that is sought by this reference.
5. The assertion, also in Art. 4, that the “post of Al-Azhar Grand *Shaykh* is independent and cannot be dismissed,” can hardly secure the political neutrality of the institution as a whole. On the contrary, life tenure for a scholar as the head of an institution will only ensure the authoritarian and unaccountable dominance of his views over those of his colleagues. Ruling elites, who determine the law that regulates the appointment of the Grand *Shaykh* and the funding of Al-Azhar according to Art. 4 will not be affected because they can simply ignore the nonbinding advice they receive from that scholar.

²¹ For instance, Art. 227 (1) of the Constitution of the Islamic Republic of Pakistan provides: “All existing laws shall be brought into conformity with the injunctions of Islam [. . .]” But Art. 227 (2) stipulates that this clause shall be given effect only through the process provided for in the same section IX of the Constitution. In other words, ruling elites control the manner and degree to which “injunctions of Islam” are given effect to in practice.

6. Art. 5 only adds another level of ambiguity and confusion by stipulating that sovereignty is for the people without reference to religion. This is of course welcome by itself, but sovereignty of the people at large is inconsistent with Shari'ah principles by any school of Sunni jurisprudence. According to Shari'ah, non-Muslims cannot exercise sovereignty over Muslims. In other words, Arts. 2 and 5 cannot be reconciled.
7. Another two layers of irreconcilable contradiction are added by Art. 6: First, it stipulates that both democracy and *shūrā*, are the basis of the political system. The contradiction here is that democracy is binding majority rule, while *shūrā* is nonbinding advice. So, will the government of the day be bound by what the elected representatives of the people decide as a matter of democratic principle, or take it to be mere advice (*shūrā*) it can accept or ignore?
8. Second, Art. 6 also provides that all citizens shall have equal in rights and duties, and that respect for human rights and freedoms is one of the bases of the system. Again, this is of course welcome as it should be the case, but neither objective can be achieved if principles of Shari'ah are the main source of legislation. Since the unanimous consensus of all Sunni schools is that there is no equality of rights between men and women, and between Muslims and non-Muslims, Shari'ah permits neither equal citizenship nor respect for human rights and freedoms.²²

Two sets of reflections seem to follow from the above remarks. First, whatever law and public policy are adopted will be determined by human beings and not by divine revelation as such. This is unavoidable because divine revelation must necessarily be interpreted by human beings before it can be applicable in practice. Second, when ruling elites select what they deem to be relevant principles of Shari'ah, the process will necessarily be arbitrary, as a result of being driven by practical needs of the time without being bound by methodological consistency among and within the schools of Islamic jurisprudence. In other words, policy makers and legislators will be seeking practical solutions to specific problems in whichever school of Islamic jurisprudence they can find them, but there will be no institution or authority that can bind them to the methodology of one school or another. Arbitrary selectivity is likely to be the outcome because pressing needs seem to justify the choices being made, in the absence of a credible mechanism for methodological supervision.

As can be seen in statutes of so-called Islamic Family Law throughout the Muslim world, parts of principles are taken from various Sunni, sometimes Shi'ah, schools of Islamic jurisprudence and fused together to make an integrated principle that none of the schools cited as its source would accept as legitimate and valid.²³ This may all sound expedient and realistic, but two seriously negative consequences seem to follow from this state of affairs. First, the religious sanctity of Shari'ah is invoked to insulate human policy and legislative choices and practice against criticism and political opposition. Second, by being used in this way, Shari'ah and Islam itself will be discredited among Muslims at large as they see how the sanctity of religion is manipulated to achieve the narrow political ends of ruling elites.

By its nature and purpose, Shari'ah can only be freely observed by believers, and its principles lose their religious authority and value when enforced by the state. It is from this fundamentally religious perspective that the state should not be allowed to claim the

²² For detailed discussion and documentation of these propositions, see An-Na'im (n 19) 69–100.

²³ Abdullahi Ahmed An-Na'im (ed), *Islamic Family Law in a Changing World: A Global Resource Book* (Zed Books, London 2002) 14.

authority of Islam. Since whatever standards or mechanisms are imposed by the organs of the state to determine official policy and formal legislation will necessarily be based on the human judgment of those who control those institutions, they should not be misrepresented as “religious”. This is what I refer to as the separation of Islam and the state. On the other hand, the religious beliefs of Muslims, whether as officials of the state or private citizens, tend to influence their actions and political behavior. I refer to this difficulty as the connectedness of Islam and politics.

The state is a complex web of organs, institutions, and processes that are supposed to implement the policies that are adopted through the political process of each society. It signifies the continuity of institutions like the judiciary and administrative agencies, as distinguished from the government or regime of the day which is the product of current politics.²⁴ The state should therefore be the more settled and deliberate operational side of self-governance, while politics is the dynamic process of making choices among competing policy options. This distinction, not dichotomy, between the state and politics assumes constant interaction among the organs and institutions of the state, on the one hand, and organized political and social actors and their competing visions of the public good, on the other.

The state should not be a complete reflection of daily politics because it must be able to mediate and adjudicate among the competing visions and policy proposals which require it to remain relatively independent from different political forces in society. But complete independence is not possible because the state cannot be totally autonomous from those political actors who control it. This reality makes it necessary to strive for a degree of separation of the state from politics, so that those excluded by the political processes of the day can still resort to state organs and institutions for protection against the excesses and abuse of power by state officials.

This need can be illustrated by experiences of a single ruling party taking complete control over the state, including Arab countries, during the last decades of the twentieth century. Whether it was Arab nationalism in Egypt or the Ba‘th Party in Iraq and Syria, the state became the immediate agent of the party which was the political arm of the state. Citizens were therefore trapped between the state and the party, without the possibility of administrative or legal remedy from the state or the possibility of lawful political opposition outside its sphere of control. That will be the outcome of declaring the state to be Islamic and enforcing Shari‘ah norms as law of the state. This necessary balancing of competing claims and tense relationships can be mediated through principles and mechanisms of constitutionalism, rule of law, and the protection of the equal human rights of all citizens.

As I see it, the challenge facing Arab societies is how to separate Islam and the state despite the connectedness of Islam and politics. The approach I am proposing calls for the deliberate and strategic mediation of the tension arising from the separation of Islam and the state (as distinguished from the government of the day) while also regulating the connection of Islam and politics, instead of attempting to impose a categorical resolution one way or the other.

This common negative perception of secularism among Muslims does not distinguish between the separation of Islam and the state, on the one hand, and Islam’s connectedness to politics, on the other. By failing to recognize this distinction, the separation of Islam and the state is taken to mean the total relegation of Islam to the purely private domain and its

²⁴ Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (Stanford University Press, Stanford 1990) 19–33; Graeme Gill, *The Nature and Development of the Modern State* (Palgrave Macmillan, New York 2003) 2 et seq.

exclusion from public policy. Since this is not what I am proposing, why do I use the term “secularism”, which only confuses my position due to others’ negative view of secularism? I prefer to use this term, while clarifying what I mean by it, not only because of its value for comparative analysis but also in order to contribute to rehabilitating and affirming the principle of secularism of the state among Muslims.

The context of the constant negotiation of the relationships among Islam, state, and politics in Arab countries is shaped by profound transformations in the political, social, and economic structures and institutions under which all Muslims now live as a result of European colonialism. This context is also shaped by the internal political and social conditions of each society, including the ways in which Islamic societies have continued to follow Western forms of state formation, education, and social organization, and economic, legal, and administrative arrangements after achieving political independence.²⁵ All present Islamic societies not only live within territorial states which are totally integrated into global systems of economic, political, and security interdependence and cross-cultural influence, but have voluntarily continued to participate in these processes long after they have achieved political independence. These realities require the safeguards of constitutionalism and protection of human rights.

In conclusion, an Islamic perspective on the legitimacy of constitution-making processes in the Arab world does not mean that constitutionalism itself is not necessary, or that there is a uniquely Islamic constitutionalism that is applicable to all Islamic societies. At the same time, constitutionalism in any Islamic society should not be a mechanical reproduction of constitution-making processes in any other society, whether Islamic or not. These processes in every society, as noted at the beginning of this chapter, are about the construction and development of the widest possible consensus around a “national settlement” among various segments of that particular society. When the society happens to be Islamic, then Islam will influence both the process of consensus building and the terms of the national settlement, but that will not be in the same manner and for the same purposes in all Islamic societies. Finally, this contextual Islamic influence will also interact with the colonial and postcolonial experiences of the society, including its particular manner of state formation, education and social organization, economic development, and legal and administrative systems. Looking across the Arab world now, we can see very different outcomes to the experiences of various societies, from Morocco to Lebanon to Yemen. For instance, we observe significant differences in the size and vigor of the middle class, in levels of education, and in social and economic development in Egypt and Tunisia in contrast to Yemen and Arabia. Such differences will influence the role of Islam in the legitimacy of constitution-making processes in each country.

²⁵ Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press, Cambridge 2009) 443–499.

Legitimacy of Constitution-making Processes

Reflections from the Perspective of International Law

RÜDIGER WOLFRUM

I. INTRODUCTION: SOVEREIGNTY OF STATES— A LIMITATION TO ANY ATTEMPT TO INFLUENCE THE PROCEDURE OF CONSTITUTION-MAKING AS WELL AS THE CONTENT OF A NEW CONSTITUTION

According to Art. 2(7) of the UN Charter, the United Nations is not authorized “to intervene in matters which are essentially within the domestic jurisdiction of any State”.

This is a matter of national sovereignty reaffirmed in Art. 2(1). The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations (1970)¹ is even more specific in this respect. While reaffirming the principles set out in Art. 2 of the UN Charter, it stipulates:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every state has the duty to respect that right in accordance with the provisions of the Charter.

¹ UNGA Res 25/2625 (October 24, 1970) UN Doc A/RES/25/2625.

This seems to clearly indicate that states are free to decide on the procedure of how to amend or adopt their constitutions as well as to decide freely on the organization of government and the rights enjoyed by persons living within the territorial scope of that constitution. Constitution-making is traditionally the hallmark of state sovereignty and the ultimate expression of national self-determination.

The reality is and always has been different;² only the intensity of external influence on constitution-making and legitimacy has grown.³ The United Nations, the community of states, regional organizations, and individual states have reacted to violations of constitutions, in particular in reaction to military coups which ousted an elected government as well as to grave human rights violations.⁴ Further, the United Nations—directly or indirectly—individual states, regional organizations as well as nongovernmental organizations have influenced, or attempted to influence, the shaping of a new constitutional order of a state after the latter emerged from civil war, internal disturbances, and even occasionally after a change of government brought about by a revolution, general elections, or through other means which arguably remained within the then existing constitutional framework. It is imperative to point out in this context that the power of constitution-making (*pouvoir constituant*) rests with the people of the state concerned. Thus, revolutions—if undertaken by the population at large or at least clearly endorsed by the latter—have, as a matter of principle, the legitimacy to end a previous and to establish a new constitutional regime.⁵ The right of self-determination—being a collective right of the population concerned—endorses this fact from the point of view of international law.⁶

Two issues have to be clearly distinguished: the procedure for constitution-making and the substance of future (or even existing) constitutions.⁷ In both cases external interferences raise the question as to whether they—attempted or successful—were legitimate.⁸ This again depends heavily upon the occasion under which the influence is being exercised and by whom. The following scenarios may be distinguished, namely, constitution-making under international administration⁹ as in the case of East Timor¹⁰ or Bosnia-Herzegovina,¹¹ constitution-making under foreign occupation as in the case of

² F. Schauer, "On the Migration of Constitutional Ideas" (2004) 37 Conn. L. Rev. 901 et seq.

³ See B.-O. Bryde, "Die Konstitutionalisierung des Völkerrechts und die Internationalisierung des Verfassungsrechts" (2003) 42 Der Staat 61.

⁴ This was the case when the democratically elected president of Haiti (1990) was ousted by a military coup in 1991. The military coup collapsed under international pressure 1994.

⁵ See B. Ackermann, *We the People: Foundations* (vol 1, Belknap Press of Harvard University Press, Cambridge 1991).

⁶ P. Dann and Z. Al-Ali, "The International Pouvoir Constituant—Constitution-Making under External Influence in Iraq, Sudan and East Timor" (2006) 10, Max Planck UNYB 425 (426). They distinguish between a "revolutionary" and a more "evolutionary" tradition of constitution-making.

⁷ See on that: C. Sunstein, *Designing Democracy* (Oxford University Press 2001).

⁸ Critical on that: N. Feldmann, "Imposed Constitutionalism" (2004) 37 Conn. Law Rev. 857 et seq.; M. Sunder, "Enlightened Constitutionalism" (2004) 37 Conn. Law Rev. 891 et seq.

⁹ See on that in general: R. Wolfrum, "International Administration and Post-Conflict Situations by the United Nations and Other international Actors" (2005) vol 9 Max Planck UNYB 649 et seq.; S. Chesterman, *You, the People, The United Nations, Transitional Administration, and State Building* (Oxford University Press 2005).

¹⁰ M. Benzing, "Midwifing a New State: The United Nations in East Timor" (2005) vol 9 Max Planck UNYB 295 et seq.

¹¹ P. Dann and Z. Al-Ali, (n 6) 431 et seq.

Iraq,¹² and constitution-making through international moderation as in the case of Sudan.¹³ Two further categories have to be added, namely the influence on constitution-making within a regional organization such as the Economic Community of West African States (ECOWAS),¹⁴ as well as the influence on constitutions and—as a permanent influence—of the progressive development of international law.

This chapter does not intend to dwell on the legitimacy of such interferences since this has been covered in quite some detail. This chapter will rather concentrate on the questions which are the procedural or substantive standards of international law which should guide states whenever they decide to draft a new constitution or to substantially amend an existing one. Since the relevant international law rules are dispersed and in the process of development, it is unavoidable to have recourse to—amongst other things—the UN practice concerning the transitional international administration of territories.

The United Nations has emphasized in the context of transitional administration of territories that the principle of the rule of law is to be respected and implemented. The content of the rule of law principle was defined by the UN Secretary General as follows:

[A] principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in the decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁵

This definition contains procedural as well as substantive aspects, some of the latter, such as the separation of powers, reflect traditional constitutional law principles. The UN General Assembly's High Level Declaration on the Rule of Law has a somewhat different focus. It states:

We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between states and the basis on which just and fair societies are built.¹⁶

Although the statement of the UN Secretary referred to the transitional administration of territories under the authority of the United Nations, it can be taken as a general principle to be implemented by constitutions. This can be shown, for example, with respect

¹² P. Dann and Z. Al-Ali, (n 6) 434 et seq.; R. Wolfrum, "Iraq: From Belligerent Occupation to Iraqi Exercise of Sovereignty" (2005) vol 9 Max Planck UNYB 1 et seq.

¹³ This classification was introduced by: P. Dann and Z. Al-Ali (n 6) 423 et seq.; on Sudan in particular: 442 et seq.; L. Lauro and P. Samuelson, "Towards Pluralism in Sudan" (1996) 37 Harv. Int'l L.J.; for further details on the so-called Heidelberg Dialogue: http://www.mpil.de/ww/eu/pub/research/details/know_transfer/sudan_peaceproject/dialogue_cfm, accessed June 15, 2015.

¹⁴ For example, in Liberia.

¹⁵ UNSC Report of the Secretary-General 616 (2004) para. 6, UN Doc S/2004/616.

¹⁶ Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels (Preamble), UNGA Res 67/1 (September 24, 2012), UN Doc A/RES 61/1.

to Liberia, where the Security Council urged the transitional government of Liberia to prioritize “the establishment of a state based on the rule of law.”¹⁷ In this context the UN Secretary General clearly indicated the connection between the rule of law principle and the restoration of peace or—that the breakdown of rule of law institutions would lead to a breakdown of internal peace.¹⁸

The demand for a democratic structure of a state is less pronounced in international law, although elements, in particular, the right of every citizen to participate in general elections and to participate in the shaping of the public opinion, are enshrined in all major human rights instruments. The cautious attitude of the United Nations in this respect is clearly addressed in the Report of UN Secretary General Boutros-Boutros Ghali in his report “An Agenda for Democratization” (1996).¹⁹ It stated in its Introduction:

10. The United Nations is, by design and definition, universal and impartial. While democratization is a new force in world affairs, and while democracy can and should be assimilated by all cultures and traditions, it is not for the United Nations to offer a model of democratization or democracy or to promote democracy in a specific case. Indeed, to do so could be counter-productive to the process of democratization which, in order to take root and to flourish, must derive from the society itself. Each society must be able to choose the form, pace and character of its democratization process. Imposition of foreign models not only contravenes the Charter principle of non-intervention in internal affairs, it may also generate resentment among both the Government and the public, which may in turn feed internal forces inimical to democratization and to the idea of democracy.

This clearly establishes the dilemma of those attempting to influence the internal process of a state attempting to reorganize its internal structure with the view to democratization, mandated by the United Nations or not. They have to steer clear from Scylla and Charybdis of illegally interfering in violation of the principles of the UN Charter and to miss the international trend toward democratization, the latter being legitimized by the overarching principle of international law for the preservation of international peace and security.²⁰ In this respect it should be noted that the definition of the notion of “international peace” has changed. Whereas originally it was only understood to mean the absence

¹⁷ UNSC Res 1509 (September 19, 2003) UN Doc S/RES/1509 of September 19, 2003; *See also*: UNSC Res 1885 (September 15, 2009) UN Doc S/RES/1885, para. 10, where the Security Council called upon the government to redouble efforts to develop rule of law institutions.

¹⁸ UNSC Report of the Secretary-General 712 (1997) UN Doc S/1997/712.

¹⁹ UNGA the Secretary-General, “An Agenda for Democratization”, delivered to the General Assembly (December 20, 1996) UN Doc. A/51/761, which was circulated under the agenda item no 41: “Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies”.

²⁰ The connection between the internal structure of a state and the principle for the preservation of international peace and security was emphasized in “An Agenda for Democratization” (n 19). It states at para. 18: “Democratic institutions and processes within States may likewise be conducive to peace among States. The accountability and transparency of democratic Governments to their own citizens, who understandably may be highly cautious about war, as it is they who will have to bear its risks and burdens, may help to restrain recourse to military conflict with other States. The legitimacy conferred upon democratically elected Governments commands the respect of the peoples of other democratic States and fosters expectations of negotiation, compromise and the rule of law in international relations. When States sharing a culture of democracy are involved in a dispute, the transparency of their regimes may help to prevent accidents, avoid reactions based on emotion or fear and reduce the likelihood of surprise attack.”

of an armed conflict, the notion now embraces all conditions, international ones as well as the ones in states which are likely to lead to an armed conflict or increase the possibility of any disturbance of international peace. This is why the United Nations considers itself to have the mandate—as expressed in “The Agenda for Democratization”—to take a position in respect of constitutional changes and developments within states. The principle of the rule of law as well as the protection of human rights plays a paramount role in this respect.

There are voices which complain about the loss of or limitation to state sovereignty. However, one should acknowledge that states have lost in national sovereignty compared to the situation prevailing in the 19th century. There are several reasons that justify this development. International interdependence in economic and security matters, the growing number of issues, such as the protection of the environment, climate change, stability of financial markets, etc., which can only be managed by cooperative international efforts, have made it necessary for states to cooperate directly or, preferably, within international organizations or agencies. Accordingly, today’s states are not totally free anymore in dealing with and managing particular issues. But it should be borne in mind that such a system also broadens the competences of states since it gives them the right to interfere in what would have been considered internal affairs before the UN Charter was written.

Following, I will explain some international parameters which directly or indirectly influence the process of framing a new constitution or its content. They are mostly to be derived from international human rights commitments and from the right to self-determination.

II. HUMAN RIGHTS AND OTHER INTERNATIONAL STANDARDS AS POTENTIAL LIMITATIONS FOR CONSTITUTION-MAKING

A. Introduction

The relevant source of universal procedural norms is in the International Covenant on Civil and Political Rights, namely, Arts. 1(1) on self-determination, 3 on equality of men and women, 25 on equal participation in public affairs, and 26 on equality before the law. The International Covenant on Civil and Political Rights envisages the extensive rights of persons to participate in the political process. Art. 25 stipulates:

every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Art. 2 and without unreasonable restrictions (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal, and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors.

The Human Rights Committee, the institution of independent experts set up to oversee the implementation of the Covenant, has had extensive opportunity, both in its review of obligatory compliance reports and in hearing individual petitions alleging violations, to develop the jurisprudence of this provision. The Committee has concluded that while the right to take part in the conduct of public affairs, directly or through freely chosen representatives, applies also to constitution-making:

it does not provide any particular model for this. In the words of the Committee it is for the legal and constitutional system of the state party to provide for the modalities of such participation.

The Human Rights Committee also made a general comment on the matter indicating that the right to participate in public affairs set out in Art. 25 is satisfied, *inter alia*, when citizens “choose or change their constitution or decide public issues through referendum or other electoral process”. This comment may indicate a tendency to regard constitutional drafting as coming within the purview of the International Covenant on Civil and Political Rights.

All states contemplating drafting or amending their constitutions are well advised to consider the International Covenant on Civil and Political Rights in organizing the framework within which their citizens participate in that process.

Regional norms may even be more relevant. For African states, attention needs to be paid on the Banjul Charter,²¹ for American ones, the American Convention of Human Rights.²²

Apart from that, also the right to self-determination as enshrined in Art. 1(1) of the Covenant comes into play. According to it all people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. This means that as far as the substance of the constitution is concerned states have a right to establish their own political system which reflects their culture and their legal history. However, the right to self-determination is not only a collective right but also an individual one. Procedurally, this right means that citizens of a state have the right to participate in the process of constitution-making.

B. Standards Concerning the Procedure of Constitution-making

1. In General

What are the situations when it comes to a change or redrafting of a constitution? This may take place in normal circumstances. For example, the Basic Law of the Federal Republic of Germany has been changed frequently, and the constitution provides for the procedure to be followed. Changes to the constitution require a two-thirds majority in both houses of parliament after the draft amendments have been debated intensively.

What we are particularly interested in is the drafting of a new constitution after the end of an external or an internal war or a regime change. In such a situation the state concerned is faced with a dilemma: It is its prime interest to re-establish peace and internal stability; however, this requires a legal framework which may not exist anymore or which may no longer be accepted.²³ Apart from that, very often it is necessary to cooperate with the

²¹ Art. 13(1) reads: Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

²² Art. 23 reads: 1. Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

²³ This is acknowledged in *The Agenda for Democratization*. The relevant sentences read: “that democracy violates minority and community rights, and that democracy must wait until development is fully achieved. However, whatever evidence critics of democracy can find in support of these claims must not be allowed to conceal a deeper truth: democracy contributes to preserving peace and security, securing justice and human rights, and promoting economic and social development.”

former enemy and perhaps the one who has gravely violated human rights to come to peace. It is for that reason that agreements between the warring fractions provide peace agreements as well as constitutions. A typical example to that extent was the National Interim Constitution of Sudan, which was developed in negotiations between the Sudan People's Liberation Movement (SPLM) and the government of Khartoum. Criticism voiced against this peace agreement was that the deliberations took place behind closed doors and one could not speak of any form of public participation. Only the two warring fractions were involved. Clearly, the drafting of the National Interim Constitution was lacking legitimacy at the beginning of the process.

What made the situation tolerable and even legitimate was that this constitution was an interim one, meant to cover a certain period in which peace and stability should be regained. This two-stage approach seems to be an acceptable solution, although it too has certain disadvantages. It is quite possible that in this interim period one fraction is able to establish a dominant position, which might later prove detrimental to finding a solution acceptable by all.

The drafting of the Constitution of Bosnia-Herzegovina was done together with a peace agreement. Although negotiated with the assistance of many external constitutional law experts, it did not prove to be successful.

Many authors dealing with constitution-making in a postconflict situation, probably the majority, seem to believe that a constitution claiming legitimacy must have been accepted in a public referendum.

I have my doubts from a practical as well as a theoretical point of view. In a public referendum, although it is always extremely useful for receiving a "democratic label", the population can only decide between "yes" and "no". Equally, or even more importantly, is that the draft which is to be put to referendum is being developed in a process which is all-embracing, which means involving all political forces in a given country. Apart from that, for a referendum to be meaningful, it requires intensive and objective information for the public at large. Such information and training has to be commensurate to the knowledge and experience of the population. The interaction of institutions in a modern government and its checks and balances are difficult to understand as are such principles as the rule of law or federalism.

As far as the body of providing the first draft for a new constitution is concerned, the best way to do so is to form a constitutional drafting committee which works together with parliament, probably consisting not only of all members of a former parliament or an existing parliament or even an assembly consisting of the members of the national parliament but also of the parliaments of states in a federal system. This was the solution followed in Germany, for example. Only if the constitution has been worked out in an open, transparent process, it makes sense to submit it to a public referendum. Most constitutional drafting committees do not meet the standards of transparency. They are more often than not established by the ruling executive or even the head of state. They may be composed of persons with some standing in the society or some constitutional law experts. However, this neither means that they are independent nor that they reflect the aspirations of the population as a whole.

What is missed out in legitimacy while preparing the first draft cannot be regained by a public referendum. An example to be avoided is the drafting of the Constitution of Iraq.

In any case, a referendum is not a must. It is from the point of view of democracy equally acceptable if the constitution is adopted in parliament with a significant majority. The two-thirds majority is a rule. If there are two chambers, it has to be adopted in both. If there are state parliaments, they should also be involved.

It seems to be appropriate to go through the procedure for preparing and voting upon a new constitution step by step on a (limited) comparative basis, indicating at the same time what is required, expected, or considered favorably by international law.

2. Preparation of the First Draft of a Constitution

In many cases the elaboration of the first draft of a constitution is vested into a constitutional committee. This is mostly a committee established *ad hoc* for the sole purpose to provide for the first draft. The appointment procedure varies significantly and already gives an indication as to whether the process is open and transparent or controlled by the government or the president. The latter is the case as far as the drafting of a new constitution for South Sudan is concerned. Another option is a constitutional committee which is appointed by the parliament or by parliament in cooperation with the government. A particularity exists in this respect to Afghanistan,²⁴ where a permanent constitutional committee exists which seems to believe to be mandated to draft the amendments to the constitution which turned out to be necessary after the 2014 presidential elections, although this is rather the task of a particularly established commission.²⁵

Apart from the general international law requirement that the process of constitution-making shall be transparent and open, states are free to organize the first steps in drafting or amending a constitution.

Another matter of interest is the composition of such constitutional committees. These may be composed by members of parliament, national constitutional law experts, and/or representatives of the civil society. There is a clear trend to not involve international experts at this stage, although they have been frequently used in preparing the work of constitutional committees.

Frequently the draft constitution is submitted to a constitutional assembly by the constitutional committee. Constitutional assemblies are elected and appointed for that particular purpose. The alternative is a parliamentary assembly, which means the members of parliament plus an equal number of parliamentarians from state parliaments in a federal system.

One of the decisive questions is from which basis the constitutional committee should proceed. The practice varies considerably. Frequently, recourse is made to previously existing or still existing constitutional rules. Depending on whether such rules were externally imposed or genuine and accepted by the population is decisive. Only in the latter case this conforms to the principle of self-determination. In cases of decolonization, frequently, new constitutions are influenced by the laws of the former colonial power. This has the advantage that the rules concerned are familiar to the population, tested and probably accepted. But all depends on whether at the end this new constitution is accepted by the population no matter what the procedure. There is a certain tendency after some years that such constitutions undergo some change in a procedure established by these constitutions. In recent years constitution-making was influenced significantly by considering foreign constitutional experiences. This was particularly true for the drafting of the constitutions of Spain, Portugal, South Africa,²⁶ and Ethiopia.²⁷ These constitutions, having been influenced by the experience of other constitutions, seem to be satisfactory to the populations concerned.

²⁴ Art. 157 reads: "The Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President with the endorsement of the House of People."

²⁵ To process the amendment proposals, a commission comprised of members of the Government, National Assembly as well as the Supreme Court shall be formed by presidential decree to prepare the draft proposal. To approve the amendment, the Loya Jirga shall be convened by a Presidential decree in accordance with the provisions of the Chapter on Loya Jirga. If the Loya Jirga approves the amendment with the majority of two thirds of its members, the President shall enforce it after endorsement.

²⁶ D. Davis, "Constitutional Borrowing: the influence of the legal culture and local history in the reconstitution of comparative influence: the experience of South-Africa" (2003) 1 Int'l J. of Constitutional Law 181 et seq.

²⁷ L. Ebstien and J. Knight, "Constitutional borrowing and non-borrowing" (2003) 1 Int'l J. of Constitutional Law 196 et seq.

However, relying on foreign constitutional experiences does not guarantee that such constitutions serve the intended purpose. Constitutions reflect, or should reflect, the legal culture, the economic and social environment of the given country, its ethnic, linguistic, and religious pluralism as well as, in particular, the aspirations of the population concerned. This is the gist of the principle of self-determination.

3. Adoption of the Constitution

As already indicated, various options exist in practice concerning the adoption of a draft constitution. The constitution may be adopted by the parliament concerned—mostly by a high majority (two-thirds or three-quarters), or the parliament and the state parliaments in a federal system, or by referendum. There may be a combination of these procedures.

As indicated above, international law requires only that this adoption procedure meets the demand of transparency and equal participation. A referendum, in particular, has to be an informed one.

4. International Standards Concerning the Content of Constitutions

Most constitutions have a similar structure. After a first introductory part, which may be a preamble or a first chapter and which sets out some political or legal principles on which the constitution is based,²⁸ there usually follows a chapter or part dealing with individual rights and freedoms. This is followed by chapters on the governmental structure and the distribution of competences amongst the various state organs. Transitional provisions may follow.

The most direct influence on the substance of constitutions is the chapter on human rights and fundamental freedoms. Such influence may be—and mostly is—an indirect one. But it may also be direct. For example, the first chapter of the German Basic Law was clearly influenced by the then existing draft for the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The Interim National Convention of the Sudan instead referred to international human rights instruments as binding sources for human rights and fundamental freedoms.²⁹

²⁸ See, for example, the Preamble of the Constitution of Afghanistan: “We the people of Afghanistan:

Believing firmly in Almighty God, relying on His divine will and adhering to the Holy religion of Islam; Realizing the previous injustices, miseries and innumerable disasters which have befallen our country; Appreciating the sacrifices, historical struggles, jihad and just resistance of all the peoples of Afghanistan, admiring the supreme position of the martyr’s of the country’s freedom; Comprehending that a united, indivisible Afghanistan belongs to all its tribes and peoples; Observing the United Nations Charter as well as the Universal Declaration of Human Rights;

And in order to: Strengthen national unity, safeguard independence, national sovereignty and territorial integrity of the country; Establish an order based on the peoples’ will and democracy; Form a civil society void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining peoples’ freedoms and fundamental rights; Strengthen political, social, economic as well as defense institutions; Attain a prosperous life and sound living environment for all inhabitants of this land; And, eventually, regain Afghanistan’s appropriate place in the international family [. . .]”

²⁹ Art. 27 reads: “(1) The Bill of Rights is a covenant among the Sudanese people and between them and their governments at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy in the Sudan.

(2) The State shall protect, promote, guarantee and implement this Bill.

(3) All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.

In the following, several issues will be dealt with which in the past proved to be matters of controversies. One of such issues is the question whether to opt for a presidential system, meaning that the president is the head of government.

In most cases where states emerged from civil war or internal disturbances and where they face severe problems concerning economic development there is an overwhelming tendency for a strong presidential system following the US example and opting for an executive president.³⁰ Whether this trend achieves positive results is a matter of dispute. The problem is not a strong presidential system but that these constitutions do not also take over the checks and balances which characterize the US system. In particular, most of these constitutions do not establish federal states but rather unitarian ones, which means the additional checks and balances in a federal system are missing. However, from the point of view of international law, states are absolute free to establish a strong presidential system. Such a system may conform to the demands of democratization—as long as the president has to be elected in periodic democratic elections. Equally, such a system is not contrary to the principles of the rule of law if it provides, as the US system does, for a separation of powers, the independence of the judiciary, and limitations to the rights of citizens and foreigners based upon acts of parliament and are in conformity with the constitution as well as international commitments in this respect.

Another critical issue is whether to establish a unitarian state or a federal system or a system where certain territorial entities enjoy some autonomy. As already indicated, most constitutions opt for a unitarian state rather than a federal one. Federalism has nearly become anathema. What is being considered is some other form of decentralization,³¹ however, mostly the decentralized entities (often referred to as provinces) are lacking adequate resources and are attached to the financial strings of the federal government.

Under international law, even for a state whose population is pluralistic no obligation exists to provide for some territorial autonomy for the individual groups concerned. However, there is a tendency in international law pointing in this direction. Even traditionally, unitarian states have introduced some elements—and in some cases quite far-reaching ones—in favor of decentralization.

International law in general does not give much guidance as to which economic system states may adopt. In most cases the constitutions are silent on this issue anyway. However, states which are members of the World Trade Organization (WTO) must adhere to the liberalization efforts undertaken by the WTO. Although exceptions are negotiable and for

(4) Legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights.”

³⁰ See, for example, Art. 60 first sentence: “The President shall be the head of state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the provisions of this Constitution [. . .]”

³¹ See, for example, Art. 1 of the Interim National Constitution of Sudan:

- “(1) The Republic of the Sudan is an independent, sovereign State. It is a democratic, decentralized, multi-cultural, multilingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist.
- (2) The State is committed to the respect and promotion of human dignity; and is founded on justice, equality and the advancement of human rights and fundamental freedoms and assures multi-partism.
- (3) The Sudan is an all embracing homeland where religions and cultures are sources of strength, harmony and inspiration.”

developing countries particular preferences apply, all the WTO members are bound by the objectives pursued by the WTO.

Another salient issue is the treatment of former militia. Here again international law does not offer any guidance. Mostly, the constitutions in question decree that such militia have to be dissolved. Frequently, former militia have been integrated into the regular army or have been integrated into the police or other such employment. None of these solutions has really proved to be satisfactory.

Finally, particularly after a civil war, the question arises of how to deal with those who have committed serious crimes, particularly international crimes. Frequently, states, after emerging from such internal conflicts, have issued a law granting immunity to all offenders or crimes. South Africa has chosen a particular system by establishing a Truth and Reconciliation Commission.

From the point of view of international law, laws, granting total immunity, violate the basic principles of human rights.³²

III. CONCLUSIONS

International law has developed in respect of constitution-making in recent years by providing for standards as far as the procedure of the latter is concerned as well as the substance of constitutions. The driving powers in this respect are international human rights standards as well as the principle of self-determination. In the most recent period, the principle of the rule of law was emphasized as the relevant standard constitutions should adhere to. This development has, however, not resulted in specifying in an uncontested way the substance of this principle. Apart from that, some core elements are therefore recognized.

The fact that international law provides a standard for the constitution-making process as well as the substance of the constitution, does not mean that states are at liberty to intervene in other states with the view of upholding these standards and principles. Here it is necessary to establish whether the intervening state or international organization has the legitimacy to do so. This is, as a matter of principle, only the case when the state or the international organization has a respective mandate or even responsibility as, for example, an occupying power.

³² A. Seibert-Fohr, "Reconstruction through Accountability" (2005) vol 9 Max Planck UNYB 555 et seq.

Regimes' Legitimacy Crises in International Law

Libya, Syria, and Their Competing Representatives

JEAN D'ASPREMONT

I. INTRODUCTION

Regimes' external legitimacy crises are a common phenomenon in the international arena. Such natural predicaments regularly come to disrupt state-to-state relations, especially when one regime experiences an unconstitutional change of government, a coup d'état, severe unrest, an unbridled insurgency, or wide condemnation for grave and systematic violations of human rights. In all such situations, the external legitimacy of the regime concerned is generally put to test, thereby raising the question of the representation of the state concerned in the concert of nations. The current developments in Syria, including the coinciding atrocities, are characteristic of such a situation where the external legitimacy of the regime begins to be scrutinized. It is against this backdrop that this chapter seeks to shed some light on the lessons that could be learned from contemporary practice regarding the question of the (il-)legitimacy of the Syrian regime, as well as the impact that the reactions of other states may bear on the question of state representation in the international legal order.

After a few introductory observations about the concepts of external legitimacy and representation envisaged from the perspective of international law (Part II), the main part of this chapter will discuss some of the features of the practice regarding the perception of (il-)legitimacy of the Syrian regime and the consequences thereof for its representation in the international arena (Part III). This chapter will be capped by a few concluding remarks pertaining to the quest for legalization observed in the international legal scholarship, which follow the growing heterogeneity of contemporary recognition processes (Part IV).

It should be noted that, in this case, attention will be paid only to institutional sanctions imposed on Syria that directly raise questions of recognition of government.¹

The empirical materials this chapter grapples with call for a preliminary caveat. The developments at stakes here remain in complete flux. It is therefore possible that the object of the following analysis has undergone changes and developments since its latest revision. It cannot be excluded that the empirical data it relies on are subsequently invalidated or proved incorrect. The subsequent considerations are formulated at a very general level, this chapter seeking primarily to yield insights that apply beyond the Syrian context.

II. EXTERNAL LEGITIMACY AND REPRESENTATION FROM AN INTERNATIONAL LEGAL PERSPECTIVE

In the context with which this chapter grapples, legitimacy should be understood as the perception of the adequacy of, first, the origin of power (legitimacy of origin), and second, the aims for which it is wielded (legitimacy of exercising power).² Legitimacy raises the question of how an actor exercising public authority is perceived as having a “right to rule”.³ In that sense, it can be said that the question of legitimacy in the exercise of public authority is, to a large extent, a moral question.⁴ Whether referring to the origin or the exercise of power, such moral perception can be internal or external.⁵ The internal legitimacy of a regime refers here to the perception of legitimacy by those subjected to the exercise of public authority of that particular regime. The external legitimacy, on the other hand, approaches such a question from the standpoint of international actors, namely states and international organizations. A few words must be said about each of these two facts of legitimacy for the sake of introducing the debate in which this chapter engages.

In its internal dimension, legitimacy of an authority usually relates to its achievement of social and distributive justice,⁶ and thus revolves around the existence of a government

¹ For instance, “The suspension of membership of Syria from the Arab League”, *The Guardian* (November 12, 2011), <http://www.guardian.co.uk/world/2011/nov/12/syria-suspended-arab-league>, accessed April 23, 2015, is only studied here because the seat was subsequently given to Syria’s opposition, see <http://www.bbc.co.uk/news/world-middle-east-21949600> <http://www.aljazeera.com/news/2013/03/2013325105453834.html>, accessed April 23, 2015.

² On this distinction, see Jean d’Aspremont, “Legitimacy of Governments in the Age of Democracy” (2006) 38 *NYU J. Int’l L. & Pol.* 877.

³ See Allen Buchanan, “The Legitimacy of International Law” in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford 2009) 80; John Tasioulas, “The Legitimacy of International Law” in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* 97.

⁴ See Allen Buchanan (n 3) 80; Thomas Christiano, “Democratic Legitimacy and International Institutions” in Samantha Besson and John Tasioulas (n 3) 119; Philip Pettit, “Legitimate International Institutions: A Neo-Republican Perspective” in Samantha Besson and John Tasioulas (n 3) 139.

⁵ The distinction between internal and external legitimacy only relates to the position of the observer. It does not have any bearing upon the measures that are used to carry out the test of legitimacy. This means that external legitimacy can focus on the respect for the rights of the individual but as seen through the lens of foreign governments.

⁶ On the relationship between justice and democracy, see generally Ian Shapiro, *Democratic Justice* (Yale University Press, New Haven 1999).

for the people.⁷ This is called the internal legitimacy of the exercise of power. It is this type of legitimacy that, as Max Weber famously explained in another context, enhances the stability of an authority and secures obedience.⁸ This means that in most political systems, it is the internal legitimacy of exercise that is constantly being tested on the basis of the authorities' actual deeds, as such a continuous appraisal is an intrinsic part of any regime's internal life. Alternatively, the legitimacy of origin, in its internal dimension, is traditionally not subject to any appraisal as long as the internal constitutional rules of power-transition are respected, and these (secondary) rules are themselves deemed legitimate. In its external dimension, legitimacy of origin traditionally remains unquestioned by a nation's peers as long as the political life of that regime is not—knowingly⁹—disrupted by unconstitutional transition between its governments or a coup d'état, severe unrest, an unbridled insurgency, or grave and systematic violations of human rights. The legitimacy that is scrutinized in this case can pertain to both the origin and the exercise of power.

In the specific case this chapter focuses on, it is the way in which the Syrian regime has exercised its power—and not its autocratic origin¹⁰—which has generated controversies over its external legitimacy and over its external capacity to represent (and speak on behalf of) those on which it claims a monopoly of public authority. The question at stake here is thus that of (the consequences of) the Syrian regime's external (il-)legitimacy of exercise.

At this preliminary stage, a few remarks must also be formulated about the discretionary character of the determination of external legitimacy, as in the case of the Syrian regime. In this respect, it should be recalled that the highly controversial character of any governments' legitimacy mostly stems from the subjectivity of its evaluation. Indeed, there are no seemingly objective and formal criteria—whether legal or of any other kind—to determine a government's legitimacy. That means that each state enjoys a comfortable leeway when asked to recognize the power of an entity that claims to be another state's representative in their bilateral intercourse. As a result, the determination of the capacity of a given government to represent the state remains a highly political issue. International relations are therefore replete with situations where a government is deemed legitimate by some states and illegitimate by others. Despite being intrinsically a political matter, the issue of representation is not without consequence in the international legal order, which is why international lawyers have long made it a traditional object of their scholarly investigations. In other words, although acknowledging the primarily political nature of issues of representation, the present contribution addresses the situation in Syria through the lenses and cognitive tools international lawyers are familiar with.

⁷ This has been called the "output legitimacy" as opposed to the "input legitimacy" (i.e., a government by the people). For such a distinction, see Fritz W. Scharpf, "Legitimacy and the Multi-Actor Polity" in Morton Egeberg and Per Lægreid (eds), *Organizing Political Institutions: Essays for Johan P. Olsen* (Aschehoug 1999) 268.

⁸ Guenther Roth and Claus Wittich (eds), Max Weber, *Economy and Society* (University of California Press, Berkeley 1968) 31; see also John Austin, *The Province of Jurisprudence Determined* (1832) 200; Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 AJIL 46, 48; Robert Grafstein, "The Legitimacy of Political Institutions" (1981) 14 Polity 51.

⁹ Some states may manage to keep such disruptions unknown to the international society.

¹⁰ On legal issues pertaining to the autocratic origins of governments, see generally Jean d'Aspremont, *L'Etat non-démocratique en droit international* (Pedone, Paris 2008).

Although the determination of the legitimacy of a regime is a fundamentally subjective and political test, practice shows that such a test is not carried out accidentally and randomly. Rather, past practice demonstrates that there are constant patterns as to when and how the legitimacy of governments is tested. In fact, government legitimacy is not constantly under scrutiny in the international legal order. The question of legitimacy only arises when there is an actual need to re-evaluate where the authority to act and speak on behalf of a given state is vested. Such a determination is only required in limited, but serious, situations. For instance, the authority that can speak and act on behalf of the state in the international legal order must be determined ahead of any recognition of government and when accreditation within international organizations is sought by two warring governments. These are the two specific questions on which the next section focuses in the context of the Syrian crisis. It is true that such tests of authority may occur in other contexts, for instance, when a state invites another state to carry out a military operation on its territory. The case study on which this chapter is based, however, has not yet provided any significant insights applicable to testing grounds of legitimacy other than the two that have been mentioned preliminarily. This is why this chapter will leave aside other hypotheses of examination of a regime's legitimacy.

Before more specifically examining each of these situations in the case of the Syrian crisis, one final remark must be made about the need to distinguish between the qualification and disqualification of governments. If a new government secures international recognition or its delegates are accredited, it qualifies as the legitimate representative entitled to speak and act on behalf of the state. But legitimacy can also have a disqualifying function when a government, previously recognized as the legitimate representative entitled to act and speak on behalf of a state, loses this recognition. In other words, it is disqualified from being the representative of that state. In the case of intervention by invitation, disqualification occurs when the state's request for intervention is refused, provided that the refusal is warranted by the inability of the government to speak and act on behalf of the state. In the case of the accreditation of delegates by international organizations, disqualification occurs when the state's delegates are refused accreditation. The following observations are only concerned with the disqualifying role of legitimacy in the case of the Syrian crisis and especially the possible manifestations of a disqualification (and the consequences thereof) of the Syrian regime as the legitimate representative of Syria. In other words, questions of recognition and accreditation will only be approached from the standpoint of the disqualification of the Syrian regime. Yet, as the following section will demonstrate, contemporary practice—and especially that pertaining to the Syrian crisis—has witnessed the emergence of a new diplomatic narrative that leaves room for oscillation between qualification and disqualification of government: the (withdrawal of) recognition as the legitimate representative of the people.

III. MANIFESTATIONS AND SANCTIONS OF GOVERNMENTAL ILLEGITIMACY

As was explained above, the determination of the government that can legitimately speak and act on behalf of the state in the international legal order is principally carried out when the question of its recognition arises (Section A) or when accreditation within international organizations is sought by two warring governments (Section B). Each of these two questions deserves a few observations in connection with the Syrian crisis.

A. Recognition as a Government vs. Recognition as a Legitimate Representative

Withdrawal of recognition of a government is commonly implied in the recognition of a newly formed government. Withdrawal of recognition short of any recognition of another government, that is, when not simultaneously accompanied by the recognition of another body as the government of the state,¹¹ is rare in practice.¹² The situation in Syria nonetheless calls for an examination of the possibility of a withdrawal of recognition, with or without recognition of the opposition. In particular, it raises the question of whether the reactions following the uprising in Syria (and those following the humanitarian disaster unfolding as a consequence) qualify as withdrawal of recognition or should rather be perceived as a different form of disqualification.

Before examining the contemporary practice pertaining to the Syrian uprising, it is relevant to recall some of the important developments that were witnessed in the recent Libyan crisis (2010–2011). Indeed, controversy arose following a statement by the United Kingdom in February 2011, according to which it had revoked the diplomatic immunity of Libyan leader Mu'ammār al-Qadhafī and his family, which conveyed the impression that the British government had withdrawn its recognition of the Libyan government.¹³ However, analysts and experts demoted the statement to pure political grandiloquence that brought neither the revocation of diplomatic immunities nor a withdrawal of recognition.¹⁴ More remarkable than this declaration by the British government are the various declarations of recognition of the National Transitional Council (hereafter NTC) as the legitimate representative of (the people of) Libya, which were issued in the spring of 2011 by France, Australia, Gambia, Italy, Jordan, Malta, Qatar, Senegal, Spain, the United Arab Emirates,

¹¹ For a classical example, see the withdrawal of recognition of the government based in Taiwan and the simultaneous recognition of the communist government based in Beijing as the government of China. See Hungdah Chiu, "The International Law of Recognition and the Status of the Republic of China" (1989) 3 Chinese J. Int'l L. 193; Victor H. Li, "The Law of Non-Recognition: The Case of Taiwan" (1979) 1 Nw J. Int'l L. & Bus. 134. On the legal status of dependent states, see generally James Crawford, *The Creation of States in International Law* (1979) 198–220.

¹² For earlier examples, see, e.g., British government's withdrawal of its recognition, for example, from Emperor Haile Selassie of Ethiopia in November 1938, the Polish Government of Unity and National Defence on July 5, 1945, or the government of Democratic Kampuchea on December 6, 1979. These examples are cited by S. Talmon, "Has the United Kingdom De-Recognized Colonel Qadhafi as Head of State of Libya?" (2011) 16 University of Oxford Legal Research Paper Series 2. See also C. Warbrick, "British Policy and the National Transitional Council of Libya" (2012) 61 ICLQ 258–259.

Although not concerning the government of a state properly so-called, the partial withdrawal of recognition of the branch of the Palestinian Authority controlled by Hamas could constitute one of these situations. On this situation, see Steven R. Weisman and Craig S. Smith, "U.S. and Europe Halt Aid to Palestinian Government", *New York Times* (April 8, 2006) at A6; Steven R. Weisman, "U.S. Digs in on Withholding Aid to Hamas Government", *New York Times* (February 17, 2006) at A12. But see Joel Brinkley, "France Backs Putin on Speaking to Hamas", *New York Times* (February 11, 2006) at A7; Steven Lee Myers and Greg Myre, "In Moscow, Hamas Delegation Gets a Warning and a Crash Course in Diplomacy", *New York Times* (March 4, 2006) at A6.

¹³ See "Foreign Secretary: increasing political pressure on Colonel Gaddafi" (February 27, 2011), <https://www.gov.uk/government/news/foreign-secretary-increasing-political-pressure-on-colonel-gaddafi>, accessed April 23, 2015.

¹⁴ On this question, S. Talmon, "Has the United Kingdom De-Recognized Colonel Qadhafi as Head of State of Libya?" (2011) 16 University of Oxford Legal Research Paper Series.

and the United States.¹⁵ Such recognitions of the insurgents as the legitimate representative of (the people of) Libya constitute a very original narrative discourse, for they were made short of a recognition as a government. In fact, they did not bring about a withdrawal of recognition of al-Qadhdhāfi's government. It was not until April 2011 that recognition of the NTC as a government and the withdrawal of recognition of al-Qadhdhāfi's government ensued.¹⁶ Italy recognized the NTC as "holding governmental authority in the territory which it controls",¹⁷ and France subsequently declared—in an alleged contradiction with its official policy of nonrecognition of governments—that the NTC was the "only holder of governmental authority in the contacts between France and Libya and its related entities",¹⁸ and the United Arab Emirates recognized the NTC "as a legitimate Libyan government".¹⁹ Many other states followed suit during the summer,²⁰ sometimes in similar contradiction with their declared policy of nonrecognition of governments.²¹

It is interesting that some facets of the practice observed concerning Libya have been replicated in the case of the Syrian regime's crisis.²² It is true that no express withdrawal of recognition as a government has, at the moment of writing these lines, been observed with respect to Bashār al-Assad's government in Syria. Even those states that have clearly

¹⁵ For a discussion of these declarations, see S. Talmon, "Recognition of the Libyan National Transitional Council" (2011) 38 University of Oxford Legal Research Paper Series 3.

¹⁶ For some critical remarks, see S. Talmon, "Recognition of the Libyan National Transitional Council" (2011) 38 University of Oxford, Legal Research Paper Series.

¹⁷ Press Release, Italian Ministry of Foreign Affairs, "Focus-Libya: Frattini, the NTC is Italy's Only Interlocutor", http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110404_FocusLibia_frattini_Cnt.html, accessed April 23, 2015.

¹⁸ Press Release, French Ministry of Foreign and European Affairs, Libyan National Transitional Council: Statement by Alain Juppé (June 7, 2011).

¹⁹ See UAE Recognises Libya's TNC, WAM-Emirates News Agency, <http://www.wam.ae/servlet/Satellite?c=WamLocEnews&cid=1289993951803&p=1135099400124&pagename=WAM%2FWamLocEnews%2FW-T-LEN-FullNews>, accessed April 23, 2015.

²⁰ Recognition by the United States in July of 2011: see Sebnem Arsu and Steven Erlanger, "Libya Rebels Get Formal Backing, and \$30 Billion", *New York Times* (July 15, 2011), http://www.nytimes.com/2011/07/16/world/africa/16libya.html?pagewanted=all&_r=0, accessed April 23, 2015; cf. this critical article by John Bellinger III in *The Atlantic* (July 18, 2011), <http://www.theatlantic.com/international/archive/2011/07/us-recognition-of-libyan-rebels-raises-legal-questions/242120/>, accessed April 23, 2015; see the Recognition by the United Kingdom in July 2011 as was reported by the BBC, <http://www.bbc.co.uk/news/uk-politics-14306544>, accessed April 23, 2015 or <http://www.fco.gov.uk/news> (July 27, 2011); see the recognition by Egypt in August 2011, as was reported by *The Guardian* (September 10, 2012), <http://www.guardian.co.uk/world/middle-east-live/2011/aug/22/libya-middle-east-unrest-live#block-65>, accessed April 23, 2015; or the recognition by Jordan in August 2011, http://www.thenewage.co.za/26532-1019-53-Egypt_recognises_Libya_rebel_government (September 10, 2012), accessed April 23, 2015; recognition by China in September of 2011 as was reported by *Reuters*, <http://www.reuters.com/article/2011/09/12/us-libya-china-idUSTRE78B3Z320110912> (September 10, 2012), accessed April 23, 2015; see the recognition by Russia in September 2011: S. Erlanger, "Russia Recognizes Libya Rebels as World Leaders Meet", *New York Times* (September 1, 2011), <http://www.nytimes.com/2011/09/02/world/africa/02nato.html?pagewanted=all>, accessed April 23, 2014.

²¹ On the particular example of the United Kingdom, see C. Warbrick, "British Policy and the National Transitional Council of Libya" (2012) 61 ICLQ 247–264.

²² For a very detailed account of the political and diplomatic developments regarding Syria, see S. Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 Chinese J. Int'l L. 219–253.

expressed support for the opposition have fallen short of withdrawing their recognition of Assad's government.

It is nonetheless interesting to note that these states are voicing support for the opposition, mirroring the above-mentioned practice observed in the case of Libya, and went as far as to disqualify the Assad regime as the legitimate representative of Syria—albeit not as the government of Syria. The August 2011 Declaration by France, the United Kingdom, and Germany is particularly noteworthy in this respect: “[. . .] President al-Assad, who is resorting to brutal military force against his own people and who is responsible for the situation, has lost all legitimacy and can no longer claim to lead the country”.²³

According to such a position the Assad government is allowed to continue to enjoy recognition as the government of Syria, but, at the same time, has been declassified to an illegitimate representative. It is also worth mentioning that, at least at the outset, such a disqualification of the Assad regime as the “legitimate representative” of Syria was not automatically accompanied by a recognition of the opposition—and especially the Syrian National Council (hereafter the SNC) as the legitimate representative of the people of Syria. Indeed, at the beginning of the conflict, only a limited number of states recognized the SNC as a “legitimate representative of the Syrian people”.²⁴ Libya has been the only country to recognize the opposition as the government of Syria.²⁵ In the first phase of the conflict, a significant disconnect could thus be observed between the withdrawal of recognition of the Assad regime as the legitimate representative of the people of Syria, on the one hand, and the absence of general recognition of the SNC as the legitimate representative of the people of Syria on the other.

It is interesting to note, however, that the political standing of the SNC significantly evolved as the conflict grew more violent and long-lasting. A first change was witnessed when the French president declared, in August 2012, that once the opposition had grown into a provisional and representative government (*un gouvernement provisoire, inclusif et représentatif*) France would recognize that entity as the government of Syria, thereby withdrawing its recognition of the current regime.²⁶ The latest entreaties of the United States for the opposition to reform itself²⁷ could similarly be seen as constituting a move similarly indicating that structuration and representativeness may be conditions for such an insurgency to secure international recognition as a government. Yet, the

²³ The statement was reproduced by the British Foreign Office (August 18, 2011), <http://www.fco.gov.uk/en/news/latest-news/?view=Press&id=645689682>, accessed April 23, 2015.

²⁴ This the case of France and Spain, (<http://www.lccsyria.org/2807>, accessed April 23, 2015), the United States (cf. K. De Young, “Clinton meets with Syria opposition”, *Washington Post* (December 6, 2011), http://www.washingtonpost.com/world/middle_east/clinton-meets-with-syria-opposition/2011/12/06/gIQApxQ9ZO_story.html, accessed April 23, 2015), the United Kingdom (as reported by the Foreign Office (November 21, 2011)), <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=695119382>, accessed April 23, 2015, or Albania http://www.mfa.gov.al/index.php?option=com_content&view=article&id=8050, accessed April 23, 2015.

²⁵ As reported by the *Khaleej Times* (October 11, 2011), http://www.khaleejtimes.com/displayarticle.asp?xfile=data/international/2011/October/international_October385.xml§ion=international&col=, accessed April 23, 2015.

²⁶ Speech of the French President at the XXth Ambassadors' Conference in the Élysée Palace (August 27, 2012), cf. <http://www.ambafrance-de.org/Le-President-de-la-Republique-la>, accessed April 23, 2015.

²⁷ Neil MacFarquhar and Michael Gordon, “As Fighting Rages, Clinton Seeks New Syrian Opposition”, *New York Times* (October 31, 2012), http://www.nytimes.com/2012/11/01/world/middleeast/syrian-air-raids-increase-as-battle-for-strategic-areas-intensifies-rebels-say.html?_r=0, accessed April 23, 2015.

disqualification of Assad's government as the legitimate representative of Syria and the indication of a readiness to recognize the opposition as government was not—unlike in Libya—accompanied by a wide recognition of the SNC as the legitimate representative of the Syrian people.

A more radical turning point toward the recognition of the opposition, however, came with the formation of the National Coalition of Syrian Revolutionary and Opposition Forces (hereafter the Syrian National Coalition) in November 2012. Indeed, following the formation of the Syrian National Coalition, close to twenty states—including, among others, France,²⁸ Britain,²⁹ the United States,³⁰ Denmark,³¹ Turkey,³² Tunisia,³³ Malta,³⁴ and Australia³⁵—as well as the European Union³⁶—immediately moved to formally recognize the coalition as the legitimate representative of the Syrian people. It was also recognized in that capacity by the six member states of the Gulf Cooperation Council.³⁷ For its part, the United States announced that it would recognize the Syrian Coalition as the legitimate representative of the Syrian people as soon as it fully developed its political structure.³⁸ In doing so, these states and organizations, albeit belatedly and sometimes with diverging diplomatic wording,³⁹ followed a similar move as the one observed in the Libyan crisis.

²⁸ S. Erlanger and R. Gladstone, "France Grants Its Recognition to Syria Rebels", *New York Times* (November 13, 2012), <http://www.nytimes.com/2012/11/14/world/middleeast/syria-war-developments.html>, accessed April 23, 2015.

²⁹ Neil MacFarquhar, "Citing a 'Credible Alternative' to Assad, Britain Recognizes Syrian Rebel Group", *New York Times* (November 20, 2012), <http://www.nytimes.com/2012/11/21/world/middleeast/britain-is-latest-power-to-recognize-syrian-opposition-coalition.html>, accessed April 23, 2015.

³⁰ Mark Landler, Michael Gordon, and Anne Barnard, "U.S. Will Grant Recognition to Syrian Rebels Obama Says", *The New York Times* (December 11, 2012).

³¹ As reported at <http://www.information.dk/telegram/319462>, accessed April 23, 2015.

³² S. Arsu and T. Arango, "Turks Grant Recognition to Coalition of Syrians", *New York Times* (November 15, 2012), <http://www.nytimes.com/2012/11/16/world/middleeast/turkey-recognizes-new-syrian-rebel-group-as-legitimate-leader-of-syria.html>, accessed April 23, 2015.

³³ As reported at <http://www.tunisia-live.net/2011/12/19/tunisian-government-to-recognize-syrian-political-opposition/>, accessed April 23, 2015.

³⁴ The declaration of the Minister of Foreign Affairs of Malta recognizing the Coalition as the legitimate representative of the People of Syria is reported here: <http://www.eubusiness.com/news-eu/syria-conflict.nay/>, accessed April 23, 2015.

³⁵ See the official declaration by the Ministry of Foreign Affairs of Australia on December 13, 2012, http://www.foreignminister.gov.au/releases/2012/bc_mr_121213.html, accessed April 23, 2015.

³⁶ T. Arango, "European Union Backs Syrian Opposition Coalition", *New York Times* (November 19, 2012), <http://www.nytimes.com/2012/11/20/world/middleeast/islamists-reject-new-syrian-opposition-coalition.html?ref=middleeast>, accessed April 23, 2015.

³⁷ See "Gulf Cooperation Council Recognizes Syrian Opposition Bloc" (November 13, 2012), <http://en.rian.ru/>, accessed April 23, 2015.

³⁸ Michael Gordon, "US Moves Toward Recognizing Syria's Opposition", *New York Times* (November 29, 2012), <http://www.nytimes.com/2012/11/30/world/middleeast/us-moves-toward-recognizing-syria-opposition.html>, accessed April 23, 2015.

³⁹ S. Talmon noted that six different formulations have been witnessed in practice: legitimate representative for [of] the aspirations of the Syrian people, legitimate representatives of the aspirations of the Syrian people, legitimate representative of the Syrian people, legitimate representatives of the Syrian people, legitimate representative of the Syrian people, or sole legitimate representative of the Syrian people. See S. Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 Chinese J. Int'l L. 219.

Like in the case of Libya, such a move toward a recognition of the Syrian National Coalition as the legitimate representative of the Syrian people fell short of a formal recognition of the Syrian National Coalition as the government of Syria and hence of a corresponding withdrawal of recognition of the Assad regime as government of Syria. Only Libya made such a move.⁴⁰ It is, however, interesting to note that, in a more recent development, France indicated that such a recognition as the legitimate representative ushers in recognition of government—and thus withdrawal of recognition of the current regime. Indeed, the French president declared in November 2012:

I announce that France recognizes the Syrian National Coalition as the sole representative of the Syrian people and thus as the future provisional government of a democratic Syria and to bring an end to Bashar al-Assad's regime.⁴¹

Such a declaration by the head of France seems indicative of the extent to which states and international organizations could have possibly construed recognition of a group as legitimate representatives as a form of intermediary step toward full recognition as a government and thus withdrawal of recognition of the current government. This is also mirrored in the practice pertaining to Libya, which was recalled above. Indeed, before recognizing the NTC in Libya, some states had issued statements disqualifying al-Qadhdhāfi's government as the legitimate representative of Libya. Nonetheless, recognition of the NTC as a government came at a later stage. Could the practice pertaining to al-Qadhdhāfi's government mean that the above-mentioned disqualification of the Syrian government and recognition of the Syrian National Coalition as the legitimate representative of the people of Syria foreshadow a withdrawal of the recognition of the Assad regime and a formal recognition of the Syrian opposition as the government of Syria? The Libyan practice and France's 2012 declaration seem to support this conclusion. Yet, in later developments, particularly in 2013 and 2014, the idea that the recognition as a legitimate representative of the people could usher in a recognition as a government of Syria and constituted only a preliminary step thereto dramatically lost currency as the opposition to the Assad governments grew diverse and more inclusive of very radical groups. In particular, the rise of the so-called Islamic State of Iraq and the Levant (ISIS)—which is not a party of the Syrian National Coalition—led those governments having recognized the Coalition as the legitimate representative to preserve some minimal standing for the Assad government.⁴² In that sense, the most recent practice pertaining to Syria seems to indicate that recognition of one entity as legitimate representative of the people does not necessarily and automatically—in contrast to the Libyan practice—bring about a disqualification of the current government.

Be that as it may, it remains that contemporary practice pertaining to Syria and Libya shows the emergence of a new diplomatic narrative short of (withdrawal of) recognition as a government, in the disqualification of a body as the legitimate representative and the

⁴⁰ As reported by the *Khaleej Times* (October 11, 2011), http://www.khaleejtimes.com/displayarticle.asp?xfile=data/international/2011/October/international_October385.xml§ion=international&col, accessed April 23, 2015.

⁴¹ S. Erlanger and R. Gladstone (n 28).

⁴² Anne Barnard and Somini Sengupta, "U.S. Signals Shift on How to End Syrian Civil War," *New York Times* (January 19, 2015), <http://www.nytimes.com/2015/01/20/world/middleeast/us-support-for-syria-peace-plans-demonstrates-shift-in-priorities.html>, accessed April 23, 2015; Michael Gordon and Anne Bernard, "Kerry Supports Syrian Peace Talks in Russia," *New York Times* (January 14, 2015), <http://www.nytimes.com/2015/01/15/world/middleeast/kerry-backs-syrian-peace-talks-in-russia.html>, accessed April 23, 2015.

election of another body in that capacity. Such a new narrative seems to simultaneously manifest a growing multilayeredness and proceduralization of recognition processes, as granting and/or withdrawing recognition as the legitimate representative of the people become a new procedural step. This is an important development that deserves to be emphasized. Whether such a development—which is reminiscent of the practice pertaining to the recognition of national liberation movement⁴³—is purely contingent on the Arab revolutions or is a sign of a new general practice is a question which cannot be answered at this stage.

B. Mechanical Accreditation vs. Legitimacy-Appraisals in Multilateral Fora

Leaving aside situations of express recognition of governments, it is important to point out that determination of the legitimacy of governments may also be carried out in the practice of accreditation in multilateral institutional fora. In this respect, and as was indicated above, it is noteworthy that such practice similarly involves an examination of governments' legitimacy. Indeed, each international organization has to approve the credentials of the delegates sent by member states. It is true that, in theory, the approval of credentials was originally to be confined to a technical operation aimed at validating the power of delegates without engaging in any political appraisal.⁴⁴ In practice, however, accreditation proceedings have been used to deny standing to some governments and resorted to as sanctions of (il-)legitimacy.⁴⁵ This is exemplified by the UN General Assembly's refusal to approve the credentials of the delegates of South Africa⁴⁶ and Hungary.⁴⁷ But there is more than that. As

⁴³ See generally Raymond Ranjeva, "Peoples and national liberation movements" in Mohammed Bedjaoui (dir), *International Law: Achievements and Prospects* (Nijhoff, Dordrecht 1991) 101–112; Alain Gandolfi, *Les Mouvements de Libération Nationale* (Presses Universitaires de France, Paris 1989); Claude Lazarus, "Le statut des mouvements de libération nationale à l'organisation des Nations Unies" (1974) 20 *Annuaire français de droit international* 173–200.

⁴⁴ See generally Yuen-Li-Liang, "Notes on Legal Questions concerning the United Nations" (1951) 45 *AJIL* 689; see also Jean-François Flauss and Philippe Singer, "La vérification des pouvoirs de l'Assemblée générale des Nations Unies" (1985) 31 *Annuaire Français de Droit International* 620–652.

⁴⁵ One could cogently contend that the recourse to accreditation as a means to sanction foreign governments is not strictly consistent with the UN Charter. On this question, see generally Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* (3d ed. Nijhoff Publishers, Leiden 1995) 186. See also Daphna Shrager, "La qualité de membre non représenté. Le cas du siège vacant" (1999) 45 *Annuaire français de droit international* 649.

⁴⁶ See UNGA Res 2636 (1970) GAOR 25th Session (November 13, 1970) UN Doc A/8142; UNGA Res 2862 (1971) GAOR 26th Session (December 20, 1971) UN Doc A/8625; and UNGA Res 2948 (1972) GAOR 27th Session (December 8, 1972) UN Doc A/8921 (UN General Assembly opposing the credentials' approval by the Credentials Committee).

⁴⁷ See The Chairman of the Credentials Committee, "Report of the Chairman of the Credentials Committee, delivered to the General Assembly" (February 13, 1957) UN Doc A/3536; The Chairman of the Credentials Committee, "Report of the Chairman of the Credentials Committee, delivered to the General Assembly" (9 December 1957) UN Doc A/3773; The Chairman of the Credentials Committee, "Report of the Chairman of the Credentials Committee, delivered to the General Assembly" (December 12, 1958) UN Doc A/4074; The Chairman of the Credentials Committee, "Report of the Chairman of the Credentials Committee, delivered to the General Assembly" (December 9, 1959) UN Doc A/4346; The Chairman of the Credentials Committee, "Second Report of the Chairman of the Credentials Committee, delivered to the General Assembly" (April 20, 1961) UN Doc A/4743; The Chairman of the Credentials Committee, "Report of the Chairman of the Credentials Committee, delivered to the General Assembly"

practice has shown, a test of legitimacy is somewhat inescapable in some situations. This arises when two contestants claim to represent a single state (usually due to a civil war). In such a scenario, the organization concerned is forced to determine which is the actual representative. It is therefore bound to engage in an assessment of the relative legitimacy of the warring representatives.⁴⁸ In such situations, it would be much less problematic to rely exclusively on the effectiveness criterion to determine which of the competing parties constituted the legitimate authority to be granted standing within the organization.⁴⁹ The practice of the United Nations and its specialized agencies has, however, demonstrated willingness to resort to other criteria.⁵⁰ In particular, the United Nations has used a test of legitimacy based on the origin of the government concerned, and especially the criterion of constitutionality. This is well illustrated by the past accreditation of the delegates of Kuwait,⁵¹ Afghanistan,⁵² Haiti,⁵³ and Sierra Leone,⁵⁴ where delegates of the constitutional governments were accredited. The constitutionality of a government bears upon the origin of its power as the constitution classically contains the rules of how power is transferred from one government to the ensuing one. If a government is deemed legitimate because it has gained power in a manner prescribed by the constitution of the state concerned, only the origin of its power is considered. Focusing on the constitutionality of governments, legitimacy tests carried out in credentials controversies have thus revolved around the constitutional legitimacy without any consideration for the way in which the claimants have exercised their power. Until recently, legitimacy was never grounded in the democratic credentials of governments in the practice of the United Nations. In fact, in the rare cases where it would have been possible to defuse a credentials crisis on the basis of democratic criteria, the United Nations put the emphasis on the constitutional character of the government, as illustrated by the approval of Aristide's credentials in 1992 (Haiti)⁵⁵ and Kabbah's credentials in 1997 (Sierra Leone).⁵⁶ The situation in Ivory Coast (2010) probably constitutes an exception. Indeed, it is noteworthy that, on December 23, 2010, the UN General Assembly approved the November 2010 report of the Credentials Committee accepting

(December 18, 1961) UN Doc A/5055; The Chairman of the Credentials Committee, "Report of the Chairman of the Credentials Committee, delivered to the General Assembly" (December 20, 1962) UN Doc A/5395.

⁴⁸ Matthew Griffin, "Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through Its Accreditation Process, and Should It" (1999–2000) 32 NYU J. Int'l L. & Pol. 725, 728–732; Gregory Fox "The Right to Political Participation in International Law" (1992) 17 Yale J. Int'l L. 539, 606.

⁴⁹ This was the solution endorsed by the UN Secretary General Trygve Lie in the Memorandum on the Legal Aspects of Problems of Representation in the UN, UN Doc S/1466 (March 8, 1950).

⁵⁰ See generally Matthew Griffin (n 48) 725–785. See also Gregory Fox "The Right to Political Participation in International Law" (1992) 17 Yale J. Int'l L. 539, 596–606.

⁵¹ See UNGA, "First Report of the Credentials Committee" (October 29, 1990) UN DOC A/45/674; Note verbal dated December 18, 1990 from the Permanent Mission of Iraq to the United Nations addressed to the Secretary-General (December 20, 1990) UN DOC A/45/891.

⁵² See UNGA, "Reports of the Credentials Committee" (October 23, 1996) UN Doc A/51/548, UN Doc A/52/719 (December 11, 1997), UN Doc A/53/556 (October 29, 1998), UN Doc A/55/537 (November 1, 1997), UN Doc A/56/724 (December 20, 2001), UNGA, UN Doc A/57/634 (December 2, 2002).

⁵³ UNGA, "Report of the Credentials Committee" (1992) UN DOC A/47/517/Add.1.

⁵⁴ UNGA, "Report of the Credentials Committee" (December 11, 1997) UN DOC A/52/719.

⁵⁵ UNGA, "Report of the Credentials Committee" (1992) UN DOC A/47/517/Add.1.

⁵⁶ UNGA, "Report of the Credentials Committee" (December 11, 1997) UN DOC A/52/719.

the credentials of the representatives designated by Ouattara to represent Côte d'Ivoire for the 65th session of the General Assembly, at the expense of those presented by Gbagbo.⁵⁷

In the light of these elementary reminders, the situation in Syria calls for a few observations. First, in the case of Syria, neither of the warring parties could point to democratic virtues in the credentials controversies that have arisen thus far in the United Nations. In that sense, the situation in Syria is not different from that of Libya. The Credentials Committee, at the 65th session of the General Assembly, in September 2011, recommended that the NTC represent Libya in the General Assembly—speaking and voting on its behalf. The General Assembly then went on to approve the Credentials Committee's report, adopting the draft resolution contained therein by a recorded vote of 114 in favor to 17 against, with 15 abstentions.⁵⁸ There is, however, one fundamental difference between the Syrian and Libyan crises. In the latter crisis, the delegates of the Qadhdhāfi government resigned and rallied the opposition. There was no competition of claims for representation at the United Nations between the warring parties.

This main difference between the case of Libya and Syria necessitates a second remark. Indeed, as was recalled above, refusal of the credentials can happen even if the credentials committee is not confronted with competing demands for accreditation. This was the case when South Africa was denied standing in the General Assembly because of its apartheid policy.⁵⁹ In that sense, a denial of the credentials of the Assad regime is not necessarily contingent upon a similar claim by the delegates of the opposition—regardless of whether or not they were originally appointed by the Assad regime before rallying the opposition. In that sense, the Credentials Committee could simply unilaterally decide not to accredit the delegates of the Assad government, irrespective of the existence of a concurring claim by anyone to represent Syria at the United Nations.

Pleas for a unilateral rejection of Syria's credentials by the UN General Assembly's Credentials Committee without any accreditation of alternative delegates have been numerous.⁶⁰ These pleas have so far remained scorned by the Credentials Committee.⁶¹

⁵⁷ See "Report of the Credentials Committee" A/65/583/Rev.1. The UN Secretary General hailing the above-mentioned decision which he said "reflects the united position of the international community with respect to the legitimacy of the new government led by President Ouattara." <http://www.un.org/sg/statements/?nid=5013>, accessed January 9, 2014. It should be noted that the importance of this very unusual move by the Credentials Committee should certainly nonetheless not be exaggerated or overblown. The United Nations had supervised the elections in Côte d'Ivoire and the Special Representative of the Secretary-General and Head of UNOCI certified that Ouattara was the winner of the elections. There was a recommendation by the Secretary-General to the Credentials Committee to accredit Ouattara's representative. It was unlikely that the Credentials Committee would defy the Secretary-General and take a position generating inconsistencies in the approach of the United Nations to the situation in Côte d'Ivoire. On this aspect of the crisis in Côte d'Ivoire, see Jean d'Aspremont, "Duality of government in Côte d'Ivoire" EJIL: Talk (January 4, 2011), <http://www.ejiltalk.org/duality-of-government-in-cote-divoire/#more-2898>, accessed April 23, 2015.

⁵⁸ <http://www.un.org/News/Press/docs/2011/ga11137.doc.htm>, accessed April 23, 2015.

⁵⁹ See UNGA Res 2636 GAOR 25th Session (November 13, 1970) UN Doc A/8142; UNGA Res 2862 GAOR 26th Session (December 20, 1971) UN Doc A/8625; and UNGA Res 2948 GAOR 27th Session (December 8, 1972) UN Doc A/8921 (UN General Assembly opposing the credentials' approval by the Credentials Committee).

⁶⁰ See, e.g., the op-eds in *The Washington Post* or *The New York Times*, <http://p.washingtontimes.com/news/2012/apr/10/time-to-suspend-syria-from-the-un/>, accessed April 23, 2015.

⁶¹ For the latest report, see UNGA, "Report of the Credentials Committee" (November 25, 2014) UN Doc A/69/617, adopted by the General Assembly at the 72nd Meeting of its Sixty-ninth session on December 15, 2014, <http://www.un.org/press/en/2014/ga11603.doc.htm>, accessed April 23, 2015.

It is interesting to note that, in contrast with the positions espoused by other international organizations and especially the United Nations, the Arab League, where the membership of Syria had been suspended, decided in March 2013 to restore the membership of Syria and attributed its seat to the Syrian National Coalition.⁶²

There is no doubt that the Arab League can autonomously and discretionally decide to depart from the position of the United Nations in this respect and is certainly not formally bound by the position of the UN General Assembly's Credentials Committee.⁶³ Yet, the decision of the Arab League remains remarkable because, as a matter of fact, UN member states tend to act consistently within each organization they are party to, many organizations factually aligning themselves to the positions of the General Assembly.

This being said, the decision of the Arab League in the case of Syria, just as the decision of the Credentials Committee in the case of Libya, comes as a good reminder that accreditation procedures in international organizations constitute a platform for the evaluation of the legitimacy of government.

IV. CONCLUDING REMARKS: DIVERSIFICATION VS. LEGALIZATION

Zeroing in on two of the situations where a regime's external legitimacy is tested, namely questions of recognition and accreditation in international fora, this chapter has tried to examine the extent to which the practice pertaining to the regime's crisis in Syria displays original and unprecedented features. As it was interpreted and reconstructed here, past practice, particularly in the recent case of Libya, has shown that a growing diversification and greater proceduralization of the recognition processes are currently at play in the international arena. In particular, the prior granting and/or withdrawing of recognition as a legitimate representative of the people seems to have consolidated itself into a new procedural step in recognition processes. Albeit reminiscent of the practice of recognition of the representative of colonial peoples engaged in a national liberation struggle observed during the decolonization process, such an intermediary step seems, in light of the Libyan and Syrian crises, to be crystallizing in contemporary practice of government recognition. Another important feature that ought to be emphasized concerns the recent developments pertaining to representation in international fora, especially at the General Assembly of the United Nations. Although such a move has not occurred in connection to the representation of the Syrian regime at the United Nations, contemporary practice has shown a consolidation of the resort to arguments of legitimacy and representativeness in order to refuse the credentials of a regime's delegates, as is illustrated by the above-mentioned March 2013 decision of the Arab League.

It is certainly futile to speculate on the continuation of this practice beyond the crisis in Syria and Libya. In other words, it would be useless to try to speculate about whether such developments will remain limited to the regime's crises that follow the Arab Spring.

⁶² Hala Droubi and Rick Gladstone, "Syrian Opposition Joins Meeting of Arab League", *New York Times* (March 26, 2013), http://www.nytimes.com/2013/03/27/world/middleeast/syrian-opposition-group-takes-seat-at-arab-league.html?_r=0; see also "Syria opposition coalition take Arab League summit seat" (March 27, 2013), <http://www.bbc.co.uk/news/world-middle-east-21949600>, accessed April 23, 2015.

⁶³ See, however, Russia's reaction to the Arab League's decision, as was described by the Russian Foreign Ministry spokesperson Aleksandr Lukashevich: "In terms of international law, decisions on Syria made by the [Arab] League are unlawful and indefensible, since the government of the Syrian Arab Republic remains the legal representative of the UN member-state" (March 27, 2013), <http://rt.com/news/arab-league-syria-opposition-924/>, accessed April 23, 2015.

Rather, what is important to highlight here is the fact that the practice reported above manifests a growing multilayeredness of both recognition processes and, more generally, of the tests of external legitimacy in international practice. Indeed, tests of external legitimacy are growing more cryptic and heterogeneous at three levels. First, there is a great diversification of the object of recognition in the context of recognition of governments. Recognition is not necessarily limited to the governmental function of the body object of the recognition. There seems to now be a wide variety of capacities in which one can be recognized, ranging from government to legitimate representative of the people. Second, we seem to be witnessing a consolidation of the diversity of occurrences in which a regime's external legitimacy is appraised. No longer limited to making a formal statement of recognition of government, external legitimacy-testing takes other forms, and more frequently manifests itself in the denial of the credentials in multilateral fora. This is certainly the case with respect to states which still allege that they do not recognize governments—a commitment that some states were prone to forget during the Libyan crisis. Third and lastly, the diversification of external legitimacy-testing can be observed at the procedural level, following the emergence of a practice of (withdrawal of) recognition of legitimate representative of the people. Indeed, the recent developments in Libya and Syria seem to indicate that withdrawals of recognition of government as well as recognitions of new governments are preceded by withdrawals of recognition of government as legitimate representatives of the people and the—sometimes deferred or withheld—recognition of the opposition as the new legitimate representative of the people.

Confronted with such intricacies of diplomatic practices pertaining to external legitimacy-testing—and especially with respect to recognition of governments—international legal scholars could be tempted to indulge in legalization, understood here as a construction of new legal categories and criteria to capture or explain such complex phenomena over which they have little control. More specifically, increasingly complex practices often generate a countervailing quest for legalization.⁶⁴ In the present case, such a temptation could take the form of an attempt to translate the above-mentioned practice pertaining to (withdrawals of) recognition as legitimate representatives of the people into an obligatory procedural step in recognition processes. It could similarly manifest itself in an attempt to make such (withdrawals of) recognition of parties as legitimate representatives a legal act,⁶⁵ subject to strict criteria, themselves elevated into legal criteria whose violation could be considered wrongful—for instance, because they would be considered an undue interference in internal affairs.⁶⁶ Likewise, it is tempting to construe the hesitations of the United States to ground the legal basis of their

⁶⁴ I have analyzed this in greater details elsewhere in connection with the law of statehood. See Jean d'Aspremont, "The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Birth in the International Society" (2014) 29 *Connecticut J. Int'l L.* 201–224.

⁶⁵ With respect to the recognition of the Syrian opposition as legitimate representative of the people, Stephan Talmon has been careful by arguing that such a recognition was only "political" and that no legal consequences were attached to it. He has, however, claimed that, even as a political act, it cannot be completely arbitrary. See S. Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 *Chinese J. Int'l L.* 219–253.

⁶⁶ See the declaration of the Russian Prime Minister in May 2011 (November 26, 2012), <http://www.premier.gov.ru> (cited by S. Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 *Chinese J. Int'l L.* 219–253).

military operations against ISIS in the consent of the Assad government as a consequence of its disqualification as the legitimate representative of the people of Syria.⁶⁷

In the view of the present author, such a quest toward legalization in the context of determining a regime's legitimacy needs to be very critically evaluated. First, because such an endeavor often expresses an aspiration by international lawyers to read the world and its practice in legal terms.⁶⁸ It can also constitute a manifestation of an even more ambitious enterprise geared toward the control of otherwise unbridled diplomatic and political power struggles. This is the regulatory ambition behind most scholarly projects in this area.⁶⁹ Second, and irrespective of the utter disconnect of such constructions from the practice of social actors, it is not certain that such legalization can be of any help when it comes to explaining and disentangling such intricate practices and discourses. Indeed, by subjecting themselves to—necessarily reductive—legal categories, international lawyers condemn themselves to read the practice of recognition with overly narrowing and oversimplifying lenses, thereby magnifying their complexity. It is true that law by itself leads to a binary reduction (and reconstruction) of complex realities.⁷⁰ Yet, when it comes to intricate and multilayered practices of external legitimacy-testing as they have been examined above in the context of the Syrian and Libyan insurrections, the explanatory and descriptive handicaps of legalization are simply too conspicuous not to be taken into account by international lawyers who should instead show greater self-restraint in the deployment of their complexity-reducing categories.

⁶⁷ On this debate, see Louise Arimatsu and Michael Schmitt, "The legal basis for the war against Isis remains contentious", *The Guardian* (October 6, 2014), <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state>, accessed April 23, 2015; see also Marc Weller, "Islamic State Crisis: What Force Does International Law Allow?" (September 25, 2014), <http://www.bbc.com/news/world-middle-east-29283286>, accessed April 23, 2015.

⁶⁸ On this aspect, see generally Jean d'Aspremont, "'Effectivity' in International Law: Self-Empowerment Against Epistemological Claustrophobia" (June 20, 2014). See <http://www.asil.org/blogs/%E2%80%9CEffectivity%E2%80%9Dinternational-law-self-empowerment-against-epistemological-claustrophobia>, accessed April 23, 2015.

⁶⁹ The common idea of a Law of Statehood or a Law of Recognition is probably the best illustration of such endeavors by international lawyers to claim a grip on an otherwise volatile political and diplomatic practice. See Jean d'Aspremont, "The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Birth in the International Society" (2014) 29 *Connecticut J. Int'l L.* 201–224.

⁷⁰ See generally Fleur Johns, *Non-Legality in International Law—Unruly Law* (Cambridge University Press, Cambridge 2013).

The Process of Institutional Transformation in Tunisia after the Revolution

HATEM M'RAD*

I. INTRODUCTION

After many decades of dictatorship and authoritarianism, the peoples of the Arab and Islamic world are just tasting the joys of democracy and freedom, after a series of successive revolutions and revolts against state authorities that had remained in power by means of corruption and the use of force. This democracy must now be patiently constructed at the institutional level. Tunisia is currently in the midst of that process, following a revolution known to Tunisians as a “Dignity Revolution” and in the West as the “Jasmine Revolution”, setting off the “Arab Spring”. The construction of a democracy in an Arab-Muslim country, even one with Tunisia’s modernist and reformist traditions, faces many hazards. The challenges are significant, but there are also real opportunities to be seized. An effective democracy in this context should be one rooted in society and be entirely distinct from the formal democracy that Arab countries have known until now and have always adopted in their constitutions. It should start from a solid and balanced institutional base in order to drive out exclusivism and banish the potential for power to be held by any single individual. Indeed, the Arab-Muslim world has had little difficulty in adopting the democratic and institutional formalism crystallized in the West as a corollary of a sustained battle over the course of several centuries against the tyranny of religion, of the state, of authorities, and even of societies. But the democratic philosophy is confronted with several difficulties inherent to Islam’s cultural heritage, such as the sanctification of power, the lack of an established secular tradition, the confusion of earthly powers with spiritual power, and

* The author and the editors sincerely thank Ms. Rebekka Yates for translating this article into English.

the communitarian ethic, although it is true that in Islamic societies, greater importance is attributed to the collective than to the individual.

Democracy is also held back by the habits and vestiges of the successive authoritarian regimes. Half a century of authoritarian rule has made it impossible for citizens to acquire a culture of participation, this being quashed by the prevailing culture of subordination. Democracy encounters further difficulties that are inherent to the revolution and the upheavals it has brought. The paradox of democracies is that they more easily and deeply take root during times of revolutionary upheaval than they do in more stable times. It is no less true that revolution itself makes it difficult to exercise democracy, since a long-term apprenticeship of democracy in a genuinely peaceful climate is needed to offer a true democratic experience. Yet unemployment, poverty, obvious regional imbalances, the fight against corruption, insecurity, turmoil in the courts, and the inevitable legal void created by the period of transition work against political stability. Having scarcely emerged from the upheavals of the revolution, Tunisian democracy has had to confront the serious threat of an Islamic majority—the al-Nahḍah Party having won the elections to the National Constituent Assembly on October 23, 2011—and of an alliance government led by the Islamists. In a way, the fight against Islamic tyranny has supplanted the fight against the dictatorship. The same is true of Egypt.¹ Islamists have traditionally and fundamentally put religion above democratic values and institutions, even if they do proclaim their respect for democracy and their attachment to the values of modernity.

However, one should not be too critical of the democratic and institutional process that is currently unfolding in Tunisia. This democracy presents a real chance of success at a difficult time. Indeed, it is clear that the revolution has created real counter-powers, ready to react strongly against the political authorities and actors in the event of any abuse or excess of power.

The Tunisian revolution, occurring in a country that historically, politically, and intellectually has a reformist and modernist tradition, has allowed a genuine civil society to emerge that is organically independent of any political authority. This civil society, driven by the enthusiasm and determination of youth and by an educated elite, has created an important historic opportunity for exhorting specific democratic and constitutional reforms. The intensity and dynamism of the civil society has allowed the citizens to reinvent their own democracy of opinion. Street protests, political debates, polemics, sit-ins, strikes, diversity of the press and the media, the creation of more meeting places, and declarations in social media are now the everyday fare of Tunisian democracy. In the absence of any new political authority, it is also these elements that contribute to the country's institutional transformation. Ultimately, we note that all political actors want to show that they respect the democratic rules of the game, even the Islamists, who are in the process of modifying their language to fit with the rules of the majority and of parliamentary democracy. Indeed, the Islamists were proud of the final adoption of the Tunisian Constitution on January 27, 2014, the product of a consensus between the Islamists and the Laicists, the discussions of which were difficult. Moreover, they are proud to demonstrate to the Tunisian and international public that they are democrats after all, having withdrawn peacefully from the government after the adoption of the constitution. They stepped down in favor of a neutral government of technocrats, appointed by mutual agreement between all representative parties, as consented in the roadmap issued by the National Dialogue.

These are the ambiguities related to the changes and transformations of the Tunisian institutional and democratic process. Let us therefore consider both the difficulties (Part

¹ For the Egyptian case, see L. Anderson, "Demystifying the Arab Spring: Parsing the Differences between Tunisia, Egypt and Libya", *Foreign Affairs* (New York/Washington 2011), <https://www.foreignaffairs.com/articles/libya/2011-04-03/demystifying-arab-spring>, accessed September 4, 2015.

II) and the chances of success (Part III) inherent in these institutional, political, and democratic transformations resulting from the Tunisian transition process following the upheaval caused by the revolution of January 14, 2011.

II. DIFFICULTIES CONFRONTING TUNISIAN INSTITUTIONAL AND DEMOCRATIC CHANGE

Institutional and democratic change cannot be taken for granted after a revolution. In Tunisia, this change encounters two kinds of difficulty: difficulties inherent to the revolution itself, and the risks presented by a new Islamist majority and government.

A. Difficulties Linked to the Revolution

The new institutional architecture and new Tunisian democracy have not yet managed to set off due to all the upheaval caused by the revolution. The move from dictatorship to democracy and the period of transition necessitate compromise, temporary arrangements, approximations, and emergencies that a population, which has been held back for half a century on all levels, is not always capable of understanding.

The first phase in Tunisia's political transition, immediately following the revolution of January 14, 2011, was not consistent, stable, or peaceful. This phase was dominated by massive collective protests across the whole country. There was no clear institutional political game, but rather a series of clashes, U-turns, demands, and excesses on all sides. There was no representative authority. The constitution was void, the parliament dissolved, the President of the Republic was fulfilling his functions in an interim capacity, and the primary task of the transitional government was to prepare and ensure the conditions for elections to the National Constituent Assembly (NCA) on October 23, 2011. Meanwhile the judicial powers, in tumult, were in search of transitional justice and even trying to bring the leaders of the former regime and those close to it to justice and to punish those guilty of corruption. A substitute for parliament was set up in the form of a political and technical consultative body, the *Haute instance pour la réalisation des objectifs de la révolution, des réformes politiques et de la transition démocratiques* (High Authority for the Achievement of the Goals of the Revolution, Political Reform, and Democratic Transition), which was mandated to prepare the legal instruments (decree-laws) required for the transition to democracy (on electoral procedure, political parties, associations, the press, and the media [. . .]). It comprised experts (jurists), representatives of the political parties, and members of civil society. An independent electoral commission was created (*Instance Supérieure Indépendante pour les Élections*, ISIE), fully mandated to organize the electoral process. A consultative body on communication was entrusted with overseeing the media and the press. Lastly, two technical committees were set up: one to combat corruption and malpractice, the other to shed light on violations of human rights by the security services at the time of the revolution.²

Although they did make some progress, these various bodies were not able to make the general unrest come entirely to an end. All the political actors, each category of the population, every professional group wished to take advantage of the country's state of dilapidation to demand things that they would not be able to get later. Thus, on the political level the political parties, the press, the media, and public opinion were continually challenging the provisional government, accusing it of one thing and also of its opposite, of intervening too much or of

² See the works of the Association Tunisienne d'études politiques (ed), *Les nouveaux acteurs du jeu politique tunisien* (Association Tunisienne d'études politiques, Tunis 2011).

not undertaking reforms quickly enough.³ On the social level, due to unemployment (700,000 unemployed, including 200,000 graduates), the most deprived section of the population was clamoring for jobs, while others were calling for salary increases or higher status; still other groups were calling for their business sectors to be cleaned up, for particular local officials connected to the old corrupt regime to be held accountable, or for their forgotten locality or region to be taken into consideration. Journalists demanded editorial independence and government recognition of freedom of the press, or at least expressed concern about the slow pace of change in the audio-visual landscape. Judges, protesting in the street, called for the independence of the justice system, the election of all members of the High Council of and participation in the investigation of those close to the former president Ben 'Alī. Lawyers believed they had the right to prosecute on their own initiative former leaders, because the public ministry or the government was not moving quickly enough in their eyes. Judges and lawyers, politicized and divided more than necessary for a role that requires serenity, devoted themselves to revolutionary justice, or justice with high media exposure. The people demonstrating in the streets, who did not fully trust the transitional bodies supposed to represent them, made demands, condemned some establishment figures and rehabilitated others.

The provisional government, formed just after the revolution, responded to each group as well as it could. Badly needing public support, it consulted the competent authorities, the parties, and the associations on complex issues. As almost everybody was calling for rapid change, the provisional government was always under pressure to respond quickly to these requests. Its mission was to end as soon as the National Constituent Assembly was elected. Neither did it have many powers. The provisional government had perhaps a certain margin of action at the economic, social, or security level, but on the political level it was obliged during the transition phase to deal with all the political groups.

The people were calling for a representative government, in which, based on the principle of national sovereignty, the people govern through elected representatives. They had to wait until the elections to the National Constituent Assembly and the end of the first phase of the post-revolutionary transition to find out how the representative and institutional processes of the second phase of the transition would work. This phase would be dominated by an Islamist majority.

B. The Risks of an Islamist-majority Government

Paradoxically, the first democratic elections in Tunisian history—the elections to the National Constituent Assembly of October 23, 2011—returned a strong majority for a party whose ideology is not democratic, but politico-religious. In fact, the Islamists of the al-Nahḍah Party won the majority of seats in the National Constituent Assembly: 89 out of a total of 217 seats, which is 41.01 percent of seats or 37.02 percent of votes. That result needs to be put in context, because it also corresponds to 34.82 percent of registered voters and 19.82 percent of the 7.5 million potential voters of voting age. The party in second place was the Congress for the Republic, a center-left party that won 29 seats; in third place was a previously unknown, quasi-tribal movement with a regional character represented by a set of independent lists, “Popular Petition,” which won 26 seats but was dissolved shortly after the elections. In fourth place was al-Takattul, a social-democrat party that won 20 seats; in fifth place was the Progressive Democratic Party, which won 16 seats. The remaining parties each won between 1 and 5 seats.

³ M. C. Paciello, “Delivering the Revolution? Post-uprising Socio-economics in Tunisia and Egypt” (2013) 48 *The International Spectator: Italian Journal of International Affairs* 18, available at <http://dx.doi.org/10.1080/03932729.2013.847674>, accessed May 21, 2015.

The Islamists of al-Nahḍah, the Congress for the Republic, and al-Takattul, i.e., the three parties with the most seats, decided to form a government in alliance and share the three key positions in the state—the Islamists were granted the right to designate the head of government, the real political authority of the country; Congress for the Republic took the presidency of the Republic, a position with a limited remit; and al-Takattul took the presidency of the National Constituent Assembly. Between the three parties, this majority government in alliance represented 138 out of 217 seats, i.e., 63% of seats and 49.74% of votes.⁴ The coalition was trying to reach a consensus between its Islamist and its secular components on the big issues of the day: unemployment, poverty, regional imbalances, fundamental freedoms, justice, and security. The government could have been a government of national unity if the other representative parties had joined the coalition, but they preferred the role of a vigilant opposition.

It is true that the Tunisian Islamists present themselves as a moderate party, which aims to run a civil government. It is also true that al-Nahḍah, professionals of the political game, are capable of being petty in their politics, playing power games and leaving religion behind concerning matters related to the protection of their political interests or their ability to stay in power. Politics beat religion in practice. Nonetheless, some astonishing practices have been witnessed in Tunisia since the revolution. Prayer is increasingly spilling out onto the street and the public highway. The Salafists, a hard-liner branch of Islamists who may or may not be linked organically or strategically with al-Nahḍah, are waging the *jihād fi sabīl Allāh*⁵ right in the heart of the city. They protest violently in broad daylight, brandishing slogans of a different political age. Religious fetishism arises from its ashes. The *ḥijāb* for women and beards for men are blossoming everywhere. Traditional Afghan-style dress, entirely contrary to Tunisian modernism and even to the old Tunisian traditions, is now being sported. The *niqāb* is visible on the streets. Some female Salafist students wearing the *niqāb* attempted to break open the gates of a university (only the veil is deemed acceptable in high schools and universities). Other students have attacked their female teachers, demanding that they change their clothes. Some have considered the teaching of design or of artistic disciplines to be an attack on the sanctity of Islam. All over the country, men demand separate queues for men and women in administrative buildings and public places. In some high schools in the interior of the country, boys are calling for separate classes to be created for girls and for an overall end to mixed education. Some are calling for the closure of premises that sell alcoholic drinks and the restructuring of tourist hotels into *ḥalāl* hotels, free of alcohol. In short, the religious and cultural unrest is getting mixed up with the economic, political, and social unrest.

More politically relevant, during the election campaign it emerged that the Islamists, whose financial resources of Qatari origin never run dry, unscrupulously bought the votes of the unemployed, the poor, and the meek. They supposedly offered cash and goods. They told voters that a vote for al-Nahḍah would ensure that the doors of paradise would be opened for them. Elderly illiterates, men and women, ended up being persuaded. Šāduq Shūrū, one of the older leading members of al-Nahḍah elected to the National Constituent Assembly, made a declaration on television on the occasion of the Assembly's opening session on November 22 calling for the future constitution to establish the Shari'ah as the source of legislation. That was at odds with the logic of a pluralist democracy, which is based on the presumption that the constitution and the state are denominationally neutral. A constitution must not take sides in favor of one religion, regardless of the number of its followers. Religion

⁴ See Association Tunisienne d'études politiques (ed), *Election de l'Assemblée constituante: lectures politiques* (Association Tunisienne d'études politiques, Tunis 2011).

⁵ *Jihād fi sabīl Allāh* is an Arabic expression meaning jihād in the way of Allāh or of the cause of Allāh.

is a matter of individual faith and does not have to be collective. But in Islam it is the interests of the community as a whole that prevail. Democracy must comply with Islamic values.

The same goes for the reference to the caliphate. The future prime minister Ḥamādi Jabālī, general secretary of the al-Nahḍah Party, for his part, said in an impassioned speech to a big meeting of militants of his party in Sousse that the “democratic” victory of al-Nahḍah could be considered as the event of the “well-guided” sixth caliphate (in the Islamic tradition, there have been four “well-guided caliphates” since the prophet, in addition to a fifth, the caliphate omeyyade ‘Omar Ibn ‘Abd al-‘Azīz). This speech caused serious concerns in civil society and among the secular parties during the negotiations on the formation of the government. The al-Takattul Party therefore suspended its participation in those negotiations for several days to protest against these declarations by the future prime minister in response to widespread public criticism.

On the other hand, the Islamists of the al-Nahḍah Party tried to reassure the democrats. They argued that if they decided to form a coalition government with secular parties, it was because they were determined to respect the democratic consensus that had emerged since the revolution: fundamental freedoms, women’s rights, republican principles, the fight against corruption and unemployment. They called Bourguibian modernity an untouchable achievement. The Islamists seemed embarrassed by their own majority and wanted to reassure both the Tunisian public opinion and international donors. Such problems easily arise where the religious discourse is exploited for political ends, or where these two very different orders are lumped together. The Islamists have difficulty in drawing upon the essence of democracy or modern institutions.

As a matter of fact, the exercise of power proved to be more awkward for the Islamists and their majority than they expected. Al-Nahḍah started to oscillate, not without difficulty, between the requirements of the political game and the desire to dominate the institutions of the state. In effect, the Islamic power began to lose the confidence of the Tunisians and even of some of its own followers after the violation of the all-party agreement concluded after the elections. This agreement limited the term of the Constituent Assembly to one year. Once it had settled down in its new powers, the Constituent Assembly considered that it was an original power (*pouvoir constituant*), elected to build a new state and political order. The Assembly was therefore not to be bound by the agreed time limit of its mandate on which the opposition and civil society insisted. The crisis of confidence stems from that time. Opposition and civil society believe that a power which does not respect its moral commitments will not respect its political commitments either—commitments which it had itself accepted. This was an implicit avowal of the al-Nahḍah Party’s will to stay in power as long as possible.

The crisis of confidence and the suspicion vis-à-vis the Islamist government and the troika persisted throughout the three years following the revolution. The crisis was aggravated by the carelessness regarding security issues, repetitive lawsuits against artists and journalists, the excesses of Salafist⁶ and al-Nahḍah militias (Leagues for the Protection of the Revolution), assassinations, and the more or less deliberate retardation of transitional justice.⁷

⁶ A. Allani, “Islamism and Salafism in Tunisia after the Arab Spring,” Right to Nonviolence Tunisia Constitutional E-Forum, October 2, 2012, 4, available at <http://www.righttononviolence.org/mecf/wp-content/uploads/2012/10/allani-presentation-en.pdf>, accessed May 21, 2015; N. Boursali, “Le fait salafiste en Tunisie: où en sommes-nous?” (2012) no. 13 *Opinions Magazine*.

⁷ L. Gazzzone, “Ennahḍa Islamists and the Test of Government in Tunisia (2013) 48 The International Spectator: Italian Journal of International Affairs 34, available at <http://dx.doi.org/10.1080/03932729.2013.847677>, accessed May 21, 2015; K. Al-Anani, “Islamists parties Post-Arab Spring” (2012) 17 *Mediterranean Politics* 466.

And yet despite all these difficulties and all these risks that Tunisian democracy is facing, since the revolution there have nonetheless been some innovations, some social and political practices, and some institutional changes that are helpful to the delicate transition to democracy, as is illustrated by the adaption of the Tunisian Constitution in January 2014.

III. THE POLITICAL, CONSTITUTIONAL, AND DEMOCRATIC CHANGES STEMMING FROM THE TRANSITIONAL PROCESS

It must be said that since the revolution Tunisia has become a country that aspires to democracy by means of new institutions and constitutional guarantees. Democracy was in a broad sense the main *raison d'être* of the revolution itself. In fact, since January 14, 2011, political pluralism and freedom of opinion and expression have spread rapidly in Tunisian society. From its very birth, democracy has become sacrosanct in the eyes of all the actors and of the entire population. Democracy is also present in the speeches of the Islamists. Tunisians are undergoing an apprenticeship in the culture of democracy. Hesitations, deviations, excesses, approximations, and democratic amateurism are also part of the game for a country that until recently never had to confront the limitations of democracy.

This said, the democratic debate proved useful, especially in the work of the Constituent Assembly, where challenges were vital regarding the political and cultural fate of the nation. The political parties of the opposition united their forces in the face of the threats posed by the Islamist majority. Quarrels with the Islamists on procedural matters were as important as fundamental principles, freedoms, and individual rights. The constitution that was finally adopted has the merit to incorporate a set of compromises between the Islamist majority and the secular opposition which wrought concessions from al-Nahḍah on a number of important constitutional issues.

In the following, four important questions concerning the institutional and political transformations of post-revolutionary Tunisia will be examined: the emergence of an independent civil society, the multiplication and the structure of the political parties, constitutional challenges, and the tenor/direction/thrust/substance of the new constitution that was adopted in January 2014 as a result of a compromise between the majority and the opposition.

A. The Emergence of an Independent Civil Society

The new Tunisian civil society emerged out of the street protests and the generalized revolt across the whole of the country against the Ben 'Alī regime. It may be said that young people were the lynchpin of these revolutions which they were driving through their new language, their blogs, their subversive use of Facebook, Twitter, and the new communication technologies,⁸ their politicized music, and their slogans. Unable to endorse or put up with a censorship incompatible with modern times any longer, these young people brought about the wind of freedom.⁹ In addition, other sections of society also expressed themselves, stood up, and protested—from the unemployed to business leaders, teachers, academics,

⁸ M. Ben Salem, "Nouvelles configurations des pratiques citoyennes en Tunisie: Les protestations de rue et virtuelles" in Association Tunisienne d'études politiques (ed), *La contre-révolution en Tunisie* (Association Tunisienne d'études politiques, Tunis 2012).

⁹ K. Mejri, "Jeunesse, Internet et transition démocratique en Tunisie" in H. M'rad and F. Moussa, *La transition démocratique à la lumière des expériences comparées* (University of Carthage, Tunis 2012).

journalists, trade unionists, lawyers, doctors, and artists. In Tunisia, these sections of society came together especially in the demonstrations in the big cities, particularly (although not exclusively) in Tunis, Sūsah, Šafāqus, and Binzart. The demonstrations by civil society were spontaneous—apolitical even—without party political support. Only in the last days of the revolution was the Tunisian General Labor Union (Union Générale Tunisienne du Travail, UGTT), a powerful trade union, able to provide—through its massive presence, as well as its discipline and experience in industrial action—assistance for the Tunisians' revolt in the big cities. The vast majority of representatives of civil society had a peaceful attitude in the demonstrations. Coming for the most part from the middle classes, they demonstrated great solidarity and civic sense, virtues which had not been very much in evidence before. They were deeply upset and shocked by the violence and looting that happened in certain areas, attributable principally to the militia of Ben 'Alī and his party, the Rally for Constitutional Democracy (RCD) in Tunisia. Despite the evening curfew, young Tunisians spontaneously formed defense committees to protect their families, property, and houses against the snipers of the militia of the presidential guard and against the looters. Volunteers cleaned the streets and lent manpower to the forces of order and to the military. Several caravans of solidarity were organized spontaneously in a spirit of patriotic generosity, setting out from the big cities to support and thank Tunisians in deprived areas in Sidi Būzīd, Qaşrīn, and Tālah, the towns that saw the largest numbers of martyrs to the revolution, to assure them of their moral support and share with them their pride of being free citizens at last.

A dictator had fallen, and an entire people felt, for the first time since independence, free and master of their own destiny. At a stroke, they became aware of each other's existence, especially of those who had been in the background in the "shadow zones". A new conviviality was born, expressed in a spontaneous show of solidarity around the caravans, illustrated by meetings, new friendships, shows, singing, dancing, and poetry recitals. In fact, the Tunisian revolution saw the birth of a genuinely independent civil society, which shook up all existing authorities—political, military, and religious.¹⁰ Civil society in Tunisia, as in other Arab countries, recalls the liberation or the creation of a "civil society" in the countries of Eastern Europe after the collapse of communism and totalitarianism—regimes that were characterized by the fusion of state and civil society at a time when the opponents, especially in Poland, identified the fight for civil rights with the fight of civil society. In any case, in Tunisia, as in Egypt and Libya and in all the other Arab countries or countries of Eastern Europe, the liberation of civil society has taken the form of an appropriation of the political by the citizens and an assertion of human rights, uniting opponents from all sides, militants as well as independent citizens.¹¹

The birth of a Tunisian civil society, through the revolutionary experience, is something that merits particular emphasis. For its great size, its independence from the political authorities (government and opposition), the consistency of its demands and the strength of its demonstrations, and above all its determination to bring about political change Tunisians had been waiting for so long are the elements that have given birth to a real Tunisian civil society. "A disobedient civil society" acts as a vehicle for free opinion, publically declared, for the attention of the political authorities in a democratic climate. An independent civil society, freedom, democracy, and public opinion indeed seem to be intimately connected. The press, television channels, and the media in general are becoming more diverse and are

¹⁰ H. M'rad, *Libéralisme et liberté dans le monde arabo-musulman. De l'autoritarisme à la révolution* (Editions du Cygne, Paris 2012) 115.

¹¹ D. Colas, *Sociologie politique* (2nd edn Presses Universitaires de France, Paris 2002) 385–386.

asserting their newly found liberties. They are sustaining the dynamism of civil society. All Tunisians now speak politics, whereas prior to the revolution they were entirely uninterested, on account of their lack of power. In sum, Tunisia has learned to find its democratic voice.¹²

It is this freedom of speech and commitment to independence that explain the efficiency which the Tunisian civil society gained in the political and institutional struggles in such a short time. Civil society has had to show its strength during the first transitional governments, before the election of the Constituent Assembly. Convinced of its legitimacy in the aftermath of the revolution, especially in the absence of legitimate political authorities, civil society with its opinion leaders was able to centralize the debate on the transition and to identify the “salient points” of the transition. It was civil society which determined the agenda of the national political debate. As a result of powerful demonstrations (Casbah 1), the civil society pushed the government to dismiss some ministers attached to Ben ‘Ali’s RCD, who were kept in the government after the revolution. Civil society even caused the demission of Prime Minister Muḥammad Ghannūshī, as well as that of all the RCD ministers in his cabinet, and the appointment of al-Bājī Qā’id al-Sabsī as new prime minister in his place (Casbah 2). The latter then formed his government around neutral technocrats.

Above all, civil society forced the government to schedule elections for a constituent assembly charged with the elaboration of a new constitution. The previous government had been hesitant on the question of electing a constituent assembly. Prime Minister al-Sabsī merely followed the demands of civil society, as he admitted himself. The old constitution was suspected to have been a smokescreen for two authoritarian regimes. The revolution marked a turning point. It brought to life a new political order, requiring a new constitutional order. This symbolism is important for civil society.

B. Multiplication and Structuring of Parties after the Revolution

After the revolution of January 14, the new Tunisian multiparty system went through two stages. A first post-revolutionary phase, that of “micropartism” characterized by an excess—over one hundred—of newly legalized small parties. All those bullied by the *ancien régime*—all political currents, countless branches or wings of the old parties or of new movements, and a multitude of old dissensions—decided to resurface. New ambitions accompanied by revolutionary enthusiasm crystallized into political parties. Even “intruders” or political amateurs, carried away by politics in a democratic-revolutionary context, were able to create political parties for the upcoming elections, promising a real pluralism and addressing, in their eyes, real political issues.

More important, the post-electoral phase, following the election for the Constituent Assembly on October 23, 2011, led to the emergence of a new elementary form of structuring. This structure was bound to further evolve with rapid changes, conflicts, and succession of mergers and divisions of political parties, especially those of the opposition. The coalition government of an Islamist party and two center-left parties, the three parties that scored best in these elections, al-Nahḍah, CPR, and al-Takattul, started a consolidation process, by forcing the opposition parties to form alliances fit to thwart the government coalition.

¹² H. M’rad, “La démocratie d’opinion: le dépassement de la démocratie représentative” in R. Ben Achour, J. Gicquel, and S. Milacic (eds), *La démocratie représentative devant un défi historique* (Bruylant, Brussels 2006); H. M’rad, “La transition par l’opinion en Tunisie” in H. M’rad and M. L. Fadhel Moussa (eds), *La transition démocratique à la lumière des expériences comparées* (University of Carthage, Tunis 2012).

On the eve of the elections to the Constituent Assembly, 117 parties populated the political landscape of Tunisia. This figure may stun observers from mature democracies which generally operate in a multiparty framework that does not exceed an average of fifteen parties. The United States, after all a state the size of a continent, has very few parties. And only two of them, the Republicans and the Democrats, regularly alternate in power.¹³ It is amazing that Tunisia, a small country of 11 million inhabitants, or 8 million potential voters, should have a hundred parties.

Basically, this exorbitant number of parties is not surprising if put in the context of the transition process itself and in consideration of similar experiences. After the death of Franco in 1975, Spain has known about 173 parties; the countries of Eastern Europe witnessed the emergence of 120 parties in Poland, 135 parties in Hungary, and 179 parties in Russia in the post-communist transition following 1989. Ultimately, the phenomenon is less political than psychological. For political parties it is—after a phase of total blockade of political life—a matter of filling, as quickly as possible, a political vacuum and positioning themselves strategically. Second, it manifests the overwhelming desire of human nature to be recognized, especially after half a century of muzzling free expression. Francis Fukuyama already pointed it out: By taking up an old idea of Hegel, he showed that a major parameter of politics is the desire for recognition.¹⁴ Moreover, in all countries that experienced a democratic transition, the number of parties decreased substantially, returning to the numbers normal in a multiparty democracy once consolidated. There are already indications in this direction in Tunisia.

After the elections of the Constituent Assembly, the political parties began to find a new legitimacy, to organize and to restructure around major unifying parties. They also started to form larger alliances, such as the Union for Tunisia around Nida' Tūnis (liberal) or around al-Nahḍah (Islamists and center-left), and other political currents, as the Popular Front. Those correspond to the three major historical, cultural, and political trends of the country: liberal reformism, Islam, and the left.¹⁵

C. The Constitution of January 27, 2014

1. *The Process of Adoption of the New Constitution*

In terms of constitutional change, three drafts were submitted to the National Constituent Assembly, each of which has been the subject of debates and amendments. After the first draft presented in August 2012, a second draft followed on December 14, and, finally, on April 25, 2013, the third draft of the constitution was submitted. Then, on January 26, 2014, the new constitution was adopted by the National Constituent Assembly.

The reference to the Shari'ah, as one of the sources of legislation, which was envisaged right at the start of the discussions by the Islamists in Art. 1 of the proposed constitution, and which was then abandoned, was discussed for several months.¹⁶ The Islamists of al-Nahḍah considered the Shari'ah as the subject for bartering with the secular movements, as

¹³ In the United States, there are, other than the two big parties, the Republicans and the Democrats, four parties (the Libertarian party, Ralph Nader's Green Party, Ross Perot's Reform Party, and the Constitution Party), and seventeen little, practically unknown parties.

¹⁴ F. Fukuyama, *La fin de l'histoire et le dernier homme* (Flammarion, Paris 1992).

¹⁵ M. Kraiem, "Déstructuration socio-culturelle et émergence du pluralisme politique en Tunisie pendant la période coloniale" (1991) *Pluralisme social, pluralisme politique et démocratie*, No. 19, 110–111.

¹⁶ L. Chedly, "Le droit musulman (la chariâa) dans la prochaine constitution tunisienne" in Association Tunisienne d'Etudes Politiques (ed), *Les islamistes et la conquête démocratique du pouvoir* (Tunis 2012).

a specter to raise, and a means of attempting to ask more to get something. The specificity of the Tunisian Islamists is that they are also great pragmatists. They know how to use the real relations of power to advance their goals. In the end, they made a “historic compromise” with the secular and democratic powers opposed to this religious reference in opting for a republican regime.

After more than two years of waiting—since the election of the Constituent Assembly—and after multiple delays alien to the constitutional cause, Tunisia finally adopted a consensual constitution. It is the result of an accelerated final deliberation process guided by the political compromises reached in the context of the National Dialogue. These compromises originated in demonstrations and strong reactions by the civil society and the opposition, following the assassination of leader of the political party People’s Movement, Muḥammad Brahmi, in July 2013 and were directed against the three-party coalition dominated by *al-Nahḍah*, the “troika”, whose legitimacy had crumbled in the almost two years following the elections. In order to get out of the political and institutional impasse, the National Dialogue was seen as a necessity in order to bring an important stage of the transition process to an end: the adoption of a constitution. But in politics there is nothing more difficult than compromise.¹⁷ Compromises of this kind require wisdom, moderation, maturity, civility, and realism. This National Dialogue was supervised by the Quartet, an ensemble of four influential trade unions and civil society organizations: the UGTT (the big labor union), the UTICA (the employers and entrepreneurs association), the LTDH (the Tunisian Human Rights League), and the ONAT (the Bar Association). It is because of the political talks and meetings between the Quartet and the twenty-two representative parties that the constitution was finally completed and passed.

In the end, the constitution, without being a memorable oeuvre, is certainly a landmark document in the history of Tunisia. Made by everyone, it satisfies essentially everybody, because of its consensual and democratic character. The constitution is one of “peaceful coexistence”, allowing two opposing, and ideologically indomitable, and camps to live together: Islamists and secular modernists. “Peaceful coexistence” means that neither side will be fully satisfied with the constitution; they will only accept the fundamentals. In the main, it was not designed by a single party or a single majority, but it was the work of all political actors in the assembly: majority, opposition, and even independents. This is probably one of the merits of drafting a constitution by an elected assembly, despite the occasional missteps by the latter in the course of its work. Perhaps it is a good thing that the constitution was not designed by a small commission or by law experts alone, despite their academic expertise. This would have meant the reproduction of the vices of the old constitutions: one-sidedness, imposition from above, and ignorance of the diversity of aspirations—things that would not be without risks for a nation reborn in a revolution.

Apart from the direct political actors, civil society has been very active in criticizing the constitution throughout the process, as have been associate experts, associations, nongovernmental organizations, the UGTT, the regions, the UTICA, elites, media, women, law schools, and international institutions. All these groups have weighed on the constituent power and the constitution and acted thus as a driving force of the process by proposing some things and criticizing others, especially when it came to defending justice or individual rights and freedoms. There has been genuine constitutional governance.

¹⁷ Y. Ben Achour, “Remédier aux dangers du vote et du gouvernement majoritaires. Le recours au Tawâfuq” in Association Tunisienne d’Etudes Politiques (ed), *Les islamistes et la conquête démocratique du pouvoir* (Tunis 2012).

In total, the Constitution of 2014 is undoubtedly democratic as well as consensual. It is a constitution of the “whole people” both in its qualities and in its defects. It is not a coincidence that it was adopted by a very qualified majority of 200 out of 216 votes (12 votes against and 4 abstentions). Those who voted against the constitution were mainly members of al-Maḥabba (9) (former al-ʿAriḍah), an anarchic, marginal, and inconsistent entity, not framed by a parliamentary group in l'Assemblée Nationale Constituante Tunisienne (ANC), and some recalcitrant members of al-Nahḍah.

2. The 2014 Constitution Viewed from the Perspective of Constitutional History

If one looks to Tunisian constitutional history, it is easy to see that the *Pacte Fondamental*, promulgated by Muḥammad Bey in 1857, was written by the reformer Aḥmad Ibn Abi Ḍiyāf alone. The Constitution of 1861 stemmed from a collaboration between the Grand Vizier and reformer Khayr al-Dīn Pāshā and the same Ibn Abi Ḍiyāf. Both constitutions had no intention to take the aspirations of the people into account, but reflected the diplomatic and mercantile pressures from foreign powers who wanted to lift the remaining legal, commercial, and religious barriers from their involvement in Tunisia. They were constitutions granted by the monarch for people still subject to, or subordinate to, history.

The 1959 Constitution was a modern constitution for an Arab-Muslim country still affected by tradition and underdevelopment, but it too was a unilateral act, the work of a single party, the Dustūr Party, even the work of one single man, the autocratic reformer Būrqiḇa. Although it proclaimed high-minded values, the constitution was not able to realize democracy, equality, freedom, and justice immediately. The Constitution of January 26, 2014, the work of both the revolution and of the 2011 elections in its elaboration process, is the very opposite of these former “constitutions”—in its shape as well as in its contents. Previous constitutions were designed less for future generations than for foreign powers or the political powers of the moment. They divided much more than they integrated the people. They had little chance of withstanding the test of time.

3. Form and Contents of the New Constitution

Concerning the form, the Constitution of 2014 is too long a constitution (149 articles) for a country that aspires to be governed democratically. But this is perhaps the price for the coexistence of the two camps. Certain indicative and nonlegal provisions are unnecessary, such as those on water, sports, youth, and health. After all, a constitution is still the Statute of the State and of the fundamental freedoms. Concerning the substance, this constitution is a synthesis of the two major political and philosophical cleavages of the country: the secular reformism on one side, both of the liberals and the left, and Islamism and tradition on the other. In terms of basic principles, Islamists were eager to highlight Islamic values and references to an Arab-Muslim identity, which, in their minds, must prevail over all other values, and the moralization of rights and liberties with respect to the sacred. They have failed to impose the sanction of achieving the sacred or *takfir*.

The seculars, in turn, clung to the reference of Tunisian reformist history, participatory democracy, the civil character of the state, individual rights and freedoms, universal human rights, pluralism, governance, the neutrality of the state, and equality between citizens. They imposed equality of female and male citizens,¹⁸ parity in employment policies and equal opportunities,¹⁹ not least owing to the struggle of women. The seculars defended the freedom of conscience as well as the progressive and modern values of education and

¹⁸ Art. 21 of the 2014 Constitution.

¹⁹ Art. 46 of the 2014 Constitution.

teaching, succeeding thanks to the unwavering support of civil society.²⁰ Modernists also insisted, supported by the ever-vigilant unions and judiciary, on the independence of the judiciary much more than the Islamists did.

In terms of rights and freedoms—one of the major contributions of the seculars—the constitution thus can be seen as largely positive. There is a chapter of twenty articles on Rights and Liberties, placed just after the preamble, to stress their fundamental character. It consecrates a great many liberties—ban of torture, minimum guarantees during detention and imprisonment—so much trampled on by the former regime, with both Islamist and secular opponents being the victims. Both traditional freedoms—such as freedom of opinion, expression, publication, information,²¹ belief, religion, conscience,²² assembly, demonstration, association, establishment of parties and trade unions²³—and more modern freedoms—such as freedom of the Internet and access to social networks,²⁴ and academic freedom²⁵—are granted.

At the institutional level, once the fears of the Shari‘ah had been eliminated, the republican regime²⁶ and civil nature²⁷ of the state were strengthened. As to the nature of the political regime, the Islamists preferred a parliamentary system, while the civilian opposition from the beginning leaned in favor of a mixed presidential system. Finally, the balance of power led to the choice of a kind of mitigated parliamentary system. This system is mitigated by a slight adjustment in favor of the powers of the President of the Republic made in the final draft. Elected by universal suffrage,²⁸ the President of the Republic also has the right to dissolve parliament²⁹ and has more or less formal diplomatic, security, and military competences.

But it is the head of government who has the most power. He “determines the general policy of the country” (Art. 91), appoints holders of public office, chairs the Council of Ministers, and exercises general regulatory power. He is responsible to the parliament alone, which can withdraw confidence from the government or from one of its members by an absolute majority. Thus, the government is not accountable to the president, because it is supported by the parliamentary majority which won the elections. However, the President of the Republic may ask the Assembly for a vote of confidence in order to bring down the government. But politically, it will be difficult to implement this procedure, because in the spirit of this system, the government relies on its own majority in parliament.

The opposition has a defined parliamentary status, useful and capital in a quasi-parliamentary system, which is described in Art. 60: “The opposition is an essential component of the Assembly of the People’s Representatives, it holds rights which allow it to accomplish its mission within the framework of parliamentary work, and which ensure its adequate representation in the structures and activities of the Assembly. The opposition must chair the Finance Committee and the position of rapporteur in the Committee on Foreign Relations.” Thus, the status of the Tunisian opposition is strengthened, and with it the position of parliament in the Tunisian system of government.

²⁰ Art. 39 of the 2014 Constitution.

²¹ Art. 31 of the 2014 Constitution.

²² Art. 6 of the 2014 Constitution.

²³ Art. 35 of the 2014 Constitution.

²⁴ Art. 32 of the 2014 Constitution.

²⁵ Art. 33 of the 2014 Constitution.

²⁶ Arts. 1 and 3 of the 2014 Constitution.

²⁷ Art. 2 of the 2014 Constitution.

²⁸ Art. 75 of the 2014 Constitution.

²⁹ Arts. 77 and 99 of the 2014 Constitution.

Another significant contribution of the constitution is decentralization. Tunisia's regions have been the soul of the revolution. Consequently, a whole chapter is devoted to local communities, entitled "Local Authority",³⁰ with three levels of decentralization and representation: direct elections at the municipal and regional levels and indirect election at the departmental level.

Five autonomous bodies³¹ have been established to strengthen and deepen the democratic process: one for elections, one for information, one for human rights, one for sustainable development, and one for good governance and the fight against corruption. Basically, these bodies monitor and promote the rights and freedoms foreseen in the constitution itself. "Plenty is no plague," as the saying goes. However, some of these bodies should not have a place in a constitution.

Moreover, the constitution states that it is not allowed to undermine, by means of amendment, the gains relating to human rights and freedoms guaranteed in the constitution.³² In the former regime, a fundamental right or a constitutional liberty could be stripped of its meaning by a restricting law, if this seemed desirable to the ruling party. The constitution also states that it is not possible to modify the state religion,³³ nor the civil nature of the state,³⁴ nor the republican regime.³⁵ Still, it will be the political and social practice as well as customs that will matter most in those respects.

To be consolidated legally, the constitution needs jurisprudence and precedents, creating constitutional traditions—and thus strengthening the body of constitutional law and the corresponding guarantees. A Constitutional Court³⁶ composed of nine independent judges, most of whom are legal experts, has been established with the aim of protecting the constitutional provisions against possible abuses by parliamentary majorities. This court may be petitioned by the President of the Republic, the head of government, thirty deputies, and by the courts, if one of the parties to the proceedings before the court requests the referral of the provision(s) on which the outcome of the case depends to the Constitutional Court for a review of their constitutionality. Its decisions are irrevocable and binding on all the authorities. The court replaces the infamous Constitutional Council of Ben 'Ali. The Constitutional Council was an advisory body, which contributed to the concentration of power and whose verdicts were not meant to upset the power by which it had been established.

4. Appraisal and Criticism

The 2014 Constitution is not without shortcomings and imperfections. The revolution and counter-revolution seem to be destined to live together. But religious values and those of modernity can hardly cohabit. Contradictions and disruptions certainly will complicate the task of the Constitutional Court, which will have a hard time settling or resolving two incompatible legal logics. It might prove necessary that these judges be both lawyers and confirmed Islamic scholars. The resulting elasticity will undoubtedly damage the necessary coherence of the whole. The reference to the religious weighs heavily on the preamble and on the body of the constitutional text. One has the impression that the constitution, while

³⁰ Twelve articles in total.

³¹ Chapter 6 of the 2014 Constitution.

³² Art. 49 of the 2014 Constitution.

³³ Art. 1 of the 2014 Constitution.

³⁴ Art. 2 of the 2014 Constitution.

³⁵ Art. 1 of the 2014 Constitution.

³⁶ Arts. 118–124 of the 2014 Constitution.

setting out principles for the citizen, does not lend less weight to the believer, who must take precedence in the Islamist scale of values.

The principle of Islam as a state religion is unacceptable in a state under the rule of law. A free constitution guarantees freedom of belief and not a forced collective belief. The condition that the president must be Muslim is unnecessary in a democracy where his nationality, his skills, and his integrity are sufficient qualifications for office. Minorities are barely taken into account, and the article on freedom of conscience is inconsistent, its exceptions outweighing its principle. The death penalty has not been abolished, contrary to the wishes of human rights organizations, for political Islam does not accept its removal yet. Art. 39 on education and teaching is not worthy of a democratic revolution, for confinement prevails over the opening. There is also the concern that the relationship between the President of the Republic, the government, and parliament is of a very high complexity which will not allow it to function smoothly. The drafters of the constitution wanted to rationalize parliamentary life so much that they made it incomprehensible. And there are still other shortcomings.

But politically, the constitution is important in this schismatic phase of politics between Islamists and secularists after the revolution. It will show the value and scope of reconciliation in a divided and torn country and the importance of coexistence between modernists and traditionalists in the same community.

Obviously, only practice will show the consensual or democratic depth of the constitution. Political behavior of different institutional authorities and parties, alertness, and strength of civil society will be crucial to create customs, traditions, and democratic cultures. What is a right or a freedom if it is not upheld by the opposition and civil society? The big tests of the constitution will probably arise, apart from the elections, with the first major political and legal conflicts which will have to be solved through an application of the constitutional provisions. The Constitution of 1861 quickly became obsolete in April 1864 because it did not resist the revolt of 'Alī Ben Ghadhāhem against the tax burden. The Būrqība Constitution was completely at odds with the authoritarian practice during half a century. Būrqība believed himself to be the constitution, and Ben 'Alī believed only in the safety of police control. These counter-examples will probably still remain in the Tunisians' constitutional and political memory for generations to come.

The Constitution of January 27, 2014, not only started to concretize the institutional and political changes in the country in practice but also reconciled the two opposing camps, secularists and Islamists, by establishing the constitutional framework of peaceful coexistence. Still, the system is certain to experience further changes and developments following the parliamentary, presidential, and municipal elections to be organized on the basis of the new constitution.

IV. CONCLUSION: THE END OF THE TRANSITIONAL PROCESS THROUGH THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS AT THE END OF 2014

A. The Parliamentary Elections

The effects of the Tunisian parliamentary elections of October 26, 2014, are twofold. On the one hand, these elections terminate the process of transition as well as of institutional transformation that began in January 2011 after the revolution. On the other hand, they recognize a democratic and peaceful change. Tunisia constitutionally and politically joined the group of democratic regimes based on popular sovereignty.

The elections saw the emergence of two major political parties: Nidā' Tūnis, the winning party which obtained 85 of the seats in the parliament (39, 17%) and al-Nahḍah, the

second party which secured 69 seats (31, 80%).³⁷ The results of al-Nahḍah are once more surprising. After all that happened in the country during the period of rule of the al-Nahḍah (Islamization, violence, assassinations, terrorism, insecurity, economic bankruptcy, political amateurism, administrative nepotism), the party maintains a strong position in the political spectrum, despite the loss of twenty seats compared to 2011. To remain the second grand party after a bitter failure constitutes a notable performance. This success demonstrates that the party can still mobilize and has firm roots in a substantial part of the electorate. Al-Nahḍah can be considered a popular party.

However, this does not reduce the significance of the breakthrough of Nidā' Tūnis in 2012, which managed to obtain the majority of votes after only a few months of existence, and that, moreover, has become a party of voters. This means that Nidā' Tūnis represents a political party that encompasses voters from all socio-professional backgrounds and over several generations, many cities, and regions, although the southern route and its electoral districts stay blocked by al-Nahḍah. The main reason for this success is to find in the personality of the party leader, al-Bājī Qā'id al-Sabsī. He is, in fact, a rallying person with a strong political culture and, above all, a lot of experience as statesman. The effect of the "useful" vote is twofold: It made it possible to avoid the fragmentation of the parliamentary landscape which occurred in the 2011 elections and to strengthen the positions of the liberal Nidā' Tūnis to the detriment of those of the Islamists. Furthermore, it permitted the emergence of a balanced democracy around two major political parties as is the case in Britain or the United States.

Besides Nidā' Tūnis and al-Nahḍah, the Tunisian political landscape after the 2014 parliamentary elections encompasses other new and old political parties.

The spectacular rise of the political party of the businessman Slim Riāḥī, the *Union des patriotes Libres* (UPL), which has become the third strongest political party with seventeen seats in the parliament, represents one of the big surprises of the elections. The growth of the UPL was favored by its financial strength, which it gained in the domain of football. Henceforth, the party will represent a new populist tradition in the parliament. The *Front Populaire* (Jibhah), with fifteen seats in the parliament, has established itself as the fourth political party of the country. Jibhah embodies the anticapitalistic left and supports severely disadvantaged parts of the population. The discourse of the party appeals to the social outcasts. It probably appealed to the voters of the center left parties (CPR, Al-Massār, and al-Takattul) as well as of the centrist parties (Jumhūrī). This could explain the weakening of the latter and the rise of the *Front populaire*.

Āfāq Tūnis is also an important party that won four seats in the space of three years. This liberal and elitist party is appreciated by the hard-core liberals. Since its creation during the revolution, it has sought to mobilize, to recruit, and to explain its choice patiently. Yassin Brāhīm, its leader, who is a novice at politics and graduated from a prestigious French high school, contributes to the success of the party.

B. The Presidential Elections

Al-Sabsī, the leader of Nidā' Tūnis, the party which won the parliamentary elections, was the president whom Tunisians chose in the presidential elections of December 21, 2014, to collaborate harmoniously with the majority in the parliament. This choice will enable the

³⁷ "Tunisia results confirm Nidaa Tounes win", *AlJazeera* (October 30, 2014), available at <http://www.aljazeera.com/news/middleeast/2014/10/tunisia-results-confirm-nidaa-tounes-win-20141030224239953.html>, accessed May 21, 2015.

new power to stabilize and rebuild a country which currently finds itself in what has to be described as a general dilapidated state. Given the hybrid parliamentary system set up by the 2014 Constitution, the head of government will exercise the main executive powers. The President of the Republic will ensure the normal functioning of the state institutions through the exercise of his constitutional powers.

Al-Sabsi was elected by a majority of 55, 68% of the votes,³⁸ which corresponds to 1,731,528 votes. In the first round 1,289,384 voters voted for him (39, 46%). In the second round, he extended his base by 442,144 additional votes. Marzūqī, a candidate who owed his presence in the second round to the voters of Al-Nahḍah, got 44, 32% of the total vote, corresponding to 1,378,513 votes. In the first round, 1,092,418 voters voted for him. In the second round, 70% of Marzūqī's voters identified themselves with Al-Nahḍah.³⁹ In total, 3,189,672 voters voted in the second round, while 5,307,842 were registered. This corresponded to a participation rate of 60, 11% (with 79,340 blank votes), slightly less than in the first round (62, 91%) and lower than the parliamentary elections (67%).

Following these two elections, the new power, which was strengthened by its political allies (Āfāq Tūnis, UPL), was induced by institutional constraints to opt for a consensual government and open up to parties like the al-Nahḍah Party. The Nida' Tūnis government needed the backing of al-Nahḍah in the parliament to get the absolute majority. The required majority for the confidence vote in the Assembly of the Representatives of the People consists of 109 votes according to Art. 99 of the constitution.

The fledgling Tunisian democracy has witnessed substantial difficulties during the past four years, but the Tunisian people as well as the principal political actors remain determined to reach this aim. Today's government, which the author would call a government of national union, being composed of secular politicians and moderate Islamists, holds in its hands the destiny of the country while it attempts to resolve the major challenges of economic and social development.

³⁸ "Tunisia election: Essebsi wins presidential run-off", *BBC News* (London, December 22, 2014), available at <http://www.bbc.com/news/world-middle-east-30579662>, accessed May 21, 2015.

³⁹ P. Markey and T. Amara, "Veteran Essebsi wins Tunisia's first free presidential vote", *Thomson Reuters* (New York, December 22, 2014), available at <http://www.reuters.com/article/2014/12/22/us-tunisia-election-idUSKBN0JZ04F20141222>, accessed May 21, 2015.

Religious Authorities and Constitutional Reform

The Case of Al-Azhar in Egypt

ASSEM HEFNY*

I. INTRODUCTION

Al-Azhar does not only represent the oldest educational system of Egypt, it has also been an influential power in Egyptian politics since its founding in 972 AD. Regularly throughout Egyptian history, critics have been open with their skepticism toward Al-Azhar's impact when they considered its two main functions, namely Islamic worship and education, being exceeded or misused.

Today, Al-Azhar finds itself in an ambivalent position in post-revolutionary Egypt. It is drawn between regaining independence from a secular, military state on the one hand and acting as one column—and beneficiary—of said state on the other. Pointing to its ambivalence, Al-Azhar has been involved in the process of constitutional reform in Egypt under the Supreme Council of the Armed Forces' (SCAF) lead since 2011. At the same time, Al-Azhar is also confronted with the task to redefine its position toward different religious groups risen to societal and political power throughout the last decades—namely the Muslim Brotherhood and the Salafists.

What has shaped Al-Azhar's relation toward the state and other significant political powers throughout Egypt's history? Which impact does Al-Azhar have in the present—first and foremost in regard to a rapidly changing constitutional and state-reforming process since Ḥusnī Mubārak's fall?

* The author and the editors sincerely thank Mr. Mohammad A. El-Haj for translating this article into English.

Referring to Al-Azhar's historical evolution toward a major Sunni clerical power throughout the Muslim world on the one side and its decreasing independence on the other side, this contribution first examines Al-Azhar's relation toward Egyptian state institutions as well as its pressing issues and political stand. Second, Islamic foundations on statehood and clerical power will be presented. Subsequently, a detailed evolution of Al-Azhar's constitutional ideology will be drawn by taking into consideration two documents of major importance, namely the 1979 Al-Azhar draft constitution and Al-Azhar's 2011 "Document on the Future of Egypt". Third, by examining the latter and comparing it to the content of both the 2012 and 2014 constitutions, Al-Azhar's impact as a patron and shaper of constitution-making in Egypt after 2011 will be discussed and illustrated.

II. EVOLUTION OF AL-AZHAR'S RELATION TOWARD THE SOVEREIGN POWER

Al-Azhar has been associated with politics and governance throughout its history; it has been an all-inclusive mosque since its establishment by the Fāṭimid Shī'ites in 972 AD, a center for congregational prayer that the *walī* (prefect) led as *imām*, in his capacity as deputy of the caliph. Whenever the *walī* was unable to lead the prayer, he designated the police chief to act on his behalf. Al-Azhar was

a major media center where official orders and publications were announced; it was also a headquarter for a number of governance *dawāwīn* [courts, bureaus]; the judge held sessions in the yards of the mosque on certain days each week, and the tax collector exercised his functions in the same mosque.¹

Al-Azhar's current status exceeds its historical foundation by far. Today, Al-Azhar includes numerous educational and religious institutions belonging to or affiliated with it. First and foremost, these are Al-Azhar Mosque and Al-Azhar University. Historically mainly representing a pillar of religious education in Egypt, Al-Azhar University's scope has widened by including new faculties of humanities or medicine.²

Besides the mosque and the university, four other integral parts of Al-Azhar are of primary importance: the Council of the Islamic Research Academy (*majma' al-buḥūth al-islāmīyah*), consisting of Islamic clerics and responsible for settlements in controversial issues of Islamic interpretation and accordance with law; the Council (Association) of Senior Scholars, which was dissolved in 1961 by Jamāl 'Abd al-Nāṣr, only to be re-established in 2012 by the SCAF; the Fatwa Committee, whose promulgations are of high reputation throughout the Islamic world; and Al-Azhar Islamic Institutes, representing Islamic schools for primary and secondary education. The highest position of Al-Azhar is filled by the Grand *Imām*, currently held by Dr. Aḥmad Muḥammad al-Ṭayyib. The Grand *Imām* is considered to be one of the most supreme authorities of Sunni Islam and Sunni Sharī'ah Interpretation.

Most of these institutions of Al-Azhar have evolved over time and have been subject to numerous and eventful changes in Egyptian state and government, with some of them effectively cutting Al-Azhar's autonomy from the state.

¹ Abdel Azeez Al-Shinawi, *Al-Azhar as an All-inclusive Mosque and University* (General Book Corporation, Cairo 2013, Part I) 13 et seqq., 108 ('Abd al-'Azīz al-Shināwī, *Al-Azhar jāmi'an wa-jāmi'ah, al-hay'ah al-'āmmah li-l-kutub, al-qāhirah*, 2013, *al-jiz' al-awwal*, §. 13 wa mā ba'dahā).

² See Nathan J. Brown, "Post-revolutionary Al-Azhar" (2011), *The Carnegie Papers: Middle East*, http://carnegieendowment.org/files/al_azhar.pdf, accessed July 28, 2015.

During the period of the Ottoman rule, *Sultān* Sulaymān the Magnificent (r. 1520–1566) established the *Dīwān Miṣr al-Mahrūsah* (Court of Protected Egypt), which was also known as the High Court or Cairo Court, a government council comprised of senior Al-Azhar scholars and the four *muftis*³ (Islamic scholars entitled to make judgments) that participated in the governance of Egypt. Even in the practice of its scholarly role, Al-Azhar was not, as propagated, independent of the ruling power. Throughout the Shī'ite Fāṭimid era and the later Sunni era, the rulers ensured that all educational material was reviewed in regard of the authors' loyalty to them. In addition, they used to select the *shuyūkh* (senior scholars), who conducted the seminars held at Al-Azhar.⁴

Let alone the complex role of Al-Azhar during the French military campaign against Egypt, the majority of the Al-Azhar scholars played dual rebellious and revolutionary roles and what amounted to flattery and alignment during the rule of Muḥammad 'Alī the Great, although they were supportive of his ascension to the throne of Egypt. From the Ayyūbid state to the era of Muḥammad 'Alī, Shari'ah scholars played a prominent role in the making of political events, in terms of appointing rulers and/or mediating between the public and the rulers.⁵ They were indulged in the course of political life due to their position as an educated class and fiduciaries of the public. Their standing as such reached the climax in the nineteenth century during the last decades of the Mamluk era and the beginning of the reins of power being taken by Muḥammad 'Alī.⁶

Exercising sovereign power at the time was confined to two layers of the society: the military and the scholars. The military took up arms, collected taxes, and regulated the affairs of the state, while scholars acted as intermediaries between the public and the rulers, given people's respect of religion at the time and the fact that knowledge of religion was restricted to scholars. The rulers used to manipulate such knowledge to consolidate their power. For religion has been and still is the most powerful element in the formation of the Egyptian identity. Besides, the ordinary people were simpleminded and knew nothing about the concept of power or the concept of state as they are currently known in the Western fashion. Thus, a scholar acted as a judge when it came to giving legitimacy to the ruler and acted as a rebel when it came to driving masses toward deposing a ruler if he so wished.⁷ Accordingly, the *Shaykh* of Al-Azhar, the judges affiliated with the four schools of thought of *fiqh* (Islamic jurisprudence), and the Chieftain of the *shurafā'* (descendants of the Holy Prophet) were the most important and influential actors during that era.

The standing and power of scholars during that period could be illustrated by the fact that they were capable of deposing the Ottoman *walī* without reverting to Mamluks in that respect. Scholars' ties with Mamluks were weakened dramatically over time to the extent that the Lebanese historian Niqūlah bin Yūsuf Al-Turk reportedly said that 'Omar Makram (1750–1822), the Chieftain of the *shurafā'*, had personally supervised setting up a group of men from the general public with the help of the head of vegetable vendors, to depose the Ottoman *walī* from office, whereas Muḥammad 'Alī's forces themselves were unable to

³ Al-Shinawi (n 2) 158.

⁴ *Id.* 61.

⁵ *Id.* 175 et seqq.

⁶ Efāf Luṭfi Al-Sayyid, "Religion scholars and their role in Egypt at the turn of the nineteenth Century" (1989) 4 Al-Itihad Magazine 215 ('Afāf Luṭfi as-Sayyid, *al-ʿulamā' wa daurihim fī miṣr muṭālī' al-qarn al-tāsi' ashar; majallat al-ijitihād, 'adad al-rābi' ʿāmm 1989, ṣ.*).

⁷ *Id.* 228.

carry out such a coup.⁸ Scholars lived in a great state of euphoria after the success of such movement. Muḥammad ʿAlī approached them in various ways, in order to muster their support toward his appointment as the *Walī* of Egypt. But, as he had established himself and consolidated his rule, he embarked on eliminating Al-Azhar scholars' power gradually. With Muḥammad ʿAlī establishing a modern state, creating civic education, and introducing modern sciences, which Al-Azhar knew nothing about, the scholars' role dwindled, whether as mediators between the people and the sovereign power or as a supreme class in the society. They were now replaced by a state structure consisting of staff, ministries, departments, local councils, and central authority assisted by European consultants. Thus, Al-Azhar became an element of the sovereign power system, a tool through which religion was manipulated to strengthen the pillars of that system. Shariʿah sciences also became one of a number of tools for developing an authoritarian educational discourse. Moreover, Al-Azhar locked itself up and established its new symbolic capital through monopolizing teaching of religion and preserving the heritage, which ensued in scientific stagnancy and deadlocking the evolution of Shariʿah sciences instead of keeping pace with the requirements of modern times.⁹

Reformist changes only occurred at the outset of the nineteenth century. Pressing issues such as students' overcrowding at Al-Azhar University and shortness of financial budgets would force Al-Azhar to not only reform its educational system by altering its examination orders but also its administrative structures.¹⁰ This gave way to a debate within Al-Azhar between conservatives and modernists in the *ʿulamāʾ* (scholars), with the former group opposing major reforms while the latter urged for them.¹¹ ʿAbdullah Nadīm, Azhar graduate and political writer, suggested a number of reforms addressing Al-Azhar's issues, among them the reduction of enrollment in upper-level education, more government spending, and reforms at the administrative level.¹² Reportedly, Nadīm approached Khedive ʿAbbās Ḥilmī II with his outline of reform, as the former sought to undermine the British in areas that lay beyond control of the colonial power. Thus, Nadīm's reformist plans were found convenient by the Khedive. In 1895, he intervened in Al-Azhar's affairs by establishing the Administrative Council (*Majlis Idārat Al-Azhar*) through decree, which should perform as a supervisory body on the improvement of education and reorganization of Al-Azhar.¹³ Appointed to the council were the *Shaykh* of Al-Azhar, the four muftis of the *madhāhib*, and two representatives of the Egyptian government.¹⁴ At the same time, Khedive ʿAbbās founded *Dār Al-Iftāʾ*, an institution mainly intended to provide solutions to issues in Islamic Law by issuing *fatāwā* (legal opinion issued by Islamic scholars), therefore being

⁸ Reportedly, Al-Turk had been sent to Cairo by the Lebanese Amīr Bashīr Shihāb to report on the occupation of Egypt. See Carl F. Petry, *The Cambridge History of Egypt (Part 2)* (Cambridge University Press, Cambridge 1998) 114.

⁹ Mustafa Abdel Zaher, "Al Azhar before the state: Institution and Authority", Momninoun (February 4, 2014) (Mustafā ʿAbd al-Zāhir, *Azhar mā qabl al-dawlah: al-muʿassasah wa ʿl-sulṭah*, 4 fabrāyir 2014).

¹⁰ See Indira Falk Gesink, *Islamic Reform and Conservatism: Al Azhar and the Evolution of Modern Sunni Islam* (Tauris, London 2014) 123 et seqq.

¹¹ *Id.*

¹² *Id.*

¹³ Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dar al-Ifta* (Social, Economic and Political Studies of the Middle East and Asia, Brill, Leiden/New York/Cologne 1997) 46.

¹⁴ According to Skovgaard-Petersen, the idea for the Administrative Council stemmed from Shaykh Muḥammad Abduh, who during that time held the position of the Grand Mufti. See Jakob Skovgaard-Petersen (n 14) 46.

assigned to the Ministry of Justice's control. Headed by the Grand Mufti—appointed by the government—*Dār Al-Iftā*'s clerics were to act as arbitrators in Shari'ah courts.¹⁵ In line with Indira Falk Gesink, the establishment of both new institutions could be announced a "major coup".¹⁶ It not only politicized Al-Azhar's affairs through intertwining its administration with the government, moreover it stipulated Al-Azhar's antagonistic relationship toward the state.

Growing influence of the state in Al-Azhar matters also marks its evolution in the ensuing twentieth century after Egypt's formal independence from British occupation in 1922. Among numerous measures aiming to limit Al-Azhar's independent stand, the 1961 reform of Law 103, promulgated under Jamāl 'Abd al-Nāṣr's presidency, remains the most momentous. Not only did it dissolve the Council of Al-Azhar Senior Scholars and fully transfer the right to appoint Al-Azhar's *Shaykh* to the president, moreover it undermined Al-Azhar's financial autonomy by cutting it off directly from transferred religious endowments (*awqāf*) and by restructuring salaries of *a'immaḥ* (Plural of imam, leaders of prayer) and professors. Besides, it reformed Al-Azhar's educational content by adding to it natural sciences and other faculties with nonreligious subjects and formally put Al-Azhar under the control of the Ministry of Religious Endowments.¹⁷ This is considered a major step of consolidating Al-Azhar's growing dependence from the state.¹⁸

Although Al-Azhar and its scholars became increasingly dependent on the state and are considered to have been used by the regime of President Naser as a tool of religious legitimization for his socialist policy, they have not been perceived as a state institution on the whole. Partly, this is due to the fact that Al-Azhar did not withdraw entirely from the political arena or obediently subordinate to the state. Especially under Anwar Sādāt's regime, Al-Azhar openly defended its position as a religious monopoly not only toward the military government but also and with growing concern toward emerging radical Islamist movements of the 1970s.¹⁹

However, its increasingly confrontational course did not bring about success: After several controversial encounters with Sādāt's regime and its struggle with new radicalism, Al-Azhar found itself in a rather isolated stand. The silencing of Al-Azhar in political areas by the Egyptian state only ended under Mubārak's rule (1981 to 2011), when the government launched a series of campaigns aimed at the containment of violent and radical forms of Islamism as well as the Muslim Brotherhood and the Salafists, who had gained power in the earlier decade.²⁰ The heads of Al-Azhar, obviously suitably chosen by Mubārak himself, repeatedly supported the ruling regime by openly criticizing the radicals, in return urging for

¹⁵ *Id.* 100 et seqq.

¹⁶ *Id.* 130.

¹⁷ See Nathan J. Brown, "Post-revolutionary Al-Azhar" (2011), The Carnegie Papers: Middle East, http://carnegieendowment.org/files/al_azhar.pdf, accessed July 28, 2015, and Malika Zeghal, "Religion and Politics in Egypt: The Ulema of Al-Azhar, Radical Islam, and the State" (1999) 31 *International Journal of Middle East Studies* 374.

¹⁸ See also Ahmed Morsy, "An Independent Voice For Egypt's Al Azhar?" *Carnegie Endowment for International Peace, Middle East Analysis* (July 13, 2011), <http://carnegieendowment.org/sada/2011/07/13/independent-voice-for-egypt-s-al-azhar/eiat>, accessed July 28, 2015.

¹⁹ Malika Zeghal, "Religion and Politics in Egypt: The Ulema of Al-Azhar, Radical Islam, and the State" (1999) 31 *International Journal of Middle East Studies* 382.

²⁰ *Ibid.* (n 20) 385. See also Ahmed Morsy, "Egypt's Al Azhar Steps Forward", *Carnegie Endowment for International Peace, The Global Think Tank* (November 7, 2013), <http://carnegieendowment.org/2013/11/07/egypt-s-al-azhar-steps-forward>, accessed July 28, 2015.

an “increasing Islamicization of society” and the right to open speech for the *‘ulamā*.²¹ At the same time, a group of Azharī *‘ulamā*’ opposing government policies gained public attention for its critical attitudes—the “Al-Azhar *‘Ulamā*’ Front”.²² The emergence and ascent of the *‘Ulamā*’ Front can be taken as an evidence for a far-reaching conflict of opinions within Al-Azhar in regard to its state relations. When in 2011 the Egyptian revolution surprised not only the regime but also Al-Azhar scholars, the constant conflict of Al-Azhar with the state would prove a clue for the *‘ulamā*’s ambivalent reaction: In the wake of growing protests, *Shaykh* Aḥmad Muḥammad al-Ṭayyib would not officially support demonstrations, but would neither stand by the regime publicly. However, in late 2011 Al-Azhar would publish a “Declaration in Support of the Arab Revolutions”, which would not only entail the positioning of Al-Azhar as backing the protest movements, but would also condemn the behavior of autocratic regimes toward protesters throughout the region as offending Islamic principles.²³

Since the fall of Mubārak, Al-Azhar has gained back some of its independence: Through the 2012 Constitution, the SCAF announced the re-establishment of the Council of Senior Scholars and vested it with the authority to electing the Grand *Shaykh* in case of vacancy.²⁴ Moreover, by ensuring Al-Azhar as a main source for “providing religious advice on contemporary issues”, the new law re-established some of Al-Azhar’s former power and granted its political impact by even giving the Council of Senior Scholars’ preference over the Supreme National Court.²⁵

Having regained some of its influence, Al-Azhar currently keeps emphasizing that it is the symbol of centrism amidst religious extremism being ascribed to streams of political Islam. However, Al-Azhar does not specify exactly what centrism means. Is it a scholarly direction being followed to demonstrate its cognitive roots? Or is it a position Al-Azhar is bound to take in order to contradict the two extremist ends, namely, the excessive detachment from religion on the one hand and the exercise of religious intransigence up to the point of terrorism or stagnancy and autism on the other hand, as is the case with the Islamic movements and the streams of political Islam? Therefore, the centrism that Al-Azhar promotes remains a slogan void of a methodologically scientific base, and an approach through which it seeks to identify itself with power and the transformation of such power from socialism to capitalism and from being religious to being democratically civic. Accordingly, Al-Azhar centrism turns to be the religious component of the power’s symbolic capital components, with which it is fighting its opponents who speak in the name of religion as well.

III. ISLAMIC PRINCIPLES ON STATEHOOD: LACKING TEXTUAL PROVISIONS AND CONSEQUENCES

A. Islam and the Concepts of Nation-State and Constitutionalism

Given the fact that the textual provisions of Islam do not specify a particular form for governance, nor do they concern themselves with developing fixed theoretical foundations

²¹ Ibid. (n 20) 385, 389.

²² Nathan J. Brown, “Post-revolutionary Al-Azhar” (2011), The Carnegie Papers: Middle East 8, http://carnegieendowment.org/files/al_azhar.pdf, accessed July 28, 2015.

²³ See Judge Adel Maged, “Commentary on the Al Azhar Declaration in Support of the Arab Revolutions”, Amsterdam Law Forum Opinion Paper (2012) 71 et seqq.

²⁴ See, for example, Hani Nasira and Said Al-Sonny, “Senior scholars and the new Egyptian constitution”, *Al Arabiya* (January 10, 2013).

²⁵ Ibid.

for state-building, thus leaving to the human mind to shape the same, subject to temporal and spatial requirements, political Islamic jurisprudence does not accommodate the term “state” as consisting of a land, a people, and a system of government. The term “state”, *dawlah* in Arabic, was used as an indicator referring to the ruling family or dynasty such as the ‘Umayyād state, the ‘Abbāsīd state, and the state of Hārūn al-Rashīd. The word *dawlah* is derived from the act of circulation and succession, that is to say rotation, meaning that the ruling families should rotate governance among themselves. This meaning is backed up by the saying of Almighty God: “We bring these days to men by turns” (verse 140, *al-‘Imrān sūrah* of the Qur’ān), as well as by His saying on nontrading of money among the rich only “so that it may not be a thing taken by turns among the rich of you” (verse 7, *al-Ḥashr sūrah* of the Qur’ān). The Syrian thinker ‘Azīz al-‘Azmah sees that the word *dawlah* means a special kind of genetic correlation, i.e., ownership of power and strength within a single family, and that the word *dawlah* is only mentioned in chronicling the history of the ruling families as such.²⁶

The absence from the Arabic language of the concept of statehood in the modern sense resulted in the absence from it of the word “constitution” (*dustūr*), which is originally Persian. While the Western civilization boasts itself as the creator of the constitutional notion, the Islamic discourse has been trying—under the influence of a contesting defensive mentality—to inculcate that the word’s connotation is known in the Arab culture, as evidenced by the existence of the Constitution of Madīnah.²⁷ The word itself has been associated in the Arab mentality as being the foundation of the legislative architecture of the modern state.

Concomitant with the entry of the term “state” in the modern sense into the Arab tongue (*lisān al-‘arab*), efforts aimed at tracing its juristic background led to nowhere as the Islamic jurisprudence is based on the notion of the unity of the “state” that governs the entire Islamic world, i.e., the caliphate. Thus, the jurisprudence has disregarded the task of developing organizational rules to govern the relationships of Islamic countries with each other,²⁸ meaning that past and present thinkers of Islam have not addressed statehood as a problematic theory nor have they examined its political essence within the framework of national community life. Instead, they have been only preoccupied with talking about its relationship with religion and the nation, and as being an identity-related matter.

There are several indications that the notion of the national state is not one of the goals solicited by the Islamic political jurisprudence and thinking, as they have not associated the land with a given people of specific civilization, cultural, religious, and linguistic ties, but

²⁶ See Aziz Al-Azmeh, *Islamization of Islam—Imaginary Worlds of Political Ideology* (Frankfurt 1996) 63 (German reference) (‘Azīz al-‘Azmah, *aslamāt al-islām, ‘awālim mukhtalifah min al-‘aqīdah al-siyāsīyah*, Fränkfurt: 1996, §. 63, *marja‘ almānī*).

²⁷ The mentioned document refers to a collection of articles on the settlement of tribal issues, which the Prophet Muḥammad had written upon his arrival in Madīnah in 622 CE. It is commonly referred to as Sheets of Madīnah (*Ṣaḥīfat al-Madīnah*), Constitution of Madīnah (*Dustūr al-Madīnah*), Document of Madīnah (*Wathīqat al-Madīnah*), or Book of Madīnah (*Kitāb al-Madīnah*). See Adam Hani Walker, “Constitution of Medina” in Coeli Fitzpatrick and Adam Hani Walker (eds), *Muhammad in History, Thought and Culture: An Encyclopedia of the Prophet of God* (ABC Clío, Santa Barbara 2014) 113 et seq.

²⁸ See Abdul Razak Ahmad Sanhourī, *The jurisprudence on the caliphate and its evolution into a League of Oriental Nations*, a study by Tawfīk Mohamed Chaoui/Nadia Abdul Razzaq Sanhourī (Message Foundation, Cairo 2008) 247 (‘Abd al-Razzāq Aḥmad al-Sanhūrī, *fiqh al-khilāfah wa-taṭawwurha li-tusbiḥ ‘aṣabat umam sharqīyah, taḥqīq wa-tawfīq* Muḥammad al-Shāwī/Nādiyah ‘Abd al-Razzāq al-Sanhūrī, al-Qāhirah: *mu‘assasat al-risālah*, 2008, §. 247).

rather associated it with religion and the call for religion, followed by a general division of the land into “house of Islam” (*dār al-Islām*) and “house of war” (*dār al-ḥarb*). They have not talked about a people of specific characteristics from a perspective of human community rules, but rather about a “nation” solely interlinked by Islamic faith without a specific geographic homeland. The term for the vision of a “nation” linked by Islamic faith is commonly referred to as *ummah* (originally *al-ummah al-Islāmīyah*). Other than the concept of a nation-state, its circumscription alludes to a notion on a global Muslim community sharing transnational collective norms and beliefs, therefore constructing a collective Muslim identity.²⁹

B. Jurisprudents and Scholars Integrating Themselves within Power

Lack of reference in the textual provisions of Islam to the concepts of statehood and constitution led jurisprudents and scholars to become preoccupied with semantic and devotional jurisprudence issues at the expense of political aspects, which reflected their loss of a large part of a ruler’s power. Thus, in the hope of staying in the power circle, they exploited their spiritual power over the entire Muslim public in their capacity as interpreters of religious texts, insofar as Islamic terms of reference related to faith and Shari‘ah do not basically pertain to institutions, but to texts, especially the Qur’ān and Sunnah, which is the normative way of life for Muslims on the basis of the teachings and practices of the Islamic Prophet Muḥammad. Also, as religion in ancient times stood as the only source of knowledge, scholars have singled themselves as the holders of that knowledge. Consequently, they have developed into influential spiritual and community figures within the state, making it inevitable for the real holder of authority (“the man in authority”) except to deal with them from the standpoint of his need to confer religious legitimacy upon his rule. As a result, his relationships with them were based on persuasion, intimidation, allurements, and torture.

However, in order for scholars to assert their right to participate in power, they have involved themselves in interpreting the phrase “those in authority”, which refers to those who must be obeyed, according to a Qur’ānic verse which reads: “O ye who believe! Obey Allāh and obey the Apostle and those in authority from among you” (verse 59, *An-Nisā’ sūrah* of the Qur’ān). Hence, the British-American historian Bernard Lewis rightfully sees that this Qur’ānic verse constituted, through interpretation and practice, the starting point of the bulk of Islamic political thinking.³⁰ While a ruler consistently attempted to exploit the sign of obedience to his benefit in his capacity as “the man in authority” at the expense of scholars, the latter maintained that they were among “those in authority” who must be obeyed. Thus, according to ‘Omar Makram, a popular leader during the French invasion of 1978, “those in authority are the scholars, the Shari‘ah holders and the just *sulṭān*”.³¹

While Islamists reject the term “religious state” under the pretext that it would render scholars (i.e., clergy) in control of the state and the state would not, accordingly, resolve any matter unless they were involved, yet they include scholars among “those in authority” who must be obeyed. They do not exclude a single matter of the affairs of the state, which should not be presented to scholars in order to make a judgment thereon whether it is permissible or forbidden. Hence, the “civil state with Islamic terms of reference”, which they advocate, should not resolve any matter without approval of scholars. In other words, while they reject a “clergy state” by name as it suggests undesirable connotations, yet they actually

²⁹ See Jeffrey Haynes, *Routledge Handbook of Religion and Politics* (Routledge, London/ New York 2009) 163.

³⁰ See Bernard Lewis, *The Political Language of Islam* (Europäische Verlagsanstalt, Hamburg 2002) 155.

³¹ *Id.* 210.

seek to realize the core of such a “religious state”, thereby contradicting the constitutional notion. Accordingly, the matter of statehood remains one of names and descriptions, like many other issues.

IV. EVOLUTION AND INFLUENCE OF AL-AZHAR’S CONSTITUTIONAL IDEOLOGIES

The dramatic evolution of Al-Azhar’s political ideology under the influence of political vicissitudes can be noticed through comparing the draft “Islamic constitution” developed by Al-Azhar in 1979 through a group of its scholars with a view to guiding the Islamic world states, as opposed to Al-Azhar’s “Document on the Future of Egypt”, which Al-Azhar prepared in collaboration with intellectuals from all Islamic, liberal, secular, and Christian streams, after the January 25 revolution in 2011.³² The document served as a basis for the 2012 Constitution in that some of its articles were derived from the principles contained in said document.

A. Comparing Al-Azhar’s Constitutional Visions: The 1979 Draft Constitution and Its 2011 “Document on the Future of Egypt”

The 1979 draft constitution in question dates back to a recommendation issued by the Islamic Research Academy of Al-Azhar *Al-Sharif* in October 1977, calling upon Al-Azhar, especially the Islamic Research Academy, to develop an Islamic constitution to be placed at the disposal of any state wanting to apply Islamic Shari‘ah. The draft constitution was completed within one year and was published by the Al-Azhar magazine in April 1979.³³

The draft constitution consisted of nine sections containing ninety-three articles, from which a few examples are stated hereunder to illustrate the strength of the Islamic religion’s content in its formulation as well as its departure from the spirit of democracy that emerged in Al-Azhar documents of 2011. They read as follows:

Section I: The Islamic Nation

Art. 1

- (a) Muslims shall form one Islamic nation.
- (b) The Islamic Shari‘ah shall be the source of all legislation.

Art. 2

The Islamic nation may combine multiple states even if the form of government varies among them.

Art. 3

An Islamic state may form a union with one or more Islamic states under any form they agree upon.

Art. 4

The people shall be in charge of monitoring the *imām*, his aides, and heads of states. The people shall also take charge of holding the aforementioned individuals accountable in accordance with the provisions of the Islamic Shari‘ah.

³² Both documents are attached to this article in the Annexes.

³³ See article by Khaled Azab, “Al-Azhar Islamic constitution,” *Al-Hayat* (November 9, 2013), <http://alhayat.com/Details/569986>, accessed July 28, 2015.

As can be noted, this first section of the Al-Azhar Islamic constitution did not address the existence of a modern state, but rather focused on the Islamic nation and its unity. In other words, it aimed at the achievement of the caliphate. It also considered Shari'ah as the source for any legislation, thereby excluding any other human sources of legislation. On the union of states, it restricted union to Islamic states only. Further, it ruled out the term "head of state", using instead the term "*imām*", while it still used the word "people".

In contrast, Al-Azhar's opinion as laid down in its "Document on the Future of Egypt" evolved dramatically toward the achievement of a modern democratic state with a constitution. This is revealed in the first principle therein which provides for

support for the establishment of a constitutional national state of modern democracy, which depends on a constitution accepted by the nation. Such constitution shall separate between the state authorities and its governing legal institutions; set governance framework; and guarantee the rights and duties of all citizens equally and give the legislative power to the representatives of the people in accordance with the true Islamic concept. It has not been witnessed in Islam—neither legislatively nor in the context of its civilization and history—what is known in other cultures as a priesthood religious state which oppressed its people and from which humanity suffered a lot in certain stages of history. Islam let people manage their societies and choose the mechanisms and institutions to achieve their interests provided that the overall principles of Islamic Shari'ah are the main source of legislation in a way that guarantees for followers of other divine religions to appeal to their religions on personal status matters.³⁴

Here the vocabulary of a modern state is used, such as: democracy; constitution; separation of powers; equality among the people; grant of power of legislation by the constitution; the overall principles of Shari'ah as a main (but not the only) source of legislation; as well as the phrase "overall principles", which allows the human mind a wide scope of understanding Shari'ah and its purposes and of formulating all that is consistent with public interest.

Section II: The Foundations of Islamic Society

Art. 6: Commanding good and forbidding evil shall be obligatory. An individual who can command good and forbid evil and, nevertheless, does not do what is in his capacity to that effect, shall be considered a sinner.

Art. 8: Protection of the family shall be the duty of the state and shall be pursued through encouraging marriage, providing its material means of housing and any aid possible, honoring married life, providing the means for the proper liability of woman to serve husband and her children and considering family care as the woman's first priority.

Art. 14: Finery shall be forbidden and chastity shall be required. The state shall issue laws and decrees in order to defend public sensibilities from vulgarity in accordance with the rules of Islamic Shari'ah.

Art. 16: Public sovereignty shall be based on achieving the interest of citizens, especially protecting religion, mind, soul, property and honor.

It is clear that Section II directs great attention to the religious identity of the society as demonstrated by the principle of commanding good and forbidding evil. This is a

³⁴ The text of the document is based on the version which was published by the Al-Azhar Shaykhdom [Chiefdom] on June 9, 2011.

loose principle governed by interpretations the majority of which sees that the mind has no role in determining what is good and what is evil as both are determined by Shari‘ah, or, in other words, by tradition, which may cause great difficulties in the coexistence of individuals with different religions or sects in one homeland. It also embodies the notion that it is the state’s responsibility to act toward woman’s subordination to her husband, which ensues in the loss of women’s right to equality with men. It prohibits finery, without specifying what finery is. Consequently, removing the veil could become a crime punishable by law, thus limiting personal freedoms. Finally, it mentions “public sovereignty”, but not governance in the modern sense. It also alludes to the protection of religion, meaning to protect Islam. Thereby, Islam is differentiated from other religions, based on the assumption that they are recognized—which is a contradiction of the principles of a democratic state.

In contrast, the Al-Azhar document from 2011 does not mention the principle of commanding good and forbidding evil. The second principle therein points to the need of embracing a democratic system and pluralism, which ensure equality in a state of law for women on one hand, and for those different in religion and sect on the other hand, as evident in the following two principles set forth in that document:

Second: [Al-Azhar] embraces democracy based on free and direct voting which represents the modern formula to achieve the Islamic precepts of *shūrā* (consultation). Islamic precepts include pluralism, rotation of power, determining terms of reference, monitoring performance, holding responsible officials accountable in front of the people’s representatives, seeking people’s benefit and public interests in all legislations and decisions, ruling the state in accordance with laws solely, tracking corruption, and ensuring full transparency and free access to, and exchange of, information.

Third: the commitment to fundamental freedoms of thought and opinion with full respect of human, women’s and children’s rights; to emphasize the principle of pluralism and full respect of divine religions; and to consider citizenship as the basis of responsibility in the society.

As can be seen, the third principle of the Al-Azhar document embodies recognition of the fundamental freedoms, the rights of women well as respect of religions, although this is confined to (revealed religions) rights. Yet, this move is remarkable and can be regarded as a positive development compared to what Al-Azhar proposed in its draft Islamic constitution. Above all, Al-Azhar now supports the concept of citizenship, including all its embodiments, which is of clear difference from its previous position.

Section III: The Islamic Economy

Art. 23: Paying or receiving usury shall not be permitted nor shall participating in any transaction covering up usury.

Art. 26: The state shall decide the disbursement policy of *zakāt* [alms] money that is provided by individuals in its legitimate banks.

Art. 27: Establishing endowments for lawful causes shall be permitted and shall be regulated in all respects according to law.

Section III emphasizes Al-Azhar’s keenness to confer pure Islamic character upon the wording of the draft constitution. To start with, the economy must be Islamic. It forbids the state to deal with what Al-Azhar interprets as usury. This outstretches the influence of scholars over legislation and the state’s physical policy, because their opinion must be sought in determining whether the state’s financial dealings embody usury or the like. Furthermore,

the draft constitution renders the state responsible for the management of the obligation related to Islamic *zakāt*, in terms of its collection and disbursement.

In contrast, Al-Azhar document does not address what is known as the Islamic economy or usury. It takes into account the evolution of economic concepts and the economy's relationship with the state. It does not link the economy to Shari'ah, but merely presents a general formulation in this regard. It states the need to take into account "the jurisprudence of priorities" in tackling unemployment and in promoting the economy. The "jurisprudence of priorities" allows the human mind to play a major role in the management of economy toward achieving public interest without being bound by a particular text or religious provision.

To that effect, the document envisions:

Eighth: Putting in place the jurisprudence of priorities in achieving development and social justice, facing tyranny, fighting corruption and eliminating unemployment, in a way activating the society's potentialities and creativities in economic aspects as well as in social, cultural and public information programs, shall be at the top of the people's adopted priorities in the current renaissance, and providing genuine health care shall be the state's duty toward all citizens.

Section IV: Individual Rights and Freedoms

Art. 29: Freedom of religion and thought, the freedom to work, the freedom to express opinion verbally, metaphorically, or otherwise, the freedom to establish societies and trade unions and to participate in them, personal freedom, and the freedom of movement and congregation are all basic and natural rights that shall be guaranteed by the state within the framework of the Islamic Shari'ah.

Art. 38: Women shall have the right to work within the framework of the Islamic Shari'ah.

It is clear here that individual freedoms are restricted and are linked to the Islamic Shari'ah, which is traditionally understood as not permitting an individual to convert from Islam to another religion and which describes such an act of apostasy, punishable by death. This is also the case for all aforementioned freedoms, which may be restricted depending on the interpretation of Shari'ah; hence, providing for such freedoms turns out to be futile. Likewise this applies to women's right to work, being dependent on Shari'ah, which allows a man the right to prevent his wife from work and travel, and even to leave the house.

The Al-Azhar document is different from these proposals, in that it emphasizes the state's role as the guarantor of freedoms and human rights without these being linked to the Islamic Shari'ah. To this regard, the sixth principle of the document provides for

ensuring the free exercise of all religious rites without any obstacles, and respect for all aspects of worship in various forms, without slighting the culture of the people or distorting their authentic traditions, as well as full care in maintaining freedom of expression and artistic and literary creativity within the framework of our steadfast cultural values.

The criterion in ensuring freedoms here is not the Islamic Shari'ah, but rather the civilized value system which, comparatively speaking, constitutes a great qualitative difference. Noteworthy in this regard is another source of Al-Azhar's constitutional ideology, its 2012 "Statement on Basic Freedoms" (often also translated as "Declaration on the Legal Ordinances of Fundamental Freedoms"): In response to growing suspicion of liberals and religious minorities toward an increasing Islamization of the Egyptian state, Al-Azhar

pointed out that “[. . .] the freedom of believe, the freedom of speech and expression and the freedom of artistic-literary creativity [. . .]” are to be guaranteed in line with Shari‘ah.^{35,36}

Section V: The *imām*

Art. 44: The state shall have an *imām* [religious guide]. Obedience to the *imām* shall be required even if there is disagreement with him.

Art. 45: Obedience to someone who disobeys God shall be unacceptable. An *imām* who commits an action that is unanimously declared forbidden under Shari‘ah shall not be obeyed with this specific action.

Art. 46: The law shall clarify the path for public pledge of allegiance [*al-mubaya‘ah*] to choose an *imām*. The public pledge allegiance shall be carried out under the supervision of the judiciary. The candidate with the required majority of votes of those participating in allegiance shall be elected.

Art. 47: It is a condition that candidates running for the presidency of the state shall be: Muslim, male, past the age of majority, of sound mind, pious, and knowledgeable about the rules of the Islamic Shari‘ah.

Section V demonstrates clearly Al-Azhar’s departure at the time from the path of democracy and the concept of a modern state in the formulation of its Islamic constitution. It uses the term “*imām*” instead of “president”, which requires that worldly power and spiritual/religious power be integrated in the ruling person, a characteristic incompatible with the notion of a modern state that separates the two powers and renders the head of state solely responsible for worldly power. Also, this section requires that the *imām* shall be obeyed in all circumstances, even if he is corrupt and unjust, that is to say, it bans criticism and does not allow the ruling person to be opposed unless he has violated Shari‘ah, meaning that the ruling person has violated the worship pillars of Islam such as banning prayer or pilgrimage, which will never be undertaken by any Islamic ruler. On the contrary, Islamic history has proven that the majority of suppressive and politically corrupt dictators have been keen on exercising Islamic rituals and participating in religious ceremonies as a kind of gaining of religious legitimacy and avoiding the wrath of the people. Furthermore, this section speaks about allegiance, not about election, and it sets as a condition that the ruling person shall be Muslim and male, thus preventing a woman or a non-Muslim becoming president, criteria totally contradicting the concept of a democratic state of law.

In contrast to that, the first principle of the Al-Azhar document emphasizes

support for the establishment of a constitutional national state of modern democracy, which depends on a constitution accepted by the nation. Such constitution shall separate between the state powers and its governing legal institutions; set governance framework; and guarantee the rights and duties of all citizens equally.

Also, the second principle thereof “embraces democracy based on free and direct voting which represents the modern formula to achieve the Islamic precepts of *shūrā*

³⁵ See David B. Burrell, “‘There Is at Most One God’: Jewish-Christian-Muslim Exchange on the Issue of God” in Paul S. Fiddes (ed), *Within the Love of God: Essays on the Doctrine of God* (Oxford University Press, Oxford 2014) 225 et seq.

³⁶ An English version of the Declaration is attached to this article in the Annexes.

(consultation).³⁷ These two principles are compatible with the notion of a modern state and allow, theoretically, at least, candidacy of women or a non-Muslim to head the state, which is a major positive development in Al-Azhar political thinking.

Section VI: The Judiciary

Art. 71: The Shari'ah penalties for the *hudud* shall be applied for the crimes of fornication, slander, theft, banditry, drinking alcohol, and apostasy.

This article requires that the state shall apply the *hudud* (the limits ordained by Allāh) wherein the Islamic Shari'ah is often reduced and which do not differentiate between what is a *limit* based definitively on a Qur'ānic text such as the punishment for adultery, theft, and slander, and what is controversial and not definitively supported by a text, such as the punishment for drinking alcohol or what is commonly called apostasy.

In contrast to that, the Al-Azhar document of 2011 does not address the issue of limits at all, nor does it even address the provisions of Shari'ah, but it highlights the necessity of observing the overall principles of Shari'ah; this opens the door to interpreting those principles in a way compatible with the notion of a modern democratic state.

B. Explaining Al-Azhar's Ideological Shift

The comparison between Al-Azhar's draft Islamic constitution and Al-Azhar's document drawn in these paragraphs shows a remarkable development in Al-Azhar's thinking from 1979 to 2011. The 2011 document with its focus on democratic state structure and human rights points to a revolutionary change in Al-Azhar ideology.³⁸ To attribute this shift to an internal, scholarly debate in the first place, based on the development of academic research within Al-Azhar, does not seem to offer a sufficient explanation. Rather, it relates to Al-Azhar's attempt as a religious establishment to identify itself with the state's political orientation or to keep pace with political developments and vicissitudes, to not lose its function and role in the society or its relationship with the ruling regime. It is historically established that Al-Azhar endeavored to Islamize the notion of socialism, which was the direction followed by the Nāṣrist regime, by endorsing a provision on socialism in the first article of the 1971 Constitution as one of the state's characteristics and describing a fortune as God's money. Thereafter, it upheld the capitalist openness direction in the Sādāt era by promoting the notion that Islam is not against the rich and does not impose limits to property and that "God raised some people above others by (various) grades."³⁹ With the blowing winds of what became known as "Arab Spring", and the success of the January 2011 revolution, Al-Azhar tried to identify itself with the new trend, notwithstanding that it was reluctant to support the movement in its early stages. Realizing that it was a defining moment in Egyptian history, Al-Azhar tried to restore its own historic, revolutionary role that it once played, especially during the French campaign against Egypt. All prevailing circumstances

³⁷ For a detailed analysis on Qur'ān-based elaborations on the compatibility of Islam and democratic principles in general and Al-Azhar's efforts in particular, see Nevin Reda, "From the Canadian Shari'a Debates to the Arab World: Developing a Qur'an Based Theology of Democracy" in Ingrid Mattson, Paul Nesbitt-Larking, and Nawaz Tahir (eds), *Religion and Representation: Islam and Democracy* (Cambridge Scholars Publishing, Newcastle upon Tyne 2015) 71–101.

³⁸ See also Judge Adel Maged, "Commentary on the Al Azhar Declaration in Support of the Arab Revolutions", Amsterdam Law Forum Opinion Paper (2012) 70.

³⁹ In reference to verse 165 of Al-An'ām *sūrah* of the Qur'ān.

now granted Al-Azhar a great opportunity to appear as a guarantor of religious stability in Egypt, and as an entity capable of managing a serious dialogue among all conflicting parties who were striving to interpret religion in a way to serve their respective political objectives.

We have seen Egypt suffering from polarities following the fall of the Mubārak regime, and how serious the size of split between various Islamic streams—such as the Muslim Brotherhood and Salafist, as well as between other streams, such as liberalist, secularist, Ṣūfī, Coptic, etc.—was. The Islamic discourse seemed at the time hostile to non-Islamists, especially Copts, Ṣūfis, and Shīʿites, all of whom suffered many attacks perpetrated by militant Islamists. All this led the military junta, which took charge of the management of the state affairs after Mubārak had stepped down, to considering Al-Azhar as the only partner capable to reunite the disputants. Thus, the junta gave the green light to Al-Azhar to do what it deemed appropriate in this regard. The *Shaykh* of Al-Azhar, Dr. Aḥmad Muḥammad al-Ṭayyib, skillfully availed himself of this opportunity, especially as the Egyptian people were since ancient times rather convinced by the notion of the Islamic homeland rather than the national homeland; therefore, the concept of nationalism in Egypt is closely linked to the concept of religion. In this climate, the role of religious institutions was featured prominently. The Al-Azhar *Shaykh* declared that Al-Azhar is the conscience of the nation and a home for all. He hosted meetings encompassing representatives of different religious and political streams of society in order for them to consult and to freely discuss the future of Egypt. Those meetings resulted in the formulation of the Al-Azhar document on the future of Egypt, which won the satisfaction of all and was highly welcome by all media sources and political parties, to the extent that it was considered as a basic reference in the development of the 2012 Constitution, which extracted more than one paragraph from it, as it will be elaborated below.

C. The Impact of the 2011 Al-Azhar Document on the Constitutions of 2012 and 2014

The role of the Al-Azhar document on the future of Egypt emerged during the drafting of the articles of the 2012 Constitution under the rule of the Muslim Brotherhood. The constitution included several principles of those set forth in that document, adding to it further Islamic character to the extent that it was known in the Egyptian media circles as “the Brotherhood Constitution” or “the Islamists’ Constitution”.⁴⁰ Following, examples of those articles and how they pose a problematic understanding of the notion of a modern state will be presented; as well, the amendments thereto will be highlighted as introduced in the 2014 Constitution.

Islamists were not satisfied with the text of Art. II of the 1971 Constitution providing for Sharīʿah as the main source of legislation since they rightfully saw that this wording would not prevent the legislator from adopting other sources—especially, as the lawyers who defended the killers of Sādāt tried to prevent the death penalty from being passed by challenging the constitutionality of the Penal Code during the trial, on the grounds that it contradicted the Sharīʿah in light of Art. II. The court dismissed that challenge and determined that the term “the main source” permitted the existence of subsidiary sources, meaning that the Islamic Sharīʿah can, sometimes, be contrasted with these other sources. Therefore, Islamists relied

⁴⁰ As for the texts of constitutions, the author has drawn on the Arabic publication *The Egyptian Constitutions—Texts and Documents for the Period 1866–2011, Introduced by Zakaria Al-Shalaq* (General Book Corporation, Cairo 2012) (*Nuṣūs al-dasātīr al-maṣriyah—nuṣūs wa-wathāʾiq 1866–2011, taqḍīm Aḥmad Zakariyā al-Shalaq, al-hayʾah al-ʾammah li-l-kutub, al-Qāhirah 2012*).

on Al-Azhar's interpretation of Shari'ah principles and introduced a new article, i.e., Art. 219, which defined Shari'ah principles as "encompassing its overall types of evidence, its rules of fundamentalism and jurisprudence and its sources of valuable consideration, as provided for in the doctrine of *ahl al-sunnah wa 'l-jamā'ah* [the people of the Sunnah and the congregation]." While Al-Azhar's aim through introducing such a definition and restricting it to the doctrine of *ahl al-sunnah wa 'l-jamā'ah*, was to exclude Shi'ites from any likelihood that they could participate in legislation, the article in question involved a high risk because "sources of valuable consideration" cannot be easily determined in the doctrine of *ahl al-sunnah wa 'l-jamā'ah*. Also, references used by this doctrine mostly do not conform to the standards of democracy and of a modern state, such as the book entitled "Provisions on *Dhimmi*s [Non-Muslims in an Islamic State]" by the Arab Sunni Islamic jurist, Ibn al-Qayyim, which classified Copts as second-class citizens, not to mention that the doctrine links marriage age with puberty and even permits that a minor girl may get married and her husband may enjoy living with her without having to exercise intercourse. This means that if a bill is submitted to the House of Representatives limiting the marriage age to eighteen years, it can be challenged by Islamists in the House on grounds of unconstitutionality because the constitution adopts the doctrine of *ahl al-sunnah wa 'l-jamā'ah* as a reference on juristic judgments.

Realizing this risk, the committee on drafting the 2014 Constitution deleted that article. The first principle contained in the Al-Azhar document states that "the Islamic Shari'ah is the main source of legislation in such a way that shall guarantee for the followers of other divine religions the right to appeal to their religions on personal status issues". A new article in the same sense, (given) No. 3, was introduced into the Constitution of 2012, stating that "the principles of religions of Egyptian Christian and Jewish citizens are the main source of legislation governing their personal status, religious affairs, and the selection of their spiritual leaders". It has been noted that this article, which remained unchanged in the 2014 Constitution, takes into consideration the Al-Azhar document's recognition of the divine religions only, i.e., Christianity and Judaism.

The eleventh principle of the Al-Azhar document states that "Al-Azhar considers itself as the main authority of reference on all Islamic affairs, sciences, heritage and modern jurisprudence and thought without depriving people of the right of expressing their opinions as long as they are committed to the requirements and respect to the manner of dialogue and Islamic consensus". Although Al-Azhar had only sought through this principle to assume the scholarly and advocacy responsibility and did not prevent qualified people other than Al-Azhar scholars from expressing a religious opinion, yet the newly introduced Art. 4 in the 2012 Constitution confined only to Al-Azhar the right to express such an opinion, depicting it as a ruling religious authority. In this connection, the article provides:

The Holy Al-Azhar is an independent, all-inclusive Islamic body, exclusively concerned with handling all of its affairs and it shall take charge of disseminating the Islamic *da'wā* [call for Islam], religion sciences and the Arabic language in Egypt and the world. The opinion of the body of senior scholars of the Holy Al-Azhar shall be sought on matters related to the Islamic Shari'ah. The State shall ensure provision of adequate funds so that it can achieve its objectives. The *Shaykh* of Al-Azhar shall be independent and shall not be liable to removal. The law shall define the method by which he shall be selected from among the members of the body of senior scholars. All this shall be regulated by law.

Given the fact that the masses of Islamists saw that no religious or secular action shall be handled outside the domain of Shari'ah, they considered the article in question as establishing the religious authority within the state insofar as no law shall be passed without being first reviewed in light of Shari'ah, thus rendering Al-Azhar as a judge over all laws at the expense of

the Supreme Constitutional Court and the parliament itself. This is corroborated by the heated arguments which took place inside the Egyptian parliament, which had an Islamic majority, as to whether paper securities were permissible or forbidden and about the admissibility of a loan from the World Bank which was to be associated with drawing interest thereon that Islamists considered as tabooed usury. Hence, the Islamists demanded that the case be presented to Al-Azhar for adjudication. This would have been all harmful rather than beneficial to Al-Azhar, which would have lost its prestigious moderation and centrism as a result of being entangled in politico-religious differences, plentiful and diverse as they were. Realizing the gravity of such a situation and being reluctant to play a watchman's role over legislation, Al-Azhar demanded that it be kept away from political differences. Thus, the 2014 Constitution took this problematic issue into consideration; consequently, Art. 7, which required that Al-Azhar's opinion be sought on matters related to the Islamic Sharī'ah, was deleted from that constitution.

As pointed out earlier, the second principle of the Al-Azhar document states:

Al-Azhar embraces democracy based on free and direct voting which represents the modern formula to achieve the Islamic precepts of *shūrā* (consultation). Islamic precepts include pluralism, peaceful rotation of power, determining terms of reference and holding responsible officials accountable vis-à-vis the people.

The third principle of the document considers "citizenship as the basis of responsibility in the society". The 2012 Constitution introduced Art. 6, including these two principles, by providing for the first time for both *shūrā* and pluralism, i.e.,

the political system shall be based on the principles of democracy and *shūrā* as well as citizenship which holds citizens equal with respect to public rights and duties, and in terms of political and party pluralism, the peaceful rotation of authority, the separation of powers and keeping balance between them, the rule of law, the respect of human rights and freedoms; all as set forth in the Constitution.

The 2012 Constitution does not ban political parties based on religion, as Art. 3 states that "there shall be no political party based on distinction between citizens because of gender, origin or religion", meaning that establishing a party whose goal is to segregate people on grounds of religion shall be prohibited, whereas establishing a party with a religious background shall be permitted. As a result, there emerged a large number of Islamic parties, including a group of the Muslim Brotherhood's parties, namely the "Freedom and Justice" party (*al-Ḥurriyah wa 'l-ʿAdālah*), the "Middle-line" party (*al-Wasat*), the "Powerful Egypt" party (*Miṣr al-Qawīyah*), the "Leadership" party (*al-Riyāḍah*), the "Renaissance" party (*al-Nahḍah*), and the "Egyptian Stream" party (*al-Tayyār Al-Maṣrī*). There also were Salafi parties, most notably: The "Light" party (*al-Nūr*), the "Originality" party (*al-Aṣālah*), the "Virtue" party (*al-Faḍīlah*), the "Salafi Reform and Renaissance" party (*al-Islāh wa 'l-Nahḍah*), the "Jihādī Salafī" party, the "Construction and Development" party (*al-Binā'ah wa 'l-Tanmīyah*), the "Independence" party (*al-Istiqlāl*), and others. However, the ban on establishing political parties based on religion was restored in the 2014 Constitution. Accordingly, the Supreme Administrative Court decided on August 9, 2014, to dissolve the "Freedom and Justice" party as it was based on religion, with it being an offshoot of the Muslim Brotherhood and its political arm. However, the party did not deny that it embraced the Brotherhood's principles.

Although Al-Azhar's document did not address the issue related to abuse of apostles, Art. 44 reads: "abusing or offending all apostles shall be prohibited". While abusing not only apostles but also anyone, is basically prohibited, the word "offending" may open the way to refusing

and criminalizing any scholarly study dealing with, for example, the infallibility of apostles in mundane matters or discussing the political role of the apostles or things that were invariable and variable in their actions, thereby dedicating traditionalism and shutting the door toward building a critical mentality. Therefore, this article was deleted from the 2014 Constitution.

Art. 43 reads: “Freedom of belief shall be inviolable. The state shall guarantee the freedom of religious practice and the establishment of houses of worship for divine religions, as governed by law”.

There is contradiction in this article between providing for freedom of belief and restricting such freedom to the three “divine” religions, which renders freedom restricted and not absolute, let alone that what is known as apostasy and its relationship to freedom of belief is not clearly mentioned. This is inconsistent with the role of a modern state, which should not meddle in protecting a particular faith, but should protect the freedom of belief itself so that belief will be built on conviction and certainty, not on fear of law.

V. CONCLUSION

It has been proven by unfolded events that the weakness of traditional religious institutions such as Al-Azhar and the consequential absence of Al-Azhar’s essential role have both led to the rise of political Islam streams and the emergence and spread of terrorism. Therefore, the state is currently trying to show interest in supporting Al-Azhar financially and politically in order for it to assume its role of religious enlightenment and education. Through promoting a moderate approach, it shall offer an alternative vis-à-vis all extremist or radical currents such as the Muslim Brotherhood and the Salafists, who attempted to control Al-Azhar and sought to place it at their disposal with a view to mobilizing its potential to serve the purpose of spreading and legitimizing their ideas. Therefore, Al-Azhar has been granted undeniable impact in shaping the post-revolutionary constitutions of Egypt, as comparisons between the 2011 Al-Azhar document and its influence on the actual constitutional provisions have shown. Moreover, the 2012 Constitution re-established the Al-Azhar’s Council of Senior Scholars, thus letting Al-Azhar gain back essential power.

The state’s interest in Al-Azhar appeared clearly in the preamble of the 2014 Constitution, wherein the constitution prided itself on the fact that Rifā‘ah al-Taḥṭāwī (1801–1873), who called for a homeland encompassing all citizens, is the son of Al-Azhar. Also, the 2014 Constitution demonstrated a clear reaction to the divisions and tensions witnessed by Egypt because of the religion-based intolerance which erupted in the aftermath of 2011 revolution, as a result of the followers of each creed or doctrine striving to identify the state with the direction of their respective trends. Thus, the constitution highlighted in its preamble that Egypt is the cradle of all divine religions, wherein God spoke to Moses, its land embraced the Virgin Mary and her newborn, and out of which the best hosts of the earth—protectors of Islam—emerged. This was an attempt to assert religious diversity in Egypt, although it was restricted to divine religions.

However, within the context of the state’s effort to counter terrorism, which is being employed under the guise of religion, Egyptian President ‘Abd al-Fatāḥ al-Sisī called for a religious revolution, explicitly demanding Al-Azhar and its *Shaykh* to revitalize the religious discourse radically, so as to pull out legitimacy from extremist streams of political Islam. In response to this call, Al-Azhar University has announced the formation of committees to review all Al-Azhar curricula, its research, and scholarly dissertations in order to refine them of all aspects that encourage extremism and rejection of the values of democracy. Will this effort bear fruit? Will Al-Azhar change its approach and methodologies? Or will it only be satisfied with an ostensibly embellished change to meet the sovereign power’s demand? This will be revealed with the passage of time.

ANNEXES

A. Al-Azhar Declaration on the Future of Egypt (2011)*

In the Name of God, Most Gracious, Most Merciful

Al-Azhar al-Sharīf

Office of the Grand Imām of Al-Azhar

Al-Azhar Declaration on the Future of Egypt

Upon the kind initiative of the Grand *Shaykh* of Al-Azhar, Dr. Aḥmad al-Ṭayyib, senior Azhar scholars (‘*ulamā*’) met with a group of Egyptian intellectuals of different backgrounds and religious affiliations. During the meetings held there were intensive discussions over the current historic juncture Egypt is going through in the aftermath of the January 25, Revolution, and which is to be the driving force for Egypt’s future, towards freedom, human dignity, equality, and social justice.

There was consensus that Egypt’s future should be built on a set of comprehensive and sound principles and guidelines to be debated by different parties of the Egyptian society in order to reach a framework of good governance.

In appreciation of Al-Azhar’s leading role in crystallizing moderate Islamic thought, the assembled group emphasize its importance as a beacon of light, one to turn to in defining the relationship between state and religion, one to interpret the sound rules of governance (*siyāsah shar‘īyah*) that ought to be followed, and to draw on its accumulated experience, its scientific and intellectual history which is based on the following dimensions:

1. Jurisprudential dimension: Reviving and renewing religious sciences following the doctrine of *ahl al-sunnah wa ‘l-jamā‘ah* (People of the Sunnah and the Community) which reconciles reason with tradition and elucidates the rules of interpreting religious texts.
2. Historical dimension: Leading the national movement toward freedom and independence.
3. Cultural dimension: Reviving natural sciences, humanities and arts.
4. Pragmatic dimension: Leading Egyptian society and shaping leaders of opinion in Egyptian public life.
5. Comprehensive dimension: Amalgamating knowledge, leadership, development and culture in the Arab and the Islamic worlds.

In their discussions, participants invoked the legacy of leading intellectual and reformist Azhar figures, from *Shaykh* Ḥasan al-‘Aṭār and his eminent student *Shaykh* Rifā‘ah al-Ṭaḥṭāwī, to Imām Muḥammad ‘Abduh and his diligent students, as well as leading *a‘immah* such as the *Shuyūkh* al-Marāghī, Muḥammad ‘Abdullah Dirāz, Muṣṭafā ‘Abd al-Rāziq and Shaltūt and others of its leading scholars. They were also inspired by the achievements of prominent Egyptian philosophers, lawmakers, writers, and artists who contributed and helped in shaping contemporary Egyptian and Arab thought and consciousness. They developed a common background that would lead to an ultimate goal unanimously accepted by the nation’s intellectuals. The goal is to outline the principles governing the relation between Islam and the State at this critical stage, according to a consensual strategy that defines the longed-for modern State and its governing mechanism.

* The author and the editors sincerely thank Professor Salah-eddin Elgawhary of Bibliotheca Alexandrina (Alexandria, Egypt), for granting permission to publish this translation.

Such principles would stimulate the nation's march towards the development and progress, ensure the transition to democracy and guarantee social justice, usher Egypt into the world of science and knowledge production, and promote peace and prosperity, while maintaining human and spiritual values and cultural heritage. This would protect the Islamic ideals instilled in the nation's conscience and in scholars and intellectuals' conscience against neglect, distortion, exaggeration, and misinterpretation, as well as against misuse by deviant parties who may raise ideological or extremist sectarian slogans that contradict our nation's principles, deviate from moderate norms, violate the essence of Islam (freedom, justice and equality), and defy the tolerant teaching of all heavenly religions.

Therefore, we declare that we have reached consensus to the following principles which outline the enlightened Islamic reference point embodied in a number of comprehensive issues derived from definite and sound religious texts, reflecting a sound understanding of religion:

- First: Supporting the establishment of a modern, constitutional democratic nation-state, based on a constitution accepted by the nation, which separates between the State's authorities and its legal ruling institutions; determines the boundaries of governance; guarantees the equal rights and duties of its citizens and offers the people's representatives the power of legislation in accordance with the precepts of true Islam, a religion that has never, throughout its history, experienced a theocratic state such as that humanity has suffered from in certain historical periods. Islam allowed people to administer their societies and choose the mechanisms and institutions that would best serve their interests, provided that the principles of Islamic Law (Shari'ah) are the main source of legislation, and guarantee that the followers of other heavenly religions would have recourse to their own religious laws in matters of personal status.
- Second: Embracing the democratic system, based on free and direct elections, which represents the modern formula of implementing the Islamic precept of *shūrā* (consultation). Democracy guarantees pluralism, peaceful rotation of power, and role identification, performance monitoring, accountability to the people, seeking public interests in all legislations and decisions, governing by the rule of law and nothing but the law, tracking corruption, and ensuring complete transparency and freedom of information.
- Third: Commitment to a system of freedom of thought and expression, with full respect to human rights and the rights of women and children, while emphasizing plurality and full respect of all heavenly religions, and to citizenship as a social responsibility.
- Fourth: Full respect of difference and the ethics of dialogue; and the necessity of prohibiting labeling others as disbelievers or traitors, and abusing religion to disunite and pit citizens against each other; considering incitement of religious strife or sectarian and racist calls as crimes against the nation; and the promotion of even dialogue and mutual respect among citizens without any discrimination in rights and duties among citizens.
- Fifth: Commitment to all international conventions, resolutions and achievements of civilization in terms of human relations in existence with the tolerant Arab and Islamic traditions, the extensive cultural experience of Egyptians throughout the ages, and with the examples of peaceful co-existence they set up throughout the ages seeking the welfare of humanity at large.
- Sixth: Full commitment to preserving the dignity of the Egyptian nation and its national pride, to protecting and fully respecting places of worship of the followers of the three heavenly religions, to safeguarding the free and unrestricted practices of all religious rites, to respecting different worship practices without demeaning the

people's culture and traditions, and to maintaining freedom of artistic and literary expression and creativity within the context of our established cultural values.

Seventh: Education and scientific research are the cornerstones of development in Egypt. All efforts should be geared at catching up with what we missed in these areas, mobilizing the community to eliminate illiteracy, and investing in human resources to achieve major projects.

Eighth: Adopting the principle of jurisprudential priorities to achieve development and social justice, fighting despotism and corruption, and eliminate unemployment. Harnessing community energies on the economic, social, cultural and media levels should be the people's top priority; noting that adequate and serious health care is a duty of the state toward all citizens.

Ninth: Egypt should rebuild its relations with its Arab sister States and its Islamic, African and international circles, support Palestinian rights, protect the sovereignty of Egyptian will, strive to regain its historic leading role based on equality and independence and on cooperation for the common good of all. Egypt should also engage in noble efforts towards human advancement, protecting the environment, and achieving just peace among all nations.

Tenth: Endorsing the proposal of the independence of Al-Azhar, the re-establishment of the Board of Senior '*Ulamā*' (scholars) which shall be responsible for the nomination and election of the Grand *Imām* of Al-Azhar, renewing the Al-Azhar curricula to regain the Institution's intellectual role and worldwide influence in various fields.

Eleventh: Al-Azhar shall be the reference institution pertinent to Islamic contemporary jurisprudence, thinking, sciences, and heritage, without infringing the rights of all to express their opinions provided they meet the appropriate qualifications and adhere to the ethics of dialogue and the consensus of the Nation's '*ulamā*'.

Al-Azhar scholars and the intellectuals who drafted this Declaration urge all Egyptian political parties and currents to commit their efforts to Egypt's political, economic and social development in accordance with the principles stated in this Declaration.

May God grant us success in our endeavors for the welfare of the Nation.

Office of the Grand *Imām* of Al-Azhar

17 Rajab 1432 A.H. (June 19, 2011)

B. Al-Azhar Statement on Basic Freedoms (2012)*

In the Name of God, Most Gracious, Most Merciful

The Noble Al-Azhar

Office of the Grand *Imām* of Al-Azhar

Al-Azhar Statement on Basic Freedoms

In the wake of the revolutions that have released liberties and fuelled the spirit of a complete awakening into various fields, the Egyptians, Arab and Islamic nation look to its scholars and intellectuals, in order to determine the relationship between the principles of the Shari'ah and the set of basic freedoms that has been unanimously agreed upon by international conventions. These basic freedoms have emerged from the cultural experience of the Egyptian people, as

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they consolidate the nation's foundations and reaffirm its long-established principles. Scholars shall outline the foundations of these basic principles to determine the necessary conditions for development and widen future prospects. The freedoms referred to are: the freedom of belief, freedom of opinion and speech, freedom of scientific research, and freedom of literary and artistic creativity. All such freedoms should bear in mind the overarching purpose of Shari'ah, as well as grasp the spirit of modern constitutional legislation and the requirements for the development of human knowledge. This relationship creates a spiritual energy for the nation that can fuel an awakening and work as a catalyst for physical and the moral progress.

This effort should be harmoniously connected and consistent with a rational cultural discourse and enlightened religious discourse. These two discourses overlap and complement each other in a pattern that is fruitful for the future and unites the goals and objectives agreed upon by everyone.

Hence, it was important for the scholars of Al-Azhar to examine the intellectual denominators involved in the system of human freedoms and rights, and to adopt a set of principles and rules that govern such freedoms. This is based on the requirements of the current time and the need to preserve the essence of compatibility in communities, taking into account the public interest in the process of democratization, until the nation moves to build its constitutional institutions in peace and moderation and blessings from God.

This can stop the spread of certain tendentious summons, which tend to invoke the pretext of the call "to promote virtue and prevent vice" in order to intervene in public and private freedoms. Such is not commensurate with the cultural and social development of modern Egypt, at a time when the country needs unity, and needs the correct, centrist understanding of Islam. Such is the message of Al-Azhar and its responsibility to the community and the nation.

First: The Freedom of Belief

The freedom of belief, and the associated right to full citizenship for all based on full equality of rights and duties, is considered a cornerstone of modern community-building.

It is guaranteed by the unchanging peremptory religious text and explicit constitutional and legal principles, as God Almighty says: "There shall be no compulsion in [the acceptance of] the religion. The right course has become clear from the wrong"⁴¹ and he says: "So whomever wills—let him believe; and whomever wills—let him disbelieve."⁴² These verses then legitimize the criminalization of any appearance of coercion in religion, or persecution, or religious discrimination. Every individual in the community can embrace ideas as he pleases without affecting the right of the society to maintain monotheistic beliefs. The three Abrahamic faiths have held on to their sense of holiness, and their followers should retain the freedom to observe their rituals without facing aggression directed at their feelings or violations on their religions sanctity, and without breaching public order.

As the Arab world has been the location of divine revelations that embrace (heavenly) religions, it is rigorously committed to the protection of their holiness, the respect of their rituals, and the maintenance of the rights of their believers, with freedom, dignity and brotherhood.

From freedom of belief follows the recognition of the legitimacy of pluralism, the protection of the right to disagree, the obligation of every citizen to respect the feelings of others, as well as equality between citizens. This equality is based on a solid foundation of citizenship, partnership, and equal opportunities in all rights and duties.

⁴¹ (Al-Baqarah 2: 256). *Sahih International Translation*.

⁴² (Al-Kahf 18: 29). *Sahih International Translation*.

Furthermore, respecting freedom of belief entails the rejection of tendencies toward exclusion and *takfir*⁴³ in addition to rejection of trends that condemn the beliefs of others and attempt to inspect the consciences of the faithful. This is based on established constitutional systems, but also—even before—based on conclusive provisions that were decided on by Sharīʿah and expressed by many Muslim scholars under the influence of the Prophet Muḥammad who once asked, “Have you opened his chest [and examined his heart]?”⁴⁴ Such was also expressed by many *aʿimmah*, including *Imām* Mālik, the *Imām* of the people of Madinah, who stated, “If a person says something that most probably denotes disbelief, yet still there is a remote possibility it does not, it should not be taken to denote disbelief”. The notable *aʿimmah* of jurisprudence and legislation in Islamic thought left us their golden rules that determine that: “If the mind and the text are apparently conflicting, the mind should be given precedence and the text reinterpreted”. This serves the objectives of Sharīʿah and keeps in mind the legal interests.

Second: Freedom of Opinion and Expression

Freedom of opinion is the foundation of all freedoms, and it is reflected in the free expression of opinion using various means of expression—spoken, written, and through art production and digital communication. It is the manifestation of social freedoms that goes beyond individuals to include things such as the formation of political parties and civil society organisations, freedom of the press and audio, visual and digital media, as well as free access to the information necessary to express an opinion. These freedoms must be guaranteed explicitly by the constitution to transcend ordinary laws that are subject to changes. The Supreme Constitutional Court in Egypt has settled on expanding the concept of freedom of expression to include constructive criticism, even if it is harshly worded. The Court stated that, “It is not appropriate to restrict the freedom of expression regarding the public issues by limits not to be exceeded; rather, it should be tolerated”. But it is necessary that we point to the need to respect the divine beliefs and rituals of the three Abrahamic faiths, as it would otherwise pose a threat to the national fabric and security. No one has the right to raise sectarian or doctrinal strife in the name of freedom of expression. However, the right to present a scholarly opinion, supported by relevant evidence and within the specialized circles, far from incitement, shall be guaranteed, as outlined by the principle of freedom of scientific research.

We declare that freedom of opinion and expression is the representation of real democracy. We call upon the nation to raise a new generation according to a culture of freedom and the right to disagree whilst respecting others. Furthermore, we urge workers in the fields of religious, cultural, and political discourse in the media to take this significant dimension into account, and to exercise wisdom in the formation of a public opinion that is characterized by tolerance, open-mindedness and invokes dialogue whilst rejecting bigotry.

To achieve this, the cultural traditions of tolerant Islam thought should be evoked. An example is a saying by one of the *aʿimmah*: “I believe that my opinion is right, but may be wrong, and that the opinion of others is wrong, but may be right”. Then, there is no way to fortify freedom of opinion except by using sound arguments according to the ethics of dialogue and the cultural customs found in sophisticated societies.

⁴³ Takfir: loosely translated to apostasy; declaration that by a Muslim that another Muslim is a nonbeliever due to a certain belief, saying, or action.

⁴⁴ Prophetic *ḥadīth*: not an official translation.

Third: Freedom of Scientific Research

Profound scientific research in humanities, natural sciences, sports, and other fields, is an engine of human progress, as well as a means of discovering the ways and laws of the universe. Such knowledge can be harnessed for the good of humanity. However, this research cannot take place and pay off in a theoretical and practical sense without the nation devoting its energy to it and mobilizing its resources for it. The Qur'anic scripture urges reasoning, review, inference, measurement and meditation in cosmic and human phenomena to discover the universe. This paved the way for the greatest scientific awakening in the history of the East, and presented an achievement for humans in both the East and the West. It is widely-known that a renaissance was led by scholars of Islam, who carried its flame to light the era of renaissance in the West. If thinking in various branches of knowledge and art is generally an obligation in Islam, as held by scholars, then theoretical and experimental scientific research is an instrument that fulfils this obligation. The most important conditions are that the research institutions and the specialized scientists possess full academic freedom in testing and imposition of assumptions and probabilities, and can carry out experiments with precise scientific standards. It is also the right of such institutions to maintain creativity and necessary experience to ensure access to new results that add to human knowledge; and nothing can direct them to achieve this goal other than the ethics, methods and constant elements of science. Some of the senior Muslims scholars such as al-Rāzī, Ibn al-Haytham, Ibn Al-Nāfis and others were leaders and pioneers of scientific knowledge in the East and the West for many centuries. Now the time has come for the Arab and Islamic nation to return to the race for power and to enter the era of knowledge. Science has become a source of military and economic power, and a basis for progress, development and prosperity. Furthermore, free scientific research has become the foundation of educational development and the supremacy of scientific thought and the prosperity of production centers, which shall be allocated large budgets, task forces and major projects proposals—all of which requires securing the highest ceiling for scientific and human research. The West was close to retaining all of scientific progress in its hands. It would have monopolized the march to science, if not for the rise of Japan, China, India and Southeast Asia, which have provided illuminating models for the Middle East's ability to break the monopoly and to embark into the age of science and knowledge. The time has come for the Egyptians, Arabs, and Muslims to enter the competitive scientific and cultural arenas. They have what it takes in terms of spiritual, financial, and human energy, as well as other conditions required for progress in a world that does not respect the weak and those falling behind.

Fourth: Freedom of Literary and Artistic Creativity

There are two types of creativity: scientific creativity related to scientific research as stated above, and literary, and artistic creativity found in the various genres of literature such as lyric and dramatic poetry, fiction and nonfiction stories, theatre, biographical accounts, visual and fine arts, film, television, music, and other innovative forms of art that have been newly introduced to these genres.

Generally, literature and arts seek to raise awareness of reality, stimulate imagination, refine aesthetic feelings, educate human senses and expand their capacity, as well as deepen the human experience in life and society. Art and literature can also sometimes criticize society while exploring better and finer alternatives. All of these functions are significant and in fact lead to the enrichment of language and culture, stimulation of the imagination, and development of thought, while taking into account sublime religious values and moral virtues.

The Arabic language had been characterized by its literary richness and remarkable eloquence, until the Holy Qur'an arrived at the peak of eloquence, increasing the beauty

and genius of the language. The Qurʾān nourished the art of poetry, prose and wisdom, and launched the talents of poets and authors—of all nationalities that embraced Islam and spoke Arabic. For years, they excelled in all arts freely without restrictions. In fact, many scientists who came from Arab and Islamic cultures such as elders and *aʾimmah* were narrators of various types of poetry and stories. The basic rules governing the limits of freedom of creativity are, on the one hand, the receptivity of the society, and on the other, its ability to absorb elements of heritage and renewal in literary and artistic creativity. Therefore, it should not touch upon religious feelings or established moral values. Literary and artistic creativity remain among the most important manifestations of a prosperous set of basic freedoms and the most effective at moving the community's awareness and enriching its conscience. As this rational freedom becomes more entrenched, it becomes a symbol of modernization, since literature and the arts are mirrors of a society's conscience and a sincere expression of a society's constants and its variables. They present a radiant image of society's aspirations for a better future, and may God bless that which is good and right.

Al-Azhar Al-Sharīf

14 Safar 1433 AH—January 8, 2012 AC

Grand *Shaykh* of Al-Azhar

Dr. Aḥmad Al-Ṭayyib

C. Al-Azhar Draft Constitution of 1979*

The Distinguished Al-Azhar

Academy for Islamic Research

The Project for an Islamic Constitution

Presented by: General Secretariat of the Academy for Islamic Research

In the name of God, the Merciful, the Compassionate

1. The decisions and recommendations of the 8th meeting of the Academy for Islamic Research, which was held in Cairo on Dhū al-Qaʿdah 1396 h./ October 1977 C. state that the meeting commissions Al-Azhar, and particularly the Academy for Islamic Research, to write down an Islamic constitution. This way, it will be available to any country that wishes to model itself after the Islamic Shariʿah. The meeting also saw fit that the principles laid down in this constitution agree with those shared between the Islamic schools of law to the utmost extent possible.
2. In order to carry out this request, during a session conducted on 11 Muḥarram, 1977, the Board of the Academy for Islamic Research decided to entrust the drafting of this constitution to the Academy's Committee for Islamic Constitutional Research. This was done with the condition that the people who could participate in carrying out this project be invited.
3. In accordance with this, the Grand *Shaykh* of Al-Azhar, Dr. ʿAbd al-Ḥalīm Maḥmūd, the *Shaykh* of Al-Azhar and President of the Academy for Islamic Research assembled a High Committee separate from the membership of the Academy's Committee for

* The author and the editors sincerely thank the translators, Elias Saba and Thomas Levi Thompson, and Tahrir Documents at the University of California, Los Angeles (USA), for granting permission to publish this translation.

Islamic Constitutional Research. He chose the very best people working in Islamic and constitutional law so that he could delegate this task to them.

4. When it met under the chairmanship of the Grand *Shaykh* of Al-Azhar, the above-mentioned High Committee decided to assemble a subcommittee to write the studies and papers, and a draft of the Constitution. This draft was to be presented to the High Committee upon its completion.
5. The subcommittee held weekly meetings on a regular basis until it finished its draft, wrote it down in its final form, and presented it to the High Committee. This draft contained nine sections which are comprised of thirty-nine independent Articles, as follows:

Section 1: The Islamic Community, Four Articles

Section 2: The Foundation of Islamic Society, Thirteen Articles

Section 3: Islamic Economy, Ten Articles

Section 4: Individual Rights and Freedoms, Sixteen Articles

Section 5: The *imām*, Seventeen Articles

Section 6: The Judiciary, Twenty-Three Articles

Section 7: Consultation, Monitoring, and Enacting Laws, Two Articles

Section 8: The Government, Two Articles

Section 9: General and Transitional Rules, Seven Articles

The General Secretariat of the Academy for Islamic Research presents this draft before the ninth meeting of the Academy in accordance with the request of the eighth meeting.

The General Secretariat of the Academy for Islamic Research

Dr. al-Husaynī ‘Abd al-Majid Hāshim

Section 1: The Islamic Community

Art. 1: Muslims are one nation.

Art. 2: Islamic Shari‘ah is the source of all legislation.

Art. 3: It is permitted for there to be more than one country within the Islamic Nation even if the style of government varies among them.

Art. 4: The people are in charge of monitoring the *imām*, his officials, and the rest of the government. They are in charge of holding them accountable in accordance with the laws of Islamic Shari‘ah.

Section 2: The Foundation of Islamic Society

Art. 5: Cooperation and integration are the foundation of society.

Art. 6: Commanding good and forbidding wrong is obligatory.

Art. 7: The family is the foundation of society. Religion and morals are the foundation of the family. The state guarantees to support the family, to protect motherhood, to look after children, and to bring about the means to ensure this.

Art. 8: Protection of the family is a duty of the state. Therefore, the state shall encourage the preservation of marriage in the society by providing assistance with housing, all possible financial subsidies, honoring married life, and create the means to improve the responsibilities of women to their husbands, service to her children, and to consider attending her family her primary responsibility.

Art. 9: It is the responsibility of the state to attend to the welfare of the nation and the well-being of individuals. It is incumbent upon the state to distribute preventative and therapeutic medicine.

Art. 10: Education is a religious duty. The state is responsible for education in accordance with the law.

- Art. 11: Religious upbringing is a basic program in all stages of education.
- Art. 12: The state is required to teach Muslims the things about which there is religious consensus. Among the things that are required to be taught: the life of the Prophet, the lives of the Rightly-Guided Caliphs, comprehensive study throughout the grade levels.
- Art. 13: The state is required to teach Qur'ān memorization to Muslims appropriate to grade levels. Likewise, it will found specialized institutes for Qur'ān memorization for those who are not school students. The state will print copies of the Qur'ān and facilitate their circulation.
- Art. 14: Excessive adornment is forbidden and chastity is required. The state will issue laws and decrees in order to defend public sensibilities from vulgarity in accordance with the rules of Islamic Shari'ah.
- Art. 15: Arabic is the official language, and the hijri calendar must be displayed on all official correspondence.
- Art. 16: Public sovereignty is based on the interest of the citizens, in particular protecting religion, reason, the soul, property, and honor.
- Art. 17: It is not sufficient for the ends to be legal, but rather at all times the means must be in accordance with Islamic Shari'ah.

Section 3: Islamic Economy

- Art. 18: The economy will be based upon the principles of Islamic Shari'ah which guarantees human dignity and social justice. It requires striving in life through both thought and deed and ensures lawful profit.
- Art. 19: Free commerce, manufacturing, and agriculture is guaranteed within the framework of Islamic Shari'ah.
- Art. 20: The state will lay out plans for economic growth in accordance with Islamic Shari'ah.
- Art. 21: The state will fight against monopolization and will not interfere with prices except when necessary.
- Art. 22: The state will encourage making the desert into arable land and increase the land under cultivation.
- Art. 23: Taking or receiving usury is not permitted nor is participating in any transaction involved with usury.
- Art. 24: The state has legal possession of all of the natural resources that are underground, i.e., metals, ores, etc.
- Art. 25: All possessions that have no owner become the property of the treasury. The law will spell out the way that individuals can take possession of it.
- Art. 26: The state will hand out the alms-tax which has been given by individuals to the government through public, Islamic banks.
- Art. 27: Establishing endowments for resources is permitted. The law to establish this will be issued with the agreement of all parties.

Section 4: Individual Rights and Freedoms

- Art. 28: Justice and equality are the foundation of rule. The rights to a legal defense and to file lawsuits is guaranteed. Infringing upon these rights is not permitted.
- Art. 29: Freedom of religion and thought, the freedom to work, the freedom to express opinion directly or indirectly, the freedom to found trade union associations and participate in them, personal freedom, and the freedom to move and congregate are all basic, natural rights that are protected within the framework of the Islamic Shari'ah.

- Art. 30: Housing, correspondence, and private affairs are inviolable and spying on them is forbidden. The law can spell out ways that the state can restrict this inviolability in cases of high treason or imminent danger. Such restrictions can only occur with permission from the judiciary.
- Art. 31: The right to move within the country and abroad are recognized. Citizens will not be forbidden from travel abroad nor will they be required to stay in one place instead of another without a court order. The judge must disclose the reasons for it. Expatriating citizens is not permissible.
- Art. 32: Handing over political refugees is forbidden, whilst handing over of regular convicts shall be regulated by agreements with respective countries.
- Art. 33: Torturing people is crime. Neither the crime or the punishment become void during the life of the perpetrator. Whoever committed the act and his accomplice are responsible for the crime monetarily. Whosoever helps in the planning or execution or remains silent about it is, legally, a criminal accomplice, and civilly responsible. The government will inquire with him about his involvement.
- Art. 34: Any government employee who knows of torturing being committed in his department and does not report it to the proper authorities will be punished.
- Art. 35: In Islam, blood is not shed in vain. The state must compensate: the families of murder victims when the murderer is unknown; the families of those rendered disabled, if the perpetrator is unknown. The state is also responsible for compensation if the perpetrator does not have enough money to pay for the compensation.
- Art. 36: Everybody has the right to submit a complaint about a crime committed against him or against someone else or about public money being embezzled or squandered.
- Art. 37: The right to work, earn a profit, and ownership are guaranteed. This cannot be infringed upon unless required by the laws of Islamic Shari'ah.
- Art. 38: Women have the right to work within the framework of Islamic Shari'ah.
- Art. 39: The state guarantees the freedom of ownership, ownership rights, and the sacredness of this right. Public confiscation is not permissible for any reason. Private confiscation can only occur through a court order.
- Art. 40: An individual's ownership rights cannot be taken away unless it is for the public good and he is compensated entirely in accordance with the particular laws that will be instituted for this.
- Art. 41: The founding of newspapers will be allowed. Freedom of the press will be within the framework of Islamic Shari'ah.
- Art. 42: Citizens have the right to form labor organizations and trade unions on a clear legal basis. Those which go against the social system, or which secretly have a military character, or which go against any aspect of Islamic Shari'ah are not allowed.
- Art. 43: Rights will be practiced in accordance with the aims of the Shari'ah.

Section 5: The *imām*

- Art. 44: The state will have an *imām*. Obedience to him is required even if there is disagreement with him.
- Art. 45: Obedience to someone who disobeys God is unacceptable. An *imām* who disobeys the Shari'ah with his actions should not be obeyed.
- Art. 46: The law will clarify the path for elections to choose an *imām*. The elections will be carried out under the supervision of the judiciary. The candidate with the required majority of votes will be elected.

- Art. 47: Candidates for the presidency of the state must be: Muslim, male, past the age of majority, of sound mind, pious, and knowledgeable about the rules of Islamic Shari'ah.
- Art. 48: The electing of the *imām* will be completed with a pledge of allegiance from all the classes of the nation as the law requires. Women have the right to demand to participate in an election when they meet the requirements and are able to vote.
- Art. 49: Expressing an opinion about the election of an *imām* before it is completed is not a crime.
- Art. 50: The people who hold the rights to the pledge of allegiance can dismiss the *imām* when there is reason to do so in a way proscribed by the law.
- Art. 51: The *imām* will defer to the judiciary. He has the right to have an attorney at court.
- Art. 52: The President of the State enjoys the same rights and responsibilities as do the citizens.
- Art. 53: It is not allowed to mention the *imām* in one's legacy nor establishing a religious foundation in his name or the name of his relatives four-times removed unless there is a testament specifying to whom the *imām* inherits. Likewise, the *imām* may not purchase or rent something that the state owns, nor can he sell or lease something that he owns to the state.
- Art. 54: Giving gifts to the *imām* is calamitous, thus all gifts will be donated to the state treasury.
- Art. 55: The *imām* is an example of justice, piety, and good deeds for his subjects. He shares the duty with the other Muslim *a'immaḥ* in looking after everything that affects the Muslim community. Similarly, he will send a delegation every year to participate in the *ḥajj* and to participate in both official and unofficial Muslim conferences.
- Art. 56: The *imām* is responsible for guiding his army to engage in *jihād* against the enemy, protect the borders and the soil of the country, to enforce the *ḥudūd*, and to sign treaties once they have been drawn up.
- Art. 57: The *imām* shall be responsible for empowering individuals and community to promote virtue and prevent vice and to perform [religious] duties.
- Art. 58: The *imām* appoints government employees. It is permissible for the law to assign someone else to appoint government employees except at the highest levels.
- Art. 59: Amnesty for crimes other than *ḥudūd*-crimes can only be granted by law. The *imām* has the power to grant pardon from criminal punishment in particular circumstances with the exception of the *ḥudūd* and high treason.
- Art. 60: Upon necessity—if great troubles occur, or something occurs which warns of great troubles, or threatens the state, or warns of civil war, or of war with another country, the *imām* has the power to take extraordinary measures. They must be presented to the Parliament a week after they have been enacted. If a Parliament has not yet been elected, then the old Parliament will be convened. These measures are void if these steps are not followed. A law will be issued that clarifies these extraordinary measures, the effects that they have, the reasons why they were taken, and the way in which their effects will be adjusted in case the measures are not affirmed.

Section 6: The Judiciary

- Art. 61: The judiciary shall rule justly in accordance with the rule of Islamic Shari'ah.
- Art. 62: The people are equals before the courts. It is not permissible to discriminate against an individual or group with special rulings.

- Art. 63: Special courts may not be established nor may any defendant be deprived of having a normal judge.
- Art. 64: It is not permissible to forbid the judiciary from hearing a claim against the *imām* or the ruler.
- Art. 65: Rulings should be published and implemented in the name of God, the Merciful, the Compassionate. Judges are subject only to the Islamic Shari'ah in their judgments.
- Art. 66: The implementation of rulings is the responsibility of the state, and omission or inaction in their implementation [is forbidden].
- Art. 67: The state guarantees the judiciary's independence, and compromising its independence is a crime.
- Art. 68: The state shall select the most qualified men for the judiciary and facilitate the functioning of their work.
- Art. 69: In *ḥudūd* crimes, the accused must be presented to the court. A lawyer of his choosing or, should he not have chosen a lawyer, one appointed by the state must attend with him.
- Art. 70: The Judicial Council should be public. The general populace has the right to attend. It is not permissible to hold court in secret unless legally required.
- Art. 71: The Shari'ah penalties for the *ḥudūd* are applied for the crimes of fornication, false accusation of fornication, theft, highway robbery, drinking alcohol, and apostasy.
- Art. 72: The law limits the judicial punishments which the judge may prescribe in non-*ḥudūd* crimes.
- Art. 73: The law clarifies laws for oaths regarding oaths of innocence in murder cases. It is impermissible for civil liability to exceed blood-money amounts.
- Art. 74: The law clarifies the conditions of accepting repentance and its rulings.
- Art. 75: The death penalty is not given for a crime unless the plaintiff declines reconciliation or amnesty.
- Art. 76: In *qisās* cases, reconciliation is permitted to be more than the blood-money.
- Art. 77: It is permissible for a woman to stand as equal to a man in terms of blood-money.
- Art. 78: The conditions of *qisās* in cases of wounding are exactly similar and the judge is completely aware of such.
- Art. 79: The whip is the principle punishment in judicial punishments. Imprisonment is forbidden except for a few crimes and for a limited period decided by the judge.
- Art. 80: It is not permissible to humiliate the imprisoned, force him to work, or insult his dignity.
- Art. 81: A Supreme Constitutional Court shall be founded, having jurisdiction over the correspondence of laws and regulations to the rulings of Islamic Shari'ah and the rulings of this Constitution. The law shall delimit its other spheres of authority.
- Art. 82: A Court for the Redress of Injustice shall be established. The law shall delimit its form, its spheres of authority, and the salaries of its members.

Section 7: Consultation, Monitoring, and Enacting Laws

- Art. 83: The state shall have a Consultative Assembly exercising the following specific duties:
1. Enacting laws such as are not inconsistent with Islamic Shari'ah.
 2. Approving the annual budget of the state and its final accounting.
 3. Monitoring the actions of the executive power.
 4. Holding those responsible in the ministry accountable for their actions and withdrawing its confidence in them when necessary.

Art. 84: The law outlines the conditions of elections, how they shall take place, and the conditions of membership. This will be based on consultation such that any sane person who has reached the age of majority of good reputation is ensured the ability to participate in expressing his opinion. Furthermore, the law outlines treatment of the Council's members monetarily. The Council shall draft its internal regulations.

Section 8: The Government

Art. 85: The government assumes the responsibility of administering the affairs of rule, realizing agreed-upon legitimate interests, and is responsible before the *imām*.

Art. 86: The law outlines the conditions for appointing ministers, the activities prohibited from them during the undertaking of their positions, and the way to hold them accountable for what they do in carrying out their jobs.

Section 9: General and Transitional Rules

Art. 87: The city of (. . .) shall be the capital of the country.

Art. 88: The law shall clarify the flag of the nation and its motto as well as delineate the particular rules for each of them.

Art. 89: The laws are applied from the date of their being put into effect and will not be applied retrospectively unless stating so. That requires the agreement of two-thirds of the members of Parliament. There shall be no retrospective action in criminal matters.

Art. 90: The laws shall be published in the official newspaper for a period of two weeks from the date of their proclamation. They will have the force of law one month after the date of their publication, unless other dates are specified.

Art. 91: Both the *imām* and the Parliament may request the amendment of an Article or Articles of the Constitution. The requested amendment must be stated in the request for amendment, along with the reasons calling for such amendment. Should the request come from the Parliament, it must at least be approved by the House.

In all cases, the House shall discuss the principle of the amendment, and proclaim a resolution on the matter with a two-thirds majority. If the request is refused, then a request for amending the same Article is not permitted until a year after the initial refusal.

If the Parliament agrees upon the principle of amendment on which discussion occurred, two months from the date of this agreement, the requested Article shall be amended. Then, the agreement of two-thirds of the members of the House on the amendment is presented to the nation for referendum. If the amendment is agreed upon, it is to be considered operative from the date of the announcement of the referendum's result.

Art. 92: All laws and lists of rules resolved before the publication of this Constitution remain valid and operative. However, their repeal or amendment is permitted in agreement with the rules and regulations laid out in this Constitution. If something contradicts the rules of Islamic Shari'ah, it shall be repealed and replaced.

Art. 93: This Constitution goes into effect from the date of the announcement of the agreement of the nation upon it in a referendum.

This plan has been prepared in accordance with this resolution, which states:

In the Name of God, the Merciful, the Compassionate

Resolution no. 11 of the Shaykh of Al-Azhar; dated the 25th of Muḥarram 1398 h. of January 5, 1978 C.

The *Shaykh* of Al-Azhar:

After reviewing Law no. 103 of the year 1961 regarding: the matter of reorganizing Al-Azhar, the agencies that comprise it, the amended laws regarding it, resolution no. 250 of the esteemed President of the Republic in the year 1975 regarding the publication of the executive regulation of the law #103 of the year 1961 mentioned above, the decisions and recommendations issued by the eighth conference of the Islamic Research Academy, which was held during the month of Dhū al-Qa‘dah, in the year 1397 h./October 1977 C., which contained his first recommendation regarding the drafting of an Islamic Constitution to be available to any country that wishes to model itself after the Islamic Shari‘ah;

It is resolved:

Art. 1: The formation of a High Committee to Draft a Plan for an Islamic Constitution to be available to any state that wishes to model itself after the Islamic Shari‘ah. Consideration shall be made for the principles agreed upon by the Islamic schools of law to the utmost extent possible.

It is up to the Committee to form a subcommittee made up of its members.

Art. 2: The formation of the High Committee mentioned above is as follows:

1. His Eminence, the Grand *Imām*, Doctor ‘Abd al-Ḥalīm Maḥmūd (Presiding)
2. His Eminence, the Professor Doctor al-Ḥusaynī Hāshim
3. Professor, consultant, the Esteemed ‘Abd al-‘Aziz Hindī
4. His Eminence, the *Shaykh* Ḥusayn Muḥammad Makhlūf
5. His Eminence, Professor Doctor ‘Abd al-Jalīl Shalābī
6. His Eminence, Professor, the *Shaykh* ‘Abd al-Jalīl ‘Isā
7. Professor, consultant ‘Abd al-Ḥalīm al-Jundī (Rapporteur)
8. Professor, consultant ‘Abd al-Fatāḥ Nāṣir
9. Professor, consultant, Minister ‘Abd al-Mun‘im ‘Imārah
10. Professor, consultant ‘Alī al-Mansūr
11. His Eminence, Professor Doctor Muḥammad Ḥasan Fayad
12. His Eminence, Professor, the *Shaykh* Muḥammad Khāṭir Muḥammad al-Shaykh
13. Professor Muḥammad ‘Atīyah Khāmis, J.D.
14. His Eminence, Professor Doctor Mahmud Shawkat al-‘Adawī
15. Professor, consultant Muṣṭafā ‘Afīfī
16. Professor, consultant Doctor Muṣṭafā Kamāl Waṣfī

In case of the absence of the head of the Committee, the oldest member in terms of age shall preside.

Art. 3: The Executive Secretary of the Academy for Islamic Research shall undertake secretarial duties, and he may be joined by other secretaries should the *Shaykh* of Al-Azhar decide so.

Art. 4: Work shall proceed in accordance with this resolution from the date of its proclamation, and it shall supersede any prior resolutions. Its implementation is the duty of the relevant bodies.

The *Shaykh* of Al-Azhar: ‘Abd al-Ḥalīm Maḥmūd

Then, the following was added to this resolution:

Resolution no. 12 of the Shaykh of Al-Azhar; dated the 25th of Muḥarram, 1398 h. of January 5, 1978 C.

The *Shaykh* of Al-Azhar:

Having reviewed Law no. 103 of the year 1961 regarding the matter of reorganizing Al-Azhar, the agencies that comprise it, the amended laws regarding it, Resolution no. 250 of the esteemed President of the Republic of the year 1975 regarding the publication of the executive regulations of the law mentioned above, and our Resolution no. 11, dated 1/5/1978, regarding the issue of forming a High Committee for Drafting the Islamic Constitution following the recommendation of the conference;

Has so resolved:

Art. 1: The formation of a subcommittee made up of members of the High Committee for Drafting the Islamic Constitution structured as follows:

1. His Eminence, Doctor Professor al-Ḥusaynī Ḥāshim
2. Professor, the consultant Mr. ʿAbd al-ʿAzīz Hindī (Rapporteur)
3. His Eminence, Professor *Shaykh* Ḥassanayn Muḥammad Makhḷūf
4. Professor, the consultant ʿAbd al-Ḥalīm al-Jundī
5. Professor, the consultant ʿAbd al-Fatāḥ Nuṣār
6. Professor, the consultant, Minister ʿAbd al-Munʿim ʿImārah
7. His Eminence, Professor *Shaykh* Muḥammad Khāṭir Muḥammad al-Shaykh
8. Professor Muḥammad ʿAtīyah Khāmis, J.D.
9. Professor, the consultant Muṣṭafā ʿAfīfī
10. Professor, the consultant Yaqūṭ al-ʿAshmawī
11. Professor, the consultant Muṣṭafā Kamāl Waṣṣfī
12. His Eminence, Doctor Muḥammad Shawkat al-ʿAdawī

The oldest member in terms of age from among those in attendance shall preside over the Committee. In the case of the attendance of His Eminence, the Grand *Imām*, at Committee meetings, he shall preside.

Art. 2: The subcommittee shall present the conclusions of its research and studies regarding the plan for the Islamic Constitution to His Eminence, the Grand *Imām*, the *Shaykh* of Al-Azhar.

Art. 3: It is the duty of the relevant bodies to implement this resolution according to how it applies to them.

Shaykh of Al-Azhar: ʿAbd al-Ḥalīm Mahmūd

The Arab Spring and Constitutional Reforms in Jordan

A Historical and Legal Appraisal

AWN SHAWKAT AL-KHASAWNEH

I. INTRODUCTION

Jordan is often described as an antique land, and the veracity of this description is attested by numerous archeological sites and findings—some from prehistoric times, others, more recent, from classical and late antiquity.

As a political entity, however, Jordan is of recent provenance. Since the rise of Islam more than fourteen centuries ago, Jordan has always been part of the lands of the caliphate (636–1918 AD) and concurrently of various Muslim dynasties that ruled in its name. In geographical terms, it is part of Bilād al-Shām (i.e., Greater Syria).

It was only in 1921, following the defeat of the Ottoman Empire in the First World War and a hiatus of three years, that a separate emirate (principdom) was formed in Trans-Jordan (though under a class A mandate entrusted to Great Britain by the League of Nations), and *Sharīf* ‘Abdullāh bin al-Ḥusayn (later King ‘Abdullāh I) declared its *amīr*.

From the beginning it was obvious that the Emirate, though not a full-fledged democracy, was to follow the model of a modern state with standing institutions, a state budget, a constitution referred to as “the basic law”, a parliament of sorts called the “Legislative Council”, a legal system, and guarantees for the rights of its citizens and indeed for those present on its territory. In other words, the course that the Emirate had embarked upon was markedly different from other absolute and paternalistic monarchies and sheikhdoms in the Arabian Peninsula and more akin to both the Egyptian Monarchy and the Hashemite Monarchy in Iraq (ruled by Faiṣal I, *Amīr* ‘Abdullāh’s brother, who had briefly been King of Syria, including Jordan, before its occupation by the French in 1920).

In 1924, *Amīr* ‘Abdullāh decreed the establishment of a committee to draft a “Basic Law” (also referred to as an “Organic Law”), i.e., a constitution, a task which was accomplished

in the same year. However, its recommendations were not put into effect until 1928, and this was done in response to popular demand for constitutional and democratic reform and for complete independence from Britain.¹ These demands were made in the first Jordanian Congress (*Mu'tamar*) in 1928—composed mainly of tribal shuyūkh (Plural of sheikh) and notables—and were contained in a document known as the National Covenant (*al Mithāq al Waṭanī*).

It is useful to recall that in following this model, the authorities in Jordan did not start from a *tabula rasa*. The idea of a constitution and of legal reform including codification of law as well as concepts of citizen rights, regardless of ethnicity or religion, had been very much at the heart of political discourse in the second half of the nineteenth century and the beginning of the twentieth, even as the Ottoman Empire was nearing its end. The first constitution, which was granted by ʿAbdülhamid in 1876, prorogued two years later and then re-established in 1908 by the Young Turks through a coup d'état, was still fresh in the memory of the *amīr* (who had himself served in the Ottoman parliament (*Mab'ūthān*) as a representative of the Ḥijāz) and, we may reasonably assume, of his coterie who were mostly men raised in the Ottoman tradition. The ideas of parliamentary and provincial representation were not new concepts either. Since 1869 in the *sanjak* (subdistrict) of ʿAjlūn, for example, elections for local councils had been held periodically.

For their part, the British Mandatory Authorities also had a keen interest in the creation of a competent civil service and army that could keep the peace, prevent intertribal raids, encourage agriculture and land registration, and, generally speaking, consolidate the nascent Emirate and the position of the *amīr*. This, however, was to be achieved without incurring unnecessary expenses. It should be borne in mind that the mandatory authorities were notoriously frugal, especially so given the economic conditions in the British Empire after the war. This frugality also helped keep the *amīr* in check and increase his dependence on them. The situation prior to full independence in 1946 can be summed up by citing the words of a recent commentator, who stated that in Trans-Jordan “the institutions of state were built almost from scratch by late Ottoman reform and colonial social engineering.”²

II. A BRIEF HISTORICAL REVIEW OF JORDAN'S CONSTITUTIONS

A. The Constitution of 1928

It would be useful to recall briefly selective highlights of the 1928 Constitution and its numerous amendments until the adoption of the 1952 Constitution.

Art. 5 declared:

There is no difference in the rights of Jordanians before the law, even if they are different in race, religion or language.

Art. 6 stipulated:

The personal liberty of all those resident in Jordan is inviolable from aggression or interference. No one shall be incarcerated, or arrested or punished or forced to change his place of residence or put in shackles, or forced to serve in the army, except in accordance

¹ “Popular” should be understood as emanating from prominent sheikhs and notables.

² Tariq Moraiwed Tell, *Economic and Social Origins of Monarchy in Jordan* (Palgrave Macmillan, New York 2013) 10.

with the law. All dwellings are protected against trespass and no one is permitted to enter them except in accordance with the law.

Here one notices the beginning of an unfortunate trend in most modern Arab constitutions of typically stating a general proposition of inviolability or protection and then creating loopholes through a *renvoi* to an undesignated law that could, and usually did, fall below certain standards of human rights (though the modern concept was hardly known then) or of basic considerations of justice.³

Art. 10 stated:

Islam is the state religion and the [state] guarantees to all those resident in the Hashemite Kingdom of Jordan total freedom of belief and the practice of their worship in accordance with their customs so long as it does not disturb general peace and is not contrary to [common] morality.

The reference to the Hashemite Kingdom of Jordan rather than Trans-Jordan indicates that the article, as with many others, was amended later. Interestingly, the reference to a state religion was not known to Muslim states in the classical era. Such references first appeared in the constitutions of the newly independent states of Latin America in the nineteenth century and are based on an assumption of the duality of the state and religion, which was simply foreign to Muslim concept(s) of sovereignty that saw the preservation of religion as one of the aims (*maqāṣid*) of the Shari‘ah; the others include preservation of the body, of honor, of territory, etc.⁴ At any rate, this reference becomes a mere slogan given that no normative consequences flow from it.

Art. 21 stated:

- (1) The Prime Minister, together with the ministers are collectively responsible to the King for the general policy of the state. Additionally, every minister is responsible to the King for the department or departments under his authority.
- (2) The King dismisses the Prime Minister from his office, or accepts his resignation.

It is clear that the concept of parliamentary monarchy, i.e., where the government is responsible to parliament, was not included in the 1928 Basic Law.

Art. 24 stated:

The King exercises his competences through a Royal Decree, such a Decree is made on the recommendations of a minister or the responsible ministers with the consent of the Prime Minister, and are signed by them. The King expresses his consent by affixing his signature above the other signatures.

³ The technique of stating a principle and then emptying it of content has a precedent in the 1876 Ottoman Constitution. In September 1909 the German Ambassador in Istanbul, commenting on the 1876 Constitution, observed “now the constitution of 1876 includes a number of liberal principles with the rejoinder as “circumscribed by the law”. Thus Turkey has freedom of press but no press law, freedom of association but no usable Law of Association”, in Hasan Kayyali, *Arabs and Young Turks: Ottomanism, Arabism, Islamism in the Ottoman Empire 1908–1918* (London, 1997) 75.

⁴ For a full treatment, see al-Māwardī, *The Ordinances of Government: A Translation of al-Aḥkām al-Sulṭāniyah wa ‘l-Wilāyāt al-Dīniyah*. Trans. Wafā H. Wabbah (Reading 1996).

Here we see the genesis of the idea that the Council of Ministers has a general competence in administering the state, and that the king does not exercise his powers except upon a recommendation or advice by a minister and the consent of the Prime minister.

Art. 25 stated:

The faculty to legislate is exercised by the Legislative Council and the King. The Legislative Council is composed of:

- a) Representatives elected in accordance with the election law which must take into account an equitable representation of minorities.
- b) The Prime Minister and other members of the Council of Ministers who had not been elected as representatives.

Plainly, this fusion of the legislative and executive branches of government falls short of notions of separation of power, since the ministers are members of the Legislative Council and are not elected. Moreover, the constitution is silent on the question of the need for a vote of confidence in the government by the Legislative Council. When this is read together with the wide powers reserved for the king in Art. 19 (3), which stipulated that:

The King issues Royal Decrees for the holding of general elections to the Legislative Council and calls the Council to meet and opens, postpones and terminates its meetings and dissolves it in accordance with the rules of law.

One cannot escape the conclusion that the 1928 Constitution had a long way to go before it could be considered a modern liberal arrangement.⁵ It appears also from contemporary anecdotal references that the *amīr* was unwilling to part with his powers. This can be gleaned, for example, from the episode where Sir John Philby, who was a close adviser to the *amīr*, left Amman (having earned the ire of ‘Abdullāh for his demand to have checks on the *amīr’s* power).⁶

B. The Constitution of 1947

The 1947 Constitution basically consolidated the numerous amendments to the 1928 Basic Law. It was occasioned by the coming to an end of the British Mandate. Its main feature was that it described the system of government in Jordan as a parliamentary one, even though the government, as was the case under the 1928 Basic Law, was responsible before the king and not parliament. It may be said of the 1947 Constitution that it is more notable for the things it omitted rather than the ones included.

⁵ The 1928 Constitution was modeled on the Ottoman Constitution of 1876, which, in turn, was taken from the liberal Belgian Constitution of 1831 and served as the basis for many constitutions in former Ottoman dominions, e.g., Bulgaria, Serbia, and Egypt. The 1876 Constitution was, however, adapted to local conditions. The executive branch of government was heavily privileged over the legislative. This feature was followed in the 1928 Constitution. See Şükrü Hanioglu, *A Brief History of the Late Ottoman Empire* (New Jersey 2008) 117.

⁶ Tariq Moraiwed Tell, *Economic and Social Origins of Monarchy in Jordan* (Palgrave Macmillan, New York 2013) 65.

C. The Constitution of 1952

King ʿAbdullāh was succeeded by his eldest son Ṭalāl. During his brief reign (1951–1952) the Constitution of 1952 was adopted and has since been hailed as a landmark development in the constitutional history of Jordan. Suffice it to say of that document that in recent years, and particularly since the onslaught of the phenomena euphemistically called the “Arab Spring”, a common demand among activists in Jordan has been the return to the 1952 Constitution.

While most of the credit must go to King Ṭalāl for the adoption of the constitution, major credit should also go to people around him, notably to the prime minister at the time, Tawfīq Pāshā ʿAbu ʿl-Hudā, and to another prime minister, Ibrāhīm Pāshā Hāshim, who headed the committee charged with drafting the constitution. Although these people were by no stretch of the imagination liberal in the modern sense of the word, they were nevertheless typical products of the Ottoman tradition of statesmanship, a tradition that was enhanced by the concepts of mandatory civil service; they embodied the qualities of dignity, honesty, total lack of corruption, and self-discipline, and took the concept of the rule of law seriously.

The 1952 Constitution survived King Ṭalāl and those who drafted it and who continued to serve well into the first years of King al-Ḥusayn’s long reign (1952–1999). However, the constitution itself underwent some restrictive changes under King al-Ḥusayn, reflecting the precariousness of the throne in the midst of the global cold war; Nāṣrite propaganda and its active interference in Jordan’s affairs, the encouragement of dissent (including failed *coups d’état*), as well as Arab nationalism, all of which fed on the responsibility of Arab leaders for the Palestinian tragedy. These developments coincided with the waning of British power in the Middle East and its replacement by American power. In 1956, when the first real attempt at forming and maintaining a parliamentary (party) government under Sulaymān Nabulsi failed miserably, shortly after its foundation, an end was put to Jordan’s experiment with liberalism. The king’s power was increased, and restrictions on personal freedoms of speech and assembly were introduced, usually through the loophole already referred to earlier, i.e., of the saving phrase, “in accordance with the law” or by direct constitutional amendments.⁷ The birth and insidious rise of the *Mukhābarāt* (the intelligence services) goes back to this era.⁸

It is important to add that these developments must not obscure other more benign, indeed positive developments. First, in the face of great challenges to a small and poor kingdom, the king and his governments were able to maintain the regime with minimal loss of life and with legendary mildness. Moreover, the standard of life in Jordan improved steadily and considerably as compared with the thirties and forties when there was famine or extreme poverty in the countryside and among the Bedouin.⁹ Education was also spreading while, importantly, its standards were maintained. The foundations of an extensive road system and infrastructure were laid, which was done by the state with the private sector playing virtually no role. Credit must go to the small but efficient civil service who believed in the ideal of nation building. Some credit must also go to the new financial benefactors,

⁷ E.g., all political parties were outlawed from 1957 until 1992 except the Muslim Brotherhood movement, which was permitted to continue operating as a charitable organization.

⁸ Formally, the General Intelligence Directorate (GID), which was established in 1964 in accordance with General Intelligence Services Law (24).

⁹ Tariq Moraiwed Tell, *Economic and Social Origins of Monarchy in Jordan* (Palgrave Macmillan, New York 2013) 84.

the United States of America, which was more generous than the British Mandatory Authorities had been, and was intent on defending Jordan against the arch enemy of the day, the Soviet Union and its allies.

Returning to the 1952 Constitution, its salient points shall briefly be highlighted. Art. 1 states:

The Hashemite Kingdom of Jordan is an independent and sovereign Arab State. Its territory is indivisible and no part of it is alienable. The Jordanian people are part of the Arab Nation, and its government system is parliamentary, monarchical and hereditary.

The reference to independence and sovereignty are readily explainable by the fact that Jordan was no longer under a mandate. The reference to Jordan as an Arab state reflected the strong nationalistic feelings of the time, as did the reference to Jordan being part of the Arab Nation. Again, this has to be understood in the context of hopes of unity, especially with Syria, particularly since the French mandate was no longer there, and of unification with the West Bank, which had taken place two years earlier.

The indivisibility of the kingdom and the fact that no part of it may be ceded (alienated) was put to the test when Jordan “severed its legal and administrative links to the West Bank” in 1989. This will be discussed in more detail below.

Much has been made, since the onset of the “Arab Spring”, of the fact that Art. 1 referred to the system of government being parliamentary, monarchical, and hereditary to support the contention that the parliamentary aspect precedes the monarchical aspect of government. This author’s view is that such an inference cannot, on the plain meaning of the words, be supported, but that both cardinal aspects are “golden rules”, without which the constitution cannot stand on its own.

Art. 9 states:

No Jordanian may be deported from the territory of the Kingdom.

It is significant that the rule is not qualified by a reference to the usual phrases “except in accordance with the law”, etc. This constitutional principle was violated when members of Ḥamās, some of whom are Jordanian citizens, were effectively deported from Jordan to Qatar in 1999.¹⁰

Art. 40 in effect repeats Art. 24 of the 1928 Basic Law. It reads:

The King shall exercise his powers by a Royal Decree, and the Royal Decree shall be signed by the Prime Minister, and the minister or ministers concerned. The King shall express his concurrence by placing his signature above the said signatures.

This article is perhaps one of the most important articles in the constitution, for it affirms the fact that the king cannot rule directly and at will, but must do so on the prior recommendation of the prime minister and the concerned ministers. Moreover the article is a necessary consequence of the concept of a parliamentary monarchy and represents the other side of the coin to Art. 30, which states:

The king is the head of the state and is immune from any liability or responsibility.

¹⁰ Jerrold Kessel, “Deportation of Hamas leaders doesn’t please all Jordanians”, *CNN* (November 26, 1999), <http://edition.cnn.com/WORLD/meast/9911/26/jordan.hamas>, accessed July 18, 2014.

Art. 51 is also significant, as it reads:

The Prime Minister and the ministers are collectively responsible before the House of Representatives, for the general policy of the state and every minister is individually responsible before the House of Representatives for the work of his ministry.

This article confirms the collective responsibility to the House of Representatives and not to the king or *amīr*, as was the case in the 1928 Basic Law and 1947 Constitution.

Arts. 53, and 54 (1) and (2), concern the requirement of seeking a vote of confidence in the government by the House of Representatives, and the fact that if the government does not pass it, or, if later, a vote of no confidence succeeds by a two-thirds majority, the government must resign. This article constitutes the heart of the Jordanian Constitution, embodied in the 1952 version.

In sum, under the Jordanian Constitution, the king is the head of the state and is immune from responsibility; the cabinet is chosen by the king but subject to a vote of confidence by the House of Representatives, to whom it is collectively responsible; executive power is exercised by the king, but only on the prior recommendation (advice) of his ministers; and Royal Commands, written or oral, do not exempt ministers from responsibility. However, the king retained extensive powers under Arts. 34 and 35 to dissolve the House of Representatives and to dismiss the prime minister.

In practice, no government has failed to win a vote of confidence, nor was one ever dismissed because it was later subjected to a vote of no confidence. However, on two notable occasions, the governments of Samīr Pāshā al-Rifāʿī (1963) and Ṭāhir al-Maṣrī (2003) resigned when it became clear to the two prime ministers in question, from speeches in the House of Representatives, that they were unlikely to pass a vote of confidence. In the first instance, the king exercised his power to dissolve parliament under Art. 34 of the constitution. It is not surprising, therefore, that since the beginning of the “Arab Spring”, demands have been made repeatedly to make the House of Representatives immune from dissolution by the king.

In 1966, the last general election under the 1952 Constitution and its amendments was held on both banks of the River Jordan and produced the longest serving parliament in Jordan’s history. This was because elections became impossible to hold in the West Bank, which had fallen under Israeli military occupation. As time and death took their toll on representatives, a device was introduced whereby elections to fill casual seats were held by the House of Representatives itself.¹¹

III. POLITICAL, SOCIAL, AND IDEOLOGICAL DEVELOPMENTS SINCE THE INCEPTION OF THE EMIRATE

In this section, the main developments pertaining to political, economic, and social life as well as ideology that have taken place since the inception of the modern state of Jordan will be examined.

The aim in doing so is not to write, or rewrite, a comprehensive history of the country¹² but to highlight some relevant developments in the hope of illuminating the broader context of the demands for reform that resonated in Jordan as the “Arab Spring” progressed.

¹¹ This was done in 1974 by constitutional amendment. The House of Representatives was called for a single meeting in which it approved the amendment.

¹² A number of histories of Modern Jordan have recently been written, see Abla Amawi, “State and Class in Transjordan: A Study of State Autonomy,” vol. I, Ph.D. Dissertation (Georgetown University 1992); Tariq

A. Political Developments

Until his assassination in 1952 in al-Aqṣā Mosque in Jerusalem, King ʿAbdullāh harbored dynastic ambitions on Syria based on his claims to rule that country, where his brother Faiṣal I had ruled briefly (March 1920–July 1920). Those ambitions, though they coincided with a general wish by Arabs for unity, were frustrated first by imperial designs and later by the rise of vested interests in preserving the status quo while paying lip service to the idea of Arab unity.¹³

In the event, the only territorial aggrandizement that ʿAbdullāh succeeded in achieving was the unification of the West Bank with the Hashemite Kingdom of Jordan in 1950 (some prefer to refer to this unification as the “annexation” of the West Bank). This acquisition however was lost to Israel in 1967. In 1989 Jordan severed its “legal and administrative ties” with the West Bank; an act done under pressure from Arab states ostensibly to enable the Palestinian Liberation Organization (PLO) to seek, on behalf of the Palestinians, their right to self-determination and to speak in their name in international fora and in negotiations regarding the question of Palestine.

The myriad issues arising out of this act, both in terms of constitutional as well as international law, remain confused and intractable: Did the severance of legal and administrative links amount to renunciation of title over the West Bank? Was the decision constitutional? Could a succession of states take place when the successor state was not fully established? These and other questions relating to the status of Palestinians who acquired Jordanian nationality, or whose fathers did, as a result of the unity of the two Banks of the Jordan in 1950, remain pertinent questions. It is beyond the scope of the present chapter to delve into them. Nevertheless, it is important to keep these questions in mind, for they continue to have a direct impact on the perennial debate in Jordan, accentuated by the “Arab Spring”, on the enjoyment of civil and political rights by Palestinians, primarily in the areas of (a) the issue of citizenship and (b) the Election Law.

Since it is equally important to bear in mind what Amin Maalouf has aptly called “mortal identities”, this point shall briefly be elaborated.¹⁴ The idea of Arab unity had been a strong force since Ottoman times. Even during the last days of that long-reigning Empire, the support it enjoyed among Arabs was partly because it was seen as a protector of the Arabs against foreign—i.e., Western—occupation. This point was put cogently by Rafiq al-ʿAzm, President of the Ottoman Administrative Decentralization Party, who wrote in 1912:

Syria is Ottoman as long as the Ottoman state is capable of defending it. If, God forbid, the Ottoman state collapses, then . . . Syria is Arab country indivisible from Arab territory. Syria is Ottoman First, Arab second, and rejects any foreign interference. The Syrian nation holds fast to its Ottomanism, and [. . .] does not wish for the policy of colonization to put an end to its national life.¹⁵

Moraiwed Tell, *Economic and Social Origins of Monarchy in Jordan* (Palgrave Macmillan, New York 2013); Eugene Rogan, *Village, Steppe and State: The Social Origins of Modern Jordan* (1995).

¹³ Much later, the idea of Hashemite rule over Syria was frustrated by inter-Arab rivalries and the rise of Nasserite and Arab nationalist ideologies, mostly inimical to the Hashemites.

¹⁴ Amin Maalouf, *On Identity* (Random House, London 2000) 26.

¹⁵ Selim Deringil, “‘They Live in a State of Nomadism and Savagery’: The Late Ottoman Empire and the Post-Colonial Debate” (2003) 45 *Comparative Studies in Society and History* 2, 341; Deringil is quoting Mahmoud Haddad, “The Rise of Arab Nationalism Reconsidered” (1994) 26 *International Journal of Middle Eastern Studies* 201–222, who is quoting an editorial by Rafiq al-ʿAzm published in al-Muʿayyad newspaper on December 24, 1912.

The striving toward Arab unity whether under the Hashemite dynasty, or later in its Nāṣrite form, cannot, however, obscure the existence of parallel localist identities and irredentist tendencies, which, to be sure, are present in all societies—even in those that enjoy a high degree of cultural, ethnic, or religious homogeneity. Typically such tendencies manifest themselves through the twin methods of (a) claims to particularism as a foundational myth, and (b) complaints about discrimination and the denial of social and political rights that may, in a particular situation, have some foundation.

In the Emirate of Trans-Jordan there were, from the very beginning, complaints that the higher offices of the state, including the office of prime minister, were invariably given to non-Jordanians, and this led to the adoption of the slogan “Jordan for the Jordanians”.¹⁶ This strain of thought, originally directed against the *amīr*’s Syrian and Lebanese friends, assumed new dimensions after the unification of the two Banks of Jordan, not immediately and not so much as a result of the first influx of Palestinian refugees dispersed from their homeland in Palestine, but largely from the rise in the 1960s of notions of Palestinian nationhood espoused and propagated by the PLO, which culminated in the armed clashes of September 1970, leading to the expulsion of the Fida’yīn from Jordan.

B. Economic and Social Developments

Alongside these developments, and contributing to them, a more imperceptible factor was at work. For a variety of reasons, including the fact that after 1970 Jordanian citizens of Palestinian origin were not favored in the army and security services (although they were never denied access to those offices and indeed some attained very high offices in the state), and the further fact that the Palestinians were perceived as more entrepreneurial than the Jordanians (this is, of course, a generalization with notable exceptions, but, as a general proposition, it is true), the Palestinian segment of Jordanian society stood to gain from the economic development of Jordan, which was marked by prolonged inflationary periods followed by periods of sharp recession.

It is understandable that those with limited incomes are more affected by such fluctuations, while the more entrepreneurial stand to gain from them. As a result, feelings of gloom started to be felt among the first group (mostly East Bank Jordanians), and a sense of differentiation among what was, in ethnic, cultural, and religious terms, an essentially homogeneous society began to develop.

Vague feelings of gloom and envy are not in themselves a serious threat to the existence of an established regime, but when those feelings were coupled with fear—which is a strong primordial instinct—regarding the future of the state itself and when, in parallel, rumors and conspiracy theories started circulating that the long-feared idea of Jordan becoming an alternative homeland for the Palestinian refugees were spreading fast (as the prospects of peace based on the two-state solution were vanishing), those feelings assumed a new urgency and became the focal point for East Bank Jordanians who started, for the first time in Jordan’s history, criticizing the regime openly and on a large scale. Thus, a rift began to appear between the regime, on the one hand, and, on the other, the tribes and clans of Jordan who had traditionally formed the backbone of the army and the security apparatus of the state since at least the 1930s.

The regime’s response to this growing rift, which meant to ameliorate or contain the situation, produced, in effect, the exact opposite of what it intended. For example, in the field of higher education special places were reserved at universities for students from tribal

¹⁶ The first “Jordanian” (i.e., East Banker) to become prime minister was Hazā’ Pāshā al-Majāli in 1955.

areas or army backgrounds. Initially, the policy was successful and tolerable, but once it was done on a large scale, it considerably lowered the standard of education at public universities. The scope of the problem may be gleaned from the fact that in 2010, 2011, and 2012, nearly 45 percent of the entrants to state universities did not go through the common (competitive) method.¹⁷ This preferential treatment exacerbated feelings of injustice and, coinciding with the economic difficulties of the state, meant that the universities had to carry the financial brunt of this shortsighted policy without adequate financial support.

It is said that in nature there is an inverse relationship between quality and quantity; and this applies to university education in Jordan. Not content with overburdening the state universities with underachievers, a policy of opening new universities in almost every province and of giving permits to open private universities where, to put it mildly, profit-making rather than academic excellence was the uppermost consideration in the minds of the founders, was implemented. With quality control now truncated and substandard, the universities started to produce many more graduates than the civil service could absorb, thus sacrificing the efficiency and aptitude that had marked it in the Mandatory period and in the first decades after independence.

An unintended consequence of this easy access to education was the havoc it wreaked on the structure of society, especially tribal society, for the traditional leadership lost, over a very short span of time, its privileged role as an intermediary between the government and various tribes and regions, and was replaced by a multiplicity of aspirants armed with formal, if very weak education, and who in many cases had acquired sudden new wealth mainly as prices of land hiked resulting from mindless urban expansion and a sharp increase in demand to accommodate new waves of Palestinian refugees from Kuwait, as well as refugees from Iraq and, at the time of writing, from Syria. In other words, the old social system with its attendant security was shattered. It could therefore be said that the apparent success of spreading formal education and the acquisition of sudden nonproductive wealth turned, in reality, into a failure.

C. Ideological Developments

So far, this chapter has investigated those developments that alienated the traditional power base of the regime, namely the tribes and clans of the East Bank of Jordan, and elaborated how the attempts to placate them by piecemeal measures only exacerbated the problem. It shall now turn to another traditional pillar of the regime, the Muslim Brotherhood and, more generally, the Islamic movement in Jordan.

It will be recalled that the main opposition to the Jordanian regime in the 1950s and 1960s came from an assortment of Nāṣrites, Baʿthists, Arab Nationalists, and, to a lesser extent, communists. By contrast, the Muslim Brotherhood stood firmly by the Hashemite Monarchy at every juncture where it was threatened, or when it was competing with regional political actors: Nāṣr, Hāfiẓ al-Assad, and ʿArafāt. The reasons for this are not hard to see; during the Cold War, the world was neatly divided between, on the one hand, socialists and secular nationalists, who liked to be referred to as “progressives”, and, on the other, “conservatives”, who were derided by their opponents as “reactionaries”. In this Manichean world, the monarchy and the Brotherhood both belonged to the latter camp.

A number of factors brought about the change that fundamentally transformed the ideological map of that period. The humiliating Arab defeat in the Six-Day War in 1967 dealt

¹⁷ Council for Higher Education, coordination of common entrance unit (Amman, Jordanian Ministry of Higher Education for the years 2010, 2011, 2012).

a severe blow to the ideology of Arab Nationalism; what remained of it was taken care of by the establishment of two repressive regimes in Syria and Iraq, respectively. Not only did those regimes fail miserably in waging war to recover Arab rights in Palestine (their main legitimizing claim), they equally utterly failed in delivering on their promises of affecting Arab Unity. In effect, they had become hereditary republics, and the ideological veneer behind which their leaders hid was becoming thinner by the day.

As for communism, it had a limited following in Jordan, and, in any event, whatever appeal it did have in the region was on the wane. The days of starry-eyed idealism were gone, and in their place the Soviet Union was seen as an empire, even as an “*Empire éclaté*”, as it had been aptly described by an acute observer even before its fall.¹⁸

In their place, a new and, at the same time, old ideology, that of political Islam, was starting to fill the void. To be sure, this rise of “fundamentalism” was taking place throughout the world. Whether this is due to disenchantment with material civilization or a reaction to the failure of earlier ideologies is an endlessly debatable question. (The rise of Christian fundamentalism in the United States or of Hindu nationalism are cases in point.) This was coupled slightly later with another, ominous development: the rise of what is referred to as “postmodern tribalism”, which found horrific expression in the Balkans.

In Jordan, for all the problems and shortcomings enumerated, the country was largely immune from the rising tide of fundamentalism and freer from the waning ideologies of Ba‘thism, Nāṣrism, etc. that had posed a challenge to the regime from the 1950s. Moreover, the monarchy enjoyed traditional cordial relations with the Muslim Brotherhood; and the population was largely homogeneous, notwithstanding politically induced tensions between Jordanians and Palestinians.

If there was a challenge to the regime, it came from a shrinking economy that had developed rapidly but unevenly. During the Iraq-Iran War, Iraq had been a captive and lucrative market for Jordanian business and industry, which sought no alternative markets. Now, with the end of the war, many sectors within the Jordanian economy began to suffer; the transport sector all but collapsed.

It was in those circumstances that the decision to resurrect the democratic process, by calling for a general election, took place. As we shall see, it was in the course of that process that the Islamists of Jordan, who like the tribes had traditionally been a pillar of the state, were also alienated.

D. The Election of 1989

As mentioned above, in 1988, Jordan had severed its legal and administrative links with the West Bank. This was interpreted as clearing the way for holding elections in the East Bank of Jordan only. Additionally, the king and his advisors had witnessed a number of unmistakable diplomatic successes by the PLO in being recognized as the sole legitimate representative of the Palestinian people, whilst support for the Jordanian Monarchy in the West Bank proved weak.

Moreover, King al-Ḥusayn, who was an astute interpreter of the international scene, had come to realize that with the ongoing disintegration of the Soviet Union the old regional system had to give in. Realizing that the United States, now pursuing different priorities from those that had traditionally cemented Jordan’s alliance with it, was going to press for “democratic reform”, he decided that the time for a general election had come. The catalyst

¹⁸ Hélène Carrère d’Encausse, *L’Empire Eclaté* (Flammarion, Paris 1978).

for this development was the outbreak of riots in the southern town of Maʿān, and the realization that Jordan's foreign currency reserves had reached an all-time low.

In preparation for this election, those in the regime who are always more royalist than the king began to concoct "creative" ideas to minimize the risks inherent in any free election. To this end, political parties were hastily fabricated and generously funded. The only problem with this scheme was that such parties lacked any coherent philosophy for which platitudes like "the homeland", "freedom", "equality", "democracy", etc. were substituted. This tutti-frutti concoction of ideas, however, did not deter many aspirants from joining the "parties of the regime". What mattered more were the prospects that joining these parties offered in terms of personal or political advancement. Naturally, there was a preponderance of *arrivistes* and the unabashedly ambitious. This, in the author's opinion, is where Jordanian parliamentary democracy, recently revived from a hibernation, took a quantum leap downward.

All this notwithstanding, the 1989 parliament itself was a relatively strong and balanced one. Some would even contend, not without justification, that it was this election which helped King al-Husayn to deftly navigate the economic crises of 1989 and the political crises that arose out of the 1991 Gulf War, where Jordan stood virtually alone.

The Gulf War was followed by the Madrid Peace Conference of 1991 and the entry of Jordan into negotiations that ended with the conclusion of a peace treaty with Israel in 1994. In 1993, a combination of factors, notably the strong showing of the Islamists in the 1989 elections, and an exaggerated fear that the passage of the treaty with Israel—which was still in the making—might fail, led to the sudden dissolution of the House of Representatives and to the holding of general elections in the same year.

To increase the chances of the passage of the peace treaty, a structural change in the Election Law was deemed necessary. It was called the "One Man, One Vote" formula. In British constitutional history, the "One Man, One Vote" formula refers to a long process to ensure, on the one hand, that everyone was entitled to vote and, on the other, that no man (or woman) was entitled to have more than one vote.¹⁹ This was achieved through successive acts of the British Parliament.²⁰

In Jordan, the formula operated differently and is more accurately described as the "One Man, One Choice". Traditionally, constituencies varied in the numbers of seats allotted to them, reflecting a composite criteria of the number of voters, size, etc. and most constituencies had five or six seats. A voter could therefore cast a ballot for five or six candidates if he so wished. Under the new formula, a voter could only vote for one person regardless of the number of seats in a given constituency. In other words, in a constituency of five seats, for example, a voter could only use one-fifth of his choices; this formula was not only less democratic than the traditional one, it was meant to work in favor of a tribal representation since the underlying assumption—no matter that it was unverifiable—was that with only one choice, a voter would give his vote to his or her kinsman, whilst if he had more than one choice, the other choices would likely go to an Islamist candidate, as the most organized political force.

Notwithstanding this amendment, which was plainly directed against the Muslim Brotherhood, the king was able to persuade them, mostly because of the high esteem in

¹⁹ Until the twentieth century, vestiges of "weighted" voting were still in existence, e.g., members of the Church of England and students at the universities of Oxford and Cambridge had more than one vote.

²⁰ E.g., the Representation of the People Acts of 1918, 1928, also commonly referred to as the Fourth and Fifth Reform Acts, respectively.

which he was held, to participate in the 1993 elections. During the debate about the ratification of the peace treaty, the Islamists voted against it in bloc, but did not go to any lengths to stop its passage. Whatever rifts were starting to emerge, enough cordiality remained to ensure that the Islamists would cooperate. Importantly, the state was not seen as an opponent, and the king continued to have good relations with the Muslim Brotherhood; as late as 1997 during his efforts to save the life of Khālid Mash'al, the head of Ḥamās, who had been the victim of an assassination attempt by Israeli agents, he at one point threatened the denunciation of the peace treaty.

Where does all of this lead us? In the 1990s, the beginning of a rift started to emerge between the regime and its traditional backers among the East Bank tribes and clans, but it had not deepened; the occurrence of riots in those areas however should have been an eye-opener.

Concurrently, as of 1993, the "regime parties" were set against the Islamists, and the obsession with preventing the latter from achieving a majority or a sizable minority in parliament seems to have overridden all other considerations, even if this included resorting to regressive measures in the electoral law and to placing the state in the position of a partisan.

Fear of the unknown and fear of losing a privileged position led to irrational moves by dominant groups, as has so often happened in history. The pity of it all is that this was unnecessary since, as described above, the king was at the height of his popularity due to his stand on Iraq, and the monarchy was at long last free from its traditional foes, i.e., Arab Nationalists, Nāṣrites, and Ba'ṭhists.²¹

King al-Ḥusayn died in 1999 after a long fight with cancer and was genuinely mourned by the great majority of his people and by many people who held him in high respect all over the world. His remarkable personality, the length of his reign, his aversion to violence, and his constant readiness to forgive and co-opt opponents made him a father of the nation. This does not suggest that his reign was without its mistakes or blemishes; his entry into the 1967 war and his support for Ṣaddām's war against Iran came to cost Jordan deeply in subsequent years.

King 'Abdullāh II ascended the throne in 1999 and immediately embarked on a policy of economic liberalization. Under this policy and on the recommendation of neoliberal advisers who were its main pundits in spreading the new gospel of privatization, the political and economic life of the country was marked by three main aspects.

First, the traditional structure of government, mainly the civil service, was being supplanted by a parallel system where the decisions relating to investment, economic matters, trade, etc. were made not through the bureaucratic method but through shortcuts either in the Royal Court itself or via independent bodies staffed by people who were thought to be especially bright (mockingly referred to as the digitals) and who were immediately promoted to important offices and were given salaries on a scale hitherto unheard of in Jordan. They naturally became the envy of ordinary civil servants who worked in difficult conditions on modest salaries. Ominously, these special bodies (*al-Mu'assasāt al-Mustaqillah*) were accountable to parliament only in a nominal sense. The task of the government was reduced to giving its formal imprimatur to the decisions taken in the Royal Court or by those new bodies.

The first years of King 'Abdullāh's reign were marked by an economic boom, in part brought about by the pouring into Jordan of American money in the "common war on terror" and the war on Iraq; and this had the effect of hiding, for a time, the structural difficulties of Jordan's economy, as well as the ineptitude of the new official elite.

²¹ Cf. (n 13) 13.

It goes without saying that in a country where state corporations, the infrastructure, and the economic institutions were all built by the public sector²² with an ethos inherited from Ottoman and British Mandatory traditions—the gospel of neoliberalism and privatization remained a largely dissident one, even if patronized by the king and his coterie.

Second, privatization was effected through the sale of most of the state's natural resources to foreign capital, the phosphate and potash industries representing the main examples. The reason given was that the state corporations responsible for the extraction and sale of those substances were running at a loss. The other justification was that the sale of these resources, and of other corporations in the field of communications, was necessary to pay for Jordanian national debt, which stood at around 7 billion dollars at the time of King al-Ḥusayn's death.²³ There have been widespread accusations of corruption relating to those sales, some of which are now under investigation, and it would be improper to comment on them. But it can be said—the truth or otherwise of those accusations notwithstanding—that there is a widespread perception among ordinary Jordanians that the sharp economic difficulties felt by them are traceable to official corruption (at the time of writing Jordan national debt stands at about 23 billion dollars²⁴).

It is the author's conviction that the ingredients of revolution are not present in Jordan. The regime is not repressive, it enjoys popular support that has however diminished somewhat; there is little abject poverty and misery; and fear that any alternative regime would be worse is a constantly sobering factor. However, corruption in Jordan now acts like a termite that eats away at the dignity of the state and its institutions, and may yet bring about its downfall, especially if economic conditions continue to deteriorate.

The third aspect of the new approach is that two actors have now started to play a larger role in the political and economic life of the country than the constitution and the political traditions contemplated for them:

1. The Royal Court, which grew enormously in size, began to play a direct role in most of the decisions relating to privatization and investments. The net result of this is that the political system became a strange hybrid of, on the one hand, the traditional parliamentary monarchy, where the prime minister and the council of ministers were held collectively accountable to parliament, and, on the other, a sort of "presidential" system, where the king, who is immune, effectively rules through his court and advisers. In other words, the basic formula that authority and accountability should be linked was shattered.
2. The intelligence services, who were incidental beneficiaries of the "war on terror",²⁵ also grew enormously in power. Whilst in theory they are supposed to report to the prime minister, they in effect became "prime minister makers" and usually bypassed the prime minister altogether. By rigging parliamentary elections, they also assumed enormous power over many members of the House of Representatives, a power they used in a cavalier manner, causing some members of parliament to change their votes on a single issue on many occasions, resulting in farcical scenes that downgraded the quality of political life in Jordan. Any glance at Jordanian dailies reporting debates in parliament dealing with such issues as the election or votes of confidence or most

²² The private sector, by contrast, contributed virtually nothing, and its total lack of a philanthropist ethos is remarkable.

²³ Central Bank of Jordan's Monthly Bulletin, October 1998.

²⁴ Central Bank of Jordan.

²⁵ Bob Woodward, *Plan of Attack* (Simon & Schuster 2012).

recently the budget law would bear testimony to this. Moreover, the government of the day was constantly at their mercy for they could direct parliament to make life difficult for it, should they decide to do so, thereby effectively incapacitating it.

In other words, for all the offices and the fanfare, the state was basically dysfunctional; a three-headed hydra, with the three heads constantly biting at each other. It is no wonder that governments did not last long, and parliaments were constantly being dissolved, while heads of the intelligence services were dismissed and sometimes imprisoned on charges of corruption.

IV. THE CONSTITUTIONAL AMENDMENTS OF 2011

This was the situation when the “Arab Spring” began to affect Jordan. The regime’s response was to promise constitutional and legal reform.

The choice of constitutional and legal reform as a method of dealing with a rising tide of popular anger was not new in Jordan. We saw how riots in the south of the country had acted as a catalyst for the “return to democracy” in 1989. With the benefit of hindsight, we can now see more clearly how the conservative elements in the regime always managed to empty reform of any substance and to retain or reassert the control they were traditionally used to exercising. In that instance, this was achieved through the fabrication of “state parties”, through electoral rigging, and, equally ominously, through a structural changes to the electoral law: the “One Man, One Choice” formula, designed to sharply reduce the chances of the opposition gaining a majority or even a sizable minority.

In January 2011, as the “Arab Spring” was underway, protest marches and sit-ins started to spread in the country. On April 26, 2011, a Royal Commission was formed under the most senior former prime minister, Aḥmad Al-Lawzī, to review the constitution. This commission labored for four months, after which the king directed that its conclusions be sent to parliament to complete the legislative steps necessary to amend the constitution within one month. Accordingly, the House of Representatives held continuous meetings for twenty-seven days, after which the draft law was approved with minimal amendments and sent to the Upper Chamber (the Senate), which in turn, approved the draft law in three days without introducing any amendments or additions of their own. Thus, the one-month period indicated by the king was met. Thirty-six articles that contained seventy-eight amendments to the constitution represent the so-called “constitutional reform” in response to popular demands. The amended constitution was published in the Official Gazette on October 1, 2011.

A number of these amendments are platitudes. In fact, some are extremely poorly written and betray a combination of haste and a lack of training in legal drafting. For example, Art. 6 contains the traditional formula regarding the equality of Jordanians in their rights and duties, but two new paragraphs, (2) and (4), were added:

Art. 6 (2):

The defense of the country, its territory, the unity of its people, and the preservation of social peace [are] sacred duty [*sic*] of every Jordanian.

Art. 6 (4):

The family is the basis of society, the core of which shall be religion, morals, and patriotism; the law shall preserve its legitimate entity [*sic*] and strengthen its ties and values.

These amendments have been transcribed from the official translation, but to the author, somewhat embarrassingly, they are equally incomprehensible in Arabic. The lives of judges called upon to interpret these amendments, in any language, will not be easy. The

reader shall therefore not be overburdened with other examples of similar amendments to the ones just enumerated; instead, this chapter will concentrate on the more substantive ones, i.e., those from which normative consequences flow and which are reasonably capable of being interpreted. The following issues shall therefore be dealt with:

- (1) The establishment of a Constitutional Court (Art. 58)
- (2) The establishment of an Independent Electoral Commission (Art. 67 (2))
- (3) Provisional Laws (Art. 94)
- (4) The amendment relating to the dissolution of the Parliament (Art. 74)
- (5) Criminalization of infringements of the rights of Jordanians (Arts. 7 and 8)
- (6) State Security Court (Art. 101)
- (7) The requirement that the laws issued in accordance with the Constitution may not influence rights and freedoms (Art. 128)
- (8) We shall also consider Arts. 34, 35, and 36, on the rights of the king, which were not amended.

A. The Constitutional Court

The author has always been, at best, only partly convinced of the need for a Constitutional Court in Jordan, for the following reasons.

First, there is a readily recognizable tension, perhaps even a contradiction, between the idea of the supremacy of parliament (Parliament including the king, the Senate, and the House of Representatives) on the one hand and the idea of a Constitutional Court on the other, where a group of unelected men can overturn the democratic will of the people expressed through parliament.

Second, under Jordanian law, a litigant could always raise, as a secondary argument, the question of the constitutionality of a given law, in which case the judge could suspend the operation of the relevant law in the given instance, but not suspend or invalidate the law itself. When this happened, constitutional traditions usually led the executive branch of government to initiate changes to the law in question. In other words, the control the judge exercised was based on considerations of *légitimité* and not one based on abrogating an act of parliament.

Third, the experiences of Constitutional Courts in the region have not been very encouraging. Some of these courts had been part of what is referred to as the “deep state”, which is intent on fighting democratic change. The worst thing that could happen to any country is to have a Constitutional Court controlled by an army or a security force. The debate for and against Constitutional Courts is endless, ultimately, it could be seen as a debate about positivism and natural law.

Be all of this as it may, a decision was made to go ahead with the idea of establishing such a court. Unfortunately, the constitutional amendments limited the entities that could seek such an opinion from the Court to the Council of Ministers, the House of Representatives, and the Upper Chamber (the Senate). Excluded were important segments of society like trade unions, political parties, and individuals.

Additionally, the traditional method of raising a point of constitutionality in an ordinary litigation even before courts of first instance, which had always been available under Jordanian law but rarely invoked, was restricted. Under the new amendment,²⁶ a court where

²⁶ Art. 11 (c) (1) of the Constitutional Court Law.

an argument of constitutionality is raised cannot send the issue to the Constitutional Court but only to another court which decides whether the issue should go to the Constitutional Court. Moreover, ordinary courts cannot decide *proprio motu* to send such an issue of constitutionality in cases before them to the Constitutional Court, and the latter court cannot undertake *proprio motu* to decide any question of the constitutionality of laws before their adoption.

Moreover, the idea of a priori control of draft laws at the request, for example, of a minority in parliament is not available. These are all unfortunate limitations that were expressly contained in the constitutional amendments, with the result that the government that came into office later²⁷ was precluded by the detailed terms of Arts. 58–60 dealing with the Constitutional Court from embracing the more recent and progressive trends relating to Constitutional Courts.

B. The Independent Electoral Commission

It will be recalled that there were widespread accusations that the 2010 election was massively and carelessly rigged, a fact all the more lamentable because the opposition did not participate in the election. Those accusations led to some localized violence and protests in certain constituencies. Some trace the beginning of protests in Jordan, before the arrival of the “Arab Spring”, to the bitterness felt in the immediate aftermath of those elections²⁸.

It was felt that devising a mechanism, independent from the Ministry of the Interior and the security services, was a *conditio sine qua non* for restoring trust to the election process. To succeed, this mechanism had to be truly independent and to be headed by a person of impeccable credentials, acceptable to the opposition and to neutral actors. The present writer was consulted on this matter in the summer of 2011, before his entry into government, and his thoughts luckily were similar to those held by Dr. Anil Seal, the distinguished Cambridge historian and fellow of Trinity College who had been running a program on electoral commissions in a number of commonwealth countries.

It was decided that a number of models, rather than one, should be studied, including models from a number of third world countries.

The main problem with setting up an electoral commission was that it required up to one year in order to be fully effective. It did not suffice to name a commissioner and a small number of staff; what was essential was to train a large number of people who were not employees of the Ministry of the Interior, to run and to observe every minute step in the election process to immunize it against rigging. This included voter registration that had to start from scratch, since in the previous elections there was a massive movement of election cards from some constituencies to others. This is why the government, which was later headed by the author of this chapter, decided to present a timetable for introducing different pieces of legislation to parliament and to make the law on the Electoral Commission the first to be introduced in December 2011, while the Election Law was to be the last one in March 2012 so that the intervening period might be used for the purposes of training the foot soldiers, as one may describe them, without whose efforts the whole exercise would come to naught.

²⁷ This was the government headed by the author, who was tasked *inter alia* with proposing laws to give effect to the constitutional amendments of October 1, 2011.

²⁸ In 2012 the head of the intelligence services who was responsible for these elections confessed before the Senate, of which he later became a member, to the occurrence of election rigging in 2010.

C. Provisional Laws

Art. 94, as amended, reads in part:

When the House of Representatives is dissolved, the Council of Ministers—with the approval of the King—shall have the right to issue provisional laws to cover the following matters:

- a) General disasters
- b) The state of war and emergencies
- c) The need for necessary and urgent expenditures which cannot be postponed.

The effect of the amendment was to limit the matters on which provisional laws may be enacted into the three categories expressly referred to as (a), (b), and (c) above.

Before the introduction of the amendment, the formula gave more discretion to the executive. It read in part:

[...] to issue provisional laws to cover matters that require the taking of necessary measures that cannot be postponed or necessitate urgent expenditure that cannot be postponed [...]

The amendment should be understood as a reaction to the widespread abuse of provisional laws. In addition to the limitations referred to above, the amendment also restricted the issuance of provisional laws to situations where parliament is dissolved, whereas in the past it was permissible to issue provisional laws in situations where parliament was dissolved or not in session.

Ideally, the executive branch of government should retain a margin of appreciation of situations where the issuance of necessary provisional laws is permissible, but it should exercise that discretion carefully and with self-restraint. This would have been forthcoming had Jordan had strong constitutional traditions and conventions, which unfortunately is not the case. Whilst the restriction imposed on the power of the executive to issue laws is understandable in the context of the abuse referred to earlier, legislation should not be based solely on an assumption of bad faith by the executive.

In practice, the amendment proved impossible to comply with. The recently established Constitutional Court gave an interpretive decision (Decision number 2/10/3) permitting the government to issue a provisional law containing the whole government budget of 2013, which is unprecedented in the history of Jordan. Traditionally, the Council of Ministers faced with a situation where parliament was not in session could issue provisional laws to permit expenditure on a monthly basis. It was argued for the government before the Constitutional Court that the conditions imposed by the International Monetary Fund necessitated the approval of the whole budget. The court accepted this argument through tortuous reasoning, which only proves that the amendment was unworkable.

D. The Dissolution of Parliament

The amendment relating to the dissolution of parliament (Art.74 (2)) reads:

The Government in the tenure of which [*sic*] the House of Representatives is dissolved—shall resign within a week from the date of dissolution; and its head may not be designated to form the Government that follows.

The background to this amendment is the following: In 1954 an amendment to the 1952 Constitution was introduced according to which, if a government during its term of office the House of Representative is dissolved, it should resign within one week of such dissolution. The intent of that amendment was to prevent the prime minister from proposing the dissolution of the House of Representatives to the king too easily.

However, in 1958 the requirement that a prime minister should resign in the situations contemplated in the previous paragraph was deleted. The 2011 amendment goes further than the 1954 amendment by requiring also that the prime minister in question (the head of government, as he is referred to in the paragraph) cannot head the government that follows. The additional requirement is nonsensical since the prime minister in question can be designated by the king to head subsequent governments. Moreover, there is nothing in the text that would prevent the rest of the Council of Ministers from staying on in the government that immediately follows the dissolution and, thus, carrying on the prime minister's policies. The amendment therefore does no more than personalize what should be a purely professional relationship between the executive and legislative branches of government.

E. Infringement of the Rights of Jordanians (Arts. 7 and 8)

The innovation in Art. 7 is the addition of paragraph 2, which reads:

Every infringement on [*sic*] rights and public freedoms or the inviolability of the private life of Jordanians is a crime punishable by law.

The philosophy behind the new paragraph is welcome. However, the criminalization is limited to infringements of "the private life of Jordanians". It does not extend to those who are present in Jordan. This is ironic when compared with Art. 6 of the 1928 Constitution (Basic Law), which stipulated "the personal liberty of all those resident in Jordan is inviolable from aggression or interference [. . .]"

However, the author is not of the opinion that the 2011 amendment consciously tried to create an *a contrario* interpretation permitting its nonapplicability to non-Jordanians present in the country. It is more probably another example of ineptitude in drafting and a result of the haste in which the amendments were adopted.

More important, the value of the new amendment can be measured by the subsequent adoption of laws to determine the extent and nature, in terms of penal law, of punishment of those who so infringe such rights and freedoms. No laws have been adopted so far to put this constitutional amendment into effect.

Art. 8 reads:

- (1) No person may be seized, detained, imprisoned or the freedom thereof restricted except in accordance with the provisions of the law.
- (2) Every person seized, detained, imprisoned or the freedom thereof restricted should be treated in a manner that preserves human dignity; may not be tortured, in any manner, bodily or morally harmed; and may not be detained in other than the places permitted by laws; and every statement uttered by any person under any torture, harm or threat shall not be regarded.

This article warrants two comments. First, whilst the contents of paragraph 2 are welcome, its implementation depends on clarifying the burden of proof required and especially whether the *onus probandi* should be reversed as well as other procedural requirements that

would enable its *mise en oeuvre* in a manner that gives real and effective protection to those whose freedom has been restricted.

Second, and crucially, the amendment is silent on the right to pecuniary compensation for material and moral harm suffered. The absence of a reference to compensation is especially disappointing in view of the fact that some old laws which are plainly contrary to human rights standards are still in force, e.g., law number 25 of 1958. That law (Art. 5) enumerates four categories of legal actions that can be brought against the state. It does expressly exclude other categories of action. Abuses of human rights are among those actions that are inadmissible before the courts.

F. The State Security Court

Art. 101, paragraph 2 reads:

No civilian may be tried in a criminal case where all [*sic*] its judges are not civilian the exception to that are the crimes of treason, espionage, terrorism, drugs and currency forgery.

With an amendment to the 1952 Constitution in 1958, the State Security Court was created by law and was given extensive jurisdiction in those turbulent years. The present amendment is a welcome and much-sought improvement, for it expressly restricts the jurisdiction of the State Security Court *ratione materiae* to the “crimes of treason, espionage, terrorism, drugs and currency forgery”. However, there is no doubt that currently civilians can still be tried before a military court—though the court is referred to only obliquely—and not before civilian courts. The effective combating of heinous and rampant crimes may necessitate the establishment of special mechanisms to ensure that there is no undue delay, but this is best achieved through strengthening the office of the Attorney General and/or the Public Prosecutor. In sum, the reduction of the scope of jurisdiction of the State Security Court and the fact that its jurisdiction is drafted as an exception to the general rule are welcome amendments.

G. The Provision of Art. 128

Art. 128 reads:

- (1) The laws issued in accordance with this Constitution for the regulation of rights and freedoms may not influence the essence of such rights or affect their fundamentals.

As a general proposition, the reference to basic rights and duties is welcome. However, the reader will have immediately noticed the very generality of the article, and much depends on how seriously specific human rights will be taken into consideration when enacting specific laws.

The reader will have also noticed how specific the constitutional amendments have been in allotting constitutional powers to parliament, to the extent of tying the hands of the executive, e.g., the requirement that a prime minister, during whose term in office a parliament is dissolved, is prevented from heading the next government. My approach would have been not to get into this tit-for-tat method but rather to retain a reasonable discretion for the executive, while raising in the constitution and subsequent laws the standard of human rights and applying them to specific situations.

H. Arts. 34, 35, and 36 on the Rights of the King

Under these articles, which were not amended, the king retains extensive powers to dissolve the House of Representatives (Art. 34 (3)); the Senate (Art. 34 (4)); to appoint the prime minister, to dismiss him and accept his resignation (Art. 35); and to appoint the members of the Senate and their Speakers and to accept their resignation (Art. 36).

A common demand of protesters, especially the Islamists, was that the king's power should be restricted through amendments to those provisions. The author is at best only partly persuaded that such restriction to the powers of the king is either wise or timely. Such demands would unduly restrict the powers of the executive and therefore disturb the checks and balances in the constitution. Tying the hands of the king would concentrate too much power in the legislature, which, in the present conditions of Jordan, is imperceptibly controlled by the security services. Nevertheless, the author is not averse to immunizing the Upper Chamber from dissolution or giving it a longer term of office (eight years, as was the case in the 1952 Constitution).

A better alternative in my opinion (perhaps the only viable alternative) is to ensure no undue influence on the House of Representatives, and this can be achieved only through a real commitment to: (a) putting an end to election rigging and vote buying, (b) structural changes to the election law so that multiple choices are available to voters, and (c) enlarging the parliamentary constituencies so that the sense of dignity and importance is restored to the legislative branch of government.

Should these things happen and should the king's powers be exercised with self-restraint, a happy balance would exist in the constitution.

V. DEVELOPMENTS AFTER THE CONSTITUTIONAL AMENDMENTS

The adoption on October 1, 2011, of those and other less noteworthy amendments did not lead to the desired result that the regime in Jordan was hoping for. The level of dissent and protest was not abated, if anything they grew in intensity and were spreading across the country with the level of violence escalating. The government of the day started preparing for municipal elections, a particularly divisive issue which touched most people's sensibilities and affected group loyalties. A neutral observer would have been excused if he thought that the country was heading toward civil war.

The security services, though mild by regional standards, were not above resorting to thugs, known as *balṭajī*, to disperse demonstrations. Equally ominous for the regime, there was a common perception that the United States, a longtime ally of the monarchy, had forsaken them, as it had done with its other allies in the region. Existentialist questions were raised about whether Jordan would be yet another victim of the theory of "creative chaos" espoused by US former National Security Adviser Condoleezza Rice—to be sacrificed according to this concept in order to make the country an alternative homeland for Palestinians.

It was at this point that the author decided to accept a kind invitation from the king to become prime minister and consequently left the serenity of Den Haag and the high intellectual reasoning of the International Court of Justice to deal with a grim situation in a country which was becoming ungovernable.

The author does not wish to turn this chapter into autobiographical reminiscences and shall therefore refrain from speaking about his motives in accepting the king's invitation or his experiences as prime minister. However, he undertakes to shed light on certain decisions that can be better understood with a personal insight.

In November 2011, the author had the following to say in parliament in the course of the speech outlining the government's program on the basis of which he was seeking a vote of confidence:

The third general remark is that the Royal letter of appointment [of the Government] has directed the Government to propose a set of laws to regulate political life [in the country], such as the law on the Independent [Election] Commission; the election law, the Political Parties law, and other questions [. . .] The Government however is in no doubt that the adoption of those laws, notwithstanding their importance, is the easier part of its mandate. The more difficult part is to find solutions to the problems of poverty and unemployment and the widening gap between the different classes in society as well as the resultant social evils and political tensions.

Laws are of no use if a citizen cannot feed his or her children. 'Ali, the Prince of the Faithful, once remarked, that "poverty in your motherland is a form of alienation and richness in alien lands is like being in a motherland." The Government shall therefore rise up to its constitutional and ethical duties in seeking solutions to those problems. At the same time the Government makes no claims that it has ready magical solutions to those problems and will not make any promises it cannot fulfil.

The government did in fact draft and propose to parliament all the so-called "laws regulating political life". Furthermore, it did so in accordance with a strict timetable that was outlined in the same meeting in the House of Representatives.

However, the conviction of the author is that what mattered most to the people of Jordan was not the drafting of those laws, but finding solutions to intractable problems; a desire that was becoming stronger by the day and is described by the imperishable words in Arnold Toynbee's *A Study of History*:

As a rule—and this rule is inherent in the very nature of the declines and falls of civilizations—the demand for codification reaches its climax in the penultimate age before a social catastrophe, long after the peak of achievement in jurisprudence has passed, and when the legislators of the day are irretrievably on the run in a losing battle with the ungovernable forces of destruction.²⁹

Have the Jordanian people reached that situation? Was the drafting of laws a form of escapism or self-delusion?

In late Ottoman history, when that once mighty Empire had come to depend on the exigencies of the balance of power in Europe for its very survival, the *Salāṭīn* and the Sublime Porte embarked on a series of constitutional and legal "reforms" that were of no avail against the constant attacks by the same external forces that were inducing the state to abandon old traditions of governance and jurisprudence in favor of a foreign legal system. In 1878, 'Abd al-Ḥamid II prorogued the parliament of 1876 in the belief that those constitutional reforms mattered very little to his subjects and embarked instead on a policy that stressed his position as a caliph. In 1908, the Young Turks re-imposed the constitution in a *coup d'état* and a few months later lost more territory in the Balkans, and thus it became clear to them that a constitution cannot by itself save a kingdom.

²⁹ Arnold Toynbee, *A Study of History: Universal States, Universal Churches*, vol. VII (London 1954) 279.

Similarly, though on a much smaller scale, the establishment of a Constitutional Court or of an Electoral Commission or the introduction of a phrase outlawing torture can never cure a culture of election rigging or interference in the judicial process, let alone solve the problems of lack of natural resources, accumulated debt, the almost total dependence on foreign financial support, etc.

Be that as it may, there was one law where legislative reform would have direct and tangible results—which is the only objective yardstick against which the success of reforms can be measured—and this was the election law. This is so because the “One Man, One Choice” system is an aberration—a structural aberration of the law that could be corrected by changing the law. There was an intention to restore the election law to its previous state (as it was in 1989), and in doing so to present a legally and morally defensible scheme, which could on the one hand make the law more democratic, while on the other, preserve the monarchical system. After all, the king’s willingness to initiate reform should not boomerang to undermine his position. In the view of the author, it is possible to set out to reform the election law, but in doing that one cannot set out to reform everything wrong in the country. Nevertheless, with vision, a reformed election law could ameliorate the politically induced tension between Jordanians and Palestinians referred to above. It can do so by striking the necessary delicate balance between equitable representation for the Palestinians, on the one hand, and the legitimate fears of East Bank Jordanians on the other.³⁰ Moreover, another achievable outcome would be the inclusiveness of all political parties, including the Islamists, in the parliamentary process while, at the same time, taking into account the fears, actual or exaggerated, of those who thought that the Islamist parties would sweep the elections.

To this end, the government headed by the author of this chapter proposed an election law where every voter would have the right to vote for two candidates in any constituency. Moreover, elsewhere in the draft law it was proposed that in any given constituency the number of seats should not exceed five. In fact, there was only one constituency where it was impossible, for demographic reasons, to have less than five seats. In the rest of the country some constituencies would have two seats, and therefore the electoral system would be virtually the one that operated prior to 1993 when the “One Man, One Choice” system was first introduced. In other constituencies where there were three or four seats, the choice of the voter was admittedly not perfect, but the ratio of two to three or two to four and the existence of an element of choice was a tolerable one and a necessary compromise to allay the fears that the Islamists would sweep the ballot boxes. This was the solution on the basis of which a national deal could be built. Even this modest improvement could not be accepted by certain elements in the regime. Any real improvement in this area would have been futile, given an obsession with total control over the House of Representatives, which started the chain of events which led the author to resign from his position as head of government. He became, in fact, the first prime minister ever to resign *proprio motu* since the establishment of Jordan.

The letter of resignation sent from Ankara during an official visit contained the words of a British judge to the effect that a banker who will not take risks out of a wish to protect his interests will soon have no interests to protect.

In the end, the “One Man, One Choice” system was adopted, leading to a boycott by the Islamists, and an election was held in early January 2013 in accordance with that law. The farcical scenes in the present parliament and the control the security services exercise over many

³⁰ Amin Maalouf (n 14) 13.

of its members that has led some of them to complain of it openly mean that in reality nothing has changed. Tensions and loss of hope remain but are subdued for fear that what is happening in Syria and Egypt could happen in Jordan. Major problems of unemployment, inflation, the downgrading of the educational system, and the decay of the civil service remain. More seriously, corruption goes on unabated. Two reformist laws, one requiring progressive taxation and the other requiring that public officials should divulge and explain their sources of income, which the government was going to introduce to the House of Representative, met unhappy fates; the first never saw the light of the day, the other was totally emasculated.

VI. THE CONSTITUTIONAL AMENDMENT OF 2014

On August 28, 2014, at the initiative of the Jordanian government, which introduced the corresponding legislation into parliament, the latter adopted an amendment to the constitution. It reads:

Notwithstanding the contents of Art. 4 of the constitution, the King appoints the Chief of the Army and the Director of Intelligence, dismisses them and accepts their resignation.

Art. 40 reads:

The King exercises his powers by a Royal Order. Such an Order will have been signed by the Prime Minister, the minister or the ministers concerned. The King [then] shows His approval by affixing his signature above their signatures.

Art. 40 is one of the most important articles in the constitution. It reflects the idea that the king does not act on his own but on the recommendations of his ministers and the prime minister who bear responsibility for their actions whilst the king is immune.

In reality, the king has always appointed the chief of the army and the head of the intelligence services, and, in view of the turbulence of the 1950s and the sad experiment with the Nabulsi government (referred to above), it is understandable that the king should have the final say as to those two important offices. Yes, his late majesty King al-Ḥusayn always did so through the existing constitution, if only for the sake of preserving the dignity and unity of purpose of the constitution. Such appointments took place through informal constitutions.

Seen in this light, the amendment is as unnecessary as it is ill-advised. Its rationale is that as the country moves to a parliamentary government and, if an Islamic Party forms a government, it would be prudent *ex abundanti cautela* to remove the power to appoint those at the helm of the army and the intelligence service from the cabinet and vest it exclusively in the king.

In doing so however, the idea that the exercise of power entails a corresponding responsibility would collapse as the king is immune. Therefore, this amendment is not a simple change but a serious contravention of the constitution, all the more regressive since it is not necessary.

VII. CONCLUSION

The author's description of the events, i.e., social and economic and other developments and constitutional and legal changes dubbed as "reforms", is a sad comment on the inability of modern Arab states, Jordan included, to implement good governance and to change in order to

survive even as the old ways have proven to be a failure. It is not an exaggeration to say that the present situation in the Arab world is best captured by Matthew Arnold's imperishable lines:

Wandering between two worlds, one dead,
The other powerless to be born.³¹

At the time of writing, the "Arab Spring", if it ever was a spring, has become a tragedy on a massive scale in Syria and Egypt in particular. The only consolation as far as Jordan is concerned is that it has been spared the worst outcome of that spring, and it is no small consolation.

³¹ Matthew Arnold, "Stanza from the Grande Chartreuse" (1855) *Fraser's Magazine* 85–90.

Winter Is Coming

Authoritarian Constitutionalism under Strain in the Gulf

GIANLUCA P. PAROLIN*

Gulf constitutions are commonly regarded as weak and ineffective documents endorsing authoritarian patterns of governance. However, on closer scrutiny, they tell a slightly different story. Designed to entrench the positions of rulers empowered by the colonial presence, and constrict the province of political participation to its narrowest, constitutions in the Gulf have created a system of (feeble) institutions that in just a few decades of operation have brought about two unforeseen, yet interconnected effects: a retreat of dynasticism and an expansion of political accountability.

Dynasticism—defined as the control over key centers of decision-making by members of a same kin group—is an important feature of Gulf governance that Gulf constitutions ignore. Reading these constitutions without considering the degree of ruling-family penetration of state institutions, the internal ruling-family power dynamics, and the relations of ruling-family members or branches with various societal constituencies is futile, just as it is futile to read any constitution without considering a central feature of the political system in which it operates. When one considers the different levels and forms of dynasticism present in the Gulf, however, reading their constitutions sheds light on the function of such documents in a complex system of multiple centers of power. Constitutions offer rulers a powerful instrument to consolidate and exercise authority within the family and

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over society; rulers, however, often need to negotiate this exercise of power with both family and society. Constitutional regulations of ruler/executive/legislative relations provide a vantage point to observe the framework of these negotiations.

Gulf constitutions generally set out to create strong executives and feeble legislatures. Neither tigers, nor paper tigers, Gulf parliaments carry little weight in the legislative process, and even less in policy-making. In a context of stifling authoritarianism, the weaker the parliament, the greater the chances of the institution's survival. And if they do survive, Gulf parliaments start making use of their modest powers to demand political accountability for government actions. This chapter looks at the emergence of the paper parliaments and the rudimentary forms of legislative oversight over the executive available to them. Questioning and embarrassing a minister in a public hearing is often the best Gulf parliaments can hope for, but the visibility that this offers can produce—and has produced—dramatic institutional effects.

This exposure to public scrutiny that constitutions have provided through (even low-key) institutional politics has dissuaded many lower-rank members of the ruling families from pursuing public positions, and started taking up instead more remunerative positions in the (not-so-private) private sector. This phenomenon has helped to concentrate powers in the hands of a small number of family members, while increasing polarization between the ruler and competing family power clusters. On paper, constitutions favor the former, having been drafted on the model of ruler-centered monarchical constitutions of mid-nineteenth-century Europe, but their enforcement often becomes a matter of negotiation as well. Moreover, non-ruling-family members started filling the lower government positions left open by lower-rank members of the ruling families, which promptly expanded areas of accountability.

Pressure has been steadily mounting on Gulf rulers to further expand these areas of accountability and engage in more participatory political processes. In spite of the pressure, rulers are ambivalent on this point (it's not just the "King's Dilemma", Huntington 1968): on the one hand, it could enhance their position against competing family clusters, but on the other, it could diminish their own powers over citizens (not just in the long run). Higher-ranking members of the ruling families strongly oppose plans to expand accountability. They correctly perceive that they would be the first casualties, since existing constitutions shield the ruler alone. So far, most of the pressure has been diverted to the constitutional provisions regulating participatory political processes. The constitutional texts, *per se*, were drafted so as to allow both a more authoritarian and a more democratic interpretation.

A conservative and narrow reading of these provisions is driving an increasing number of political forces outside the confines of the constitutionally-defined participatory processes (parliamentary politics, primarily), thus challenging the legitimacy that constitutions offer both to the ruler and to their family-led executives. The choice between voicing their positions from within state institutions, or exiting the institutional framework altogether threatens not only the internal cohesiveness of the political forces but also the constitutional arrangement. Lowering the incentives for political participation within the institutional framework can be risky. Regardless of the various attempts to deny it, Gulf constitutions are the linchpin of legitimacy, and an uncompromising rigidity in their enforcement is severely straining the system and jeopardizing its resilience. Calls for broader and more effective participation in political decision-making are not new to the Gulf, but have significantly escalated since 2011. Bahrain has witnessed the most dramatic events, including the recourse to foreign troops to quell the insurgency, but major protests have also taken place in Kuwait and Oman, and, to a lesser extent, Saudi Arabia. Only Qatar and the United Arab Emirates have so far managed to prevent major protests, counterweighed

by an ever-growing, discreet yet above-ground political activism aiming at greater political participation.

Institutional responses to the unrest have ranged from a government reshuffle and constitutional amendments in Oman to early general elections in Kuwait; and from constitutional amendments in Bahrain to the call for the first general elections in Qatar and the revival of municipal elections in Saudi Arabia. While defusing some of the pressure, these responses, in effect, channel dissent into the existing authoritarian reading of the constitutional framework, thus fueling discontent.

I. NOT JUST ORNAMENTS

The exclusive Gulf club has six members: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. At a distance, they look like interchangeable units of an exotic mosaic. A closer examination, however, reveals high levels of diversity in demographics, power structures and wealth resources. Apart from membership in the Gulf Cooperation Council (GCC, the Gulf club), founded in 1981, the six member states seem not to share much else—except for a certain, often underestimated commonality in the perception of their legal systems, and their apical expression: the constitution.

Far from sharing a common constitutional history, the six club members have all adopted documents that reflect some fundamental political arrangements on which their various systems hinge. While some analysts are skeptical of the benefits of such texts, none of these documents can be considered fully ornamental (al-Fahad 2005). The degree to which Gulf constitutions limit governments might be modest, but they have become the centerpiece of regime legitimacy and are subtly producing dramatic changes in Gulf governance. Suffering minor disturbances caused by partly-elected bodies seems largely outweighed by the benefits that constitutions offer in the hard currency of legal authority.

In a bid to draw attention away from themselves, Gulf constitutions tend to refer to external sources of legitimacy be it tribal tradition, customary rules, or religious reference. The primary example is the Saudi document that is defined as a Fundamental System of Government (*al-Niẓām al-Asāsī li-l-Hukm*) and in its first article states that the constitution (*Dustūr*) of the kingdom is the Book of God and the Sunnah of the Prophet (*dustūruhā kitāb Allāh wa-sunnat rasūlih*, followed by the eulogy). The pious proclamation, however, is just a pious proclamation, as the *Niẓām* codifies the practice of government in the kingdom and serves as its basis.

Gulf constitutions often offer only a partial framework to the political process and the text is usually complemented by uncoded conventions. The relationship between the regulated and the unregulated offers valuable insights into the key systemic nodes. Succession rules are a good case in point: Where primogeniture has long been established, as in Bahrain, it is included in the constitution and regulated by it, but where the agreement on the rules of succession has proven to be beyond reach, as in Saudi Arabia, the text is silent (or equivocal, at best) and the succession to the throne regulated by not-necessarily definitive texts like the 2006 Law on the Allegiance Body (*Niẓām Hay'at al-Bay'ah*).

When it comes to institutional design, Gulf constitutions show the closest interrelationship. This can be explained by the genesis of these documents. Panels of foreign experts and consultants (mostly from other non-Gulf Arab countries notably: Egypt, Iraq, and Jordan) advised rulers and ruling families on the institutional design. The panels invariably suggested the most archaic yet prestigious designs (the European mid-nineteenth-century ones) and experts then tried to tailor ruler-centered models to the needs of the internal family dynamics—and, to a much lesser extent, citizens' aspirations. Dynasticism is the elephant in the drafters' room; it does not transpire from the text, yet it guides the drafting

of provisions on ruler/executive/legislative relations: provisions that, in view of guaranteeing ruling family cohesion and offering some form of accountability to citizens, aim at neutralizing the emergence of any antagonizing power center drawing legitimacy from the constitution itself. The conventional distinction between pacted and granted constitutions appears blurred; chiefly because ruling family members, one of the three main players, are not fully factored into this distinction. The only constitutions that were adopted by a partly-elected convention were those of Kuwait in 1962 and Bahrain in 1973. In Kuwait, elections were held for twenty convention members, but ministers participated *ex officio* even if they did not vote on the final draft. In Bahrain, elections were held for half of the members of the convention and the ruler appointed the other half (all the ministers and eight figures of his liking); the drafting followed an informal UN referendum gauging the orientations of self-determination and the support for the ruling family among the notable figures of the country. This approach reinforced and perpetuated patriarchal domination in public life.

Moreover, in the case of granted, flexible constitutions, any text of equal standing can complement, amend, or deprive it of any effect as basic law. In these contexts, the decision to amend the constitution rather than to simply introduce a new piece of legislation can signal the ruler's intention to underline the concession in the act. This was the case with the 2011 amendments to the Basic Law of Oman, which could have easily been added to the Council of Oman Regulations (Decree 86/1997).

II. THE PARLIAMENTARY CONUNDRUM

Currently, the major strain on existing constitutions in the Gulf appears to be the status and role of parliaments, but occupying the stage are still internal ruling-family power dynamics, exemplified in ruler/executive relations, which affect the institutional responses to the current strains. In systems with no elected parliament, the political costs associated with channeling politics and opposition outside the institutional framework seem to be on the rise. This is the case in Saudi Arabia, Qatar, and the United Arab Emirates. In systems with an elected parliament, the overburdening of narrowly constructed executive/legislative regulations, all tilted in favor of the rulers and their executives, seem to leave little room for negotiation. This is the case in Bahrain and Kuwait. Frustrated by the ruling families' beguiling strategies on constitutions, street protests and political boycotts—certainly not a novelty in the Gulf—seem to be precisely raising the ceiling of requests, challenging the legitimacy of the entire existing constitutional design.

The peculiarities of each experience require an individual survey of the provisions under strain: in particular the provisions regulating the status and role of parliaments, their oversight powers over executives and the rulers' position as final arbiters on executive/legislative confrontations. A few general trends can nonetheless be identified, in particular when considering different generations of constitutional texts.

There are no fully elected parliaments in the Gulf. On a spectrum of elected/appointed ratios, Kuwait, and Qatar² are the ones at the higher end (2/3–1/3), Bahrain, Oman, and the UAE are in the middle (1/2–1/2), and at the opposite end is Saudi Arabia (0). There are, of course, substantial differences in the levels of enfranchisement and the powers of these bodies. (See Table 1.)

Ruler/executive/legislative regulations in the Gulf generally include a combination of four constitutional devices. The order of gravity of consequences is: (1) requests for

² In abeyance until establishment of first elected Council (Art. 150).

TABLE 1 Gulf Parliaments on Elected/Appointed Ratios

| | 1960 | 1970 | 1980 | 1990 | 2000 | 2010 |
|----------------------|--|------|------|--|--|------|
| Kuwait | Single House '62 Elected (+ Ministers) | | | | | |
| | | | | | | |
| Qatar | Single House '70 & '72 (S)election of Elected '70 ³ Unregulated '72 | | | | Single House '03 Elected (+ Ministers) | |
| | | | | | | |
| United Arab Emirates | Single House '71 Unregulated ⁴ | | | | | |
| | | | | | | |
| Bahrain | Single House '73 Elected (+ Ministers) | | | | Two Houses '02 Lower Elected Upper Appointed | |
| | | | | | | |
| Saudi Arabia | | | | Single House '92 Unregulated ⁵ | | |
| | | | | | | |
| Oman | | | | Two Houses '96 Unregulated ⁶ | Two Houses '11 Lower Elected Upper Appointed | |
| | | | | | | |

| | |
|--|-------------------------------|
| | No Parliament |
| | All Appointed |
| | Half elective, half appointed |
| | 2/3 elective, 1/3 appointed |

³ Art. 45 of the 1970 Qatari Constitution stipulated the appointment of two councilors out of the four elected in each of the ten districts (*see also* Art. 17 of the Electoral Law 9/1970).

⁴ Left to the individual Emirate regulation (Art. 69).

⁵ Regulated by statute (Art. 68).

⁶ Regulated by statute (Art. 58).

information, (2) interpellations (or questioning), (3) no-confidence motions against a single minister, and (4) non-cooperation motions against the prime minister.

- (1) Requests for information (*ṭalab al-bayānāt*, or *istifsār*) entail no consequence. In the first generation, both the Qatari and the UAE constitutions included the possibility of requesting information from ministers without any consequence. The Saudi Consultative Council is the only Gulf body that cannot even request information; it can only ask the prime minister to have some government officials attend a session.
- (2) Interpellations (*istijwāb*) can lead to no-confidence or non-cooperation motions. Interpellations can be addressed to the prime minister or any other minister by every councilor; the discussion can be scheduled only after a set number of days (usually eight), unless the minister requests an earlier hearing.

This is how the 1962 Kuwaiti Constitution regulated interpellations (Art. 100); the same provision was adopted verbatim by the 1973 Bahraini Constitution (Art. 67). The constitutions of the third generation (Bahrain 2002 and Qatar 2004) also included interpellations, whereas in the countries affected by the second generation of Gulf constitutions (Saudi Arabia and Oman) interpellations were introduced only later and with no consequences; Saudi Arabia only introduced questioning for the administration of provinces and municipalities in the mid-1990s, and Oman introduced the questioning of “service Ministers” only in 2011 (Art. 58 *quinquies quadragies*).

- (3) A no-confidence motion (*mawḍū‘ al-thiqah*) can lead to immediate resignation of the individual minister. After interpellations, a no-confidence motion can be proposed, but only against a single minister (except the prime minister). The motion can be proposed by the minister, or a minimum of ten councilors. The motion can be voted only after seven days and must pass by absolute majority (ministers—who are councilors *ex officio*—are not allowed to vote). A no-confidence vote entails immediate individual resignation of the minister.

This is how the 1962 Kuwaiti Constitution regulated the no-confidence motion against a single minister (Art. 101); the same provision was adopted by the 1973 Bahraini Constitution (Art. 68), which, however, allowed the no-confidence motion against the prime minister if the latter held other ministerial portfolios (Art. 69(a)). In the 2002 Bahraini Constitution, the possibility of a no-confidence motion against the prime minister is no longer included, and a super-majority of two thirds is now required even for the no-confidence motion against an individual minister (Art. 66).

- (4) A non-cooperation motion (*‘adam al-ta‘āwun*) against the prime minister can lead either to resignation of the entire government or to dissolution of parliament.⁷ Voting on the non-cooperation motion against the prime minister follows the same regulations of the individual no-confidence vote in terms of right to propose the vote and majorities.

Only two constitutions of the first generation (Kuwait and Bahrain) included a non-cooperation motion. The 1962 Kuwaiti Constitution required the same (absolute) majority as the individual no-confidence vote (Art. 102), while the

⁷ The only text that proposed a no-confidence motion against the prime minister entailing immediate resignation was the one presented by the Saudi “Red Prince”, see his *Risālah ilā muwāṭin* (Letter to a Citizen) of 1961.

1973 Bahraini Constitution opted for a super-majority of two thirds, with no express disqualification of ministers in the vote (Art. 69).

In the 2002 Bahraini Constitution requirements were drastically raised; two votes are now required: a first vote in the elected house by two-thirds majority, and a second vote again by two-thirds majority in the general meeting of the elected and the appointed houses (which have the same number of members). Ministers, however, are no longer councilors *ex officio* (compare Art. 43 of the 1973 Constitution with Art. 56 of the 2002 Constitution). The 2002 requirements are so stringent that fall just short of those of the amendment procedure (instead of a second two-thirds vote by the houses in joint session, the amendment procedure requires two independent two-thirds votes in each house (Art. 120)).

- (4a) If the ruler opts for the dissolution of parliament, the new parliament can vote a new motion of non-cooperation leading to immediate resignation of the entire government. In this case, the constitutions of the first generation require a vote by absolute majority (the 1973 Bahraini Constitution follows here the Kuwaiti model, requiring a lower majority (Art. 69(b)).

The 2002 Bahraini Constitution, however, no longer mentions the automatic government resignation after a new non-cooperation vote.

At the center of this constellation of ruler/executive/legislative provisions sits the star of constitutional design in the Gulf: the non-cooperation motion by parliament against the prime minister. It was conceived for the allowance of a smooth, timed transformation of dynastic rule into a constitutional monarchy with a parliamentary government: In the event of a vote against the prime minister, the ruler still retained the choice to opt either for the dismissal of the prime minister or the dissolution of parliament. By dissolving parliament, the ruler would use his royal prerogative, and by relieving the prime minister the ruler would introduce the principle of parliamentary government; a balanced use of the two was what the text allowed.

Behind the complex articulation of the ruler/executive/legislative provisions, and the non-cooperation motion in particular, lies a factual consideration: in the Gulf, the prime minister's position is held either by the ruler himself (Saudi Arabia, Oman, the UAE⁸), the crown prince (Kuwait,⁹ Qatar), or a prominent member of the ruling family (Bahrain). The Kuwaiti parliament holds a substantial record in the recourse to the non-cooperation procedure, even if a motion was never passed. Non-cooperation motions peaked after 2003, when the positions of crown prince and prime minister were first dissociated in Kuwaiti politics. (See Table 2.)

A. The First Generation: The Constitutions of Independence (1960s–1970s)

Upon independence, all the states of the former Trucial Coast adopted a constitution; Kuwait was the first in 1962, followed by Qatar in 1970, the United Arab Emirates in 1971, and Bahrain in 1973. Of the four, only Kuwait and Bahrain held elections for a constitutional convention (*al-Majlis al-Taʿsīsī*) and introduced partly-elected parliaments. (See Table 3.1.)

⁸ Normally the *Amīr* of Dubai (whereas the President is normally the *Amīr* of Abu Dhabi).

⁹ Until 2003, when *Shaykh* Ṣabāḥ al-Aḥmad assumed the post, while *Shaykh* Saʿd al-ʿAbdallāh remained the crown prince.

TABLE 2 Parliament/Government Relations in Gulf Constitutions

| | | Interpellation | No-Confidence | Non-Cooperation |
|--------------|--------------------|---|---|---|
| Kuwait | 1962 | Yes (<i>istijwāb</i>) (request by a councilor) | Yes (absolute majority) ¹⁰ (request by 10 councilors) | Yes (absolute majority) (request by 10 councilors) |
| Qatar | 1970 & 1972 | Yes (<i>ṭalab al-bayānāt</i>) (unspecified) | No | No |
| | 2004 ¹¹ | Yes (<i>istidāh</i> for ministers and the prime minister) (<i>istijwāb</i> for ministers) (request backed by 1/3 of the councilors) | Yes (two-thirds) (request by 15 councilors) | No |
| UAE | 1971 ¹² | Yes (<i>istifsār</i>) (any councilor) | No | No |
| Bahrain | 1973 | Yes (<i>istijwāb</i>) (any councilor) | Yes (absolute majority) ¹³ | Yes (two-thirds) |
| | 2002 | Yes (<i>istijwāb</i>) (request by 5 councilors) | Yes (two-thirds) (request by 10 councilors) | Yes (two two-thirds votes) (request undefined) |
| Saudi Arabia | 1992 | No | No | No |
| Oman | 1996 | No | No | No |
| | 2011 | Yes (<i>istijwāb</i>) (request by 15 councilors) | No | No |

¹⁰ Ministers disqualified from voting (Art. 102 referring to the procedure of Art. 101).

¹¹ Section on Parliament unenforced until establishment of first elected Council (Art. 150).

¹² Since 2006 half elected.

¹³ Ministers disqualified from voting (Art. 68).

TABLE 3.1 The First Generation

| | | Adoption | Parliament | Ruler/Exec/Leg Relations |
|---------|------|---|---------------------------------------|---|
| Kuwait | 1962 | Convention (all elected) | SINGLE HOUSE Elective (+Ministers) | (1) Info request (Art. 99) (2) Interpellation (Art. 100) (3) No-confidence (Art. 101) (4) Non-cooperation (Art. 102) |
| Qatar | 1970 | Grant | SINGLE HOUSE (S)elected | (1) Info request (Art. 50) |
| | 1972 | Grant | SINGLE HOUSE Unregulated | (1) Info request (Art. 51) |
| UAE | 1971 | Grant | SINGLE HOUSE Unregulated | (2) Interpellation (Art. 93) |
| Bahrain | 1973 | Convention (half elected, half appointed) | SINGLE HOUSE Elective (+Ministers) | (1) Info request (Art. 66) (2) Interpellation (Art. 67) (3) No-confidence (Art. 68) (4) Non-cooperation (Art. 69) |

1. Kuwait (1961)

One of Kuwait's founding myths is the *ab initio* limited power of the ruling family. According to this myth, the al-Ṣabāḥ were established as rulers on the basis of an agreement between influential merchant families who preferred to ask a third party to rule rather than accept a ruler from a rival family. This myth was further reinforced in the late 1930s, when merchants spearheaded a move to force *Shaykh* Aḥmad al-Jābir (Al Ṣabāḥ, r. 1921–1950) to accept the creation of an elected legislative council (with 140 representatives), a council that drafted Kuwait's first Charter in 1938. *Shaykh* Aḥmad soon dissolved the Council, and called for new elections. The new Council refused to accept the *shaykh's* new Charter, which was intended to transform the legislative council into a consultative body, limit its right to appoint state officials and oversee state finances. *Shaykh* Aḥmad dissolved the second Council in 1939 and proceeded with an appointed body. The "1938 paradigm", however, has become a complementing myth to the previous of ruler-merchants equality and has heavily influenced the drafting of the 1962 Constitution (Tétreault 2000: 62).

The drafting of what became the 1962 Kuwaiti Constitution occurred under ongoing threats from the Iraqi regime to Kuwait's independence and served as a momentous statement of independence. The drafting of the constitution, moreover, was part of a larger plan to remodel the entire Kuwaiti legal system. Since the late 1950s, *Shaykh* 'Abdallāh al-Sālim (r. 1950–1965) had recruited very prominent Arab experts to draft ordinary legislation and a Basic Law for Kuwait in a broad program of reforms for the country's forthcoming independence. Among these experts, the most distinguished jurist was the Egyptian 'Abd al-Razzāq al-Sanhūrī. He was a leading legal scholar in the region with a strong comparative law training acquired earlier with Edouard Lambert in Lyon. The constitutional law expert to the Kuwaiti Convention, however, was a different Egyptian scholar, 'Uthmān Khalīl 'Uthmān, who later played a very significant role in defining Bahrain's Constitution (Parolin 2006).

The Kuwaiti draft constitution underwent a complex process of mediated popular scrutiny. In October 1961, an electoral law set the rules for the first polls and divided the

country into ten constituencies with two representatives each. Elections were held at the end of the year, and on January 7, 1962, the ruler granted a Provisional Constitution. The Constitutional Convention, composed of twenty elected members and ministers *ex officio*, worked under the rule of the Provisional Constitution, which guaranteed basic civil and political rights. Of the fourteen incumbent ministers, three won a seat as elected members and were then counted as elected members;¹⁴ the remaining eleven ministers all belonged to the al-Šabāḥ and, even if they participated in the Convention, were instructed by *Shaykh* ‘Abdallāh not to vote on the provisions. The Convention approved the permanent constitution in the fall of 1962, and on November 11, 1962, the ruler enacted the text.

The influence of liberal constitutional theory on the basic principles as well as the institutional architecture of the Kuwaiti Constitution is clear. The system of government is defined as “democratic”, with sovereignty residing in the nation (*ummah*, Art. 6): two cornerstones of liberal constitutional doctrine along with a declaration of separation of powers. The three powers, nonetheless, are expected to work in cooperation (*ta’āwun*, Art. 50). Legislative power is vested in the *amīr* and the National Council (*Majlis al-Ummah*): a single house composed of fifty councilors directly elected by universal suffrage and secret ballot, and ministers *ex officio* (figure unspecified, but within an upper threshold of one-third of the members of the National Council: Art. 55).

Kuwait’s 1962 Constitution is where a new Gulf-styled formula for ruler/executive/legislative relations was first rehearsed. The government has to present its program before the National Council upon its formation, but no confidence vote is needed (Art. 98). Clarifications (*as’īlah li-l-istiḍāḥ*) can be addressed by any councilor to any minister or the prime minister, and the inquirer has the right to reply once (Art. 99). Interpellations (*istijwāb*) can be proposed by any councilor and be directed toward any minister or the prime minister (Art. 100). Interpellations can be followed by a no-confidence motion against any minister, which need to be backed by ten councilors and passed by a majority of the elected members—ministers are disqualified from the vote (Art. 101). The prime minister cannot hold any ministerial portfolio, and no motion of no-confidence can be directed toward him (Art. 102(1)). By a majority of the elected members, however, the National Council can pass a motion of non-cooperation (with the prime minister), which effectively gives the ruler the final decision of whether to relieve the prime minister and appoint a new government, or dissolve the National Council (Art. 102(2)). In the latter case, if a new council passes a new non-cooperation motion against the same prime minister (by a majority of the elected members, again), the prime minister is considered to have resigned (Art. 102(3)).

This Gulf-styled formula of ruler/executive/legislative relations became the standard reference for the other Gulf States, with its influence reaching its high point during the first generation of constitution-making in the Gulf in the 1960s and 1970s.

2. Qatar (1970 and 1972)

In 1964, four years into his reign, *Shaykh* Aḥmad (al-Thānī, r. 1960–1972) formed the first Consultative Council (*Majlis al-Shūrā*) of Qatar, composed of fifteen members, all belonging to the ruling family. In 1970, in the wake of independence, *Shaykh* Aḥmad adopted a Provisional Basic Law (*al-Nizām al-Asāsī al-Mu’aqqat li-l-Ḥukm*) foreseeing the participation of Qatar in the soon-to-be-established Federation of Arab Emirates (*Ittiḥād al-Imārāt al-‘Arabīyah*).

¹⁴ Ḥammūd al-Zayd al-Khālīd, ‘Abd al-‘Azīz Ḥamad al-Šaqr, and Muḥammad Yūsuf al-Naṣaf.

The 1970 provisional document provided for a Consultative Council composed of twenty (s)elected members and ministers *ex officio* (Art. 44). Qatar's territory was to be divided into ten districts, each electing four candidates, out of which two would be appointed to the Council by the ruler (Art. 45). The document also meant to clearly demarcate the roles of the ruler (Art. 23) and of the crown prince (Art. 26), at the time the ruler's cousin: *Shaykh* Khalifah. In early 1972, *Shaykh* Khalifah (r. 1972–1995) deposed *Shaykh* Aḥmad and adopted an amended Provisional Basic Law (*al-Nizām al-Asāsī al-Mu'aqqat al-Mu'addal*). The Council had not been formed in the meantime and the 1972 text removed the provision on the (s)election, briefly providing that appointment to the Council would be issued as an *amīrī* decree (*qarār amīrī*, Art. 41). *Shaykh* Khalifah formed a new Council of twenty members in 1972 and in 1975 amended the Provisional Basic Law to allow himself the possibility of appointing ten extra councilors “in case he believed the general interest commanded so” (*idhā mā ra'ā anna al-ṣāliḥ al-ʿamm yaqtaḍī dhālik*, Art. 41(2)).¹⁵ In 1975 *Shaykh* Khalifah did appoint ten extra members to the Council, and the Council kept operating in this configuration until 1996.

In 1995, *Shaykh* Khalifah was deposed by his son and crown prince, *Shaykh* Ḥamad. *Shaykh* Ḥamad (r. 1995–2013) amended the Provisional Basic Law the first time in 1996 to create the post of President of the Council of Ministers. This post was previously held by the crown prince *ex officio* until 1972 and was later absorbed by the *amīr* himself (arts. 31 and 33).¹⁶ The Provisional Basic Law was amended a second time in 1996 to bring the minimum number of members of the Consultative Council to thirty-five and remove the upper limit to further *amīrī* appointments (Art. 41).¹⁷ In 1996, *Shaykh* Ḥamad filled a vacant seat and appointed the missing five councilors to reach thirty-five.¹⁸

When the Consultative Council was first formed in 1964, all fifteen members belonged to the ruling family, and it effectively looked like a family council. In 1970, *Shaykh* Aḥmad may have had in mind the Kuwaiti model of an institution with elected members and ministers (read: family members) *ex officio*. A step shy of Kuwait, however, *Shaykh* Aḥmad wanted to retain the upper hand in the selection of councilors after elections and introduced the system of (s)election. Before the new system could be tested, *Shaykh* Aḥmad was deposed, and *Shaykh* Khalifah appointed a new Council, removing the provision on the (s)election of councilors from the Provisional Basic Law. The new Council, however, was no longer just a family council, even if most of the members boasted common ancestry with the al-Thānī (generally drawing *ansāb* (lineage) back to the Banū Tamīm).

Shy of Kuwait also on the Council's role, both the 1970 and the 1972 Provisional Basic Laws provided for a mere “request for information” by members of the Council to Government (*ṭalab al-bayānāt*, Art. 55 (1970), and Art. 51 (1972)). The ruler's extended ability to change at will the composition of the Council rendered the “request for information” apparently innocuous.

3. The United Arab Emirates (1971)

The drafting of the Constitution of the United Arab Emirates is a long, fascinating story. For most of the three years it took to draft it, Bahrain and Qatar were active participants. The text was eventually signed by only six of the Emirates on July 18, 1971, and came into force on December 2, 1971, when the Emirs finally decided to establish the Federation. The

¹⁵ As amended by *Amīrī* Decision (*Qarār Amīrī*) 11/1975.

¹⁶ As amended by *Amīrī* Decision (*Qarār Amīrī*) 28/1996.

¹⁷ As amended by *Amīrī* Decision (*Qarār Amīrī*) 34/1996.

¹⁸ See Rabi'ah al-Kuwāri, “Majlis al-shūrā wa-musā'alat al-wuzarā” in *al-Sharq* (February 17, 2008).

Emirate of Ra's al-Khaymah joined the Federation and signed the constitution on February 11, 1972. The constitution was provisional and was to be replaced after five years by a permanent one, pending the resolution of issues standing in the way of full integration among the federated Emirates, including the contributions of the individual Emirates to the federal budget and defense integration. Defense integration at the federal level was decided in 1976 and the provisional text amended accordingly, but disagreement on the other issues led to renewed extensions of the provisional text in 1976, 1981, 1986, and 1991. Eventually, in 1996, a constitutional amendment scrapped the term "provisional" from the official title altogether. A significant number of legislative matters were then brought under federal jurisdiction in 2004 with a constitutional amendment to Art. 121.

The UAE Constitution established a unique structure of government in which one of the seven *Umarā'* (traditionally Abu Dhabi's) presides over a Council of all the *Umarā'*: the true center of all decision-making in the Federation. The federal government retains jurisdiction on a selected number of matters including foreign policy, defense, security, immigration, and communications, while the individual Emirates exercise residual powers.

The Supreme Council of the Union (SCU), also known as the Federal Supreme Council, functions as the highest federal authority in executive and legislative matters (Art. 46). Narrowly, the executive branch consists of the Supreme Council, the Council of Ministers (the cabinet), and the presidency. The SCU consists of the rulers of the seven Emirates; it elects from among its members a chairman and a vice chairman, who serve for a five-year term (Arts. 51–52). The constitution defines the powers of the SCU as (1) formulating the general policy of the federation, (2) legislating on all "matters of state", (3) ratifying all federal laws and decrees, including those relating to the annual budget and fiscal matters, (4) ratifying all international treaties and agreements, and (5) assenting to the appointment of the prime minister and of the judges of the Supreme Court of the Union (Art. 47). The rulers make decisions by simple majority on procedural issues (*al-masā'il al-ijrā'iyyah*); substantive issues (*al-masā'il al-mawḍū'iyyah*) require a super-majority of two-thirds (five of seven rulers), including the votes of both Abu Dhabi and Dubai (Art. 49). The SCU carries out its work through a secretariat and whatever ad hoc committees it chooses to establish. The president serves as chairman of the SCU, head of state, and commander of the Union Defense Force. The president convenes the SCU and appoints the prime minister, the two deputy prime ministers, the cabinet ministers, and other senior civil and military officials (Art. 54).

The Federal National Council (FNC) is a body whose role in government is limited to consultation (Arts. 89–93 and 110). Its forty members were originally appointed for a two-year (renewable) term (Art. 72) by the respective Emirate rulers and in accordance with a constitutionally fixed quota that allotted proportionately more councilors to the wealthiest and most populated Emirates (Art. 68). The Provisional Constitution, however, did not require appointment, but rather left the decision on how to designate the individual Emirate's representatives to each Emirate (Art. 69). The decision, in late 2005, to transform the FNC from an entirely appointed body into a partly-appointed, partly-elected one did not, at the time, require constitutional amendment. Under federal guidelines, *Umarā'* retain a significant level of discretion in identifying the electoral college (*al-majma' al-intikhābī*); in 2006 slightly over 6,000 citizens were selected to vote (approximately 0.8% of citizens), but the number was increased in 2011 to almost 130,000 (approximately 12% of citizens), and a further increase was announced for the 2015 elections (increase possibly precipitated by a turnout in 2011 below 30%). The FNC tenure was also extended to four years by a constitutional amendment in 2009 (Art. 72). The FNC meets in regular sessions for a minimum of six months, beginning in November (amended in 2009 to be October in order

to better coordinate with the government session, Art. 57). The UAE President may call a special session if necessary.

The president opens the regular session with a speech on the state of Union (*bayān aḥwāl al-bilād*, Art. 80). The FNC can appoint a committee to draft a “reply” (*radd*) to the speech in the form of “observations and wishes” (*mulāḥazāt al-Majlis wa-amānīhā*), and the reply is presented to the Supreme Council after approval by the FNC. The FNC also makes recommendations on legislative matters to the Council of Ministers, the president, and the SCU. The FNC has to discuss any government bills drafted by the Council of Ministers; it can approve, amend, or reject such bills, but it cannot veto them. Federal legislation can either appear in the form of federal laws (*qawānīn*) or emergency decrees (*marāsim bi-qawānīn*). A bill, drafted by the Council of Ministers, presented to the FNC for nonbinding deliberation, submitted to the president for assent, and to the SCU for ratification, becomes a federal law upon enactment by the president (Art. 110). Emergency decrees are issued jointly by the president and the Council of Ministers between sessions of the Supreme Council of the Union; an emergency decree must be confirmed by the SCU to remain valid (Art. 113).

The 1971 UAE Constitution carries but a small hint of the Gulf-styled formula of ruler/executive/legislative relations. Explanations (*as’īlah li-l-istīfāsār*) can be addressed by any councilor of the FNC to any minister or the prime minister (Art. 93). The constitution provides neither for a no-confidence motion, nor for a non-cooperation motion.

The Provisional Constitution underwent a major institutional crisis in the late 1970s. In the spring of 1979, the Federal National Council and the Council of Ministers issued a white paper addressing a number of issues stemming from the loose federal structure set by the Provisional Constitution. Among the issues, the white paper pointed to the desirability of transforming the Federal National Council into a full legislative body—mentioning a degree of “democratization”, yet avoiding the explicit reference to elections or universal suffrage. Popular support for the document was seen in street demonstrations during its presentation to the Supreme Council of the Union. Faced with strong opposition from Dubai, however, the Supreme Council rejected the white paper, and the crisis was resolved with the intervention of *Shaykh* Ṣabāḥ al-Aḥmad (then Kuwait’s foreign minister and now *amīr*) and a government reshuffle (Heard-Bey 1986).

In 2009 a series of constitutional amendments extended the tenure of the FNC (Art. 72), and its ordinary sessions (Art. 78). It also provided the FNC with a secretary-general and the capacity to adopt its bylaws (Art. 58), as well as the right to be informed of international agreements signed by government (Art. 91), but its limited legislative and oversight capacities have not been increased.

4. Bahrain (1973)

Even though Bahrain’s Constitution is the furthest on the temporal scale from the 1962 Constitution of Kuwait, it is nonetheless the closest to the Kuwaiti model. Bahrain’s independence under the al-Khalifah family came after an informal survey conducted by a UN representative,¹⁹ and on Independence Day (December 16, 1971) *Shaykh* ‘Isā b. Salmān (*al-Khalifah*, r. 1961–1999) announced plans for a “constitutional form of government”.

¹⁹ The UN “referendum” was not performed by ballot-casting, but through interviews with Bahrain’s prominent personalities carried out by the UN Personal Representative Vittorio Winspeare Guicciardi who arrived in the country on March 30, 1970. On May 11, 1970, he submitted his report (no. 9772) to the UN Security Council stating: “The Bahrainis I met were virtually unanimous in wanting a fully independent sovereign state. The great majority added that this should be an Arab state.” The report was ratified later in May 1970 by the two houses of the Iranian parliament; Iran was claiming Bahrain as its fourteenth province

Six months later, *Shaykh* ʿIsā issued a decree providing for the election of representatives to a Constitutional Convention—a Convention charged with both drafting and ratifying a constitution. The Convention was to consist of twenty-two elected and twenty appointed members. Of the twenty appointed members, twelve were ministers *ex officio*, and eight selected by the ruler. The election, which was held in December 1972, was the first national election in Bahrain’s history with voting rights restricted to native-born male citizens aged twenty or older.

The relative openness of the political debate during the campaign for the Convention encouraged citizens to petition the ruler. Two such initiatives asked for the repeal of the harshest provisions of the 1965 Law of Public Security (a series of three *amīrī* Decrees that authorized the ruler to indefinitely maintain a virtual state of emergency in order to protect national security from suspected foreign and domestic enemies), and women’s enfranchisement; neither of them, however, met with a positive response.

In a few months, the Convention completed a draft which closely resembles the 1962 Kuwaiti model; the text was then enacted by the ruler in December 1973. The 1973 Constitution provided for an advisory legislative body, the National Council (*al-Majlis al-Waṭanī*), consisting of thirty members elected for four-year terms (forty from the second legislative term), and ministers *ex officio* (Art. 43). Clarifications (*as’īlah li-l-istiḍāḥ*) could be addressed by any councilor to any minister or the prime minister and the inquirer had the right to one reply (Art. 66). Interpellations (*istijwāb*) could be proposed by any councilor and directed to any minister or the prime minister (Art. 67). Interpellations could be followed by a no-confidence motion against any minister, which needed to be backed by ten councilors and be passed by a majority of the elected members (Art. 68). A motion of no-confidence could not be directed against the prime minister, unless the latter held also a ministerial portfolio (Art. 69(1)). With a two-thirds majority, however, the National Council could vote for a non-cooperation motion, which effectively gave the ruler the final decision on whether to relieve the prime minister and appoint a new government, or dissolve the Council altogether. In the latter case, if a new Council passed a new non-cooperation motion against the same prime minister (this time just by absolute majority), the prime minister was considered to have resigned (Art. 69).

The ruler retained the right to dissolve the National Council at will, but had to provide grounds for it and could not dissolve the Council more than once on the same grounds (Art. 65). Elections were to be called immediately after the dissolution and if elections were not held within two months, the dissolved Council was reconvened and restarted operating as if the dissolution had never happened (Art. 65(2)). In reality, however, these conditions were not followed. The first National Council was dissolved in 1975, Art. 65 was suspended, and neither elections were held, nor the Council reconvened for almost three decades.

B. The Second Generation: Codifying Practice (1990s)

After the 1990–1991 Gulf War, a new generation of constitutions emerged in countries where no formal basic law had been previously adopted: Saudi Arabia and Oman. In both cases, the documents do not proclaim high aspirations, but rather intend to provide a codification of existing practice with various corrections. (See Table 3.2.)

and even had a seat reserved for Bahrain in its national assembly. See UNSC (April 30, 1970) UN Doc S/9772; Gianluca P. Parolin, “Reweaving the Myth of Bahrain’s Parliamentary Experience” in Mary Ann Tétreault, Gwenn Okruhlik, and Andrzej Kapiszewski (eds), *Political Change in the Arab Gulf States: Stuck in Transition* (Lynne Rienner, Boulder 2011) 21–48.

TABLE 3.2 The Second Generation

| | | Adoption | Parliament | Ruler/Exec/Leg Relations |
|--------------|------|----------|---------------------------|--------------------------|
| Saudi Arabia | 1992 | Grant | SINGLE HOUSE Undefined | – |
| Oman | 1996 | Grant | TWO HOUSES Undefined | – |

1. Saudi Arabia (1992)

Saudi Arabia did not have a codified constitution until 1992, but an interesting history leading up to it. Power dynamics significantly changed ever since the establishment of the kingdom in 1932 and the adoption of the Basic Law in 1992. Under the reign of King Ibn Sa‘ūd (r. 1932–1953), power was firmly in the hands of the king, aided by his royal court (the *Dīwān*). Only at the very end of his reign did King Ibn Sa‘ūd decide to form a government. Under the reign of King Sa‘ūd (r. 1953–1964), the power center kept shifting back and forth between the government and the royal court. Government stabilized as the center of the kingdom’s political life under the reign of King Fayṣal (r. 1964–1975), and it was thus codified under the reign of King Fahd (r. 1982–2005) into a single document called the Fundamental System of Government (*al-Niẓām al-Asāsī li-l-Ḥukm*) in 1992. Granted as a royal decree (A/90 of 27 Sha‘bān 1412), this document codifies existing governance practices in the kingdom: at the heart of the system are the king and his government, where the former serves as president of the Council of Ministers (Art. 56).

Many have argued that the adoption of a constitutional text has had little effect on the Saudi political system, being a clear example of “ornamental constitutionalism” (al-Fahd 2005: 347). There is some truth to this. Portrayed as a gracious “grant” from the king, the 1992 text grants very little, if anything. However, it does acknowledge the call for accountability through a representative body. It does not provide either for a representative body, or for accountability, but its restraint speaks of the level of pressures (low but present).

The constitutional history of Saudi Arabia also offers interesting insights into the push-backs of “strategic constitutionalism”. With the conquest of Hijāz in the Interwar Period, the al-Sa‘ūds’ governance structure of Central Arabia met with a more sophisticated setting. King Ibn Sa‘ūd decided to create a dual structure within the kingdom (which he ruled as Kingdom of Najd and Hijāz from 1926 to 1932) and allow the Hijāzī Kingdom an institutional structure outlined in a Basic Law (*al-Ta‘līmāt al-Asāsīyah li-l-Mamlakah al-Hijāzīyah*) issued in 1926. The Hijāz/Najd duality within the kingdom—even after full unification in 1932—persisted for decades, and the Hijāzī Consultative Council (*Majlis al-Shūrā*) as well as municipal institutions remained a unique experience under the unified Kingdom of Saudi Arabia, even if they were progressively deprived of real powers. The later decline of Hijāzī institutions coincided with the king’s consolidation of power. The 1926 text even included a timid provision on accountability in the form of mandatory attendance of Council meetings by the directors of Hijāzī administrations (*mudīru ‘l-dawā’ir*) when addressing issues within their jurisdictions; however, attendance had to be requested by the viceroy (Art. 30). The provision disappeared from the 1928 text of the Basic Law of the Consultative Council (*al-Niẓām al-Asāsī li-Majlis al-Shūrā*), which was said to replace the entire section on the Council in the 1926 Basic Law (Art. 13). The Basic Law of the Consultative Council was eventually repealed in 1992 by the Consultative Council Law.

Since 1962, Saudi kings have periodically promised to establish a national Consultative Council to advise them on governmental matters, but, for more than three decades no king undertook practical steps to establish such a body. This changed however in 1992 when the Basic Law finally established a Consultative Council (*Majlis al-Shūrā*, Art. 68); it left the details of structure, powers and membership to another piece of legislation, the Consultative Council Law (*Nizām Majlis al-Shūrā*) granted as a royal decree (A/91 of 27 Sha‘bān 1412). Councilors (60 in 1992, 90 since 1997, and 120 since 2001) are all appointed by the king; the Council has extremely limited authority. One meager form of accountability, in line with the 1926 Hijāzī model, is the mandatory attendance of Council meetings by government officials (*mas’ūl ḥukūmī*) when addressing issues within their jurisdictions; however, attendance has to be requested by the president of the Council to the president of the Council of Ministers (Art. 23).

2. Oman (1996)

After deposing his father in 1970, *Sulṭān Qābūs* (r. 1970–present) refused to establish a constitutional monarchy and an elected parliament, but in 1975 he organized the administration and the governmental institutions by Decree 26/1975 (Siegfried 2000: 366). During the 1980s and early 1990s, a Consultative Council progressively emerged out of the *sulṭān*’s practice of holding parliament sessions around the sultanate and the 1996 Basic Law unambitiously codifies such institutional practice.

In 1996 Oman was the last country of the Gulf to adopt a Basic Law, which *Sulṭān Qābūs* granted with Decree 101/1996. The *sulṭān* remains the paramount authority in the country and even though the Council of Ministers is the highest executive authority (Art. 44), it derives its powers from the *sulṭān*, who also issues and ratifies all laws and decrees (Art. 42). The *sulṭān* heads his government and keeps the portfolios of defense, foreign affairs and finance to himself. The layout of the Basic Law sections suggests that legislative power is vested in the Council of Oman (*Majlis ‘Umān*), but this is not explicitly stated; a brief and dry provision outlines the Council of Oman as being composed of the Consultative Council and the State Council, leaving to the law the specification of the powers of each of these Councils, the length of their terms, the frequency of their sessions and their bylaws, as well as their size, membership requirements, methods of selection and appointment, reasons for dismissal, and other regulatory provisions (Art. 58).

The Council of Oman Regulations were adopted by Decree 86/1997. The 1997 Regulations provided for an appointed State Council, and a (s)elected Consultative Council; two out of four candidates put forward by each province with more than 30,000 inhabitants were selected (Art. 21). One out of two for provinces with less than 30,000 inhabitants. The text did not specify how provinces were supposed to “put forward their candidates” (*taqūm kull wilāyah bi-tarshīḥ [4/2] min abnā’ihā*). In 2000 the Regulations were amended to provide for the election of the Consultative Council members (Decree 35/2000). Each province with more than 30,000 inhabitants now elects two councilors, one for provinces with less than 30,000 inhabitants (Art. 21 of Decree 86/1997 as amended by Decree 35/2000). Retrospectively, the language adopted in the 2000 amendment (*taqūm kull wilāyah bi-intikhāb [2/1] min mutarashshihā*) suggests that the 1997 text did not point to a necessary shift to an electoral process.

The first elections to the Consultative Council were held in 2003 and have been regularly held every four years since then. The (low) numbers of registered voters also progressively increased, especially after the announcement of constitutional reforms to the role of the Council in 2011.

C. The Third Generation: The Conservative Convergence (2000s)

The two constitutions of the third generation share a remarkable conservative convergence, both in their structure and tone. Upon independence, Bahrain and Qatar had adopted two fairly distinct constitutions; in Bahrain a Convention had drafted a fairly liberal constitution with a strong parliament, whereas in Qatar the ruler had granted a fairly conservative constitution with a weak parliament. In both systems, however, the previous constitutions had long gone unenforced in particular on ruler/executive/legislative relations: in Bahrain since the dissolution of parliament in 1975, and in Qatar since the 1972 amendments. During the suspension (technically not a suspension or a full suspension in either system), an appointed Council remained operating in Qatar, while no Council operated in Bahrain at all. (See Table 3.3.)

In the early 2000s, the constitutional trajectories of Bahrain and Qatar show a remarkable convergence, both in the half-hearted engagement with the citizenry in the adoption of the new constitutions and in their half-hearted liberalization. Process-wise, both Bahrain and Qatar resorted to the polls to boost the legitimacy of the new texts. In Bahrain, citizens were polled on a broad-stroke plan which was then tampered with in the drafting of the actual final text, while in Qatar only a negligible number of citizens were polled. Content-wise, both Bahrain and Qatar departed from their previous constitutions in two opposite directions yet joined in a conservative mid-ground; in Bahrain the elected/appointed ratio was lowered and accountability limited, whereas in Qatar the former was increased and the latter expanded. A decade into their adoption, however, the constitutional provisions on Qatar's parliament are still held in abeyance.

1. Bahrain (2002)

Upon the death of *Shaykh* 'Isā b. Salmān in 1999, *Shaykh* Ḥamad b. 'Isā (r. 1999–present) became the new ruler of Bahrain and decided to address the “constitutional conundrum” early on. The unrest of the 1990s seemed to suggest to the ruler that the costs of conducting

TABLE 3.3 The Third Generation

| | | Adoption | Parliament | Ruler/Exec/Leg Relations |
|---------|------|---|--|--|
| Bahrain | 1973 | Convention (half elected, half appointed) | SINGLE HOUSE Elective (+Ministers) | (1) Info request (Art. 66) (2) Interpellation (Art. 67) (3) No-confidence (Art. 68) (4) Non-cooperation (Art. 69) |
| | 2002 | Grant (& polls) | TWO HOUSES Lower elected Upper appointed | (2) Interpellation (Art. 65) (3) No-confidence (Art. 66) (4) Non-cooperation (Art. 67) |
| Qatar | 1970 | Grant | SINGLE HOUSE (S)elected | (1) Info request (Art. 50) |
| | 1972 | Grant | SINGLE HOUSE Unregulated | (1) Info request (Art. 51) |
| | 2004 | Grant (& polls) | SINGLE HOUSE 2/3 Elected 1/3 Appointed | (1) Info request (Art. 109) (2) Interpellation (Art. 110) (3) No-confidence (Art. 111) |

politics outside an institutional framework were higher than the ones associated with operating within a constitutional text. The 1973 Constitution was still formally in force, even if most of it was *de facto* suspended due to the absence of the National Council—the elected body dissolved in 1975 and never reinstated. Restoring the constitution and calling for new elections, however, was not the al-Khalifah's desire: The 1973 text included forms of accountability that the al-Khalifah family were not ready to submit to. Amending the constitution looked tricky as well: The 1973 text required the National Council to be involved in the process (Art. 104). Getting rid of the text altogether and writing up a new constitution from scratch had its own significant political costs: The 1973 Constitution had become a highly mythicized document and building consensus over a new text would have been an uphill battle.

The ruler opted for an alternative path: have a committee draft a text with broad strokes, gather consensus on it by popular vote, and then introduce fine-print clauses in the original text of 1973. In late 2000, *Shaykh* Ḥamad appointed a forty-six-member body (the Supreme National Committee) to draft a National Action Charter (NAC). The NAC was later submitted to a general public referendum (*istiftā' sha'bi*) on February 14 and 15, 2001. After a broad media campaign in its favor, the NAC was approved by 98.4% of the voters with high turnout figures. A few days after the plebiscite, the State Security Law was repealed and the State Security Court abolished. Shortly thereafter, two committees were set up to implement (read: tamper with) the NAC provisions and other measures were taken accordingly, giving rise to international commendation and UN High Commissioner for Human Rights Mary Robinson's "praise for Bahrain's reform drive." At the end of the process, on February 14, 2002, *Shaykh* Ḥamad enacted the "amended 1973 Constitution." As I have detailed elsewhere, the text cannot be considered the "amended 1973 Constitution," but rather the "2002 Constitution" on both procedural and substantive grounds (Parolin 2003, 2004, 2006, and 2011).

The 2002 Constitution introduced a bicameral system with two houses operating as a single body on more sensitive issues. The National Council (*al-Majlis al-Waṭani*) is a body composed of the Consultative Council (*Majlis al-Shūrā*), an upper house of forty members appointed by the king, and the Council of Representatives (*Majlis al-Nuwwāb*): a lower house of forty members elected by universal adult suffrage. Even when operating individually, the Bahraini houses function in a system of egalitarian bicameralism: Both houses need to be in agreement on almost everything. If they disagree, the final call is made by the National Council (where the Crown can count on all the appointed members and hopefully some loyalists among the elected to vote in its favor).

The 2002 Constitution still carries the possibility of addressing interpellations (*istijwāb*) to ministers, but the interpellation now needs to be introduced by five councilors, and must not pertain to a private interest of the questioner or her relatives up to the fourth degree (which, given the small size of the population, is not a remote hypothesis) or be made by proxy (which seems to sit exactly at the heart of the concept of representation, especially in a single-member district systems as Bahrain's) (Art. 65). Interpellations can still lead to a no-confidence motion against a minister, but the motion now needs to be seconded by at least ten councilors and supported by a two-thirds vote (Art. 66). The non-cooperation motion against the prime minister can be raised at the request of two-thirds of the councilors of the lower house and decided by a two-thirds vote in the National Council (which means all of the elected members and one third—at least fourteen—of the appointed) (Art. 67). The 2002 text omitted the provision regulating a renewed non-cooperation motion by the newly elected Council that would no longer allow the ruler to dissolve the latter.

With the new constitution, the honeymoon with the opposition came to an end. The country's four major political forces decided to boycott the first elections of 2002 and put all their weight behind a campaign to prove the legitimacy deficit of the regime and its new constitution by not voting. However, the government managed to get 53.6% of the eligible

voters to the polls. The four “societies” lived under shock for the following years and in 2006 decided to run in the new round of elections (the turnout jumped back up to 72% with these elections). This decision caused an internal rift with splinter groups taking in all those who continued to see no advantage in participating in the institutional circus.

2. Qatar (2004)

Writing up and adopting the Permanent Constitution (*al-Dustūr al-Dāʾim*) for Qatar has dragged on for years, and a third of its provisions have been awaiting implementation for almost fifteen years now. The process started with the appointment, in 1999, of a panel of experts to draft the text (thirty-two members, including six al-Thānī's). Three years later, in 2002, the panel presented its draft to the ruler; one year later, in 2003, the ruler called for a popular referendum on the draft; one year later, in 2004, the draft was issued; and another year later, in 2005, the text was finally published in the official gazette. Voter turnout on the day of the popular referendum in April 2003 was very high (above 84%, with eligible voters making up only 10% of citizens); 97% voted in favor. The constitution formally entered into force with the ruler's enactment in June 2004.

According to the Permanent Constitution, the Consultative Council (*Majlis al-Shūrā*) is to consist of forty-five members, thirty of whom are to be elected by direct, secret ballot (Art. 77). The ruler appoints the remaining third. The constitution grants the Council some legislative authority: If it passes a bill (that needs to be introduced in accordance with the provisions guaranteeing ample government oversight), the bill is then sent to the ruler for enactment, but the latter may return it for reconsideration. If returned to the Council, a bill can pass only by a two-thirds majority; in such an event, the ruler is obliged to sign it into law, but he may suspend its enforcement for as long as he deems necessary to protect the supreme interests of the country (*li-l-muddah allatī yuqaddir annahā tuḥaqqiq al-maṣāliḥ al-ulyā li-l-bilād*, Art. 106).

The Permanent Constitution employs two different terms to refer to the two ways in which the Council can question the government. Clarifications (*asʿīlah li-l-istidāḥ*) can be addressed by any councilor to any minister or the prime minister; the councilor has the right to reply once (Art. 109). Interpellations (*istijwāb*) can be proposed by any councilor to any minister, but the interpellation will not be considered unless it is backed by one third of the councilors (Art. 110). Interpellations can be followed by a no-confidence motion, which needs to be backed by one third of the councilors and passes by a two-thirds majority (Art. 111).

The accountability of the government to the Council has been sensibly increased by the Permanent Constitution. Under the rule of the Provisional Basic Law, only a request for information was available, and it could not lead to a no-confidence motion.

One decade and countless speeches later, however, the entire section on the Council remains unenforced and is expected to remain so until the first Council is elected (Art. 150). Tenure of the Council has simply been repeatedly extended. The government does not hide the fact that it considers the Council an advisory body. In 2008, for instance, the Council voted against the traffic law by unanimity; the vote was completely ignored and the decree-law continued to be enforced.²⁰ In 2008, the Council also voted in favor of the electoral law; it took the government four years to enact it.²¹

²⁰ See Ḥasan b. ʿAbd al-Raḥīm al-Sayyid, “Ilā matā yabqā thulth al-dustūr muʿaṭṭal^{an},” *al-Sharq* (February 26, 2008) (republished in *Waqafāt dustūriyyah* (Beirut: Al-muʿassasah al-ʿarabiyyah li-l-dirāsāt wa-ʿl-nashr, 2008)).

²¹ See Ḥasan b. ʿAbd al-Raḥīm al-Sayyid, “Li-madhā nakhshā al-majlis al-muntakhab?”, *al-Sharq* (June 5, 2013).

D. Uprisings and the Quick Fix: Elections and/or Constitutional Amendments? (2011)

Institutional responses to the unrest have focused on parliaments as the primary locus for channeling the requests for participation in the decision-making. In systems with existing elected houses, the response has either been to call for early elections (as in Kuwait), or amend some constitutional provisions on the role of the elected house (as in Oman and Bahrain). In systems with no elected houses, proposals calling for elections for revamped elected bodies seem to be the most popular response (Qatar, Saudi Arabia, the UAE), but the lack of an appropriate constitutional framework might deprive such strategies of any meaningful effect.

1. The Omani Amendments

The first Gulf system to be affected by unrest after the uprisings in Tunisia and Egypt was also the first to respond to them with an early government reshuffle in early 2011: Oman. Unrest did not die out in Oman, and a package of constitutional amendments was issued by decree later in the year, following a round of elections for the Consultative Council (the third elections since 2003). The amendments give constitutional status to the regulations on the Council of Oman, a bicameral parliament composed of the Consultative Council and the State Council. The new section substitutes the previous single article with a set of forty-six, increasing the number of constitutional provisions by a full half. Just as its previous codification of constitutional practice in 1996, Oman raised the status of the provisions on the bicameral body to a constitutional one in 2011, but has not significantly modified the body's powers and the relationship between the elected and the appointed houses.

The Council of Oman is composed of the State Council (*Majlis al-Dawlah*) and the Consultative Council (*Majlis al-Shūrā*) (Art. 58). The State Council cannot have more members than the Consultative Council, and all of the State Council members are appointed by the *sulṭān* (Art. 58 *bis*). The amendments include broad provisions on member qualifications, tenure, dismissal procedure, and internal regulations (Art. 58 *ter* through *nonies*).

The Consultative Council is an elected body that represents every province of the sultanate. Its size depends on the number of the provinces and their population; every province (*wilāyah*) with less than 30,000 residents elects one councilor; every province with more elects two (Art. 58 *decies*). The Basic Law prescribes election by direct, secret, general ballot (Art. 58 *undecies*). The extensive member qualifications also include being registered in the electoral register (*al-sijill al-intikhābī*), but the conditions for registration are not specified in the amendment (Art. 58 *duodecies*). The *sulṭān's* freedom to dissolve the Council is unconditional (*li-jalālat al-Sulṭān fī al-hālāt allatī yuqaddiruhā ḥall Majlis al-Shūrā*, Art. 58 *unvicies*).

The Council of Oman, the bicameral body, decides by absolute majority (Art. 58 *quinquies tricies*), and has the right to approve or amend a bill proposed by government, however, it is not clear what happens when the bill is returned to the Council by the *sulṭān* (Art. 58 *septies tricies* (2)). The Council of Oman's budgetary oversight is limited to receiving a copy of the annual report drafted by the financial and administrative system (Art. 58 *quater quadrages*). The Consultative Council's government oversight is limited to interpellations (*istijwāb*) to service ministers and on matters of *ultra vires* acts in breach of the law (Art. 58 *quinquies quadrages*), however, it is the *sulṭān* who decides what action, if any is to be taken.

2. The Kuwaiti Elections

Ever since independence, Kuwait has seen a remarkable number of elections. In the last two decades, in particular, early elections have been the norm, and Kuwaiti citizens have been called to the polls ten times since 1992: in 1992, 1996, 1999, 2003, 2006, 2008, 2009, 2/

2012, 12/2012, and 2013. Two dissolutions were ordered by the Constitutional Court in 2012 and 2013: Both decisions seemed to serve the ruler's agenda while deflecting some of the criticism for the series of dissolutions initiated by him.

The ruler's strategy seems tilted toward allowing the executive to operate on electoral laws and by-laws (chiefly on the voting system and redistricting), rather than addressing the underlying constitutional problem of government's responsibility to parliament. Here the Constitutional Court built up some political capital and then stepped in to aid the executive: In 2012 the court rejected a government challenge to the five-constituencies Electoral Law of 2006, and in 2013 declared that the one-vote electoral system—introduced by an emergency decree just weeks ahead of the December 2012 elections, prompting the opposition to boycott it on grounds of its stifling effects over party politics and alliances—was in line with the constitution.²²

The 1962 Constitution established a constitutional monarchy, but introduced only an option for parliamentary government by giving the choice to resolve parliamentary opposition to the government in favor of the former or the latter to the *amīr*. The constitution neither requires the prime minister to be a councilor, nor to be a member of the ruling family (Art. 56). Contrary to the parliamentary tradition, however, ministers become councilors *ex officio*. The ruling family is largely represented in the executive, and the traditional appointment of the crown prince as prime minister somehow forced the non-cooperation motion clause (Art. 102) toward either early elections or a government reshuffle, never the removal of the prime minister.

A major shift in this pattern, however, occurred in 2003, when—for the first time—the post of prime minister was dissociated from that of crown prince. Retrospectively, the situation did not change until 2006, because *Shaykh* Ṣabāḥ al-Aḥmad (prime minister 2003–2006, *amīr* 2006–present) served as prime minister until becoming *amīr*. Since then, however, *Shaykh* Nāṣir al-Muḥammad (prime minister 2006–2011), who served as prime minister without being crown prince, faced strenuous parliamentary opposition and had to form seven different governments before eventually giving in in mid-2011 (after three dissolutions of parliament and barely surviving a non-cooperation motion of a split house in early 2011). The reluctance of the ruling family to loosen the grip over the position of prime minister and key ministerial positions still heavily affects the operation of both the no-confidence and the non-cooperation motion clauses.

Transformation into a full parliamentary system has been at the center of Kuwaiti politics for decades, well before the recent regional uprisings. Until now, however, the *amīr*'s preference has been to maintain the ruling family's grip on government and the calling of new elections. This option, coupled with a heavier hand on the electoral system and districting, strains the wisely devised constitutional provision. An increasing recourse to boycotts by political actors signals the level of pressure on Art. 102—a level of pressure that can no longer be defused by new rounds of elections alone.

3. The Bahraini Amendments

In May 2012, a year after the military intervention of the GCC's Peninsula Shield forces in Bahrain and yet under relentless unrest, the King of Bahrain enacted a series of constitutional amendments focused on parliament and its institutional role. The amendments were approved by both the appointed and elected house of parliament pursuant to Art. 120 of the 2002 Constitution. Obtaining the requested super-majority of two

²² Decision rendered on June 16, 2013, while dissolving the parliament elected in December 2012, *Al-rā'ī al-āmm*, June 17, 2013.

thirds was eased by the new composition of the lower house following the 2011 by-elections: protesting the killing of demonstrators, all eighteen al-Wifāq councilors had resigned in February 2011. By-elections, boycotted by al-Wifāq and all the other opposition groups, were held in September 2011 with a turnout of below 20% (government figures are much higher because the four uncontested seats were counted as showing 100% turnout). All of the new councilors ran as independent and were considered pro-government candidates.

Among the Bahraini amendments, what features prominently is the right to dissolve the lower house. This right still rests with the king, who is now required to request a nonbinding opinion from the speakers of both houses and the President of the Constitutional Court before proceeding (Art. 42 (1) (c)).

Membership requirements for the upper house have been modified to apparently limit the king's discretionary appointments, but the appointment only needs to comply with principles and conditions set forth in a royal order (*amr malakī*), issued by the king himself (Art. 52).

More stringent citizenship requirements have been introduced for membership in both houses. Here the draft amendments proposed by the government were less stringent than the final text approved by parliament (Arts. 53 and 57 (1) a). The government also wanted to introduce a minimum schooling requirement for membership in the lower house but parliament refused (Art. 57 (1) c).

The Bahraini government also did not want to have to deal with by-elections for resigning councilors again, and proposed a text whereby the candidate that had gotten the second largest number of votes after the resigning councilor would be immediately elected, but parliament refused and stipulated that new elections would have to be held within two months, and candidates (excluding the resigning councilor who is not allowed to run) would run for the remainder of the legislative term, unless it is less than six months, in which case by-elections would not be held (Art. 59).

The tense ruler/executive/legislative relations, exacerbated by the egalitarian bicameral system, have been the crux of the Bahraini crisis which started with the adoption of the new constitution in 2002. The text, as amended in 2012, now leaves the issue of non-cooperation with the prime minister (the Gulf-style no-confidence vote) in the sole hands of the lower house. However, a super-majority of two thirds is still required to raise the non-cooperation issue with the king, who still has the option of relieving the prime minister from his post or dissolving the elected house (Art. 67).

A more significant move toward a greater institutional role for the elected house has been introduced by the new provision establishing an initial confidence procedure (Art. 46, new section). After having taken the oath, the prime minister needs to present her program to the lower house within thirty days or the first session if the house is in recess. If the absolute majority of councilors does not vote in favor within the following thirty days, the government has twenty-one days to resubmit its program, amended as it sees fit. If within the following twenty-one days the house votes again against the program, this time by a super-majority of two-thirds, the king has to accept the government's resignation. With a new government, however, this procedure can end either with the government's resignation or the dissolution of the lower house. The program is to be considered approved if the deadlines elapse without a formal second vote against it. The stringent requirement of the initial absolute majority in favor is complemented by the very loose requirement of a second super-majority against, and the presumption of approval of the program after the deadline.

In an effort to show an enhanced role of the lower house, the speaker of the appointed upper house has been substituted by the speaker of the elected lower house, chiefly in

inconsequential provisions. For instance, when a text is approved by both houses, it is the speaker of the lower house who now sends it to the king for enactment (Art. 83).

A timid opening to the possibility of discussing public policy issues in the lower house has been introduced (Art. 68). The presentation of the government's program to the plenary session of parliament (now subject to the lower house approval, as per the new section of Art. 46) has been scrapped in favor of a voluntary address by the prime minister (Art. 88). The process of addressing written questions to government has been streamlined (Art. 91), just as the individual councilor's legislative initiative which, if approved by the house, is sent to government for the drafting (Art. 92 (1) a).

An interesting addition that, albeit restrictive, could lead to a wider use of the interpellations of ministers by councilors (*istijwāb*) has been the reorganization of the procedure through standing committees, with a possible transfer of the discussion to the plenary session in case of an absolute-majority vote in that sense (Art. 65, new section). Details are left to the internal bylaws, the amendment of which on this point generated tensions in December 2012. Interpellations need to be initiated by at least five members of the lower house and, after the committee/plenary discussion, can lead to an individual no-confidence vote (*mawḍū' al-thiqah*) against a minister as stipulated in Art. 66. The committee pre-discussion, by avoiding the public scrutiny that the parliamentary media broadcast involves, is seen as a way of implementing a more acceptable form of parliamentary scrutiny over the government (and in particular ministers belonging to the ruling family) because of its lack of publicity. Most of the government crises in Kuwait have actually been generated by the interpellation of the prime minister, invariably the crown prince, until 2003.

III. WINTER IS COMING

Constitutions in the Gulf may have little bite and their parliaments may be weak, yet both matter. Not all Gulf systems face the same challenges: While one group struggles to establish a parliament and increase its elected/appointed ratio (Saudi Arabia, Oman, Qatar, UAE), a second group struggles to substantiate and expand political accountability (Kuwait, Bahrain). Over the fifty years since the first constitution in the region, the Gulf has witnessed the creation of parliaments, a swell in the number of elections (from lower municipal levels, up),²³ and a retreat from the general principle of appointment in favor of that of representation. This has happened in often timid steps, but across the region nonetheless.

As parliaments grow stronger, electoral systems are being considered more closely by governments, who have started to play with them. Evidence from Kuwait and Bahrain shows that governments do not leave details unattended when elections are involved: from the nuts-and-bolts of the electoral system to the number, size and shape of districts, from degrees of enfranchisement to strategic naturalizations. Elections are also used to engineer a certain political image. In Bahrain, for instance, both gerrymandering and out-of-district votes generate a sectarian outcome that is in turn adduced in support of dismissing opposition as sectarian and gathering regional endorsements of repression (Parolin 2011).

The weak constitutional devices to establish political accountability of governments available to Gulf parliaments are complemented by a powerful visibility effect, deemed highly undesirable by ruling-family members serving in the executives. Kuwait and Bahrain show an interesting double reinforcing consequence of the visibility effect. As ruling-family

²³ Data from Qatar show that after the first hype for candidacies to local councils (248 in the first municipal elections in 1999), numbers have stabilized on a significantly lower level (slightly over a hundred in the following rounds of 2003, 2007, and 2011).

members leave lower-key government positions to non-ruling-family members, out of fear of being publicly embarrassed, they thus embolden parliaments to pursue accountability of ministers who are not family members. This effect has reached its apex in Kuwait, where the post of crown prince has been dissociated from that of prime minister, still a prominent family member; since 2003, the Kuwaiti parliament has significantly increased the number of pursuits of government accountability (both against individual ministers and the prime minister). In Bahrain the two posts were never associated, but the prime minister is a ruling-family figure towering above both the king and the crown prince; the incumbent prime minister is the world's longest-serving incumbent prime minister and is the only one Bahrain has known since independence. As a result, Bahraini parliamentary politics has so far tended to pursue lower-key ministers, whereas street protests have aimed at the prime minister's resignation.

Winter—in the form of parliamentary government—is coming.²⁴ This is what protesters remind rulers and ruling families in the Gulf in a threatening tone. The cycle of seasons, however, has been highly discontinuous. Since the (often inflated) enthusiasm for the first generation of Gulf constitutions, setbacks have outnumbered advances in citizens' participation in the decision-making process. Nonetheless, constitutions are proving to be an enduring feature and elected bodies are on the rise. The severe constraints on these elected bodies seem to be what is jeopardizing the resilience of a constitutional order where political participation is simply driven into an institutional dead end. The first cracks have begun to be seen in Kuwait and Bahrain, just as arguments of Gulf exceptionalism have begun to vanish.

²⁴ The phrase "Winter Is Coming" is a reference to George R. R. Martin's epic fantasy series *A Song of Ice and Fire*, later popularized by the HBO TV series production *Game of Thrones*. The phrase is a recurring admonition about a season of hardships, yet unknown in its degree of harshness and undetermined in its timing. The reference is also used to indicate all that is not treated in the chapter, just as in the first book of Martin's series, where three main story lines interweave: conflicts among ruling families over the control of the region (Westeros), signs of the incumbent threat of dormant supernatural others (beyond the Wall), and the ambitions of the descendants of a fallen dynasty who crave to regain control (from Across the Narrow Sea).

Constitutional Reform in Oman

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KHALID M. AL-AZRI

I. INTRODUCTION

Sulṭān Qabūs bin Saʿīd has enjoyed absolute power in Oman for more than four decades. Absolutism, on the one hand, is one of the main characteristics of Arab Gulf monarchies. Oman is no exception in this regard. Constitutionalism, on the other hand, restricts governmental powers—and people, not monarchies, make modern constitutions. This is not the case in the oil-rich Gulf monarchies. Indeed, absolutism and constitutionalism are not only two different concepts, but as far as democratic nations are concerned, the two are also in conflict with each other.¹ Arab Gulf monarchies are not democratic states, yet they all have constitutions, and some of them claim that their constitutions are modern, in a temporal as well as contextual sense. However, the constitutions of Arab Gulf monarchies are usually seen as a king's, *sulṭān's*, or *amīr's* "gift" to their subjects. In a socio-political environment such as that in the Arab Gulf monarchies, the legitimate question arises why a ruler would constrain his own powers by adopting a constitution. Why does he need a constitution in the first place? This article seeks to answer these questions by addressing the Omani experience in the development of a constitution from the late 1960s until 2014. It focuses exclusively on Oman and highlights historical and political concepts, namely constitution, legitimacy, and power, in relation to the Omani state.

In 1996, His Majesty *Sulṭān* Qabūs bin Saʿīd, through a royal decree, promulgated the first Omani Constitution. The *sulṭān*, who at that time enjoyed unquestionable public support, decided with absolute power to present to his people a constitution with a lengthy chapter on

¹ See, for instance, Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul, *What Should Constitutions Do?* (Cambridge University Press, Cambridge 2011) 1–24.

rights and liberties. What were the underlying reasons for this political move? And why was the same constitution an immediate target of widespread contestation at the very first opportunity during 2011, when uprisings related to the “Arab Spring” occurred in Oman?

Before answering these questions, it is essential to take a look at the historical background concerning Oman’s constitutional experience. Then, this article will highlight a number of issues concerning the 1996 Constitution and its amendments in 2011.

II. THE GCC AND OMAN’S CONSTITUTIONS: A VERY BRIEF OUTLOOK

Modern Arab history has shaped the political landscape of the current politics and nation-states’ building within the Arabian Peninsula, particularly the member countries of the Gulf Cooperation Council (GCC), i.e., Oman, the United Arab Emirates (UAE), Bahrain, Kuwait, Qatar, and Saudi Arabia. The Bedouin socio-cultural and political nature of the Arab region and its people, the religious-tribal semi-state experiences in some areas, the British involvement since the eighteenth century, and the discovery of oil and its huge impact on these societies have all played a significant role in the emergence of some of these states and their contemporary socio-economic, political, and legal structures.²

All GCC countries have separately established a written constitution, setting up the state’s sovereignty and, generally speaking, defining the principles of governance upon which the state is based. Constitutional establishment in the GCC commenced as early as the 1960s with Kuwait being the first to establish a constitution in 1962 and a “Constitutional Court” in 1974.³ With the exception of the state of Qatar, which issued its constitution in 2004, Oman was the last country among the GCC to issue its “Basic Statute of the State”, also known as the Basic Law, or in Arabic, *al-Nizām al-Asāsī li ‘l-Dawlah*, in 1996.

Apart from its constitutional development, Oman’s cultural identity also appears in many ways to differ from that of other GCC countries. Historically, Oman is the home of an Islamic minority division, known as the Ibādīs (Ibadism, or *al-Ibādīyah* in Arabic). Ibādī religious leaders have governed the country (with interruptions) since the eighth century.⁴ The current *sulṭān* belongs to the Ibādī school of Islam. During the late 1960s and early 1970s, Oman experienced socialist and extreme leftist movements known as the Ṣofār revolution.⁵ The revolution took its name from the southern region of Oman, Ṣofār.⁶

Ṣofār region was exposed to the ideology of the ‘Arab Nationalism’ that engulfed Arab societies in the late fifties and the sixties of the twentieth century. Along with their other demands, the revolutionaries called for an end to the monarchy in Oman. Thus, demands for political change in Oman have continued since the late 1950s until the end of the Ṣofār war in 1976.

² See, for instance, Mehran Kamrava, *The Modern Middle East: A Political History since the First World War* (University of California Press, Berkeley and Los Angeles 2005) 35–66.

³ Jane Kinninmont, “Kuwait’s Parliament: An Experiment in Semi-democracy”, 2012 Chatham House Middle East and North Africa Programme Briefing Paper 03/2003, http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Middle%20East/0812bp_kinninmont.pdf, accessed April 10, 2015.

⁴ For details about Ibādī school of Islam, see Khalid M. Al-Azri, *Social and Gender Inequality in Oman: The Power of Religious and Political Tradition* (2nd ed. Routledge, Oxford 2012) 20–28.

⁵ Details about the current relationship between Ibādī Islam and the state in Oman after 1970 and the Ṣofār movement can be found in Al-Azri (n 4), 96–113.

⁶ It was a revolution in the eyes of some and a rebellion in the eyes of others. The present author considers it a revolution since it extended into almost the entire Arabian Peninsula, ideologically, if not militarily. Certainly, revolutionary counterattack policies have been initiated in Oman and their impact has remained.

In this context, is it also important to shortly highlight the 1967–1972 call for a constitutional monarchy in Oman. This call was led by Sayyid Ṭāriq bin Taymūr.⁷ His efforts, however, were unsuccessful. Interestingly, a similar demand for a constitutional monarchy was repeated in Masqaṭ during the 2011 protests which coincided with what is known today as the Arab Uprising.⁸ So, while Oman is part of the GCC, historically it has—to a large extent—developed a distinctive identity and thus a political history.

III. HISTORICAL BACKGROUND

Oman's 1996 Constitution arrived more than twenty-five years after the *Sulṭān*'s accession to power in July 1970. It was applauded loudly by the local media, which is government owned and generally celebrated internationally.⁹ In one of his rare interactions with the media *Sulṭān* Qabūs highlighted his vision concerning the Omani Constitution stating, "I had promised on the first day of my rule to create a modern government".¹⁰ Accordingly, this was a task in progress, which required hard work, time, and a certain level of social change. This change, according to the *sulṭān*, "had to be entered into slowly, very slowly", primarily because "the level of education—during the middle of the 1990s—had to reach a certain point so that people would know what we were talking about".¹¹ In the *sulṭān*'s view, Omanis in 1996 were ready to appreciate an important legal document, namely, *al-Niẓām al-Asāsī* (the Basic Law). Either, in line with the *sulṭān*'s notion of a nation "unprepared" for a constitution, the development of *al-Niẓām al-Asāsī* was meant to be a surprise or, as Jones argues, perhaps it was done in quietness like many other projected ideas in Oman.¹² In the words of the *sulṭān*: "[A]s I approached my silver jubilee (in 1995), I said to myself: this is the time (for an Omani constitution)". The *sulṭān* asked four of his "most trusted people [. . .] all Omanis. I sat with them and told them exactly what I had in mind".¹³ In almost one year, the constitution was issued. Neither the *sulṭān*'s four trusted men nor the constitution-making process were disclosed. Oman's Basic Law, as it appears, can therefore be considered "wise man-legislation".¹⁴ In this sense, it goes

⁷ Ṭāriq was born in Istanbul in 1920 to a Circassians-Turkish mother and was ten years younger than his brother *Sulṭān* Sa'īd. He was educated in Turkey before his mother took him with her to Germany in 1935. He was also trained in India and had extensive experience working in the Middle East as the representative of a construction firm. In 1940, Ṭāriq came back to Oman and began a tour, visiting Omani towns and meeting with tribal and religious leaders in what appears to be an attempt to strengthen his Arabic language and to gain better understanding of the Omani-Arabic tradition.

⁸ Some of the Omanis, who led the protestors in Masqaṭ in 2011, have, as this article will reveal, called for a "Social Contract", others for a "Constitutional Monarchy".

⁹ Calvin H. Allen and W. Lynn Rigsbee II, *Oman under Qaboos: From Coup to Constitution 1970–1996* (Frank Cass Publishers, London and Portland, OR 2000) 222. See also Nikolaus A. Siegfried, "Legislation and Legitimation in Oman: The Basic Law" (2000) 3 *Islamic Law and Society* 1.

¹⁰ Judith Miller, "Creating Modern Oman: An Interview with *Sulṭān* Qaboos", *Foreign Affairs* (1997) 3, <http://www.foreignaffairs.com/articles/53039/judith-miller/creating-modern-oman-an-interview-with-sultan-qabus>, accessed April 10, 2015.

¹¹ *Id.*

¹² Jeremy Jones, "Oman's Quiet Diplomacy and Iran" (2014), <http://www.nupi.no/en/News/Oman-s-quiet-diplomacy-and-iran> accessed March 2, 2014.

¹³ *Id.*

¹⁴ Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford 2013) 419–441.

without saying that the secretive nature associated with the emergence of Oman's first constitution contributed substantially to the lack of information and relevant documents during the constitution-making process.¹⁵

But one may find political grounds for the *sultān*'s views about Oman's "un-readiness" for a constitution in the 1970s. In her analysis of the nineteenth-century Italian state and constitution building, Anna Gianna Manca noticed a conflictive relationship between having a constitution and having a monarchy with wide-ranging powers.¹⁶ She argues that conflict is inevitable since the establishment of a constitutional state would bring about a power struggle between the monarch and parliament. The 1970s Omani *sultān* had in fact seen the same struggle between his father and his uncle Ṭāriq¹⁷ before he personally experienced it during the first two years of his reign. During this time *Sultān* Qabūs's uncle, Ṭāriq, presented to the *sultān* his idea of establishing a constitutional monarchy in Oman. Ṭāriq had already presented the same idea in October 1967 to his own brother, *Sultān* Sa'īd, Qabūs's father. Like *Sultān* Sa'īd, *Sultān* Qabūs was not interested in his uncle's idea. Ṭāriq and Qabūs struggled to maintain a relationship before Ṭāriq was forced to resign in 1972. Possibly, *Sultān* Qabūs was aware of the fact that an early constitution could restrict him from pursuing his plans for Oman.

Indeed, Ṭāriq's notion for a constitution was part of a wider struggle for change in Oman between the 1950s and 1970s. Ṭāriq's proposal for a constitution came a few years after Kuwait announced the establishment of a constitution in 1962. Also, it coincided with the flood of Arab nationalism, which found a foundation in Oman. The proposed constitutional monarchy followed the loss of the Ibādī religious establishment. The struggle between the two political systems, monarchy and religion, had occupied Oman's politics for almost half a century before Qabūs's father was able to bring an end to the *Imāmate* during the Green Mountain War (*Ḥarb al-Jabal al-Akhḍar*, 1957–1959) with British military support.¹⁸ While the *Imāmate* collapsed in 1959, the leftist revolution in Ṣofār, where *Sultān* Sa'īd resided, commenced in 1967. The war in Ṣofār brought about a political change in Oman. *Sultān* Qabūs removed his father in 1970 and introduced a project to develop the country's infrastructure.

The following looks at Ṭāriq's proposal for Oman in the late 1960s and early 1970s, an idea that appeals to some Omanis today. What would the expression of such a constitutional monarchy in the late 1960s Oman have been?

¹⁵ The absence of a constitution-making process in the GCC has contributed to the lack of constructive scholarly constitutional evaluation. Similar observation can be seen in Abdulhadi Khalaf and Giacomo Luciani (eds.), *Constitutional Reform and Political Participation in the Gulf* (Gulf Research Centre, Dubai 2006) 51.

¹⁶ Anna Gianna Manca in Kelly L. Grotke and Markus J. Prutsch (eds.), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* (Oxford University Press, Oxford 2014) 49.

¹⁷ Ṭāriq was inimical to his brother's autocratic control in Omani. He advocated political and economic changes. Sa'īd was able to tolerate this advocacy. But, Ṭāriq crossed the red line—the taboo—when he began contacting Omanis for their support about his proposal for a constitutional monarchy. In 1996, Ṭāriq publicly asked *Sultān* Sa'īd to leave power. This came out on November 20, 1966, in an interview with Ṭāriq, published in the British newspaper, *The Sunday Times*. The newspaper titled the interview "Sultan must go". See Basmah Al-Kiyūmī, *Al-Tajribah al-Dustūriyah fi 'Umān* (Markaz Dirāsāt al-Waḥdah al-'Arabiyah, Beirut 2013).

¹⁸ See, for instance, John. C. Wilkinson, "The 'Ibadi Imama" (1976) 39 Bulletin of the School of Oriental and African Studies 535, 551.

IV. EARLY OMANI “CONSTITUTIONAL MONARCHY”

Ṭāriq named the constitutional proposal “The Interim Constitution for the Arab Omani Kingdom”. He attached his proposal to a letter which he sent to the Omani leaders. In it, Ṭāriq highlighted the cause of the country’s backwardness and the peoples’ suffering, by accusing the government of *Sulṭān* Sa‘īd. Ṭāriq defended his aim of standing against his brother Sa‘īd by stressing the importance of having a developmental policy for the country. He asked Omani leaders to stand with him and to demonstrate their support. The interim constitution “is a temporary constitution until Omanis decide the constitution that fits with their need and the country’s traditional values, so no more dictatorship or orders but the people and the state’s interest”, Ṭāriq wrote.¹⁹ The letter shows great respect for Omani leaders, and it places their contribution to the country’s future on an equal footing with that of Ṭāriq.

The proposed constitution came with six chapters and contained thirty-six articles in addition to the preamble.²⁰ In the preamble, the draft specified (a) the willingness of the Omani people to have a modern constitutional system without ignoring the importance of Omani traditional values, (b) that this constitution serves an interim version subjected to change from the Omani people, and (c) that its aim is to unite Omanis and fulfill their dreams of a better life.

The nine articles of the first chapter introduced Oman as an “Arabic and Islamic Kingdom” with a red-and-white flag.²¹ Islamic Shari‘ah law is supposed to be the source of law and Masqaṭ “the contemporary capital” for Oman until the Omanis decide on their capital. The first chapter also addresses nationality, Omanis in diaspora, and those who have been subjected to imprisonment and ill treatment for their political views. The chapter affirms the protection of individual freedoms and the freedom of (other) religions (as far as it does not contradict Islamic law), but also confirms the state’s supervision of cultural and ethical values. The mixture of traditional and modern values in the first chapter of the interim constitution can within the timeframe be understood as a reflection of the 1950s and 1960s tribal-religious Omani society.

The second chapter comprises six articles. It defines the *sulṭān*, his rights and responsibilities. It identifies Oman as a “hereditary monarchy” and the *sulṭān* as the representative of its people inside and outside of the country. The *sulṭān* can only be removed from power if a two-thirds majority of the members of the national assembly decide to do so. The proposed constitution, in contrast to the existing system, defines the *sulṭān*’s power as mainly symbolic. Accordingly, the *sulṭān* undertakes constitutional and representational duties, providing stability and continuity, formally recognizing the parliament’s appointment of prime ministers and approving certain legislation and bestowing honors. The role of the *sulṭān* in the proposed constitution appears to be similar to other modern constitutional monarchies such as the United Kingdom, where the legislation power resides within the elected parliament.

The third chapter is dedicated to the ministerial cabinet, or as it is called in the draft, the “Ministerial Council” (*Majlis al-Wuzarā’*). In addition to the prime minister, who draws the guidelines of the state and holds the power to appoint or dismiss ministers, the

¹⁹ Al-Kiyūmī, *Al-Tajribah al-Dustūriyah fi‘Umān* (Markaz Dirāsāt al-Waḥdah al-‘Arabīyah, Beirut 2013) 217–218.

²⁰ I have been holding a copy of Ṭāriq’s proposal since 2010. Al-Kiyūmī published it, however, in 2013. See Al-Kiyūmī, *Al-Tajribah al-Dustūriyah fi‘Umān* 209–215.

²¹ The color red represents the monarchy, whereas the color white represents the *Imāmate*.

ministerial council incorporates eleven minsters. It is responsible for executing the state's policy and affairs. Interestingly, the distinctions between powers of each branch of government appear more differentiated than in the 1996 Omani Constitution. This early "proposed Constitution" provided a reasonable degree of checks and balances between the legislative and executive branches.

Chapter four is dedicated to the interim State's Council (*Majlis al-Dawlah*), which has the right and power to discuss all state matters. It consists of fifty Omani elites representing various sectors of society, including clergy, royal family, merchants, and professionals. The members are appointed by the prime minister. Chapter five concerns the National Assembly. The proposed constitution designates an important role to it and its significant powers. The "National Assembly" comprises both the council of ministers and the state's council. It has the power to elect or dismiss the *sulṭān* and his crown prince. Also, it has the power to dismiss the prime minister from his position, if he "dangerously" abuses his power. The assembly has the power to amend the constitution, decide on Oman's external relationships with foreign countries and organizations, and set the country's budget. The last chapter affirms Oman's commitments to work with Arab nations and the international community.

Noticeably, the interim proposal leaves the judiciary unmentioned. Perhaps it was left for discussion with the religious scholars of that time. It is, however, difficult to imagine a secular or even an amalgamation of judiciary that comprises both secular and religious judiciary, as is the case in Oman's 1966 Constitution.

Indeed, one could argue, as al-Kiyūmī did, that Ṭāriq's proposal was a serious and noble one.²² Yet, whether it was viable or not in Oman in the 1950s and 1960s is a matter for research investigation, which is beyond the scope of this article. Ṭāriq's proposal illustrated an important part of the struggle Omanis have endured for the establishment of a new political order. It was collective in the sense that Omanis from various geographical, social, and educational backgrounds contributed to it. There was also a variety of methods employed in an attempt to bring about change in Oman. The search for a new order, however, was not complete without a constitution.

V. OMAN'S 1996 BASIC STATUTE OF THE STATE

A very early interview conducted with the *sulṭān* in December 1970 illustrates the *sulṭān*'s disinterest in the establishment of a constitutional monarchy or even a constitution at all. The *sulṭān* argued that establishing a constitution in Oman would be a great mistake. According to the *sulṭān*, "You cannot run before you walk", because "most of the population that live in the interior of the country still do not live within their time. What these people (Omanis) want before anything else is education and health". He added that as long as "we provide them with these fast enough, there will not be any problem".²³ The *sulṭān* asserted that most Omanis

[. . .] do not even know what a vote is [. . .] In these conditions to draft a constitution, to set up a parliament would be like building a huge dome without either walls or foundations. It might perhaps give a nice impression to the outside world, but it would be nothing but a big show.²⁴

²² Al-Kiyūmī, *Al-Tajribah al-Dustūriyah fi 'Umān* 85.

²³ Chris Kutschera, "Oman: the Death of the Last Feudal Arab State", *Washington Post* (Washington December 27, 1970) 1. See also online at <http://www.chris-kutschera.com/A/Oman%201970.htm>, accessed April 10, 2015.

²⁴ *Id.*

In 1976, the war in Zofār ended with the *sulṭān* proclaiming a victory against the revolution, making him even more popular among his subjects. The *sulṭān*'s vision for the country then became more obvious: His focus was on the development of Oman's infrastructure, based on the needs of the people, by exploiting the oil wealth. However, it should not necessarily be combined with any serious political or socio-cultural change.

Yet in November 1996, just one year after the country's celebration of what has become, since 1970, the State's National Day—corresponding with the *sulṭān*'s birthday on the November 18—the *sulṭān* surprised²⁵ many observers with the establishment of Oman's "White Book" or "The Basic Law", as the constitution became known in Oman.

Time and circumstances, in which constitution-making takes place, can be a determinant factor in the development of any constitution. Oman in 1996 appeared stable, and there was no public demand for a constitution, despite the 1994 "secret attempt" to overthrow the government.²⁶ What could have driven the *sulṭān* to constitute his power has remained a matter of speculation. There are, as follows, a number of possible reasons:

1. Justification to some degree is provided in the official statement accompanying the *sulṭān*'s royal decree, which can loosely be treated as a "preamble" for the Basic Law. It (a) affirms the continuation of the principles guiding the policies of the state in the past era, (b) determines the continuity of the state's efforts for the establishment of a better future, and (c) consolidates the international status Oman enjoys and its international role in establishing the foundations of peace, security, and justice.²⁷
2. It can be assumed that it was the right time to constitute governmental institutions and deal with issues previously considered "political taboos", like the subject of the next *sulṭān*. Hence, the constitution sought to "formalize the extant political structure and officially give credence to governmental organs".²⁸ Prior to this, governance, being a prerogative of the *sulṭān*, was a malleable system that waxed and waned depending on the incumbent *sulṭān*. The constitution explicitly addressed key issues, including previous taboo concerns such as the succession to the throne.

²⁵ Since early 1970, the state has created a "practice" of what one can call "surprising its citizens" with new orders or initiatives from the *sulṭān*. Accordingly, the state National 'Ayd has become a time when everyone will be waiting for the *sulṭān*'s November 18 evening speech. This practice has made the month of November a very special one. State initiatives or new developments such as schools, hospitals, roads, etc. will be inaugurated in November. Some of these developments will deliberately be delayed until November, while some of the delayed ones will be speeded up so they can be inaugurated in November. This practice is part of the "invented tradition" in Oman's post-1970 era, to use Eric Hobsbawm's book title *The Invention of Tradition* (Cambridge University Press, Cambridge 2010). It has worked successfully, surely for the first three decades of *Sulṭān Qaboos*'s era.

²⁶ In November 1994, during the state's celebration of its 25th National Day, the government announced the discovery of what it called a "secret Islamic terrorist organization, which aimed to overthrow the government by force". About 500 suspects were arrested. More details about this and the state's identity building project can be found in Al-Azri, *Social and Gender Inequality in Oman: The Power of Religious and Political Tradition* (Abingdon, Oxford, Routledge 2012) 106–109.

²⁷ "The Basic Statute of the State", http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125868.pdf, accessed April 10, 2015.

²⁸ Hussain S. Alsalmi, "Oman's Basic Statute and Human Rights: Protections and Restrictions with a focus on Nationality, Shura and Freedom of Association" (PhD thesis, University of Manchester 2011) 22.

3. The August 1990 Iraq invasion of Kuwait and the 1991 Gulf War and its aftermath have posed challenges to Arab leaders and their cooperation with Western powers against another Arab state. The Gulf War led GCC governments to reconsider their political legitimacy. Additionally, the Gulf War radicalized Islamic discourse, and a number of radical Islamic parties have emerged from it. The above-mentioned 1994 “secret Islamic organization”, which the Omani government “discovered”, was of a Sunni Islamic origin and, according to the Omani official announcement, has links with the wider “Muslim Brotherhood Movement” elsewhere in other Arab countries. It was, for many Arab states, a time of general instability that led governments to recalculate their political policies. Saudi Arabia, for example, announced its Basic Law in 1992. Arguably, even if the Gulf War was not the causal factor underlying the initial idea, it has speeded up the process of having a constitution in Oman, which represented a “legitimate” and widely recognizable source of legitimacy.
4. Moreover the Gulf War, 1980s fluctuating prices, and the world economic crunch brought economic instability to Oman.²⁹ The state’s increasing expenditure and its absence of economic diversification led the World Bank to criticize Oman in a report issued in 1993, particularly the state’s rentier system. The June 1996 international conference, organized in Masqat, was an indication of how fragile Oman’s economic structure was (and perhaps still is).³⁰ The need for international investments was urgent and possibly—if the situation of the global economy had not improved—a rescue plan was looming. Any foreign intervention or investment would not have come without (a) some political guarantee for the country’s political stability and (b) a firm and acceptable legal basis. A constitution was, thus, very helpful to this end. In fact, Art. 11 of the Basic Law, with its eight provisions, exclusively provides clear protection for foreign investment and defines state capitalism to be Omani’s economic principle.
5. One incident directly concerning the royal family needs to be taken into account: In September 1995 a road accident occurred in which the *sulṭān* and his adviser ‘Omar al-Zawāwī were injured, while ‘Omar’s brother Qays died on impact. This incident evoked concerns about Oman’s future succession and placed direct pressure on the *sulṭān* to take action regarding this issue, particularly since he has no heir to succeed him.

The Basic Statute of the State, as the name suggests, “offers a basic framework for the protection of human rights and regulates the organizational relationships between the various state’s organs and mechanisms”.³¹ It was also regarded to be “a step forward to start a new developmental era through legal and institutional reforms”.³²

It consists of two parts; the first includes two articles that the *sulṭān* decreed as the Basic Statute of the State, formally published in the Official Gazette, while the second part is the main document—the Basic Law consisting of seven chapters and eighty-one articles.

²⁹ See, for instance, United Nations Industrial Development Organization, “The Global Financial Crisis and the Developing World” (Research and Statistics Branch Working Paper 06/2009), http://www.unido.org/fileadmin/user_media/Publications/RSF_DPR/WP062009_Ebook.pdf, accessed April 10, 2015.

³⁰ Mark N. Katz, “Assessing the Political Stability of Oman” (2004) 8(3) Middle East Review of International Affairs (MERIA), see online at <http://www.gloria-center.org/2004/09/spyer-2004-09-01/>, accessed April 10, 2015.

³¹ Hussain S. Al-Salmi, *Oman’s Basic Statute and Human Rights* (Schwarz, Berlin 2013) 22.

³² *Id.* 42.

The first chapter of the Basic Law, titled “The State and the System of Government”, consists of nine articles, and it follows the same formats as other Gulf States’ constitutions. Also, to some degree, it follows the Egyptian model by defining the state’s religion, language, and the Islamic Shari’ah as the basis of legislation. It emphasizes the hereditary *Sultānate* (monarchy) as the system of government, and provides the method for choosing the next successor to the throne. “Principles Guiding State Policy” is the second chapter and lists five articles of Political, Economic, Social, Cultural, and Security headings. Al-Salmi³³ and al-Kiyūmī³⁴ separately argued that they are nothing more than guiding principles. Enforcing them legally poses a question, especially since their common principles are difficult for the courts to rely on as definite law articles. Nevertheless, they give some direction for the government to follow in all of its policies, decisions, and regulations.

The third chapter listed twenty-six articles, twenty-two articles relating to “Public Rights and Civil Liberties” and four articles concerning “Public Duties”. In this regard, the Omani Constitution is similar to other GCC constitutions, as noticed by Al-Salmi in stating that “almost one third of the Omani Constitution is very similar to the GCC’s”.³⁵ Siegfried, however, questioned the combination of rights and duties in Oman’s Basic Law as to whether the rights are conditional on meeting obligations.³⁶

Three articles list the *sultān*’s powers and functions under the fourth chapter, “The Head of the State”, which consists of seventeen articles divided into five sections. These sections are titled “The Sultān”, “The Council of Ministers”, “The Prime Minister, His Deputies and Ministers”, “Specialized Councils”, and “Financial Affairs”. Listing those institutions under the chapter “The Head of the State” could possibly be regarded as a sign that they are mandated by the *sultān* rather than by Oman’s council and the judiciary.³⁷

Chapter five is the shortest chapter, with only one article about the “Oman Council”, declaring that it is a bicameral chamber and consists of *Majlis al-Shūrā* (consultative council) and *Majlis al-Dawlah* (State Council). Noticeably, Oman was the only country in the GCC to constitute a bicameral chamber. At the same time, however, it was also the only one to have left the “powers, sessions, procedure of each council to be determined by an external statute”.³⁸ Judiciary is dealt with under the thirteen articles of chapter six; and among other constitutions it was the first one to establish the “Public Prosecution” and “Attorney General” as parts of the legal system constitutionally.

The last chapter of the constitution was dedicated to “General Provisions”, with ten articles that reflect the importance of international treaties in the local law as well as regulating the relationship between the Basic Law and extant laws, and any amendments to the constitution.

The word “law” or “laws” appears sixty-nine times in the Omani Basic Law. Allen and Rigsbee II maintain that “this gives the impression that the *sultān* has established a constitution, making the document an aspect of positive law and, at least in theory, the supreme law of the land”.³⁹ Indeed, Art. 77 of the Basic Law prevents contradiction between previous regulations and the provision of the Basic Law. Art. 80 explicitly named the Basic Law “the

³³ *Id.* 44.

³⁴ Al-Kiyūmī, *Al-Tajribah al-Dustūriyah fi’Umān* 164–165.

³⁵ Hussain S. Al-Salmi (n 32) 45.

³⁶ Nikolaus A. Siegfried, “Legislation and Legitimation in Oman: The Basic Law” (2000) 3 *Islamic Law and Society* 370.

³⁷ *Id.*

³⁸ Hussain S. Al-Salmi (n 32) 45.

³⁹ *Oman under Qaboos: From Coup to Constitution 1970–1996* (Portland, London 2000) 122.

Law of the Land”, while Art. 79 stated that “competent bodies shall take steps for issuance of non-existing laws necessitated by this Basic Statute”, and that “Laws and procedures that have the force of Law shall conform to the provisions of the Basic Statute of the State”. Further, since its inception in 1996, changes to Omani legislations have been undoubtedly witnessed. For example, the establishment of the Administrative Court and the Supreme Council for Judiciary (SCJ) took place in 2000. The *sultān*, however, remained the chairperson of the SCJ. Moreover, other laws relating to human rights, such as the Labor Law and modifications to the Social Security Law, were declared in 2003 and 2005. In November 2008 Omanis witnessed the establishment of the first Human Rights Commission in the country. Recently, in 2011, Oman has established the independence of prosecution and has for the first time granted parliament some important legislative powers, which will be highlighted in the next section of this article.

However, the Basic Law follows the state’s political nature. Despite the long list of provisions, which at least in theory protects human rights, guarantees freedoms, and ensures individual liberties, the law is authoritarian. For instance, Art. 41 installs the *sultān* even legally as the head of the state and a disposer of law, while he himself is regarded as standing above the law. His person is sacrosanct and, as Art. 41 declares, “respecting him is a duty and his command must be obeyed”. The political right of citizens is limited to only being able to “address public authorities on personal matters or matters pertaining to public affairs, in the manner and conditions designated by Law”.⁴⁰ In spite of the Basic Law, the Omani state has remained in control of society.

Moreover, the Basic Law stipulates that all state’s laws and regulations shall comply with the provisions of it. Two years were allocated for this to happen.⁴¹ Yet, fourteen years after its promulgation, several laws remain unchanged. In fact, the government has issued new regulations and laws that not only do not respect the provision of the Basic Law of the State but in effect even contradict it. For instance, following a number of interrogations and arrests made by the Omani security services after the 2011 “Omani Uprising”,⁴² the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association visited the *Sultānate* in September 2014. The Special Rapporteur concluded that “the Basic Law of Oman nominally guarantees the right to peaceful assembly, but requires that this right must be “within the limits of the Law.” Unfortunately, these limits “are quite restrictive, to the point where they often annul the essence of the right.”⁴³ He went on to state that “the Basic Law of Oman also establishes the right to form associations, but this right in practice is virtually non-existent.” Accordingly, “the law on associations limits the type of associations that may be formed [. . .] Given the deep and fundamental flaws in the current association law [. . .],” the UN reporter recommended that “the government consider a new law altogether that is in line with the relevant provisions of international human rights law instruments”.⁴⁴ Additionally, the Basic Law guarantees a long list of freedoms, such as freedom of

⁴⁰ Art. 34.

⁴¹ Art. 78.

⁴² James Worrall captured the essence of the protesters demands and the *sultān’s* response. See J. Worrall, “Oman: The ‘Forgotten’ Corner of the Arab Spring” (2012) 19 Middle East Policy, <http://www.mepc.org/journal/middle-east-policy-archives/oman-forgotten-corner-arab-spring>, accessed April 10, 2015.

⁴³ Statement by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the *Sultānate* of Oman, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15028&LangID=E#sthash.DSq54la1.dpuf>, accessed August 15, 2015.

⁴⁴ *Id.*

expression,⁴⁵ freedom of the press,⁴⁶ and freedom of assembly.⁴⁷ In reality, these rights are violated. The 2014 Human Rights Watch World Report noticed that Omani authorities “did not respect these rights”.⁴⁸ In fact, the Omani state issued a new law in 2002 that not only restricts online social media but effectively violates the above-mentioned articles. Art. 26 of the 2002 “Telecommunications Act” penalizes “any person who sends, by means of telecommunications systems, a message that violates public order or public morals”. Phrases such as public order or public morals are left to the authority’s interpretation. It appears that in theory Oman’s Constitution has addressed rights granted in many Western constitutions. However, not everyone practices constitutionalism, and, sadly, not every constitution is respected.

With the feeling that their Basic Law was not clearly respected and should be changed, many Omanis took to the streets in Masqat and a number of other capital cities in November 2010 demanding economic, political, and constitutional reforms. The *sulṭān* answered some of their demands. The following section highlights the 2011 amendments to the Oman’s Constitution of 1996.

VI. THE CONSTITUTIONAL AMENDMENTS OF 2011 AND A CONSTITUTIONAL MONARCHY

In 2010, a few months before the onset of the Arab Uprising, more than one hundred Omanis presented a signed petition to the *sulṭān* demanding a Social Contract to be agreed upon between the ruled and their ruler.⁴⁹ This petition was reaffirmed during the early 2011 protests which sparked in the country.⁵⁰ The demand was to constitutionalize the unlimited powers of the *sulṭān* and his government, which represented, in effect, an indirect call for a “Constitutional Monarchy”. Many believed that a new system of checks and balances should be put into place. Also, protesters demanded clarification of the power transition process, freedoms to be clearly defined and methods of or regulations for implementation to be put in place. Effective power to the elected council, *Majlis al-Shūrā*, was among their demands.⁵¹

The *sulṭān* was responsive, and society’s demands were partly answered. Art. 6 in Section 1 of the amended 2011 Constitution added clarification to the method of selecting a new *sulṭān*. Also, powers to the parliament (*al-Shūrā* council) were allocated. The *sulṭān*’s royal decree number 99/2011 added forty-five articles to the fifth section of the Basic Law empowering *Majlis Umān* (which consists of *Majlis al-Shūrā* and *Majlis al-Dawlah*).⁵²

⁴⁵ Art. 29.

⁴⁶ Art. 31.

⁴⁷ Art. 33.

⁴⁸ See online at <http://www.hrw.org/world-report/2014/country-chapters/oman?page=2>, accessed April 10, 2015.

⁴⁹ Al-Kiyūmī, *Al-Tajribah al-Distoriyya fi Umān* (Markaz Dirāsāt al-Waḥdah al-‘Arabiyyah, Beirut 2013) 183–185.

⁵⁰ Sa‘īd al-Hashmī, *Al-Rabi‘ al-‘Umāni* (Dār al-Farābi, Beirut 2013) 113–150.

⁵¹ *Id.*

⁵² The Basic Law with its amendments can be viewed online at https://www.constituteproject.org/constitution/Oman_2011.pdf, accessed April 10, 2015.

Art. 6, which previously allocated the power of designating the new *sultān* (in the absence of the current *sultān*) to the Security Council, was modified. In the 1996 Constitution, the article reads:

The Ruling Family Council (RFC) shall, within three days of the throne falling vacant, determine the successor to the throne. If the Ruling Family Council does not agree on the successor to the throne, the Defense Council (DC) shall confirm the appointment of the person designated by the former *Sultān* in his letter to the Ruling Family Council.⁵³

The amendment added to the DC “the Chairman of *Majlis al-Dawlah*, the Chairman of *Majlis al-Shūrā*, and the Chairman of the High Court along with two of his most senior deputies”. Those “shall instate the person designated by His Majesty the *Sultān* in his letter to the Royal Family Council”.⁵⁴ Nevertheless, this amendment has not clarified the succession issue in its entirety and forever. There are at least three problematic issues with this amendment:

First, there is great concern regarding the RFC. It is unfamiliar to Omanis. Who are in and who are out of the RFC? There are no guidelines, let alone a law governing the selection process. This should be according to the country’s constitution a family business. The problem here is that it is not so. Still, there is a total lack of information about the council. Furthermore, none of the RFC has held a significant political role during *Sultān* Qabūs’s time. *Sultān* Qabūs has not only kept control of the state’s affairs in his own hands, but he has also distanced his family from sharing political power. Al-Sa‘īd’s female members, some of who might be highly educated and could be influential, will be locked behind doors during the RFC meeting. This is in spite of Art. 17 of the constitution, which provides for gender equality.

Second, and more problematic, is the position and role of the DC in any future power transition. It is indeed controversial. The DC is in an influential position constitutionally. It could, for instance, manipulate the letters positioned by the *sultān*. It has the ability to force its own candidate by other means, such as alliances. Further, the DC is in a position—if the royal family was unable to decide—to force the new *sultān*. All these options are at least theoretically possible. In fact, the DC is also in a position to possibly take over the country’s authority.⁵⁵

Lastly, the role of each of the institutions placed in the amended Art. 6 is unclear and undefined. While in theory, people are represented through the representation of the chairman of *Majlis al-Shūrā*, in practice neither he nor the others that are placed beside the DC have similar power to balance the selection process and/or the opening of the *sultān*’s envelopes.

Taking these issues into consideration, Art. 6 brings the tradition of politics in Oman under close scrutiny. One could argue that it shows that the political process in the country is still lagging behind world politics, openness, and peaceful power transition. However, many praised the 2011 amendments for the lengthy articles concerning the powers given to the two *Majālīs*: *Majlis al-Shūrā* and *Majlis al-Dawlah*. Previously, laws and regulations were written and implemented by the government. Now, Art. 58 of the amended

⁵³ “The Basic Statute of the State”, http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125868.pdf, accessed April 10, 2015.

⁵⁴ The amendment can be viewed at http://www.wipo.int/wipolex/en/text.jsp?file_id=269893, accessed April 10, 2015.

⁵⁵ Sa‘īd al-Hashmī, *Al-Rabī‘ al-‘Umāni* 153–155.

1996 Constitution clarified the role of *Majlis Umān* in society and its legislative position. Domestic and external legislation passed should be approved by the two councils.⁵⁶ If they disagree, the final decision should be left to the *sulṭān*. The number of members of the appointed *al-Dawlah* council should not exceed the number of the elected council.⁵⁷ Also, according to the amendments, the chairperson of *al-Shūrā* council should be elected from within its members and not appointed by the *sulṭān* anymore. No authority should determine the removal of membership of any member of the elected council for any reason.⁵⁸ Further, both councils have the right to suggest new legislations. Additionally, the state's annual budget, plans, and government proposals can be reviewed and approved by the two councils. Also, the amendments gave the elected council the power to question "service ministers" (only) and to suggest the removal of ministers should they be found unqualified for their ministerial position.

This summarizes the most important changes to Art. 58. They represent significant changes particularly for an ineffective parliament established in 1991. However, not everyone was completely content with these amendments.⁵⁹ It has now become evident that with the passage of time many people have become less than enthusiastic about these legislative changes. Al-Kiyūmī, for instance, argued that the *sulṭān* has remained the main lawmaker.⁶⁰ The promulgation of laws remains in the *sulṭān's* hands, and he can pass laws at times when the elected council is on leave. There is no Constitutional Court or other channel in Oman to challenge the validity of a law or to rule whether certain regulations conflict with constitutionally established rights and freedoms. This is undeniably one big challenge facing the constitution and its amendments.

The 2014 controversial "Nationality Law" passed by the *sulṭān* during the leave of absence of *al-Shūrā* council is arguably one example for this concern. Art. 20 of the Nationality Law, de-nationalizes a citizen, who works "against the interest of the country". That is, if he or she believes in a doctrine, ideologies, or ideas that "damage the country". The wording of the law carries multiple meanings and can be interpreted broadly.⁶¹ It appears that the law is politically motivated. Art. 4 of the law stipulates that a government committee should deal with the matter outside of the judicial system. This article is seen to have breached Art. 25 of the Basic Law, which grants access to justice to all people in Oman.⁶² The use of executive powers to de-nationalize dissidents has occurred in a number of GCC states, as Jane Kinninmont argued, "at precisely the same time that youth movements around the region have been calling for a new relationship between states and their people, seeking greater rights and dignity".⁶³

⁵⁶ *Id.* 155–156.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Al-Kiyūmī, *Al-Tajribah al-Dustūriyah fī 'Umān* 157–173.

⁶⁰ *Id.*

⁶¹ The law was published in Arabic in the Official Gazette Number 1066. It can be found at <http://www.ref-world.org/country/LEGAL,,OMN,,542a75ea4,0.html>, accessed April 10, 2015. See also Al-Salmi, *Oman's Basic Statute and Human Rights* 125.

⁶² See, for instance, Ahmad al-Mukhaini's article (in Arabic), "Nationality Law: Painful Nationality or Silent Citizens", at <http://albaladoman.com/?p=21936>, accessed April 10, 2015. See also Al-Salmi (n 62) 131–133.

⁶³ Citizenship in the Gulf, http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Middle%20East/0713ch_kinninmont.pdf, accessed February 17, 2015.

VII. CONCLUSION

Demand for a constitution in Oman commenced in the second half of the 1960s. Interestingly, the initial efforts came from within the ruling family, and the plea was for a constitutional monarchy. This meant quite a leap from the two political systems Oman has recognized throughout its history: theocracy of the Ibāḍī *Imāmate* and autocratic absolutism of the *sulṭānate*. The efforts only materialized in the second half of the 1990s with an authoritarian constitution called “The Basic Statute of the State”, also referred to as “The Basic Law”. This law was issued autonomously by the *sulṭān*. Possibly, he did so with the strong conviction that the majority of Omanis fully supported his decision. This Basic Law promulgated was lacking clear provisions that separated powers. In this sense, it was not a total shift from one political era to another. Rather, as the *sulṭān*’s royal decree explained, it was a continuation of the state’s economic and infrastructural developments.

Omanis, who were frustrated by the high level of unemployment and government corruption, took to the streets in 2011 demanding change. Not surprisingly, legal change, particularly changes to the Basic Law, were among the demands of many educated Omanis. The *sulṭān* addressed a number of the demands, including amending the constitution. More powers were given to the elected “parliament”, and an attempt was made to initiate an improved system for the transition of power or the succession issue. (A hot topic in Oman currently as the *sulṭān* has been seriously ill for some considerable time.) Both the elected parliament and the power transition system are in need of amendment, even more at the present stage than before. A new system of checks and balances between the executive, legislative, and judiciary should be put into place. It is time for Oman to move a step forward in relation to its parliamentary experience. Elections should be based on a political party system rather than the current malfunctioning “tribal”-based system. But before anything else, post-Qabūs Oman’s era is in urgent need of openness, free press, association, and accessibility.

PART

2

WHAT BASIS FOR STATEHOOD

Religion or Citizenship?

Al-Dawlah al-Madanīyah

A Concept to Reconcile Islam and Modern Statehood?

SALWA EL-DAGHILI

During the Arab Spring, protesters in many Arab countries such as Tunisia, Libya, and Egypt strongly called for *al-dawlah al-madanīyah*. However, the protest movement itself did not give a clear answer as to what exactly is meant by the call for *al-dawlah al-madanīyah*.

On a general level the term *al-dawlah al-madanīyah* can be referred to as the Arab notion of what Western, secularized nations would consider the “civil state”. The history and development of Islamic countries, however, has been distinctly different from that of European and other Western states. Does the concept of *al-dawlah al-madanīyah* even have its roots in the constitutional thought of the Islamic world? Another relevant question is whether the meaning and content of the concept have changed over time, especially recently, during and after the Arab Spring. Has *al-dawlah al-madanīyah* become a void expression used by various political actors in order to disguise their visions and ideologies in an attempt to gain an upper hand in the debate on the each respective country’s constitutional future? Or is the concept of *al-dawlah al-madanīyah* a genuine and consistent one, which can play a role in reconciling traditional Islamic perceptions of organizing and regulating the affairs of the community with modern and more Western approaches and understandings of statehood?

I. ORIGINS AND DEVELOPMENT OF THE NOTION OF AL-DAWLAH AL-MADANĪYAH

In this section, I would like to shed some light on the development of *al-dawlah al-madanīyah* as a concept and attempt to trace its origins.

As a starting point it is helpful to analyze the term’s two components separately. While *al-dawlah* can be translated simply as “the state”, the meaning of *al-madanīyah* is more

complex. To begin with, it should not be confused with the term *ṭarīqah madanīyah*, which refers to the North African *Shādhiliyah Ṣūfī* order.¹

In the early nineteenth century, it was the desire of the Egyptian elite to be on an equal footing with Europe, especially in the field of technology. On return to Egypt, students, who were sent to Europe to learn about the European way for the benefit of their own people, described their observations of the European way as “civilization”, using a variety of Arabic expressions. The one that stuck was *madanīyah*.² *Madanīyah* was not a precise concept, but rather a perspective of certain scholars on Europe.

The meaning, however, developed with time. In their works, authors and thinkers, such as Muḥammad ‘Abdū and Rashīd Riḍā, used the expression *madanīyah* to describe their visions of a civil state, *dawlah madanīyah*.³

The fall of the Ottoman Empire went hand in hand with the fear of a decline in Islamic values and traditions due to the imposition of Western models. Islamists at the time saw the Islamic state as the proper mean of resistance against Western influences. The Islamic state was seen as the solution that would guard Islamic traditions and Islamic identity while simultaneously limiting Western influence.

While some saw the debate about a civil state as an attempt to disguise Western imperial motives, others were uncertain whether or not the idea of a civil state was too closely linked to notions of secularism (*al-‘almānīyah*), and were concerned that these two concepts could not be clearly differentiated from one another. It was agreed among the vast majority of scholars that secularism had no historical basis in the Islamic world,⁴ but that it rather was the result of a specific development which took place in Europe, where distinct factors such as the strong power of the theocracy or Church prepared the floor for the Enlightenment period, which was one of the major events in the process of secularization.⁵ Thus, secularism was met with great skepticism. It was not seen simply as the division between religion and the state. For some Islamic scholars, it also carried implications of hostility toward Islam, its traditions and values. Therefore, it was in no way helpful for advocates of the concept of *al-dawlah al-madanīyah* that uncertainty existed about its relation to the concept of secularism.

However, with the Iranian experience, which some scholars perceived as an actual theocracy,⁶ attitudes toward the idea of a civil state changed. Many Islamic scholars and leaders

¹ Frederick de Jong, “Madaniyya,” *Encyclopaedia of Islam* (Brill Online), http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/madaniyya-SIM_4726, accessed May 21, 2015.

² W. Scott Chahanovich, “Madaniyya: What’s in a Name?” (April 4, 2012), <http://www.resetdoc.org/story/00000021943>, accessed May 21, 2015.

³ Mohammed Fadel, “Civil State, Islamic State, Mafia State,” <http://shanfaraa.com/2012/06/civil-state-islamic-state-mafia-state/>, accessed May 21, 2015.

⁴ For further information refer to: Abdullahi Ahmed An-Na’im, *Islam and the Secular State: Negotiating the Future of Sharia* (Harvard University Press, Cambridge 2008); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, Stanford 2003); Abdelwahab Elmessiri, “Secularism, Immanence and Deconstruction” in: Azzam Tamimi and John L. Esposito (eds.), *Islam and Secularism in the Middle East* (New York University Press, New York 2000) 52 et seq.

⁵ Karel Dobbelaere, *Secularization—An Analysis at Three Levels* (2nd edn, Presses Interuniversitaires Européennes, Brussels 2004) 22. For further reading: Steve Bruce, *God Is Dead: Secularization in the West* (Blackwell Publishing, Oxford 2002).

⁶ Abdolmohammad Kazemipour and Ali Rezaei, “Religious Life Under Theocracy: The Case of Iran” (2003) 42 *Journal for the Scientific Study of Religion* 347 ff.; Francis Fukuyama, “Iran, Islam and the Rule of Law,” *The Wall Street Journal* (July 27, 2009), <http://online.wsj.com/news/articles/SB10001424052970203946904574300374086282670>, accessed May 21, 2015.

overcame their doubts and no longer saw Islamic and democratic principles as contradictory to one another.

It appears, however, that it was Maḥfūz Naḥnāḥ, leader of the Algerian Ḥamās Party—which was later named Movement for Society and Peace—who, in the 1990s, was the first Muslim scholar to stop speaking of an Islamic state, but rather a civil state.⁷ There seems to be a growing tendency initiated by scholars, such as Muḥammad Maḥdī Shamsaddīn, who have expressed the view that the concept of *al-dawlah al-madaniyah* could be applied to help overcome religious divisions within a state. Still, the idea of a civil state has not yet lost its secular connotations.

II. AL-DAWLAH AL-MADANIYAH IN CONTEXT OF THE ARAB SPRING

The protest movements in the Arab world, which are generally referred to as the Arab Spring, have once again reignited the debate about the concept of *al-dawlah al-madaniyah*.

In the beginning, the demands of the protesters were general and vague: “Religion to God and Egypt for everyone!” was one of the slogans echoing through Tahrir Square in Egypt. Although the exact issues and demands of the protests were different in every country, there was a unifying, revolutionary aspect: The old had to go and something new had to come.

One characteristic of the old order was the involvement of the military in public state affairs. The military state (or military government, *ḥukūmah ‘askariyah*), it was argued, should be substituted with a civil one, *dawlah madaniyah*. It is fair to say, that the meaning of *al-dawlah al-madaniyah* gained an additional aspect in this context. Not only was the application of this concept to lead to some sort of rearrangement and settlement in relation to the role of religion and the execution of state power, but the concept also came to stand in opposition to the notion of a military-ruled state.

The issue of the future and the orientation of the states in which major protests took place became more delicate with the institutionalization of the debate. New parliaments and councils were to be elected and constitutions were in the process of being drafted.

In Egypt, the Grand Imām of Cairo’s Al-Azhar University, Aḥmad Al-Ṭayyib, initiated discussion panels consisting of Egyptian scholars in order to discuss the future of Egypt in the aftermath of the uprisings that started on January 25, 2011. The document which resulted from the discussions, known as the Al-Azhar Charta on the Future of Egypt,⁸ avoided any specific statement concerning the nature of the future state. Neither the term “civil state” was used, nor was any reference to an Islamic state made.⁹

Other actors voiced their views more plainly. While certain Salafi movements still perceived the concept of *al-dawlah al-madaniyah* as a rhetorical trick to disguise a liberal and secular agenda,¹⁰ the Muslim Brotherhood developed its position and now envisions the

⁷ Tariq Ramadan, “Not an Islamic State, but a Civil State” (January 30, 2012), <http://www.abc.net.au/religion/articles/2012/01/30/3418847.htm>, accessed May 21, 2015.

⁸ See Assem Hefny, “Religious Authorities and Constitutional Reform: The Case of Al-Azhar in Egypt” (*in this volume*).

⁹ For an English version of the Document, see <http://www.sis.gov.eg/en/Story.aspx?sid=56424>, accessed May 21, 2015.

¹⁰ Stéphane Lacroix, “Sheiks and Politicians: Inside the New Egyptian Salafism” (Brookings Doha Center Publications, June 2012) 5, <http://www.brookings.edu/~media/research/files/papers/2012/6/07-egyptian-salafism-lacroix/stephane-lacroix-policy-briefing-english.pdf>, accessed May 21, 2015.

civil state as a concept that can be applied to the future organization of institutional state power.¹¹

It is interesting to note that the Muslim Brotherhood does not fear a rise of secularism through the implementation of a civil state. It rather sees the civil state as an apt alternative to military rule and secularism. This leads to the question of whether the idea of a civil state offers the opportunity of a constitution-based society and state that is characterized by Islamic values and has Shari'ah as the main source of legislation. This concept is referred to as a "civil state with Islamic reference" (*al-dawlah al-madaniyah bi marja'iyah islamiyah*).

It seems as if the civil state with Islamic reference has been the first step toward a consensus between opposing actors on the political field during the Arab Spring. In Libya too, Muṣṭafā 'Abd al-Jalil, in his first public speech in Tripoli after the revolution, urged the attending crowd to strive for a civil state. Nonetheless, he made clear that the main source of legislation should be Shari'ah.¹² This idea also found entry into the Libyan Draft Constitutional Charter for the Transitional Stage. The Draft Constitutional Charter made it clear in its Article 1 that, while Libya is "an independent democratic State wherein the people are the source of authorities",¹³ Islamic law is to play an essential role: "Islam is the religion of the State and the principal source of legislation is Islamic jurisprudence." The proposition of a civil state with Islamic reference was met with some criticism. The question that arises in this context is: What is the civil character of the state if it has an Islamic reference and the source of legislation is Shari'ah?

Jamāl al-Bannā, the younger brother of Muslim Brotherhood founder Ḥassan al-Bannā, has strong and clear opinions on this issue. He says the idea of a civil state with Islamic reference is a fallacy. Religious and civilian outlooks differ and eventually one will always try to trump the other. Therefore, in his view, the confusion that would result from using Islamic law as a foundation of legislation should be avoided by keeping the state strictly civil.¹⁴

A stage has commenced where the concept of *al-dawlah al-madaniyah* has been politicized and various political actors have tried to gain the upper hand in the debate over its definition. While it is on the one hand possible to insist on the secular nature of *al-dawlah al-madaniyah* and therefore to reject it, on the other hand *al-dawlah al-madaniyah* could be seen as an opportunity to integrate religious morality into the state without theocratic rule. A third position would claim that there is no possibility of a state being civil and simultaneously relying on religious Shari'ah law. Has the concept of *al-dawlah al-madaniyah* created more division and polarization than unity and consensus?

¹¹ Statement of Khairat Al-Shater, deputy chairman of the Muslim Brotherhood in Egypt at a seminar held in Alexandria on April 24, 2012, see <http://www.ikhwanweb.com/print.php?id=28450>, accessed May 21, 2015. Also: ICNL interview with Khaled Hamza, "The Muslim Brotherhood on the State of Civil Society and Civil Society Law in Post-Mubarak Egypt" 4 (2013) 1 Global Trends in NGO Law <http://www.icnl.org/research/trends/trends4-1.html>, accessed May 21, 2015.

¹² Dugald McConnell and Brian Todd, "Libyan leader's embrace of Sharia raises eyebrows", *CNN* (October 26, 2011), <http://edition.cnn.com/2011/10/26/world/africa/libya-sharia/index.html>, accessed May 21, 2015.

¹³ For the official English version of the Charter: <http://www.refworld.org/docid/4e80475b2.html>, accessed May 21, 2015.

¹⁴ Jamāl al-Bannā in an Interview with 'Omar Ḥalāwah, "Gamal al-Banna: No to civil state with Islamic reference", *Egypt Independent* (May 16, 2011), <http://egyptindependent.com/news/gamal-al-banna-no-civil-state-islamic-reference>, accessed May 21, 2015.

III. CONSTITUTIONAL RELEVANCE OF AL-DAWLAH AL-MADANĪYAH

In European consciousness in general, a state consists of three elements: its people, its territory, and its inherent authority.¹⁵ The last element does normally consist of a government, i.e., some kind of assembly for establishing the rules the citizens of the state live by, which is most likely a parliament, and a judicial branch to review alleged infringements of the rules established. If the state is organized democratically, it is the people who give the state's institutions legitimacy through elections, and therefore those who exercise powers through the state's institutions are accountable to the people.

The Islamic tradition is distinctly different. Without drifting into a lesson on Islamic history, it would be useful to briefly outline the basic pillars of Islamic constitutional thought in order to provide an insight into the possible compatibility of Islam with modern concepts of statehood. The following questions are of central concern: Who or what is the entity in which the ruling power is vested? Which laws are to be obeyed by a Muslim? These are issues that have been strongly debated among Islamic scholars. There have been certain movements proclaiming that sovereignty belongs solely to God (*al-hākimiyyah li'llāh*) and that the Qur'ān is the only legitimate constitution on which society can be based upon (*al-qur'ān dustūrunā*). One of the writers supporting the exclusive sovereignty of God, 'Alīm Amīdī, wrote: "Know that none but Allāh is the Sovereign and no command is worthy of obedience except that which is given by Him."¹⁶ The Egyptian author *Shaykh* Muḥammad Khadhīrī similarly stated: "As command is the exclusive prerogative of *Allāh*, none is entitled to give any Command but He. This is a point on which all Muslims are agreed."¹⁷

With the exclusive sovereignty and right to command with God, an obligation to obey manmade law would be virtually impossible to justify. Nonetheless, the community is in need of somebody who takes God's word and applies it. The Rightly Guided Caliph Abū Bakr, who is successor to the Prophet (Peace Be Upon Him), stated that the choice of leadership after the Prophet Muḥammad's death was left to the *ummah*¹⁸ itself: "God has left people to manage their own affairs so that they will choose a leader who will serve their interests."¹⁹

Other authors, like Mohammad Hashim Kamali, laid their focus on Qur'ānic verses which do not contest God's sovereignty, but highlight the obedience expected of the people to those in charge of the affairs of the community: "[...] obey God and obey the Messenger and those in charge of the affairs among you [...]"²⁰ This line of argument therefore concludes that the executor of power is a human being—the caliph—who is in charge of managing the affairs of the community and whose powers can be limited. This human directly executes God's divine will. It is noteworthy that the obedience and allegiance to the leader appointed to manage the affairs of the community is contingent upon certain requirements that have to be fulfilled by the leader. The leader remains accountable

¹⁵ This theory, the *Drei-Elemente-Lehre*, was established by Georg Jellinek in: Georg Jellinek, *Allgemeine Staatslehre* (3rd edn, Häring, Berlin 1914) 181.

¹⁶ 'Alīm Amīdī, *Al-Iḥkām fī Uṣūl al-Aḥkām* (Dār al-Kutub al-'Ilmiyyah, Beirut 2004).

¹⁷ Khadhīrī, *Uṣūl al-Fiqh* (University of California Press, Berkeley 1999).

¹⁸ The Arabic expression is used to describe the community of Islamic peoples and to denote the collective of believers who form a group of common belief and common culture.

¹⁹ 'Abd Allāh b. Muslim b. Quṭaybah (attributed), *al-Imāmah wa al-Siyāsah*, ed. Zinī Ṭahāh (Mu'assasat al-Ḥalabī, Cairo 1967) 21.

²⁰ Al Qur'ān: IV: 59.

to the people (*bay'ah*): "The state is elective in character and represents the community to which it remains accountable."²¹

It can thus be observed that Islam itself provides principles and ideas that resemble notions of modern statehood. However, these rules and principles were established for the coordination and guidance of the *ummah*. The remaining question is: Are these rules equally applicable to nation states which do not exclusively consist of Muslims?

This is where the idea of an Islamic state comes in. Scholars such as Abu 'l-A'la Mawdūdī²² and Ayatollah Ruhollah Khomeinī²³ advocated a state which is not necessarily lead by a successor to the Prophet Muḥammad, a caliph; a state which also has institutions, such as judicial review and elections. Nonetheless, the establishment of norms and law would be based on Islamic law. Legislation would have to be consistent with Islamic law, and the state would also be responsible for observing possible breaches of Islamic law, being in charge of its implementation in society. Although institutions exist which would seem to have similarities with Western models of statehood, the very foundation and source of legislation within the state would be Islamic law. An important question of debate in the future will be that of how close this idea of an Islamic state is linked to the call for a civil state with Islamic reference (*al-dawlah al-madaniyah bi marja'iyah islamiyah*), which is voiced, amongst others, by the Muslim Brotherhood, especially considering the fact that the Muslim Brotherhood views *al-dawlah al-madaniyah bi marja'iyah islamiyah* as an apt alternative to secularism.

In opposition to *al-dawlah al-madaniyah bi marja'iyah islamiyah*, some Muslim scholars call explicitly for a secular state. Abdullahi Ahmed An-Na'im is one of the most prominent voices. For An-Na'im, a secular state is the only form of statehood in which a Muslim can obey God by free will and not through the state's implementation and observation of religious rules and practices.²⁴ Obedience and worship, according to this view, cannot be mandatory. In order for the obedience to be genuine, it has to be the result of the free will of each individual Muslim. Furthermore, when the state itself enacts Shari'ah law, the law becomes the secular will of the state and loses its quality of being the religious law of Islam.²⁵ In order to avoid confusion, the inherently secular nature of state law should be openly acknowledged.

However, Abdullahi An-Na'im is not the only scholar who advocates a secular state. The Egyptian scholar Muṣṭafā Wabwah also calls for a secular state, although his reasoning might be slightly different. Wabwah is of the opinion that the Prophet Muḥammad himself established an order which displayed significant features of a secular state. Although ultimate sovereignty lies exclusively with God, certain principles were established by the Prophet Muḥammad, as he emigrated from Makkah to Madīnah, which Wabwah sees as resembling the features of a secular state.²⁶ In this regard, Wabwah does not focus on the question of the link between the leader and the people he governs, or the source and the

²¹ Mohammad Hashim Kamali, "Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law" in: Rainer Grote and Tilmann J. Röder (eds.), *Constitutionalism in Islamic Countries* (Oxford University Press, New York 2012) 22.

²² For example, in his books *Islamic Law and Constitution* (Kazi Publications, Lahore 1955) and *The Process of Islamic Revolution* (8th edn, Islamic Publications, Lahore 1980).

²³ Most important, in his work *Hokumat-e eslami* (Manor, Rockville 1979).

²⁴ Abdullahi Ahmed An-Na'im, "Why Muslims need the secular state", *ABC religion and ethics* (November 15, 2011), <http://www.abc.net.au/religion/articles/2011/11/15/3022774.htm>, accessed May 21, 2015.

²⁵ Abdullahi Ahmed An-Na'im, "Islam, Sharia and Democratic Transformation in the Arab World" 87 (2012) 1 Die Friedens-Warte 29–41.

²⁶ "Muslim scholar: Prophet Mohamed established first civil state", *Egypt News* (November 27, 2011), <http://news.egypt.com/english/permalink/69021.html>, accessed May 21, 2015.

legitimacy of this leadership, but rather looks at non-Muslim minorities and their position within the Muslim society. For Wahbah, the state has to be constructed in a way that allows a relationship between the individual and God, that has consideration for the relationship of each Muslim with his brethren and that establishes a protective environment for non-Muslims within the Muslim society, as was the case for the Jews in the days of the Prophet Muḥammad. While being in doubt over whether an Islamic state can genuinely provide for these fundamental pillars, Wahbah sees Turkey as a successful example of statehood. However, the statement of Turkey's prime minister, Recep Tayyip Erdoğan, hoping that Egypt would adopt a secular constitution, was heavily criticized by various groups.²⁷

Nonetheless, both approaches fail to offer a solution to the question of obedience. If, as the Qur'ānic verse states, a Muslim should obey those in charge of the affairs of the community, the legitimacy of the execution of powers is a religious one. Therefore, the means of selecting the leader and defining the limits in which he can execute powers have to derive from religious law. This aspect is highly relevant. What is the source of legitimacy in the secular state? The question becomes even more pressing, considering the fact that both the secular state and the religious normative order claim the same ground: the regulation of human interaction. In fact, the religious normative order claims even more—it seeks to regulate a relatively greater amount of areas of human life and behavior.

From this perspective, the concept proposed by the Muslim Brotherhood of the civil state with Islamic reference (*al-dawlah al-madaniyah bi marja'iyah islamiyah*) actually seems quite fitting. The state, which is civil and based on institutions, has Islamic law as the main source of legislation. Therefore, the legitimacy of the legislation can again be linked to Islamic law.

However, it seems as if the civil state, *al-dawlah al-madaniyah*, seeks to go further than creating a civil state that has Islamic law as the main source of legislation. Amr Hamzawy, an Egyptian scholar, tries to give a general and basic definition of what he believes the basis of a civil state should consist of:

1. Authority should be transferred from the military establishment to elected civil bodies.
2. The relationship between religion and politics is arranged.
3. Equal rights are guaranteed for all citizens.²⁸

These features of *al-dawlah al-madaniyah* seem extremely close to what is understood as a secular state. Therefore, the question asked should be: Is there a conceptual difference between the secular state and the civil state, *al-dawlah al-madaniyah*? This question is rather difficult to answer.

First, I would like to analyze the aspect of legitimacy. As seen above, it can be said that the Islamic state tries to establish an order that is comparable to the caliphate, although the means of election and selection may differ. The issue of religious legitimacy can also be found in the demand for a civil state with Islamic reference.

However, in a secular democratic state, the ultimate source of authority and legitimacy stems from the people themselves. A constitution is the manifestation of the will of the

²⁷ "Egypt's Muslim Brotherhood criticizes Erdogan's call for a secular state", *Al Arabiya News* (September 14, 2011), <http://www.alarabiya.net/articles/2011/09/14/166814.html>, accessed May 21, 2015.

²⁸ Amr Hamzawy and Issandr El Amrani (tr.), "On the Necessity of a Civil State" (October 21, 2011), <http://www.arabist.net/blog/2011/10/21/in-translation-amr-hamzawy-on-the-civil-state.html>, accessed May 21, 2015.

people at a specific moment in history. The institutions that are established by the constitution represent and enforce the will of the people. In a pluralistic society, the values represented by the state and its institutions are mirrored by the values that the people themselves express through voting. Although religious traditions, which become part of the identity of a particular state, may be enforced and upheld by it, for example by declaring Christmas or Easter a public holiday, actual religious practices and their observation are not maintained by the state. A secular state would not sanction punishing the infringement of what is considered a religious rule.

The civil state, *al-dawlah al-madaniyah*, seems to share this characteristic with the secular state. The concept of *al-dawlah al-madaniyah* seeks to distinguish these two normative orders (religion and state), without denying the value of Islamic law for society. Moreover, its answers to the question of legitimacy are similar. Elected bodies execute state power. These bodies are to be legitimated by public elections. Again, the people are the source of authority and legitimacy, whether the society consists predominantly of persons of the Islamic faith or not.

The question remains, however, as to what is to be done with the presumption that the ultimate authority and sovereignty lie with God. The fact that the two normative systems, the religious order and the state, are separated enables true and genuine obedience to God's ultimate sovereignty individually, since the enforcement of religious law by the state would strip it of its religious content.

Nonetheless, the concept of *al-dawlah al-madaniyah*, as well as the secular state, does not intend to expel all religious influences from the public. Countries in the Arab world undeniably have a Muslim majority. How can this be reflected on a state level? Both *al-dawlah al-madaniyah* and the secular state would respond with an answer that does not require reliance on Islamic law as a source of legislation. Instead, it should depend on the will of the people whether and to what extent religious Islamic values are reflected in the practice of the state and its organs. Religion and the implementation of its values into society can be privately organized, for example, through mosques or voluntary welfare organizations. The ballot would also give society the opportunity to introduce Islamic values at a government and state level without giving the state the competence to actually enforce religious rules.

Second, another issue of importance should be mentioned in this context, which Amr Hamzawy also mentioned in his general definition,²⁹ namely the granting of equal rights to all citizens.

Before the state, its institutions, and organs, all citizens should be treated equally. It may be asked how non-Muslims can be protected in a society with a vast Muslim majority. Islamic scholars argue that there has been protection and peaceful coexistence of Muslims and non-Muslims, *dhimmah*, dating back to the early days of the *ummah*. One point of reference is the "Constitution of Madinah", signed by the Prophet Muḥammad with various tribes. Articles 25 to 31 of the "Constitution of Madinah" state that all Jewish tribes and Muslims together form one *ummah* and other articles grant both groups the freedom of religion.³⁰ The "Pact of Najrān",³¹ which the Prophet Muḥammad signed with the Christian community of Najrān, also granted the Christian community certain rights but at the same

²⁹ Amr Hamzawy (n 28).

³⁰ Muhammad Khalid Masud, "Rights of Minorities in Islam Part 1/2", <http://islamicstudies.islammessage.com/ResearchPaper.aspx?aid=759>, accessed May 21, 2015.

³¹ For an English version of the Pact, see Maryam Sakeenah, *"Us versus Them" and Beyond* (The Other Press, Selangor 2010) 41.

time subjected them to special tax obligations. Furthermore, the “Pact of Jerusalem”³², signed by Caliph ‘Omar I and the people of Jerusalem after its conquest, mentions in its first paragraph that no church would be demolished and Christians would not be forced to change religion.

It seems as if Islamic history has a significant tradition of protecting *dhimmah* and granting them certain rights and liberties. Not only were the Jewish tribes granted certain rights in the “Constitution of Madinah”, but at the same time they were accepted as part of the *ummah*. Furthermore, the people of Najrān were viewed as “Allies of Allāh”. Accepting groups that are not part of the majority as part of the overall community, while at the same time providing for and protecting their particularities, is the essence of minority protection. Although the civil state and the Islamic state obviously have different starting points, it would be quite difficult to argue how a civil state would grant minorities more efficient protection than an Islamic state (at least from a theoretical point of view). Therefore, the level of protection enjoyed by non-Muslim minorities in the past could serve as an example and model for *al-dawlah al-madaniyah*.

We have not yet seen how *al-dawlah al-madaniyah* is of additional value when compared to the secular state. This is more a practical than a theoretical issue. Secularism and secularization have negative connotations in the Arab world. These concepts are often viewed as being atheistic and even hostile toward religion. Additionally, it is seen as a Western concept and therefore raises concerns about imperialism amongst the public if mentioned in the debate. *Al-dawlah al-madaniyah*, however, is viewed as a concept which was developed in the Arab world. It enjoys a higher level of perceived authenticity in Arab countries. Although some groups try to tie the concept of *al-dawlah al-madaniyah* to secular ideas, they cannot ignore the fact that the societies themselves, as demonstrated by the demand for *al-dawlah al-madaniyah* during the protests, view it as being different from the secular state. The aspect of demilitarization of the state should not be neglected. While the secular state is more or less neutral toward its form of leadership, *al-dawlah al-madaniyah* expresses the will for a government and a state freed from interference from the military.

IV. CONCLUSION

It is fair to say that a clear-cut concept of what is meant by a civil state, *al-dawlah al-madaniyah*, as called for during the protests does not yet exist. The debate about its content and form that has taken place during and in the aftermath of the Arab Spring have made it seem as if *al-dawlah al-madaniyah* has not yet got past the stage of being a political catchphrase. It has caused some amount of confusion among political actors and might even have led to distrust, because the true aims of the actors using the term and their vision for a future constitution and a future state have become blurred in the fog of political battle.

Nonetheless, *al-dawlah al-madaniyah* is a suggestion for a new form of genuinely Arabic statehood, with demilitarization as its starting point. It also offers a common ground for debate between all groups, secular or religious.

³² For an English version, see <http://www.mideastweb.org/covenantofomar.htm>, accessed May 21, 2015.

Islam and the Constitutional State

Are They in Contradiction?

FERHAT HORCHANI

I. INTRODUCTION

The relationship between Islam and democracy is a highly controversial question much debated by experts in the social sciences, political sciences, and constitutional law.

The aim of this modest contribution to the debate is not to put forward a theoretical answer to that question; it will be future developments in Arab countries that will tell us whether or not democracy can be compatible with Islam—or in other words, whether the fall of a dictator or the collapse of an authoritarian regime can produce regimes based on free and transparent elections, the peaceful transition of power, and respect for human rights and freedoms, including women's rights.

This article will adopt a more pragmatic, legalistic approach, by considering how the question of Islam has been perceived and handled during the ongoing process of drafting new constitutions, both in the region generally and with particular regard to the Tunisian Constitution.

First, a few preliminary explanations that will allow proper understanding of the subject:

1. The question of the relationship between Islam and constitutionalism arises because the constitution is supposed to define the identity of the state, the source of power and the manner in which norms, especially those governing rights and freedoms, are generated and respected. The question becomes more pressing in countries where the dominant religion is Islam, because Islam is a religion that does not concern itself only with the faith of its believers but also seeks to regulate civil, social, and even political aspects of the life of society. Consequently, and in contrast to transitions elsewhere,¹ it is because “Islam is both religion and state” (*al-islām dīn wa*

¹ Such as in the countries of Central and Eastern Europe or South Africa, for example, where the transition to democracy was easier from this point of view.

dawlah or *dunyā wa dīn*) that the fact of drafting a constitution cannot gloss over the debate about the position of the Shari‘ah and of religion in general.

2. This question has never really been discussed in Tunisia, much less negotiated. The issue did come up during the drafting of the 1959 Constitution (the first constitution of Tunisian independence), but it was resolved quickly. At the time, the constitutionalist elite within the National Constituent Assembly was modernist, and its leader Habib Bourguiba (Ḥabīb Būrqiḇa) solved the problem with a compromise formulation that rejected characterization of the state as Islamic: “Tunisia is a free, independent and sovereign State; its religion is Islam, its language is Arabic and its system of government is the Republic”² (Art. 1 of the 1959 Constitution). There was no real negotiation or debate between the various factions of civil and political society—the political elite of the time was preoccupied by other important and urgent tasks, such as building a modern state and administration, education, sanitation, economic development, and poverty reduction.
3. Following the revolution of January 14, 2011, the elections held on October 23 that same year allowed an Islamist party, al-Nahḍah, to win a relative majority in the National Constituent Assembly. This meant that the question of religion and the identity of the state was very quickly raised within the Assembly and in society in general.³ Although the al-Nahḍah Party leans toward a moderate political Islam, it has never clarified its position on the place of the Shari‘ah as the basis for power and as a source, or otherwise, of legislation. This structural ambiguity in Islamist parties—in general—extends to key questions such as the civil nature of the state, the equality of men and women, and the separation of politics and religion.

Islam is not just a religion but is also a history and practice that extends through space and time. Consequently, there is no single Islam but many readings and interpretations that are a reflection of national specificities and of the weight of modernity in each country. That means there can be no single answer to the question of the contradiction/compatibility between Islam and the constitutional state, but there must be several answers. In the history of independent Tunisia, specifically, achievements have been made, but the challenges of/obstacles to transition are hazards to watch out for in the drafting of the constitution and the construction of a constitutional and democratic state.

II. THE ACHIEVEMENTS: TUNISIA AS THE “EXCEPTION”?

To talk of Tunisia as the “exception” may be going too far—we use the expression because Tunisia seems to us to be quite distinct from other countries in the region, and the term “specificities” does not go far enough to shed light on Tunisia’s achievements in these areas. There have been achievements on at least two fronts: the rights of women and Islam’s place in the constitution.

The promulgation of the Personal Status Code on August 13, 1956—well before the first constitution of the independent State of Tunisia was adopted on June 1, 1959—is highly significant. The Personal Status Code prohibited polygamy, introduced civil divorce and abolished religious divorce (repudiation), and strengthened women’s rights in several areas. Other laws were adopted subsequently, including notably one on adoption and

² Our emphasis.

³ Islamists; see the modernist era of Bourguiba and Ben ‘Alī as a perversion of Tunisia’s Islamicism that has led Tunisia away from “the right path”.

those that supplemented the Personal Status Code in regard to women's rights in terms of divorce, etc. It is important to note that while the Personal Status Code had its historical roots in the Tunisian reformist movement,⁴ it relied on a modernist reading of the precepts of Islam. The Personal Status Code is in fact and in law a founding act for the exception of Tunisia and paved the way for the constitutional state that would be established by the 1959 Constitution.

The question of Islam's place in the constitution was resolved by means of the inclusion in a very prominent position of an article (Art. 1) that summarizes a political stance that goes beyond the simple question of the constitutional identity of the state. That article provides that "Tunisia is a free, independent and sovereign State; its religion is Islam, its language is Arabic and its system of government is the Republic." It should be noted that the wording of the constitution does not establish the Shari'ah as a source of legislation, as is the case in most Arab or Muslim countries except Turkey.⁵ It is true that there was some debate when this article was under consideration, including on the question of whether or not to establish the notion of the "Islamic State", but that debate was quickly cut short by Habib Bourguiba, who proposed, if not to say imposed, Art. 1. Although the article does not constitute a separation, it establishes or rather declares the Islamic nature of "Tunisia" (as a social formation), but not as a state. At first glance this suggests that it cannot have legal effect in that regard. However, it is not as simple as that, because the constitution at the same time establishes the principle of nondiscrimination, in particular with regard to women, or most importantly, the primacy of international law (in particular on women's rights) over domestic law. The key question was to know whether, for example, it is necessary to establish Tunisia's respect for its obligations under international human rights conventions on women's rights even if these contradicted the precepts of Islam, or whether to plead the exception of Islam based on an interpretation of Art. 1 of the constitution.⁶

By virtue of its ambiguity and consequent flexibility, Art. 1 allowed two possible interpretations at the jurisdictional level: The first interpretation raises the public order exception on grounds of religious considerations on the basis on Art. 1 of the constitution, which can justify the nonapplication of an international convention by a judge. In the same spirit, Tunisia has in the past issued several reservations on particular human rights conventions on the basis of that same Art. 1; in particular, this applies to the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁷ Those reservations were withdrawn after January 14, 2011.⁸

⁴ See, in particular, the celebrated work of the thinker Tahar Haddad, *Our Women in the Shari'a and Society* (1930).

⁵ Nonetheless inheritance in Tunisia is governed by rules based exclusively on the Shari'ah.

⁶ Some Islamic countries only accept international law on the protection of human rights and fundamental freedoms subject to an inventory of conformity with their own concepts of human rights and the Shari'ah. See in particular Art. 24 of the Declaration of Human Rights in Islam adopted in Cairo by the Organization of the Islamic Conference, July 31 to August 4, 1990.

⁷ Tunisia notified in its General Declaration that "the Tunisian Government declares that it shall not adopt in virtue of the Convention, any administrative or legislative decision that would risk contravening the provisions of article one of the constitution", see http://lib.ohchr.org/HRBodies/UPR/Documents/session13/TN/UNFPA_UPR_TUN_S13_2012_UNFPA_F.pdf, accessed September 3, 2015.

⁸ The reservations were withdrawn by the Decree Act 103 of October 24, 2011, Official Journal of the Tunisian Republic No. 82 of October 28, 2011, pp. 246–247. However, the withdrawal procedure is incomplete at the international law level. To date, notification has not been received by the Secretary-General of the United Nations in his capacity as depositary of the Convention. The Islamists in power contest the

The second interpretation was established at a doctrinal but especially judicial level, and has been defended by judges who are in favor of a modernist reading of the constitution and who more readily accept the primacy of the international norms to which Tunisia is bound even if these might appear to be contrary to a particular concept of religious public order. Indeed, a number of decisions have cautiously established a new form of primacy by means of “fundamental rights”, respect for which is set down as an absolute norm that may suffer no exceptions, including of a religious nature. This applies to the principles of equality and religious nondiscrimination. Contrary to previous jurisprudence brought about by the infamous *Hurriyah* arrest,⁹ the trial judges in fact ruled that the indignity of succession (i.e., the legal denial of a woman’s inheritance of property from her deceased parents on the basis of the inheritor’s [non-Muslim] religion) constituted an attack on the principles of the equality of citizens and on religious freedom guaranteed by the constitution and by the relevant international instruments.¹⁰ The same is true of a woman’s freedom to choose her own spouse and her rights in terms of divorce: Here, too, the judges put respect for the fundamental rights established by the constitution and in international instruments (the Convention on Consent to Marriage, New York, December 10, 1962) above a religious interpretation of domestic legislation: Art. 5 of the Personal Status Code relating to the “Shari‘ah” impediments to marriage.¹¹ In the same spirit, judges rejected the application of foreign legislations prejudicial to fundamental rights relating to divorce (repudiation, for example) and the equality of spouses in divorce, as established under several international instruments.¹²

withdrawal, which, they say, is contrary to the country’s identity. In the face of extraordinary mobilization by civil society, they reluctantly accepted the principle of “equality” and gave up on their plans to insert the notion of women’s “complementarity” to men.

⁹ The Court of Cassation in decision No. 3384 of January 31, 1966, commented on notably by E. De Lagrange in the *Tunisian Law Review* (RTD), 1968, 114. The Court’s decision broadly interpreted Art. 88 of the Tunisian Personal Status Code relating to cases of indignity of succession. The only case explicitly provided for is murder, but the wording of the article allows and has allowed an expansive reading based not on positive law (i.e., the Code itself) but on Islamic law (on the basis of Art. 1 of the constitution) in order to include other impediments, in particular apostasy and by extension the marriage of a Muslim woman with a non-Muslim man treated as an apostate according to the classical Muslim legal advisers.

¹⁰ The 1966 Covenants, the Universal Declaration of 1948; V. Tribunal of the First Instance of Tunis, Decision No. 7602 of May 18, 2000, Court of Appeal of Tunis Decree No. 82861 of June 14, 2002, V. RTD 2000, Commentary Ali Mezghani, 247 and RTD 2002, Commentary Malek Ghazouani, 1.

¹¹ Tribunal of the First Instance of Tunis, No. 26855 of June 29, 1999, *see* RTD, 2000, Commentary Souhayma Ben Achour, 403 and RTD 2002, Observations Malek Ghazouani, 8. According to Islamic law but also consecrated by the practice (Circular of the Ministry of the Interior of November 15, 1973) still in force, the marriage of a Muslim man with a non-Muslim woman is invalid. The 1973 circular prohibits officers of the civil service from performing such a marriage—in fact it requires the non-Muslim to convert to Islam (before the Mufti of the Republic). The almost anecdotal nature of the 1999 case cited above is that the Tunisian wife who called for rejection of her Belgian husband’s file for divorce because she claimed dissolution can only be enacted on a marriage that was validly entered into, whereas in her case, she claimed, the marriage was not valid under Tunisian law because it was between a Muslim and a non-Muslim. Calling into question firmly established jurisprudence and practice, the tribunal ruled very astutely that the marriage of a Muslim woman with a non-Muslim man is valid. On the basis of a positivist interpretation of Art. 5 of the Personal Status Code and of the 1962 New York Convention, it retains only the legal impediments to marriage and rejects religious impediments.

¹² On this legislation, *see* RTD, 2002, *op. cit.*, 15 et seq.; RTD, 2000, Commentary Monia Ben Jemia, 425 et seqq.

III. THE OBSTACLES TO THE ESTABLISHMENT OF A CONSTITUTIONAL STATE

The Tunisian “revolution,” however well-founded the qualification might be, brought down a totalitarian system and a regime under which freedom was stifled. However, while the Tunisian revolution did enable that freedom to be won back, it brought to an end a “vertical” system of modernity in which it was the state that guaranteed, including through the use of force, that the generation of norms was assured by a system of positive law and not by some kind of system of rules of religious origin. From then on, the notion of the “civil State” based on the separation of politics and religion would be of critical importance in the drafting of the new constitution.

In truth, the question that is currently being asked in Tunisia is this: Is Tunisian society capable of negotiating a new social and political contract for itself with a view to producing a civil and constitutional state system that is sustainable and guaranteed by popular legitimacy through the mechanisms of democracy rather than by means of some kind of protection by the state?

Before attempting to answer that question, it is worth noting that what we are witnessing here is a decisive moment in history that will determine the country’s political, constitutional, and cultural future and that will without doubt have repercussions throughout the Arab region.

What we can say is that, unlike other countries (Egypt in particular), Tunisia has chosen the more difficult path, i.e., a participative approach to the drafting of the constitution that brings together the National Constituent Assembly and above all a very strong civil society. Out of the current constitutional debates, a new consensus is emerging on the revival of the 1959 compromise in relation to Art. 1, but there is a great deal of disagreement and compromise on everything else.

A. Revival of Art. 1 of the Constitution

By virtue of its flexibility or, paradoxically, its ambiguity, Art. 1 of the constitution was deemed to be a satisfactory compromise between the tenants of political Islam and the various modernist or democratic movements as well as the various factions of civil society. By way of compensation, the Islamists agreed not to include the Shari‘ah, formally at least, as a source of legislation.¹³ In truth, everybody was aware of the article’s ambiguity and understood that that ambiguity would give rise to contradictory interpretations. Everybody was also aware that the notion of the Shari‘ah varies in content and that its variable application is allowed in several specific contexts.

In fact, the “battle” over Art. 1 never happened because the debate is elsewhere—in the interpretation of the article, i.e., in the other provisions of the constitution in relation to Art. 1 and, indirectly, in the provisions of the constitution regarding the future governors (executive, legislative, and judicial powers, the constitutional court, etc.), who will be in charge of applying the article or influencing its application, that is to say, the provisions that determine the relationships between the future political powers of the country.

For either side, Art. 1 was not in itself sufficient to determine the identity of the state or even the place of religion and its relationship with the constitutional state. In fact, the Islamists recognized that Art. 1 did not provide an adequate basis for their aim of establishing

¹³ The first draft of the constitution by the al-Nahḍah Party included, in addition to Art. 1, an Art. 10 that provided that “the Islamic Shari‘ah is a principal source of legislation.”

“an Islamic State”, as is still their immutable goal. Nor, as the modernists recognized implicitly, did Art. 1 provide sufficient basis for the establishment of a civil, democratic, and modernist constitutional state.

B. What Protections Are There for a Democratic and Constitutional State?

There was a debate between the Islamist party and other factions of civil and political society on some key questions that relate to our topic. On most of these points, the Islamists did make concessions. However, some of those concessions were reinstated in the latest (fifth) draft of the constitution—the draft that will be the subject of formal debate and will be voted on in the National Constituent Assembly. Other issues were accepted in the framework of political consultations or in the framework of an ad hoc commission established for that purpose within the National Constituent Assembly (the Consensus Commission). The debates focused primarily on the following.

1. The Civil Nature of the State

There is no provision in the draft constitution that guarantees the civil nature of the state. A provision was in the end inserted in the last draft, according to which “Tunisia is a state that is civil in nature, based on citizenship, the will of the people and the primacy of the law” (draft Art. 2). Although this does represent considerable progress, the provision, which was inserted as a result of pressure from civil society, does not protect unequivocally against the establishment of an Islamic State or against Islam being the state religion.¹⁴ Indeed the notion of the theocratic state does not exist in Islam—Sunni Islam at least never extols power being exercised by religious leaders or some kind of clergy. Consequently, the notion of the “civil nature” applies more to the individuals responsible for exercising power than to the nature of the state itself, and thus a power exercised by civil authorities or physical persons could perfectly well apply the Shari‘ah in its entirety, as in fact happens in several Arab and Islamic countries. In fact, the only protection offered by this Art. 2 is that power may not be exercised by members of the military.

2. Islam’s Position in the Constitutional and Legal System

This question is at the heart of the debate between constitutional state and religion. It is asked in the following terms: Does the constitutional norm sit at the very top of the pyramid of norms, or does it draw its validity and authority from a supra-constitutional religious norm? The preamble to the constitution provides: “On the basis of the teachings of Islam and of its outward-looking and moderate ends, noble humanitarian values and the principles of universal human rights, inspired by our cultural and historical heritage, by our enlightened reformist movement based on our Arab and Islamic identity and on the universal achievements of human civilization, and by attachment to the national achievements of our people.”¹⁵ As was observed by the Venice Commission, that first phrase “on the basis of the teachings of Islam [. . .]” translated the tensions between the dominant position of Islam on the one hand, and the civil nature of the state on the other.¹⁶ It can be interpreted as meaning that the constitution is a set of legal—and therefore human—norms which find

¹⁴ Art. 141 of the draft provides that “no constitutional revision may undermine Islam as the religion of the State [. . .].”

¹⁵ Our emphasis.

¹⁶ [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2013\)034-f](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2013)034-f), accessed September 4, 2015.

their basis in a system of religious norms, namely the “teachings” of Islam, which, given the general nature of the word “teachings”, comprise a set of rules, precepts, and principles that includes or could reasonably include the Shari‘ah, even though this has not been formally provided for and notwithstanding the recognition in the latter part of the article of the noble humanitarian values, the universal principles of human rights, and the universal achievements of human civilization. This fear that has been expressed by democratic and modernist movements and by civil society has recently resulted in amendment of that article to replace the phrase “on the basis of the teachings of Islam” with the words “expressing the attachment of our people to the teachings of Islam”.

Finally, Art. 1 declares that Islam is the religion of Tunisia, whereas Art. 141 (on amendment of the constitution) prohibits the amendment of the provision relating to “Islam as the religion of the State”.¹⁷ This means that Art. 141 contradicts and constitutes a pernicious reading of Art. 1, which does not declare Islam to be the religion of the state, and moreover it renders void the content of Art. 2, by virtue of which Tunisia is “a State civil in nature based on citizenship”. A compromise solution there too would make no reference to “Islam as the state religion” but refer simply to Arts. 1 and 218. Which, in a way, means a return to the 1959 compromise, which thus becomes all the more relevant, despite its ambiguity.

3. Freedom of Religion and Belief and the Separation of Religion and Politics

Several states (in particular the Nordic states) manage perfectly well to reconcile a state religion with freedom of conscience, of thought, and above all of religion. The draft Tunisian Constitution declares in this regard in Art. 6 that the state guarantees “freedom of conscience, belief and worship”, but earlier declares that “the State shall protect religion” and that the state is “the protector of that which is held sacred” and at the same time guarantees to ensure “the neutrality of mosques and places of worship with regard to any use for partisan purposes”. This wording betrays a lack of conceptual clarity and does not guarantee freedom of conscience, belief, or worship, much less the freedom of religion.

First, the phrase “the State shall protect religion” may be interpreted as applying not to religion in general, but exclusively to Islam; it therefore risks engendering discrimination against the other religions or beliefs practiced in the country.

Moreover, a state that declares itself to be civil cannot be “the protector of that which is held sacred” because, quite apart from the impossibility of defining the notion of what is held “sacred”, the provision may contradict international instruments that prohibit the criminalization of blasphemy.

Last, the draft requires the state to guarantee “the neutrality of mosques and places of worship with regard to any use for partisan purposes”. The expression “partisan purposes” is too restrictive, because it allows preaching that is political but not formally partisan, but under the guise of a general speech, can, in fact, target the religious turf of a particular party or of a political or partisan tendency or policy.

Finally, Art. 6 guarantees “the freedom of conscience, belief and worship” but does not guarantee freedom of religion, which must include the right not to have a religion or to change religion. This constitutes a departure from international law and in particular, the International Covenant on Civil and Political Rights.

¹⁷ According to Art. 141 of the draft, “No constitutional amendment may undermine: Islam as the religion of the State, Arabic as the official language, The Republican system of government, The civil nature of the State, The achievements of human rights and the freedoms guaranteed by the present Constitution, The number and duration of the presidential mandates in terms of increasing them.”

4. *The Place of the International Conventions*

The 2013 draft is a step backward compared to the 1959 Constitution, which unambiguously guaranteed the primacy of ratified international conventions (in particular those on human rights) over domestic law.

According to Art. 19, “international treaties that are approved by the Assembly of representatives of the people and subsequently ratified have a supra-legislative and infra-constitutional ranking”.

The position of international law in the new text is weak; the constitution does not make any mention of international law in the preamble, as many constitutions around the world do. The draft reflects a certain distrust toward international law and in particular the key international instruments or toward the ideals set out in the international conventions of the United Nations on the protection of human rights.

In addition to this distrust, specifying that the treaties have an “infra-constitutional ranking” may appear superfluous, but it could be dangerous in relation to the treaties that are already in force, i.e., all the treaties ratified since 1956 (the date of the country’s independence) and may cast doubt on the position of these treaties, since Art. 19 does not explicitly apply only to treaties approved by the future Chamber of the people and not explicitly those approved by former legislative assemblies.

IV. CONCLUSION

The relationship between the constitutional state and religion is the subject of contradictions and, in the best case scenario, of multiple tensions in the current constituent process in Tunisia. In truth, these tensions translate a moment of acute crisis in Tunisian identity, torn between two ideas: a conservative notion that sees Tunisia only as one component of a larger area, namely, the Islamic *ummah*, and a modernist concept that defends a “Tunisian-ness” open to universal values and anchored in its reformist history.

This identity crisis has dominated and continues to dominate the process of drafting the new constitution, both within the assembly and in society. The persistence of this crisis of identity explains why the debates have focused more on the identity of the community (the relationship between the state and religion, the position of religion, women’s rights, and so forth) than on realizing the objectives of the revolution or on how best to transition to democracy in order to avoid a new dictatorship.

In truth, Tunisia is at a crossroads; either it takes the path toward democracy, peaceful transitions of power, and the construction of a constitutional State that is in harmony with its Arab and Islamic identity and respectful of its ancient history, or it becomes submerged in the familiar story of religious totalitarianism and the exploitation of religion for political ends.

Whatever happens, what is certain is that a new (in reality the first) national and social contract/pact is being negotiated in Tunisia, and that negotiation will occupy the country’s political future for a long time. If this pact is formed, Tunisia will, perhaps, become the first Arab country to succeed in reconciling Islam and democracy.

State and Religion in the Aftermath of the Arab Uprisings

NOUREDDINE JEBNOUN

Nearly five years have elapsed since a series of uprisings began to convulse the Arab world, disrupting the status quo, toppling despotic rulers and dynastic regimes, dismantling Western policies and strategic alignments, and rendering much of the existing research and expertise on the region obsolete. Since 2011 an extensive amount has been written about these uprisings in a bid to explain, predict, and promote certain courses of action. From the outset the prevailing assumption among scholars was that the popular uprisings would lead to democratic, liberal, secular states based on the Western model. Indeed, the initial energy behind these popular uprisings appeared to be democratic and secular,¹ deep-rooted in socio-economic grievances and a desire for dignity, freedom, and equality. Since January 2011, however, many Western observers have come to fear that Islamists—seeking to Islamize their countries’ political and social institutions—will hijack the transition to democracy, capitalism, and secularism by way of the ballot box. This inward-looking assumption that the Arab world should naturally follow the West’s path, lest it drift into theocracy, lacks both analytical vigor and nuanced understanding.² Moreover, such an outlook will do little to help observers understand the web of underlying grievances that triggered the Arab uprisings and their trajectories or to assist people in arriving at the optimal outcome for their countries in this period of upheaval and transition.

¹ Although initial signs indicated a desire among protestors for secularism and democracy per se, it should be pointed out that the image of secularism in Egypt and Tunisia was hijacked and tarnished by years of cronyism and dictatorship.

² For a critique of the use of the idealized history of Western democracy as a model for transitions elsewhere and for the endorsement of aggressive secularism in non-Western states by democracy advocates, see Alfred Stepan, “Tunisia’s Transition and the Twin Tolerations” (2012) 23 (2) *Journal of Democracy* 89, 101.

In order to address both of the aforementioned assumptions, this chapter will focus on two issues. First, it will argue that the term “Arab Spring” is itself an allusion to Eastern Europe as a model for political and economic change in the transitional Arab states while problematizing that comparison. It will then analyze the past, present, and future of the relationship between religion in its ideological form and states in the region. In essence, the Arab uprisings neither aim to achieve Western-inspired liberal democracy nor will they result in Western-style constitutional secularism. As Collin Hay has demonstrated in recent years, liberal democracy is increasingly confronted with an existential crisis, which is apparent within numerous Western democracies.³ Along similar lines of thought, Michelle Pace has questioned the European Union’s (EU) somewhat idealistic aim of promoting liberal democracy around the world as the only applicable political model while refusing to learn about alternative systems of political organization in different socio-political contexts.⁴ Given the socio-economic challenges Western societies are experiencing and the disinterest shown by their citizens towards polity, liberal democracy might not be as appealing a paradigm as it used to be for those seeking to establish a new political order across the Arab world.

One of the major factors behind the Arab uprisings was a rejection of the chaotic privatization and economic “liberalization” pursued in previously socialist states such as Egypt and Tunisia. There, such liberalization resulted in high growth rates but also a suffocation of the middle class and an ever-widening gulf between rich and poor. This exacerbated an uneven distribution of wealth, which enriched a small elite connected to the countries’ ruling families at the expense of the rest of the population.⁵ The discord in Egypt—at least until the coup that overthrew President Muḥammad Mursī on July 3, 2013—was between the Muslim Brotherhood, which aimed to continue such policies while opening the economic elite to newcomers, and those—mainly youths and the working class—who rejected such policies in the first place.⁶ While the former represents a continuation of the same

³ Collin Hay, *Why We Hate Politics* (Polity Press, Malden 2007).

⁴ Michelle Pace, “Liberal or Social Democracy? Aspect Dawning in the EU’s Democracy Promotion Agenda in the Middle East” (2011) 15 (6) *The International Journal of Human Rights* 801.

⁵ For a survey of economic conditions in North Africa before the Arab uprisings, see African Development Bank Group, *Jobs, Justice, and the Arab Spring: Inclusive Growth in North Africa* (Tunis 2012). Available at: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Jobs%20and%20Justice%20-%20EN.PDF>, accessed March 31, 2015. See also Mongi Boughzala, “Youth Unemployment and Economic Transition in Tunisia”, *Global Economy and Development*, Washington, D.C.: Brookings, Working Paper, No. 57, January 2013. Available at: <http://www.brookings.edu/~media/research/files/papers/2013/1/youth%20employment%20tunisia%20boughzala/01%20youth%20employment%20tunisia%20boughzala.pdf>, accessed March 31, 2015; Amnesty International, *Behind Tunisia’s “Economic Miracle”: Inequality and Criminalization of Protest*, London: Amnesty International, June 2009. Available at: <http://www.amnesty.org/en/library/asset/MDE30/003/2009/en/2e1d33e2-55da-45a3-895f-656db85b7aed/mde300032009en.pdf>, accessed February 10, 2015.

⁶ For an analysis of crony capitalism as a regional phenomenon, see Robert Blackburn, “Arab burden of crony capitalism”, *Financial World* (May 2011) 28. Available at: <http://fw.ifslearning.ac.uk/archive/2011/may/features/arabburden.aspx>, accessed February 10, 2014; Andy Barnett, Bruce Yandle, and George Naufal, “Regulation, Trust, and Cronyism in Middle Eastern Societies: The Simple Economics of ‘Wasta’”, *Discussion Paper Series*, No. 7201, Bonn: Institute for the Study of Labor, February 2013. Available at: <http://ftp.iza.org/dp7201.pdf>, accessed March 31, 2015. For Egypt’s existing military-economic elite, see Yezid Sayigh, “Above the State: The Officers’ Republic in Egypt”, *Carnegie Middle East Center* (August 2012). Available at: http://carnegieendowment.org/files/officers_republic1.pdf, accessed March 31, 2015.

economic policy choices characterized by privatization, enrichment of the elite (potentially under International Monetary Fund (IMF) imposed austerity measures) and the expansion of the crony class to include businessmen affiliated with the Muslim Brotherhood; the latter reflects a call for social justice and “dignity” and represents a rejection of those failed policies more than it advocates any coherent economic program.⁷

As regards the relationship between the state and religion, Western-style secularism appears an impossible hope shared by a small minority of the populations of countries like Tunisia and Egypt. These states have either adopted or will adopt nonsecular, formally Islamist constitutions.⁸ Yet the Islamists’ initial successes on this front have not yet been accompanied by successes in their command of politics and leadership, and the heavy responsibility of governing will likely force them to compromise and to address other more pragmatic issues before focusing on the religious identity of the state.⁹ For instance, Islam’s formal role as the main source of legislation in the suspended 2012 Egyptian Constitution does not mean that Shari‘ah will become the law of the land. In the long term, one can most likely expect a form of state to emerge both there and elsewhere in the Arab world “that resembles Western democracy in institutional terms but differs with regard to the purpose of the state, the role of the individual in politics and society, and the character and function of law.”¹⁰

⁷ Hernando de Soto, “What the Arab world really wants. Middle East protest has its roots not in Islam but in frustrated enterprise”, *The Spectator* (July 13, 2013). Available at: <http://www.spectator.co.uk/features/8959621/what-the-arab-world-really-wants/>, accessed March 31, 2015. For a regional summary of economic motives for the Arab uprisings, see George Joffé, “The Arab Spring in North Africa: Origins and Prospects” (2011) 16 (4) *The Journal of North African Studies* 507; Jane Kinnimont, “Bread and Dignity”, *The World Today* (August–September 2011) 31.

⁸ Egypt’s Constitution, approved in December 2012 and suspended in the aftermath of President Mursi’s ousting, establishes a vague relationship between the state and religion. It retains Islam as the religion of the state, makes Shari‘ah principles—though not Shari‘ah law itself—the primary source of legislation, grants Al-Azhar an imprecise role in legislation, and gives Christian and Jewish religious establishments control over their respective communities’ personal status laws. An English translation of the 2012 Egyptian Constitution is available at: <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>, accessed March 31, 2015. The final draft of the new Tunisian Constitution retains Islam as the state religion but does not specify Shari‘ah principles as the primary source of legislation. An English translation of the latest draft constitution of the Tunisian Republic adopted by the National Constituent Assembly on January 26 and promulgated into a law on January 27, 2014, is available at: <http://www.venice.coe.int/files/Constitution%20TUN%20-%2027012014.pdf>, accessed March 31, 2015. The Libyan Interim Constitutional Declaration names Shari‘ah as “the principal source of legislation”. See the official English translation of the Libyan Interim Constitutional Declaration can be accessed at: http://portal.clincencenter.illinois.edu/REPOSITORYCACHE/114/w1R3bTlKElG95H3M-H5nvrSxchm9QLb8T6EK87RZQ9pfnC4py47DaBn9jLA742lFN3d70VnOYUeW7t67gWXEs3XiVJJx-M8n18U9Wi8vAoO7_24166.pdf, accessed March 31, 2015. In the same vein, Art. 8-1 from the “C1-Form of the State” chapter of the 2014-Libya’s “Preliminary Draft” prepared by the Constitution Drafting Assembly states “provisions of the Islamic Sharia shall be the source of all legislations.” Available at: <http://www.constitutionnet.org/vl/item/libya-initial-draft-constitution-2014-english>, accessed March 17, 2016.

⁹ For a similar argument that governing will pose a threat to Islamist hegemony in Tunisia, Libya, and Egypt, see Barah Mikhail, “Religion and Politics in Arab Transitions”, *FRIDE* No. 116 (February 2012).

¹⁰ Bruce K. Rutherford, “What Do Egypt’s Islamists Want? Moderate Islam and the Rise of Islamic Constitutionalism in Mubarak’s Egypt” in Mehrzad Boroujerdi (ed), *Mirror for the Muslim Prince: Islam and the Theory of Statecraft* (Syracuse University Press, Syracuse 2013) 278.

For the sake of coherence, this chapter will focus primarily on Tunisia and Egypt undergoing transition, and having already gone through the first stage of the Arab uprisings—the overthrow of a dynastic or proto-dynastic ruler, if not an entire regime. It will therefore devote the majority of its attention to these two countries while discussing other countries only in the context of broader regional trends.

I. THE “ARAB SPRING”: EUROPE AS A MODEL FOR CHANGE

At its outbreak the “Arab Spring” received its romantic name from the international media.¹¹ This name, however, is loaded with connotations and expresses a particular historical and political understanding. The term “Arab Spring” implicitly suggests a resonance between the Arab uprisings and the “Prague Spring” of 1968, along with the ultimate collapse of the Warsaw Pact, the revolutions in Central and Eastern Europe, and the end of the Soviet Union, along with an entire totalitarian system. This allusion expresses three kinds of judgment: first, about the nature of the change that the “Arab Spring” represents; second, about the direction of social, political, and especially economic change; and third, preference for the Eastern European example as the ideal means of managing that change despite the fact that the issue of religion and its future role was almost nonexistent in the Eastern European case.

Many observers have, of course, also expressed doubts about whether the Arab world will follow Europe’s example. These include Lucan Way, who argues that the region’s autocracies will remain durable despite the overthrow of certain heads of state.¹² In the same vein, Robert Springborg, in the autumn of 2011, contrasted the political conditions in the aftermath of the Arab uprisings to those found in Eastern European countries following the demise of communism. He asserted that “the Arab Spring of 2011 will probably prove to be more akin to the 1848 failed revolutions than to the democratic transitions set in motion by the crumbling of the Soviet Union in 1989.”¹³ Indeed, the prospect of Islamist movements taking power has also been considered, and every possible sign that this might happen is thoroughly scrutinized by the media and regional specialists. In the few weeks after the fall of the autocratic rulers in both Tunisia and Egypt, the orientalist Bernard Lewis, when interviewed about the assumption that the Islamists would win the elections, claimed that Middle Eastern countries “are simply not ready for free and fair elections.” His main argument being that a “Western-style election is part of a very distinctively Western political system, which has no relevance at all to the situation in most Middle Eastern countries.” As a result, “[i]t can only lead to one direction, as it did in [Nazi] German[y].”¹⁴ Yet Lewis’s doubts that the Arab world will follow Europe’s path erroneously frames the issue in binary opposition between Westernization, democratization, capitalism, and modernization, on the one hand, and Islamism, understood as an “extremist” tendency that “would gradually sink [the region] back into medieval squalor,” on the other.¹⁵ Some observers offer the

¹¹ For example, see *The Guardian’s* live blog compiled by Toby Manhire (ed), *The Arab Spring: Rebellion, Revolution and a New World Order* (Guardian Books, London 2012).

¹² Lucan Way, “The Lessons of 1989” (2011) 22 (4) *Journal of Democracy* 17.

¹³ Robert Springborg, “Whither the Arab Spring? 1989 or 1848?” (2011) 46 (3) *The International Spectator* 12.

¹⁴ David Horowitz, “A Mass Expression of Outrage against Injustice,” *Jerusalem Post* (25 February 2011). Available at: <http://www.jpost.com/Opinion/Columnists/A-mass-expression-of-outrage-against-injustice>, accessed March 31, 2015.

¹⁵ *Ibid.*

contemporary Turkish example as a successful alternative to Westernization and Islamism and argue that the only Turkish model that post-uprising Arab societies could emulate is the “old” hard one—the early twentieth-century secular modernism as the ideological foundation of Kemalism—deeply rooted in the Western model of democracy.¹⁶

Comparisons between change in the Arab world and Europe are not completely mistaken, but these comparisons alone are partial and inadequate for a number of reasons. First, using only Europe as a matrix of comparison will lead any analyst to overlook much of what is going on, even if he or she does gain some insight. Second, comparisons with Europe tend to assume that states and regions are only subject to their own internal dynamics and are not influenced by their wider political and economic relations. Such an assumption needs to be challenged: For example, over the past decade, Turkey’s profound transformation—its economic revival and increasing regional influence—has been linked not just to Turkey’s internal administrative reforms and its journey to democracy but also to how the country has revitalized and developed its relations with its neighbors in Central Asia and the Arab world.¹⁷ Likewise, the Arab autocracies grew in an international climate characterized by Western encouragement of economic openness and privatization framed within the “Washington Consensus” (financialization, privatization, and deregulation) and the international “War on Terror” since 9/11. This climate was accompanied by cosmetic political reform and Western security assistance that served as a reconfiguration of their fallacious “durable” and “stable” authoritarianism.¹⁸ National and regional change must be understood in an international context, and any comparison between the Arab world of 2011 and Eastern Europe in 1989 must take both regions’ international positions at those times into account.

Though Eastern Europe in 1989 and the Arab world in 2011 are similar in that both regions witnessed the rapid and contagious overthrow of authoritarian and totalitarian regimes, two fundamental differences distinguish the two sets of uprisings. First, as Lucan Way notes, the overthrow of totalitarian regimes in Eastern Europe was accompanied by the decline of the hegemonic power supporting those regimes.¹⁹ Whereas the international power relations that shaped autocratic Arab regimes still persist, 1989 came amidst the Soviet Union’s collapse. Second, while 1989 saw the end of Eastern Europe’s failed command economies, the Arab uprisings of 2011 took place in states whose state-led economies had already been “opened”, privatized, and integrated into the global economy to varying degrees, even though the state continued to constitute a large proportion of these economies.²⁰ Although the Arab uprisings can and should be understood as a rejection of both

¹⁶ See, for example, the controversial analysis of H. Akin Ünver, “The Forgotten Secular Turkish Model Turkey, Past and Future” (2013) 20 (1) *The Middle East Quarterly* 57.

¹⁷ Saim Kayadibi and Mehmet Birekul, “Turkish Democracy: A Model for the Arab World” (2011) No. 3 *Journal of Islam in Asia*, Special Issue 255, 273; Marleen Verhagen, “A ‘Turkish Model’ in the Middle East? Consequences of the Arab Spring for Turkey’s Regional Position and International Partnerships”, *Economic Development Foundation Working Paper* No. 5 (June 2012). Available at: http://www.ikv.org.tr/images/upload/data/files/marleen_paper_arab_spring%281%29.pdf, accessed March 31, 2015.

¹⁸ Nouredine Jebnoun, “Rethinking the Paradigm of ‘Durable’ and ‘Stable’ Authoritarianism in the Middle East” in Nouredine Jebnoun, Mehrdad Kia, and Mimi Kirk (eds), *Modern Middle East Authoritarianism: Roots, Ramifications, and Crisis* (Routledge, New York 2013) 1.

¹⁹ Lucan Way, op. cit., 18.

²⁰ A wide array of literature exists on the economic opening of the region’s economies and its political consequences. See, for example, Raymond A. Hinnebusch, “The Politics of Economic Reform in Egypt” (1993) 14 (1) *Third World Quarterly* 159; Raymond A. Hinnebusch, “The Political Economy of Economic Liberalization in Syria” (1995) 27 (3) *International Journal of Middle East Studies* 305; Dirk Vandewalle,

authoritarianism and failed economic policies, which does make them partially similar to Eastern Europe in 1989, it should not be assumed—as the term “Arab Spring” suggests—that the Arab uprisings will necessarily result in the Arab states following Eastern Europe’s liberal path.

The difference between the Arab world in 2011 and Eastern Europe in 1989 is stark, although this is not to argue, as many political scientists once did, that the Arab world is exceptional—so fundamentally different from Europe that comparison is of no benefit.²¹ Rather, the comparison between the two regions is instructive in revealing fundamental differences that further problematize the term “Arab Spring” and the assumptions that go along with it.

Certainly, it is useful to afford more consideration to other experiences and the Turkish model that mixes political and economic independence with openness to Europe, the Middle East, and Central Asia. This path of development provides a very useful example to Arab states in search of direction. Turkey aside, Latin America—another diverse but interconnected region with a history of liberalization, authoritarianism, imperial interventionism, and democratic transition—may also provide instructive examples for managing change in the Arab world.

With these experiences in mind, should we not ask whether comparisons that limit themselves to Europe are too provincial? Should we not also ask whether the current changes in the Middle East and North Africa need to be understood in a more global context, particularly if we are to try to understand how such change might be managed in the most orderly and fruitful manner possible? And how do the Arab states’ relations with the wider world coincide with or differ from those of Eastern Europe in 1989 and after? Before addressing the issue of where the Arab uprisings are headed, there must be more discussion of their root causes.

II. STRUCTURAL CRISIS OF THE ARAB POLITICAL AND ECONOMIC POWER

The Arab world and its component states share a number of characteristics, including a common understanding of Arab identity, regional fragmentation, and a distinct modern history. Arab identity is perceived and claimed as a shared characteristic by the peoples and states of a vast geographical area stretching from North Africa to the Middle East and the Persian Gulf. Arabs claim their Arab identity in a large variety of contexts, be they political (monarchies, republics, and the Palestinian Authority), religious (Sunni, Shī‘ite, ‘Alawī, and Druze forms of Islam, as well as various Christian denominations), or social (in large cities, rural and mountainous regions, and among desert nomads). Although this geopolitical ensemble of twenty-two Arab states shares a predominant language (Arabic) and religion (Islam), it also includes diverse states with their own unique challenges. Most states have accepted the capitalist consensus that emerged at the end of last century, though many retain the vestiges of decades of socialism. Some suffer from a lack of national unity, others from politics distorted by water scarcity or oil wealth. However, even before 2011 and as

“Qadhafi’s ‘Perestroika’: Economic and Political Liberalization in Libya” (1991) 45 (2) *Middle East Journal* 216; Stephen J. King, *Liberalization Against Democracy: The Local Politics of Economic Reform in Tunisia* (Indiana University Press, Bloomington 2003).

²¹ For an example of a pre-2011 call for cross-regional analysis, see Oded Haklai, “Authoritarianism and Islamic Movements in the Middle East” (2009) 11 (1) *International Studies Review* 27.

early as the 1990s the region witnessed the growth of a civil society that demanded more attention, greater responsibilities, and an increased political role.²²

Shared history in recent times also makes the Arab world distinct. The nation-state, for instance, is relatively new to the region as a whole: In 1918 the Kingdom of Yemen became the first independent Arab state, followed by Egypt in 1922, Iraq and Saudi Arabia in 1932, and Lebanon, Syria, and Jordan by the mid-1940s. These seven states established the Arab League in 1945. Over the next three decades the expanding membership of this regional organization went hand in hand with the spread and entrenchment of undemocratic political systems in which the dreaded *mukhābarāt* (security-intelligence apparatus) stifled any domestic dissent or challenge to the regime and its self-imposed legitimacy. Among the twenty-two states none is considered to have had a constitutionally accountable elected government on the eve of the popular uprisings. Indeed, the region has been characterized by the protracted longevity of presidential rule, a longevity that increasingly erased the difference between monarchies and republics. The lack of a republican spirit, the restrictions on political expression and pluralism that were placed on the Arab societies, and the preeminence of a centralized “presidential security state” with remarkably personalized power encouraged the proliferation of dynastic regimes and so-called “presidents for life.”²³ Consequently, fourteen of the twenty-two Arab states are listed among the most corrupt governments in the world and hold the lowest confidence rating among their citizens, making them unattractive for business and investment.²⁴

Despite Arab societies’ achievement of political independence in the early 1960s, the establishment of functional, democratic, and egalitarian nation-states remained a challenge. Power and wealth remained concentrated within a small predatory vestige of the colonial elite without being distributed equitably throughout these new nations. Moreover, the fledgling nation-state system was put under tremendous strain by the perverse effects of globalization that came to prominence in the 1990s, including the widening gap between rich and poor and social atomization. Indeed, globalization challenged Arab nation-states before their effective consolidation and placed the region under a new form of Western economic tutelage soon after its achievement of relative independence.

Major structural changes have also strained the capacities of the Arab states. Most of these countries have populations growing faster than their economies, contributing to high unemployment “among young people (15–35 year olds) [in particular, with a rate that currently] hover[s] around 25%.”²⁵ Given the pressure on the labor market, education in Arab states is inadequately designed to respond to market needs, as has been highlighted time and again by numerous reports.²⁶ In short, the younger generation of citizens of Arab states has been marginalized, echoing the fate of the older generation, prompting many to demonstrate in the streets and encouraging others to flee abroad in search of opportunity.

²² For further information on increased political activity in the Arab world since 1990, see Rami Khouri, “Apples and Oranges: Identity, Ideology, and State in the Arab World” in Amit Pandya and Ellen Laipson (eds), *Transnational Trends: Middle Eastern and Asian Views* (The Henry L. Stimson Center, Washington, D.C. July 2008) 41.

²³ Roger Owen, *The Rise and Fall of Arab Presidents for Life* (Harvard University Press, Cambridge 2012).

²⁴ Transparency International, *2011 Corruption Perceptions Index*. Available at: <http://www.transparency.org/cpi2011/results>, accessed March 31, 2015.

²⁵ Georges Corm, “The Socio-Economic Factors behind the Arab Revolutions” (2012) 5 (3) *Contemporary Arab Affairs* 357.

²⁶ Michael Sakbani, “The Revolutions of the Arab Spring: Are Democracy, Development and Modernity at the Gates”? (2011) 4 (2) *Contemporary Arab Affairs* 133.

Since 2002, regularly published reports on human development in the Arab world by the UN Development Programme have confirmed that these structural crises have made raising living standards and reducing social disparities considerably more difficult.²⁷ The first of these reports, released by the Arab League, aimed to catalogue development challenges and opportunities throughout the Arab states. Its independent team of Arab scholars²⁸ contended that despite substantial progress in human development over the last three decades, the shortcomings of those institutional structures that might otherwise encourage further development are severe and deeply rooted. These shortcomings, the report argued, are an obstacle to further human development and are reflected in deficits of freedom, women's empowerment, and knowledge acquisition as a critical factor of progress. The report concludes that Arab countries must rebuild their societies on the basis of full respect for human rights and freedoms as the cornerstone of good governance, the complete empowerment of Arab women, and the efficient and productive utilization of knowledge in all aspects of society. This, the report states, is to be done with the goal of enhancing human well-being across the region.

Such intellectual and critical energy is not new and has long been at work in the Arab world. Indeed, Arab thinkers have critically evaluated such concepts as authenticity, liberation, tradition, modernity, the West, the nation, Islam, identity, and diversity. The same attention has also been given to the successive struggles for liberation as well as the so-called "Arab malaise".²⁹ Yet this enlightened critical thinking has yet to be channeled into institutional change in education, the media, or politics, and it has failed to bring about any real transformation. Beyond the obstacles mentioned above, a number of other negative forces have stood in the way: interference from outside, state lethargy, conservative elements within society, and political stasis resulting from oil income and other sources of revenue which allow for the treatment of the symptoms of the region's "malaise" without finding a cure for it.³⁰

The combination of these factors was such that many people seemed to have resigned themselves to the idea that any progress was impossible, particularly when once progressive and revolutionary republican regimes like those in Egypt, Tunisia, and Syria had transformed themselves into "family businesses" in which political power was passed on from father to son like an inheritance.³¹ These populations have been dominated by securitocracies that fostered an increasing sense of hopelessness and a bitter sense of paralysis due to their apparent inability to effect political, economic, or cultural change. Living under conditions of socio-economic inequality, mismanagement, high youth unemployment, dismal

²⁷ United Nations Development Programme (UNDP) and Arab Fund for Economic and Social Development (AFESD), *Arab Human Development Report 2002*. Available at: <http://www.arab-hdr.org/publications/other/ahdr/ahdr2002e.pdf>, accessed March 31, 2015.

²⁸ It should be pointed out that the institutions that put together these reports for the United Nations Human Development Report (UNHDR), even those that include Arab scholars, are a part of the same system that espouses neoliberalism and the following of a "Western model" of development.

²⁹ See, for instance, Will Hobsen (tr), Samir Kassir, *Being Arab* (Verso, New York 2006).

³⁰ For an example of a political scientist's approach to this issue, see Michael L. Ross, "Does Oil Hinder Democracy?" (2001) 53 (3) *World Politics* 325. For a basic text on the political economy approach, see Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (University of California Press, Berkeley 1997).

³¹ Larbi Sadiki, "Like Father, Like Son: Dynastic Republicanism in the Middle East", *Policy Outlook*, No. 52, Washington, D.C.: Carnegie Middle East Center (November 2009). Available at: <http://carnegie-mec.org/publications/?fa=24226>, accessed March 31, 2015.

public services, anxiety, and increased distrustful citizen-state relations, many people harbored a feeling of political humiliation, loss of dignity, and loss of self-respect. Indeed, the region as a whole seemed to have entered a period of stagnation as early as the 1970s. This ended abruptly in 2011 thanks to the strength, courage, and conviction of millions of people. The brief elapse of time since then—which unfortunately reveals the dashing of initial hopes for positive change—alerts us to the fact that today’s aspirations must be nurtured carefully and wisely and safeguarded by appropriate institutions within a political system dedicated to popular sovereignty.

Though the above helps explain some commonalities among the region’s various uprisings, each uprising is rooted in local conditions and has its own particular features. The Maghreb, stretching from Morocco to Libya, is relatively homogeneous as regards religion, meaning that religious identity cannot be employed to exclude certain groups from the polity. Conversely, given the religious diversity of the Mashreq, which includes Egypt, the Levant, Iraq, and the Gulf, any link between national and religious identity threatens the unity of its countries. This helps account for the important differences between the uprisings in Bahrain and Syria, on the one hand, and Libya and Tunisia on the other. Politically, the Arab world also includes monarchies, republics, and al-Qadhdhāfi’s unique (and inaptly named) stateless *jamāhiriyah* (“state of the masses”, or massocracy); demographically, countries with large working classes like Egypt and Syria differ fundamentally from the labor importers of the Persian Gulf; finally, economic conditions vary from relatively industrialized economies like Egypt’s to the Gulf economies based on oil-revenues and finance as well as to others lacking both an industrial base and oil wealth. Given the deep structural differences between the Arab states, their respective uprisings should be understood as parallel movements rather than a single phenomenon in spite of the inspiration they draw from one another.³²

One characteristic shared by every state in which an uprising has taken place is a recent history of economic liberalization and Western investment, which also makes the comparison to Eastern Europe’s revolts difficult on economic grounds. The economies of Tunisia and Egypt were growing quickly and undergoing privatization as 2011 approached. Indeed, one impetus for the Arab uprisings could have been the rejection of the specific strain of capitalism that has emerged from the liberalization and privatization of formerly command socialist economies, such as Tunisia, Egypt, and Libya. More broadly, the uprisings could be understood as a rejection of the position of economic and political tutelage to the West in which much of the Arab world has found itself in the recent past. Unconditional economic liberalization under Western oversight helped generate the very regimes that the Arab uprisings have overthrown or transformed. This makes it difficult to believe that another dose of the same medicine is what the region’s fledgling democracies require.³³

Yet despite the role of neoliberal economic policies in spurring the Arab revolts, the Egyptian Muslim Brotherhood appears willing to accommodate and consolidate the neoliberal transformation of Egypt that began in the 1970s with President Anwar al-Sādāt’s *infitāḥ* (economic “opening”, meaning privatization of national enterprises and openness to foreign investment). Indeed, the increasing resistance to Mursī’s policies in part reflects his failure

³² James L. Gelvin, *The Arab Uprisings: What Everyone Needs to Know* (Oxford University Press, New York 2012).

³³ Ziad Abdel Samad and Kinda Mohamadieh, “The Revolutions of the Arab Region: Socio-Economic Question at the Heart of Successful Ways Forward” (2012) *Perspectives*, Special Issue (2) 122. Available at: https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/Perspectives_02-17_Ziad_Abel_Samad_and_Kinda_Mohamadieh.pdf, accessed March 31, 2015.

to address the Arab uprisings' root economic causes. The region's economic future is not predetermined, and the supporters of neoliberal austerity will face just as much resistance in the Arab world as they have in Europe, as Egypt's 2013 floundering IMF loan made clear.³⁴

III. DEMOCRACY AND THE RELATIONSHIP BETWEEN STATE AND RELIGION

With the shortcomings of overemphasizing the European model addressed and the structural crisis of power discussed, this chapter turns now to the uncertainty over the nature of the relationship between the state and religion. Over the last five years, the subject of the "civil state" has come powerfully to the fore in the Arab world.³⁵ This is the result of an ironic contradiction. At the outset, the uprisings called for civil, democratic, and constitutional states. Yet those who have come to dominate the political sphere in these countries and have inaugurated their first elected governments are from Islamist political parties which proclaim "Islam is the solution" and call for the return of Shari'ah through its application in constitutional provisions and law. Bruce Rutherford has already masterfully shed light on the Egyptian Islamist discourse with regard to Islamic constitutionalism and governance, examining the theory and praxis of concepts that include: the Islamic state, the secular state, the constitutional reference to Islam, the relationship between the Shari'ah and the state, as well as religion and the state.³⁶ What best demonstrates the ambiguity of these

³⁴ Many opposition forces in Egypt contend that the proposed IMF loan will negatively affect the majority of the Egyptian population. See "Egyptian opposition urges rejection of IMF loan," *Al-Jazeera* (April 30, 2013). Available at: <http://www.aljazeera.com/news/middleeast/2013/04/2013430174148753997.html>, accessed March 31, 2015. The US position on the Egypt IMF loan was a nuanced one, mainly between the administration and Congress. In March 2013, some lawmakers seemed to be pushing in the direction of politicizing the support of the United States to Egypt's IMF loan by subordinating the American bilateral economic assistance to Egypt to a draconian IMF programme as they argued that the Obama administration was too indulgent in terms of the economic reforms that it requested from the Egyptian government. In contrast, other lawmakers likely did not want the administration to adopt a hard-line approach on an IMF loan, asserting that such approach would push the Egyptian government into declining an IMF loan and running a risk of major economic crisis, and/or pushing it to seek other sources of financial support that may be opposed to US interests. For more information on this issue, see Rebecca M. Nelson and Jeremy M. Sharp, *Egypt and the IMF: Overview and Issues for Congress*, Washington, D.C.: Congressional Research Service, April 29, 2013. Available at: <http://www.fas.org/sgp/crs/mideast/R43053.pdf>, accessed March 31, 2015.

³⁵ Most of the analyses online on this new controversial political "concept" are available in Arabic rather than in English. See Amer Katbeh, "The Civil State (*dawla madaniya*)—A New Political Term?" *IFAIR (Young Initiative on Foreign Affairs and International Relations)* (February 24, 2014). Available at: <http://ifair.eu/think/the-civil-state-dawla-madaniya-a-new-political-term/>, accessed March 31, 2015. Furthermore, participants at a roundtable discussion organized in autumn 2012 at the American University of Beirut (AUB) on the topic of the "civil state" argued that "Islamic forces on the post-revolution political scene have had a tendency to use the term and . . . this new ruling class is increasingly guilty of manipulating the term in order to organize themselves and garner support for governance." See Issam Fares Institute for Public Policy and International Affairs, *The Question of the "Civil State": An Arab Public Policy roundtable discussion in light of the Arab Uprisings*, Beirut: AUB, September 4, 2012. Available at: https://www.aub.edu.lb/ifi/programs/arab_uprisings/Documents/arab_publicpolicy_roundtable/20130225_roundtable_final_eng.pdf, accessed March 31, 2015.

³⁶ Bruce K. Rutherford, "What Do Egypt's Islamists Want? Moderate Islam and the Rise of Islamic Constitutionalism in Mubarak's Egypt" op. cit., 240.

concepts (and most of the political conflicts over related matters) is that until the election of Muḥammad Mursī as president of Egypt, the Egyptian Brotherhood had refrained from clarifying the meaning of the so-called civil state, likely because of its ambiguous relationship, in their view, to the secular state. Meanwhile, this group had tacitly accepted the notion of the civil state so long as it did not, in its opinion, contradict the constitutional “Islamic reference.”³⁷ The former Grand Mufti of Egypt, ‘Alī Jum‘ah, was more explicit about the definition of the civil state, which was to be understood, in his view, as an institution that “does not contradict Islamic law, but conforms to it.” He pointed out that “[i]n Egypt, a civil state means a modern nationalist state that is compatible with Islamic provisions.” He further added that “Egypt did not import the civil state model from the West and that the model has existed for about 150 years.” He argued that the Egyptian “state relies on its constitution, institutions, parliament, and administrative and judicial systems—all consistent with Islamic Shari‘ah—to adopt the civil model.” He further emphasized that “Egypt’s Islamic identity does not clash with its civil system, which defends citizens’ rights regardless of their faith.”³⁸ This last point clearly stressed the commitment of the Al-Azhar religious institution to the idea of a state based on equality of rights and responsibilities between citizens, including complete participation in governing and total equality before the law.

Nevertheless, the aforementioned assertion raises a number of questions. What is the civil state in historical and contemporary practice? How has the debate surrounding the civil state changed in the Arab and Islamic worlds in the twentieth century? And what is the history of the civil state in both theory and praxis in the current context shaped by the Arab uprisings?

Historically, states and religions have in most cases been closely intertwined. Nevertheless, the theory of the civil state does not provide a clear model for the religious state. Christendom in the Middle Ages constitutes the closest example of the religious state and the historical context from which the notion of the civil state emerged. However, it is worth noting that medieval Europe saw intense competition between the Vatican, monarchs, and local potentates, although the church was dominant in religious affairs and operated as the highest referent in bestowing legitimacy upon rulers or contesting their legitimacy in the political sphere. The law also remained mixed—the church (at least since Thomas Aquinas (1225–1274)) supported natural law. Church law developed accordingly, though it was not applied except in church and religious affairs (e.g., the constitution of the religious apparatus in most Christian monasteries, the right to assess the faith and practices of individuals and groups, cases of personal status and cases of religious and public reconciliation). Eventually, European princes gained political independence from the church; notions of popular will, the social contract, and eventually popular sovereignty displaced the Vatican’s approval and divine right as the philosophical basis for legitimate rule; and the nation-state became the standard form of the European polity. In Europe, the civil state emerged out of a complex set of conditions to which church authority served as a façade of legitimacy, although the thinkers who formulated the notion of the secular civil state never established a clear theory of the civil state’s theocratic opposite.

The debate over the civil and religious state in the Arab world, on the other hand, has its roots in the debate between the Lebanese thinker Farah Anṭūn (b. 1874, d. 1922) and

³⁷ “Al-Shater: MB calls for civil state based on Islamic references,” *Ikhwanweb* (April 24, 2011). Available at: <http://www.ikhwanweb.com/article.php?id=28450>, accessed February 10, 2014.

³⁸ Ahmed el-Beheri, “Egypt’s Grand Mufti: Civil State not at odds with Islam,” *Egypt Independent* (January 11, 2011). Available at: <http://www.egyptindependent.com/news/egypts-grand-mufti-civil-state-not-odds-islam>, accessed March 31, 2015.

Shaykh Muḥammad ‘Abduh (b. circa 1849, d. 1905) of Egypt at the beginning of the twentieth century.³⁹ Anṭūn followed the heated discussions in France about the separation of religion and state, which led to the ratification of the “1905 French law on the Separation of the Churches and State” and contributed to a certain amount of hostility toward religion and the religious. Because France was, according to Anṭūn, the symbol of progress and modernity, he believed it was necessary for the Islamic world to imitate France in the separation of religion from the state. He believed this would overcome a significant obstacle to national unity, prevent the state’s exploitation of religion for despotic ends, and advance freedom, justice, progress, and civility. Indeed, Anṭūn believed that secularism could accomplish all of this in Arab societies because of the sectarian conflicts that had disrupted politics, the public sphere, freedom of expression, and scientific creativity in the Arab world both historically and in his time. To demonstrate his point, Anṭūn made reference to the oppression that Averroes faced under one particular Islamic state. Indeed, the translation of Averroes’s works at the end of the fourteenth century was one cause of the emergence of a strong liberal current in the heart of Catholic Christianity, which called for something akin to the separation of the creed of the church from the pure and practical sciences, which, at that time, were still included under the aegis of philosophy.

In response, Muḥammad ‘Abduh argued that the struggle between religion and the state was foreign to Islamic history because, unlike Christendom, Islam has no priesthood with political aims. Moreover, science flourished under the patronage and encouragement of Islam, making moot the argument that religion constituted an impediment to progress. Persecution of scholars, among them Averroes, were few and far between, were primarily political in nature, and should not be understood as diminishing Islam’s positive stance toward knowledge. Therefore, for ‘Abduh, the call for the separation of religion and the state in Islamic societies was irrelevant as the Islamic world was subject to historical conditions that differed from Europe. Other thinkers built up on ‘Abduh’s thesis, including Egyptian reformist scholar ‘Alī ‘Abd al-Rāziq (b. 1884, d. 1966), whose 1925 book *al-Islām wa Uṣūl al-Hukm* (“Islam and the Fundamentals of Governance”) argues along the same lines. ‘Abd al-Rāziq posits that the Prophet Muḥammad called people to Islam as a religious leader rather than as a political leader, and consequently the realm of religion should be separated from the realm of politics.⁴⁰ The violent reactions against ‘Abd al-Rāziq’s book at the time of its publication and almost to this day reveal the emergence of new circumstances influencing religious thought, primarily resulting from Mustafa Kemal of Turkey’s dissolution of the caliphate in 1924. It is worth noting here that while Kemal’s decision was met with protest, the caliphate had already lost its political dimensions generations earlier. Indeed, the two countries that witnessed protests over the caliphate’s dissolution (with tragic consequences) were Egypt and India, even though the British occupation of both countries had long since ended their political subservience to the Ottoman state that held the caliphate.

The furor over the dissolution of the caliphate was one of the primary causes for the emergence of Islamic identitarian groups in both Egypt and India in the form of parties and movements that called for the preservation of the identity and character of Islam and the *ummah*.⁴¹ In Egypt, the Muslim Brotherhood was formed in 1928, and in India the

³⁹ Farah Anṭūn, *Ibn Rushd wa Falsafatuh: Ma’a Nuṣūs al-Munāzarah bayna Muḥammad ‘Abduh wa-Farah Anṭūn* (Averroes and his Philosophy: Texts of the Debates between Muhammad ‘Abduh and Farah Anṭūn) (1edn, Dār al-Fārābī, Beirut 1988).

⁴⁰ Souad T. Ali, *A Religion, Not a State: Alī ‘Abd al-Rāziq’s Islamic Justification of Political Secularism* (University of Utah Press, Salt Lake City 2009).

⁴¹ The Islamic community of Muslim believers, a concept that is roughly equivalent to “Christendom.”

“Islamic Movement for the Revival of the Caliphate” paved the way for birth of the Islamic Party in 1941. These two movements developed the idea of the Islamic state dominated by two main ideas: making Shari‘ah (Islamic law) instead of national popular sovereignty the basis of political legitimacy, and affording the state the power and responsibility to apply Shari‘ah. While Abū ‘l-A‘lā Mawdūdī, the leader of the Islamic Party in Pakistan, forwarded the idea in 1979 that the Islamic political system is a mixture of theocracy and democracy, the Egyptian Muslim Brotherhood continued to argue that the system of rule in Islam is divine. Indeed, the Egyptian Brotherhood contends that God has jurisdiction over the Islamic ruling system and that the state must therefore implement Shari‘ah to be considered Islamic.

From the 1960s to the 1990s a number of developments occurred within Islamist movements throughout the Islamic world. First and foremost, the notion of the Islamic state, an idea used by Islamist movements that then evolved into strict dogmatic parties in Egypt and Pakistan, gained salience. Other parties and movements in many Arab and Islamic states, which resemble their Egyptian and Pakistani equivalents in terms of their popularity and their endured suppression, have also adopted the notion of the Islamic state. This occurred in two interrelated contexts: the construction of the national state by military men,⁴² with whom the Muslim Brotherhood clashed bloodily;⁴³ and the Cold War, which helped militarize and entrench Arab political elites against the phenomenon of Islamism.

Second, a number of jihādī groups defected from large Islamist parties to enter armed conflict for the sake of the Islamic state both within and outside of the Arab world. Meanwhile, the larger Islamist parties remained under the aegis of the prevailing dictatorships, participating in their political systems to the extent allowed. In some spheres these parties succeeded and evolved into the most prominent of the internal opposition parties while insisting upon two slogans: “Islam is the solution” and “implementation of Shari‘ah.” These notions gained traction throughout societies and among elites with the result of the Islamization of many constitutions in the Islamic world. Successful Islamist parties and movements also retained their cohesive structure despite, having faced continuous security pressure from the governments under which they operated.

Third, the 1979 Islamic Revolution in Iran was premised on the same principles on which Egypt and Pakistan’s Islamist groups operate. However, when it succeeded the Iranian religious institution, represented by *Imām* Khomeinī, imposed the “Guardianship of Islamic Jurist” system, which resembles Mawdūdī’s mixture of theocracy and democracy. The Iranian system combines Iran’s long-established *imāmate* clergy with a presidential republic and a parliament elected by universal suffrage.⁴⁴ The Sunni Islamist parties, in contrast to the Iranian model, have continued to rely on the primacy of Shari‘ah within existing legal and political systems. In this approach Shari‘ah is guaranteed constitutionally and has no supreme guide or *imām*.

Finally, due to their long political life, Islamist parties have acclimatized to the regimes in which they operate and to other opposition forces. This has led Islamist parties to call for democracy and peaceful pluralism on numerous occasions. That said, their rhetoric has not recognized popular sovereignty, and their failure to recognize the principle of equal citizenship for all has disturbed relations between these parties and other religions and sects.

⁴² Charles Lam Markmann (tr), Anouar Abdel-Malek, *Egypt: Military Society; the Army Regime, the Left, and Social Change under Nasser* (Random House, New York 1968).

⁴³ Richard P. Mitchell, *The Society of the Muslim Brothers* (Oxford University Press, London 1969) 105–162.

⁴⁴ See, for instance, “The Islamic Revolution at 30” (2009) 250 MERIP, Special Issue 10.

With the overthrow of a number of autocratic Arab governments, these diverse Islamist groups have been propelled into power in several post-authoritarian Arab states. Indeed, several months after Ḥusnī Mubārak's overthrow, in the summer of 2011, the *shaykh* of Al-Azhar issued a document on "The Future of the System of Rule in Egypt."⁴⁵ Several *shuyūkh* from Al-Azhar, some liberal Muslims and Christians as well as a number of Salafi parties—better known as "traditional Islamists" within Islamist circles—and members of the Muslim Brotherhood participated in its drafting. This document proclaimed that the system of rule in Egypt is constitutional, democratic, and pluralist, that the religion of the state is Islam, and that Islamic Sharī'ah is the primary source of legitimacy, as was the case in the 1971 Constitution. The document ruled out a civil system of rule because of Muslim Brotherhood opposition stemming from their conflation of a civil system with a secular one and their association of secularism with France's aggressively secular system, or even with state atheism. Since the election of Muḥammad Mursī as president, however, the Brotherhood has retroactively declared that Egypt is a civil state based on citizenship and one in which all Egyptians are equal in their rights and obligations. Nonetheless, Egyptian liberals remain uneasy, as do Coptic Christians. Indeed, their sense of marginalization is such that they withdrew from the Constitutional Committee in protest, with the result being the writing and passage of a constitution that leaves the relation between state and religion frighteningly vague. President Mursī and the Muslim Brotherhood, not to mention Egypt's Salafi parties, seem to have become comfortable returning to their twin mantras: "Islam is the solution" and "implementation of Sharī'ah." As Sumita Pahwa argues:

At a rally for the Freedom and Justice Party's presidential candidate Mohammed Morsi in the summer of 2012, conservative preachers declared that he would restore the caliphate, Morsi swore that he had made a "pact with God and the public" to apply shariah, and his campaign flaunted the endorsement of Salafi leaders: election banners in many parts of Cairo simply featured the names and headshots of the numerous Salafi sheikhs who had endorsed him. [. . .] This symbolic affirmation of the importance of an Islamic state and of shariah, at odds with the party's continuing official support for a civil state, responded to a challenge from the more conservative Salafi movement for the right to "represent Islam" in the political sphere [. . .], the continuing centrality of shariah in this discourse, and the movement's self-image as the voice of Islam par excellence, forced it to match the Salafis' more conservative rhetoric and to reassure the movement's base that it would not abandon leadership of the Islamist cause to another group.⁴⁶

Matters in Tunisia appear less confused. However, extreme "cultural" and political polarization between the "liberal-seculars" and Islamists in the aftermath of the 2011 National Constituent Assembly (NCA) elections reached its apex and quickly turned into complete mistrust and open antagonism following the deterioration of the country's security situation.⁴⁷ There is, however, something of a consensus on replicating the first article

⁴⁵ Al-Azhar Document: *Statement about the Future of Egypt*, July 20, 2011. Available at: <http://www.sis.gov.eg/Ar/Templates/Articles/tmpArticles.aspx?ArtID=48572> (Arabic original), accessed March 31, 2015, and <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=56424> (English translation), accessed March 31, 2015.

⁴⁶ Sumita Pahwa, "Secularizing Islamism and Islamizing Democracy: The Political and Ideational Evolution of the Egyptian Muslim Brothers 1984–2012" (2013) 18 (2) *Mediterranean Politics* 201.

⁴⁷ Nouredine Jebnoun, "Tunisia's Security Syndrome", *IPRIS Viewpoints*, No. 123 (May 20, 2013). Available at: <http://www.ipris.org/php/download.php?fid=765>, accessed March 31, 2015.

of the canceled 1959 Constitution in the new constitution. This article states, "Tunisia is a free, independent, and sovereign state. Its religion is Islam, its language is Arabic and its form of government is the Republic."⁴⁸ By inserting Art. 1 from the previous constitution the NCA seemingly aimed at emphasizing the state religion of Tunisia rather than the people's religion. This safe move reflects the prevailing political atmosphere, which is charged with tension over the role of Islam in the public sphere. Likewise, it guarantees the rights of the non-Muslim minorities—chief among them the Jews—who are considered full citizens based on their "Tunisiness" rather than their beliefs. The latest draft (released on June 1, 2013) demonstrated significant improvement in comparison with the previous versions,⁴⁹ although many observers have highlighted in their reports that a number of inconsistencies remain.⁵⁰

The seven months that followed the release of the fourth draft of the constitution were punctuated by stormy debates, disagreements, tension, and further polarization between different ideological trends, political affiliations within the NCA, and across the country. Likely, the ousting of President Mursi in Egypt, coupled with political assassinations and terrorist attacks against Tunisia's military and security forces created a conducive atmosphere within the political arena and various segments of society favorable to questioning the legitimacy of the constituent process. The poor performance of the NCA's members in everyday life has underpinned the perception that the constituent process is becoming further and further disconnected from the harsh realities of life. Tunisians want to end this uncertain transition and swiftly move toward new elections that could overcome the fog of uncertainty. In spite of all the frustrations and deceptions experienced by Tunisian people during a nearly two-year constitutional process, constitutional changes were introduced in a raucous give-and-take fashion in the fourth draft adopted in June 2013. The latter was further amended, debated, scrutinized, and voted on article by article for almost one month, before being adopted on January 26, 2014, and solemnly promulgated into law in a special session the next day. The ambivalence of some constitutional clauses within this legal framework led al-Nahḍah (Renaissance) Party's leadership, whose group in NCA played a decisive role in crafting the constitution, to portray the document as embodying "some ambiguity—even some landmines."⁵¹

⁴⁸ English translation of the 1959 Tunisian Constitution is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=188948, accessed March 31, 2015.

⁴⁹ Three drafts of the Tunisian Constitution were issued before the release fourth draft on June 1, 2013:

The first draft on August 14, 2012. Available at: http://www.constitutionnet.org/files/2012.08.14_-_draft_constitution_english.pdf, accessed March 31, 2015.

The second draft on December 14, 2012. Available at: http://www.constitutionnet.org/files/tunisian_constitution14_dec_2012-english-undp.pdf, accessed March 31, 2015.

The third draft on April 22, 2013. Available at: <http://constitutionaltransitions.org/wp-content/uploads/2013/05/Tunisia-third-draft-Constitution-22-April-2013.pdf>, accessed March 31, 2015.

⁵⁰ Numerous international organizations have provided extensive commentary on the draft constitutions, chief among them the International Commission of Jurists, Human Rights Watch and Art. 19. The fourth draft was submitted to the Venice Commission for review. For an exhaustive overview of all provisions on the latest draft of the Tunisian Constitution, see European Commission for Democracy through Law (Venice Commission), *Observations on the Final Draft Constitution of the Republic of Tunisia*, Council of Europe, Strasbourg July 17, 2013. Available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2013\)034-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2013)034-e), accessed March 31, 2015.

⁵¹ Nouredine Jebnoun, "Tunisia at the Crossroads: An Interview with Sheikh Rachid al-Ghannouchi," *ACMCU Occasional Papers*, Alwaleed Bin Talel Center for Muslim-Christian Understanding-Edmund

In terms of the relationship between state and religion, some reflection is necessary. Whereas Art. 2 states, "Tunisia is a civil state based on citizenship, the will of the people and the supremacy of law," Art. 6 stipulates, "The state is the guardian of religion. It guarantees freedom of conscience and belief, and free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalization." Although freedom of religion and freedom of conscience are clearly confirmed in this article, it seems to contradict the character of the civil state as described above. Furthermore, it appears that reconciling the state guarantee of religion and the impartiality of places of worship with freedom of belief in general will be problematic. The second paragraph of this article bestows upon the Tunisian state the responsibility "to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof." However, the "protection of sacred" could be subjected to more restrictive and repressive interpretations that may be motivated by political calculations and religious sentiments seeking to suppress critics and muzzle religious nonconformism. Nonetheless, it must be incumbent upon the state "to prohibit and fight against calls for *takfir* [apostasy] and the incitement of violence and hatred." The vagueness and contradictions of these clauses make the implementation of Art. 6 very challenging, mainly if the ideological polarization within society further widens. Art. 15 affirms that public administration "is organized and operates in accordance with the principles of impartiality, equality and the continuity of public services", and yet the president, in accordance with his prerogatives underlined in Art. 78, appoints "the General Mufti of the Tunisian Republic." This could be considered an interference of the executive power in the religious sphere. Such a provision, it should be noted in closing, would further widen the division between "official Islam" as a religion sponsored by the state and other competing social and political forms of Islamism.

In 2004, the Syrian Muslim Brotherhood, for their part, issued a text on the civil state "in which Islamic law would seemingly act more as a cultural referent respectful of diversity than a theocratic system infringing upon minority rights."⁵² In this regard, they are closer to the opinion of the al-Nahḍah Party in Tunisia, while the Libyan Muslim Brotherhood's outlook is closer to that of its Egyptian counterpart. Following the overthrow of al-Qadhafi's regime and benefiting from the institutional and security vacuum as well as the fierce debate over centralism, decentralism, regionalism, and federalism, the Libyan Muslim Brotherhood (a major component of the mainstream Libyan Islamist movement) allied itself with other conservative groups. These groups included a Group of Libyan Scholars, which aimed to prescribe Shari'ah as "the only source for laws and legislation,"⁵³ rather than "the principal source of legislation" as it was initially referred to in the Art. 1 of the Libyan Interim Constitutional Declaration.⁵⁴ Furthermore, Islamists called without tangible success for "restrict[ing] the legislative jurisdiction of the future *Majlis* [parliament] by specifying in the transitional constitution that in the permanent constitution no legislation could be passed contradicting the Shari'ah."⁵⁵ Clearly, Islamist parties in most

A. Walsh School of Foreign Service (Georgetown University, Washington, D.C., April 2014) 23. Available at: <http://acmcu.georgetown.edu/node/1161>, accessed March 31, 2015.

⁵² See Raphaël Lefèvre, "The Muslim Brotherhood Prepares for a Comeback in Syria" Carnegie Middle East Center (May 2013) 11. Available at: http://carnegieendowment.org/files/muslim_bro_comeback.pdf, accessed March 31, 2015.

⁵³ Youssef Mohammad Sawani, "Post-Qadhafi Libya: interactive dynamics and the political future" (2012) 5 (1) Contemporary Arab Affairs 15.

⁵⁴ See (n 8) which refers to articles highlighted in Libya's constitutional drafts.

⁵⁵ Youssef Mohammad Sawani and Jason Pack, "Libyan Constitutionality and Sovereignty Post-Qadhafi: The Islamist, Regionalist, and Amazigh Challenges" (2013) 18 (4) The Journal of North African Studies 531.

of the Arab countries that have experienced uprisings share at least one of two primary dogmas. The first is limited to the declaration that Islam is the religion of the state. The second adds that Shari‘ah is the primary source of legislation, as stated in Art. 2 of the 2012 suspended Egyptian Constitution and reiterated in the 2014 adopted Constitution—likely to suite the Salafist al-Nūr Party constituencies in the post-coup—or “the source of all legislation,” as is stipulated in Art. 3 of the Yemeni Constitution.⁵⁶ Nevertheless, one should acknowledge that:

calls for a return to shari‘a do not mean the same thing in every situation. In some cases, they clearly convey an aspiration for the moralization of public life. In popular circles, where illiteracy often still prevails, as well as among those whose education conveyed scientific and technical skills with little opening to the humanities, traditional religious formulations remain the way of expressing a wish for what in the West would be described as “basic decency” (the absence of gross abuses of power, widespread corruption, or general cynicism). It is this that lends slogans such as “Islam is the solution” their meaning and their strength, and that explains the success of Islamists in so many places.⁵⁷

Indeed, it should be pointed out that Islamic constitutionalism, as a legal doctrine derived from Shari‘ah, does not seek to build on a totalitarian form of the state. As Bruce Rutherford observes:

If democracy is a set of institutions that constrain the state, enforce law, and allow public participation in politics, then Islamic constitutionalism is fully compatible with democracy. However, if one views democracy as the adoption and promotion of a set of values—such as individual liberty, freedom of choice, popular sovereignty, and a minimalist state—then the conclusion with regard to Islamic constitutionalism is more ambiguous. . . . [It] place[s] less emphasis on individual rights than one finds in the West. The individual is not the center of the political and legal universe. Rather, the focus is on building a pious community. In pursuit of this goal, the state assumes an invasive role in the lives of its citizens. The purpose of the institutions of [Islamic] constitutionalism is to enhance and refine this invasive role rather than to limit it.⁵⁸

However, the newly drafted 2014 Constitution removed the clauses prescribed in the suspended 2012 Constitution which provided Islamic clerics with a prominent role in interpreting Islamic law. Art. 7 of the new constitution confines Al-Azhar in its traditional role as “an independent Islamic scientific institution, with exclusive competence over its own affairs.” Furthermore, the new constitutional text repealed Art. 219 of the 2012 Constitution, which sought to restrict the exegesis of the judicial corpus to the “principles of Islamic Shari‘ah [that] include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.” In contrast, the Preamble of the 2014 Constitution provides the Supreme Constitutional

⁵⁶ The Constitution of the Republic of Yemen published on February 10, 2011. Available at: <http://www.refworld.org/docid/3fc4c1e94.html>, accessed March 31, 2015.

⁵⁷ Abdou Filali-Ansary, “The Language of the Arab Revolutions” (2012) 23 (2) *Journal of Democracy* 12.

⁵⁸ Bruce K. Rutherford, “What Do Egypt’s Islamists Want? Moderate Islam and the Rise of Islamic Constitutionalism in Mubarak’s Egypt” *op. cit.*, 277.

Court (SCC) with the exclusive competence in “the interpretation of such principles.” In doing so, the 2014 Constitution reinstated the constitutional order prior to the fall of Mubārak’s regime that attributed to the SCC the competence of interpreting Shari‘ah law. Moreover, it should be pointed out that “freedom of belief” as an “absolute” right is stated in Art. 64 of the new text, but limited to “practicing religious rituals and establishing worship places for the followers of Abrahamic religions.”

IV. IN SEARCH OF A ROLE MODEL

The Muslim Brotherhood and its various tendencies aside, there is wide disagreement in the region on the relationship between religion and the state. Radical secularists in Tunisia and Syria repudiate the notion of any state religion being specified. Nonetheless, an overwhelming majority of “liberals” and leftists in Egypt and other Arab countries are inclined to concede that the religion of the state is Islam, but take issue with making Shari‘ah the source of legal legitimacy. For their part, Salafists want the constitution to specify that Shari‘ah rulings are the main source of legitimacy, whereas other Islamists insist that reference to Shari‘ah or its principles is sufficient, as was the case in the Al-Azhar document mentioned above. In short, despite the first impressions given by the Arab uprisings and the demands of Tunisian and Syrian “secularists”, there is no hope for the establishment of a purely civil or agnostic state along liberal, Western lines. These countries have their own histories and trajectories to follow, and they will not necessarily follow the various precedents to be found elsewhere in the world. As was the case with the economies of the Arab states, the West does not necessarily provide a compelling model for the potential relationship between religion and the state in the Arab world.

The following section will therefore review the relationship between religion and state in the non-Arab states of the Middle East, each of which is relatively unique and provides a model more relevant to the Arab world than do Europe or the United States. These regional examples of the relationship between religion and the state might elucidate potential routes for the Arab states to take. In the Middle East today there are three non-Western models for the relationship between religion and the state: the Jewish state in Israel, the Guardianship of the Islamic Jurist in Iran, and the constitutionally secular but Islamist-controlled state in Turkey.⁵⁹

In Israel, the question of religion’s relationship to the state is broader than the issue of the state’s religious identity—a primary issue in most Arab states—because the Chief Rabbinate determines who is legally Jewish and who can therefore gain nationality and citizenship. Extremist religious organizations in Israel are unique among groups in the region with political representation as they consider non-Jews to be foreign to the Israeli polity. As a result, Israeli citizenship is closely associated with the “Jewishness” of its citizens, and Arab minority struggle for equal rights is considered by many Israeli Jews as a dangerous denial of Jewish nationhood. In 2007, the head of Israeli domestic security services, Shin

⁵⁹ For an in-depth comparison between Turkish and Arab Islamists, and especially the challenges facing the Egyptian Muslim Brotherhood in emulating the Erdogan’s AKP, see Alper Y. Dede, “The Arab Uprisings: Debating the ‘Turkish Model’” (2011) 13 (2) *Insight Turkey* 23. On Turkey’s ability to spread democracy in its neighborhood, see Kemal Krişçi, “Democracy Diffusion: The Turkish Experience” in Ronald H. Linden et al. (eds), *Turkey and Its Neighbors: Foreign Relations in Transition* (Lynne Rienner Publishers, Boulder 2012) 145; Kemal Krişçi, “Turkey’s ‘Demonstrative Effect’ and the Transformation of the Middle East” (2011) 13 (2) *Insight Turkey* 33.

Bet, admitted that among his service's prerogatives is the carrying out of operations targeting "political activities aimed at changing the 'Jewish identity' of Israel."⁶⁰

In Iran, the constitution not only establishes the Islamic identity of the state but also specifies the *Ja'fari* school of *fiqh* (principles of Shī'ite Islamic law and jurisprudence) as being dominant. Moreover, Iran is also a special case because of the great privileges afforded to the Supreme Leader, who is considered the representative of the Hidden *Imām* (a semi-messianic figure in Shī'ah Islam who will govern the *ummah* upon his return) and therefore enjoys general leadership of the polity as if the Hidden *Imām* were present. Indeed, despite some exceptions and the semblance of democracy provided by elections at some levels, Iranian law does not treat citizens equally. The state discriminates between Shī'ah and non-Shī'ah while also determining who among the Shī'ah is eligible to run in elections or hold official state positions.

Turkey, on the other hand, in comparison with Israel's ethnocracy and Iranian theocracy, seems to be the only non-Arab regional state that meets the standards of the civil state and where a "Democratic-Islamic model" has proven relatively successful.⁶¹ According to the Turkish Constitution, the state ensures the basic rights of the citizen, there is a separation of powers, and the judiciary exists as an independent power that can be appealed to in constitutional matters.⁶² Even an Islamist party was able to come to power in the secular Turkish state thus providing a clear demonstration of the state's civil and democratic nature. However, the long-standing suppression of journalists and the violent crackdown of early June 2013 on the Gezi Park protesters in Istanbul and elsewhere have revealed the Turkish state's lingering authoritarian streak.⁶³ However, this "increasingly authoritarian behavior," as Asef Bayat pointed out in the past, "is not necessarily related to religious sensibilities of the Justice and Development Party (AKP)." Rather "secular governments may also indulge in such undemocratic conduct, particularly when their self-confidence is boosted, as is the case with AKP, by economic success, regional power, and a feeble opposition."⁶⁴

To return again to the Egyptian case, the approved—and suspended—Egyptian Constitution under Mursi's presidency established a close, albeit rather ambiguous, relationship between Islam and the state. Whereas the Muslim Brotherhood's political grassroots base contributed to Mursi's election, his triumph over Aḥmad Shafīq "was basically due to fears [of "liberals," nationalists, and leftists among mainstream Egyptian political parties] related to the possibility of the former President Mubārak and/or his supporters return to power."⁶⁵ Moreover, the power of political Islam in Egypt comes from the fragmentation of its political rivals, their dispersion, and the lack of popular parties with

⁶⁰ Jack Khoury and Yuval Yoaz, "Shin Bet: Citizens subverting Israel key values to be probed," *Haaretz* (May 20, 2007). Available at: <http://www.haaretz.com/news/shin-bet-citizens-subverting-israel-key-values-to-be-probed-1.220965>, accessed March 31, 2015.

⁶¹ Alon Liel, "The Turkish Model and the Arab Spring" (2012) 18 (1) *Palestine-Israel Journal* 45.

⁶² English version of Turkish Constitution is available at http://global.tbmm.gov.tr/docs/constitution_en.pdf, accessed March 31, 2015.

⁶³ Kemal Krişci, "The Rise and Fall of Turkey as a Model for the Arab World," *Brookings Opinion* (August 15, 2013). Available at: <http://www.brookings.edu/research/opinions/2013/08/15-rise-and-fall-turkey-model-middle-east>, accessed March 31, 2015.

⁶⁴ Asef Bayat, "Post-Islamism at Large" in Asef Bayat (ed), *Post-Islamism: The Changing Faces of Political Islam* (Oxford University Press, New York 2013) 12.

⁶⁵ Wahid Abdul-Majid, "Egypt at the Crossroads. Egypt's Future: Three Scenarios" (2013) 6 (1) *Contemporary Arab Affairs* 19.

a non-Islamic ideology.⁶⁶ Unlike in Turkey, often proffered as the best example for the relationship between religion and the state in the region, Egypt's constitutional order will remain Islamist rather than secular. While several forces have militated against the imposition of strict Islamist rule in Egypt, which bodes well for the eventual creation of an essentially civil state (although almost certainly not a secular one), remnants of the Mubārak regime still populate the army, judiciary, and bureaucracy, thus making the machinery of the state itself an impediment to the Muslim Brotherhood's vision.⁶⁷

The Islamists who have achieved electoral victories in Tunisia and Egypt have fairly claimed the right to govern in accordance with the Islamic principles they espoused. As long as they govern through democratic procedures and not by force, opposition forces must, of course, restrain themselves to civil disagreement and acknowledge the Islamists' right to govern following their electoral victories. Nonetheless, the Islamists' determination to govern democratically remains a subject of debate and justified concern. On the one hand, the inconsistency between al-Nahḍah's democratic discourse and its lackluster performance during two years in office called its credibility into question among large segments of Tunisian society and reinforced a widespread perception that the Tunisian Islamist leaders "share a crucial misconception: securing electoral victories leaves them free to act as they wish."⁶⁸ Although the electoral democracy that brought the Islamists to power was highly praised by Tunisians, it nonetheless brought about unsustainable development, inefficient government institutions, attempts to Islamize public sphere and state administrations, indecisiveness toward a violent militant component within the Salafīyah spectrum, a lack of transparency and accountability, a rise of nepotism and patronage, endemic

⁶⁶ On the eve of the military coup that ousted President Muḥammad Mursī, a survey carried out by Zogby Research Services and released in June pointed out: "The two main Islamic parties (the Muslim Brotherhood's Freedom and Justice Party and the Nūr Party) appear to have the confidence of just under 30% of all Egyptian adults. The major opposition groups (the National Salvation Front and the April 6th Movement) combined have a somewhat larger support base claiming the confidence of almost 35% of the adult population, while the remaining almost 40% of the population appear to have no confidence in either the government or any of the political parties. They are a 'disaffected plurality.'" See *After Tahrir: Egyptians Assess Their Government, Their Institution, and Their Future*, Washington, D.C., June 2013. Available at: http://www.zogbyresearchservices.com/zrs/Zogby_Research_Services_ZRS_News_files/Egypt%20June%202013%20FINAL.pdf, accessed February 10, 2014.

⁶⁷ See the story on the role played by the state apparatuses as well as the Tamarrod movement (rebellion), political parties, and others segments within Egyptian society in the coup orchestrated against President Mursī; excellently reported by Hugh Roberts, "The Revolution That Wasn't" (2013) 35 (17) *London Review of Book 3*. The author argues: "The return with a vengeance of the Egyptian army to the centre of government doesn't, as some have suggested, mean the advent of Mubārakism without Mubārak, since the extreme autonomy of the presidency is no more—this will be true even if Sīsī takes the job. Moreover, an important element of Mubārak's prolonged balancing act was his tacit reliance on the Muslim Brothers to provide needed services and to keep order in those parts of society the state could or would no longer bother itself with. That compact is now broken. Whether there will be a substantive as opposed to purely rhetorical reversion to Nāṣrism in domestic policy remains to be seen—but it's unlikely." In addition, see the excellent piece describing the deliberate sabotage that targeted Mursī's government, recorded by both Ben Hubbard and David D. Kirkpatrick, "Sudden Improvements in Egypt Suggest a Campaign to Undermine Mursī," *New York Times* (July 10, 2013). Available at: <http://www.nytimes.com/2013/07/11/world/middleeast/improvements-in-egypt-suggest-a-campaign-that-undermined-morsi.html?hpw&r=0>, accessed March 31, 2015.

⁶⁸ Jeffrey Haynes, "The 'Arab Uprising,' Islamists and Democratization" (2013) 18 (2) *Mediterranean Politics* 178.

corruption, and weak economic growth that jeopardized the interests of the majority of Tunisian people.⁶⁹ This all has left a strong impression that al-Nahḍah “leaders have an authoritarian approach to ruling [the country].”⁷⁰ The most troubling fact is al-Nahḍah’s leadership view of Tunisia’s secular elite and intelligentsia, who are identified as the carriers of a culture inherited from the French colonial era.⁷¹ This indicates that for *Shaykh* Rashīd al-Ghannūshī the only indigenous Tunisian culture is Islamic, pure and simple. This romantic attempt to somehow create a more Islamic society in line with the original teachings of Islam sounds similar to the arguments made by Islamists in Turkey, Iran (i.e., Shari‘ati and Khomeīnī) and Pakistan (i.e., Mawḍūdī), who all dismissed the discourse of democracy as a European import and, therefore, incompatible with the collective Islamic heritage.

Ideological inconsistencies combined with poor governance performance, political amateurism, broken promises, dire economic situation, and increased insecurity diminished the popularity of Tunisia’s Islamists and forced them to end their ruling coalition by conceding power to a caretaker government in the beginning of 2014. Despite the consensual and inclusive process of Tunisia’s constitutional process, al-Nahḍah and its ruling-partners failed to nurture—beyond formal institutionalization—a democratic political awareness within Tunisian society. Democratic political awareness implies a social internalization of democratic core values and practices among Tunisian elites and citizens enabling them to overcome decades of authoritarianism entrenched within the Tunisian political system. The lack of democratic spirit among citizenry strongly contributed to the authoritarian resilience within the Tunisian political landscape. The resurgence of authoritarian temptations has been illustrated by some of the controversial decisions taken by the so-called “technocratic” government headed by Prime Minister Mahdi Jum‘ah. Chief among these is the arbitrary and unilateral decision related to the suspension, outside the legal process, of 157 associations as well as radio and television stations under the pretext of fighting terrorism and in contradiction with the provisions of the 2014 Constitution.⁷² The setback of al-Nahḍah in the legislative elections won by Nida’ Tūnis—mainly made up of elites more familiar with the country’s authoritarian past—in October 2014 did not only reflect public dissatisfaction with the Islamists but also highlights the weakness of democratic spirit

⁶⁹ According to a survey conducted and recently published by Pew Research Center, “Tunisians are extremely disappointed with conditions in their country and their economy. A broad majority (81%) says the nation is headed in the wrong direction. Just 13% think things are going well, down slightly from the 20% who felt that way in 2012.” It highlights that “the Tunisian public has lost faith in many of the main institutions of Tunisian society. Support for the Constituent Assembly, which is tasked with drafting a national constitution, is down 25 percentage points since last year and just one-in-five Tunisians now say it has a good influence on the country.” Moreover, the survey observes: “Large majorities of Tunisians say their economy is doing poorly (88%) and that they are dissatisfied with the direction of the country (81%). Optimism that the economy will improve in the coming year has declined from 75% in 2012 to just 50% today. Tunisians’ personal economic situation has also gotten worse over the past 12 months. In 2013, 42% say their personal finances are very or somewhat good, down from 56% last year.” For further details on this survey’s findings, see *Tunisians Disaffected with Leaders as Conditions Worsen* (Washington, D.C., September 12, 2013). Available at: <http://www.pewglobal.org/files/2013/09/Pew-Global-Attitudes-Project-Tunisia-Report-FINAL-9-12-131.pdf>, accessed March 31, 2015.

⁷⁰ Jeffrey Haynes, op. cit., 178.

⁷¹ Nouredine Jebnoun, “Tunisia at the Crossroads: An Interview with Sheikh Rachid al-Ghannouchi,” op. cit., 18.

⁷² Human Rights Watch, “Tunisia: Suspension of Association Arbitrary: 157 Associations Suspended Outside the Legal Process,” August 13, 2014.

among Tunisians. This trend was already “observed in the pre-legislative elections, which showed that Tunisians apparently have preference for a ‘leader with strong hand’ who is able to stabilize the country.”⁷³ In December 2014, the election of al-Bāji Qā'id al-Sabsi to the office of president—who claims Būrqiba's legacy—demonstrated that those who casted their ballots were less concerned about his patriarchal style and allegedly authoritarian penchant. Rather, their choice was more motivated by the stability syndrome—if not soft authoritarianism—over commitment to a democratic spirit undermined by decades of authoritarian legacy. This preference for stability could, also, be explained by the lack of trust in the nascent democratic system seen as the expression of socio-political uncertainties, which is the main feature of most of the transitional processes experienced around the world.

In Egypt, on the other hand, the crisis of confidence in the Muslim Brotherhood was palpable among many Egyptians before and after the presidential election in regard to the Islamists' willingness to be inclusive rather than exclusive. These Egyptians believe that “President Mursi did not resolutely affirm and re-affirm his commitment to democracy, with many believing that his pro-democracy statements were not genuine but only rhetorical,” which make them deeply “suspicious both of the political motivations of power [of the Muslim Brotherhood] as well as the capacity to rule according to democratic norms and values.”⁷⁴ Such suspicions were strongly advocated by Tariq Ali who argues:

The reality is that the Muslim Brotherhood, its supreme guide and its elected president were visionless sectarians, incapable of fulfilling the central demand of the uprising: “an end to the regime”. Mursi had no desire to unite the country by full-blooded democratization: his ambition was to be an Islamist Mubarak. His drawling indolence and utter indifference to the needs of the country saw his unpopularity rise by the day. It wasn't just urban liberals who turned against him. In mosque after mosque, I was told, and not by Sisi fans, ordinary believers stood up and challenged Brotherhood preachers after Friday prayers and *khutba*, accusing them of hypocrisy (a very strong condemnation in Islam) and of lining their own pockets.⁷⁵

The electoral victories of Islamists in the immediate aftermath of the Arab uprisings can be explained by the perceived antagonism of essentially secular regimes to Islam in a region colored by faith and religiosity as well as the particular dynamics of the authoritarian regimes that were overthrown. Islamists contend that the failures of the overthrown authoritarian regimes were a result of their failure to govern by Islamic principles. Thus came the mantra “Islam is the solution,” although this appears to offer just as little in terms of substantive policy proposals now as it did when current Islamist groups became prominent in the 1970s and 1980s. Nonetheless, due to the perceived antagonism of secular authoritarian regimes to Islam—a central argument in some Islamist polemics being that Western modernity imposed by “secular” regimes constitutes a direct threat to Islam—this slogan has had substantial appeal. In short, Islamists have succeeded in focusing political attention on the problem of identity,⁷⁶ and their exclusion from (or token representation in) the

⁷³ Nouredine Jebnoun, “Tunisia caught between fear and stability”, *Al Jazeera Opinion* (December 19, 2014). Available at: <http://www.aljazeera.com/indepth/opinion/2014/12/tunisia-caught-between-fear-st-201412181435377522.html>, accessed March 31, 2015.

⁷⁴ Jeffrey Haynes, op. cit., 181.

⁷⁵ Tariq Ali, “Diary” (2014) 36 (11) *London Review of Book* 39.

⁷⁶ François Burgat, “Islam and Islamist Politics in the Arab World: Old Theories and New Facts?” in Samer S. Shehata (ed), *Islamist Politics in the Middle East. Movements and Change* (Routledge, New York 2012) 25.

region's governments have given Islamists the ability to repeat the mantra "Islam is the solution," although it is yet to bear fruit in practice.

Despite the emptiness of their rhetoric, years of suppression of Islamists by security forces have given credence to the notion that "secular" authoritarian regimes were anti-Islamic, which in turn gives Islamists themselves a large degree of credibility. Despite their abstention from the first and most vulnerable stages of the Arab uprisings, the history of torture, killing, and exile of Islamists has given them an aura of legitimate resistance to despotic leaderships. Indeed, the claims of observers in the 1990s over the "failure" and "decline of Islamism"—read as fundamentalism—was nothing more than the illusion that autocratic regimes, such as Mubārak's Egypt, al-Qadhafi's Libya, Ben 'Ali's Tunisia, and Algeria's generals had successfully (and bloodily) contained and triumphed over their respective Islamist opponents.⁷⁷ In fact, years of repression had given the region's Islamist movements a prestige of legitimate opposition that served them well when those governments fell.

Despite their perceived legitimacy, the Islamists' electoral victories following the collapse of regimes like Ben 'Ali's, al-Qadhafi's, and Mubārak's have undermined the very dynamics that brought them to power. If this nascent democratization in some Arab countries survives, Islamists will have to compete with other political actors and offer real and practical solutions for governance.⁷⁸ The political priority of Islamic identity will become unsustainable and likely unsuitable as Islamist-led governments begin tackling problems like poverty, unemployment, and attracting foreign investment.⁷⁹ Moreover, Islamist politicians and their programs will be subject to critique by other political forces in future electoral contests, especially as the Islamists' aura of resistance to those countries' overthrown regimes fades into irrelevance.

A civil state in which Islam is the primary and official source of legislation and where Shari'ah is not applied but Islamists tend to govern—in short, a rough approximation of the Turkish model—could be a source of inspiration for countries experiencing transition, chief among them Tunisia. This nonsecular, nontheocratic system would challenge prevailing notions of political modernity due to the difficulty of placing it on the classical traditional-modern spectrum and would represent one of the "multiple [political] modernities" identified by John Voll.⁸⁰

V. CONCLUSION

Because of the new dynamics of the Arab states which have witnessed uprisings and largely free political discussion that are taking place within them, most observers believe that there is no future for the religious-oriented state in the countries of the Arab uprisings. The Arab movements for change were driven by other concerns—mostly economic—that Islamist movements can neither obscure nor ignore. Rather, they have to put these concerns in the center stage of their political agenda in order to build a less discriminating society with equal opportunity for all. Despite the uncertainty of the way ahead, the Arab uprisings'

⁷⁷ Olivier Roy, *L'échec de l'Islam politique* (Editions du Seuil, Paris 1992); Gilles Kepel, *Jihad: Expansion et déclin de l'islamisme* (Editions Gallimard, Paris 2000).

⁷⁸ Khaled Hroub, "Islamists and Power: End of Ideology" (2012) 18 (1) Palestine-Israel Journal 41.

⁷⁹ For an analysis of the rapid change in political Islam and Islamists' quick and pragmatic reconciliation with formerly demonized Western powers, see Khalil al-Anani, "Islamist Parties Post-Arab Spring" (2012) 17 (13) Mediterranean Politics 466.

⁸⁰ John Voll "Modern Movements in Islam" in Mehran Kamrava (ed), *Innovation in Islam: Traditions and Contributions* (University of California Press, Berkeley 2011) 213.

Islamist movements may represent an opportunity for the breakthrough in economic and social prosperity that the region's people so strongly desire. Furthermore, if Islamists come to govern in the near future, they will likely face two major challenges: On one hand, they need to counter ultraconservative and violent militants who are in the process of hijacking the hope of change across the region; on the other hand, they have to acknowledge the difficulty of controlling a largely hybrid state of public-private occult interests, entrenched elites, and external players who intertwine in revitalizing and perpetuating the agonizing pre-Arab uprisings order.

It is nevertheless imprudent to contend that the success of Islamist parties constitutes an opportunity for the civil state's realization in Arab countries. It can only be hoped that the democratic process, should it survive, will force Islamists to espouse a wide understanding of Islam that is in harmony with their constituencies' desire for development and progress—preconditions for allowing the countries' inhabitants act as true citizens. Future articulations of Islamism must be shaped and rationalized by different local contexts in which religion-based ideology should adapt to and reconcile with specific and multiple forms of political practice and realities. Whether or not this self-rationalization is one of many trajectories leading to so-called “post-Islamism,” “an Islamist ideological package characterized broadly by [a] monopoly of religious truth, exclusivism and emphasis on obligations” has no choice but to move “toward acknowledging ambiguity, multiplicity, inclusion and flexibility in principles and practice.”⁸¹

The Islamists' rise to power and, in particular, their responsibility for governing constitutes a challenge to their own continued leadership and not just one to current intellectuals and political elites. So long as the electoral process forces Islamists to address the needs of the polities they govern, there is no future for theocracy in the countries of the Arab uprisings. Indeed, if the Muslim Brotherhood's neoliberal economic orientation is any indication, the continuation of the overthrown regime's failed economic policies by Islamist governments in both Egypt and Tunisia and the lack of bureaucratic expertise have further discredited them and offered openings to other political forces. Therefore, banning Islamists from the political arena subsequent to the reinvigoration of authoritarian regimes, as is the case with the Egyptian Muslim Brotherhood, is not a valuable option. Egypt, as Rami Khouri observes, “has tried this kind of heavy-handed, one-party military rule and it was a catastrophe. Repeating it would only add imbecility to the attributes of the Egyptian governance system.”⁸²

On the one hand, the oppressive rationale that prevailed in Egypt's pre-January 25, 2011, is now in full motion under Sisi.⁸³ Egypt's new strong man has bestowed state institutions with an arsenal of liberticidal laws and decrees seeking to engulf the old authoritarianism with further legal framework. Seemingly, this rationalization of authoritarianism aims at better normalizing Mubārak's narrative of stability, securitization, and combatting terrorism over democratization, political freedom, and human rights. Interestingly, this reconfiguration of authoritarianism has been expanded to the public space that becomes a

⁸¹ Asef Bayat, “Post-Islamism at Large,” op. cit., 25.

⁸² Rami G. Khouri, “Eliminate the Brotherhood at your peril,” *The Daily Star* (September 25, 2013). Available at: <http://www.dailystar.com.lb/Opinion/Columnist/2013/Sep-25/232452-eliminate-the-brotherhood-at-your-peril.ashx#axzz35njmngvH>, accessed March 31, 2015.

⁸³ See, e.g., Human Rights Watch, “All According to Plan: The Rab'a Massacre and Mass Killings of Protestors in Egypt” (Washington, D.C., August 2014); Patrick Kingsley, “Egypt's hidden prison: ‘disappeared’ face torture in Azouli military jail,” *The Guardian* (June 22, 2014); Tom Stevenson, “Sisi's Way” (2015) 37 (4) London Review of Book 3.

high stake for the new-old regime in the post-July 3 coup. Rather than curtailing political space by only excluding and suppressing those who do not toe the regime's official line, the control has been extended to the spiritual realm where "religion is being used to promote subordination to the state [and nurture the regime's legitimacy]." ⁸⁴ Empowering the state's exclusive control over Islam in public spaces will continue to be one of the main priorities of Sisi's regime in order to remedy its lack of legitimacy and circumvent the Islamist religious discourse. Such an approach will likely fail, as the regime seems disinclined to contain its authoritarian instincts and "abandon [its] terrorist rhetoric, reach some kind of truce with Brotherhood supporters, and resuscitate Egypt's economy without exploiting a long-suffering working class." ⁸⁵

On the other hand, there is no doubt that the path ahead holds many political, economic, and ideological obstacles. First and foremost among them is some Islamists' exploitation of Islam for political gain. These Islamists claim Islam as a total system that can solve all problems without offering practical policy recommendations and while proclaiming their own religiosity in piety contests with other citizens. Both tendencies obstruct the development of the political system. Islamists' confusion of definitions and practices demands a move toward increased consciousness and enlightened self-criticism on their part. This does not seem to exist presently. Since the solution will not come from the Islamists themselves, the matter will be determined by free, vibrant, and dynamic political developments in which Islamists are forced to govern and compete with other parties and forces in elections. The likely alternative to this is that countries will plunge deeply into a perilous zero-sum game illustrated by a "double failure—the failure of the [Islamist] movements to resolve the conflict in their interest and the failure of their opponents to neutralize the movements and to terminate their influence." ⁸⁶ With all certainty, the Arab world's half-century legacy of authoritarianism persists and must be overcome if the democratic process is to draw the region out of the ideological quagmire into which political Islam has dragged it. The battle that lies ahead for Arab societies is no longer about Islamism versus secularism-nationalism. Rather, it is more about inclusiveness, national partnership, fundamental rights, and civil liberties, as well as citizenship and values of democracy. Ordinary Arab people tore down the wall of fear by removing autocratic and kleptocratic regimes, but they have to learn how to empower their own citizenship, exercise their political rights, and hold their legitimate government accountable in abiding by the rule of law and respecting their diversity. Only by adhering to these principles, will Arab citizens be able to assert themselves and regain control over the outcomes of their popular uprisings, which thus far have been confiscated by securitocracies and sectarianism.

⁸⁴ Patrick Kingsley, "Religion still leads the way in post-Morsi Egypt", *The Guardian* (September 18, 2014).

⁸⁵ Editorial, "Egyptian elections: full circle", *The Guardian* (May 29, 2014).

⁸⁶ Abdulwahhab El-Affendi, "Islamic Movements: Establishment, Significance and Contextual Realities" in *Islamic Movements: Impact Political Stability and the Arab World* (Emirates Center for Strategic Studies and Research, Abu Dhabi 2003) 51.

The Relationship between Constitutions, Politics, and Islam

A Comparative Analysis of the North African Countries

BAUDOUIN DUPRET

I. INTRODUCTION

Contemporary experiences of integrating Shariʿah in the legal body of nation-states took place in such a way that we can talk about disruption of the economy and the epistemology of Islamic normativity. Its overall balance, its fundamentals, and its morphology—or what we might call its grammar—have been transformed completely. This is true at a substantial level, where applicable norms are largely formulated through codification. This is also true at an institutional level, with the establishment of constitutional architectures dedicated to the separation of powers, the hierarchy of jurisdictions, the legislative principle, the popular representation, and the fundamental rights and freedoms, within which Shariʿah is deemed to be a reference framework rather than specific and directly applicable rules.

The use of certain terminology does not necessarily mean the use of the same language. It is thus seen that the vocabulary of Shariʿah is mobilized in different contexts, without any greater permeability between the argumentative logic of any register. This is not due to different levels of truth, but in fact it is due to the purposes toward which the people involved orient themselves in terms of these discursive activities. As a law, the Shariʿah is an invention of the nineteenth century. As a reference in the political register, it is a formulation of the second half of the twentieth century. However, as a constitutionalized source of legislation, it is an innovation of the last quarter of the twentieth century. But as an ethical paradigm autonomous from legal normativity, it is a current resurgence.

Shari'ah went through, to use Armando Salvatore's heuristic formula, a true implosion.¹ This has led, in terms of the positivist nineteenth-century logic, to the dissociation of normativity between law and ethics. Each of these realms became autonomous, at least in appearance, according to very specific terms. In the mid-twentieth century, the Islamic referent was marginalized in the political, ethical, or legal discourse. Then, under pressure exercised from national, regional, and international dynamics, Shari'ah began to gain more sphere, both from below—what might be called the Islamization of societies—and from above—it's comeback as a constitutional and political referent. This dynamic, however, is more variegated than it appears at first glance, as the advent of Islamic-conservative government did not necessarily mean the establishment of Shari'ah-centered political and constitutional systems.

II. IMPLOSION, ECLIPSE, AND COME-BACK IN POLITICS

Nowadays, what is called Shari'ah belongs primarily to morality, and the tensions observed in political and constitutional matters derive from complex relationship maintained in modern societies between politics, religion, law, and morality. In some former work, I talked about the invention of Islamic law, a phenomenon that is part of the political emergence of the nation-state and the corollary development of a positive legal system.² "As in Japan during the Meiji era, says Chibli Mallat, there was a need for clear, simple and complete codes that would address the most common legal transactions, and only the Napoleonic Code could provide the right necessary model".³

As Shari'ah is Islamic normativity, it may have ethical, religious, political, and legal dimensions—without necessarily making it a "law" in the current sense of the word. This composite nature is found torn apart by a tendency to the autonomization of each of these dimensions, due to, among others, the Islamic reform movement (*iṣlāḥ*). In Egypt, for instance, especially during the late nineteenth century, one observed at the same time the organization of a public sphere, the dynamics of codification of the law, and the emergence of a constitutional movement. This reorganization of the public sphere—which brought about the establishment of a state apparatus and the means with which it legally regulates its relationship with its citizens—led to the progressive fragmentation of Shari'ah between a legal framework, where it found itself both positivized and confined; and a public space where it acquired the place of a hegemonic reference built around a core that was characterized as authentic, civilizing, and normative.

The ambivalence of Shari'ah is reflected in the conception that people demanding Shari'ah have.⁴ It can sometimes be "the basis on which the law is based", sometimes "a life project", and sometimes even something else: "Islam is not limited and can never be reduced to mere laws", as an Egyptian lawyer told me in the 1990s.⁵ Thus, in general, Shari'ah is a

¹ Armando Salvatore, "La shari'a moderne en quête de droit: raison transcendante, métanorme publique et système juridique" (1998) 39 *Droit et Société* 293.

² Léon Buskens and Baudouin Dupret, "L'invention du droit musulman. Genèse et diffusion du positivisme juridique dans le contexte normatif islamique" in François Poullion et Jean-Claude Vatin (eds), *L'Orient créé par l'Orient* (Karthala, Paris 2011).

³ Chibli Mallat, "Islamic law, droit positif and codification: reflections on longue durée", speech held during a workshop on *Plurality of Norms and State Power from 18th to 20th Century* in Vienna 1997 organized by European Association for Middle Eastern Studies (EURAMES).

⁴ Baudouin Dupret, *Au nom de quel droit?* (Droit et Société, Recherches et Travaux du Réseau Européen Droit et Société à la Maison des Sciences de l'Homme, Série anthropologie, LGDJ, Paris 2000).

⁵ Baudouin Dupret (n 4).

reference, not a specific content, and it refers to the idea of an authentic tradition that a society would keep as the only legitimate one. As for the purpose of this reference, it varies depending on the many worldviews of the people.

Originally, pan-Arabism was not but a variant of nineteenth-century nationalism. The Arab idea was first expressed around the concept of Arab caliphate, as formulated by ‘Abd al-Rahmān al-Kawakibī (d. 1902) in the *Mother of Cities*, or by Rashīd Riḍā (d. 1935), in *The Caliphate*. We note, however, that the Arab argument was during all times combined with an Islamic affirmation. This trend was reflected in the doctrine of the Ba‘th, the Arab nationalist party par excellence. In his *Manifesto* of 1943, Michel ‘Aflaq (d. 1989) speaks of the “Arab Spirit” (*ruh ‘arabīyah*), “the irreducible essence” in which Islam is a fundamental component: “Islam is the vital impulse which revealed to the Arabs the forces residing in them and which made them known in the stage of history”. ‘Aflaq attempted to make a synthesis in which Islam is Arab as well as Arab is Muslim, in which Arabism is the body and Islam is the soul.

Nāṣr’s discourse, although less doctrinaire, is marked by the same characteristics. Islam is considered the easiest way to permeate the country in depth. However, Islam has also a global purpose. Thus, in an annex to the National Action Charter of 1962, a reference text of Nāṣrism, a Charter Report was published. The first chapter thereof was entitled “Religion and Society”. It aimed to reconcile those who held a “sociological perception of Islam” and the “defenders of a conformist conception”,⁶ as well as to conciliate, through ambiguous formula, modernity and the Islamic legacy. The content of this Islamic socialism coincided pretty much with the Muslim Brotherhood’s Islamic socialism: “It believes in God and His prophetic messages, in religious and moral values; it believes in the community [. . .] while respecting human dignity and individual liberty.” This shows, incidentally, that the opposition between the Muslim Brothers and Jamāl ‘Abd al-Nāṣr (d.1970) was more for a fight for power than an ideological opposition.

Algerian socialism was not devoid of any reference to Islam either, or even to early Islamism. The Association of Algerian Muslim Scholars, founded in 1931, had during independence a strong position. Its influence is materialized in the development of the doctrine of Islamic socialism, which was different from the Muslim Brotherhood’s. The early 1970s was marked by the strengthening of Islamic tone in public discourse, with the launch of the *Authenticity* magazine (*al-Aṣālah*). The magazine reflected the ambivalence of Algerian Islamism, both in and outside the state. The magazine actually symbolized both the instrumentalization of Islam by the leading team and the performance of the fundamentalist purpose by part of the elite. It was in the process of Arabization and the adoption of the Personal Status Code that such tone was fully expressed.⁷

It is therefore incorrect to claim that the Islamic referent disappeared from the scene in the first three quarters of the twentieth century. Nevertheless, it was subject to the overriding goal of building a nation-state. If one examines its constitutional translations in the Arab context, one observes the inclusion of the objective of “creating a unified Arab state” (Art. 1 of the Iraqi Constitution of 1970), but also the primacy of “defending the socialist gains, their consolidation and preservation” (Art. 59 of the Egyptian Constitution of 1971). In addition to that, and within the Arab context, the failure of nationalism, the 1967 defeat, the lack of freedom, and the impossible success of authoritarian policies of modernization were all factors that facilitated the emergence of a political Islamic vision. If the first phase of the twentieth century was marked by a translation

⁶ Statement by Michel Camau (personal communication).

⁷ Jean-Claude Vatin, “Chronique Algérie” (1976) 15 *Annuaire de l’Afrique du Nord* 305.

of the caliphate utopia to the Arab nation utopia, the second phase was however characterized, within the Islamist movement, by a return to the original utopia. This return was made possible by the failure of the nationalist culture to play a competitor role over that of religion, and therefore a role in enabling the development of ideologies as a counterweight to religion. At the same time, the return of such religious referent to the forefront was largely sponsored by the ruling regimes that had little difficulty in exploiting the ideological points of convergence such as the Unitarian utopia. Some Islamist movements have not hesitated to use the term *ba'th islāmī* (Islamic resurrection), while nationalists appropriated the term *ummah* (community), characterized as Arab for the occasion, in parallel to the *ummah islāmiyah*, the Islamic Community, to which all religious literature refers. The concept of social justice is one of those convergence points, as it is attested in Sayyid Quṭb's (d. 1966) writings, the rhetoric of the deprived people (*mustad'ifun*) in the Iranian revolution, or the socialist discourse of most Arab states in the 1960s. The multiple conjunctions of nationalism and Islamism allow us to realize how much the nationalist enterprise never intended to stand out from the Muslim anchorage of societies, but rather to find Islamic roots endorsing the advanced project, while taking the power away from the first proponents of this return to sources. The stumbling block is therefore not ideological, at least not in principle. The issue is more political. The denunciation of the illegitimacy of the existing powers, the indictment of authoritarian practices, the fight against nepotism and corruption, are all the constants of Islamism. The challenge was even greater for in-power regimes that secular forms of opposition had failed or were recuperated by the regimes. Their reactions varied between concessions and violence, intimidation and state Islamism. The last technique was to ensure the system stability that coercion failed to provide and to give it a legitimacy making, therefore, Islamist demands inoperative.

In fact, it is the dual status of ideological convergence of nationalism and Islamism, and the instrumental recovery of the Islamist rhetoric by in-power regimes that explains the inversely proportional size of the victory of Islamist groups in the rise of the so-called "Arab Spring", and the return to the use of Islam and Shari'ah repertoires. The resurgence of old partisan oppositions firmly grounded in political Islam was not surprising, if one wants to remember that the only organized opposition groups regarding authoritarian regimes had left the shores of Marxism and socialism and resorted to those of religious authenticity. But at the same time, on the ground of Islam, little features distinguished the regimes from their oppositions.

In Egypt, the heads of the National Democratic Party competed under the dome of the parliament to show their piety.⁸ In Algeria, several parties claiming Islamism were involved for years in government, which is also engaged in the construction of the largest mosque in the world. Sudan, in its part, has adopted a criminal Code labeled "Islamic". And one can hardly be more dogmatic than the Saudi monarchy. In a nutshell, the Islamic relevance had long been imposed in the public space to the point of becoming unavoidable; to the extent that it was no longer possible not to pay it tribute; and to the extent that it was not necessary to enter in an inflationary process regarding Islamic reference, since the most important thing had already been acquired as to the matter. In this regard, we can say that ideological Islam is dissolved in political Islam, that is to say, in the game of power and politics.

⁸ Baudouin Dupret and Jean-Noël Ferrié, *Délibérer sous la coupole. L'activité parlementaire dans les régimes autoritaires* (Presses de l'Institut français du Proche-Orient, Beirut 2014).

III. AN ESSENTIAL REFERENCE, A DIVERSIFIED CONTENT

The reference to the Shari'ah can be achieved in different ways, only some of which are political. In this latter case it means that one can resort to the Shari'ah in an institutional setting, in an electoral process, or in opposition demonstrations against the ruling power. These political uses rely upon a religious dimension which gives credibility to the action committed in the name of religion. This does not mean that religion and politics are combined; on the contrary, each one of them responds to multiple logics, which are sometimes convergent. Neither does this mean that the political use of religion is purely cynical, nor does it preclude any calculation of costs and benefits.

Hence, when a politician wants to pass, in the name of religion and his conviction, a law prohibiting the sale of alcohol, it is not only the effect of his will to apply the divine order; in fact, he also formulates a political position that is beneficial to him, since it corresponds, in his way of assessing the situation, to something that is expected by public opinion. He may predict popularity gain or even electoral gain. At the same time, this calculation is only possible if the reference system on which he bases his proposal is credible, that is to say, in an Islamic context, if the religious language is widely present, disseminated, and accepted. In this respect, there is no reason to exclude that he himself accepts this language game. We see that the religious reference belongs, in this case, to something other than politics and therefore cannot be reduced to that only. However, it also directly affects politics. In other words, the fact that he acts according to political calculation does not contradict his conviction of the rightness of his claim: We can desire power, struggle for a standard, and try to attain the first using the second.⁹ From this point of view, the political uses of the divine Law do not draw a Muslim conception of politics, but a natural way of making policy using an Islamic frame of reference. This reference frame functions ordinarily, since it refers a position to principles commonly agreed upon and therefore taken for granted. As self-evidence does not require to be demonstrated, this promotes argumentative economy and obliges the others to show a discursive alignment: In fact, it is not easy to publicly challenge what is recognized by many others. This does not mean that the content given to this common reference repertoire is shared by all, by far. All that people place behind a referent such as Shari'ah can be contrasted, and the consequences they derive from the invocation of the commonly accepted reference may be different and even contradictory.

One specific characteristic of the political use of Shari'ah lies in the prevailing consensus on the need to use it as a reference. At the same time, variations may be very important regarding its content. As it is almost impossible to withdraw from the necessity to refer to Shari'ah, the political actors anticipate positions that others might have adopted, preempt their argument, or prejudge their ends and intents. Political strategies are outlined that aim at forcing opponents to align to the prescribed register and thus reduce their room for maneuver. Yet, these strategies have a cost: Involving in the religious repertoire, one finds oneself in an argumentative framework that makes some debates more difficult than others, among other things, in the field of manners and freedoms. I think of issues related to equality of men and women, freedom of conscience, or liberalization of sex. Moreover, it is noted that it is the particular circumstances that give the Shari'ah register a specific content. The latter is not substantiated until it is invoked in specific situations. Thus, it is not possible

⁹ Jean-Noël Ferrié, "Usages politiques de la Charia" in Baudouin Dupret (ed), *La Charia aujourd'hui* (La Découverte, Paris 2012); see also Baudouin Dupret and Jean-Noël Ferrié, "Participer au pouvoir, c'est imposer la norme: sur l'affaire Abu Zayd (Égypte, 1992–1996)" (1997) 47 *Revue Française de Science Politique* 762.

to know in advance with certainty what will be the arguments and, most important, what will be said regarding diverse subjects such as loan interest, divorce by compensation, bio-medical ethics, restoration of virginity, homosexuality, alcohol sales, tourism, wearing the veil, apostasy, or blasphemy.

It is not that the content is opportunistically invented by cynical politicians, but there is an extremely wide range of possible solutions as to Islamic standard reference. It is thus a balance of political forces, backed by a moral vision of the world, which leads to one configuration rather than another. In other words, what varies is not the content of Shari'ah but the state of public opinion toward this content. "From this point of view, relying on divine Law in the course of a political action is first relying on a state of public opinion- at least as it is interpreted. This attitude is of course highly political. This is what politicians generally do. By the way, nothing is more natural, since it is the opinion course and variations that, at least, partially determine their future (if not more bluntly their career)".¹⁰ This political game is primarily that of conformism, out of which it is difficult for a political actor to stand without paying a heavy price. This conformism in today's Muslim majority societies goes through a conservative reference to Islam and its normativity, the Shari'ah. Certainly, everyone can make it appropriate for his own ends, but that still requires the acceptance of the obligatory track: Doing politics in a Muslim context means recognizing the primacy of the Islamic referent, be it purely symbolic.

IV. REFERENCE TO ISLAM AND THE DEVOLUTION OF POWER IN RELIGIOUS MATTERS

The term "Islamic law" has become unfit to designate both the law of a Muslim majority country and a range of mechanisms that do not belong to the continuity of doctrine (*fiqh*) but rather to techniques specific to contemporary law-drafting and constitutionalism. A particular phenomenon is actually observable, among others in the constitutions of the states with a Muslim majority. It is that of referencing to Islam, to Shari'ah, or to *fiqh*. It is no longer here the issue of codifying Islamic normativity, but most important, to refer contemporary legislators to this divine Law in order to inspire their works. Thus, there will be provisions making Islam the religion of the state, providing that the head of the state is a Muslim, or making the Islamic normativity the inspiration source of positive law.

With the transition movement initiated by the overthrow of the Tunisian regime in January 2011 and the beginning of the drafting of new constitutional texts, this issue has taken a new urgency, especially as there are Islamic-conservative political forces that have emerged as winners of the elections. The concern with political consensus often seems to have prevailed over the desire of religious hegemony, and ideological pragmatism to have prevailed over the utopian ideal. One of the reasons helping to explain the ease with which this pragmatic trend has emerged is doubtlessly due to the plasticity of the reference that the Shari'ah constitutes and its ability to function as a flexible resource rather than as a set of binding rules. Many are the state constitutions in predominantly Muslim population that refer to Islam. This is illustrated, generally, at four levels: the preamble, the determination of a state religion, the principle of conformity of the legislation to the principles of the religion, and the conditions to be met by the head of the state. The inclusion of Islam as the state religion is an ancient practice that dates back to the 1950s.¹¹ Some constitutions

¹⁰ Jean-Noël Ferrié (n 9).

¹¹ Although countries such as Indonesia do not do so; and others, such as Turkey, emphasize the secular character of the state.

reserve high positions to Muslims, and devolution to the throne in monarchies is through Muslim geniture. Many constitutions also limit the scope of certain rights and freedoms in respect of Shari'ah, as they affirm the centrality of the family formed around the religion and the Islamic values. Numerous basic texts consecrated the normative value of Shari'ah, principles of Shari'ah, or Islamic *fiqh*, but they differ on the place given to it. Three specific constitutional experiences will allow us to explore the contrasting nature of reference to Islam.

A. Egypt

In Egypt, the Constitution of September 11, 1971, marks a break, in the sense that it introduces, for the first time, a reference to the normativity of Islam in the institutional system by providing in Art. 2 that "the principles of Islamic Shari'ah are a main source of legislation." On May 22, 1980, Art. 2 was amended and has stated since that time that "the principles of Islamic Shari'ah are the main source of legislation." For the special commission in charge of preparing the constitutional reform, the new formulation aimed to "compel the legislator to make use of the commands of the Shari'ah, to the exclusion of any other source, to discover what it looks for. If it finds no explicit command, it may, by deduction from the sources of interpretation (*ijtihad*) of Shari'ah find out the rules to be followed and that do not violate Shari'ah's fundamentals and general principles."

On the basis of this article, many constitutional complaints have been brought before the Supreme Constitutional Court (SCC), the case law of which is of particular interest. Initially, the court had the tendency, when it was asked to review the constitutional character of laws and decrees, to avoid engaging in the field of interpretation of Shari'ah. Thus in 1985 the SCC canceled the decree Jihān (which borrowed the name of the late President Anwar Sādāt's wife, who inspired it), reforming personal status,¹² not for its alleged contravention to Art. 2 as recently amended, but for the purely technical reason that there was no need to use the exceptional powers granted by the constitution to the President of the Republic in order to change a text dating back to 1929 and not modified since then. In another decision taken on the same day, the SCC formulated a principle that constitutes a precedent. In the origin of the lawsuit, there was condemnation of the Ministry of *Awqāf* (religious endowments) and the Faculty of Medicine at the University of al-Azhar to pay a large debt that had added default interest as provided by the Civil Code. This article was the subject of a case of unconstitutionality, and the SCC then established the principle of the nonretroactivity of Art. 2: "The obligation of the legislature to adopt the principles of the Shari'ah as the main source of legislation [...] extends only to legal texts promulgated after the date of its entry into force [...] Concerning texts that preceded that date, they cannot for that reason alone be subject to this obligation, and are thereby out of the control of constitutionality." The SCC added that the application of Shari'ah as if it were codified rules would risk conflict and destabilization of the legal order.

However, over time, the possibilities to sue on unconstitutionality of texts subsequent to this reform have increased. Thus, in a judgment of May 15, 1993, the court was required to take a stance in the field of Shari'ah and its interpretation. It explained what is meant by Shari'ah and what, in this context, can be a work of interpretation. It was the case of a divorced woman who had filed a petition for custody of her son and the right to stay with him in the former marital home, according to law No. 100 of 1985. She also claimed the right to receive compensation in an amount equivalent to ten years

¹² This law—among other things—granted the first wife whose husband remarries an almost automatic right to divorce.

of alimony. On the basis of the noncompliance of these provisions to the Shari'ah, the ex-husband had gone to the SCC. In its decision, the court drew a distinction between Islamic absolute and relative principles. For it, only the principles "whose origin and meaning are absolute", that is to say, the principles that represent unquestionable Islamic norms, whatever their source is (Qur'an, Sunnah, consensus, analogy) or their significance, must be applied without margin for interpretation. However, there is also, for the SCC, a set of rules considered as relative, which are subject to interpretation, are evolving in time and space, are likely to be different in interpretation, and can adapt to the changing needs of the society.

As Nathalie Bernard-Maugiron noted: "The Supreme Constitutional Court gave great freedom to the authorities of the state to adapt the rules relating to Shari'ah to the evolution of the society". Indeed, it is the legislator's responsibility to proceed to the interpretation of Shari'ah principles by referring to one or the other doctrinal school, without being bound by previous opinions of jurists. The only conditions which apply to it are to make rules consistent with the current social conditions, based on the general principles of Islamic law and without violating an absolute principle. If it recognized, the legal value of the principles of the Islamic Shari'ah and the need for the legislature to meet those "whose origin and meaning are absolute, it is paradoxically to better limit its effects. The court declared to be bound by the norms derived from the Islamic Shari'ah, but reserved itself the right to determine the content."¹³

A new constitution was promulgated in Egypt on December 26, 2012, following the 2011 revolution and the Muslim Brotherhood's electoral successes. It fully duplicates Art. 2, while adding a new provision, Art. 219, which states that "the principles of Islamic Shari'ah include its general evidence and its fundamental and doctrinal rules, as well as its sources considered by schools of the People of tradition and consensus (*ahl al-sunnah wa-'l-jamā'ah*)."

The convoluted wording of this article and its insertion at the end of the constitutional text show the precipitate adoption of the Egyptian Constitution, but they also reflect the desire to limit the power of the SCC, instead of the court defining itself, the terms "Shari'ah principles" formulated in Art. 2. These principles are expressed in an all-embracing manner: The term "general evidence" (*adillah kulliyah*) refers to everything that comes from the Revelation; that of "fundamental rules" (*qawā'id uṣūliyah*) refers to the science of the foundations of doctrine (*ilm uṣūl al-fiqh*); that of "doctrinal rules" (*qawā'id fiqhīyah*) refers to Islamic doctrine, fiqh; that of the "sources taken into consideration by schools" refers to everything on which the Sunni schools of thought are based. In other words, the principles of Shari'ah correspond to all sources of Islamic normativity. Nothing is said, however, about the constraint that these principles have on the Egyptian legislator and hence on the SCC when it is required to check the compliance to them. More than ever, the Shari'ah imposes itself as a reference register, not as a substantial and compelling content.

With the military coup of July 2013, the 2012 Constitution was suspended. The new regime, which ousted the Muslim Brotherhood, appointed a commission of experts in charge of presenting propositions of amendment. A new constitutional text was drafted, which again duplicates Art. 2 as amended in 1980, but discards the controversial Art. 219. The new constitution was approved by referendum in January 2014.

¹³ Nathalie Bernard-Maugiron, "La place de la charia dans la hiérarchie des normes" in Baudouin Dupret (ed) (n 9).

B. Tunisia

Contrary to Egypt, there is no provision in Tunisia making the Shari‘ah a formal source of legislation. In the 1959 Constitution, Art. 1 provided: “Tunisia is a free, independent and sovereign state; its religion is Islam, its language is Arabic and its regime is the Republic”. This formulation was adopted under the initiative of Tunisia’s first president, Habib Bourguiba (Ḥabīb Būrqiḇa), in order to overcome the differences which had appeared within the first constituent assembly, although it was monopolized by the members of the National Front (i.e., the Neo-Destour Party and its allies). Together with the constitution’s preamble, which invokes Islam, it created interstices in which some representatives of the conservative forces (often supporters of Sāliḥ Ben Yūssef) within the judiciary.¹⁴

Some judges used this opportunity to give Shari‘ah the status of a subsidiary source in case the law is silent or obscure, especially in the field of personal status. In the rulings which make reference to it, it becomes “the source” of personal status, although it is only one of its many sources in principle. In other domains of civil law, some judges also used Shari‘ah by invoking its being one of the material sources of the code of obligations and contracts. Tunisian jurisprudence questioned for a long time the judges’ rights to elevate Shari‘ah to the status of a subsidiary source. For those who were in favor of it, the issue was to know the right interpretation of Shari‘ah, while for those who were against it, the question was to imagine a means to expel it from the positive legal order.¹⁵

Of course these tensions came back to the surface after the ousting of President Ben ‘Alī and his clique in 2011. The place of Islam and Shari‘ah was the object of tense debates. One of the many paradoxes was the polarization of the political scene around the opposition Islamists versus Liberals, while there was little reference in the official texts to Islam and Shari‘ah. Under the pressure of its opponents and because of its political pragmatism, the Islamist party al-Nahḍah, which had led the government since the 2011 elections, renounced making any mention of Shari‘ah in the constitution. It does not mean, however, that al-Nahḍah renounced its project of the Islamic moralization of the society, but as in Erdoğan’s Turkey, it prefers to substitute to symbolic moves a more gradualist approach using the *de facto* acceptance of Shari‘ah as a source of legislation and case law. As Rashīd al-Ghannūshī put it in a press conference on March 26, 2012: “nearly 90% of our legislation finds its origins or sources in Shari‘ah”. All this shows the importance of Islam as a resource and constraint in the inchoative structuring of the political field.¹⁶

After much turbulence, a new constitution was adopted in January 2014. It states in its Art. 1 that Islam is the religion of the state. Art. 6 provides: “The state is the guardian of religion, the protector of the freedom of belief, conscience and religious practice, the guarantor of the neutrality of mosques and of cult places against partisan uses. The state is committed to the spreading of the principles of equity and of tolerance, to the protection of the sacred, and to the forbidding of any blow against it. It is also committed to the forbidding of apostasy accusations and of the inducement to hatred and violence”. Thus, Shari‘ah is not given the role of a legislative referent, but this does not mean that Islam cannot be legally mobilized, since it is the religion of a state which is required to protect the sacred. It

¹⁴ Yadh Ben Achour, “Statut de la femme et État de droit au Maghreb” in Yadh Ben Achour, Jean-Robert Henry, and Rostane Mehdi (eds), *Le débat juridique au Maghreb. De l’étatisme à l’État de droit. Études en l’honneur de Ahmed Mahiou* (Iremam, Paris 2009).

¹⁵ Monia Ben Jemia, “Le juge tunisien et la légitimation de l’ordre juridique positif par la charia” in Baudouin Dupret (ed) (n 9).

¹⁶ Statement by Michel Camau (personal communication).

is the political climate that will determine the interpretation given to provisions which are not consensual.

C. Morocco

The case of Morocco also is interesting, regarding the reference to Islam and the attribution of religious competences. The constitutional history of the country is rich. After the authoritarian constitution of 1970, there was the 1972 Constitution, which reintroduced the parties in politics after the king was convinced, following two attempted coups, that he could not rely only on the security apparatus. A major reform was made in 1996, which prepared the consensual 1998 alternation and laid the bases of succession. The Constitution of 2011 is in line with the reformist trend, accelerated by the Moroccan version of the Arab Spring, which the power has seized as an opportunity to engage in a consensual political remodeling. The constitution has three essential features: delineation of a wide scope of action of the head of government who has the necessary means to carry out its task and, above all, to control the parliamentary majority supporting it; the affirmation of the arbitration and influence powers of the sovereign; the establishment of independent bodies responsible for the protection and development of rights. This separation is aimed less at separating the executive, the legislative, and the judiciary than to define the spheres of influence of three functional blocks.

If it comes to provisions relating to religion, we note the distinction between the Islamic frame of reference and attribution of powers in religious matters. The reference to Islam in the Moroccan case is both prolific and nonimplicative. Art. 3 states that it is “the religion of the state,” while recognizing “the free exercise of religion.” Although freedom of conscience is not recognized in the constitution—despite its inclusion in an earlier draft—Art. 25 states that there “are guaranteed freedoms of thought, opinion and expression in all its forms.”

Unlike the technique of limiting the scope of the provision by reference to the law—which draws its limits or affects its application—this text establishes an inviolable principle. Thus, we see that the predominance of Islam is not coupled with a reference to Islamic normativity (Shari‘ah or *fiqh*). Islam, the religion of the state, is primarily a national frame of reference. The text reads, in fact, that in its “moderate version” the “Islamic religion” is one of the unifying elements of the state, with national unity, territorial integrity, and the one and indivisible identity of the nation (Art. 1). The articles of the constitution that refer to Islam almost always emphasize the principles of tolerance and openness, and freedom of worship. What is characteristic of the Moroccan constitutional system is, unlike situations where the religious legitimacy of the head of state is lacking, the superfluous nature of the identification of the Islamic normativity as a legal reference. The Constitution of 2011 is no exception to this constant.¹⁷

The new constitution differs from previous texts in the dissociation that occurs between the functions of the king as “Head of State, the supreme representative, symbol of the unity of the nation, guarantor of the perpetuation and the continuity of the State and Supreme Referee between its institutions” (Art. 42); and the king as “Commander of the Faithful” (*amir al-mu‘minin*). Art. 41 states:

The King, Commander of the Faithful, ensures respect for Islam. He guarantees the free exercise of religion. He chairs the Higher Council of ‘*Ulamā*’ (*Oulema*), responsible for

¹⁷ Note also Art. 175 of the constitution: “No review can be on the provisions relating to the Muslim religion, the monarchical form of the state, the democratic choice of the nation or the achievements in matters of freedoms and fundamental rights stated in this Constitution.”

the study of questions submitted to it. The Council is the only body empowered to give religious consultations (*fatāwā*) officially approved on matters referred to it and that, based on the principles and precepts of Islam tolerant designs. The powers, composition and procedures of the Council are set by *ḍahīr*. The king exercises by *ḍahāʾir* religious prerogatives inherent to the institution of the commander of the believers conferred exclusively by this article.

In other words, the constitution distinguishes the two “bodies” of the king and seeks to reduce the possibility of confusing the powers of the one with the other. In the course of a development that, as Hassan Rachik underlines, marks the secularization of Sultanic function that began with the establishment of the Protectorate and was pursued by the nationalist movement, this allows us to imagine the long term, a deepening demarcation of the two functions, where the executive role of the head of the state always becomes even more a role of arbitration, while his role as the supreme religious authority would be exercised in a strong and extensive way.¹⁸

For now, however, it is in an exclusive manner that the king exercises the powers of commandery (*imārah*) of believers. The differentiated devolution of royal powers is accompanied by a maximum definition of his powers in the field of religious regulation. The question, then, is to know what exactly the commandery of the believers is. It is not the subject of a list either illustrative or exhaustive, listing the powers that are related to it. We can talk in this regard of a subsidiarity principle: Everything that is not explicitly outside religion is likely to be attached to it by the will of the commander of the faithful. Recent history has provided an example of this type of connection, when the king committed himself to the reform of the family code (*mudawwanat al-usrah*). The regulation of this legal domain does not strictly belong to the realm of religion, but it is under the umbrella of commander of the believers that Muḥammad VI took stance. One can imagine a number of areas where the same mechanism would be activated, and neither the legislative nor the executive, nor the Constitutional Court can much oppose it: freedom of conscience, abortion, death penalty, heritage, public organization of fasting in Ramaḍān, legality of extramarital sexual relations, Islamic finance, etc.

The Moroccan system is unique in that it is able to narrow the normative field of Shariʿah. As noted by Mohamed Mouaqit, it operates in a way inversely proportional to the centrality of the commandery of the believers. Where, as in Morocco, the symbolism of the commandery is constitutionally strong, the normativity of Shariʿah is less relevant politically, “as if the strength of the former had a compensatory effect on the weakness of the latter.”

Morocco is a case of overdetermination of the monarchical order rather than Shariʿah. The power of the king enhances or undermines the normativity of it as he wants to take advantage of or, conversely, contain it. When it comes to nationalize the legal order through the Islamizing of its sources or to defeat the leftist political forces, the trend is that of an opportunistic exploitation of this resource. On the contrary, when it comes to stem the Islamist surge, the trend is to establish limits on the normativity of Shariʿah through the use of the Islamic commandery.¹⁹

¹⁸ Hassan Rachik, “Légitimité politique et sacralité” working paper presented at a conference organized by Fondation Bouabid (2012), available at https://www.youtube.com/watch?v=EZG4xENiS_c&feature=youtu.be, accessed April 23, 2015.

¹⁹ Mohamed Mouaqit, “Marginalité de la charia et centralité de la Commanderie des croyants: le cas paradoxal du Maroc” in Baudouin Dupret (ed) (n 9).

V. CONCLUSION: SHARĪ'AH AS AN IDEOLOGY

We know that religions change, however unsettling these thoughts for those who are attached to permanence. This applies to Islam, which is not a “nomocracy” that would be irreducibly frozen in its past. How religious and political spheres are articulated affects very directly the form of discourses legitimizing authority. They oscillate between ideology and utopia. While it is difficult to identify a political, constitutional, or moral truth from the sources of Islamic normativity, it is equally clear that people, when they refer to a foundational past and interpret it, participate in the recreation of their tradition. In doing so, they feed on utopias. When these utopias are anchored again in the political and social reality, and take a concrete form in it, they become ideologies. It is not absurd to think that Sharī'ah is today confirmed in this function, especially in the context of accession to power of Islamic-conservative forces.

By ideology, this author, following Paul Ricoeur, refers to this set of shared representations, in a given society, transformed into action. These representations are both moral and normative. When they are projected into the political arena, these value-ideas often acquire an unquestionable status. This is what Jean-Noël Ferrié calls an effect of negative solidarity.²⁰ In their development, political ideas ground themselves on what makes sense in a given context, in a movement of retrieval that allows them to add the weight of normativity while remaining free enough to give it a new content. From this process of ideological sedimentation emerge new rationalizations. Political discourse claims then to express—when in fact it creates—what everyone is supposed to know, thereby producing metaphors and a sense of belonging, continuity, and consistency. Whatever the degree of innovation, the ideological discourse constantly reaffirms its roots in preexisting and deep moral ties, which can project a very personal version of reality in the world of public consensus and, at the same time, naturalize its authority.

Islamic normativity is in the process of being integrated in the political and constitutional but also moral and social domains. Sharī'ah, as it combines an understanding of the world and a set of values, and as long as it is represented as such, tends to be particularly usable in ideological terms. Sharī'ah has become somehow consubstantial with the public and political life, in the context of predominantly Muslim societies. Most protagonists of politics try to impose their representation of the Sharī'ah and their use of it to the public as if it were self-evident. Views on its contents remain very diverse, but it has become difficult in the contemporary Muslim world to position outside the space it defines. It is certainly only a framework, but it is the framework of a sieve through which all discourse seems to have to go.

²⁰ Jean-Noël Ferrié, *Le Régime de la civilité. Public et réislamisation en Égypte* (CNRS-Editions, Paris 2004).

Contesting Islamic Constitutionalism after the Arab Spring

Islam in Egypt's Post-Mubārak Constitutions

NATHAN J. BROWN AND CLARK B. LOMBARDI

Since 1971, Egypt's constitutions have contained provisions defining the role of Islam in the constitutional order. After the fall of President Ḥusnī Mubārak, the nature of these provisions underwent changes in response to extremely contentious national debates.

Egypt's 1971 Constitution defined the role of Islam in fairly minimal terms. As initially drafted, Article 2 of that constitution explained nebulously that that "the principles of the Islamic Shari'ah are a chief source of legislation" without defining what "the principles of the Islamic Shari'ah" are or what it means to be "a chief source of legislation". In 1980, the constitution was amended to make Islamic law "the chief source of legislation". This change clearly strengthened the role of Islamic principles but still did not explain exactly what they were, or what role precisely they would play in the legal system. Religion was mentioned in other places as well, but the formulations generally seemed symbolic and without clear meaning (such as defining Islam as the state religion).¹

A reader of the first post-Mubārak constitution, promulgated at the close of 2012, would notice some significant developments. Although the 2012 Constitution continued to include as its Article 2 a provision declaring the principles of the Islamic Shari'ah to be "the chief source of Egyptian legislation", other provisions seemed quite different. Taken

¹ There was one mention that was far more specific, but its formulation was too convoluted to have clear meaning. Art: 11 provided: "The state guarantees harmony between the duties of a woman toward the family and her work in the society, [as well as] her equality with men in the fields of political, social, cultural, economic life without violating the rulings of the Islamic Shari'ah."

together, the changes suggested that the role of Islam in the state was changing. For example, the 1971 Constitution had included in the body of the constitution a gender equality provision. The 2012 Constitution did not. (Instead, a statement of gender equality had been moved without explanation to the unenforceable preamble.) In general, the number of conservative and paternalistic provisions increased. Furthermore, the 2012 Constitution contained some startling and entirely new provisions. To begin, our reader would likely be totally flummoxed by Article 219. This new provision defined the principles of the Islamic Shari'ah, using technical terms from the Islamic legal tradition that are generally not found outside of scholarly circles. No Muslim country had ever enacted a constitutional provision anything like this. She might also pause at Article 4, which makes an unprecedented constitutional promise that the ancient mosque university of Al-Azhar will be independent and consulted in matters of Islamic law.

If the same reader turned to the second post-Mubarak constitution, issued in 2014 after the overthrow of Muḥammad Mursī, she would immediately notice changes suggesting that the pendulum was swinging back largely to where it had been under the 1971 Constitution. The 2014 Constitution removed Article 219, scaled back the provision on Al-Azhar, and placed gender equality back in the main body of the document. Nevertheless, things were not exactly the same as they were. The 2014 Constitution contained mysterious language in the preamble declaring that those who want to understand what the constitution means by “the principles of the Islamic Shari'ah” must look to the opinions issued by Egypt's Supreme Constitutional Court during the Mubarak era, and it even contained a footnote directing all readers to the texts in which the opinions are recorded. In so doing, it makes no mention of the fact that these opinions had been developed by a court created by a regime overthrown by the popular uprising in 2011, and it never explains why contemporary interpreters of Islamic law are being bound to respect doctrines developed under the repudiated *ancien régime*.

How did these different provisions regarding Islam get into Egypt's constitutions? What accounts for the changes in the way that these constitutions define “the principles of Islamic law” and allocate authority for interpreting it? What impact did the changes have in the day-to-day lives of Egyptians? To answer these questions, one needs to draw upon both Islamic intellectual history and modern Egyptian history.

In the last quarter of the twentieth century, most Egyptians appeared to grow comfortable, in the abstract, with the political principle that their government should be constrained to enact only laws consistent with Islamic Shari'ah. Nevertheless, even as this happened, important political factions came to favor very different methods of interpreting Islamic law. The Islamic provisions found in any of Egypt's constitutions from 1971 through the present are the result of bargains made at particular points in time among multiple groups, each of whom is vested in a very different understanding of Islam. By studying the wording adopted in 1971, 1980 (in amending the 1971 language), 2012, and 2014, we can tell which of the groups had the greatest bargaining power. In examining the way in which these provisions have been interpreted, we can see that wording does not always have the effects that the drafters expected. A study of Islam in Egypt's post-Mubarak constitutions reveals that Islam's role in the Egyptian system continues to be contested and evolve; the attempt to draw on eternal religious truths leads to surprising dynamism.

I. BACKGROUND: CLASSICAL AND MODERN ISLAMIC LEGAL THEORY

Islamic scriptures reveal unambiguously that God has established a moral code. Those who act in accordance with it will be rewarded after their death. Those who violate it will be punished after death. The scriptures are far less clear about the specifics of what this code

requires, and over the course of history, Muslims have debated how best to discover God's moral law.²

A. Islamic Law before Modern Times: The Formation of a Sunni Consensus and Elaboration of Traditional Sunni Law

Several generations after the death of the Prophet Muḥammad in 632, the group of Muslims who would come to be known as "Sunni Muslims" came to a general consensus about how scholars could best develop an understanding of God's command and also of how state should develop law that helped facilitate Muslim's attempts to live according to God's law. They agreed that the job of interpreting God's moral command should be entrusted to a special class of legal scholars. Individuals would have to refer questions about God's law to certified members of the scholarly class. Rulers were obliged to consult with them to ensure that the laws they imposed in their realm did not interfere with Muslims' ability to act in accordance with God's law.

The classical Sunni jurists were trained in guild-like organizations called *madhāhib* (sing. *madhhab*). While there were once many *madhāhib*, the number declined over time until four came to dominate. Until the modern era, aspiring Sunni legal scholars were expected to align themselves with one of the four *madhāhib*. They would learn from master scholars within their chosen *madhhab* the proper Sunni method of interpreting God's law. This method required them to have a command of scripture, logic, and the evolving precedents of their *madhhab*.

1. To begin, scholars had to have command of the scriptures and exegetical skills to identify God's command. Thus, they needed to know the Qur'ān, the *ḥadīth* literature and the records of scholarly consensus and also skills in logical reasoning. Later jurists would describe these three scriptural sources of knowledge about God's law and the ability to reason logically as *al-adillāt al-kulliyah*.³
2. Jurists also had to be familiar with the texts that explained the proper method of deriving law. These texts were known collectively as the *uṣūl al-fiqh* literature.
3. Jurists also had to learn the precedents of their guild. Jurists were generally not supposed to interpret scripture or expand upon it entirely on their own. Scholars were taught to consider the precedents laid down over the years by the great scholars of their guild/school. Other than a handful of the very highest scholars, all Muslims had to work within the confines of their *madhhab*. They were expected to ensure that their rules were consistent with the reservoir of precedents developed by the founders of the *madhhab* and added to over the years by the great sages of a generation. They thus had to be familiar with several types of literature that recorded the *madhhab*'s established understanding of God's law, literature that collectively was known as the *fiqh* literature.

Within the *fiqh* literature some texts provide rules that scholars in the *madhhab* were axiomatically to accept as part of God's law. For example, all *madhāhib* taught

² For an overview of the history of classical Sunni Islamic legal theories, see, e.g., Aaron Zysow, *The Economy of Certainty* (PhD, Harvard University, 1984); Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press, Cambridge 1997); Bernard Weiss, *The Spirit of Islamic Law* (University of Georgia Press, Athens, US 1998); Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, Cambridge 2001); Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt* (Brill, Leiden 2006). The description of classical theory draws upon all of these works.

³ Our thanks to Mohammed Fadel for his insights into the later juristic discussions of the *al-adillāt al-kulliyah*.

that “God has forbidden fornication.” If a scholar initially concluded that the scripture permitted fornication, he would have to check his conclusion against the *fiqh* literature, and would ultimately set his opinion aside on the grounds that it was contrary to rules established in the *fiqh* literature of his school.⁴

The *fiqh* literature also included a second type of text, the so-called *al-qawā'id al-fiqhiyya* literature which elaborated general principles that a jurist would need to bear in mind as he elaborated the law.⁵ For example, all the *madhāhib* recognized that the scriptures revealed a general principle that “harm is to be avoided” and jurists were expected to always take care when interpreting God’s command, to avoid interpretations that would require Muslims to harm themselves or harm each other. Similarly, scholars identified certain social benefits that God wanted his subjects to enjoy, including religion, life, reason, wealth, and children. When deciding which of two possible legal rulings was correct, jurists were supposed to avoid rules that would inappropriately prevent Muslims from enjoying these “goals of the law” (*maqāṣid al-sharī'ah*).⁶

Using these texts and techniques, classically trained scholars issued legal opinions about the moral correctness of actions. The opinions of well-known scholars were collected and debated by scholars within his *madhhab*. If consensus developed that a particular opinion was correct, that opinion would be recorded in that *madhhab*’s books of *fiqh*. Inevitably, over time, the *madhāhib* developed different interpretations of God’s law, with the scholars of one *madhhab* teaching that God forbade a certain act even while scholars in another held the act to be morally blameless. Recognizing each other’s interpretive approach as reasonable, medieval Sunni scholars taught that it was impossible to know with certainty which of the competing interpretations of God’s moral command was correct. As they saw it, competing, “mutually orthodox” understandings of God’s law could coexist. The willingness to accept multiple interpretations of God’s law was a distinguishing feature of Sunni Islamic thought, and it posed conundrums. If there was doubt about how God wanted people to act, were most Muslims doomed to go to hell? Was it not impossible for rulers to know with any confidence that their state laws were permitting Muslims to act in accordance with God’s law? Eventually, most Sunni thinkers in the Middle East accepted the following answers.⁷

First, God had vested rulers with considerable authority to select one *madhhab*’s interpretation of the law as the official interpretation, and even, under certain circumstances to impose rules that are not drawn from the teachings of any *madhhab*. The ruler had the

⁴ For a description of the role that the *fiqh* literature played in establishing precedents, see generally Hallaq, *Authority, Continuity and Change in Islamic Law* (n 2) and Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Brill, Leiden 1996).

⁵ While the *qawā'id al-fiqhiyya* have received less attention from historians of Islam than other types of classical Islamic legal literature, new attention is being focused. See, for example, Hasim Kamali, “Legal Maxims and Other Genres of Literature in Islamic Jurisprudence” (2006) 20 *Arab Law Quarterly* 77; Fawzy Elgariani, *Al-qawā'id Al-fiqhiyyah (Islamic Legal Maxims): Concept, Functions, History, Classifications and Application to Contemporary Medical Issues* (PhD, University of Exeter, Exeter 2012); Intisar Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge University Press, Cambridge 2014).

⁶ On the *maqāṣid al-sharī'ah*, see Hallaq, *A History of Islamic Legal Theories* (n 2) 89–90, 164–187; Zysow (n 2) 335–402.

⁷ Compare Frank E. Vogel, “Siyāsa: (3) In the sense of *siyāsah shar'iyah*” in *Encyclopedia of Islam* 2 (vol. 9 Brill, Leiden 1997), citing al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah* (Beirut: 1410/1990) 148–170, 160, 361–363; Mohammed Fadel, *Adjudication in the Mālikī Madhhab: A Study of Legal Process in Medieval Islamic Law* (PhD, University of Chicago, 1995); Lombardi (n 2) 47–58.

power to create any law that met two criteria. The first criterion prohibited to command Muslims to sin. For reasons that will become clear below, this means as a practical matter that rulers were not allowed to command Muslims to act in a way that all four *madhāhib* agreed on as being forbidden. The second criterion in question implied that the law regulated not to contravene the public interest—which means that it should not unnecessarily interfere with the “goals of the law”. Any regulation that complied with these two criteria was legitimate. Subjects were morally required to obey them.

Second, on issues that were not regulated by the state, each Sunni Muslim was expected to choose one of the competing *madhāhib* as personal school. When deciding how to act, the Sunni Muslim should seek guidance from jurists trained by that guild/school and act in accordance with the teachings of that *madhhab*. God would then reward the person for making a good faith effort to follow God’s law.⁸ In cases where the state regulated, however, the situation was different. In short, according to Sunni legal and political theory, Muslim life was to be regulated by multiple sets of norms. Muslims had to obey any rules that were established by the ruler within the boundaries allowed him by the *madhhab*’s interpretation of God’s law. In those areas of life where the state had not bothered to regulate, individual Muslims would select for themselves a *madhhab* and act in accordance with its commands.

B. Modernity and the Collapse of the Sunni Consensus

In the nineteenth and twentieth centuries, a number of social changes led Muslims throughout the world to question some medieval assumptions about Islamic law. For example, in Egypt, as in many other countries governments began to open schools that were not controlled by classically trained scholars, and printing presses allowed thinkers with radical ideas to distribute new ideas more quickly.⁹ A new literate class of intellectuals and activists began to rethink traditional methods of interpreting God’s ethical commands and to question whether a state should consider itself obliged to legislate only within bounds established by classical scholars. As a result, new factions emerged in many countries, including Egypt. Each favored a different method of identifying the “Islamic” limits on state regulation and of developing rules in areas where the state had not regulated.¹⁰

For the purpose of understanding constitutional debates after the Arab Spring, four competing approaches to Islamic interpretation are of particular importance.

1. Neotraditionalist

The first camp can be described as “neotraditional”.¹¹ Neotraditionalism is strongly associated with the mosque-university of Al-Azhar, Egypt’s undisputed center of traditional Sunni legal study. In the premodern era, Al-Azhar was controlled by the scholarly guilds that taught traditional methods of reasoning. Over the course of the nineteenth and

⁸ See Weiss (n 2) 116–122.

⁹ On the impact of these technological and social changes on society, see, e.g., Charles Kurzman, *Introduction*, in Charles Kurzman (ed), *Modernist Islam: 1840–1940* (Oxford University Press, Oxford 2002); Lombardi (n 2) 59–77; R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge University Press, Cambridge 2007).

¹⁰ Lombardi (n 2) 78–80; Francis Robinson, “Crisis of Authority: Crisis of Islam?” (2009) 19 *Journal of the Royal Asiatic Society of Great Britain and Ireland* 339, 350 et seqq.

¹¹ On neotraditionalism with a focus on South Asia, see Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Oxford University Press, Oxford 2002); with a focus on Egypt, see Lombardi (n 2) 80–83.

twentieth centuries, the government reformed Al-Azhar, eliminating the guild's control over the school and creating a unified curriculum that required Al-Azhar students to learn not merely the doctrines of their chosen guild, but the doctrines of all four Sunni schools.¹² Despite these modifications, however, students to this day continue to receive training that is distinctly traditional, and they are thus expected to study (1) the scriptures and logic (*al-adillāt al-kulliyah*), (2) the literature explaining how law is to be derived from scripture (the *uṣūl al-fiqh* literature), (3) the literature recording the precedents of all four Sunni schools of law (the *fiqh* literature), and (4) the literature recording the underlying legal principles that these schools recognized (*al-qawā'id al-fiqhiya*). Neotraditionalists believe that this type of slightly modified traditional training give a person unique insights into God's moral command. In contemporary Egypt, therefore, neotraditionalists want the Egyptian state to ensure that its statutes are always vetted by scholars at Al-Azhar or by scholars who had gained equivalent expertise at famous centers of learning elsewhere.¹³

2. *Salafi*

A second group of thinkers are often referred to as "Salafis" for their insistence on focusing on the practices of the earliest Muslims (*al-salaf al-ṣāliḥ*). Salafis are scriptural literalists.¹⁴ They rely heavily on some traditional Sunni methods of scriptural analysis—methods discussed in the *uṣūl al-fiqh* literature. Employing these, however, they find in the scriptures considerable numbers of "clear" rules that they believe must be followed. Salafis thus tend to identify in scripture far more rules than traditionalists. At the same time, Salafis are skeptical about the ways in which medieval Sunni thinkers used logic to develop laws for situations about which they felt scripture was silent. As a result they are skeptical about the interpretations of God's law that had developed in the four Sunni *madhāhib* and were recorded in the *fiqh* literature and *al-qawā'id al-fiqhiya* literature. And they are suspicious too of many neo-traditionalist interpretations that build upon those Medieval interpretations. Salafis believe that these interpretations of Shari'ah tend to ignore many rules that God wanted Muslims to follow, and, conversely, they imposed many rules that were the product of flawed human reason.

3. *Modernist*

A third approach has been called "modernist".¹⁵ Like Salafis, modernists reject the idea that Islamic law can only be interpreted by scholars trained in a hyper-complex, arguably "medieval" method of legal reasoning. At the same time, however, they are deeply skeptical about the scriptural literalism of most Salafis. Modernists argue that the task of the Islamic legal interpreter is merely to identify in the scriptures—or sometimes in an inductive review of

¹² On the evolution of al-Azhar in the nineteenth and twentieth centuries, see Chris A. Eccel, *Egypt, Islam and Social Change: al-Azhar in Change and Accommodation* (Islamkundliche Untersuchungen 81, Klaus Schwartz Verlag, Berlin 1984).

¹³ Malika Zeghal, "Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam and the State (1952–94)" (1999) 31 *International Journal of Middle East Studies* 371; Zaman (n 11) 144–150.

¹⁴ On the history of the term "Salafi" and the diversity of Salafisms over history, see Henri Lauziere, "The Construction of Salafiyya: Reconsidering Salafism from the Perspective of Conceptual History" (2010) 42 *International Journal of Middle East Studies* 369.

¹⁵ On modernism, compare Muhammad Qasim Zaman's discussion of modernism in the subcontinent in Zaman (n 11) 7–12 with Lombardi (n 2) 73–92. Zaman reserves the term "modernist" for the thinkers that we refer to as "liberal modernists" or "progressive modernists" and uses the term "Islamists" for the people Lombardi calls "conservative modernists."

the *fiqh* literature—some general principles that can be applied flexibly to respond to the evolving situations that Muslim society faces in different times and places. Many modernist theorists are heavily influenced by utilitarian thought. Some early modernists, including Rashid Riḍā and the seminal thinkers in the Muslim Brotherhood, favored a scriptural utilitarian form of modernism.¹⁶ Arguing that much of the *ḥadīth* literature is of uncertain authenticity and much of Qurʾān is opaque, such modernists argued that God revealed only a handful of clear rules. The Scripture also instructs Muslims, in cases where clear guidance is lacking, to promote social utility and justice given the conditions existing in their particular society. Legal interpreters who wish to help the state develop laws consistent with Islam should thus not be guided by the rules laid down by premodern jurists in the *fiqh* and *uṣūl al-fiqh* literature. Rather modern interpreters should help rulers develop laws that realize the general principles of law, including, above all, the principles of utility and justice. Laws should change to reflect the evolving interests of Muslims. A slightly different wing of modernism is associated with the famous twentieth century Egyptian lawyer ʿAbd al-Razzāq Sanhūrī. Sanhūrī agreed that scripture provided few clear rules of behavior, but did not think the solution was to look for general scriptural principles.¹⁷ Modernists inspired by Sanhūrī instead turn to the traditional *fiqh* and *al-qawāʿid al-fiqhiyya* literature, but they use this literature in an unprecedented and distinctly untraditional way. They aggregate all of the literature from all *madhāhib*. From the mass of mutually contradictory works, they try to induce shared concerns and general principles. (These are often ideas that were never explicitly articulated but which a later scholar can nevertheless identify as implicit in the writings of all scholars at all times and places. Among them, naturally, are principles of utility and justice.) The job of an Islamic interpreter in the modern age is to identify these shared principles and to help a ruler develop state laws consistent with them.

Based on their different views of utility, modernists can reach very different conclusions about God’s command. While the mainstream of the Muslim Brotherhood have long operated on the assumption that society benefits from relatively conservative social regulations, other modernists, including some within the Brotherhood, have taken a more liberal position. The most progressive of these liberals tend to blend into a group that can be called, with caution, “secularists”.

4. Secularist

The term “secular” has come to have negative connotations in contemporary Egypt—being equated in the minds of many Egyptians with “godless”. The group that we define as “secular” is probably best thought of as representing a radical form of Islamic modernism that was informed by European liberalism. For Islamic secularists, Islamic law provides a body of ethical guidance for individual lives, but Muslims are likely to disagree about its commands.¹⁸ Islam does not dictate any particular form of government organization to reconcile conflicting interpretations. The state must therefore recognize a wide private sphere in

¹⁶ On Riḍā and his impact on the ideologues of the Muslim Brotherhood, compare Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (University of California Press, Berkeley 1966); Hallaq (n 2); and Lombardi (n 2) 83–92.

¹⁷ On Sanhūrī, see Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ʿAbd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971* (American University in Cairo Press, Cairo 1987); Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Brill, Leiden 2007); Leonard Wood, *Reception of European Law, Origins and Islamic Legal Revivalism, and Transformations in Islamic Jurisprudence* (PhD, Harvard University, 2011).

¹⁸ For a discussion of the paradoxical concept of “Islamic secularism”, see Lombardi (n 2).

which individuals are free to explore Islam's requirements and to structure their private lives in accordance with their understanding of these requirements. Outside it, the state should regulate to promote the public interest. As should be clear, few of these "secularists" would object to some kind of Islamic provisions in the constitution. Nevertheless, they do not think them necessary and would not see such provisions as creating many, if any, limits on the state's discretion to promote utilitarian outcomes.

II. ISLAMIC LAW IN EGYPT'S CONSTITUTIONS BEFORE THE ARAB SPRING

After a long period first as an Ottoman province and then as a *de facto* British colony, Egypt emerged as an independent nation state after World War I. Egypt's first national constitution was drafted in 1923. The drafters of that constitution and subsequent ones have invariably and increasingly struggled to define the role of Islam in a state where Muslims disagree deeply about who is qualified to interpret Islam and about how to identify the limits that Islam places on state.

A. Religious Reticence in Egypt's First National Constitutions 1923–1971

While Egypt's 1923 Constitution declared Islam as the official religion of the state, it did not formally establish a constitutional role for Islamic law. Perhaps the drafters simply assumed that their independent government would act within Islamic limits and, perforce, refrain from enacting laws that were inconsistent with Islamic legal principles. The drafters did not include a provision formally requiring this—perhaps fearing that would raise divisive questions about what interpretation of Islamic law the state should follow.¹⁹ In practice, the state often sought an Islamic imprimatur for its policies. When it did so, it tended to seek the public approval of traditionalist scholars at Al-Azhar.²⁰

The 1923 Constitution continued in force (with two suspensions) until 1952, when a group of officers overthrew the monarchy, canceled the 1923 Constitution, and replaced it with a series of abbreviated "constitutional declarations". The new regime gradually consolidated in an authoritarian manner under a strong presidency and after 1956 issued a series of fuller documents none of which declared that the government would govern in a manner consistent with Shari'ah.²¹ And, in fact, the new regime, led by former Colonel Jamāl 'Abd al-Nāṣr, was less concerned with its Islamic legitimacy than previous regimes had been but instead stressed its nationalist and later its socialist credentials. It thus suppressed Islamists of all types— neotraditionalist, Salafi, and modernist alike—and insisted that they either remain silent on political questions or toe the regime's ideological line.²² While the Nāṣr

¹⁹ Nathan J. Brown and Adel Omar Sherif, "Inscribing the Islamic Shari'a in Arab Constitutional Law" in Yvonne Haddad and Barbara Stowasser (eds), *Islamic Law and the Challenges of Modernity* (AltaMira Press, Walnut Creek 2004) 60 et seqq.

²⁰ Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwās of the Dar al-Iftā* (Brill, Leiden 1997).

²¹ On Egypt's constitutional history up to Sadat, see generally Nathan J. Brown, *The Rule of Law in the Arab World* (Cambridge University Press, Cambridge 1997) 23–93.

²² On Nāṣr's relationship with traditionalists, see Tamir Moustafa, "Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt" (2000) 32 *International Journal of Middle East Studies* 3; Nathan J. Brown, "Post Revolutionary al-Azhar," *Carnegie Papers* (Carnegie Foundation: Washington, D.C., 2011) 6–9, available at http://carnegieendowment.org/files/al_azhar.

regime did not pose as fully secular and indeed continued to support a role for Islam in public life, the harsh political repression and embrace of nationalist and socialist ideologies led to an Islamist backlash. Setting aside their many disagreements about how to interpret Islamic law, Islamists united behind a demand that the government take seriously its obligation to regulate society in a way that was consistent with Islamic law.

B. The Evolution of Provisions Governing Islam in Egypt's 1971 Constitution

When Nāsr died in 1970, his successor, Anwar al-Sādāt, appointed a committee to draft a new constitution that was instructed to maintain a strong presidential system of government but, at the same time, to make significant gestures to the regime's most significant opponents.²³ The regime's motivations seemed clear: to co-opt opposition where possible and distance the new president from the excesses of the old regime. The new president also sought to remove possible challengers from within governing ideological structures (such as the sole political party, the Arab Socialist Union) by reorienting the regime and from the powerful security apparatus by emphasizing the judiciary and rule of law. Thus there were lengthier rights provisions, greater respect for the judiciary and legal procedures, a very partial retreat from socialism, and a greater stress on religion. The country's Supreme Court, a body created only two years earlier by presidential decree, was renamed the Supreme Constitutional Court. It was given the task of assessing the constitutionality of challenged legislative acts. While the court was initially quite close to the regime, a tradition developed in which sitting justices nominated new members to their own bench, giving it some autonomy and the ability to develop a surprisingly liberal jurisprudence in the midst of what remained an authoritarian regime.²⁴

To burnish the regime's Islamic credentials, the 1971 Constitution made specific reference to Islamic law. Article 2 ambiguously declared that the principles of the Islamic Shari'ah shall be "a chief source" of Egyptian legislation. In theory, the newly created Constitutional Court could enforce this. But as initially drafted, the provision was so opaque that judges seemed to have little idea what it meant. It was not clear what it meant for a law to be "a chief source of legislation."²⁵

During the 1970s, the regime's orientation away from socialism, its concern about leftist opposition, and a general religious revival in Egyptian society led the leadership to continue its Islamic turn. In 1980, Article 2 was amended to say that the principles of Shari'ah were not merely "a" chief source but rather "the" chief source of legislation. It was still not

pdf, accessed February 26, 2015. For the relationship with the Muslim Brotherhood and Islamists, see Bruce Rutherford, *Egypt after Mubarak: Liberalism, Islam and Democracy in the Arab World* (Princeton University Press, Princeton 2008) 79–82.

²³ On the circumstances surrounding the appointment of a committee to draft a new constitution in 1971, see Bruce Rutherford, "The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World" (PhD, Yale University 1999) 262–278.

²⁴ See Brown (n 21) 93–129; Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge University Press, Cambridge 2009) 57–90; Clark B. Lombardi, "The Supreme Constitutional Court of Egypt: Managing Constitutional Conflict in an Authoritarian, Aspirationally Islamic State" (2008) 2 *The Journal of Comparative Law* 234.

²⁵ Clark B. Lombardi, "Constitutional Provisions Making Sharia 'A' or 'The' Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?" (2013) 28 *American University International Law Review* 733, 754–757.

entirely clear what the amendment was supposed to mean in concrete terms. Indeed, skeptics noted that it was presented as a package along with a removal of the term limitation on President al-Sādāt, essentially forcing Egyptians willing to vote against the president to reject the Islamic Shari'ah at the same time. Over time, the provision, as amended, came gradually to be understood by most to require that henceforth all new laws would have to be consistent with Shari'ah principles, and in 1985, the Constitutional Court endorsed this understanding. In a seminal opinion, it held that citizens could challenge the constitutionality of new laws on the grounds that they were inconsistent with Shari'ah.²⁶ Many wondered how the Supreme Constitutional Court (the SCC) would harmonize its established liberal rights jurisprudence with the new requirement that all laws be consistent with Islamic principles. That question was answered during the following decade in a series of cases reviewing laws for compliance with Shari'ah.

In these cases, the court acknowledged traditional scholars, but treated them a bit roughly and even as unimportant. Instead, the court interpreted Islamic law *de novo* using its own distinctive, somewhat idiosyncratic, version of modernist reasoning. According to the court, state law would be measured against two different types of Islamic principles: First, it would be measured for conformity with a subset of *al-adillāt al-kulliyah*. That is, laws would be checked to ensure that they were consistent with all principles clearly and explicitly announced in the Qur'an and with principles revealed clearly in *aḥādīth* whose authenticity was entirely beyond doubt. Second, the law would have to be consistent with the "goals of the law", the *maqāṣid al-shari'ah*, as the court understood them.²⁷

In applying its tests, the court reflected liberal modernist sensibilities. Traditionalists and Salafis came before the court challenging many Egyptian laws as inconsistent with scriptural passages that had traditionally been recognized as authentic and clear. The SCC dismissed their claims.²⁸ It found that few Qur'anic passages laid down clear principles and very few *aḥādīth* were authentic. Indeed, the court never struck down a law on the grounds that it was inconsistent with an indubitably authentic and clear scriptural passage. As a practical matter, then the question of whether a law was consistent with Islam invariably turned on a second test: whether the law was consistent with the "goals of the law".

As noted above, traditionalists and modernists both believe Islam requires state law to promote broader social goals, but they use different methods of identifying the goals that laws should achieve. Traditionalists explore them using complex methods elaborated in the *al-qawā'id al-fiqhiyah* literature. Modernists use different methods, many of which drew upon modern consequentialist philosophy. Betraying a modernist sensibility, the SCC identified among the important goals of the Shari'ah the promotion of utility and justice. Strikingly too, the justices interpreted utility and justice in ways that were shaped by its commitment to liberal values. Thus, disagreeing with traditionalist and Salafī understandings of Shari'ah, the court consistently held that state laws promoting liberal values were

²⁶ Case No. 20 of Judicial Year 1 (May 4, 1985).

²⁷ For descriptions of their methodology, see Frank Vogel, "Conformity with Islamic Shari'a and Constitutionality under Article 2: Some Issues of Theory, Practice and Comparison" in Eugene Cotran and Adel Omar Sherif (eds) *Democracy, the Rule of Law and Islam* (Kluwer, London 1999); Baber Johansen, "The Relationship Between the Constitution, the Shari'a and the Fiqh: The Jurisprudence of Egypt's Supreme Constitutional Court" (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 881; Lombardi, *State Law* (n 2) 174–258; Clark B. Lombardi and Nathan J. Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law" (2006) 21 *American University International Law Review* 379.

²⁸ For an overview of numerous cases, see Lombardi (n 2) 174–258.

consistent with Shari'ah principles, and it struck down illiberal laws on the grounds that they were inconsistent with God's law. For example, it upheld laws granting wives rights against their husbands that premodern Sunni scholars had never recognized.²⁹ Conversely, the court struck down landlord-tenant laws that premodern scholars would likely have seen as harmless.³⁰ In each case, the court found that there was no scriptural passage on point that was both clear and indubitably authentic, and it justified its decision entirely by reference to its liberal understanding of Islam's broader goals.³¹

Liberal modernists and secularists tended to be happy both with the SCC's method of interpretation and with the results that it reached in the cases before it. Among other groups, the SCC's jurisprudence was controversial, although the critics disagreed about what, exactly, was wrong. Neotraditionalists, for their part, did not always disagree with the results that the court reached. Nevertheless, they found the SCC's approach a bit too freewheeling, not so much because of the results but because the court refused to anchor itself in the legal precedents developed over the centuries by Islamic jurists. Salafis were dismayed by the court's refusal to accept many *ḥadīth* as binding. Conservative modernists disagreed with the court's extremely liberal understanding of utility, favoring instead a more socially conservative understanding of utility.

III. CONTESTING ISLAM AFTER THE FALL OF MUBĀRAK

In early 2011, much of the Arab world was thrown into turmoil by mass demonstrations against the region's authoritarian governments. Starting in Tunisia, demonstrations spread quickly to other countries, including Egypt. In spring, the army removed President Mubārak, abrogated the 1971 Constitution, and promised a transition to democracy. Free and fair elections demonstrated the formidable organization and electoral power of Islamist factions, but also showed that there continued to be deep divisions between secularists and Islamists as well as among Islamists themselves.

A. State and Islam in the 2012 Constitution

The 2012 Constitution was written by an assembly dominated by self-styled Islamists who interpreted Islam in very different ways.³² Deputies aligned with the modernist Muslim Brotherhood viewed Salafi-aligned deputies with bitterness and deep suspicion. To their mind, Salafis showed a mindless obsession with ancient practice, tended to focus on marginal issues, and generally proved themselves unable to interpret Islam's timeless truths in a

²⁹ See, e.g., Case No. 7 of Judicial Year 8 (May 15, 1993), Case No. 29 of Judicial Year 11 (March 26, 1994), Case No. 35 of Judicial Year 9 (August 14, 1994).

³⁰ Case No. 6 of Judicial Year 9 (March 18, 1995).

³¹ For analyses of these cases, see Lombardi (n 2) 201–258. For a translation of one, see Nathan J. Brown and Clark B. Lombardi, "Translation: The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)" (2006) 21 American University International Law Review 437.

³² On the tensions between Islamic factions in post-Mubarak Egypt, see Nathan J. Brown, "Islam and Politics in the New Egypt", Carnegie Papers (Carnegie Foundation: Washington, D.C., 2013), at <http://carnegieendowment.org/2013/04/23/islam-and-politics-in-new-egypt>, accessed February 26, 2015; on tensions specifically in the constituent assembly, see Clark B. Lombardi and Nathan J. Brown, "Islam in Egypt's New Constitution *Foreign Policy* (Washington, D.C., December 13, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2258252, accessed February 26, 2015.

way that made sense in a modern context. Salafis viewed the Brotherhood-aligned modernists as too Westernized. They accused these modernists of abandoning their Islamic roots and working for their own self-interest. Although they talked about religion, they were merely cloaking their personal preferences in religious garb. Traditionalists had almost no formal representation, but played a powerful role behind the scenes. A handful of deputies represented the views that might be described as “secularist” (though they found the term distasteful since it was often taken to suggest rejection of religion by their fellow Egyptians). Their only bargaining tool was a repeated threat of withdrawal (ultimately acted upon). A complex negotiation thus took place, with Islamists of different stripes and “secularists” all wrangling over the religious provisions. All seem to have understood that realistically the new constitution would require the state to respect Islam. The question was, what type of Islam?

After intense bargaining, Egypt’s constituent assembly agreed to import the language of the old Article 2 word for word into Article 2 of the new constitution. “The principles of the Islamic Shari‘ah” would continue to be “the chief source of Egyptian legislation.”³³ It was understood that this provision would require all state law to be consistent with Shari‘ah principles. Furthermore, it was agreed that the Supreme Constitutional Court would continue to exercise judicial review in all cases, including Article 2 cases. Agreement on these threshold points allowed people to focus on the divisive questions: Should the constitution include provisions that directed the SCC to abandon its modernist approach to Islamic interpretation and to adopt a more conservative one?

This second struggle resulted in two new articles, each of which represented a compromise between those who were comfortable with the SCC’s earlier interpretation of Islam and those who wanted Egypt’s government to be constrained by a more rigid interpretation.

Article 219 clarified Article 2 by defining the term “principles of the Islamic Shari‘ah” using terms drawn from the classical tradition: “The principles of the Islamic Shari‘ah include its *adillāt kulliyah*, *al-qawā‘id uṣūliyah* and *al-qawā‘id al-fiqhiyah* and the sources considered by the Sunni *madhāhib*.” This new article represented a clear attempt by Salafis and traditionalists to force a shift in the way that judges were interpreting the words of Article 2. As described already, the SCC had consistently interpreted the “principles of the Islamic Shari‘ah” in a modernist fashion. It had dismissed as inauthentic most *ḥadīth* that Salafis and traditionalists considered to be part of the *adillāt kulliyah*. It thus recognized very few clear scriptural rules of Shari‘ah and had resolved most cases by analyzing the impact of the law on the Shari‘ah’s goals. When the court had expanded on those few scriptural principles, it had used methods inconsistent with the *al-qawā‘id* discussed in the classical *uṣūl al-fiqh* literature and it had reached results in cases that cannot easily be reconciled with the rulings found in the Sunni *madhāhib*’ books of *fiqh* and *al-qawā‘id al-fiqhiyah*. In short, Article 219 suggested that, although Article 2 of the 2012 Constitution contained the same words as Article 2 of the 1971 Constitution, those words should be interpreted differently. The article should be applied in a manner that shows more respect for *ḥadīth* and traditional interpretations of Islam. Article 219 probably showed more solicitude for the *madhāhib* tradition than Salafis ideally wanted. (Salafis are, after all, scriptural literalists who would prefer to interpret Islamic law through a plain meaning of scripture without

³³ Constitution of the Arabic Republic of Egypt 2012 is widely available on the Internet, both in the Arabic original (see, for example, <http://www.wipo.int/edocs/lexdocs/laws/ar/eg/eg047ar.pdf>, accessed February 26, 2015), and in unofficial English translation (see, for example, <http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg047en.pdf>, accessed February 26, 2015). In this article, however, translations of the constitution are our own.

reference to the literature produced by the medieval *madhāhib*.) Article 219 nonetheless seemed to require a form of reasoning that was more consistent with the Salafī approach than the SCC's approach to date, one likely to lead to more conservative results. Attractive to traditionalists and less threatening to modernists than a provision that required a more explicitly Salafi approach, it was the best the Salafis could get.

Another unprecedented provision, Article 4, dealt with the question of who can be trusted to interpret the texts described in Article 219 and who can explain how the principles of Islamic law are to be interpreted in the modern era. A result of hard bargaining, the provision, like Article 219, tried to draw a compromise between the positions of people who have very different views on this subject. But it raised as many questions as it answers. As noted already, secularists and modernists in the Muslim Brotherhood appear to have been comfortable with the SCC's method of Islamic legal interpretation and comfortable that the SCC was qualified to engage in this type of interpretation. Salafis, however, were appalled by the SCC's lack of familiarity with or respect for many of the scriptures they held dear. Although they disagreed with traditionalists' tendency to interpret those scriptures in light of the medieval tradition, they nevertheless had far more respect for the learned *shuyūkh* of Al-Azhar than they did for the liberal-utilitarian modernists who dominated the Egyptian judiciary. They wanted to give Al-Azhar a role in interpreting and applying Arts. 2 and 219. The *shuyūkh* of Al-Azhar were not enthusiastic about this. Admittedly, they were skeptical about the SCC's familiarity with the nuances of classical Sunni legal texts and about the ability of judges without classical training ever to appreciate their subtleties. In addition, the *shuyūkh* worried about what might happen if they were actually given a formal role in correcting judicial misinterpretations. After the fall of President Mubarak, Al-Azhar's leaders had pressed successfully for independence from state control. They had achieved this through legislation and wanted to have guarantees of independence incorporated into the new constitution. They feared that if the Supreme Constitutional Court's jurisdiction over Article 2 and 219 cases were transferred to them, the state would refuse to grant them the full independence they wanted. For example, the state might demand a continuing role in the appointment and disciplining of *shuyūkh* analogous to its traditional role in appointing and disciplining judges.

Article 4 represented a compromise between all these groups. It constitutionalized, for the first time in Egyptian history, the place and role of Al-Azhar. It declared: Al-Azhar is "an independent Islamic institution of higher learning. It handles all its affairs without outside interference. It leads the call into Islam and assumes responsibility for religious studies and the Arabic language in Egypt and the world." Article 4 also required that "the Azhar's Body of Senior Scholars is to be consulted in matters pertaining to Shari'ah". In what appeared to represent a deliberate ambiguity, however, the provision does not, on its face, require that the government actually follows the advice of Al-Azhar or, even, that Al-Azhar's opinions be made public. Whether these would be required would be left to be resolved over time. Finally, to protect Al-Azhar from the most likely types of interference that might arise from its involvement in political issues, the article guaranteed that Al-Azhar would be allowed to select its own leader and be provided sufficient funding to do its work.

In the short period of time that the 2012 Constitution was in force, some actors tried to test the impact of its new Islam provisions. Salafis and, to a lesser degree, traditionalists, tried to establish conclusively that Egypt would have to legislate in line with a more conservative understanding of Islam, policed by Al-Azhar. Secularists and, to a lesser degree, modernists resisted. The outcome of these contests remained unclear when the constitution itself was suspended in the summer of 2013.

In March 2013, the upper house of the parliament passed a law governing *ṣukūk* (an Islamic financial instrument) while only consulting Al-Azhar by inviting a representative to

a committee session. The Al-Azhar leadership declined this offer as insufficiently respectful of the institution's weight. When the parliament pressed ahead regardless of its stony silence, the insulted leadership of Al-Azhar formally objected to the law, forcing then President Muḥammad Mursī of the Muslim Brotherhood to resubmit the bill to the parliament with a request for changes.³⁴ This would seem to suggest that Al-Azhar had established a presumptive right to engage in a substantive review of legislation prior to formal enactment. The question of its role in reviewing laws after enactment was never resolved.

Article 4 could plausibly be read to require that Al-Azhar be consulted by the government in all matters related to Shari'ah, meaning that it would have to be consulted not only by the legislature during the legislative process but by the Supreme Constitutional Court when it was deliberating on a case that challenged a law as inconsistent with Article 2's command that all laws respect "the principles of the Islamic Shari'ah". In May 2013, shortly before the military coup that would lead to the abrogation of the new constitution, the Supreme Constitutional Court issued an opinion that appeared to reject this reading of Article 4. More striking still, the court in this opinion appeared implicitly to challenge the idea that Article 219 would require it to justify its interpretations of Islam with greater reference to *aḥādīth* and classical Islamic texts and, thus, to abandon the liberal modernist interpretation of Article 2 that it had developed during the Mubārak era.

In Case 37 of Judicial Year 33 (decided May 26, 2013), the SCC resolved an Article 2 challenge to a provision of Egypt's personal status law on grandparental visitation rights.³⁵ The court voided the provision on the grounds of inconsistency with the principles of the Islamic Shari'ah. The SCC appears to have reached its decision without ever asking Al-Azhar for its views. Without much substantive engagement with the *ḥadīth* literature, the *fiqh* literature, or the literature on the *al-qawā'id al-fiqhiyah*, the justices concluded that there was no clear textual provision on point. They then concluded without much elaboration that the *maqāṣid* of the Shari'ah required an approach more generous to the grandparents than the text of the law suggested. The style of the opinion is consistent with that found in the court's liberal modernist cases issued from the mid-1980s through the 2000s.

B. State and Islam in the 2014 Constitution

The public, legal profession, academy, and legislature never had an opportunity to react to the SCC's opinion or to respond to the SCC's attempt to minimize the practical effects of Arts. 4 and 219. Shortly after this opinion was issued, nationwide demonstrations erupted, calling on Mursī to step down. The military stepped in to depose the president, suspended the constitution, installed the SCC chief justice as interim president, and amended (really rewrote) the 2012 Constitution. The Muslim Brotherhood resisted the coup by calling out its own demonstrations, which were ruthlessly suppressed in August 2014. Salafis and various youth organizations were all sidelined in the general crackdown. Azharite traditionalists too were marginalized, although the military, having alienated many powerful Islamists, appears to have been nervous about making an enemy of yet another important Islamic group.

³⁴ For more details, see Nathan J. Brown and Mohktar Awad, "Egypt's Judiciary Between a Tea Ceremony and the WWE", *Foreign Policy* (May 14, 2013), at <http://carnegieendowment.org/2013/05/14/egypt-judiciary-between-tea-ceremony-and-wwe>, accessed February 26, 2015.

³⁵ Case 37 of Judicial Year 33 (decided May 26, 2013), published in *Egypt's Official Gazette* [*al-jaridah al-rasmiyah*] Issue 21 (May 26, 2013) 16–21.

When it came time to redraft the constitution, only token Islamist participation was allowed in the committees charged with the task, and Al-Azhar was more healthily represented.³⁶ The draft was finished by the end of 2013 and ratified by the public in 2014 in an atmosphere of significant military repression. Not surprisingly, the new constitution revisited the bargains struck a year earlier—a period when secularists had been disempowered, a democratically elected government led by members of the Muslim Brotherhood had been pushed to the right by powerful Salafi political organizations, and Al-Azhar had been compelled to take a formal constitutional role with which it was uncomfortable.³⁷ The new constitution adopted different compromises, reflecting the new balance of power.³⁸ It remains unclear how much input the justices on the Supreme Constitutional Court had on the constitution. On the question of Islam, the text suggests that the court had at least some influence. The conservative social and cultural provisions of the 2013 Constitution were edited out. Article 219 was no longer necessary to assuage the Salafis, and it too was jettisoned. More surprising, given Al-Azhar's influence, was the decision to eliminate the provisions in Article 4 that granted Al-Azhar a formal consultative role in government decisions that touched upon Islam. But this may have been just what the senior Azhari leaders wanted. The new constitution continued to give them the unprecedented guarantees of independence that they had received under the 2012 Constitution. Although it eliminated the requirement that they be consulted, it left them free to do so and to exercise their moral authority when they chose.

Most striking, however, is a provision slipped into the turgid preamble—one that reflects the re-emergence of secularists and others who were comfortable with the Supreme Constitutional Courts' liberal modernist jurisprudence: "We are drafting a Constitution that affirms that the principles of Islamic Shari'ah are the principal source of legislation, and that the reference for interpretation thereof is the relevant texts in the collected rulings of the Supreme Constitutional Court." In a step that may not be unprecedented, but is surely unusual, the preamble puts a footnote after this declaration. The footnote explains that if anyone wanted to find these opinions giving authoritative interpretations of Islamic principles, they could find them in the official gazette.

IV. BACK TO THE FUTURE?

In the modern era, many Sunni Muslims in countries like Egypt came to embrace an abstract principle that their state should be constitutionally required to enact only laws that are consistent with Islamic principles. At the same time, these Muslims are deeply divided about how to interpret Islamic law and about who can be trusted to identify and apply the principles that limit the state. The role of Islamic law in the Egyptian constitutional order

³⁶ Tom Berry and Shaimaa Fayyed, "Egypt Names Key Constitution Panel with Few Islamists", *Reuters* (September 1, 2013), <http://www.reuters.com/article/2013/09/01/us-egypt-protests-constitution-idUSBRE9800C620130901>, accessed February 26, 2015.

³⁷ Ahmed Morsy and Nathan J. Brown, "Egypt's Al-Azhar Steps Forward", <http://carnegieendowment.org/2013/11/07/egypt-s-al-azhar-steps-forward>, accessed February 26, 2015.

³⁸ Constitution of the Arabic Republic of Egypt 2014. This is widely available on the Internet, both in the Arabic original (see, for example, <http://www.wipo.int/edocs/lexdocs/laws/ar/eg/eg060ar.pdf>, accessed February 26, 2015), and in unofficial English translation (see, for example, <http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg060en.pdf>, accessed February 26, 2015). In this article, translations of the constitution are our own.

evolved dramatically over the course of the twentieth and early twenty-first centuries and reflects the contest over these basic questions.

The 1971 Constitution for the first time carved out a formal role for Islamic law—but left that role ambiguous. By the 1980s the constitution's Islam provisions had been amended and elaborated by Egypt's Supreme Constitutional Court. The state was henceforth prohibited from enacting laws inconsistent with Islamic legal principles. Islamic legal principles were to be interpreted by judges using a modernist mode of interpretation that appealed to a significant number of Egyptians, but clearly not all. After the fall of President Mubārak and much political tussling, Egypt's 2012 Constitution enacted provisions that compromised between the competing preferences of secularists, Islamic traditionalists, Islamic modernists, and Salafis. The compromises were ambiguous in some particulars, and there was contest over their implications. After a military coup and three years of leadership by a former general, the constitution's Islam provisions seem to have brought Egypt back largely to where it was before the uprising of 2011. There are, however, some differences. Islamic provisions are authoritatively interpreted by a more autonomous SCC, which has now been given responsibility for filling its own vacancies and appointing its own chief justice. While neither the government nor the court has any formal obligation to consult with Al-Azhar, that institution has the power publicly to weigh in, when it chooses, on important questions. At the same time, Al-Azhar has become more autonomous than it was under Mubārak, and its Body of Senior Scholars has similarly turned into a self-perpetuating body. These developments are likely to give Al-Azhar new prestige, flexibility, and power. It thus may be able to exercise more influence than it did under Mubārak—at least on questions important to it. And of course the elimination of the Muslim Brotherhood as a governing political force and the political marginalization of the Salafis will lessen the political and religious pressures on both the SCC and Al-Azhar to defend themselves against those who favor other approaches.

What these developments mean in practical terms is unclear. For the foreseeable future, the constitutional role of Islam in Egypt and the practical constraints that it places on government are likely to be defined by two increasingly independent institutions. With the SCC inclined toward a modernist approach and the current Al-Azhar leadership inclined toward an approach that blends neotraditionalism with modernism, it seems likely that any change in law and jurisprudence will be mild and gradual if it happens at all. But the history of Islam in Egypt's constitutions has to date been one full of surprises. It reminds us that constitutions in the Muslim world are influenced by contentious tussling among various camps, odd bargains, and, in many circumstances, by regime manipulation. Things can change quickly, and changes do not always have the impact that one might initially expect.

The Caliphate State

A Basis of Modern Statehood?

SIRAJ KHAN

I. INTRODUCTION

Revolution and reform are two terms that can facilely be applied to the origins of Islam, as well as to the continuous progression of Islamic leadership from the time of the Prophet Muḥammad until the present age. Islam as a religion and faith movement, intending to continue and revert humankind to the Abrahamic tradition of worshiping one God, was born out of a revolutionary instant in which the Angel Gabriel appeared to Muḥammad, instructing him to recite or read the divinely revealed revelation from God, an instruction that was largely at odds with a society formed around an oral-based literary and social tradition if taken literally. Throughout the life of the Prophet Muḥammad, Arab society was largely given to paganism and idolatry, all of which was condemned and sanctioned, and diametrically challenged by the Prophet's call to worship only one God and to forsake all other deities. This revolutionary message, in an age and area that was consumed with multifarious forms of idol- and pagan-worship, caused deep ruptures in society and across tribal and familial lines.

At the occasion of Islam's acceptance in the area and beyond the known frontiers of the Arab lands as a belief system and religious order, and after the untimely demise of the Prophet, this message remained the central tenet of Islam that was pursued by the religious authorities who succeeded the Prophet. During the first two centuries, roughly the seventh and eighth centuries of the Common Era, the followers of the Prophet Muḥammad established an empire stretching from Spain to Central Asia and developed a full array of political institutions and a noteworthy tradition of statecraft. The growing needs of the Muslim polity, through massive expansions in Persia and beyond, led to the abrupt realization that politico-legal challenges of governing large swathes of land and new communities that entered into Islam needed to be met. Although all of this precedes the existence of the nation-state in the modern sense of the term, the ordinances of governance and leadership of a polity were clearly among the newly acquired functions of the successors to the Prophet.

Known variously as *amīru'l-mu'minīn* (Leader of the Believers), *khalīfatu'l-rasūl* (Successor to the Prophet), and *khalīfatu'l-khalīfatu'l-rasūl* (Successor to the Successor of the Prophet), respectively, and so on, the *khalīfah* (caliph) was the head of the Islamic community and representative or Successor to the Prophet and served as both a religious authority charged with leading the Muslim polity in the face of challenges that either found little or no precedent in the available sources or regarding which there were a plenitude of legally valid options, and for which a decision from an authoritative representative of the Prophet was sought. The *khalīfah* therefore commanded and lead the *khilāfah* (caliphate), which was the term applied to both the system of governance and synonymously to the collective body politic of Islam.¹

This chapter seeks to assess the extent to which the premodern, historical models of the caliphate can possibly serve as a basis or model for a state that is governed in accordance with established precepts of Islamic governance or, at least, whether some elements can serve to be of use. At the same time, it may be prudent to highlight those aspects of historical models of the caliphate that are clearly at odds with the modern qualifications of statehood—which may also reveal an underlying incongruity that is difficult to reconcile. In this sense, the present author agrees with the apparently confusing but quite accurate (if controversial) claim: “There never was an Islamic State.” Hallaq’s own justification for such an outrageous statement reads as follows:

The State is modern, and by modern, I do not mean a particular unit of time located at some point in the trajectory of human history. The modern is a specific structure of relations that distinguishes itself as a unique phenomenon [. . .] Therefore, to resort to such a usage as “Islamic State”—as an entity having existed in history—is not only to indulge in anachronistic thinking but also to misunderstand the structural and qualitative differences between the modern state and its “predecessors,” especially what I have called Islamic governance.²

In Hallaq’s fluent reading, “Islamic governance” stands parallel to the modern understanding of the “state”, and consists of precepts that rest entirely on moral, legal, political social, and metaphysical foundations which he considers to be “dramatically different from those sustaining the modern state.”³ This is best understood through Hallaq’s succinct distinction between the philosophical framework within which both “Islamic governance” and the “modern state” each reside. Hallaq posits that the nation-state is an end in and of itself: It knows only itself and serves as the foundation of sovereign will. In stark contradistinction, the *ummah*, the community, and its individual members are merely the means to a greater end, possessing neither sovereignty themselves nor an autonomous legal or political will, as does the nation-state, since sovereignty and will belongs to God alone. Though the community has the power of decision-making through consultation and consensus,

¹ For an extensive overview of the meaning and types of *Khalīfa*, which cannot possibly be covered here, please refer to: T. W. Arnold, “Khalifa” in T. Houtsma et al. (eds), *Encyclopaedia of Islam* (2012), http://www.brillonline.nl/entries/encyclopaedia-of-islam-1/khalifa-COM_0132?s.num=0&s.q=khalifa, accessed September 4, 2015; D. Sourdel, “Khalifa” in P. Bearman et al. (eds), *Encyclopaedia of Islam* (2011), http://www.brillonline.nl/entries/encyclopaedia-of-islam-2/khalifa-COM_0486, accessed September 4, 2015; Wadad Al-Qāḍī, “The Term ‘khalifa’ in Early Exegetical Literature”, *Die Welt des Islams*, (Bonn 1988) 28–405.

² Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament* (Columbia University Press, New York 2013) 48–49.

³ *Id.* 49.

this can be a severely restricted power, limited largely to an interpretative role bound by moral and ethical principles contained in, and derived from, the Shari'ah, not necessarily limited to human and social experience, often transcending them irrespective of historical experience.⁴ The absence of an individual or group that has sovereignty is a possibility that the nation-state refuses to acknowledge as, in the "nation-state", sovereignty must rest in an individual or a group of people—a government. In the Islamic community, in order to determine the values by which social interaction is to be dictated and governed, of utmost importance is the knowledge that in the determination of the moral values upon which belief is erected, God is the only sovereign since He owns everything. Government intervention in societal and legal matters is:

[t]he exception rather than the rule. The state (= sultanic executive), even as executive, is not the repository of religious authority. Nor does the individual exist for the sake of the state. It is rather the state [...] that exists to promote the welfare of the individual. The individual, who again actually precedes the state, is beholden, in the final analysis, only to God. In the end, the state is justified only to the extent that it promotes the efforts of the individual to obey and worship the Creator.⁵

When analyzing and understanding the role of Islamic law in the modern nation-state—or put more bluntly, the extent to which the modern-state is willing to tolerate the Shari'ah—the red herring of the compatibility of the Shari'ah with democracy (and vice versa) and the separation of powers must be put to rest, because it is often understood that the Shari'ah would be accepted (read "tolerated") if and to the extent to which it were compatible with democracy.⁶ Consequently, if the Shari'ah were incompatible with democracy, then it would assume that the modern nation-state would not tolerate the Shari'ah. Such an all-in or all-out approach would be extremely counterproductive, because it ignores a serious question regarding the extent to which the principle of separation of powers is itself democratic. The distribution of legislative power over three organs does not provide a perfect solution to the problem of non-concentricity: But perhaps it is the best possible solution thus far.⁷ Added to this, if the legislature is a legitimate and competent body that expresses the will of the popular sovereign, why designate its legislative functions in favor of an organ that is supposed to execute its decisions on the basis of legal norms? This would still concentrate most of the authority in the executive and the judiciary and reduce the power of the legislature. As Hans Kelsen writes:

The principle of a separation of powers understood literally or interpreted as a principle of division of powers is not essentially democratic. Corresponding to the idea of

⁴ *Id.* 49–50.

⁵ Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfi* (E.J. Brill, Leiden/New York 1996) 224; Wael B. Hallaq (n 2) 50.

⁶ Intisar Rabb, "'We the Jurists': Islamic Constitutionalism in Iraq" (2008) *University of Pennsylvania Journal of Constitutional Law* 577.

⁷ "[...] I would argue that a democracy offers the greatest potential for promoting justice, and protecting human dignity, without making God responsible for human injustice or the infliction of degradation by human beings upon one another . . . A constitutional democracy avoids the problem by enshrining some basic moral standards in a constitutional document, and thus, guarantees some discernment and differentiation, but, at the same time, a democracy insures that no single person or group becomes the infallible representative of divinity," cited in Khaled El-Fadl, "Islam and the Challenge of Democratic Commitment" (2003) 27 (1) *Fordham International Law Journal* 10.

democracy, on the contrary, is the notion that all power should be concentrated in the people; and where not direct but indirect democracy is possible, that all power should be exercised by one collegiate organ the members of which are elected by the people and which should be legally responsible to the people. If this organ has only legislative functions, the other organs that have to execute the norms issued by the legislative organs should be responsible to the latter, even if they themselves are elected by the people, too. It is the legislative organ which is most interested in a strict execution of the general norms it has issued. Control of the organs of the executive and judicial functions by the organs of the legislative functions corresponds to the natural relationship existing between these functions. Hence democracy requires that the legislative organ should be given control over the administrative and judicial organs. If separation of the legislative function from the law-applying functions, or a control of the legislative organ by the law-applying organs, and especially if control of the legislative and administrative functions by courts is provided for by the constitution of a democracy, this can be explained only by historical reasons, not justified as specifically democratic elements.⁸

With this somewhat lengthy but necessary introduction, this chapter enters relatively new ground in highlighting the importance and relevance of the historical caliphate and its legal and governmental principles to some of the current legal and political challenges facing states in the Arab and Islamic world, notwithstanding more recent developments regarding the newly claimed caliphate of Abū Bakr al-Baghdādī across the lands of Iraq and Syria.⁹

Though this chapter seeks to avoid making sizeable anachronisms, we may have to bear the risk of some in order to highlight the complexities that inhere in the ideologies of certain religious and ideological movements in the present age. This entry seeks to highlight some of the main differences between the concept of the caliphate as a succession to the Prophet Muḥammad and models of caliphate that are propounded by some in the contemporary period. The objective of this is not to argue the validity or invalidity of the contemporary caliphate, but rather to emphasize that merely applying the same term should not confuse us as to the political realities and constituent makeup of contemporary caliphates. Synonyms are often invoked to echo the ideals of the past to contemporary models—often in order to make up the shortfall in legitimate comparison. But in this case, as this chapter hopes to show, the contemporary forms being paraded as the caliphate is of a pedigree born from an entirely different breed and, therefore, cannot be accurately compared to the pre-modern forms of caliphate.

To add to this complexity, some writers throughout the ages have long maintained that the Muslim world has always been the home of oriental despots and have portrayed that part of the world as comprising of backward forms of autocratic, illegitimate, and arbitrary governance. The present author does not perceive that their musings were born out of hatred or animosity, but possibly a way to show the success of Western systems and to reveal the dystopian nature of the alternative, in order to ensure the success of their own

⁸ Hans Kelsen and Anders Wedberg (tr), *General Theory of Law and State* (Russell & Russell, New York 1961) 282.

⁹ Before proceeding further, it is essential to understand that wherever I use the term “state” in reference to the caliphate that proceeded after the demise of the Prophet, I use the term loosely and not in the sense of “statehood” as we recognize it in the postmodern, nation-state period. I personally prefer the term “statecraft” in reference to possible forms of organizing, ruling, and governing a polity and community but avoid its usage here in order to avoid confusion with modern forms of statehood.

system and to ensure its perpetuation. Far from being Janus-faced, this message showed the success and validity of Western models of governance by showing the alternatives in the Muslim world as being bleak, unruly, and uncouth. Many Western legal minds have portrayed Muslim law and justice in this way—largely, it seems, to buttress the integrity of models formulated by themselves.¹⁰

II. THE PRECURSOR TO THE CALIPHATE

The forms, jurisdiction, and function of the caliphate cannot be understood without its antecedent, for it is this precursor to the caliphate that determines to a large extent the overall circumference of its remit. The sources and rules of the Shari'ah, from which the concept of the caliphate (*khilāfah*) derives, are premised upon the Revelation that Muslims believe God revealed to the Prophet Muḥammad over a period of twenty-three years, until his death in 632 AD, which take the form of the Qur'ān, the orally transmitted traditions (*ḥadīth*), and practical example (Sunnah) of the Prophet. Though these sources speak of matters of governance, executive, and administrative authority, and the distribution of roles and powers in a community to varying degrees of detail, they do so in a somewhat different context to that which the modern-day frameworks of governance require. It must be acknowledged that premodern societies maintained an internal method of self-governance and autonomous management through which they controlled and administered their communities. It is this framework through which we must contextualize any analysis of the premodern caliphates, and failure to do so leads to exactly the types of problematic anachronisms that plague extremist versions and projections of modern-day proponents of the caliphate to highlight the perfection of the premodern versions of the caliphate and the inadequacies of modern-day governance (ironically, this is very similar to the approach of the anti-Muslim extreme right in Western societies, who spread fear using the very same anachronisms). Contemporary organizations that seek to re-establish a caliphate also fail to recognize that to some extent, the early Muslim community continued the practices of the pre-Islamic period (*jāhiliyyah*),¹¹ and ignore the fact that the caliphate was perhaps a more refined and polished version of the concept of rule, leadership, and administration of authority that existed in the pre-Islamic period amongst non-Muslims, albeit tapered by specific regulations and guidelines detailed in the Qur'ān and thus in the overall corpus of the Shari'ah, and manifested in the example of statesmanship or leadership of the Prophet Muḥammad.¹² So although it was enameled with Islamic legal rulings that restricted the actions of the caliph or the leader of the Muslim community, it was by no means an "Islamic" creation.

¹⁰ See, e.g., Weber's Depiction of a judge handing out decisions without reference to rules of law, by using the image of a *qāḍī* sitting under a palm tree dispensing justice as he saw fit. Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University Press, Princeton 2008) 22; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill, Leiden/Boston 1999) 47–51; Bryan S. Turner, *Weber and Islam: A Critical Study* (Routledge & Kegan Paul, London/Boston 1974) 109–121. Though this is typical of orientalist depictions of what Weber called "Kadijustiz", this was clearly never the case. The *qāḍī* was supposed to judge in accordance with the law, and if he did not know the law, he would refer it to a more qualified jurist who would respond with a *fatwa*. The role and appointment of judges were defined by law and the official in charge of such appointments would have been accountable to the caliph.

¹¹ Majid Khadduri and Herbert J. Liebesny, "Pre-Islamic Background and Early Development of Jurisprudence" in *Origin and Development of Islamic Law* (The Lawbook Exchange, New Jersey 2008), Noel J. Coulson, *A History of Islamic Law* (Edinburgh 1964) 21–35.

¹² Erwin Isak Jakob Rosenthal, *Islam in the Modern National State* (Cambridge University Press, Cambridge 1965) 15.

The Qurʾān also precedents and predates the original idea of the caliphate to a time much before the time of Prophet Muḥammad, in the creation and setting on the earth of Adam, as God's vicegerent (*khalīfah*) on earth:¹³ "Behold, thy Lord said to the angels: "I will create a vicegerent (*khalīfah*) on earth" (Qurʾān 2:30).

Khilāfah (caliphate) is referred to in the Qurʾān in the context of authoritative and legitimate "representation" of God on earth in three main senses. In the first sense, the term *khalīfah* (in the singular) in the Qurʾān is used for Adam, who was installed as a *khalīfah* of God on earth. In a second sense, the term *khalīfah* is employed generally for "mankind" as the communal representative of God on earth, in the sense that God divested the governance of the earth and all that is in it to mankind, as opposed to other beings (such as animals, or spiritual beings like angels, etc.), and charged mankind with the trust of bringing people to the worship of God.¹⁴ In the third sense, the term has been employed as a verb in the third person, and cites that God establishes some people as *khulafāʾ* (pl. of *khalīfah*) in the earth, and that this is not a new phenomenon in Islam—but that it happened thus prior to Islam also, with other prophets—for very specific tasks, such as for establishing the worship of God and the establishment of peace in the land. Many exegetes and jurists understand the use of the term *khalīfah* here to refer to the Prophets and Messengers of old, saints and reformers whom God appointed for this purpose. It could well be argued that each of these terms have a common thread that runs through each concept—the governance of one or more human beings—without explicitly inferring their relative levels of religious authority—upon the rest of the earth, for the establishment of certain spiritual/religious, moral, and societal objectives. It was not until the demise of the Prophet that the generic term became synonymous with the model of succession and governance of the spiritual, religious, and other affairs of the Muslim polity in the early Islamic community, and was used in the singular for the individuals who succeeded the Prophet as his successor (*khalīfah*).

In another series of poignant verses that explicitly speak of God's authority and the authority of the Prophet, we find the context of God establishing His representative on earth. The believers are commanded in the Qurʾān:

Say: "Obey Allāh, and obey the Messenger": but if ye turn away, he is only responsible for the duty placed on him and ye for that placed on you. If ye obey him, ye shall be on right guidance. The Messenger's duty is only to preach the clear (Message).

Allāh has promised, to those among you who believe and work righteous deeds, that He will, of a surety, grant them in the land successorship [of power/authority] (*la-yastakhliḥannahum fi'l-arḍi*), as He granted successorship to those before them; that He

¹³ The term *khalīfah* appears elsewhere in two instances in the Qurʾān: Qurʾān 2:30 and Qurʾān 38:26; the first refers to having made Adam a *khalīfah* in the land, and the second refers to having made David a *Khalīfah* on earth. For Qurʾānic exegetes, such as al-Zamakhsharī (d. circa 1144), the concept of *Adam* may have referred as a generic term for all prophets, or even all of mankind, whereas David was a king and a Prophet, so his authority in the land was dually justified. See Sourdell et al., "Khalīfah"; for more on the plural forms of the word that occur in the Qurʾān, see the thorough treatment in Rudi Paret, "Signification Coranique de Ḥalīfa et D'autres Dérivés de La Racine Ḥalafa" (1970) 31 *Studia Islamica* 211–217.

¹⁴ For more on the theme of man's universal vicegerency and its centrality to the theology and political theory of Islamist thinkers in the contemporary period, see generally Abu 'l-A'la Mawdūdī, *Al-khilāfah wa 'l-mulk* (Kuwait: Dār al-Qalam 1978); Rāshid al-Ghannūshī, *Al-ḥurriyāt al-ʿammah fi'l-dawlah al-islāmīyah* (Markaz Dirāsāt al-Waḥdah al-ʿArabiyyah, Beirut 1993); Andrew F. March, "Naturalizing Sharīʿa: Foundationalist Ambiguities in Modern Islamic Apologetics" (2015) 22 *Islamic Law and Society* 71–72.

will establish for them in authority their religion—the one He has chosen for them; and that He will give them in exchange safety after their fear: “They will worship Me (alone) and not associate anyone with Me. Those who disbelieve thereafter, it is they who are the miscreants.” (Qur’ān 24:54–55)

The verses establish and conjoin obedience to God with obedience to the Prophet, and imply that obedience to God and to the Prophet are essential prerequisites for belief in God and His Prophet. Only as a result of such obedience will authority and successorship in the land then be given as a reward. It is necessary to recall that the Prophet Muḥammad was at once the spiritual, religious, moral, and political leader of the community of believers. Though the book revealed to Muḥammad, the Qur’ān, contained many laws, it was not primarily a legal code. Whenever the early believers needed guidance on a subject, they would refer to the Qur’ān; if nothing was found therein, they would refer to the Prophet, who would dictate the relevant rules and assert whether they were binding, or would indicate the degree of flexibility that inhered in those rules. Often when accosted, the Prophet would wait for divine revelation before giving a decision on a matter. Through analyzing such decisions and rulings, both those found in the Qur’ān and applied by the Prophet as well as those instructed by the Prophet from his own judgment, jurists in the time of the Prophet and later in the formative period of the development of the schools of Islamic law were able to develop a very distinct and intricate legal methodology, jurisprudence, and legal reasoning which built upon and benefited from the methodology and science of the authentication of the Prophet’s oral traditions and practical observance of his actions, in later years.¹⁵ Some companions of the Prophet who held a certain mastery over certain branches of knowledge were specifically appointed by the Prophet to carry out various delegated tasks. Some were dispatched to teach new Muslim communities the revelation of the Qur’ān and the essentials of the religion. Following a request from Yemeni Arabs to send them someone to teach the religion of Islam to them, the Prophet gave his close companion, Mu‘ādh ibn Jabal, vital guidance on how to perform these important functions, saying:

Verily, you are coming to a people from among the people of the book (*ahl al-kitāb*), so call them to testify there is no God but Allāh and I am the Messenger of Allāh. If they accept that, then teach them that Allāh has obligated the five prayers in each day and night. If they accept that, then teach them that Allāh has obligated charity to be taken from the rich and given to the poor. If they accept that, beware not to take from the best of their wealth. Be on guard from the supplication of the oppressed, for there is no barrier between it and Allāh.¹⁶

The Prophet’s tutelage of Mu‘ādh ibn Jabal occupies a central place in the formation of Islamic legal methodology. The Prophet also appointed Mu‘ādh to act as a judge and arbiter for a community in Yemen who showed compliance toward the Prophet’s message and his authority. In a *ḥadīth* well known to Muslim jurists, one which evidences both the hierarchy

¹⁵ Wael B. Hallaq, *Sharīa: Theory, Practice, Transformations* (Cambridge University Press, Cambridge UK/ New York 2009) 38–48.

¹⁶ Kitāb al-Īmān, Ḥadīth No. 27-28 Muslim Ibn al-Hajjāj al-Qushayrī, *Ṣaḥīḥ Imām Muslim, fī jam‘ jawāmi‘ al-aḥādīth wa’l-asānīd wa maknaz aṣ-ṣiḥāḥ wa’s-sunan wa’l-masānīd, al-juz’ al-awwal* (TraDigital, Stuttgart 2000).

of the sources of Islamic law and the legitimacy of independent legal reasoning in Islamic law, the Prophet is reported to have said to Mu'adh:

When the Messenger of Allāh, peace and blessings be upon him, intended to send Mu'adh ibn Jabal to the Yemen, he asked: How will you judge when the occasion of deciding a case arises?

He replied: I shall judge in accordance with Allāh's Book.

He asked: And if you do not find any guidance in Allāh's Book?

He replied: Then (I will judge) in accordance with the Sunnah of the Messenger of Allāh, peace be upon him.

He asked: And if you do not find any guidance in the Sunnah of the Messenger of Allāh and in Allāh's Book?

He replied: Then I shall exert intellectual effort to form a (sound juridical) opinion and I shall spare no effort (in this regard).

The Messenger of Allāh, peace be upon him, then patted him on the breast and said: "Praise be to Allāh Who has helped the messenger of the Messenger of Allāh to understand that which pleases the Messenger of Allāh."¹⁷

This prophetic tradition gives an idea of the extent of overlap between the religious and legal domains in the early prophetic period. Law, morality, and religion were necessarily intertwined, particularly in relation to theology and ritual, and religious verdicts and rulings had legal force; rules were enforceable, breaches were punishable, and there was ample opportunity to enforce compliance with certain rulings, particularly those that related to the public sphere and which could affect the moral or ethical architecture of the early Islamic society.

The greater the Muslims expanded, the more important became the need for governmental infrastructure. Although primitive in its procedures and with little bureaucracy, governance was a serious matter and was practiced with great care and transparency. The Prophet ensured that matters of law and public order were, as far as possible, transparent and nonsecretive in order to both educate the Muslims as to the rules of what was acceptable in society and furthermore to have a positive deterrent effect regarding crime and punishment. The Muslim community then organically produced its own legal experts, persons qualified to fulfill a variety of legal functions that in totality constituted an Islamic system of law and governance.¹⁸

Religious and worldly authority, then, rested in the Prophet whilst he was among the believers. The Prophet did not limit himself to religious and spiritual leadership of the Muslims or expand his mandate arbitrarily, even though this would not be questioned—in fact, he would at times censor himself from speaking until God had revealed something to him regarding certain petitions submitted to him, whether they related to religious, civil, private, matrimonial matters, or any other area of life. This aptly complements his understated role as "Prophet"—who was understood as the recipient of revelation from God—or as a vehicle for delivering and showing the practical implementation of the divine message and law to the "believers" (in the wider sense of believers in God) or to those who would believe in him specifically. Due to his status as Prophet, Muḥammad ensured that the laws that were revealed were implemented appropriately, with the two

¹⁷ Sulaymān Ibn al-Ash'ath Abū Dāwūd as-Sijistānī, *Sunan Abī Dāwūd, fī jam' jawāmi' al-aḥādīth wa'l-asānīd wa maknāz aṣ-ṣiḥāḥ wa's-sunan wa'l-masānīd, al-juz' al-thānī* (TraDigital, Stuttgart 2000) 611–612.

¹⁸ Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, Cambridge 2005).

accompanying qualifications that were also revealed in the Qurʾān, namely, “wisdom and goodly exhortation” (Qurʾān 16:125). Alongside this, the Qurʾān dictates a painful punishment that God will give to those who are the *munāfiqūn* (hypocrites)—those who say one thing and do another (Qurʾān 4:138). This also adumbrated the manner in which the law was to be applied, uniformly and without discrimination, except for justifiable exceptions which the law itself stipulated. This ensured a healthy level of equality of treatment, such that the Prophet himself rarely ever had more belongings and wealth than his followers and applied all rulings upon himself and those closest to him so that others would also be encouraged to follow suit. This was necessary as many of the newly revealed rulings, such as clothing and feeding workers and slaves as one clothes and feeds one’s self, were difficult, and likely to upset the hierarchical and class-based society that permeated pre-Islamic Arabia.

The earliest sources support the view that legislative authority—alongside being rooted in the Qurʾān and the Prophet—was not limited only to these two. By the time of the Prophet’s demise, it is not hyperbolic to state that he was regarded unanimously as the vehicle through whom God spoke. To his followers, as attested by the very Qurʾānic text that he preached, Muḥammad was commanded to proclaim that he was “[. . .] only a man like yourselves, except that revelation has come to me [. . .]” (Qurʾān 18:110), devoid of any form of divine status. But by the time of his death, he was the most important figure the Arabs knew. Notwithstanding his immense success, the Arabs also knew of the important role played by Abū Bakr, ʿUmar, ʿUthmān, ʿAlī, and others, in contributing to this success. Much like the Prophet, they too were charismatic and enjoyed the respect of the faithful. These men, all of whom became *khulafāʾ* to the Prophet later on, derived their own authority as privileged companions of the Prophet, as they demonstrated themselves to be exemplary defenders of the Prophetic authority. Consequently, that authority was handed to them when the Prophet no longer remained among them. Thus the *khulafāʾ* tended to see themselves, and were seen by others, as God’s direct agents in the enforcement of the Divine will, His laws, commandments, and the way established by the Prophetic example, after the Prophet.

Since the *khalīfah* was the “successor” to the Prophet, and his “representative”, it naturally followed that the *khalīfah* would be expected to provide further guidance on the revealed law, adjudicate on matters of critical doctrine in which there existed some ambiguity, and on essential matters for the continuation of the religion and the community. Some have argued that the *khalīfah* would venture to do this from his own authority,¹⁹ however, much of caliphal-legal authority rested on precedent, either on explicit textual evidence from either the Qurʾān or Prophetic traditions, generally accepted custom, the practice of earlier *khulafāʾ* and of the accepted modes of legal and juristic methodology.²⁰ This naturally led to the accumulation of a combination of theological, doctrinal, spiritual, temporal, and governmental authority; the latter was of particular relevance in the context of the newly acquired areas of land that were now coming under the Islamic domains of governance through preaching, conquests, and battles.

¹⁹ Patricia Crone and Martin Hinds, *God’s Caliph: Religious Authority in the First Centuries of Islam* (Cambridge University Press, New York 2003) 43; Abdulhadi Alajmi, “Ulama and Caliphs New Understanding of the ‘God’s Caliph Term’” (2011) 13 (1) *Journal of Islamic Law and Culture* 102–112.

²⁰ Hallaq argues that there was also “a thin layer of caliphal law” to which later caliphs in the early period referred for precedent. Largely, however, the caliph would legislate in accordance with the Qurʾān and the Sunnah. Wael B. Hallaq (n 15) 39.

There is also the ascription to the *khalīfah* of the title of *khalīfatū'llāh fi'l-'arḍ*—or “God’s representative on earth,”²¹ which is likely derived from a verse of the Qur’ān in which God promises to “make them successors in the earth” (*la-yastakhliḥanna-hum fi 'l-'arḍ* [. . .]):

Allāh has promised, to those among you who believe and work righteous deeds, that He will, of a surety, grant them in the land successorship [of power/authority] (*la-yastakhliḥannahum fi'l-'arḍi*), as He granted successorship to those before them; that He will establish for them in authority their religion—the one He has chosen for them; and that He will give them in exchange safety after their fear: “They will worship Me (alone) and not associate anyone with Me. Those who disbelieve thereafter, it is they who are the miscreants.” (Qur’ān 24:54–55)

Many studies have shown that the Qur’ānic term *khalīfah* was understood by the early Qur’ān exegetes of the seventh and eight centuries as referring, in general, to the human being in his function as a custodian of the earthly order and its resources.²² But the usage of the title *khalīfat rasūl Allāh* (successor/vicegerent of the Messenger of Allāh) as widely recorded in the sources gave the title an overtly political significance that has continued until the present age. This may have been because of the political exigencies that the leadership of each of the first four *khulafā'* had to deal with. Each of the first four *khulafā'* of the Prophet were appointed in a different way and each adopted unique policies to deal with the problems during their respective term as *khalīfah*, without invoking divine authority or revealed policies for political administration and governance of the Muslims.

It is to be noted that this formulation of “God’s successor on earth” was not employed for the first four caliphs, who have a high and noble respect in Islam as *al-Khulafā' al-Rāshidūn*—the “Rightly Guided Caliphs.”²³ This ennobled status derives largely from the fact that these first four caliphs were all companions of the Prophet—they lived, laughed, wept, suffered, fought, were victorious, and were personally taught the laws, rules, and practices of Islam intimately by the Prophet himself. All in some way shared some proximity to the Prophet, through marital relationships, or, as in the case of the fourth Caliph, the Prophet’s cousin and nephew, and this blood-relationship was something that later defined the doctrine of the Shī‘ah, according to whom leadership and authority over religious and political affairs must vest in those directly descendant from the Prophet himself.

III. ESSENTIAL CHARACTERISTICS OF THE CLASSICAL (PREMODERN) *KHILĀFAH* OR *IMĀMAH*

Along with the *ummah*, the community of believers, its religious (and some argue political) organization and leadership is contained and guaranteed in the *khilāfah* (caliphate) or the *imāmah* (leadership). Under God’s sovereignty and the authority of His law, the Shari‘ah, the *khalīfah* was understood to be the temporal ruler of the Muslim polity, the premodern state and later appellations also made the *khalīfah* the defender of the faithful (*amīru'l-mu'minīn*).²⁴ It is noteworthy that Western scholarship has shown that Islamic law did not begin to crystallize until the advent of the ‘Abbāsīd caliphate, from around 750 CE onward.²⁵

²¹ Ibid.

²² Wadad Al-Qāḍī, “The Term ‘Khalifa’ in Early Exegetical Literature” (1988) 28 *Die Welt des Islam* 405.

²³ Wael B. Hallaq (n 15) 39.

²⁴ Erwin Rosenthal, *Islam in the Modern National State* (Cambridge University Press, Cambridge 2009) 12.

²⁵ Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Clarendon Press, Oxford 1953).

Muslim tradition, however, associates the full flowering of Islamic law with the golden age of the Prophet and his first four successors, the *khulafāʾ al-rāshidūn* (the Rightly Guided Caliphs). For jurists concerned with constitutional theory and law, *khilāfah sensu stricto* was confined to these four early caliphs—Abū Bakr, ʿUmar, ʿUthmān, and ʿAlī. Muʿāwiyah, who came after, established a *mulk*—a dominion of temporal dynastic rule within his family, which became an absolute monarchy—by challenging ʿAlī’s authority as *khalīfah*. The ʿAbbāsīd caliphs came close to blurring the distinction between *khilāfah* proper and *mulk*. They were very close to acting as absolute monarchs, except that they depended heavily on the veto of the *ʿulamāʾ*, whom they constantly tried to co-opt in order to maintain a hold on power. But they were aware that they had to play within the guidelines established by the *ʿulamāʾ*, else they would quickly lose favor amongst the masses, who trusted the *ʿulamāʾ* more than they did the caliphs, but they also maintained some safety in the knowledge that the *ʿulamāʾ* also knew that the only legitimate modes of governance in Islam was through a caliphate. Thus the jurists were forced to maintain a compromise between what they promoted as the closest form of the ideal caliphate and the ugly reality of a quasi-dynastic rule, in order to ensure that the caliphate indeed remained the ideal.

The classical formulation of the *khilāfah* was propounded by al-Māwardī (d. 1058) in the early tenth century, who wrote his authoritative *al-Aḥkām al-Sulṭānīyah* [Ordinances of Government] at a time of political crises faced by the ʿAbbāsīd caliphate in Baghdad. Al-Māwardī was a renowned jurist of the *Shāfiʿī* school of Islamic jurisprudence who wrote extensively on law, governance, and the caliphate, was a Judge at Nishapur, later Chief Judge (*qāḍī al-quḍāt*) at Baghdad under the early Saljuks, and also practiced statecraft as a diplomat under contemporary ʿAbbāsīd caliphates.²⁶ His guidelines and formulations on the caliphate and its requirements remained largely authoritative until Ibn Taymiyah (d. 1328) shifted the focus from the *khilāfah* to the Shariʿah itself.²⁷ This point is essential to grasp: Although the caliphate existed immediately after the Prophet’s demise, treatises on the rules of governance, on the proper governance of the Islamic community, and texts on constitutional theory were formulated largely in defense of the caliphate as a system and the caliph’s authority and legitimacy (in al-Māwardī’s case, defense of the ʿAbbāsīd caliph), which was threatened by rulers, *umarāʾ* (pl. of *amīr*) or sultans. The principle aims of these texts, as can be seen from the very first chapter of al-Māwardī’s *al-Aḥkām al-Sulṭānīyah* entitled “On the Appointment of the Sovereign (*imām*)”, is to establish through textual, religious, legal, and historical evidences the legitimacy of, and unquestionable obedience toward the *imām* or caliph by the Muslim community. The principal aims behind such texts were to maintain the unity of the *ummah* under one caliph in a situation of the growing disunity and disintegration of power from the hands of the caliph, who was the symbol of Islam’s religious and political unity throughout the Islamic empire. Although they were composed many centuries after the existence of the ideal institution that they sought to justify, their importance may rest in this point; they sought to help both the authorities and their discontents in understanding what Islamic leadership was in its classical and formative period, and held up a mirror to what it had become and what it may lead to tomorrow, if not rectified. Thus we find al-Māwardī defending the idea that the *imāmate*, or supreme

²⁶ H. A. R. Gibb, *Studies on the Civilization of Islam* (Beacon Press, Boston 1962) 151–165.

²⁷ It is Ibn Taymiyah to whom many of the Wahhābī revivalist movements of the late eighteenth century attempt to draw an oblique line; to Rashīd Riḍā, the disciple and protégé of Muḥammad ʿAbduh, and to other contemporary *ʿulamāʾ* and thinkers who call for a restoration of the Shariʿah in an Islamic state, or caliphate. See generally Ovamir Anjum, *Politics, Law and Reason in Islamic Thought: The Taymiyyan Moment* (Cambridge University Press, Cambridge 2012).

leadership of the *umma*, is the institution intended as the “vicarate of the prophecy in upholding of the faith and managing the affairs of the world” and that its “establishment is unanimously considered to be obligatory on the Community.” Furthermore, al-Māwardī goes to some length in trying to show that the *imāmate* is required by the revealed law, primarily, as well as by reason.²⁸ But al-Māwardī’s purpose was not to emphasize a distinction between worldly and divinely revealed power, but to reclaim, rather, socio-political authority for the caliph. On the basis of the divinely appointed functions of the caliph, al-Māwardī was able to assert the *khalīfah*’s authority in “political” as well as “religious” matters:

God [. . .] ordained for the people (*al-umma*) a Leader through whom He provided for the Deputyship (*khalīfah*) of the Prophet and through whom He protected the Religious Association (*millah*); and he entrusted government (*al-siyāsa*) to him, so that the management of affairs should proceed (on the basis of) right religion [. . .] The Leadership became the principle upon which the bases of the Religious Association were established, by which the well-being of the People (*maṣāliḥ al-umma*) was regulated, and affairs of common interest (*al-umūr al-‘amma*) were made stable, and from which particular Public Functions (*al-wilāyāt al-khāṣṣa*) emanated.²⁹

The principal public functions that the *khalīfah* had to ensure were being fulfilled were those of the Judges, the *muḥtasib* (market supervisor), and the *maẓālim* Court (for redress of grievances). All these functions fall under the remit of *siyāsa* (governance) and are entrusted to the *khalīfah* to provide for and have oversight of under his governance.

Among jurists and historians alike, probably due to the gradual disintegration of religious fervor, diffusion, and delegation of the authority of the *khalīfah* to various deputies and the increasing ceremoniousness of the office, the caliphate began to lose its significance and necessity, but more important, the religious credibility and authority of the office of the caliph began to wane. The role of the ‘*ulamā*’ became increasingly significant, and the caliphs began to see the co-opting of the ‘*ulamā*’ as part of the state’s infrastructure (by taking over religious endowments) as one way of ensuring the obedience of the masses. Whilst early jurists concentrate on the necessity of the *imāmate* or the caliph as necessary to the establishment of the caliphate or an Islamic state, later scholars such as al-Ghazālī begin to expand the definitions include possible alternatives, such as condoning the idea of usurping the office of the *khalīfah* in certain circumstances, and others such as Ibn Taymiyah eventually held that the *imām* or caliph was not a central qualification for an Islamic state, rather, it was the authority and rule of the Shari‘ah, which was the most important qualification, and that it was not necessary for this to be established under the leadership of a caliph. Such debates are still contested today amongst groups of varying ideological heritage, with some requiring the existence of the *imām* or caliph for establishing an Islamic state, whereas others hold that the necessary conditions, such as an Islamic state, are required before the *imām* or caliph can be sent, appointed, or claimed, if required at all.

A renowned *Mālikī* jurist and historian, Ibn Khaldūn (d. 1406 CE) was able to highlight the distinction between these various models quite clearly. Ibn Khaldūn was an exceptional jurist and was steeped in political theory and statesmanship in addition to being an esteemed judge (*qāḍī*) of the *Mālikī* school of Islamic jurisprudence. Writing in his *Muqaddimah*, he

²⁸ ‘Alī ibn Muḥammad Māwardī (ed), Waffaa Hassan Wahba (tr), *A Translation of Al-Aḥkām Al-Sulṭāniyya W’al-Wilāyāt Al-Dīniyya* (Garnet Publishing, Reading 1996) 3.

²⁹ Ann K. S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford University Press, New York 1981) 85.

provides a useful distinction between the caliphate and the various types of *mulk*. Analysis of Ibn Khaldūn's views may also be relevant as the foremost thinkers of many Muslim revivalist ideological movements, such as Muḥammad ʿAbduh, studied his works extensively.³⁰ Ibn Khaldūn recognizes two political realities regarding the state: the *siyāsah dīniyah*, synonymous with the caliphate or Leadership of the Jurists (essentially a theocracy), and the *siyāsah ʿaqliyah*, a state founded upon human reason. Realizing the declining legitimacy of the *siyāsah dīniyah* with the decline of the rightly guided caliphate, and the increasing power of the *mulk*, Ibn Khaldūn promoted the idea that even the *mulk*, a Kingdom or a dynastic leadership, would constitute valid forms of governance in Islam, but stipulated that for this the primary laws and statutes by which the Sovereign rules his subjects are to be based upon the Shariʿah:

The aforementioned rational politics may be of two types. The first type of rational politics may concern itself with the (public) interest in general, and with the ruler's interest in connection with the administration of his realm, in particular. This was the politics of the Persians. It is something related to Philosophy. God made this type of politics superfluous for us in Islam at the time of the Caliphate. The religious laws take its place in connection with both general and special interests, for they also include the maxims (of the philosophers) and the rules of royal authority.

The second type (of rational politics) is the one concerned with the interest of the ruler and how he can maintain his rule through the forceful use of power. The general (public) interest is, here, secondary. This is the type of politics practiced by all rulers, whether they are Muslims or unbelievers. Muslim rulers, however, practice this type of politics in accordance with the requirements of the Muslim religious law, as much as they are able to. Therefore the political norms here are a mixture of religious laws and ethical rules, norms that are natural in social organization together with a certain necessary concern for strength and group feeling. Examples to be followed in (the practice of) this (kind of politics) are, in the first place, the religious law (Shariʿah) and then, the maxims of the philosophers and the way of life of the rulers (of the past).³¹

Such a mixed constitution, though falling short of the ideal Islamic caliphate and system of governance, still holds the basic elements for an Islamic state for Ibn Khaldūn, foremost in which is the unchallenged primacy of the Shariʿah, to which all things are secondary. But whereas the early caliphate had a naturally endearing force that necessarily maintained the primacy of the Shariʿah, since its progenitors were at once religious/spiritual and de facto political leaders, the caliphate after the *khulafāʾ al-rāshidūn* no longer held unquestionable religious or spiritual authority in matters of religion and were only authoritative as long as they had the support of the *ummah*. Thus, Ibn Khaldūn discerned between the *siyāsah dīniyah* of the Rightly Guided Caliphs under the rule of the religious law, and the *siyāsah ʿaqliyah*, the Islamic state under the later caliphs, under the authority of the human sovereign whose laws required some substantiation and force to be implemented, which could often be derived from the religious law, but was not directly from it.

³⁰ Erwin Rosenthal (n 24) 17.

³¹ ʿAbd-ar-Rahmān Ibn-Muḥammad Ibn-Khaldūn (ed), Franz Rosenthal (tr), *The Muqaddimah: An Introduction to History* (Princeton University Press, Princeton 1974) 138–139.

IV. THE ISLAMIC STATE: LEGITIMATE GOVERNANCE AND RULE IN ISLAMIC LAW

As alluded to in the introduction, the Islamic state in the contemporary period has a lot to answer for, especially in the ways that its foremost architects have compromised certain fundamental principles in order to gain favor with the existing domestic and international orders.

The legitimacy of government or rule in Islamic law is entirely dictated by the legal sources in Islamic law. Disputed as to their number, they include the Qur'ān, the Sunnah (practice of the Prophet), the *ahādīth* (the sayings of the Prophet), and *ijmā'* (scholarly consensus). The *Mālikī* school of jurisprudence inserts an important source in fourth place before *ijmā'*, known as the *'amal ahl al-Madīnah*—the practice of the people of Madīnah (since they lived amongst the Prophet until his demise and thus observed the law in practice for a long period of time).

One of the foremost concepts in Islamic governance, historically as well as that which remains powerfully significant today, is the method of *shūrā*, a term that appears in the Qur'ān and means “consultation” in general. Two verses specifically refer to the concept in the context of administration of affairs: The first exhorts the Prophet to consult the people in matters, and then once a decision has been made, to trust in God and follow it through (Qur'ān 3:158–159). The second verse qualifies the believers as those who “conduct their affairs by mutual consultation” (Qur'ān 42:38). Historically, *shūrā* has been used to refer to a consultative body or electoral council established by 'Umar b. al-Khaṭṭāb to help nominate and decide on his successor. The consultations of this council saw 'Uthmān becoming the third *khalīfah* to the Prophet.³² The Qur'ān commentary of al-Qurṭubī (d. 1273) provides a useful, if common, understanding of the importance of *shūrā*, especially in the context of governance. In his exegesis of Qur'ān 3:158–159, he writes:

It is the obligation of the rulers to consult the scholars on matters unknown to them and in religious matters not clear to them. [They should] consult the leaders of the army in matters pertinent to war, and leaders of the people in administrative issues, as well as teachers, ministers, and governors in matters related to the welfare of the country and its development.³³

The important point here is that nonconsultative, dynastic rule was deemed as a departure from proper Islamic governance and a betrayal of forms of decision-making in the early Islamic caliphate. For this and other reasons, the concept of *shūrā* still resonates strongly in Muslim societies, even if at times nostalgically, in order to ensure just and consultative power-sharing and to avoid arbitrary despotic rule (*istibdād*). At the same time as recognizing the importance of *shūrā*, we should not make the mistake of confusing *shūrā* with democracy, whether constitutional or liberal. Not only does this make illiberal Muslim movements reject the notion of *shūrā* because of its proposed synonymy with democracy, but it is only accurately reflective of one aspect of democratic governance, failing to maintain absolute equivalence. The main point of contention between many Islamists and modernist

³² Fazlur Rahman, “The Principle of Shura and the Role of the Ummah in Islam” in Ahmad Mumtaz, *State Politics and Islam* (American Trust Publications, Indianapolis 1986) 87–96.

³³ Abī 'Abdallāh Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, “Al-jāmi' li-aḥkām al-Qur'ān” (1930) 1 al-Qāhirah: Dār al-Kutub al-Miṣriyah 1491–1492.

Muslims remains the concept and extent of “divine sovereignty” (*al-ḥākimiyyah*)³⁴ that they permit in the governance of affairs of the state. For many Islamists it is the notion of absolute divine sovereignty that does not permit them to allow for *shūrā*—in the sense that there is no possibility for consultation in matters that are properly the reserve of divine sovereignty—added to this, the claimed synonymy of *shūrā* with democracy further polarizes their respective positions. In parallel to *al-ḥākimiyyah* is the concept of *mulkiyyah* (from *mulk*, “dominion”), where sovereignty is delegated to the monarch or ruler.

The Qurʾān, which forms the primary source of legislation and legal authority in Islamic governance and law, reveals a notable linkage between the exercise of legitimate authority with primarily judging and ruling in accordance with the revealed law—both connoted by the term *ḥukm*:

Are you not aware of those who claim that they believe in what has been bestowed from on high upon thee, [O Prophet] [. . .] [and yet] are willing to defer to the rule of the powers of evil, even though they were bidden to deny it? (Qurʾān 4:60)

And they, who do not judge [or rule (*yahkum*)] in accordance with what God has revealed, they are the oppressors [or evildoers (*ẓālimūn*)]. (Qurʾān 5:45)

These verses adduce that power is only righteously and legitimately exercised when done so by sanction of, and in accordance with, divine law. It implies that to impose any standards or proscriptions on the people subject to the law (*riʾāyah*) other than those provided by divine law is illegitimate and a grievous sin.

In the lifetime of the Prophet, the law was already revealed in the Qurʾān. Anything that was left ambiguous or that was omitted from the revelation of the Qurʾān was completed by the Prophet’s role as the “lawgiver” and the “apportioner” (*al-qāsim*). For this reason, time and again, we find that all rulings (*aḥkām*) or laws were to be given in line with the rulings of “God and His Prophet”. So central was this as a verse of the Qurʾān and a legislative principle, that after the demise of the Prophet the formulation remained the same, but the latter part thereafter referred to the corpus of the actions (Sunnah) and sayings (*aḥādīth*) of the Prophet.

But the principles alluded to in the verses above do not speak of fundamental principles of governance in the modern nation-state, such as the concept of popular sovereignty. Popular sovereignty and the rule of law are supported by a great majority of Islamic thinkers, by those branded “fundamentalist” as well as modernist or reformist scholars. While these thinkers also propound a theory of democracy within their ideal models of statehood, it is obvious that in their parlance, democracy and sovereignty acquire a very different meaning. This is because these ideas have undergone a systematic domestication, especially by political-Islamist thinkers, something that Tibi has questionably termed “sharīʿatization”.³⁵ The Tunisian Muslim political leader Rāshid al-Ghannūshī, for example, sees Islam as having the ability of improving Western-democratic models by underpinning them with a moral code, something that he believes Islamic principles of governance could contribute to.³⁶ Tibi, however, follows a very linear argument, one which denies any role

³⁴ The notion of *al-ḥākimiyyah* is hardly found in the history of Islamic thought until the modern period, despite the claims of Islamists who claim its originality as stemming from the origins of Islam. Andrew F. March (n 14).

³⁵ Bassam Tibi, *The Sharia State: Arab Spring and Democratization* (Routledge, New York 2013) 61–63.

³⁶ Azzam S. Tamimi, *Rachid Ghannouchi: A Democrat Within Islamism* (Oxford University Press, New York 2001) 103.

for governance or political organization in the Shari‘ah, holding it merely as a religious and spiritual faith system. In doing so, he ignores a large section of history and sources that conclusively prove the opposite.³⁷ This is in stark contrast to the Sudanese Muslim political leader Hassan al-Turabi (1932–2016) who has at various times been a leading force in the Islamist-political leadership in the government of Sudan, and until his death recently was a leading opposition and head of Sudan’s Popular Congress Party. In the author’s various personal meetings with him, as well as in his public lectures, he has declared his firm faith that “an Islamic order of government is essentially a form of representative democracy” alluding to the concept of *bay‘ah*, allegiance to the ruler, without which popular sovereignty would not be realized. Al-Turabi propounded a unique understanding of these terms:

An Islamic government is not strictly speaking a direct government of and by the people; it is a government of the Shari‘ah [. . .] but in a substantial sense, it is popular government since the Shari‘ah represents the convictions of the people and, therefore, their direct will. This limitation on what a representative body can do is a guarantee of the supremacy of the religious will of the community.³⁸

The crucial question underlying much of this is the question of what the Shari‘ah is and who can authoritatively determine what it is. In the classical forms of the Islamic state in the form of the caliphate, the caliph, with the assistance of the ‘*Ulama*’, would formulate and detail what the Shari‘ah comprised and what its rulings and edicts demanded in terms of the rights, responsibilities, and obligations of the rulers and the ruled. In the modern state in the Muslim world, in contemporary forms of government (whether they are monarchies, democracies, or dictatorships), this crucial function—of deciphering and enumerating what the Shari‘ah is—is delegated to the elected legislature; not too dissimilar to the way in which a Western state may, for instance, delegate to the legislature to decide and delineate what is meant by and protected under the aegis of “human rights”. This has seen the incremental introduction of legislative statements into constitutions and primary legislative documents of the “Shari‘ah clause”, which determines the primacy of, and compliance with, the Shari‘ah in all matters of legislation. Thus in the modern Islamist-political view (and the author uses this term without its derogatory connotation), an Islamic democracy or Islamic state of any form, must “make “Islamic Shari‘ah” the primary, a [or perhaps the only] source of positive law”.³⁹

As both Feldman, and more recently Hallaq, have pointed out, this is an original approach with the difference that Hallaq considers this to be a failure of the Islamic religious, legal, and political leadership; that they have essentially deformed the sacred notion of the caliphate and Islamic governance, and have transmogrified it to fit it into modern frameworks of state and governance, which are the product of a largely Western, European, and mainly secular experiment that has stuck.⁴⁰ This experiment of democratizing the Shari‘ah requires the legislature to pass laws that ensure incorporation of, and compliance with, Islamic law, principles, and values.⁴¹ The obligation to legislate in this way stems

³⁷ Bassam Tibi (n 35) 31–41.

³⁸ Roxanne Leslie Euben and Muhammad Qasim Zaman, *Princeton Readings in Islamist Thought: Texts and Contexts from Al-Banna to Bin Laden* (Princeton University Press, Princeton 2009) 216.

³⁹ Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University Press, Princeton 2008) 113.

⁴⁰ *Id.* 10; Wael B. Hallaq (n 2) 23–24.

⁴¹ Noah Feldman (n 39) 119–120.

from another experimental design feature, and one that has become the standard feature in recent Muslim states' experiences, whereby the constitution stipulates the requirement that all legislation enacted must comply with the Shari'ah, or which prohibits, through "repugnancy clauses", passing legislation that is in contravention to the dictates or values of the Shari'ah, or which violates core tenets of Islam.⁴² Though this formulation seems to satisfy most Islamist leaders and movements, it is rather naïve in its assumptions since all such formulations, with the exception of one or two, fail to detail what those values may be, or what such dictates of the Shari'ah actually require. Feldman, however, is slightly too eager to concede success to contemporary attempts as what he understands to be a type of judicial review, equating it to a "constitutionalization of the Shari'ah".⁴³ Until recently, the Egyptian Constitution and governmental model was looked upon as the closest one that encapsulated the various requirements as far as possible within the modern nation-state system, incorporating a constitution that required legislation to comply with the Shari'ah, designation of the various sources of the Shari'ah that would be considered, the schools of law deemed to be authoritative, and also a body of scholars that would be relied upon to provide authoritative and reliable, although nonbinding, legal opinions and interpretations on what the law should be. An example of this was seen in 2012, when the Supreme Council of the Armed Forces (SCAF), the body that governed Egypt after the removal of Ḥusnī Mubārak, unilaterally amended Law 103 of 1961, which granted Al-Azhar quasi-independent status.⁴⁴ This was further reinforced by Art. 4 of Egypt's 2012 Constitution, which stipulated that Al-Azhar is "an encompassing independent Islamic institution with exclusive autonomy over its own affairs." Previous amendments to the 1961 law restored the Council of Senior Scholars of Al-Azhar and the council's right to elect the Grand *Shaykh* and nominate the Mufti. The 2012 Constitution mandated that the council be consulted on all matters of Islamic law. The 2014 Constitution devotes an entire article to Al-Azhar and its remit but does not specify a legislative or interpretive role for Al-Azhar, except that it has "exclusive competence over its own affairs."⁴⁵

Underlying all of this is the relationship between religion and government, or theocracy and constitutionalism. Hirschl studies this dynamic in his work on the understanding of constitutional governance in societies where there is a substantially intrinsic societal, legal, and cultural (and formal) recognition of religion.⁴⁶ His analysis also reveals the biggest problem in this important question—that slogans made famous by Islamic political movements in the nineteenth and twentieth centuries, such as "the Qur'an is our Constitution", are wholly incompatible with the modern constitutional governance (read: Western forms of constitutional governance) but also with the ideal notions of the Westphalian nation-state model, whereas, slogans made popular by the likes of the Muslim Brotherhood, such as "Islam is the solution" are not so problematic. What Hirschl fails to adequately segregate is the difference between constitutional theocracies and the institutions that are operating within those

⁴² Ibid. 121. For more on the Islamization of Muslim states' constitutions and the frequency, typologies, and effects of "Shari'ah" and repugnancy clauses in constitutions, see Intisar Rabb (n 6); Dawood I. Ahmed and Moamen Gouda, "Measuring Constitutional Islamization: The Islamic Constitutions Index" (2015) 38 Hastings International and Comparative Law Review 1–74.

⁴³ Ibid. 121.

⁴⁴ See scan of the original document: Issued by the Supreme Council of the Armed Forces, "Amendment to Art. Law 103 of 2012", *Official Gazette—al-Jaridah al-Rasmiyah* (January 19, 2012) 10–16.

⁴⁵ Art. 7 "Constitution of Egypt (2014)" (International Idea, 2014), https://www.constituteproject.org/constitution/Egypt_2014?lang=en, accessed September 4, 2015.

⁴⁶ Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2011).

states. In constitutional theocracies, lawmaking and legal interpretation, indeed governance as a whole, are undertaken by traditional and informal structures of authority, from muftis, theologians, jurists, and then *salāṭīn* (Ar. pl. of *sulṭān*), *umarāʾ*, and the ruling elite, often from tribal or familial heritage. The second group comprises of religio-political movements that seek to control or influence the operation, composition, and *modus operandi* of various institutions and apparatus within the state. Hirschl makes a compelling argument that in the modern theocratic state, secular structures and secular-trained judges are employed as a means of curbing religious law and its application.⁴⁷ Although the constitution and laws may be Islamic in nature or in overtones, the underlying process is one whereby judges trained in secular legal traditions (and seldom trained adequately in, for example, Islamic jurisprudence) will be interpreting and applying Islamic legal formulations, or discounting where they feel they are not suitable.

V. PRINCIPLES OF GOVERNANCE IN AN ISLAMIC STATE

The underlying principle and one that is certainly not disputed, is that in the premodern Islamic polity, any political form of governance or rule was to be subordinate to the Shariʿah, including the executive and judicial authority—although during various caliphs’ rule, the extent to which authority was exercised in line with precepts and rulings of the Shariʿah varied. What is sometimes difficult to understand when comparing with the modern period, however, is that the Shariʿah itself is the legislative power that has force by virtue of it being divinely originated, in contrast to legislation, which requires a sovereign to enact it. With the Shariʿah, even the executive cannot define the limits of the Shariʿah and must work within the limits it sets; the executive’s power in the early Islamic caliphates was mandated by the Shariʿah and was severely limited in its scope. The executive derived their power to exercise authority by virtue of the Shariʿah, and they did not legislate to give themselves a mandate, as happens in modern forms of statehood in the contemporary period.

If we merely refer to the Qurʾānic pronouncements of principles of governance, we find relative plurality of options regarding modes and models of governance. Though there is an overriding emphasis on the authority of God and the Prophet as being the final arbiters in matters of dispute and in terms of the source of legislative authority, the Qurʾān does not condone any particular model of governance, except one that propounds injustice (social, economic, or otherwise).

It also posits a technocratic, even a meritocratic form of rule, stating that “Allāh commands you to *give over the trusts to those entitled to them*, and that when you judge between men, you judge with *justice* [. . .]” (Qurʾān 4:58, emphasis added).

In addition to the fundamental understanding that governance and leadership is a trust (*amānah*), there is no condemnation of a nondemocratic form of leadership, as long as the fundamental precepts of justice are maintained. Similarly, the Qurʾān mentions monarchy as a form of governance and rule without condemnation, in reference to the appointment by God of King Ṭālūt. Then ensues an interesting discussion as to the right to legitimate leadership in this case:

Their Prophet said to them: Allāh has appointed for you Ṭālūt as a King. They demurred, saying; “How can he have sovereignty over us while we are better entitled to sovereignty than he, and he has not even been granted an abundance of wealth (possibly referring to

⁴⁷ Ibid. 103.

land/dominion)?” He answered: Surely Allāh has granted him superiority over you and has given him a large portion of knowledge and strength (possibly referring to authority and power), And Allāh bestows sovereignty upon whom he pleases. Allāh is Lord of vast bounty, All-Knowing. (Qur’ān 2:247)

VI. CONCLUSION: CAN THE ISLAMIC MODEL OF STATEHOOD OFFER ANYTHING OF VALUE TO MODERN STATES THAT ESPOUSE THE CENTRALITY OF ISLAM IN THE PUBLIC REALM OF THE STATE?

As argued above, the classical form of governance in Islam has seen a tripartite pole of leadership (caliphate), law (Shari‘ah), and the community of believers (*ummah*). Most modern Muslim revivalist and reformist movements in the contemporary period have attempted to force this tripartite division into a modern form of statehood that accepts modern principles, such as democracy, the defined nation-state, constitutionalism, and the separation of powers. This disfiguration of classical modes of governance in accordance with the exigencies of modern political forms of governance has resulted in a concoction that has no precedent in Islamic history.

The Shari‘ah, as claimed by modern Muslim reformist and revivalist groups, is heralded as the constitution of a state, ignoring the fact that not only is the Arabic word for constitution, *dustūr*, absent from the premodern classical Islamic sources and tradition but also that the very idea of constitutions and constitutionalism postdate the period of the Islamic caliphate.

At the same time as there seems to be a project of desecularization of law and governance, this is met with an equally strong project on behalf of Muslim movements to introduce the sacred into law and governance.⁴⁸

If there is to be an Islamic state today along the lines of the early caliphate, it necessarily must abide by the central notions of governance—which entails a supreme leader that combines both religious and political authority, and a scholarly juristic class that is at once independent, but also one to whom the caliphal authority can look toward for guidance and to keep legitimate Islamic legal and political authority in check. This bidirectional autonomy and interdependence may seem anomalous, but is not too dissimilar to the independence and interdependence of the various branches of government in modern, secular democracies; this is not to say, however, that the Islamic governance structures need to embody democratic principles—they may do, and could do, but are not required to be democratic in order to be legitimately Islamic.

One could argue that if the ultimate purpose of human governance and human agency (according to the traditionalist Muslim view) is to promote lawfulness, justice, and order in society, any mode or structure of governance which is conducive to, and achieves this objective, is “permissible” and cannot be objected to on moral or ethical grounds. This must be true, whether it is a dictatorship, autocratic rule, monarchic, theocratic rule, or democratic rule. It must also, therefore be accepted, as many discerning scholars of law and constitutional law have argued, that a benevolent and just monarchy or autocracy, which resorts to varying levels of consultation with representatives of society at large, could very well be considered not only permissible, but legitimate and authoritative, as long as basic standards of just human governance are achieved.

⁴⁸ Bassam Tibi (n 35) 53–57.

Islamists in the modern period tend to be blissfully ignorant of historical circumstances when they disingenuously compare Western legal and political traditions with Islamic ones. It has been discussed widely that the former has undergone fissures of ideological, political, and theological nature that are largely irrelevant to those that have been experienced by the latter. Similarly, in the Western legal experiment, religious law (with the exception of canon law, perhaps) has no longer continued to dictate the governance and political spheres to the extent that it has in the Islamic world and in Islamic history. For this very reason it is, at best presumptuous, and at worst highly fallacious, to seek to legitimize Islamic political and governmental experimentation in a theological vacuum or in a secular environment.

PART

3

WHAT KIND
OF GOVERNMENT

Civilian or Military?

State Control over the Military or Military Control over the State?

A Comparison of Selected Arab Constitutions

TILMANN J. RÖDER

I. INTRODUCTION

The Arab Spring brought the armed forces of all regional countries back to the center of attention. The call for a *dawlah madaniyah* or “civil state” in the streets, media, and politics clearly challenged the military character of many of the then-existing regimes.¹ At the turn of the year 2010/2011, Libya was still firmly under the control of Colonel Mu‘ammar al-Qadhafi, who had overthrown King Idrīs in 1969 and continued to use his military rank like a title until his death. Ḥusnī Mubārak had served as Commander of the Egyptian Air Force before he became Anwar Sādāt’s vice president in 1975 and, after the latter’s assassination in 1981, president. Tunisia’s President Zīn al-‘Ābidīn Ben ‘Alī, a former air force officer as well, assumed power in a coup d’état in 1987. President ‘Alī ‘Abdullāh Ṣāliḥ resumed his career in North Yemen’s army after his active participation in the Nāṣrist army coup of 1963 and served as a military governor of Ta‘izz Province until parliament elected him head of state in 1978. Ironically, the only authoritarian ruler who has remained in office since the 2011 uprising—President Bashār al-Assad of Syria—is also the only one among his peers who had not grown out of the military ranks of his country. However, he inherited power and the military tradition from his father, Ḥāfiẓ al-Assad, a former air force officer who had trained with Ḥusnī Mubārak during the short-lived political union between Egypt and Syria, known as the United Arab Republic (1958–1961).²

¹ See Salwa El-Daghili, “*Al-Dawlah al-Madaniyah*: A Concept to Reconcile Islam and Modern Statehood?” (in this volume).

² Mehran Kamrava, “Military Professionalization and Civil-Military Relations in the Middle East” (2000) 115 *Political Science Quarterly* 1, 76 et seq.

Iraq's former President Ṣaddām Ḥusayn also belonged to this line of autocrats, despite his being toppled as early as 2003 by the US-led invasion of Iraq, tried for murder charges, and executed in 2006. Ṣaddām had a particularly complex relationship with the military. As a young man, he was deeply disappointed over not being accepted into the military college; as a political leader who had assumed power, together with Aḥmad Ḥassan al-Bakr—a trained army officer—in the Baʿthist coup d'état in 1968, he feared that his own general staff would follow his example and remove him. At the same time, he considered himself a military strategist, promoted himself to the rank of field marshal in 1976, and, after becoming president in 1979, drove his country into war with Iran (1980–1988).³

In 2011, uprisings throughout the Arab world began to turn so violent that police forces could not keep them under control, and the decision of the respective militaries either to protect their governments or to side with the protesters effectively defined further national developments. Despite this fact, media reports as well as expert studies mostly focused on the dichotomy between protesters and regimes, thereby ignoring the importance of the regional militaries⁴ and the fact that they would probably base their decisions on factors other than merely political ones—namely, on their own corporate interests. In recent years, very few scholars have assessed the role of the Arab militaries in the context of the uprising.⁵ Regarding the constitutional framework for the armed forces, there does not seem to exist any recent literature at all; maybe because, among other reasons, many jurists tend to underrate the potential influence of the military on constitutional systems. The present article endeavors to shed some light on this aspect of the Arab Spring.

The developments in the authoritarian regimes of the region varied a lot. The Tunisian armed forces supported the popular protests almost from the beginning. Their Egyptian counterpart exploited the situation to assume control of the state. Meanwhile, the Syrian military firmly backed President al-Assad. In Libya and Yemen, the armed forces splintered, accelerating the descent into chaos of their countries as Iraq had experienced a decade earlier, where the Coalition Provisional Authority had formally disbanded the military after the invasion. It is worth noting at this point that the military lasted as a functioning institution in countries that had experienced phases of political and societal modernization during the twentieth century, such as Egypt, Syria, and Tunisia, while it rapidly disintegrated in those societies where primal loyalties continued to belong to clans or tribes rather than to the nation or state, as in Yemen and Libya.

³ Joseph Sassoon, *Saddam Hussein's Ba'ṯh Party: Inside an Authoritarian Regime* (Cambridge University Press, New York 2012) 137 et seq.

⁴ Ben-Dor's formula that "by far the most important single factor in Arab politics is the army; by far the most important type of regime is military" seems to still hold true after four decades. Gabriel Ben-Dor, "Civilianization of Military Regimes in the Arab World" (1975) 1 *Armed Forces and Society* 3, 317.

⁵ A fact also stated by Oreb Barak, "Studying Middle East Militaries: Where Do We Go from Here?" (2011) 46 *International Journal of Middle Eastern Studies*, 406. Important new works are William C. Taylor, *Military Responses to the Arab Uprisings and the Future of Civil-Military Relations in the Middle East* (Palgrave Macmillan, London 2014), Birthe Hansen and Carsten Jensen, *Transforming Civil-Security Relations in the Middle East: The Role of the Military After the Arab Spring* (Routledge, London 2016), Florence Gaub, *Guardians of the Arab State: When Militaries Intervene in Politics, from Iraq to Mauritania* (C Hurst & Co, London 2016), Zoltan Barany, *How Armies Respond to Revolutions and Why* (Princeton University Press, Princeton, New Jersey 2016), and Philippe Droz-Vincent, "Changes in Civil-Military Relationships after the Arab Spring" (*in this volume*); Mehran Kamrava lists the seminal works on the subject published in the 1960s and 1970s, *id.* (n 2) 67.

Similar to the mentioned authoritarian regimes, all regional monarchies based—and continue to base—their power at least to some extent on the armed forces. Tight oversight mechanisms and the employment of mercenaries are characteristic instruments to avoid any threat to the rulers. Indeed, none of them was overthrown. Kings Muḥammad VI of Morocco and ‘Abdullāh II of Jordan quickly mitigated public pressures through political and constitutional reforms, thereby ensuring that their rule was never seriously endangered.⁶ The monarchs of the Gulf region, who were faced with popular discontent and protests to a much lesser extent, reacted with a combination of economic benefits for loyal citizens and fierce oppression of opponents.⁷ Only in Bahrain did sizeable numbers of protesters expressly turn against the monarchy. In this situation, the King of Saudi Arabia, ‘Abdullāh Ibn ‘Abd al-‘Azīz al-Sa‘ūd, immediately sent troops across the border to protect King Ḥamad bin ‘Isā al-Khalifah, suppress the revolt, and prevent its spillover to other Gulf Cooperation Council countries.⁸

Altogether, the relations between the Arab monarchs and their militaries did not change to any appreciable extent since 2011. The same is true for a number of other countries, such as Lebanon, Algeria, and Mauretania.⁹ These countries will therefore receive less attention in this article than those countries that underwent significant changes of civil-military relations as part of a more general reorganization of their state structures.¹⁰

This article is composed of five main sections, analyzing the constitutional framework for the armed forces in Tunisia, Egypt, Libya, Syria, and Yemen along common criteria. At the end, some comparative thoughts and conclusions will be presented. This article can, however, only provide an overview of the main issues and developments.

At the outset of every country analysis, it is essential to clarify the mandate of the armed forces in the respective constitutional system. In most countries, this is primarily the defense of the state and its citizens against external threats. Many constitutions also allow the deployment of armed forces in support of allies. A secondary, frequent function of the armed forces is to ensure the safety and security of the state and its citizens in the domestic sphere. Tertiary functions include guarding important objects, providing disaster relief, serving as honor guards, and the like. It is important to note that in a democracy—to which the five countries scrutinized here at least officially declared to adhere—the armed forces are supposed to protect the citizens against external or internal threats, but not the government against the people. Promotion of a specific political agenda, protection of their own corporate economic interests, and similar objectives of militaries do not comply with democratic principles as well.

The criteria that will be used to analyze civil-military relations in the mentioned countries from a constitutional angle consist of five blocks of questions. First, the question of

⁶ See Awn Shawkat Al-Khasawneh, “The Arab Spring and Constitutional Reforms in Jordan: A Historical and Legal Appraisal”; and Francesco Biagi, “The Separation and Distribution of Powers under the New Morocco Constitution” (both in this volume).

⁷ See Gianluca Parolin, “Winter Is Coming: Authoritarian Constitutionalism under Strain in the Gulf” (in this volume).

⁸ Zoltan Barany, “Comparing the Arab Revolts: The Role of the Military, *Journal of Democracy*” (2011) 22 *Journal of Democracy* 4, 30 et seq.; Steffen Hertog, “Rentier Militaries in the Gulf: The Price of Coup-Proofing” (2011) 43 *International Journal of Middle East Studies*, 400 et seqq.

⁹ See Antoine Messarra, “The Role of the Army in a Multicommunity Society: The Case of Lebanon; Madjid Benchikh, “The Grip of the Army on Algeria’s Political System”; and Mohamed Driss Horma Babana, “The Changing Role of the Military in Mauritania” (all in this volume).

¹⁰ See Philippe Droz-Vincent, “Changes in Civil-Military Relationships after the Arab Spring” (in this volume).

command over the armed forces needs to be answered: Which institution or figure commands the military in times of peace and times of war? How is this command secured? This institutional aspect forms the core of civil-military relations; it is usually regulated in a country's constitution.

Second, what institutional control mechanisms exist, if any? Particularly, does the constitution necessitate parliamentary approval of the military budget and its deployment? Clearly, such control mechanisms will only take effect in a functioning system with separated state powers that check and balance each other. In practice, foreign financial contributions to the military constitute an additional problem because they can be channeled around institutional control mechanisms.

Third, under which conditions, and for which tasks, may the military act in the domestic sphere? How is its relation vis-à-vis the police defined? What is the role of the military during the state of emergency? May the military justice organs also prosecute civilians? The mere existence of the military can be tempting to use for political purposes, for example, to push back concurring political forces or protesters.

Fourth, does the constitution allow for economic activities of the military that may be misused to exert undue influence on society and the state?

And fifth, does the constitution define the fundamental rights or limitations of rights of military personnel? In this context, one may also look out for institutions or figures representing the interests of the members of the military forces, such as a soldiers' association or a parliamentary commissioner ensuring the protection of their rights.

II. TUNISIA: FROM AUTHORITARIAN TO DEMOCRATIC CONTROL OF THE ARMED FORCES

A. The Military and Its Constitutional Status before the Revolution

On the eve of the Arab Spring, in 2010, the Tunisian military comprised 35,800 active staff.¹¹ It was dependent on conscription and poorly equipped by regional standards. The armed forces were better suited for border control, rescue missions, and similar tasks rather than traditional combat operations. They were intentionally isolated from the institutions of the state and did not have any noteworthy economic activities of their own. Another 12,000 served in the paramilitary National Guard, which was designed as a counterbalance to the military, and better equipped. Added together, 0.46% of the population actively served in the armed forces, which is the lowest rate of all countries compared in this article. A few dozen soldiers and observers were deployed to the UN missions, mostly in the Democratic Republic of Congo.¹²

The pre-revolutionary Constitution of Tunisia, which was enacted by President Habib Bourguiba (Ḥabīb Būrqība) in 1959 and last amended in 2008, contained very few provisions about the military. Most important, Art. 44 determined the President of the Republic to be Supreme Commander of the Armed Forces. He was also in charge of appointments to higher military positions (Art. 55). The fact that these appointments had to be based on proposals by the government did not mean much, as the government was not considered an organ of its own but an instrument of the president to exercise executive power (Art. 37).

¹¹ By service: Army 27,000, Navy 4,800, Air Force 4,000, The International Institute of Strategic Studies (IISS), *The Military Balance 2011* (Routledge, London 2011) 332 et seq.

¹² Central African Republic/Chad: UN (MINURCAT), 2 troops + 4 observer; Côte d'Ivoire: UN (UNOCI), 4 troops + 7 observers; Democratic Republic of Congo: UN (MONUC) 46 troops + 30 observers. *Id.* 333.

The president could unilaterally change the composition of the government (Arts. 50, 51). Moreover, the 1959 Constitution provided that a law should regulate the fundamental guarantees granted to members of the armed forces (Art. 34 sentence 1). This was all. The constitution neither defined the mandate of the armed forces nor did it foresee any institutional control mechanisms. In the French-style presidential system that Bourguiba adopted in 1959 and that Ben 'Ali kept after he had removed him from office in 1987, the military was an exclusive instrument of the head of state.¹³

B. Military Support for the Revolution and the Drafting of a New Constitution

In the revolution of 2011, the Tunisian military ambitiously supported the protesters and played a decisive role in the developments that led to President Ben 'Ali's ouster in January 2011.¹⁴

During the first days of the protests in the province of Sīdī Būzīd in December 2010, the armed forces lacked information and understanding of the uprising, followed Ben 'Ali's orders, and left the bases in order to protect key infrastructures. However, the military leadership soon realized that the protests were directed against the person of the president, his wife and her family—the Ṭrābelsī clan—the police, and some other institutions that were perceived as corrupt, but not the military. The situation escalated when the internal security forces—the National Police and the National Guard—began to use, upon presidential order, lethal force against protesters on December 24, 2010. However, neither state violence, a curfew in Tunis, nor the declaration of a state of emergency helped to disperse the revolting crowds. At the turn of the year 2010/2011, the protests had become a national uprising that was supported by strong societal groups such as trade unions, lawyers, and students. When this stage was reached, the Chief of Staff of the Army, General Rashīd 'Ammār, decided to disobey the president's orders—allegedly beginning with the refusal to shoot at civilians—and instead sent troops to disarm the Presidential Guard. On January 14, 2011, the military forced the president to leave the country. For a moment, it assumed full control over the country, only to hand it back to a civilian interim government that was quickly formed thereafter.¹⁵

The decision of military leadership resulted less from its support of democratic values in general and its rejection of the concept of military subordination to civilian leadership in particular, than from its rational choice between two options. Further, supporting Ben 'Ali would have had more disadvantages than breaking with him. By siding with the protesters, the military gained a heroic reputation not only in Tunisia but worldwide.¹⁶ While Ben 'Ali had tried to insulate the military in order to coup-proof his regime, the military now found itself aligned with the new political leadership—mainly at the expense of the domestic

¹³ The civil-military relations laid out in the Tunisian Constitution of 1959 seem to be modeled on those of the Constitution of the French Fifth Republic of 1958. See L. B. Ware, "Ben Ali's Constitutional Coup in Tunisia" (1988) *Middle East Journal* 42, no. 4 (1988) 587 et seqq.

¹⁴ William C. Taylor (n 5) 57.

¹⁵ Zoltan Barany (n 8) 30 et seq. The existence of an order to use lethal force by Ben 'Ali is disputed. See Sharan Grewal, "A Quiet Revolution: The Tunisian Military After Ben Ali", *Carnegie Middle East Center Regional Insight* (February 24, 2016), <http://carnegieendowment.org/2016/02/24/quiet-revolution-tunisian-military-after-ben-ali/iucz>, accessed March 20, 2016.

¹⁶ See, for example, Clement M Henry and Robert Springborg, "The Tunisian Army: Defending the Beachhead of Democracy in the Arab World", *The World Post* (January 26, 2011), http://www.huffingtonpost.com/clement-m-henry/the-tunisian-army-defendi_b_814254.html, accessed September 30, 2015; and Badra

security forces, which had proved to be willing instruments of the previous government and, in some cases, the president personally. Economically speaking, Tunisia's military had nothing to lose from true democratization, unlike its Egyptian counterpart. After the Arab Spring, the military preserved weighty authority within the society, which is reflected in the conviction of a former presidential adviser "denigrating" the army in September 2012.¹⁷

Already during the transitional period, the interim state institutions introduced some democratic control mechanisms for the deployment of the military. According to the Law on the Provisional Organization of the Public Powers of December 16, 2011,¹⁸ the president remained Supreme Commander of the Armed Forces but could not declare war or establish peace without approval by a three-fifth majority of the Assembly of the Representatives of the People (Art. 11 no. 5 and 6). Another important area where control mechanisms were introduced is the appointment of individuals to high military positions. The mentioned law left this competency with the president, who needed the consent of the *Président du gouvernement* (prime minister) (Art. 11 no. 10). However, the prime minister was not a figure unilaterally appointed by the president anymore—it was now the leader of the largest faction in the *Assemblée constituante* (Constituent Assembly) who had secured a parliamentary majority for his government (Arts. 15 and 16) and could thus act independently of, and even against the will of, the president.

The committees of the *Assemblée constituante*, which was elected on October 20–21, 2011, developed different models for the appointments to the highest military positions. The draft of a permanent constitution of August 2012 provided two alternatives: The president should appoint individuals to these positions either "upon the recommendation of the Prime Minister" or "after taking the opinion of the competent parliamentary committee".¹⁹

Other innovations concerned the definitions of the national army and its mandate, which was formulated in the August 2012 draft as follows:

The national army is a republican institution that shall defend the nation and the independence, unity and land thereof. The army shall contribute to all efforts exerted in the areas of relief and development and shall support the civil authorities in accordance with the provisions stipulated under the Emergency Law.²⁰

A more advanced draft of December 2012 added that the army "has an obligation of political neutrality".²¹ The same draft mentioned, for the first time, the military courts, providing that their competence, composition, organization, and procedures should be defined by an organic law.²² Most of these provisions were adopted into the final draft.

Galloul, "Back to the Barracks: The Tunisian Army Post-Revolution", *Sada Journal* (November 3, 2011), <http://carnegieendowment.org/sada/?fa=45907>, accessed September 30, 2015.

¹⁷ Sofiene Addala McNeil, "'Repression' creeps back in Tunisia", *Aljazeera* (September 8, 2012), <http://www.aljazeera.com/indepth/features/2012/09/201295122743900690.html>, accessed September 30, 2015.

¹⁸ Loi constituante n° 2011-6 du 16 décembre 2011, on the interim organization of the public powers.

¹⁹ International IDEA, Draft Tunisian Constitution dated August 14, 2012: Unofficial translation, <http://www.idea.int>, accessed September 30, 2015.

²⁰ *Id.*

²¹ Democracy Reporting International (DRI), Tableau comparatif des première et seconde versions de l'avant-projet de Constitution en Tunisie, à l'exception des travaux de la commission III. January 2013, at <http://www.democracy-reporting.org>, accessed September 30, 2015.

²² *Id.*

C. The Military and Its Constitutional Status after the Revolution

The *Assemblée constituante* decided to regulate the role of the military in the state in much more detail than in the Tunisian Constitution of 1959. In its first chapter, the constitution that was adopted by the revolutionary parliament on January 26, 2014, determines the mandate for the armed forces. According to Art. 17,²³ the state holds a monopoly on the use of force. The same provision begins to define the character and mandate of the armed forces by stating that these may only be established “to serve the public interest”. Art. 18 continues:

The national army is a republican army. It is an armed military force based on discipline that is composed and structurally organized in accordance with the law and charged with responsibility to defend the nation, its independence and its territorial integrity. It is required to remain completely impartial. The national army supports the civil authorities in accordance with the provisions set out in law.

The notion of a “republican army” is not further explained; apparently, it means that the army may only serve the purposes of the new, truly democratic state, in which power resides in elected individuals representing the citizens and government leaders exercise power according to the rule of law. If political forces would try to transform Tunisia into an authoritarian regime, army leaders could base their decision to defend the republic on the basis of Art. 18.

The principal mandate of the army is the defense against threats to the nation, independence, and territorial integrity of Tunisia, which constitute external threats. It may support the civil authorities only “in accordance with the provisions set out in law”; this formulation clearly relates to, and restricts, the use of the military within the domestic sphere.

In Chapter IV, the constitution assigns the main responsibility “for determining the general state orientations in the domains of defense, foreign relations and national security related to protecting the state and the national territory from all internal and external threats” to the president (Art. 77). He chairs the National Security Council, remains commander-in-chief of the armed forces, may declare war and establish peace, sends troops abroad, and appoints and dismisses individuals in senior military positions (Arts. 78). This combination of powers may appear like a continuation of the Tunisian tradition of an extraordinarily strong president, but in this case these powers are checked and balanced. Most important, the head of state may only declare war and establish peace “upon the approval by a majority of the Assembly of the Representatives of the People by three-fifths of its members”, a quorum which can hardly be reached without the support of two or more political parties. Sending troops abroad requires “the approval of the President of the Chamber of the People’s Deputies and of the Prime Minister, provided that the Chamber is convened with a view to deciding on the matter within a period of no more than 60 days from the date of the decision to send troops” (Art. 77, third sentence, fourth indent), a compromise formula that allows quick decisions in cases in which Tunisia is urgently requested to militarily support its own allies or missions of the United Nations or the African Union. At the same time, it ensures a broad political basis of such decisions as a president of the Chamber of the People’s Deputies would certainly take account of the current opinions and majorities in parliament, which can at any time demand that the deployed units return. The executive and legislative organs must also cooperate when it comes to the compulsory military service, the composition and structure of the national army, fundamental rights of

²³ Art. 17 reads: “Only the state may establish armed forces and internal security forces, in conformity with the law and in the service of the public interest.”

military personnel, and military courts, which are all to be determined by law (Arts. 9(2), 18, 65, 110). The only limitations relating to military personnel, determined directly in the constitution, concerns trade union rights, including the right to strike (Art. 36).

The strict application of the principle of the separation of powers by demanding parliamentary approval of all important decisions relating to the armed forces provides a notion of democratic armed forces that the elected representatives of the people are necessarily involved in the establishment and use of the armed forces and the protection of citizens serving in them. The management of the military has become more decentralized, with the president, prime minister, minister of defense, parliament, and other actors involved. It has been transformed from personal rule to institutional rule.²⁴ As such, it is singular in the Arab world.

Economic activities of the military are not regulated; they did not become a matter of concern in Tunisia in recent years.

The structure of the Tunisian military did not change much since the Arab Spring. In 2015, it still comprised 35,800 active staff.²⁵ The number of soldiers and observers deployed to international missions was slightly reduced.²⁶ During the Libyan uprising in 2011, the army patrolled the borders and the navy competently dealt with migrant flows and rescue operations. Since then, the army has struggled with Islamist spillovers through the porous borders with Algeria and Libya, and experienced losses in operations against insurgents.

III. EGYPT: TRIUMPH OF THE MILITARY OVER THE CIVIL STATE

A. The Military and Its Constitutional Status before the Uprising

In 2010, the Egyptian military comprised up to 468,500 active personnel²⁷ and up to 479,000 reserves. The armed forces had not been tested in large-scale combat since the Gulf War following Iraq's invasion of Kuwait in 1991, but performed regular exercises, including with foreign militaries. Another 379,000 served in paramilitary forces.²⁸ Added together, 1.07% of the population actively served in the armed forces (reserves not included). Over 5,900 troops and observers were deployed to international missions abroad.²⁹ Military service was compulsory.

²⁴ Sharan Grewal, "A Quiet Revolution: The Tunisian Military After Ben Ali," *Carnegie Middle East Center Regional Insight* (February 24, 2016), <http://carnegieendowment.org/2016/02/24/quiet-revolution-tunisian-military-after-ben-ali/iucz>, accessed March 20, 2016.

²⁵ By service: Army: 27,000; Navy: 4,800; Air Force: 4,000. The size of the National Guard has also remained unchanged, The International Institute of Strategic Studies (IISS), *The Military Balance 2015* (Routledge, London 2015) 354 et seq.

²⁶ Côte d'Ivoire: UN (UNOCI), 3 troops + 7 observers; Democratic Republic of Congo: UN (MONUC) 29 observers, *id.* 355.

²⁷ By service: Army: 90,000–120,000 regular forces, 190,000–220,000 conscripts; Navy: 8,500 regular forces, 10,000 conscripts; Air Force: 20,000 regular forces, 10,000 conscripts; Air Defense: 30,000 regular forces, 50,000 conscripts, The International Institute of Strategic Studies (IISS), *The Military Balance 2011* (n 11) 306–308.

²⁸ Thereof 325,000 in the Central Security Forces, 60,000 in the National Guard, and 12,000 in the Border Guard Forces, *id.* 308.

²⁹ Central African Republic/Chad: UN (MINURCAT) 2 observers; Côte d'Ivoire: UN (UNOCI) 176 troops; Democratic Republic of Congo: UN (MONUSCO) 999 troops; 25 observers; Liberia: UN (UNMIL) 5 observers; Nepal: UN (UNMIN) 3 observers; Sudan: UN (UNMIS) 1,503 troops + 15

Since the “Free Officers Movement” had overthrown King Fārūq in 1952 the Egyptian state had remained under heavy military influence. Therefore, it comes as no surprise that the Constitution of 1971 contained only very few provisions relating to the military. According to Art. 150 the armed forces stood under the sole authority of the president, who was *de facto* always a former military officer. Art. 180 determined the state monopoly to the use of force and expressly prohibited the establishment of military or semi-military formations. The provision further defined the mandate of the armed forces, “which owe their allegiance to the people”, as follows: “to protect the country and safeguard its territory and security”.³⁰ The president was the Supreme Commander of the Armed Forces (Art. 150) and could appoint the military officers without the approval or consultation of other state organs (Art. 143). A National Defense Council, which was presided over by the President of the Republic, examined “all questions pertaining to the ways and means to ensure the safety and the security of the country” (Art. 182). Formally, it was merely an advisory organ. In political reality, however, decisions touching upon the interests of the military could hardly be taken against the will of its representatives in the National Defense Council. More than any other institution, it symbolized the arrogation of the military caste of their being entitled to rule the country.

B. The SCAF as Ruler and *Pouvoir Constituant*

After the departure of Tunisia’s President Ben ‘Ali to Saudi Arabia on January 14, 2011, the wave of protests reached Egypt and quickly developed into a massive uprising. At first, the military leadership decided to observe the developments from a distance. However, the Supreme Council of the Armed Forces (SCAF)—a body of about nineteen senior military officers convened only in cases of war or great internal emergencies and under the chairmanship of the minister of defense, Field Marshal Muḥammad Ḥusayn Ṭanṭāwī—was alerted.

Already on the first days of mass protests, the Egyptian police and the Central Security Forces used massive force, killing hundreds and injuring thousands, but could not prevent the demonstrations from spreading. On January 29, 2011, President Ḥusnī Mubārak addressed the nation and announced his plans to dismiss his entire cabinet and appoint the head of the General Intelligence Directorate (*Ri’āsat al-Istikhbārāt al-‘Āmah*), General ‘Umar Sulaymān, as vice president. Mubārak also called upon the army to help restore order in the country. Similarly, President Sādāt had ordered the military to intervene in the “bread riots” of 1977, against revolting Central Security Forces conscripts in 1986, and against Islamists after the Luxor attacks of 1997.

The military heightened its presence in the streets and, with airplanes and helicopters, in the air. However, the SCAF declared in a television statement on January 31, 2011, that it would not use force against the people, except for cases of looting and other crimes.³¹ During the following days, no concessions of the government could conciliate the millions who joined or sympathized with the protests. Finally, on February 10, 2011, the SCAF chose sides. In its “Communiqué Number 1”, the military leadership spoke “in affirmation and support for the legitimate demands of the people”.³² On the next day, Vice President

observers; Sudan: UN (UNAMID) 2,394 troop + 24 observers; Western Sahara: UN (MINURSO) 21 observers. *Id.* 308.

³⁰ The original version of the constitution contained the further mandate to “protect the socialist achievements of popular struggle”.

³¹ International Crisis Group, “Popular Protest in North Africa and the Middle East: Egypt Victorious?” MENA Report no. 107 (February 24, 2011) 7.

³² Communiqué Number 1: “The Supreme Council of the Armed Forces is in continuous convening to protect the people”, *Al-Ahram* (February 10, 2011).

Sulaymān informed the public that Mubārak had stepped down from his office and handed over control of the country to the SCAF.³³

For a number of reasons the SCAF took its decision to topple Mubārak more reluctantly than the Tunisian military leadership. Traditionally, the Egyptian military held a privileged position in the state and enjoyed considerable prestige in society, where it was viewed in the tradition of the medieval military caste of the *mamluks*, which ruled the lands along the Nile from the overthrow of the Ayyūbīd Dynasty in 1250 until the Ottoman conquest of Egypt in 1517. With a view to the country's more recent history, many deplored the defeat in the 1967 Six-Day War with Israel but found that it had "restored Egypt's collective national honor" in the 1973 Arab-Israeli War.³⁴ The military enjoyed far-reaching autonomy in the allocation of its own budget, which included US\$ 1.3 billion of financial assistance from the United States since the Camp David Accords of 1978.³⁵ Moreover, the Egyptian military controlled vast commercial conglomerates, including in civilian sectors such as energy, food and consumer goods production, tourism, and medical services. According to some estimates, between 30 and 40% of Egypt's production stemmed from the military.³⁶ This offered perspectives for many retired officers to start a second career. Others served on senior positions in public administration, as governors, and even as cabinet members. Only a few recent developments, such as Mubārak's grooming of his son Jamāl, who had not served in the armed forces, as a successor—which meant shifting power from the military caste to a family dynasty—angered the military leadership.³⁷ Altogether, they had little reason to change the status quo.

After the removal of Mubārak, the SCAF held onto power for a year. During this period, it issued several declarations that outlined the way toward a new constitution and civilian rule. The first document of this kind was a set of amendments to the 1971 Constitution, which were approved by popular referendum on March 19, 2011. However, the SCAF found the amendments insufficient and unilaterally amended numerous further articles of the constitution in a Constitutional Declaration, which it promulgated on March 30, 2011. For the first time after the uprising, the SCAF superseded the people as *pouvoir constituant* and revealed that it did not recognize it as the true sovereign of Egypt. The famous Tahrīr Square slogan, "the people and the army are one hand", proved to be erroneous.³⁸ Art. 56 of the Declaration, which functioned as an interim constitution, provided:

The Supreme Council of the Armed Forces deals with the administration of the affairs of the country. To achieve this, it has directly the following authorities:

1. Legislation.
2. Issuing public policy for the state and the public budget and ensuring its implementation.
3. Appointing the appointed members of the People's Assembly Council.

³³ Holger Albrecht and Dina Bisharab, "Back on Horseback: The Military and Political Transformation in Egypt" (2011) 3 Middle East Law and Governance 16.

³⁴ Steven Cook, *Ruling but not Governing* (John Hopkins University Press, Baltimore 2007) 28.

³⁵ At that time the Egyptian military also switched from Soviet to American doctrine. Florence Gaub, *After the Arab Spring: Reforming Arab Armies* (United States Army War College Press, Carlisle Barracks, Pennsylvania 2014) 5.

³⁶ William C. Taylor (n 5) 135 et seq.

³⁷ Zoltan Barany (n 8) 32.

³⁸ August R. Norton, "The Return of Egypt's Deep State" (2013) 112 Current History 758, 339.

4. Calling the People's Assembly and *Shūrā* Councils to enter into normal session, adjourn, or hold an extraordinary session, and adjourn said session.
5. The right to promulgate laws or object to them.
6. Represent the state domestically and abroad, sign international treaties and agreements, and be considered a part of the legal system of the state.
7. Appoint the prime minister and his deputies, ministers and their deputies, as well as relieve them from their duties.
8. Appoint civilian and military employees and political representatives, as well as dismiss them according to the law, and accredit foreign political representatives.
9. Pardon or reduce punishment, through blanket amnesty is granted only by law.
10. Other authorities and responsibilities as determined by the President of the Republic pursuant to laws and regulations. The Council shall have the power to delegate its head or one of its members to take on its responsibilities.

In addition to these wide-reaching, unchecked competences in the executive and the legislative spheres, the SCAF reconfirmed the existence of the military justice system “in line with constitutional principles” (Art. 51).

The SCAF intended to rule “until a time at which the People's Assembly and *Shūrā* Councils assume their responsibilities and the President of the Republic is elected and assumes his position” (Art. 61). However, it altered this plan as well as the timeline for parliamentary and presidential elections several times. Many citizens perceived these changes as deliberate attempts to delay the handover to a civilian government. Moreover, military officers publicly voiced their intention to strengthen the role of the military in politics and its autonomy from civilian institutions. In May, Major-General Mamdūh Shāhīn, a legal adviser to the defense minister, went so far as to demand a special status for the armed forces in the new constitution, exempting it from being at the discretion of the president.³⁹ Public annoyance grew steadily.

On November 1, 2011, the SCAF issued a Declaration of the Fundamental Principles for the New Egyptian State. The document determined essential content of the future constitution in advance, despite arguing the converse in the preamble.⁴⁰ Principle no. 9 contained provisions relating to the military. Its first paragraph repeats the mandate formulated in Art. 180 of the Constitution of 1971 (as amended in 2007), adding the unusual new task “to defend constitutional legitimacy”. The second paragraph sought to cement, once and for all, the existence and powers of the SCAF:

The Supreme Council for the Armed Forces is solely responsible for all matters concerning the armed forces, and for discussing its budget, which should be incorporated as a single figure in the annual state budget. The Supreme Council for the Armed Forces is also exclusively competent to approve all bills relating to the armed forces before they come into effect.

³⁹ Mohamed Gharib and Ebtessam Talab, “Military Legal Advisor Demands Special Status for the Army in the New Constitution” *Al-Masry Al-Youm* (eds) (May 26, 2011), <http://www.egyptindependent.com/news/military-legal-advisor-demands-special-status-army-new-constitution>, accessed July 10, 2014.

⁴⁰ The preamble reads: “We are convinced that the people are the source of legitimacy, that its will should never be circumvented through the establishment of irrevocable supra-constitutional principles, that there is no need to issue a constitutional declaration on supra-constitutional principles or other such principles, as the people's will is sufficient.”

Principle no. 9's third paragraph confirmed the President of the Republic as the Supreme Commander of the Armed Forces, but defined the Minister of Defense to be "General Commander of the Armed Forces" and allowed the president only to declare war "after the approval of the Supreme Council for the Armed Forces and of the People's Assembly". According to Principle no. 10, the advisory "National Defense Council" continued to exist.

Parliamentary elections to the People's Assembly of Egypt were held from November 28, 2011, to January 11, 2012. The Freedom and Justice Party that was affiliated with the Muslim Brotherhood gained the largest single portion of votes (36.3%). Together with the Salafi Islamist al-Nūr Party (28.8%), it maintained a solid majority of seats. They translated their parliamentary dominance into the Constituent Assembly of Egypt, where they held 66 out of 100 seats. However, after an administrative court decision, the Constituent Assembly of Egypt had to be formed again.⁴¹ Meanwhile, on June 7, 2012, Islamist and non-Islamist parties reached an agreement to form a more balanced assembly.⁴² Finally, the Constituent Assembly could start drafting a permanent constitution.

However, the SCAF intervened again. On June 17, 2012, it issued a Constitutional Declaration that amended its Declaration of March 2011. The new Art. 60 B1 entitled the several officials and institutions, including the chairman of the SCAF, to veto any clause of the constitutional text formulated by the Constituent Assembly:

If the President, the Chairman of the SCAF, the Prime Minister, the Supreme Council of the Judiciary or a fifth of the Constituent Assembly find that the new constitution contains an article or more which conflict with the goals of the revolution and its main principles or which conflict with any principle agreed upon in all of Egypt's former constitutions, any of the aforementioned bodies may demand that the Constituent Assembly revises this specific article within 15 days. Should the Constituent Assembly object to revising the contentious article, the article will be referred to the Supreme Constitutional Court, which will then be obliged to give its verdict within seven days. The decision of the Supreme Constitutional Court is final and will be published in the Official Gazette within three days from the date of issuance.⁴³

Moreover, the SCAF warned that it would dissolve the Constituent Assembly and appoint a new one if the drafters were unable to complete their work in time (Art. 60 B). Under these strict requirements, the Assembly continued to work on the draft.

C. The 2012 Constitution and the Coup against President Mursi

The SCAF had issued its second Constitutional Declaration shortly after the second round of the presidential elections. One week later, on June 25, 2012, the final result of the presidential election was announced. The candidate of the Freedom and Justice Party, Muḥammad Mursi, had narrowly won over Aḥmad Shafīq, the last prime minister under

⁴¹ Decision of the High Administrative Court, First Chamber, Case no. 26657 (April 10, 2012).

⁴² According to this agreement, 39 seats would be filled by Members of the People's Assembly, six by judges, nine by law experts, one each by a member of the armed forces, the police and the Ministry of Justice, 13 seats by unions, and 21 by public figures. Five seats would be filled by the Al-Azhar University, one of Sunni Islam's most important institutions, and 4 by the Coptic Orthodox Church.

⁴³ English text of SCAF amended Egypt Constitutional Declaration, *Al Ahram Online* (June 18, 2012), <http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Egypt-Constitu.aspx>, accessed September 30, 2015.

Ḥusnī Mubārak and a former air force commander. Mursī was determined to change civil-military relations. The opportunity to pursue his plan came soon.

In August 2012, Islamist militants attacked an army base in Sīnāʾī, provoking the largest operation of the Egyptian military since the 1991 Gulf War. President Muḥammad Mursī used the situation to dismiss several members of the SCAF and replace its chairman, Minister of Defense Ṭanṭāwī, with the then little-known General ʿAbd al-Fatāḥ al-Sīsī. He may have chosen al-Sīsī because of his origin from a faithful, though certainly not radical, Muslim family. However, as the subsequent developments showed, al-Sīsī's loyalty ultimately belonged to the SCAF.

Meanwhile, the Constitutional Assembly finished the drafting process and agreed on a constitutional text on November 29, 2012. None of the officials or institutions mentioned in Art. 60 B1 of the Constitutional Declaration vetoed a clause; the Assembly had formulated it carefully enough. The constitution was passed in a popular referendum in December 2012 and signed into force by President Mursī on December 26, 2012.

In regard to the military, the new permanent constitution maintained several provisions of the 1971 Constitution, such as those on the state monopoly to the use of force, the mandate of the armed forces (both in Art. 194), and the president's competence to appoint and dismiss military officers (Art. 147). However, the president now shared his powers with other actors. In compliance with the SCAF's Fundamental Principles of November 2011, he remained Supreme Commander of the Armed Forces (Art. 146), but the minister of defense—who had to be an active military officer—was General Commander of the Armed Forces (Art. 195). The SCAF's existence was also mentioned in the constitutional text.⁴⁴

Moreover, the president could declare war or send the armed forces beyond state borders only “after consultation with the National Defense Council and the approval of the House of Representatives with a majority of its members” (Art. 146). Art. 197 precisely defined the composition of the National Defense Council.⁴⁵ The authors clearly intended to secure a narrow civilian predominance for the event of a confrontation between the president and the military: By appointing five loyal cabinet members and a loyal head of the nonmilitary intelligence, the president could secure six votes (including his own). If both chambers of parliament stood behind the president, their presidents would have to support him, too. On the other hand, the Council included six of the highest-ranking military officers. However, one cabinet member—the minister of defense—had to be an active military officer himself, and it was clear that political realities would force the president to choose a member of the SCAF to this position. This figure could switch sides and support the military position. But also in this case, eight pro-government votes, including that of the president himself, could overrule the seven military votes, including that of the minister of defense.⁴⁶

⁴⁴ Art. 194 (2) reads: “The armed forces have a Supreme Council, as specified by law.”

⁴⁵ Art. 197 reads: “A National Defense Council shall be created, presided over by the President of the Republic and including in its membership the Speakers of the House of Representatives and the *Shūrā* Council, the Prime Minister, the Minister of Defense, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Interior, the Chief of the General Intelligence Service, the Chief of Staff of the Armed Forces, the Commander of the Navy, the Air Forces and Air Defense, the Chief of Operations for the Armed Forces and the Head of Military Intelligence.”

⁴⁶ In December 2012 when the constitution was signed into force the actual situation was more favorable in the eyes of the military, as the House of Representatives had been dissolved after a decision of the Supreme Constitutional Court of Egypt of June 14, 2012, and thus no parliament speaker could join the National Defense Council.

This system was not in compliance with no. 9(3) of the Fundamental Principles of November 2011, which gave the SCAF the right to veto a president's plan to declare war. Why the SCAF accepted a constitutional provision that reduced its power is not known; possibly, the military, which was hit hard by Mursi's election and the humiliating Sīnā'ī attack, did not want to provoke any further public annoyance.

According to Art. 197 of the 2012 Constitution, the government had to consult with the National Defense Council also in regard to the military budget and legislative drafts relating to the armed forces. However, it had no decision-making competence in these matters. The SCAF thus continued to allocate the military budget as it deemed reasonable, while the competent legislative and executive organs could enact laws even against the will of the military—at least, theoretically.

The 2012 Constitution also confirmed the mandate of the military courts to try civilians. These courts were feared and detested in Egypt, because their decisions may not be appealed, fair trial rights are limited, and they are often used to harshly punish legitimate protests (Art. 198). Between 2011 and 2015, they tried around 12,000 civilians.

Encouraged by his seemingly successful reshuffle of the SCAF and the introduction of the new constitution, President Mursi took further steps to consolidate his political power. He annulled the Constitutional Declarations that the military leadership had enacted before his election, filled governor positions with his loyalists from the Muslim Brotherhood, and radically changed the country's foreign policy. Against the advice of the National Defense Council, Mursi strengthened ties with Iran, advocated for a military intervention against the regime of Bashār al-Assad in Syria, and even threatened Ethiopia with war for its plan to build a dam at the Nile.

The military exercised "tactical patience", as the analyst of civil-military relations in Arab countries, William C. Taylor puts it, "calculating that it needed an outpouring of public support" before it could remove Mursi from office.⁴⁷ This situation, culminated out of previous events, came to a head in June 2013. Millions of Egyptians had grown irate over Mursi's politics and the continuous worsening of their socioeconomic situation.⁴⁸ More and more voices called for the military to resolve the impasse. On June 26, 2013, the SCAF returned to the scene and demanded that political parties form a new government and a commission to solve the controversial issues of the 2012 Constitution. As millions of pro- and anti-government protesters filled the streets, the army deployed throughout the country. On July 1, Minister of Defense al-Sīsī issued a forty-eight-hour ultimatum to President Mursi to resolve its differences with the opposition. Mursi refused. Two days later, the SCAF removed him from office, placed him under house arrest, declared the constitution suspended, and appointed the President of the Supreme Constitutional Court, 'Adlī Maṣṣūr, acting president of the country. The supporters of Mursi and the Muslim Brotherhood mounted large demonstrations, which were met with increasing violence by the security forces. On the bloodiest day, August 14, 2014, even the military government admitted that 595 civilian protesters were killed across the country.

On July 8, 2013, Maṣṣūr issued a decree that envisaged the preparation of amendments to the 2012 Constitution, which would be subject to another referendum. The drafting process involved two organs that were created ad hoc. First, a small technical committee prepared the amendments. Afterward, a so-called Committee of Fifty, which was supposed to represent major stakeholders in Egyptian society, reviewed the draft under the

⁴⁷ William C. Taylor (n 5) 140.

⁴⁸ See Kilian Bälz and Anja Schöller-Schletter, "The Quest for a New Economic Order in Egypt" (*in this volume*).

chairmanship of the Egyptian diplomat and former secretary-general of the Arab League, ‘Amr Mūsā. The resulting document was approved in a referendum by 98.1% of voters and took effect on January 18, 2014.

D. 2014: Another Constitution for the Deepest of All Arab States

The provisions of the 2014 Constitution relating to the military only marginally deviated from those contained in the 2012 Constitution. The 1971 Constitution clearly constitutes the textual basis of both documents. Only one small difference between the 2012 and the 2014 versions deserves to be highlighted: The National Defense Council, which continued to have only a consultative function, had lost one civilian member, namely the president of the *Shūrā* Council, as the second chamber had been entirely eliminated from the constitution. Thus, the National Defense Council could now be more easily controlled by the military.

Three years after the ouster of President Mubārak, the constitutional framework remains almost the same as before. As far as changes to the provisions are concerned, the results mainly benefit the military, beginning with the limitation of candidates for the post of minister of defense, who must be selected from among the active officers, and his new function as “Commander in Chief of the Armed Forces” (Art. 195 of the 2012 Constitution and Art. 152 of the 2014 Constitution). From the structure of the constitution, it can be concluded that the president may act as “Supreme Commander in Chief of the Armed Forces” (Art. 146 of the 2012 Constitution and Art. 152 of the 2014 Constitution) only in cases of international war, while the minister of defense is in charge in all other situations—including the use of the military in the domestic sphere. Assuming that a minister of defense, who has been an active officer until his appointment, will keep ties to the military leadership, it may be concluded that the armed forces can stage another coup d’état against an adverse president at any time.

The ascendancy of the SCAF, which is now mentioned in the constitutional text (Art. 194 of the 2012 Constitution and Art. 200 of the 2014 Constitution), is another triumph of the military over the civil state. In October 2014, President al-Sisi issued a decree that considerably extended the jurisdiction of military courts.⁴⁹ In Egypt, where the protesters called for a “civil state” in 2011, the military “deep state” is today deeper than ever before.⁵⁰

The structure of the Egyptian military has not changed much. Statistics of 2015 count up to 438,500 active staff⁵¹ and up to 479,000 reserves; exact numbers were not available at the time of publication. Another 397,000 serve in paramilitary forces.⁵² Soldiers

⁴⁹ The Law 136 of 2014 for the Securing and Protection of Public and Vital Facilities, which was enacted by presidential decree, defines all public property, including electricity stations, gas pipelines, roads, and bridges, as “equivalent to military facilities” and refers crimes committed at such places under the—already very broad—military jurisdiction, <https://www.hrw.org/news/2014/11/17/egypt-unprecedented-expansion-military-courts>, accessed September 30, 2015.

⁵⁰ August R. Norton (n 38) 338.

⁵¹ By service: Army: 90,000–120,000 regular forces, 190,000–220,000 conscripts; Navy: 8,500 regular forces, 10,000 conscripts; Air Force: 20,000 regular forces, 10,000 conscripts; Air Defense: 30,000 regular forces, 50,000 conscripts. The International Institute of Strategic Studies (IISS), *The Military Balance 2015* (n 25) 323–325.

⁵² Thereof 325,000 in the Central Security Forces, 60,000 in the National Guard, and 12,000 in the Border Guard Forces. *Id.* 325 et seq.

and observers serving in UN missions were reduced, but over 2,800 remain deployed abroad.⁵³

The Egyptian military continued to receive an annual \$1.3bn of US financial aid in 2011 and 2012 and has upgraded its inventories by replacing Soviet-era equipment with US products. Only temporarily, relations with the United States became tense after the expulsion of President Mursi from power; the United States canceled a large military exercise, delayed delivery of equipment, and suspended annual financial assistance. In the spring of 2015, as terrorist attacks directed against Egypt continued, the United States restored relations to conditions similar to those before the coup d'état.⁵⁴

IV. SYRIA: STAUNCH SUPPORT FOR THE REGIME

A. The Military and Its Constitutional Status before the Arab Spring

Like their Egyptian counterparts, the Syrian armed forces traditionally belong to the largest and best-trained militaries of the region. At the end of the year 2010, the Syrian military comprised 325,000 active staff⁵⁵ and 314,000 reserves. Another 108,000 served in paramilitary forces.⁵⁶ Added together, 1.99% of the population actively served in the armed forces, which is the highest rate of all countries compared in this article. No troops or observers were deployed to international missions outside of the country.

Organized according to Soviet doctrine, the Syrian military was tasked to defend the country's borders and, if ever possible, retake the Golan Heights from Israel. Despite its relatively poor combat record against the Israelis, the Syrian Army had earned a reputation as a disciplined and motivated force.⁵⁷ However, the Syrian military also showed shortcomings. Much of Syria's military material was outdated Soviet equipment from the 1970s or earlier. Military commanders were not used to taking initiative without deferring to their superiors in the chain of command. Years of training with Soviet military advisers may have contributed to this inflexibility, but this behavior derived primarily from Ḥāfiẓ al-Assad's insistence on a highly centralized and personal chain of command, ranging from the president himself to individual unit commanders.⁵⁸

The Syrian Constitution of 1973 contained a short set of rules pertaining to the military, which stood under the exclusive authority of the president as commander-in-chief of the armed forces. In this function, he was entitled to "declare war and general mobilization and conclude peace following the approval by the People's Assembly" (Art. 100), "issue all the necessary decisions and orders in exercising this authority" (Art. 103), and appoint and dismiss military officials "in accordance with the law" (Art. 109).

⁵³ Central African Republic/Chad: UN (MINUSCA) 2 observers; Côte d'Ivoire: UN (UNOCI) 176 troops; Democratic Republic of Congo: UN (MONUSCO) 987 troops; 18 observers; Iraq: UN (UNAMI) 1 observer; Liberia: UN (UNMIL) 7 observers; Mali: UNI (MINUSMA) 9 observers; Sudan: UN (UNMISS) 3 observers; Sudan: UN (UNAMID) 893 troop + 23 observers; Western Sahara: UN (MINURSO) 20 observers, *id.* 325.

⁵⁴ Jeremy M. Sharp, "Egypt: Background and U.S. Relations," Congressional Research Service Report (July 24, 2015).

⁵⁵ By service: Army (including conscripts) 220,000; Navy 5,000; Air Force 40,000; Air Defense 60,000. The International Institute of Strategic Studies (IISS), *The Military Balance 2011* (n 11) 272–273.

⁵⁶ Thereof 8,000 in the Gendarmerie and 60,000 in the Workers' Militia (Ba'ṯh Party), *id.* 273.

⁵⁷ Richard M. Bennett, "The Syrian Military: A Primer" (2001) 3 Middle East Intelligence Bulletin 8.

⁵⁸ Joseph Holliday, "The Syrian Army: Doctrinal Order of Battle" (February 2013) Institute of the Study of War 5.

Art. 11 defined the mandate of the military as follows:

The armed forces and other defense organizations are responsible for the defense of the homeland's territory and for the protection of the revolution's objectives of unity, freedom, and socialism.

"Unity, Freedom, Socialism" is the slogan of the Ba'th Movement that split into two separate organizations dominated by its Iraqi and Syrian branches in 1966. President Ḥāfiẓ al-Assad led the Ba'th Party–Syria Region, which has branches in several countries, from 1970 until 2000. Since then, 'Abdullāh al-Aḥmar acts as *de facto* general secretary of the party.⁵⁹ Ḥāfiẓ al-Assad's son Bashār heads the Secretary of the Regional Command of the party, which nominated the candidate for President of the Republic according to Art. 84 of the 1973 Constitution. In addition, the constitution defined the Ba'th Party as the "leading party in the society and the state" (Art. 8). The history of the Syrian-dominated Ba'th Party, including the "Corrective Movement"—an inner-party movement that brought Ḥāfiẓ al-Assad to power in a coup d'état in 1970—is described in the preamble to an extent that it becomes clear that the party—or rather, its *nomenklatura*—considered itself the sole legitimate leader of the state. Therefore, it is not surprising that the mandate of the armed forces is extended beyond the state to protect the Ba'th Movement and its goals. At the same time, the wording of Art. 11 was vague enough to legitimize the use of the military in all kind of situations inside and outside of the country, whenever the party saw its goals endangered.

The competence of the president to deploy the military was formulated in a similarly unspecific manner:

In case of a grave danger or situation threatening national unity or the safety and independence of the homeland or obstructing state institutions from carrying out their constitutional responsibilities, the President of the Republic can take immediate measures necessitated by these circumstances. (Art. 113)

According to Art. 40(2) of the 1973 Constitution, military service was compulsory. Altogether, the system of civil-military relations laid out in the document strongly resembles those in the 1971 Constitution of Egypt, which may have been among its models.

A description of civil-military relations in Syria would be incomplete without mentioning the parallel structures of the Ba'th Party, which emerged many years before the split between its branches in Iraq and Syria. The Military Committee of the party's Syrian Regional Command essentially planned and realized the 1963 military coup. Afterwards, the committee, which was renamed the Military Bureau, secured its control over the Syrian armed forces through a hierarchical formation that mirrored the civilian party structure. Twelve branches, which operated at the battalion level under the leadership of a *tawjīhī* (guide), ensured oversight over the military chain of command at all levels. Details about their functioning in more recent years are not known.

⁵⁹ The Syrian branch of the Ba'th Party is organized along Leninist lines, a policy stemming back to its founders Michel Aflaq and Ṣalāḥ al-Dīn Bitar, the split between the Iraqi and Syrian branches. It was designed as a transnational political organization. Formally, its highest organ is the Party Congress, which elects a secretary general and a National Command. Under the National Command there is a Regional Command for each state in which the party operates. *De jure*, the deceased Ḥāfiẓ al-Assad remains secretary general of the party and the National Command; *de facto*, Assistant Secretary General 'Abdullāh Al-Ahmar is the party leader.

B. Civil-Military Relations during the Uprising and the Civil War

Alarmed by the wave of protests that swept over the region, and small-scale demonstrations mainly in Damascus, Bashār al-Assad's regime tried to calm the population with social and economic programs and political concessions. Among others, the Ministry of Social Affairs and Labor advised all governorates to treat the Syrian Kurds, whose legal status was rather like that of foreigners than Syrian nationals, like other citizens in matters pertaining to employment and work.⁶⁰ In March, however, the police detained a group of school pupils in Dar'ā who had chanted slogans against the regime. Their families were the first to protest, but the case angered Syrians across the country. On March 15, 2011, thousands gathered in the streets of Damascus and in many other cities. The security forces immediately reacted with lethal force, shooting four civilians dead and wounding many more in Dar'ā. This excess of violence opened the gates for countrywide demonstrations, calling for the overthrow of the regime. On March 21, protesters in Dar'ā reportedly killed seven policemen. Al-Assad sent the Republican Guard, which stood under the command of his brother Māher, into the town where the military killed up to a hundred civilians within two days. In response, protests in many towns, particularly in the country's long-neglected periphery, became much stronger. The regime countered them with hundreds of organized pro-government rallies and tried carrot-and-stick tactics, raised rental payments for retired citizens, replaced unpopular government officials on the national and provincial levels, reduced the length of military service, allowed female teachers to wear the *niqāb* in school, and even lifted the forty-eight-year-long state of emergency on the one hand, and deployed the security forces to suppress upheaval: first in the coastal towns of Latakia and Bāniyās, then in Aleppo and Qāmishli, Ḥoms, and Ḥamāh.⁶¹ Antigovernment protests also occurred in the suburbs of Damascus. In the capital, however, influential societal groups—merchants, state employees, members of the 'Alawī⁶², Christian and Druze minorities—backed the regime, which they saw as a bulwark against Islamist rule. Moreover, they were "loath to see a provincial underclass reassert itself and thus potentially threaten their interests in a well-established social hierarchy."⁶³ Religious authorities such as Syria's Sunni Grand Mufti, Aḥmad Badr al-Dīn Ḥassūn, and the Patriarch of the Greek Orthodox Church of Antioch and All the East, Ignatz IV, refused to support the uprising, too.⁶⁴

For the military, two incidents in April changed the picture. On April 8, nine soldiers were gunned down in a convoy that was moving toward the city of Bāniyās. Then, on April 18 and 19, militant opponents of the regime assassinated two senior officers, Brigadier General 'Abdū Khaḍar al-Tallāwī and Colonel Muḥammad 'Abduh Khaḍūr. The military immediately reacted by deploying units in all parts of the country, killing hundreds wherever they clashed with protesters. The situation escalated. Regional commanders used the regular army units, which they did not fully trust, to cordon off cities and sent elite units—particularly the 4th Armored Division and the Republican Guards, which are almost

⁶⁰ William C. Taylor (n 5) 88.

⁶¹ Tony Badran, "Syria's Assad No Longer in Vogue," *Foreign Affairs* (March 25, 2011), <https://www.foreignaffairs.com/articles/syria/2011-03-25/syrias-assad-no-longer-vogue>, accessed September 30, 2015.

⁶² For background information on the 'Alawī sect, see Martin Kramer, "Syria's Alawis and Shi'ism" in Martin Kramer (ed), *Shi'ism, Resistance, and Revolution* (Westview Press, Boulder, Colorado 1987) 237 et seqq.

⁶³ International Crisis Group, "Popular Protest in North Africa and the Middle East (VI): The Syrian People's Slow-motion Revolution," Crisis Group Middle East/North Africa Report no.108 (July 6, 2011) 11.

⁶⁴ In contrast, the Al-Azhar University, which is an accepted authority of Sunni Islam far beyond the borders of Egypt, supported the protests. See Assem Hefny, "Religious Authorities and Constitutional Reform: The Case of Al-Azhar in Egypt" (*in this volume*).

entirely ʿAlawī, the Special Forces Regiments, where more Sunnis serve, and the Military Intelligence⁶⁵—inside to break up demonstrations and raid houses. They also began to use ʿAlawī militias, called *shabiḥah*, which blended into the protesting crowds and brutally attacked them from inside.⁶⁶

In the summer and spring of 2011, the armed forces came under serious pressure. The numbers of military casualties and defections were rising. Nonetheless, al-Assad decided to seek a military solution and reduced his political offers to the protesters. The army began to focus on Sunni-dominated territories, cut lines of communication and supplies between the main hubs of the uprising, and also kept an active presence in the main settlement areas of the Druze and Kurds. As a result, the resistance became even stronger, while at the same time more and more Syrians departed for refuge in Jordan, Lebanon, Turkey, and Northern Iraq. In August 2011, diverse opposition groups formed a political roof organization, the Syrian National Council. Defected members of the armed forces began to build up the Free Syrian Army, which counted around 10,000 members by the end of 2011. Syria was, as William C. Taylor writes,

afire in civil war. Al-Assad's military-first strategy had largely backfire[d]. Demonstrations continued to rage across the country; protests and car bombs threatened the merchant-military complex in Damascus and Aleppo; defections and casualties spiked; and the Syrian regime faced growing isolation from regional and international powers alike. [. . .] [A]s Syria's historic uprising entered into its second year, many wondered if 2012 would witness the military removal of or fervent support of President al-Assad. Amidst increasing opposition, would the military remain intact or disintegrate?⁶⁷

To some extent, both happened. Most of the military leadership stood firmly behind the regime; only some prominent officers defected, including the commander of the Republican Guard, Brigadier General Manāf Ṭlās, and the commander of the military police, Major General ʿAbd al-ʿAzīz Jāsīm al-Shallāl. On the other hand, increasing numbers of ordinary soldiers fled from the armed forces. Nevertheless, the Syrian army's cohesiveness and operational and logistical capacity remained widely intact. In early 2012, the military began to apply a new strategy of blocking, sieging, and bombarding cities, thereby directly killing or starving to death thousands of civilians. It replicated the infamous siege of Ḥamāh in 1982, where it brutally oppressed an uprising incited by the Muslim Brotherhood with massive bombardments, killing up to 30,000 civilians and turning the city into a ghost town.

The adjustment of the military strategy had dramatic effects. From December 2011 to December 2012, Syria's death toll rose from 7,500 to 40,000, and the number of registered refugees in neighboring countries from 10,000 to 470,000. Only five months later, the number of deaths reached 80,000 and that of refugees 1.2 million persons.⁶⁸ The regime maintained control of only about 30% of the country and lost the support of the Druze and parts of other minority groups. Nonetheless, the military continued to firmly back al-Assad.

There are several reasons for the Syrian armed forces' staunch support for the regime. Most important, the military leadership consists of extraordinarily loyal soldiers who

⁶⁵ Nikolas van Dam, *The Struggle for Power in Syria: Politics and Society under Asad and the Ba'th Party* (I.B. Tauris, New York 2011) 115 et seqq.

⁶⁶ The *shabiḥah* were formed in 1980 out of criminal gangs from the Mediterranean coast and became pro-government militias that acted with impunity.

⁶⁷ William C. Taylor (n 5) 99.

⁶⁸ Figures from <http://data.unhcr.org/syrianrefugees/regional.php>, accessed September 30, 2015.

primarily belong to the ʿAlawī sect, like the al-Assad family. The same is true for its elite units, which were traditionally based either close to Damascus or in areas of potential unrest, such as Ḥoms, Ḥamāh, and Darʿā. In addition, they were placed in such a manner that they could be used against each other if one unit attempted to overthrow the regime. In contrast, the regular military units that consisted primarily of Sunni soldiers were rather poorly trained and equipped. Already for this reason they could hardly constitute a threat to the regime. Moreover, Syria's four security directorates—Military Intelligence, Air Force Intelligence, State Security, and Political Security—controlled the armed forces and, as one can imagine, each other. In addition, the *shabiḥah* played a role in the prevention of defections.⁶⁹ Due to this complex system of influence and oversight, the possibilities of a military coup were, and still are, extremely limited.⁷⁰

In addition, the military leadership probably calculated that the switching of sides and the toppling of al-Assad would have brought more disadvantages than advantages. From the beginning it was not clear which forces within the opposition would ultimately prevail, but the important role of Sunni Islamists soon became visible. For most of the ʿAlawī military elite, serving under a government of this kind would be unacceptable. By lending their full support to al-Assad, they could improve their social prestige among other groups that also supported him and regain regional credibility. Economic interests played a minor role in the decision of the military leadership.⁷¹

Last but not least, the Syrian military has been continuously stabilized through the military assistance from Iran, Russia, and the Lebanese Shiʿite militant group Hizbullāh during the civil war.

C. The 2012 Constitution and Syria's Military

In his early response to the Syrian uprising, President Bashār al-Assad appointed an expert committee that prepared amendments to the 1973 Constitution. The changes were approved in a referendum on February 26, 2012, which was not monitored by foreign observers. Opposition groups inside and outside of the country opposed the proposed constitution and called for a boycott. The turnout was higher in pro-Assad neighborhoods and in areas with a high security presence than in areas where antigovernment protests had been staged. In some conflict-affected areas, citizens could not participate in the vote at all.

The constitutional amendments of 2012 also affected the system of civil-military relations. The most visible change is the removal of the Baʿthist revolutionary goals from the mandate of the armed forces in Art. 11, which now reads as follows:

The army and the armed forces shall be a national institution responsible for defending the security of the homeland and its territorial integrity. This institution shall be in the service of the people's interests and the protection of its objectives and national security.

⁶⁹ William C. Taylor (n 5) 103 et seqq.

⁷⁰ The only attempt during their rule failed in 1983/1984 when Ḥāfiẓ's younger brother, the commander of the Defense Companies Rifāʿ at al-Assad, tried, together with other ʿAlawite officers, to overthrow his older brother Ḥāfiẓ. In a face-saving compromise, Rifāʿ at was made vice president and later exiled.

⁷¹ The Syrian military economy is mostly related to military needs and capacities, such as armament, construction, agriculture, and food processing. Besides, Syrian officers have become increasingly active in their countries' growing private sectors, benefiting as they do from contacts accumulated in the military. As in

The new wording prompts the question about who actually defines the interest of the people.⁷² Even though all references to the Baʿth Party as the “leader of the nation and society” have been omitted, its rule still seems to be a reality in Syrian politics.⁷³ Hence, it may be assumed that not only President al-Assad, his minister of defense and deputy commander-in-chief, General Fahd Jāssim al-Farij, and the chief of staff, General ʿAlī ʿAbdullāh Ayūb, define what the “people’s interests” are and take their strategic and operational decisions accordingly, but that also other leading figures and organs of the Baʿth Party, particularly the Regional Command and—presumably—the Military Bureau do the same.

As in times before the changes to the constitution, the president is the commander-in-chief (Art. 105) and decides on higher military careers (Art. 106). The above-cited competence of the president to use the armed forces remained unchanged, too (Art. 114). Altogether, the constitutional framework for the Syrian military remains the same as before the uprising and the ensuing civil war.⁷⁴

However, the events between the years of 2011 and 2015 heavily impacted the strength and structure of the armed forces. During this time, overall staff numbers fell to 178,000⁷⁵ through casualties and defections. Military service continues to be compulsory (Art. 46 para. 1), and women may serve in the armed forces, too, but the regime faces growing difficulties to maintain conscripts. On the other hand, the armed forces have adapted to the challenges of a civil war, moving from Soviet-style conventional doctrine toward more flexible forms of guerrilla combat with an increasing role of junior officers, and are in this regard stronger than before the Arab Spring. Some observers describe symptoms of military deprofessionalisation such as corruption, nepotism, and a growing isolation from society.⁷⁶

In addition to the regular forces, an estimated 100,000 loyalist militias—including the increasingly professionalized paramilitary National Defense Force and a myriad of domestic and foreign Shīʿah militias—support the army as auxiliaries.

Meanwhile, the number of registered refugees outside of the country has risen to over 4 million, and the death toll to far more than 200,000 persons.⁷⁷

Egypt, the primary purpose of the tolerance of the officers involving in the economy is to ensure their loyalty. Robert Springborg, “Economic Involvements of Militaries” (2011) 43 *International Journal of Middle Eastern Studies* 397.

⁷² This problem is also discussed by Jean d’Aspremont, “Regimes’ Legitimacy Crises in International Law: Libya, Syria, and Their Competing Representatives” (*in this volume*).

⁷³ The present author is not in a position to assess if the Baʿth Party–Syria Region continues to be a self-reliant organization, or if it has become an empty shell used by the al-Assad clan and its allies for their purposes.

⁷⁴ It is worth noting that the so-called “Social Contract of Rojava Cantons in Syria” adopted by the Legislative Assembly of the de facto autonomous region of Rojava in northern and northeastern Syria on January 6, 2014, expressly opposes “militarism” and prohibits the prosecution of civilians before military tribunals. See Bawar Bammarny, “The Legal Status of the Kurds in Iraq and Syria” (*in this volume*).

⁷⁵ By service: Army (including conscripts) 110,000; Navy 5,000; Air Force: 17,500; Air Defense: 30,000, The International Institute of Strategic Studies (IISS), *The Military Balance 2015* (n 25) 352–354.

⁷⁶ E.g., Kheder Khaddour, “Strength in Weakness: The Syrian Army’s Accidental Resilience”, *Carnegie Middle East Center Regional Insight* (March 14, 2016), <http://carnegie-mec.org/2016/03/14/strength-in-weakness-syrian-army-s-accidental-resilience/iuz7>, accessed March 20, 2016.

⁷⁷ See <http://data.unhcr.org/syrianrefugees/regional.php>, accessed September 30, 2015, and http://www.nytimes.com/interactive/2015/09/14/world/middleeast/syria-war-deaths.html?_r=0, accessed September 30, 2015.

V. YEMEN: PROGRESSIVE CONSTITUTION-MAKING VS. MILITARY DISINTEGRATION AND HUTHĪ REBELLION

A. The Military and Its Constitutional Status before the Uprising

Yemen belongs to the poorest countries of the world. Therefore, it is not particularly surprising that its armed forces were already known to be underequipped and poorly trained before the Arab Spring. Like other regional armies, they mainly relied on old-fashioned Soviet-era equipment.

In 2010, the Yemeni armed forces—which were partly based on compulsory military service that was introduced in 2007—comprised 66,700 active staff.⁷⁸ Even more members—71,200 staff—belonged to paramilitary forces.⁷⁹ Added together, 0.60% of the population actively served in the armed forces. Small numbers of troops and observers were deployed to six different UN missions.⁸⁰

Yemen's Constitution of 1991, which was substantially amended in 1994, 2001, and 2009 without changing the provisions relating to the military, is still in force. The document clearly stipulates the state's monopoly to the use of force. Art. 36 further declares that the army, police, and security forces as well as any other force “belong to all the people and their function is to protect the Republic and safeguard its territories and security”. Art. 40 further clarifies that military, security, police, and other forces shall not be employed in the interest of a party, an individual, or a group. They shall be safeguarded against all forms of differentiation resulting from party affiliation, racism, factionalism, regionalism, and tribalism in order to guarantee their neutrality and the fulfillment of their duties in a proper manner. The members of all forces are banned from party memberships and activities according to the law.

Like in other regional republics, the president is Supreme Commander of the Armed Forces (Art. 111). He appoints and dismisses senior military officers and establishes military ranks (Art. 118 no. 9, 10).

When it comes to the use of the armed forces, the constitution remains vague. Art. 37 provides:

General mobilization shall be organized according to the law and shall be proclaimed by the President of the Republic following the approval of the House of Representatives.

Not all uses of the military in or outside the country demand general mobilization, which is generally understood as the call of duty of all active and reserve units in order to counter large-scale threats to the security of a country. The domestic use of standing military forces inside the country against, for example, Islamist insurgents, tribal or sectarian rebels, or political protesters, as well as their deployment to international missions, usually do not necessitate general mobilization. Thus, one might conclude that the president alone

⁷⁸ By service: Army 60,000; Navy 1,700; Air Force 3,000; Air Defense 2,000, The International Institute of Strategic Studies (IISS), *The Military Balance 2011* (n 11) 335 et seq.

⁷⁹ Thereof 50,000 in the Ministry of the Interior Forces, 20,000 Tribal Levies, and 1,200 belonging to the Yemeni Coast Guard Authority, *id.* 336.

⁸⁰ Côte d'Ivoire: UN (UNOCI) 1 troops + 8 observers; Democratic Republic of Congo: UN (MONUC) 6 observers; Liberia: UN (UNMIL) 1 troops; Sudan: UN (UNMIS) 21 observers; Sudan: UN (UNAMID) 5 troop + 22 observers; Western Sahara: UN (MINURSO) 10 observers.

may decide in these cases.⁸¹ He is only held to consult with the National Defense Council (Art. 38), and—when it comes to the more general lines of policy, including in military matters—with his Consultative Council (Art. 125 no. 3). In other words: checks and balances to the president's power are almost absent in the 1991 Constitution.

The constitution further provides that “promotion and disciplinary conditions in the military shall be defined by law” (Art. 35). In the chapter on “Basic Rights and Duties of Citizens”, Art. 59 stipulates:

Defending religion and the homeland is a sacred duty, military duty is an honor, and national service is to be organized by law.

B. President Ṣāliḥ's Ouster and the National Dialogue Conference

In late January 2011, initial demonstrations could be observed in Yemen's capital Ṣana'ā'. They quickly spread across the country. In the early phase, protests were directed against unemployment, bad social and economic conditions, and corruption. Half-hearted concessions by President 'Alī Abdullāh Ṣāliḥ, including the offer to amend the constitution, did not appease the growing crowds that soon began to call for his resignation. Ṣāliḥ refused and deployed his security forces, including the army. However, the weaknesses of Yemen's military soon surfaced, as scores of soldiers, including high-ranking officers, defected across all military units.

In March 2011, after military units stormed the campus of the University of Ṣana'ā' and soldiers opened fire on a mass demonstration, the armed forces fractured into two halves. The powerful commander of the First Armored Division, General 'Alī Muḥsin al-Aḥmar, and other northern commanders announced that they had joined the revolution and deployed tanks in Ṣana'ā' to protect demonstrators against the loyalist forces. The regime had lost its monopoly over arms and power.⁸²

In June 2011, a weakened President Ṣāliḥ was forced to leave the country for medical treatment after being severely injured in an attack on the presidential palace. During his absence, his deputy 'Abd Rabbuh Maṣṣūr Hādī ruled the country. Over the following months, violence between pro- and antigovernment demonstrators groups further escalated. Under international pressure, Ṣāliḥ finally signed an agreement on a power transfer, which had been brokered by the Gulf Cooperation Council (GCC) in Riyadh many months before, on November 23, 2011. The agreement included the formation of a National Dialogue Conference that would seek consent on the fundamentals of a new constitution and prepare national elections. Vice President Hādī tasked Muḥammad Bāsindawah, who had left the former ruling party, the General People's Congress, joined the opposition to form a National Reconciliation Government. As part of the GCC-brokered agreement, the new government approved a law that granted amnesty to President Ṣāliḥ and others who had held offices during his presidency, shielding them from judicial prosecution. Finally, presidential elections were held in February 2012, with acting President 'Abd Rabbuh Maṣṣūr Hādī as the only candidate. Still, 64.8% of the registered voters participated in the election. Hādī found the support of the voters; consequently, Ṣāliḥ stepped down from the presidential office on February 27, 2012, and handed over power to his former deputy.

⁸¹ Information about the practice of decision-making under Presidents Ṣāliḥ and Hādī is not available.

⁸² Philippe Droz-Vincent, “The Military in the Arab World, from Authoritarian Regimes to Transitional Settings and New Regimes in the Making” (2015) 10 *The Singapore Middle East Papers* 1, 7.

In the following months, the Yemeni military severely clashed with the Sunni militants of al-Qa'idah in the Arabian Peninsula, who sought to exploit the situation and gain territory in the eastern part of the country under their control. A growing independence movement in the south and militant Zaydī Shi'ah⁸³ rebels belonging to the Ḥūthi Movement and its organization, Anṣār Allāh,⁸⁴ in the north constituted further challenges. The new government tried to solve the loyalty problems of its own armed forces by restructuring the military in 2012, forming a new Presidential Protection Force that was financially and administratively independent of the military, and disbanding the Republican Guard and one division.⁸⁵

However, these measures could only temporarily halt the disintegration of the Yemeni armed forces. William C. Taylor explains this development through several factors. First, parts of the military—and of society in general—were highly unsatisfied with President Ṣāliḥ, whose family, clan, and tribal allies enriched themselves over decades to the disadvantage of others who were more distant from the center of power.⁸⁶ The disaffection grew particularly among the population of the South, which had been an independent socialist state until Yemen's unification in 1990. It grew even further when Ṣāliḥ and his corrupt entourage were granted immunity for all their acts. On the other hand, supporters of Ṣāliḥ, when they realized that their privileges were threatened, turned against the new government and partly reacted with violence.

Second, the fact that the Yemen's population is heterogeneous and loyalties tend to belong to the clan, tribe, and sect, rather than to the nation, may have resulted in members of military units having little scruples to use violence against groups that they perceived as "others" or "enemies" instead of fellow compatriots.⁸⁷ One should also not forget that Yemen's armed forces were insufficiently trained and paid and permanently struggling with tribal rebels, Islamist insurgents, and other groups in different parts of the country. Interestingly, comparatively intense foreign assistance—2.5% of Yemen's military personnel had been trained by US military personnel—did not prevent the armed forces from using lethal force against civilians defecting, or building ties with, one of the concurring political factions in the ensuing civil war.⁸⁸

But the transformation process had not yet arrived at its end, be that positive or negative. On March 18, 2013, with a delay of four months, President Hādī launched the National Dialogue Conference in Ṣanā'ā'. The conference brought together over 500 representatives from all parts of the country and many diverse political directions. According to the GCC agreement, their main tasks were to draft a new constitution and prepare elections in early 2014. During the first plenary of the conference, the members divided into nine different working groups, including one on "Building the Foundations of the Security and Military Institutions." During the second plenary in June 2013, the working groups presented their midterm reports and recommendations (often called "decisions" or "guidelines"). Subsequently, the working groups resumed their activities. At the third plenary, which

⁸³ The Zaydiyyah sect emerged in the eighth century out of Shi'ah Islam. Followers of the Zaydī Islamic jurisprudence make up about 35–40% of Muslims in Yemen.

⁸⁴ The movement took the name al-Ḥūthiyyūn after the death of its leader, Ḥusayn Badr al-Dīn al-Ḥūthī, in 2004. Since then it has been led by his brother, 'Abd al-Malik al-Ḥūthī. Anṣār Allāh began its insurgency against the government of Yemen in 2004.

⁸⁵ The International Institute of Strategic Studies (IISS), *The Military Balance 2015* (n 25) 359.

⁸⁶ William C. Taylor (n 5) 8.

⁸⁷ *Id.* 2 et seq.

⁸⁸ *Id.* 180.

convened between October 2013 and January 2014, the nine working groups presented their final results. Afterward, a so-called Consensus Committee incorporated them into a document of more than 1,800 recommendations. The most difficult questions were the status of the southern governorates and that of the northern region around the city of Ṣa'dah, where the large Zaydī Shī'ah minority lives and from which the Ḥūthi Movement stems.

The final report of the Working Group on Building the Foundations of the Security and Military Institutions follows the tradition of the 1991 Constitution in some regards. Nonetheless, it constitutes a comprehensive concept for civil-military relations in a democracy. In particular, the Working Group's "Decisions on Constitutional Principles", which is the most important set of recommendations developed by its members, informed the respective provisions of the draft constitution that was written after the end of the National Dialogue Conference. The following excerpts give insights to the ideas of the Working Group.

The first constitutional principle contains no surprises; it defines the mandate of the armed forces and the state monopoly to the use of force with similar wording as the 1991 Constitution.⁸⁹

As the members of the Working Group could not foresee what type of political system the future constitution would establish, they formulated constitutional Principle no. 7 as follows:

The President of the Republic in a presidential system or the mixed system, and the Prime Minister in the Parliamentary System is the Commander in Chief of the armed forces. The Commander in Chief declares war and general mobilization after the approval of the legislative authority.⁹⁰

Here, the scope parliamentary control is only slightly extended by adding the declaration of war. Principles no. 8 and 9 continue with a definition of the tasks of the ministry and the minister of defense, who shall be in charge of the armed forces in times of peace, and further extends the decision-making and oversight functions of the parliament:

The Ministry of Defense is responsible for the armed forces before the people and before the authorities of the State. [. . .] It shall define the operation theater, the financial and administrative system, transparency of financial control by the legislative authority and the control agencies.

The office of the Minister of Defense is a political position. The person who will assume such office shall be appointed by the President of the Republic in the presidential or mixed systems of government, or the Prime Minister in the parliamentary system and in accordance with the requirement of the public interest for the nation. The Chief of Army Staff is the military commander of the army.⁹¹

⁸⁹ "The armed forces belong to the people; its mission is to protect the country, maintain security, unity and territorial integrity, sovereignty and the republican system. The State has the exclusive right to establish such forces. An individual, body, party, agency, group, organization, or tribe are prohibited from establishing such formations, bands, military or paramilitary organizations under any name." Final Report of the Working Group on Building the Foundations for the Military and Security Institutions to the National Dialogue Conference Plenum on the period July 13–September 18, 2013, submitted by Yehia Mohamed Al-Shami, Chair, and Fahd Dahshoush, Rapporteur, 5 et seq.

⁹⁰ *Id.* 7.

⁹¹ *Id.* 7.

The preexisting High Council for National Defense and National Security—its name appears slightly changed—is described in Principle no. 5, which demands that the authors of the future constitution should pay “due consideration to civilian representation in the council.”⁹²

Principle no. 11 contains another important definition: It not only defines the competences of the military judiciary, which “specializes exclusively in adjudicating all crimes related to the armed forces, officers and members”, but also limits them: “It is not permissible to prosecute any civilians before military courts.”⁹³

The next two principles aim at radically separating the armed forces from politics. Principle no. 12 bans all military personnel from “the participation in elections and referendum, whether in voting or nomination or participation in election campaigning in favor of any candidate” in order to protect these elected organs “from any political infiltration”. In an effort to counter the dangers of a politicized military, the Working Group decided to severely limit the political rights of military personnel. The document, though, reveals that not all members of the National Dialogue Conference agreed with this proposal; four representatives of the General People’s Congress party made a reservation. Principle no. 13 adds that “partisan activities by military personnel” as well as “any activity by any political party in the military” and the “utilization of the armed [. . .] services in favor of any political party” shall be considered crimes.⁹⁴ No reservation against this clause is noted.

Principle no. 14 aims in a similar direction, prohibiting the highest-ranking representatives of the state to appoint relatives in military leadership positions during their tenure.⁹⁵

The last set of principles demand that the military doctrine for armed forces “be derived from constitutional principles so as to make the military, a national and professional army, loyal to God first and to the Nation”, and that the military shall “respect human rights and international conventions and agreements that do not contravene the sovereignty of the country” (no. 15); that the military personnel shall “derive legitimacy and full protection in the performance of their duty from their adherence to the constitution and the law” (no. 16); and that the military should be more open for women (no. 17) and avoid the employment of minors (no. 19).⁹⁶

One recommendation is different from the others insofar as it seeks a solution for a problem that is perceived as temporary: the uneven representation of soldiers from the different parts of the country in the military. Principle no. 2 demands:

Representation in the armed [. . .] forces [. . .] during the constituting period shall be 50% for the North and 50% for the South at the command level in the military [. . .] and below that, 50% for population and 50% for geography.⁹⁷

From a slightly different perspective and in less detail, the National Dialogue Conference’s Working Group on State Building and Constitution Principles and Foundations also dealt with the role of the military in the future state. The results are similar to those described above.⁹⁸ In addition, its members demanded that the change of the political system through

⁹² *Id.* 6.

⁹³ *Id.* 8.

⁹⁴ *Id.* 8.

⁹⁵ *Id.* 8.

⁹⁶ *Id.* 8 et seq.

⁹⁷ *Id.* 6.

⁹⁸ See the Constitutional Guidelines—Political Foundations no. 3 and 13 and the Constitutional Guidelines—Social Foundations no. 6 in the Final Report of the Working Group on State Building, Principles and Foundations of the Constitution to the National Dialogue Conference Plenum on the period July 13–September 17, 2013, submitted by Mohamed Marem, Rapporteur, 5, 8, and 12.

violence, a military force, or military coup should be criminalized⁹⁹ and that the Federal Council's approval of the General Commander of the Armed Forces be necessary—an additional element of checks and balances in the envisaged system of civilian control over the military.

The final outcome document of the National Dialogue Conference reflects this only in broad terms, demanding:

The armed and security forces should be established to ensure the territorial integrity of the country and border protection from foreign interference or invasion.

The State shall apply basic principles for rebuilding the relationship of the military and security institution with the people so that these institutions will be the protective fence for interests, security and stability of the people. A new identity, culture and doctrine for the military will be formulated for all the military and security institutions, including the police, judiciary and prisons organizations. The State will work to tighten civilian control over the armed forces and security services and will ensure the formation of a professional non-partisan and non-politicized security sector which is subject to the law, accountability and respect for human rights and civil liberties through an alerted conscience. It would prohibit the assignment of the security services, the armed forces and intelligence services in favor of any political party, group or individual. [. . .]

In an effort to address the threats to internal and external security of the Federal Republic of Yemen, and for protection of its sovereignty, a national council for defense and security should be established to analysis risks and develops suitable structures and appropriate responses.¹⁰⁰

C. Theory and Reality: The 2015 Draft Constitution and the Ḥūthī Rebellion

Two months after the end of the National Dialogue Conference, in March 2014, President Hādī formed a Constitutional Drafting Committee to prepare a new constitution. However, in the following months, protests against the new government, the transformation process, and particularly the plans for a new federal structure of the country continued and became increasingly violent. In September, tens of thousands of supporters of the Ḥūthī Movement first blocked the Ṣanaʿā with massive protests, then overran army posts in the outskirts, and finally seized control of the capital. Quickly agreed ceasefires and peace deals were not implemented; within days, a civil war engulfed almost the entire country. Before the Constitutional Drafting Committee could present any tangible results, the political situation had once again radically changed.

The Committee continued and prepared a complete draft constitution until January 2015. Obviously, under the conditions of a civil war, the planned public consultations and a referendum on the draft constitution cannot be held, as much as general elections cannot take place. Nevertheless, the draft is an important document, as it reflects a compromise that was reached between political, social, and religious actors representing a large portion of Yemen's heterogeneous society. The National Dialogue can be considered an inclusive process; groups that left it were more than once invited to return.

⁹⁹ See the Decision Relevant to the State's Identity no. 6 in *id.* 17.

¹⁰⁰ Republic of Yemen, National Dialogue Document, Sana'a 2013–2014, 24 et seq.

Yemen's draft constitution of 2015 closely follows the recommendations of the National Dialogue Conference's working groups and plenary but also uses elements from the 1991 Constitution, for example, in the definition of the mandate of the armed forces, which is "a national institution that belongs to the people", "entrusted with the protection of the Republic and maintaining security, unity, territorial integrity, sovereignty and the Republican system" (Art. 317).

In a slightly redundant manner, the document binds the armed forces to several general principles, particularly "the provisions of the Constitution and the Law, and the principles of human rights and freedoms" (Art. 308), the "principles of national partnership and professional standards" (Art. 311), and "the principles of good governance, including accountability, transparency and financial oversight" (Art. 312); their doctrine shall be "devoted to the values of national belonging, respect for human rights and clarity of their functions" (Art. 310).

The president, who continues to be advised by the Supreme Council for National Defense and National Security (Art. 326), remains Supreme Commander of the Armed Forces (Art. 190); however, the authors of the draft constitution did not follow the proposal to determine the defense minister as "General Commander" who would be in charge in times of peace.

The president cannot take critical decisions alone. Senior military appointments need the approval of the Federal Council (Art. 191 no. 6); missions abroad and any military cooperation with other states or with regional or international organizations require the approval of the National Assembly (Art. 145 no. 2 and Art. 321).

The legislature is tasked to regulate many matters in detail that were not mentioned in the 1991 Constitution, such as the equitable representation of the regions in the command structures of the armed forces (Art. 311 sent. 2), the obligation of military commanders to disclose their private financial situation (Art. 312 sent. 2), the terms of service, promotion, retirement, penalties, and sanctions in the armed forces (Art. 313), measures to employ women in the armed forces (Art. 314), the prohibition to appoint relatives of highest ranking state officials in any position in the command structures (Art. 315), the production, procurement, import, export, and transit of military materials and possession and carrying of weapons (Art. 316), the organizational structure of the armed forces, including job descriptions, functions, human resources, and physical capital for all of its subcomponents, and the financial and administrative system (Art. 318). Compulsory military service, which should also be regulated by law (Art. 46), is not new.

The authors of the draft constitution followed the recommendations of the National Dialogue Conference that partisan activities of military personnel as well as activities of political organizations of any kind inside the armed forces should be punishable (Art. 309) and military personnel should not enjoy the right to vote or be elected (Art. 319). They were also highly careful when it comes to the economic activities of the armed forces, which are expressly prohibited (Art. 320). In order to reduce the possibilities for corruption, military procurements "shall be subject to the same rules applied for procurement by the State" (Art. 322), which shall have "the exclusive right of the possession of weaponry (Art. 316)—clauses that would be difficult to implement in a country that takes leading positions in indices describing levels of corruption and the uncontrolled circulation of small arms.

The 2015 draft constitution of Yemen is a highly ambitious document. In some regards, it continues the country's tradition of civil-military relations, for instance, when it comes to the supreme command over the armed forces, but it strengthens parliamentary oversight and introduces numerous provisions that could considerably improve the structure and

capacities of the armed forces. However, the way toward the implementation of any such changes will be long; not only because the constitutional process has been halted by the Ḥūthi rebellion but also because many of its provisions presuppose functioning institutions, such as an effective legislature, which Yemen has never had. If tested in reality, this constitution might prove to be too ambitious.

However, it is certainly a more adequate basis for the future Yemeni state than the “Constitutional Declaration to Organize the Foundations of Governance during the Transitional Period in Yemen” that the “Revolutionary Committee of the 21 September Revolution”, a body formed by Ḥūthi militants, promulgated on February 6, 2015. In this document, the Supreme Revolutionary Committee, which is presided by Muḥammad ‘Alī al-Ḥūthī, justifies the expulsion of President Hādī, with delays of the implementation of the National Dialogue Conference’s outcomes by his government. It declares the provisions of the 1991 Constitution to remain in force, “provided that they do not conflict with the provisions of the present Declaration” (Art. 1).

The document foresees the establishment of a “National Transitional Council with 551 members” (Art. 6), which is supposed to elect a “Presidency Council” that, if approved by the Supreme Revolutionary Committee, should perform the tasks of the president (Art. 8). The Committee itself announces “to take all the necessary measures and arrangements to protect the sovereignty of the nation, guarantee its security and stability, and protect the rights and freedoms of citizens” (Art. 11), in other words—to rule the country. Art. 3 clarifies for how long:

Within a maximum period of two years, the State’s transitional authorities shall work to reach the milestones of the transitional period in accordance with the outcome of the comprehensive National Dialogue Conference and the Peace and National Partnership Agreement. This includes reviewing the new draft constitution, enacting the laws required by the constituent assembly phase, holding a referendum on the constitution in preparation for the country’s transition to a permanent status, and conducting parliamentary and presidential elections in accordance with the provisions of said constitution.

The last day of the Ḥūthi rule would thus be February 5, 2017. The political and constitutional future of Yemen remains unclear, depending on which conflict party will prevail, and this again will depend much on the international support they can secure.

The current strength and structure of Yemen’s formal armed forces—those loyal to the elected President Hādī—can hardly be assessed. The 2015 edition of *The Military Balance* presents the same figures as in 2010,¹⁰¹ which does not appear to be realistic. In the ongoing civil war, the armed forces strongly rely on military support from GCC countries, particularly Saudi Arabia and the United Arab Emirates.

¹⁰¹ Small numbers of troops and observers still seem to be deployed to seven UN missions: Central African Republic/Chad: UN (MINURCAT) 2 troops; Côte d’Ivoire: UN (UNOCI) 1 troops + 8 observers; Democratic Republic of Congo: UN (MONUC) 5 observers; Liberia: UN (UNMIL) 1 troops; Sudan: UN (UNMIS) 14 troops + 12 observers; Sudan: UN (UNAMID) 2 troop + 21 observers; Western Sahara: UN (MINURSO) 10 observers, The International Institute of Strategic Studies (IISS), *The Military Balance 2015* (n 25) 358 et seq.

VI. LIBYA: TOTAL LOSS OF CONTROL

A. The Military and Its Constitutional (Non-)Status before the Revolution

The armed forces of the Libyan Arab Jamāhirīyah ceased to exist following the Libyan civil war of 2011. A year earlier, they consisted of about 76,000 active staff¹⁰² (1.22% of the population) and 40,000 reserves in the so-called People's Militia. Six military observers were deployed to a UN mission in the Philippines.¹⁰³

Most of the fighting equipment of the armed forces had been bought from the Soviet Union in the 1970s and 1980s and become largely outdated. No major purchases of equipment had been made in the 1990s due to the decline of the domestic economy and the sanctions imposed by the UN Security Council (1992–1999).¹⁰⁴ These factors seriously debilitated the Libyan Armed Forces. Mu'ammad al-Qadhdhāfi, who had survived several military coups and assassination attempts during his rule, deliberately kept his military weak and controlled it tightly.

Only a few army units could be considered effective regime protection forces. The 32nd Mechanized Brigade, which stood under the command of al-Qadhdhāfi's son Khāmis, the 9th Brigade, or Special Forces, which was commanded by his son Sa'di, and the Revolutionary Guard Corps, commanded by his cousin Ḥassan al-Kabīr al-Qadhdhāfi, served this purpose. Many other relatives and confidants, called "men of the tent" (*rijāl al khaymah*), held strategic positions in the armed forces.

Mainly in the 1980s, the regime formed several paramilitary units. With around 40,000 staff, the People's Militia was the largest among them. Trained and equipped for territorial defense, it stood under the leadership of local military commanders and was allegedly involved in a border clash with Egyptian forces in 1977.

The Islamic Pan-African Legion, a body of mercenaries primarily from Sudan, Egypt, Tunisia, Mali, and Chad, consisted of about 7,000 individuals. It was reported to have been fighting in Chad in 1980.

Al-Qadhdhāfi's vision of a united Islamic Arab Legion that would grow into an army of 1 million men and women fighters to prepare for "the battle of liberating Palestine, of toppling the reactionary regimes, of annihilating the borders, gates, and barriers between the countries of the Arab homeland, and of creating the single Arab Jamāhirīyah from the ocean to the gulf" only initially found the support the Syrian Ba'th Party, Palestinian factions, and smaller radical groups from Lebanon, Jordan, Tunisia, Sudan, Iraq, and the Persian Gulf states. It was never effectively built up.¹⁰⁵

¹⁰² By service: Army 25,000 regular forces, 25,000 conscripts; Navy 8,000 regular forces; Air Force 18,000 regular forces, The International Institute of Strategic Studies (IISS), *The Military Balance 2011* (n 11) 320 et seq.

¹⁰³ *Id.* 320.

¹⁰⁴ An observer joked that al-Qadhdhāfi owned "the world's largest military parking lot". Anthony Cordesman, "The Military Balance in the Middle East" (2004) Center for Strategic and International Studies 96.

¹⁰⁵ Some units of the Islamic Arab Legion engaged in Chad in the 1980s and later reappeared as armed groups in other regional conflicts, for example, in Darfur, where they supported the *Janjaūūd* militia. Philippe Droz-Vincent, "From Fighting Formal Wars to Maintaining Civil Peace?" (2011) 43 *International Journal of Middle Eastern Studies*, 394.

The constitutional framework for Libya's armed forces under al-Qadhdhāfi is difficult to describe, as the country did not have one constitutional document but a number of proclamations, declarations, decisions, and laws that complemented each other.

The first relevant document was the Constitutional Proclamation that was promulgated a few weeks after the toppling of King Idris on December 11, 1969. The document was meant to serve as an interim constitution until a permanent constitution was drafted. According to its Art. 18, the Revolutionary Command Council that had overthrown the monarchy

[...] constitutes the supreme authority in the Libyan Arab Republic. It will exercise the powers attached to national sovereignty, promulgate laws and decrees, decide in the name of the people the general policy of the State, and make all decisions it deems necessary for the protection of the Revolution and the regime.

The Revolutionary Command Council, which consisted of twelve officers from all parts of the country, further entitled itself to declare war and conclude and ratify treaties and agreements (Art. 23). It intended to appoint a Council of Ministers as its executive organ (Art. 19). A parliament was not foreseen. Without any separation of powers, it would be pointless to search for any institutional control mechanisms. The Constitutional Proclamation remains silent about the supreme command over armed forces; the Revolutionary Command Council chose its leader, Colonel Mu'ammār al-Qadhdhāfi, as *de facto* commander-in-chief and head of state. The state held the monopoly to establish armed forces, which "shall protect the people and insure the security of the country, its republican system, and national unity" (Art. 26). Military service was compulsory (Art. 16).

In the following years, a number of laws were enacted that regulated in more detail the service in the armed forces (Law no. 40/1974 and later amendments), general mobilization (Laws no. 80/1974, 7/1987, and 21/1991), the organization of the armed forces (Law no. 35/1977), the introduction of military education from school age on (Law no. 3/1984 on the Armed People), and other matters.

During the 1970s, al-Qadhdhāfi developed his own political philosophy, a hybrid of socialism and Islam called the Third Universal Theory. In 1975, he wrote the Green Book, which presented the theory of a system of government called *jamāhirīyah*, a term that is usually translated as "state of the masses".¹⁰⁶ Based on the idea of direct democracy, the *jamāhirīyah* concept obliged all citizens to participate in local congresses, where they should debate all matters of government, from budget to defense, and bring their views and ideas into the government through higher-level congresses. In 1977, the General Conference of the People's Congresses, the People's Committees, and the Professional Unions—an organ that was not mentioned in the Constitutional Proclamation of 1969—adopted this seemingly innovative political system by approving the Declaration on the Establishment of the Authority of the People. According to this document, every citizen of the newly created Great Socialist People's Libyan Arab Jamāhirīyah belonged to a Basic People's Congress. Representatives of these councils formed the General People's Congress, which should take all important decisions for the state. Al-Qadhdhāfi headed the General Secretariat of the General People's Congress, a kind of parliament that was also tasked to oversee the execution of state policy through the government, which was renamed the General People's Committee. In this

¹⁰⁶ *Jamāhirīyah* is derived from the Arabic *jumhūrīyah*, which means "republic." It was coined by changing the component *jumhūr* (public) to its plural form, *jamāhīr* (the masses). The term, which is similar to the notion of "people's republic," is often left untranslated in English. See Lisa Anderson, *The State and Social Transformation in Tunisia and Libya, 1830–1980* (Princeton University Press, Princeton 1986).

position, he could effectively exercise influence on and control over all political affairs. The Declaration on the Establishment of the Authority of the People did not elaborate on the armed forces; it only reconfirmed that military service was compulsory (Art. 9).

In March 1979, al-Qadhdhāfi officially relinquished all his formal government positions. Since then, he only used the title Leader of the Revolution and Supreme Commander of the Armed Forces. However, he continued to rule the country together with a small military elite and his family. Also internationally he was widely considered *de facto* head of state.¹⁰⁷

Until the outbreak of the Arab Spring, the constitutional system was amended by several more documents. The General People's Congress adopted the Great Green Charter of Human Rights of the Jamāhiriyan Era of 1988, which recognized a number of fundamental rights, among them the Law no. 20/1991 on the Enhancement of Liberties and the Law no. 1/2001 regarding People's Committees and People's Congresses, which rearranged the distribution of authority between the different levels of government. None of them contained any specific references to military matters. Several efforts to create a permanent constitution for the country failed.¹⁰⁸

In regard to the military, Law no. 4/2007 is worth mentioning, as it formed the basis of a new National Security Council, which was chaired by the secretary of the General People's Committee and primarily tasked to develop the strategies in the areas of internal and external security, defense, and foreign policy. The power to take final decisions continued to lie with the Supreme Commander of the Armed Forces, Mu'ammār al-Qadhdhāfi.

The surprising result is that, between 1969 and 2011, only the compulsory military service was regulated in constitutional documents. There were no constitutional provisions concerning the mandate of the armed forces, the supreme command in times of peace and times of war, institutional control mechanisms, fundamental rights of military personnel, and other relevant matters. This situation mainly resulted from al-Qadhdhāfi's preference for rule by decree over a stable legal and constitutional framework, which would have limited his ability to realize his revolutionary, and at times eccentric, political ideas.

B. From Uprising into the Civil War

In Libya, the uprising began on February 15, 2011, with a large demonstration in the eastern city of Benghazi. Within days, it spread to other cities, including the capital, Tripoli. The police reacted with massive violence, killing dozens of civilians. Angry crowds armed themselves and began to attack posts of security, police, and army units.

Al-Qadhdhāfi reacted in a manner similar to other authoritarian rulers in the region. On the one hand, he pretended to understand some of the demands, discussed with societal leaders about the need of reforms, visited poor families, promised to double the salaries of government employees, and even went so far as to announce that he would join the people in the street

¹⁰⁷ See, for instance, the final *Arrêt* of the French *Court de Cassation* of March 13, 2001, no. 1414.

¹⁰⁸ From 1992 on, different circles in Libya tried to launch the idea of a comprehensive constitution for Libya. Most of them were rather progressive, like the committee that drafted a constitution in 1998/1999. The document was supposed to be handed over to the Basic People's Congresses for discussion, which never happened. Between 2004 and 2010, Mu'ammār al-Qadhdhāfi's son Sayf al-Islām, who was seen as a reformer inside the country and internationally, pursued the project of a modern constitution. A first draft was leaked to the media in 2008. After a legal committee finalized the document, it was handed over to the influential People's Social Leadership Committee in 2010—"and nothing more was heard of it." Mu'ammār and the old guard had halted his son's ambitious reform plans, which apparently went too far in their view. Ronald Bruce St. John, *Libya: Continuity and Change* (Routledge, London 2015) 74. The present author visited Libya in September 2006 for talks about the ongoing constitution-drafting process.

and demand the toppling of the government—of course, not referring to himself, as he insisted that he did not hold any official position, but to the General People's Committee. On the other hand, he blamed foreign governments for stirring up unrest and ordered the national media to launch campaigns in his support and to refrain from reporting about developments in Tunisia and Egypt. Behind the scenes, he activated the military to suppress the revolt.¹⁰⁹

In Benghazi, the protesters gained an early victory. On February 20, 2011, they overwhelmed the army's al-Faḍīl brigade. Some members of the unit fled, others joined the protesters. Al-Qadhdhāfi's son Sa'dī and other loyalists had to be rescued by air transportation. This battle had a strong impact on further developments. Influential societal and political actors began to condemn the brutal crackdown against the protesters. Tribes threatened to withdraw their support to the government. Founding members of the Revolutionary Command Council went so far to demand that al-Qadhdhāfi hand over power to the defense minister and army commander, General Major Abū-Bakr Yūnis Jabr. More and more members of the armed forces defected or refused to fight the protesters.¹¹⁰ High-ranking government officials, including the ministers of justice, Muṣṭafā 'Abd al-Jalīl, and interior, Major General 'Abd al-Fatāḥ Yūnis,¹¹¹ and diplomats resigned or declared allegiance with the opposition. On February 27, 2011, the opposition formed the National Transitional Council in order to coordinate the revolutionary efforts in the different cities and regions and to give a political face to the opposition. It soon became a provisional government. A few days later, Muṣṭafā 'Abd al-Jalīl was elected its chairman.

Meanwhile, clashes between opposition and regime forces continued. Defected senior officers of the armed forces of the Libyan Arab Jamāhīrīyah formed a Military Council in order to coordinate the resistance in the country that remained mainly on the shoulders of many local militias, organize supplies, and train new recruits. Moreover, the Military Council began to establish the Free Libyan Army, which was renamed the National Liberation Army after two months, and the Free Libyan Air Force with 'Abd al-Fatāḥ Yūnis as one of the main front-line commanders.¹¹² In its Declaration of the Founding of the National Transitional Council, the opposition government announced, among other things, that it intended to supervise the Military Council to ensure the introduction of a new military doctrine in the defense of the people and to protect the borders of the country. Different members of the National Transitional Council and its Executive Board, a body created to implement the Council's decisions, were successively in charge of military affairs.

However, they could not stop the massive counteroffensive of the loyalist Libyan military, which began to attack one city after the other in two fronts, one in the east and one in the west of the country. On March 17, they approached Benghazi, where the National Transitional Council was based. The uprising would have been crushed had the Security Council of the United Nations not imposed a no-fly zone over the country on that day. Resolution 1973 further authorized UN member states to "take all necessary measures [...] to protect civilians and civilian populated areas under threat of attack". On March 20, the North Atlantic Treaty Organization (NATO) destroyed Libya's armed force, parts of the army equipment, and key military infrastructures. A day later, allied jets attacked al-Qadhdhāfi's compound in Tripoli. Thus strengthened, the opposition forces could regain some of the ground they had lost.

¹⁰⁹ William C. Taylor (n 5) 146.

¹¹⁰ Zoltan Barany (n 8) 34.

¹¹¹ The formal Jamāhīrīyah titles of Jabr, 'Abd al-Jalīl, and Yūnis were Secretary of the General People's Committee for Defense, Secretary of the General People's Committee for Justice, and Secretary of the General People's Committee of Public Security, respectively.

¹¹² Yūnis was murdered under unclear circumstances on July 29, 2011.

As the defeat of al-Qadhdhāfi came into sight, another wave of government officials and members of the armed forces defected. On August 20, 2011, the opposition forces took Tripoli; on September 16, the United Nations recognized the National Transitional Council as the legal representative of Libya; and on October 20, al-Qadhdhāfi was killed in his last stronghold, Sirt, the home of his tribe. The First Libyan Civil War came to an end with the armed forces of the Libyan Arab Jamāhīriyah defeated.

Looking back, the reaction of the armed forces to the popular uprising can be described as inconsistent. For several reasons, they fractured into competing groups. First, the elite and the regular military units had different interests.¹¹³ Elite units such as the 32nd Mechanized Brigades and the Special Forces, which were well equipped, trained, and paid, profited from the regime and remained highly loyal to it until the end. In contrast, regular military units had received much less attention in the past and were therefore much less interested in protecting al-Qadhdhāfi, his family, and the military elite that ruled the country. Many of them joined the opposition, refused to take sides, or formed new militias.

Second, the armed forces were not held together by a common professional ethic or spirit of comradeship. In his mistrust, al-Qadhdhāfi had rotated officers frequently in order to avoid their growing close relations with their troops and promoted and dismissed them on the basis of loyalty rather than merit, while also creating an atmosphere of suspicion, if not fear, by infiltrating the armed forces with spies and informants.¹¹⁴

Third, the tribal character of Libya's society had an impact on the developments after February 15, 2011. Libya consists of more than a hundred tribes, out of which between twenty and thirty are particularly important. The country is informally divided into three distinct regions—Tripolitania in the west, Cyrenaica in the east, and Fezzān in the south—which have competed for political influence throughout history. Al-Qadhdhāfi skillfully played the tribes, influential families, and different regions off each other. Within the military, he preferred members of three tribes—his own, the Qadhdhāfah, and the Warfalah and Magharahah—over others and installed them as tools of influence and control, thereby aggravating other tribes. When the uprising began, many tribal leaders openly encouraged their “sons” to defect from the security forces and refuse orders to attack demonstrators.¹¹⁵ Not surprisingly, among the earliest high-ranking defections were officers who belonged to the ‘Ubaydāt tribe, which has its homelands in the region around Benghazi.¹¹⁶

On August 3, 2011, while the First Libyan Civil War was raging, the National Transitional Council promulgated a provisional Constitutional Declaration. This document outlined a pluralistic democratic state that would respect and protect the fundamental rights of its citizens. The military only indirectly referred to in Art. 9, which read:

Defense of the motherland, safeguarding national unity, keeping the civil, constitutional and democratic system, abiding by civil values, combating tribal, kindred and eminent bias shall be the duty of each and every citizen.

In more detail, the Constitutional Declaration described the processes of state building and constitution drafting that should begin immediately after the liberation of the country.

¹¹³ William C. Taylor (n 5) 158.

¹¹⁴ Kenneth Pollack, *Arabs at War: Military Effectiveness, 1948–1991* (University of Nebraska Press, Lincoln 2002) 364–365.

¹¹⁵ See Ranj Alaaldin, “How Libya’s tribes will decide Gaddafi’s fate,” *The Telegraph* (March 4, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8361279/How-Libyas-tribes-will-decide-Gaddafis-fate.html>, accessed September 30, 2015.

¹¹⁶ Examples include the aforementioned Major General ‘Abd al-Fatāh Yūnis and the commander of the Tobruk region, Sulaymān al-‘Ubaydi.

However, the hopes of most Libyans for a near stabilization of the country were not fulfilled. In the aftermath of the civil war, a low-level insurgency by former al-Qadhdhāfi loyalists continued. Another matter of concern was the large number of militias that had fought against the former regime. Many of them—particularly those that leaned toward Islamist ideology—refused to disarm and cooperate with the National Transitional Council. Citizens began protesting against militias. However, the efforts of the interim government to disband these groups or integrate them into the Libyan military widely failed.

In 2012 and 2013, attacks against political and diplomatic targets in Tripoli emphasized the threat by the militias. The government established a Warriors' Affairs Commission to enable individual reintegration of members of militias. Moreover, it formed two umbrella organizations to gain control of militias and prepare their disarmament and demobilization: the Supreme Security Commands that stood under the authority of the Ministry of Interior, and the Libyan Shield that stood under the authority of the army. However, for different reasons—among others, salaries paid to militiamen were higher than those paid to members of the armed forces—becoming a member of regular forces was unattractive. In addition to these efforts to get a grip on the militias, the government announced a plan to recruit 20,000 new soldiers not belonging to any existing armed group in order to establish forces with loyalty only to the state.¹¹⁷

Despite the growing unrest propelled by the militias and ethnic minority and radical groups, elections for a constitution-making assembly and provisional parliament, the General National Congress, took place on July 7, 2012. A month later, the National Transitional Council formally transferred power to the General National Congress, which subsequently formed a new government.

C. Constitution-making: Killed in Action

As demanded by Art. 30 of the Constitutional Declaration, the General National Congress appointed a Constitution Drafting Assembly that was tasked with the permanent drafting of a constitution within sixty days from its first meeting, which took place on April 21, 2014. However, this time schedule had to be adapted several times to changing circumstances. While the drafting began, the General National Congress organized elections to a new parliament, the Council of Deputies, and was replaced by it on August 4, 2014. Three weeks later, mainly Islamist members of the General National Congress who had not been re-elected and claimed that the dissolved Congress was the sole legitimate representative of the Libyan people, and continued to meet. The Libyan Revolutionaries Operations Room—an Islamist militia led by the former chairman of the General National Congress, Nūri Abū Sahmayn—and other irregular forces that originally belonged to the Libya Shield, backed them, attacked and kidnapped political enemies, took control of Tripoli, and began to fight forces that were loyal to the Chamber of Deputies in Benghazi and other cities. The Second Libyan Civil War began to ravage the country.

The members of the Council of Deputies, which enjoys international recognition as Libya's legitimate parliament, fled to the city of Tobruk. Due to the lack of adequate rooms, they live and meet on a rented car ferry. Air force units from Egypt and the United Arab Emirates assist them with airstrikes against Islamist militias. Fighting is taking place on several fronts across the country. The militant Islamic state now has a growing presence and is becoming an additional dangerous actor in the conflict.

¹¹⁷ The International Institute of Strategic Studies (IISS), *The Military Balance 2014* (Routledge, London 2014) 332

Under these circumstances, the governmental plans to build up loyal armed forces could not advance. However, the works on a new permanent constitution continued, if only at a slow pace. By the end of 2014, several thematic committees of the Constitution Drafting Assembly had prepared a first draft constitution. In his analysis of the document, law professor Jörg Fedtke remarks:

The section dealing with the security sector is conspicuously brief, given the tremendous importance of this area and the considerable challenges that the country is facing with respect to the development of national security forces (the army, police and intelligence agencies), their integration into a system of civilian rule, and the dissolution and disarmament of the many local and regional militias that currently control large parts of Libya.¹¹⁸

The president is commander-in-chief of the armed forces, a position which has the mandate to preserve the security and integrity of Libya and be loyal to God and nation (Art. 5). It seems that the president may also deploy the military to avert internal “disasters and crises” (Art. 1).¹¹⁹ The state holds the monopoly on the use of force (Art. 4 and 5). A National Security Council advises on matters pertaining to the external and internal security of the country. The system lacks thorough parliamentary oversight mechanisms. In order to keep the armed forces institutionally neutral, military personnel may not vote or engage in other kinds of political activity (Art. 3).

Fedtke rightly criticizes the wide competencies for military courts, which are thought to decide on crimes not only committed by military personnel but also by civilians, such as attacks on “military installations, public or private funds, or military factories”, crimes relating to conscription, and crimes that constitute an attack on military personnel “because of or during the performance of their duties” (Art. 16), and crimes that constitute a “direct aggression on military installations or installations of a similar nature” (Art. 18):

Both provisions are capable of a wide interpretation that might undermine the judicial safeguards otherwise enjoyed by civilians in ordinary criminal courts. This author strongly advises the drafters to review the powers of military courts given the troubling experience with the interpretation and application of similarly phrased provisions in the Egyptian Constitution.¹²⁰

In October 2015, the Constitution Drafting Assembly presented a first complete draft of a permanent constitution to the Chamber of Deputies. The chapter on the army is visibly based on the groundwork of the Assembly’s thematic committees. However, there are some remarkable changes. According to Art. 63 of this document, the approval of the two-chamber *Shūrā* Council is necessary in three cases:

1. Approving a declaration of war or ending it;
2. Approving the state of emergency and martial law;
3. Approving sending military forces outside the borders of the State; [. . .].

¹¹⁸ Jörg Fedtke, Analysis of the Draft Constitution of Libya Thematic Committees of the Constitution Drafting Assembly, Status: December 2014 (International IDEA, March 2015) 30, http://www.constitutionnet.org/files/2015.03.31_-_analysis_of_draft_libya_constitution_english.pdf, accessed September 30, 2015.

¹¹⁹ *Id.* 31.

¹²⁰ *Id.* 10.

Thus, parliamentary oversight has been introduced at least to some extent. The constitutional limitations for military courts have also been tightened. Art. 103 clearly defined their mandate:

Military courts are specialized in looking into military crimes committed by military officers in accordance with procedures stated by the law and in a manner that ensures fair trial.

Moreover, it is expressly forbidden to refer civilian cases to military courts during the state of emergency or under martial law, civilian cases may not be considered before military courts (Art. 202 para. 4). It seems that the expert advice has not been futile.

Some other provisions are quite unique as well, such as the rule that a candidate for the office of president may not have served in the armed forces during the previous two years (Art. 70 no. 8), and the careful hints to the army to refrain from military coups (Arts. 187 and 188).¹²¹ However, the fate of this draft constitution remains unclear as the Council of Deputies rules over a country without having access to most of its territory.

D. The Libyan National Army and Its Constitutional (Non-)Status as of 2015

The National Transitional Council established the Libyan National Army after the first Libyan Civil War, as Libya's previous national armed forces were defeated and disbanded. Only one elite unit of paratroopers and commandos, the al-Şā'iqah Forces, continued to exist and bowed to the Council of Deputies.¹²²

In the ongoing Second Libyan Civil War, the Libyan National Army is loyal to the Tobruk-based Council of Deputies. It is reported to comprise only 7,000 staff.¹²³

The Libyan National Army fights against diverse, mostly Islamist militias. The 2011 Constitutional Declaration, which is widely silent on the military, still constitutes the constitutional framework for the armed forces.

VII. CONCLUSION AND OUTLOOK

Before the Arab Spring, the constitutional systems analyzed and compared in this article primarily served to keep authoritarian regimes in place. They all contained elements upon which democracy and the rule of law may be built—such as elections and the distribution of state power between different institutions—but these elements were either not construed in a manner that would have enabled the development of constitutionalism,

¹²¹ Art. 187 sentences 2–4 read: “[The army] is committed to absolute neutrality and is subject to civilian authority. It has no role in the peaceful rotation of authority. It does not interfere in political life.” Art. 188 reads: “The army is charged with defending the country, its independence, and territorial integrity. It supports the security services according to the law; and it is prohibited from undermining the constitutional system and the State’s institutions, obstructing their activity or limiting the rights and freedoms of the citizens.”

¹²² “Guide to key Libyan militias,” BBC, <http://www.bbc.com/news/world-middle-east-19744533>, accessed September 30, 2015.

¹²³ The International Institute of Strategic Studies (IISS), *The Military Balance 2015* (n 25) 340 et seq. Other sources mention the figure of 35,000 staff. Hanspeter Mattes, “Rebuilding the national-security forces in Libya,” *Middle East Policy* 21/2 (Summer 2014) 85 et seqq.

or they were circumvented in political practice. They were mostly a sort of façade—a fact also revealed by the constitutional provisions pertaining to the military, through which the regimes pursued mainly two objectives not compatible with democracy: to maintain firm, undivided control over the armed forces and to protect themselves against coups d'état, including those stemming from inside the military. They certainly contributed to the long incumbencies of the pre-Arab Spring rulers.¹²⁴ Parliamentary oversight of the strength, structure, budget, and particularly the use of the armed forces, was literally inexistent. The national security or defense councils that traditionally exist in all five countries here compared had merely advisory functions. Military courts were also utilized as instruments of social control, which often facilitated the arbitrary declaration of the state of emergency.

Furthermore, all of the compared regimes never hesitated to deploy the military against civilians, as the so-called “bread riots” in Egypt (1977) and Tunisia (1983–1984), the massacre in the Syrian city of Ḥamāh (1982), and the suppression of political protests, secessionist movements, and Islamist activism in Libya and Yemen in the 1990s exemplify. When the Arab Spring began to shake the region, the rulers—most of them politicians with a military background—reacted in a military manner. However, not all of them could rely on their militaries. In Egypt and Tunisia, the armed forces turned their back on the foundering rulers; in Libya, Yemen, and—to some extent—Syria, they fractured or disintegrated. Incidentally, the armed forces proved immune against attempts of foreign influence. The training of generations of officers in Western military academies did not prevent them from ordering their soldiers to shoot at their fellow citizens, nor did diplomatic pressure nor—in the case of Egypt's SCAF—the freezing of financial assistance impact their decisions in any noteworthy manner. As events were unfolding, the role of the armed forces in the dynamics of the Arab Spring and the specific corporate interests underlying their decisions were not fully appreciated outside of the region. Within the respective countries, politicians, activists, and citizens had difficulties recognizing on which side the military stood, too. President Mursi's dual strategy of reconfirming the military's political role and economic privileges to a large extent on the one hand, and trying to subjugate it by replacing key military leaders and ignoring the SCAF in essential questions of foreign policy on the other, was doomed to fail.

In regard to civil-military relations, the uprisings have triggered disparate developments. Egypt has seen a further militarization of the state that is clearly visible in its 2014 Constitution. Tunisia ventured into a remarkable process of civilianization of the armed forces. The country's 2014 Constitution impresses with an elaborate framework for a true “republican army” (Art. 18) in the sense of armed forces fully under democratic control.

The scenarios in Libya, Syria, and Yemen are depressing; however, even here, a sharpened sense of the necessity of a carefully designed constitutional framework for the armed forces is visible. The Yemeni and Libyan draft constitutions, both of 2015, contain many sensible provisions apt for a relatively stable, democratic society with reasonably functioning institutions. Some of them are even innovative, such as the proposed rule that a candidate for the office of president may not have served in the armed forces during the previous two years (Art. 70 no. 8 of the Libyan draft constitution) and the complex safeguards to prevent corruption and nepotism in the armed forces (Arts. 312–322 of the Yemeni draft constitution). The fact that these ideas have been discussed and approved in relatively inclusive, legitimate bodies and announced to the public gives reason to hope that they will not be

¹²⁴ Mu‘ammar al-Qadhafī remained in power for a period of 42 years, Ḥusnī Mubārak for 29 years, Zin al-‘Abidin Ben ‘Ali and ‘Ali ‘Abdullāh Šālīḥ for almost 22 years, and Bashār al-Assad has been ruling more than 15 years.

forgotten when the situation in these two countries stabilizes. The people will then have a chance to decide on their new permanent constitutions. They might also inspire a future democratization of Syria, which, at the time of publication, seems to be no less far away.

The changes of civil-military relations in Tunisia, Egypt, Syria, Yemen, and Libya need to be viewed in a wider regional context, where three other countries are of particular importance.

Algeria experienced a military takeover aimed at preventing a foreseeable election victory of the Islamist party *Front islamique du salut* (*al-Jabhah al-Islāmiyah li-l-Inqādh*) as early as 1991. Here, like in Egypt in 2013, a military officer—General al-Yamīn Zerūāl—became president, under whom the ideological confrontation was fought out in a bloody, multiyear civil war. Despite the fact that Algeria was less influenced by the Arab protest movement of 2011 than its neighbors, the country had set an important precedence that impacted the decisions of military circles in other countries when the Arab Spring unfolded.¹²⁵ It was therefore no surprise that the first foreign journey of the former head of the SCAF and newly elected president of Egypt, al-Sīsī, did not bring him to Tunis or Washington, D.C., but to Algiers.

Iraq's military was defeated, dispersed, and formally disbanded shortly after the US-led invasion by Coalition Provisional Authority Order no. 2 of May 23, 2003. The subsequent developments could have served as a warning example of what can happen when armed forces disintegrate. Scores of dismissed soldiers joined the growing insurgency against the coalition forces and the newly emerging Iraqi state and created a highly volatile situation. Efforts of the occupying powers and the interim government to build an entirely new Iraqi army failed. The provisions in the permanent constitution that was adopted on October 15, 2005, in a popular referendum could serve as a perfect basis for armed forces in a democracy, but without functioning state institutions, they are idle words. All this resembles the developments in Libya, Syria, and Yemen after the Arab Spring. The bitter lessons from Iraq cannot be stressed enough.¹²⁶

Finally, Turkey may be used as a role model for the reduction of the influence of the military on politics.¹²⁷ Traditionally, the Turkish Armed Forces perceived themselves as the guardian of the official state ideology, Kemalism, and particularly its secular aspects. They were notorious for intervening in politics and removing elected governments. In 1960, 1971, and 1980, the Turkish Armed Forces staged coups d'état, and in 1997 they forced the removal of the leader of the Islamist Milli Görüş movement, from the office of prime minister Necmettin Erbakan. However, since 1999, civilian control of the military has been strengthened and the respective constitutional and legal framework amended.¹²⁸ Two factors forced the Turkish Armed Forces to restrain themselves: The European Union membership process, which nurtured the notion of democratization in the country, and the clear election victories of the Justice and Development Party (AKP) under the leadership of Recep Tayyip Erdoğan since 2002. In 2003, the government established full parliamentary oversight of defense expenditures. In 2006, it prevented military courts from trying civilians in peacetime. This was followed by legislation in 2009 that allowed civilian courts to try military personnel in peacetime for crimes subject to the Heavy Penal Court. In 2010, it withdrew the permission for the military to conduct operations in the domestic sphere

¹²⁵ See Madjid Benchikh, "The Grip of the Army on Algeria's Political System" (*in this volume*).

¹²⁶ See Shaikh Humam Hamoudi, "Lessons from the Iraqi Constitution-making Process" (*in this volume*).

¹²⁷ See Aşlı Ü. Bâli, "Turkish Constitutionalism: A Model for Reforms in Arab Countries?" (*in this volume*).

¹²⁸ Turkey Country Report 2014, available at: http://www.ecoi.net/file_upload/ds750_03014tur.pdf, accessed September 30, 2014.

without a request from civilian authorities. Faced with such losses of power and enraged about the arrest of more than forty high-ranking officers on charges of attempt to overthrow the government, the chief of the general staff, along with the army, navy, and air force commanders, requested their retirement in August 2010. Their swift replacement affirmed the government's control over the military and illustrated the demise of the Turkish "deep state" (*derin devlet*).¹²⁹

In many regards, Tunisia follows the Turkish path toward a civilianization of the state. There is reason to hope that other Arab countries will follow in the future, too. The constitutional debates during the Arab Spring and many of the documents they yielded, including the 2015 draft constitutions of Libya and Yemen, clearly evidence that the basic concept of civil-military relations in a democracy has irrevocably proliferated in the region. The initial call of the Arab Spring protesters for a *dawlah madaniyah* does not seem to remain entirely unheard.

¹²⁹ Ersel Aydinli, "A Paradigmatic Shift for the Turkish Generals and an End to the Coup Era in Turkey" (2009) 63 Middle East Journal, 581 et seqq.

Changes in Civil-Military Relationships after the Arab Spring

PHILIPPE DROZ-VINCENT

I. INTRODUCTION: CHANGE IN MOTION?

Once an area characterized by years of enduring authoritarian rule, the Arab world was shaken in 2011 by a sudden process of transition, namely a process of change from one type of regime (i.e., entrenched authoritarian rule)¹ to other types of potential regimes, with strong societal pressures toward democratization. It also witnessed counterrevolutionary trends, along with derailments of transitional processes into civil wars. Five years later, the end-results of that process are still inconclusive and, at least, the harvest in terms of democratic transition remains modest. This uncertainty is also well exemplified by the related changes in civil-military relations.

In this process of change, massive, unpolitical (not prodded by a specific and identified political trend), trans-class or trans-sectorial, and peaceful (unarmed at the beginning) social mobilizations without leadership (though organized), were pivotal to explaining change in the initial stages of the uprisings. The process of change, with a strong imitation effect, was influential across countries; the “snowballing effect” (to borrow the expression used by Samuel Huntington in 1991) or the new “Zeitgeist” (Juan Linz and Alfred Stepan in 1996) was crucial, and four Arab presidents for life were overthrown by street protests—a fifth president in

¹ The authoritarian “Zeitgeist” in the Middle East was based on a complex interplay of authoritarian regimes corseting political and economic dynamics, though in revamped ways (elections lacking “depth” in the Dahlian sense of conditions needed for elections to play their democratizing role; a kind of societal pluralism from below tolerated by the regime, etc.), a specific setting of regional relations between these entrenched regimes; and international alliances vindicating the prevalence of authoritarianism, openly or tacitly (in the name of the fight against Islamist insurgencies then “global terror” linked to al-Qā‘idah). This system no longer existed in 2012, though conservative monarchies in the Gulf have tried to preserve some part of this system among themselves.

Syria has an indeterminate fate in 2016 and, though severely weakened and with its military resources heavily strained, managed to recover some lost territory in 2013, then again in 2015–16 with a direct Iranian-Russian intervention. The rebuilding of new kinds of regimes, in the new vacuum created by the disappearance of authoritarian rulers in Tunisia, Egypt, Libya, and Yemen, has been differentiated in the various cases of Arab uprisings according to the weight of prevailing or surviving actors and their interplay with emerging or reinvigorated ones, but short of any wave of democratic transition in the Arab world comparable to the “third wave” of the 1980–1990s. Democracy remains elusive, except perhaps in the specific case of Tunisia, though the Arab world has entered a new phase of political development. Change will be long, protracted and costly in most countries. There will be counterrevolutionary tendencies across the region, with some actors playing on exhaustion and fear of instability among societies to install new authoritarian pacts among elites (including “remnants” of the old regimes) as in Egypt; there will be difficulties to rebuild states with acute risks of civil wars and a proliferation of failed states, as in Libya, Yemen, and presumably Syria; and this without speaking of the complex case of Bahrain. And, in almost all our cases, civil-military relations have been rebalanced on behalf of the military sector with the latter either left powerful or transformed yet crucial: the military bedrock has been reinforced in Egypt and new militarized actors (militias) have taken prominent roles in Libya, Yemen, or Syria.

As an institutional actor, the military was the ultimate coercive pillar of authoritarian regimes, and was often the most coherent actor in the vacuum created by transition. As such, it played a crucial role. The political engagement of the military has been a pivotal factor, to a much higher degree than anticipated. The new military role can be broken down into more palatable processes. First, the military had a crucial role in the fate of regimes, either refusing to enter into full-scale repression and then easing the end of authoritarian entrenched rule, or taking part in repression and thereafter being submitted to stressing pressures, and then fracturing. Second, the military had to adjust to new transitional settings, away from the old questioning about “the military under authoritarian rule”. Authoritarian rule, which had been able to subsume all political relations under a common principle of political exclusion, *de facto* came to an end and was replaced with more open-ended (yet messier) political games, hence forcing the military to take open political stances, a very new feature. Third, we witness the stirrings of the (difficult) redefinition of “civil-military relations” (a very new feature in the Arab world after years during which the military was said to be a pillar of the regime without much further clarification). But the tentative pursuit of a legalistic evolutionary process toward a separation of powers between the military and civilian domains has been elusive and all talks about control of the military in institutional and constitutional terms have remained baseless under the extreme intricacies of transitions. And the military has tried to immunize itself from scrutiny, to shape political outcomes in a context of heightened uncertainties, or even halt the transitional process, such as in Egypt after 2013. Furthermore, in some cases, the impossible rebuilding of the military (or what remained of it) and more generally of the security forces, along with the resilience of newly emerging armed actors (militias), have been crucial impediments to any form of civil-military relations and have even foiled the very possibility of political processes.

II. WHAT IS THE MILITARY IN THE MIDDLE EAST?: FROM CONSTITUTIONAL CONSIDERATIONS TO THE ROLE OF THE MILITARY IN AUTHORITARIAN SETTINGS

The military was a key institution of the state; yet constitutional provisions concerning national defense with their sheer vagueness did not offer a clear picture of the role the military played in Arab political systems before 2011. For instance, in the 1971 Egyptian Constitution (in effect before the 2011 revolution), the military was tasked

with “protecting the country, its territorial integrity and security” (Art. 180), a vague statement with counterparts all over the Arab world. That kind of legal analysis did not render justice to the whole spectrum of privileges, insider leverage, and entrenched roles that the military had in Arab authoritarian regimes; and most were not written in legal provisions, but were a product of the specific roles of the military in Arab authoritarian regimes.

The paradox is further enhanced if we bear in mind that the military was not the most visible part of entrenched authoritarian rule in the Middle East. Authoritarian regimes in the Middle East were not military regimes per se, though many of their leaders (*zaʿim, raʾīs*) often hailed from the military and used the military as a way to come to power (by coup d’états, or as designated heirs or vice presidents). The action of ministries of the Interior was the foremost and most visible arm of authoritarian states in their day-to-day “policing” of societies and in the control of public spaces, especially in the capitals. The Ministry of the Interior (and its security agencies, known in the Arab world under the generic term of *mukhābarāt*) was in charge of regime maintenance. It had oversight over a wide range of areas, not just those related to countering mobilizations, discontents, and insurrections but also a wide range of roles in governance aiming at fragmenting society (in political, economic, societal, and cultural spheres) and keeping it under a strict authoritarian grip. The military no longer had a pivotal role in state building (initiating new regimes after coups d’état) and in governing, quite differently from the 1950s and 1960s, when Egypt was dubbed, by an Egyptian sociologist and Marxist, “a military society,”² a qualification that would have applied to many other Arab polities at that time.

Authoritarian regimes in the Arab world were much more “security states” (*mukhābarāt states*) than military regimes, namely countries where the military structures (junta composed of those in high command positions) were the instances of decision-making. Military interventions occurred more often as exceptions than as general rules, but they were decisive when they occurred: In Egypt, after Sādāt’s assassination in 1981; in 1986 when the paramilitary Central Security Forces (CSF) rioted over low pay (the Egyptian military suppressed the rebellion); or in 1996–1997 at the peak of the offensive of armed Islamists against the Egyptian state (the military supported the police and the CSF that were the front-line forces against Islamist insurgents); in Syria between 1974 and 1982, the military was pivotal in helping the Ḥāfiẓ al-Assad regime overcome internal challengers led by the Muslim Brothers; in Jordan, riots in Karak in 1996 and Maʿān in 1998 were dealt with by heavy military deployments; in Saudi Arabia, the military was deployed on numerous occasions in the oil-rich Shīʿah eastern province to support the police and the paramilitary National Guard. The military was considered a powerful player in authoritarian regimes, even if this feature was not clearly specified beyond a vague image and some rare occurrences of direct interventions. Even in monarchies, said to be regimes with a different genetic makeup to republics, the military was also a vital constituency, especially in Jordan and Morocco; the Gulf is a specific case, where the military has been downsized and kept tiny, as a way to keep control and to prevent the risks of politicization of the officers’ corps and coups d’état in the 1950–1960s; yet even so, many princes from royal families or closely associated branches have had strong professional experience in the military.³ Hence, the

² Anouar Abdel Malek, *Egypt: Military Society* (Random House, New York 1968).

³ The flipside of this choice for Gulf States, in a pressing context of regional threats and tensions, is a strong reliance on a “American military umbrella” of sorts, with American military bases and prepositioned equipment serving as a life assurance for regimes.

role of the military must be specified beyond the vague characterization of the military as the ultimate coercive pillar of authoritarian regimes.

The military is a Weberian rational bureaucratic institution par excellence, hence it harbors a tendency toward secrecy and autonomy to protect itself from the supervision of external power centers; it enjoys the monopoly of heavy arms (ministries of Interior can be militarized, but in a lighter manner); and it displays a set of cultural norms that value service, self-sacrifice, and honor, and that constitute a symbolic status as the defender of the state, a form of solidarity and considerable favor in society. For instance, a culture of militarism has pervaded Egyptian society and has attached great value to the role of the military. The military is identified with the establishment of national strength and as a “factory producing men” (*maṣnaʿah rijālah*, as the Egyptian expression puts it). Yet, these defining features of the military should be contextualized with the varying degrees of engineering exerted by regimes in the military. The military has been transformed by authoritarian regimes ruling for decades, and, conversely, it has adapted itself to enduring authoritarian rule.

Authoritarian regimes have “tamed” the military—in the sense that the military is too important an institution to be left without strict control by the regime—and coups d’état have waned dramatically since the beginning of the 1970s in the Arab world, once a region famous for its recurring waves of coup d’états. Regimes have developed various coup-proofing and control devices within the military; they have watched after recruitments in the officers’ corps, and they have followed promotions closely, either favoring loyalists directly or recruiting en masse from what they considered to be their “natural”/historical social base: rural ‘Alawīs and Sunnīs in Syria, rural Sunnīs in Iraq under Ṣaddām Ḥusayn, Bedouins and rural Transjordanians in Jordan, Najdīs in Saudi Arabia, Northerners in Yemen, Sunnīs in Bahrain, those coming from Syrte and Bani Walid in Libya. The filter placed by the regime to the entrance in the officers’ corps was pivotal in producing a “tamed” military corps. Authoritarian rulers have been mindful of connecting themselves closely with the officers’ corps (Arab rulers have spent much time meeting with high officers and attending graduation ceremonies in military academies). Regimes have also created new heavily armed security forces or praetorian units counterbalancing the regular army (the National Guard in Saudi Arabia, the Republican Guard in Syria, Yemen and Iraq under Ṣaddām Ḥusayn, etc.), as a way to compartmentalize the security sector and to impede the possibility that any coup d’état might come from within the army. Military intelligence has also been expanded with numerous agencies watching each other. All these measures have been carefully devised to ensure that the military was kept in its barracks unless explicitly solicited by the executive to enter into repression. The Arab militaries in the 2010s are quite different from their homologues in the 1950s and 1960s, when promotions of officers were *loci* of politicization (and of coup d’états). They have been “tamed” by authoritarian rulers, whose governing “nervous system” has been the exclusive control of the state apparatus by the executive, namely by a few networks (called neo-*ʿaṣabīyah*, to borrow Ibn Khaldūn’s term) of family members, high bureaucrats, police cadres, party apparatchiks, political high elites, crony capitalists, media figures, well-known preachers, and high-ranking military officers linked to the president or the king (rather than representing the army as a corps).

These tendencies of renewed control display a full spectrum of diverse military institutions, between those kept tiny and marginalized (such as the military in Tunisia under Ben ‘Alī); those who were transformed into a ragtag of separate units with some units completely left abandoned to themselves without many munitions or materials and other units controlled by close relatives of the guide (Qadhafi) and better equipped (as in Libya); those armies whose officers’ corps have been stacked with ‘Alawī officers, either in the first position as commanders or as deputies and security officers (as in Syria); those tinkered with by the reunification of the regime’s (Northern) military with other (Southern) units

along with tribal and Islamist militia (in Yemen); those kept very modest in scale (despite regular American exhortations to build a regular potent army) and counterbalanced by a tribally recruited National Guard (in Saudi Arabia); to the huge Egyptian military kept at distance from political power though cajoled by the Ḥusnī Mubārak regime. Such transformative moves carried out by the regimes in the military indicate a powerful, yet subdued (“tamed”) and sometimes weakened military. Several decades of authoritarian rule have left a deep impact on the military. In the Arab world in general (with the exception of Tunisia, Lebanon, and Arab Gulf countries), the military was a huge bureaucratic organization, ensconced in a strong corporatist closure (and often its “dark side”, namely corruption) that gave it some degree of military autonomy (for its training, its corporate features, and its definition as a profession, etc.), under the close scrutiny of authoritarian regimes which were always very prickly/sensitive about what was going on inside the military.

Conversely, the military has adapted itself to authoritarianism. In “normal authoritarian times” (as differentiated from periods of heightened social mobilizations as in 2011), military quietism was de facto exchanged for privileges and huge favoritism toward military interests. The Egyptian military was an expansive actor with access to resources, either military resources (through its own budget, annual US military aid, or resources from arms sales, etc.) or through its economic encroachment in the Egyptian civilian economy (its economic wing).⁴ As exemplified by Yezīd Şāyigh’s description,⁵ the “officers’ republic in Egypt” in 2012 was of a specific kind, with officers exchanging loyalty and acceptance of relatively poor salaries (when compared with the booming private sector) during years of service for the prospect of appointment to lucrative positions after retirement in the civilian (either public or private) sector at all levels, not just very high positions. The Syrian military was a huge bureaucratic organization, whose networks of corruption and patrimonialism were essential defining features, more so than the preparation for war, and ranging from high generals involved in economic ventures with civilians, to low-level officers finding some means to survive at a time of dwindling resources (even for the Syrian military). Quite similarly, Yemen ranked among the ten-highest countries in the world in terms of percentage of GDP spent on the military (although figures are a point of great contention and secrecy): The military was a fundamental source of employment, and the number of personnel on the payroll was not necessarily the number of real soldiers—this was the problem of “ghost soldiers” whose salaries were pocketed by high commanders. Despite the military’s extraordinary budget, they were not able to put down the al-Ḥūthī rebellion in the Northern governorate of Şa‘adah in 2004. Most soldiers came from de-tribalized or impoverished groups, whereas officers hailed from a Northern tribal elite; the latter controlled webs of patronage, especially through the Military Economic Corporation placed under the supervision of the Ministry of Supply (but which acted largely autonomous)—the military was allotted part of the quota import of the state apparatus and was heavily involved in land deals.⁶

The military in general was by its very size a stakeholder in the authoritarian status quo or equilibrium. But, quite differently from the image of a powerful actor, it remained a constrained institution: The military as a stakeholder was more a consequence of its

⁴ Due to lack of space to deal with this point in this piece, please refer to my “From Political to Economic Actors” in Oliver Schlumberger (dir), *Debating Arab Authoritarianism* (Stanford University Press, Stanford 2007).

⁵ Yezid Sayigh, *Above the State: The Officers’ Republic in Egypt* (Carnegie Endowment for International Peace, The Carnegie Papers, Washington, D.C., August 2012).

⁶ *Yemen’s Corruption Assessment*, Washington, USAID, September 25, 2006.

“negative posture” as a powerful coercive pillar in the background—the regime had no other reliable sources of support, with the decay of its legitimacy, with the weakening of its own institutions through networks of power affiliated with the supreme ruler and his family, and with the withering away of its social bases of support—rather than a consequence of its “positive assertion” as a day-to-day pillar of the authoritarian regime, a role fulfilled by the police apparatus. The military’s potentially assertive role as a national institution or a “state builder” was delimited by the regime’s pervading discourse on national security, for instance, the “securitization” of many issues in Egypt or the preparation for war and the fight against alleged “foreign/regional plots” in Syria. The military was “above the state” in its capacity to circumvent numerous state regulations, to enter into some form of direct dialogue with the (inner core of the) regime—on crucial issues for the military, for instance, in Egypt in the 1990–2000s: the US-Egyptian military relations, the fate of the military interests at a time of privatization, the prospects for succession, etc.—and to defend its corporatist interests or to cushion itself from the negative effects of structural economic adjustment in most cases (though it suffered from relative deprivation due to a severe shortage of resources). But at the same time, the military was located “below the (threshold of the) regime”, because of its submission to it. The big difference in the Arab world was between, on the one hand, some cases where the military was able to retain some degree of “professional” autonomy institutionalized in the regime (notwithstanding the important role of cronyism and favoritism in high posts)⁷ and some sort of legitimacy for itself (under the guidance of its high officers’ corps, at least in terms of values and norms summed up by expressions such as duty, call, honor, and loyalty to their fatherland),⁸ and, on the other hand, those armies that lacked coherence or were kept weak and disorganized (a choice of the regime). In the former cases (and the paradigmatic case is Egypt), just by being in the background and part of some behind-the-doors deals, the military retained a crucial importance: This feature remained unseen as the authoritarian regime was firmly in power—and, symptomatically, a few years year ago, students of the military among academics in the Middle East were very few—but it was quickly revealed in times of crisis. In the later cases, the military was a mere tool of the regime with informal chains of command or shadow grids of influence and its cohesiveness was weakened.

III. TIME OF CHANGE IN 2011: MASS MOBILIZATIONS AS AN ESSENTIAL “STRESS TEST” FOR ARMIES

In the Arab world in 2011, the remarkable and crucial factor is mass social mobilizations in public spaces against authoritarian rule—hence the use of the label “revolution” (*thawrah*) by demonstrators. Such mobilizations are not just “moments of madness,”⁹ a time of extreme outrage and collective hopes that take large parts of society to the streets and bring them to a moral boiling point. They are not just mass mobilizations with large demonstrations in the streets (especially in cities), whose potential of contention may prove

⁷ Eva Bellin, “The Robustness of Authoritarianism in the Middle East” (2004) 2 *Comparative Politics* 36, 139–157.

⁸ For instance, in Egypt the military has navigated between the heavy constraints placed on its ability to assert itself by the regime, displaying some sense of responsibility to the state and projecting an image of an institution at the service of the nation (but most of the time, it has remained closed regarding its own privileges), away from day-to-day policing of Egyptian society by the regime.

⁹ Aristide Zolberg, “Moments of Madness” (1972) 2 *Politics and Society* 183–207.

uncontrollable (the *via revolucionaria* to transitions).¹⁰ However messy and insurgent, they are indicative of a “return of societies to the fore” or “societies put in motion”, namely, social actors in great numbers who are forcefully taking back public spaces away from authoritarian regimes and keeping them in their own hands, from villages to cities, and from cities to the capital (the famous Tahrir Square symbol resonating throughout the Arab world), then from country to country (the imitation effect across the Arab world). This is indicative of a new sense among citizens, especially among young generations—as well as with the current “youth bubble” of the 1980s–1990s coming to adult age—that they have to take the fate of their lives back into their own hands: There is a strong sense among social actors that they face huge problems (in the first place in their own life, just to find a job, to create a family, to live an independent life, etc.), but that they can create an impulse to solve them (the generic slogan “the people want . . .”, *al-sha'b yurid*, addressed to the regime); that there is a new window of opportunity and, as a corollary, a sense that if they miss it, they will be the only ones to be blamed and they will suffer their whole life long; there are demands for rights, for liberty, but also demands for responsibilities in the Arab protest movements, especially among the young generations. Protests have then coalesced into mass mobilizations that jettisoned the “appearances” of authoritarian rule in public spaces and their day-to-day management by a mixture of coercion and self-constraints/fear that had forced societies “to act as if [. . .]” all this was legitimate. That explains the resilience of protests in the face of the regimes’ violent reactions relying on security forces’ active repression, arrests, the heavy deployment of paramilitary anti-riot forces, live ammunition shots, snipers, arbitrary arrests and beatings, etc., in order to reinstate “the wall of fear” in Arab societies in ebullition. Social actors, when awakened, do matter, even if no real case in the Arab world in 2011 completely fits the ideal of a purely societal-led transition.

Such mass social mobilizations submit the military institutions, called on by the regime to exert heavy repression (heavier than that of the police and paramilitary forces), to a strong “stress test” (to borrow this expression from central bankers’ jargon in Europe in the 2010s). Three elements are pivotal.

First, the officers’ corps, though a close and secretive part of the authoritarian regime, is not cut from societal trends. There was no open dissidence in the Egyptian military under Ḥusni Mubārak, though some rumblings were heard in mid-2010 in circles usually close to the regime (with letters circulating within the Egyptian elite and in particular in military closed circles against the prospects of dynastic succession in favor of Jamāl Mubārak—but this should not be equated at all with open dissidence). Furthermore, large Arab armies are conscript armies that will more easily identify with the protesters’ demands, if the protest movement becomes widespread.¹¹ In Syria in the 2000s, thousands of regular soldiers and conscripts have seen extensive corruption and abuse of power by high-ranking officers linked to the Assad regime.

Second, the very activation of societal actors and the new tools they use, namely new information and communication technologies, change the setting entirely: New

¹⁰ Guillermo O’Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Johns Hopkins University Press, Baltimore 1986); for a critique of the negligence of mass mobilizations, see Mark R. Thompson, *Democratic Revolutions* (Routledge, London 2004).

¹¹ The Tunisian army is a conscript army, the smallest in North Africa with 35,000 soldiers (and only one-third are professionals); the Egyptian army is a conscript army, but its membership is highly selective (those mainly rural conscripts who do not satisfy recruitment requirements do their military service in the paramilitary Central Security Forces of the Ministry of Interior); conscription was abolished in 2001 in Yemen, then re-established in 2007 (to combat unemployment).

technologies are not just conveying information (as most other technological revolutions in information have done before, from printing to the Internet), but their new technical possibilities (tweet feeds, cameras on cell phones, live blogging, etc.) are helping convey in real time new content, for instance feelings, emotions, passions, images, etc. Images of violence against demonstrators have been pivotal in galvanizing energies among demonstrators: Civilian victims display wounds recalling a war situation, not that of usual disturbances (even violent ones) in public spaces; and they are seen by a large public with their dissemination through the Internet.

Third, mass mobilizations, with masses convened in public spaces, are a very new entity for potential military repression. Regimes facing mass mobilizations have preferably deployed anti-riot paramilitary units, then praetorian units, keeping the regular military in the background; but, with enduring movements in public spaces, they have called upon the military for harsh repression. Using lethal force against massive demonstrations by unarmed and peaceful civilians—not just silencing media outlets and cordoning off some areas where repression is exerted by anti-riot police, such as Qafṣah and Rudayyif in Tunisia or Maḥallah al-Kubrā in Egypt, both in 2008¹²—is problematic because repression will amount to a bloodbath. Repression will then undermine the image of the military and, more important, threaten its internal cohesion and discipline;¹³ young officers on the ground and the rank and file are called to open fire on their social equals with whom they may identify—as exemplified by the famous slogan *al-jaysh wa al-sha'b yad waḥidah*, “the army and the people are one hand”, a call by demonstrators addressed to the army to side with protesters against the hated police, the paramilitary forces, and, more generally, the regime.

As a result of the extreme polarization between the regime unleashing violence against demonstrators and societal mobilizations keeping resilient in public spaces, the military can in some cases (Tunisia, Egypt) distance itself from the incumbent regime and ease its end: The degree of cohesion of the military that was a dependent variable (dependent on the regime's management of the military, see Part II, above) can then become an independent variable, with the military (and its high leadership) trying to preserve its own organizational coherence by dissociating itself from the fate of the regime.¹⁴

In Tunisia in January 2011, the military was called upon by the regime to confront the rapidly swelling protests: The military was deployed to secure public buildings (a mission defined by its own internal regulations, agreed upon with the regime in 2002),¹⁵ but it became embroiled in unmanageable settings (with massive demonstrations facing the live ammunition shots from the police, snipers, and paramilitary militia linked to the Ministry of Interior); its conscript force, mainly drawn from economically depressed areas, somehow identified with many of the demands voiced by protesters (and demonstrators were taking shelter from police shots behind military armed vehicles). The chief of staff, General Rashīd 'Ammār, seemed to have forbidden his men from firing at demonstrators and issued a warning to the police that the military would retaliate if the police continued massive shooting at protesters—Ben 'Ali

¹² The Ministry of Interior has managed deployments of anti-riot police by carefully sending policemen to regions very different from the ones they come from.

¹³ Eva Bellin, “Reconsidering the Robustness of Authoritarianism in the Middle East” (2012) 2 *Comparative Politics* 44, 127–149.

¹⁴ There are numerous accounts of the end of the Ben 'Ali or Mubārak regimes by insiders. They should be read with caution, but they paint a general picture of a military's high leadership trying to extricate itself from repression in Tunisia and Egypt.

¹⁵ Personal interviews with active officers, Tunis, October 2011.

reportedly tried to sack him for insubordination. When videos circulating in the Internet on January 12 and 13 showed the military not only refusing to shoot at the crowds but also positioning itself between the police and the crowds,¹⁶ the risk of protesting declined precipitously, and this sense of impunity led to massive demonstrations in Tunis city center (drawn not just from popular peripheral neighborhoods/*banlieues* or among lawyers and artists, but from large strata of the Tunisian society); furthermore, after January 14, the military played a crucial role (along with local popular committees, *lijān sha'biyah*) in providing security to neighborhoods after the disappearance of the police, as militias from the Ben 'Ali regime were terrorizing some quarters. With the regime in complete disarray (because of its enduring inability to retake control of public spaces), the military is said to have played a crucial role in the complex rivalries inside the inner core of the regime (the presidential guard, the high apparatchiks of the Ben 'Ali regime) and in ultimately pushing Ben 'Ali to leave the country. While exercising its influence, the military's high command also had in mind, as a background to the military's decision not to shoot at massive protests, warnings from the US embassy and from the State Department, which officially cautioned Ben 'Ali against an excessive use of force, something interpreted as a kind of American green/orange light by the military's hierarchy.¹⁷

By the same token, in January 2011, the Egyptian armed forces were deployed in different parts of the country (and especially in central Cairo on January 28, a move seemingly executed under the command of President Mubārak) as massive demonstrations overwhelmed the repressive force and potential of containment of the security and paramilitary forces. The rank and file and young officers on the ground were fraternizing with demonstrators, as exemplified by numerous videos taken with cell phones and posted on the Internet;¹⁸ the military leadership seemed to swing more in Mubārak's favor, as in early February the president offered some concessions (the army called upon protesters to go home and resume normal life). But the setting was unbearable as demonstrations endured in public spaces, with the army playing an ambiguous role on both sides of the barricades. A turning point came on January 31, 2011, when the military explicitly stated that it would not fire on protesters whose demands it acknowledged as "legitimate". The military had no plan at the time, but leaned toward the incumbent regime as long as it could avoid being driven into massive repression: The military did not intervene on February 20, 2011, when pro-Mubārak thugs (*baltajiyyah*) killed several demonstrators.¹⁹ On February 20, 2011, as the crisis worsened in the streets, the Supreme Council of the Armed Forces (SCAF, a body of the twenty-four most senior officers, which could theoretically not meet without the president) issued "Communiqué No.1"—since the 1950s in the Arab world, the issuing of such news was the first sign of a coup d'état. The communiqué did not refer to the president or to the newly appointed vice president, mentioning instead "the honorable people who rejected corruption and called for reform" (but also stressing "the need to restore normal public life"). The SCAF then took power and ousted Mubārak—who resigned and handed power to the SCAF, one day after he publicly vowed to serve his current term to the end.²⁰

¹⁶ Personal interviews, journalists and activists, Tunis, October 2011.

¹⁷ The United States (along with France) has close relations with the Tunisian military elites for the training of officers and as an important provider of arms: Due to budget paucity in Tunisia (an exception in the Arab world!), the Tunisian military has relied on surplus equipment donated by the United States.

¹⁸ Personal interviews with activists and human rights defenders, Brussels, March 2012, and Paris, April 2013.

¹⁹ Personal interviews with active officers, Cairo, February 2012.

²⁰ In Egypt (as in Tunisia), the behind-the-scene contacts with American envoys (either military or civilian) and the American public declarations from the Obama administration (though cautious and accompanying events much more than shaping them) have also played a crucial role in the decision by the SCAF to act in its own way.

In such exceptional settings, the military was submitted to a heavy “stress test”, whatever its role as a stakeholder in the former regime (in Egypt), and became a crucial arbiter, as exemplified in Tunisia and Egypt.

Even in cases where the military carried out repression under the guidance of the regime, the “stress test” of mass social mobilizations was so intense that it imploded (Libya), it fractured (Yemen), or it was enfeebled by a slow process of defections (Syria).

The Libyan army displayed no real coherence—as was the case in the whole state apparatus, which was counterbalanced, in al-Qadhdhāfi’s view, by “revolutionary committees” ruling from below. Eventually, it imploded: In February 2011, parts of the Libyan army defected to the mobilized opposition, especially in Benghazi where the forces led by the defecting Minister of Interior, General ‘Abd al-Fatāḥ Yūnes, ousted loyalists (defections involved entire battalions); defecting soldiers were supplemented by young demonstrators taking arms to defend their cities and villages;²¹ conversely, the most elite units within the army (units that constitute a kind of parallel army, such as the 32nd Brigade led by al-Qadhdhāfi’s son Khāmīs, or units hailed from al-Qadhdhāfi’s hometown of Syrte), members of the Revolutionary Committees, the People’s Militia (an auxiliary force to the regular army), along with mercenaries recruited from Sub-Saharan African countries, were at the forefront in fighting the opposition and trying to retake lost towns. The end result was a fierce eight-month-long civil war, with the military balance shifting from one side to another. It ended when the rebels attacked the capital, with NATO’s intervention decisively weighting on the rebels’ side, thanks to aerial bombings and the targeting of crucial military infrastructure.

In Yemen, the repression by loyalist units was very harsh from the beginning, and it quickly provoked violent convulsions inside the military. In early March 2011, after the army violently stormed Ṣana‘ā’s university campus where demonstrators had been camping and after soldiers opened fire on a massive demonstration, the armed forces fractured: General ‘Alī Moḥsen Al-Aḥmar, the commander of the 1st Armored Division and powerful head of the Yemeni army in the North-West—a pillar of the Ṣāliḥ’s regime, from Ṣāliḥ’s home village, Bayt Al-Aḥmar, but with no familial relationship to the preeminent Al-Aḥmar family—and other Northern commanders announced that they had joined the revolution and deployed tanks in Ṣana‘ā to protect demonstrators against loyalist forces. The end result were fights which erupted after May 2011, especially in Ṣana‘ā and Ta‘izz, between troops controlled by ‘Alī Moḥsen and units loyal to President Ṣāliḥ.

In Syria in March 2011, the Assad regime first relied on a few elite praetorian units (the 4th Division headed by Maher, the brother of the president, the Republican Guard, etc.) highly trained and equipped and better staffed with carefully selected ‘Alawī officers (and whose rank and file is mainly ‘Alawī) to repress demonstrators. Yet, with continuous mobilizations in public spaces and with their spread to other parts of Syria, especially big cities (not just peripheral areas where the uprising originated), the regular army has been increasingly involved in direct repression (and no longer support operations), and it has become ever more overstretched by its numerous deployments and “stressed” by months of repressing opponents, fighting against an increasingly capable insurgency as well as by the widespread display of videos posted on the Internet showing the savagery of the repression. Hence, the potential for defection (*inshiqāq*) has been on the rise, with increasing defections giving birth to the Free Syrian Army after the summer of 2011.

In contrast to this, in Bahrain, repression by the Bahraini Defense Forces (along with additional troops from Saudi Arabia and the United Arab Emirates in March 2011) was

²¹ Interviews with former members of the Libyan National Transitional Council, Brussels, March 2012.

violent, yet it was carefully carried out to avoid the effect of the “stress test” described above. The officers’ corps was composed of members of the Al-Khalifah family and of the main Sunni tribes. The Al-Khalifah regime thoroughly re-engineered the composition of the army as well as the police and the riot police, even in the rank and file, after the 1994–1999 uprising (*intifāḍah*) with the systematic withdrawal of Shi‘as and their subsequent replacement by Sunni Bahrainis and the recruitment of foreign mercenaries such as Pakistanis, Jordanians, and Syrians, who were granted Bahraini citizenship to ensure their loyalty.²² Also, the Bahrain Defense Forces’ intervention in March 2011 lasted only for a short period of time, an essential measure to avoid submitting the military to the “stress test” of massive and enduring repression. After this short period of military intervention, the task of repression was “given back” to the police, the riot police, and the political police, and it resulted in street battles (which can be described as guerrilla battles between police and protesters in small villages around the capital), arbitrary arrests, and torture, etc. The essential point is that these specific ways of carrying out repression are less visible than in the case of troops deployed with tanks in the streets of Manāmah for long periods of time—and such (in-)visibility is an central factor at a time of massive societal awareness fueled by Internet communication. Furthermore, military intervention in March 2011 was carried out in the framework of a state of emergency which was proclaimed for a short time and then lifted in order not to give the impression of a permanent abuse of civil liberties through the use of emergency measures over decades, as in Egypt (since 1981 until 2012) or Syria (since 1963 until 2011). Finally, military intervention was framed as repression of Shi‘ah plots against the Bahraini regime devised in Iran—indeed the majority of demonstrators were Bahraini Shi‘ahs for demographic reasons, Bahrain being a country where around 70% of the population is Shi‘ah and which is ruled by a Sunni dynasty—as a way to deflect internal and external attention²³ away from revolt against authoritarian rule of geopolitics in the Gulf.

IV. TRANSITIONAL SETTINGS AND THE MILITARY: TUNISIA, EGYPT, AND BEYOND

In some cases, social mobilizations and the arbitration on crucial decisions by the army (in favor of demonstrators) open up an era of transition, namely, the installation of a new regime. The military, after it has eased a transition (by calling an end to the regime, or by fracturing and then lessening the regime’s coercive capacity), is thrown into the political process, a setting for which it is not well-prepared. The military, whose role is crucial, along with the essential factor of massive social mobilizations, ends up not just with a role as an arbiter (to decide the end of the regime) but also with substantial power in its hands (after the fall of the regime). The problem for the military is not just that of organizational adaptation to changes.²⁴ The revolutions of 2011 are a sea change in the foundations of political systems in which the military was embedded, due to strong societal awakening and the collapse of institutionalized arrangements (those of authoritarian regimes) behind which the military was protecting itself in one sense or another. In all cases, the military is forced into political roles which it is reluctant to fulfill. As observed in the field of military sociology

²² Laurence Louer, “Sectarianism and Coup-Proofing Strategies in Bahrain” (2013) 2 *Journal of Strategic Studies* 36, 245–260.

²³ Here again the external factor was important: The headquarters of the US Fifth Fleet is located in Bahrain.

²⁴ Kimberley Marten Zisk, *Engaging the Enemy, Organization Theory and Soviet Military Innovation, 1955–1991* (Princeton University Press, Princeton 1993).

several decades ago in the middle of the era of triumphant coups d'état in the so-called Third World, militaries display many weaknesses when they rule in a direct way (by military junta): Their political inability to rule, their lack of legitimacy, and, worst of all, the risks of fragmentation within their officers' corps and also rifts between military units when the military is too directly involved in political games.²⁵

Transitions are periods of uncertainty, where the behavior of political actors is undetermined by structural constraints, reliable institutions, or entrenched practices. They are periods of agency, where political actors make choices in a hurry, with imperfect information and without much knowledge of the long-term consequences.²⁶ In the study of past transitions/ regime transformations (the so-called "third wave" of democratic transitions), "transitologists" have stressed the greater frequency of "pacted" or "imposed transitions", referring to the disproportionate role played by a small group of leaders in the decision-making phase. Management came from above, by a faction in the incumbent authoritarian regime or through negotiations between soft-liners within the regime and moderates within the opposition, to forge new institutional arrangements (elections, roundtables, pacts, etc.). In past transitions, mass mobilizations (from below) or the surge of "civil society" tended to occur after such a pacted transition had begun or in parallel to it: Social mobilizations kind of triggered change at some crucial junctures (often playing as "cork events"), and thereafter receded or were taken over by more casual political processes, with political elites making their bidding with elections, party building and institution (re-)building. The Arab world after 2011 displayed a much messier picture which showed a revolutionary "mode of transition", namely, mass mobilizations from below being resisted violently by the ancient regime, then mass protests remaining resilient and defiant with the disarray of all institutional sectors. Eventually, the social movements defeated the regime in some cases, with mobilizations keeping apace in all parts of society. The military as an institution has tried to navigate through this messy setting (when it managed to retain its coherence) and, in the first place, has found itself endowed with substantial power.

A. The Tunisian Case—The Military as a Safeguard of the Transition Process

The Tunisian case may be regarded as an exception—though the process of transition was also shaken by political assassinations of two opposition figures, very new features in Tunisia. The tiny Tunisian military found itself with considerable power in its hands after the collapse of the regime (and the military has emerged as the great hero and as "guarantor" of the Tunisian revolution); yet, it has stuck to its tradition of strict legalism and apoliticism, by relying on (and reverting the management of the transition to) the Tunisian tradition of bureaucrats, party politics, and civil society activism (jurists, journalists, university teachers, etc.) with the "Instance supérieure pour la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique".²⁷ An important milestone was the

²⁵ Samuel Finer, *The Man on the Horseback* (Pall Mall, London 1962); Robin Luckham, *The Nigerian Military* (Cambridge University Press, Cambridge 1971). The weaknesses of the military are also apparent in the patterns of intervention of the Turkish military, from open coup d'état to more indirect (though heavy) influence behind closed doors of the (civilian) political system.

²⁶ See the pioneering work by Dankwart Rustow, "Transitions to Democracy" (1970) 3 *Comparative Politics* 2, 337–363, and the huge "transitologist" literature, among others Terry Karl and Philippe Schmitter, "What Democracy Is . . . and Is Not" (1991) 3 *Journal of Democracy* 2, 75–88.

²⁷ "The High Commission for the Realization of Revolution Objectives, Political Reforms and Democratic Transition," gathering a labor syndicate (UGIT), the syndicate of judges, the National Lawyers'

rebirth of organized political life taking precedence over street politics through the landmark elections of October 23, 2011, which were conducted with a crucial logistic and organizational role for the Tunisian military.

The military, though in a real state of anxiety in a new transitional setting—with officers asking questions, often indirectly, and former officers acting as unofficial spokesmen of the military on questions of how a new democratic regime will control the military²⁸—has refrained from perusing any political objectives and has kept a strong apolitical role within the strict framework of the Tunisian Constitution. The explanation lies also in the fact that it is a small military. Nonetheless, the armed forces have become much more visible in day-to-day life in Tunisia. There were a growing number of provincial governors coming from the military in the new post-Ben ‘Alī regime, and a new military grip on the Ministry of Interior existed for some time. The military has also been called upon to secure borders with neighboring Libya, where a civil war was raging until al-Qadhdhāfi’s fall, and where instability, insecurity, and the stirrings of a renewed civil war have since prevailed. However, this does not necessarily foreshadow a political role for the tiny and legalist Tunisian military in post-Ben ‘Alī Tunisia.

B. The Egyptian Case—The Military Elephant in the Porcelain Shop of Egyptian Politics

In contrast to the Tunisian case, the problem is much more intricate in cases of huge military corps that are stakeholders in the structures of the state—first of all because of their size and their historical roles (not to speak of their sense of duty, their feeling of being the guardian of the state, and their appetite for power)—if the military maintains the essential caveat of coherence during the transition. The military is not particularly geared toward the task of regime installation/transition when it treads beyond the role of strict facilitator of transition toward the role of a ruler, as exemplified in Egypt from February 2011 to August 2012. Power was exerted by army personnel who had not played a role in policy-making under Mubārak, the generals in the SCAF. The Egyptian military had no experience in politics except for its “adaptation” to authoritarian rule over the years (see Part II, above).

On the one hand, transitions and the installation of a new regime are situations of rapid and unpredictable change, high risk, shifting interests, and indeterminate strategic reactions. The SCAF wanted a return of the country to normal life and to stability and was perhaps slightly intoxicated by the immense popularity the Egyptian military enjoyed during the revolution.²⁹ The SCAF first announced on February 28, 2011, that parliamentary elections would be held in June, followed by a presidential election later in the summer of 2011. The SCAF then hammered out the March 19, 2011, referendum to partially and rapidly modify the (authoritarian) 1971 Constitution in order to get an interim legal framework before the drafting of a new constitution: The SCAF had suspended the 1971 Constitution, as everybody in Egypt wanted change; but the SCAF had to allay fears that it was settling in for the long haul.³⁰ The SCAF then decided to change the rules by putting in place a “Provisional

Association, the Tunisian League for Human Rights, the Islamist movement al-Nahḍah (for some time), the Communist Workers’ Party of Tunisia, etc., was created in February 2011 by presidential decree to channel the transition and lead the process of legal and institutional reforms to ensure free, fair, transparent, and pluralistic elections; it ended its work with the October 2011 elections.

²⁸ Personal interviews with retired military high officers, Tunis, November 2011.

²⁹ Personal interviews, Cairo, February 2012, and Brussels, March 2013.

³⁰ The new amended constitution, adopted with the tacit help of the Muslim Brothers and former National Democratic Party (the dominant presidential party in the Mubārak era) stalwarts, stipulated that an

Constitutional Declaration” (on March 30, 2011) that included the referendum-approved amendments plus fifty-five other articles never put to a vote—some highlighted civil rights and liberties, others such as Article 56 allowed the SCAF overwhelming executive and legislative powers and protected it as a legitimate and constitutional ruler. In fact, the Constitutional Declaration contained no clear strategy, and the SCAF began to stretch the procedure. It circulated news about delaying parliamentary elections and attempted several course corrections; the SCAF resisted schedule for the presidential elections for some time (favoring an approach of putting them off until after the drafting of a constitution was completed); in the fierce debate around the sequencing of elections and constitution-writing at the beginning of November 2011, the SCAF circulated so-called “supra-constitutional principles” (also called al-Salmī Document after the name of a Deputy Prime Minister) to guide the constitution-writing process (with provisions to cordon off the military from civilian oversight and a blueprint for the composition of the constituent assembly charged with drafting the constitution); it provoked resentment from all ends of the political spectrum, from liberals and leftists to the Muslim Brothers and other Islamists. Furthermore, the SCAF’s use of force against demonstrators provoked massive demonstrations in mid-November 2011, making the SCAF backtrack from the “supra-constitutional principles” and move the presidential elections forward to June 2012. This was followed by the circulation of some further contradictory SCAF declarations. Lingering confusion over the timetable plagued the Egyptian transition as managed by the SCAF.

On the other hand, in transitions, new actors begin to settle into the new political field, with parties beginning to assemble to capture the votes of citizens and influence the formation of governments. The SCAF allied itself with the Muslim Brothers for some time (the Muslim Brothers were seen by the military’s leadership as the only credible political force coming out of the transitional process), then it regarded them as a mounting challenger (and played the liberals against them); it tried to conduct dialogues with numerous other political forces. But it displayed a very paternalistic and hierarchical way of handling things (through its appearance in the media and its Facebook page *al-Qūwāt al-Musallahāh*). It then started to view civilian political leaders as being too divided and crippled by their divisions to become reliable allies, and it spent a considerable amount of time in September–October 2011 talking directly to potential presidential candidates. The end result was an enduring inability to move ahead with civilian actors (notwithstanding their high fragmentation) to discuss the way forward on a transitional path, in contrast to the Tunisian situation where an institutional mechanism was established which all actors had invested in (the “Instance supérieure pour la réalisation des objectifs de la révolution . . .”): in Egypt, the path of transition forced itself on the military amidst large social mobilizations; not to speak of the inabilities of the two provisional governments (headed by E. Sharaf, then K. Janzūrī) to effectively rule and take crucial decisions for Egypt in a state of socio-economic crisis due to the heavy military tutelage on them. The SCAF was never able to manage its relations with newly emergent civilian political forces. Faced with increasing difficulties, the SCAF resorted to violence, from the violent clearing of Tahrir Square in April 2011, to the repression against bloggers, to the October 9 Maspero massacre of Copts, to the raids against nongovernmental organizations in December 2011, and up to the clashes in front of the Ministry of Defense in April 2012 (not to speak of the growing number of civilians tried

elected parliament (the election of which was due to begin around September) would select a constitutional assembly to craft a new constitution. Other influential actors (especially the liberals) argued that a new constitution should come before parliamentary elections—with the Muslim Brothers arguing that the protesters’ appeal was at odds with the will of the voters expressed during the March 2011 referendum.

before military tribunals for “insulting” the military). At the same time, the SCAF tried to ingratiate itself by offering apologies and always backed down when faced with massive mobilizations. It also offered certain concessions, for instance, by putting former President Mubārak and his entourage on trial, a very symbolic move in Egypt.

As a result, the military (the SCAF) has exhausted itself in trying to steer the transitional process in Egypt: The SCAF has repeatedly claimed in media and in social networks (its Facebook page) that it will not keep power for a long period; yet it has been unable (or perhaps unwilling with its old leadership) to take the appropriate steps to extricate itself from power.³¹ As a consequence it found itself on the verge of losing its huge legitimacy in Egyptian society, hence creating discomfort or even some signs of discontent within the officers’ corps.³² The military was in a kind of prisoner’s dilemma, whose only way out came when newly elected President Mursī surprisingly moved against the SCAF: On August 12, 2012, after a terrorist attack in the Sinā’i, President Mursī repealed the SCAF’s supra-constitutional declaration (hence returning the SCAF’s powers, legislative as well as executive, to him until a new constitution would be ratified) and removed the top leadership of the SCAF, first of all Minister of Defense Marshall Ṭaṇṭāwī and Chief of Staff General ‘Anān.³³ This often misunderstood situation explains an essential paradox: The military in Egypt was often presented as the ruler in Egypt since 1952, and this was exemplified, according to the proponents of this view, by its essential role in forcing the end of the Mubārak regime followed by its appearance of the ruler of Egypt under the SCAF; but the ease with which President Mursī managed to force the SCAF out of power by his decrees on August 12, 2012, confirms the military’s exhaustion and the military leadership’s broad-mindedness—not among those in the highest positions like Marshall Ṭaṇṭāwī or General ‘Anān, but rather among those younger members around them, for instance, the newly-appointed Minister of Defense General al-Sīsī—to enter in a tacit deal with the newly elected President Mursī in order to extricate themselves from power; and, conversely, President Mursī believed these younger officers (some of whom are religious) posed less a threat than the old generals who had served under Mubārak.

C. The Yemeni Case—Incoherent Military Structures, Fragmentation, and Instability

Paradoxically, the presence of a strong military keeping some organizational coherence during transition is a liability to the installation of a new regime, as exemplified by Egypt, where it played a role as a powerful stakeholder from February 2011 to August 2012. Conversely, the complete absence of a coherent military institution after transition has begun is also a dangerous liability.

In Yemen, President Ṣāliḥ reluctantly signed the transition plan on November 23, 2011, for fear of international sanctions and after critical concessions had yielded him an honorable exit. Phase one ended with early presidential elections on February 21, 2012, in an election with only one candidate, the vice president, yet a figure without much power in the Ṣāliḥ regime, ‘Abd Rabbū Mansūr Ḥādī. Since then, the reform of the security sector has

³¹ Other sources even put the hypothesis the other way and state that the SCAF’s officers went to Mursī to offer such a deal. Personal interviews with civilian lawyers and university teachers close to the military, Paris, February 2012.

³² Jack Shenker, “Egyptian Army Officer’s Diary of Life in a Revolution,” *The Guardian*, December 28, 2011.

³³ In Ṭaṇṭāwī’s place, Mursī promoted General Sīsī, the SCAF’s youngest member, who ousted him on July 3, 2013.

been the most crucial factor weighing on the Yemeni transition. The situation bears strong resemblance to peace-building operations having to deal with warlords or “spoilers” (those who can undermine a pact or a peace agreement) after civil wars.³⁴

The military under Ṣāliḥ suffered from pervasive fragmentation due to the fact that after 1999, power was concentrated amongst relatives (sons and nephews) of President Ṣāliḥ and placed in his tribe’s (Sanḥān) hand. Moreover, starting from 1993, the military faced the enrolment of Islamist militants and tribal militias (especially those controlled by the influential tribal Al-Aḥmar family) to fight against the Southern uprising and then Northern (Ḥūthi) rebels. The Yemeni military had no real coherence, at least none resulting from its being part of a strong hierarchical military apparatus, because it was made up of high officers whose loyalty and links to the president were rewarded by appointments to key units. The military was also counterbalanced by the establishment of heavily armed paramilitary units under the Ministry of Interior, such as the Counter-Terrorism Unit (attached to the Central Security Forces, headed by the president’s nephew Yahyā Ṣāliḥ and funded by the United States after 2001) and by parallel forces established by the various security agencies.

With the end of the Ṣāliḥ presidency and the weakening of the center, those networks of patronage, consisting of a handful of Sanḥānī officers in command of separate competing units that were centered on the president, turned into autonomous rival warlords in competition with each other. The most important amongst them in the period between 2011 and 2013 were General ‘Alī Moḥsen and his 1st Armored Brigade, members of the Al-Aḥmar family who controlled tribal militias within the army, former President Ṣāliḥ who had significant networks of personal loyalty with parts of the military taking orders from him (or his son Aḥmad ‘Alī Ṣāliḥ and various close relatives posted in the Republican Guard, 8th Shock Brigade, 1st Infantry Brigade, 1st Rocket Brigade, etc.). These stakeholders, in a setting specific to Yemen, have remained highly influential in the security and military sector, to the point of controlling whole units even after the removal of President Ṣāliḥ. After the departure of President Ṣāliḥ, Ṣana‘ā and Ta‘izz were divided between ‘Alī Moḥsen forces, Islāḥ-associated tribal troops, and the Republican guards loyal to the former president who manned checkpoints and controlled high points.

As in other settings of warlord politics, the new (transitional) government has had only a tenuous grip over the periphery of big cities; and furthermore, in the south, al-Qā‘idah in the Arabian Peninsula (AQAP, the same group which was probably renamed Anṣār al-Shari‘ah) has made inroads in the Abyān and Sheba‘ah governorates, restive fields that have been retaken (their cities at least) by governmental forces using tribal militias as auxiliary forces. The whole military sector was fragmented by warlord politics. The crux of the problem in warlord politics constitutes the existence of a “commitment problem”³⁵ in which all major military/militia parties are exhausted and consequently interested in peace, but where none can trust the others sufficiently to keep promises. Therefore they are reluctant to give up their positions in the military and security apparatus.³⁶ Moreover, the fear of losing one’s political voice in a transitional unstable setting can motivate recourse to violence.

³⁴ John Stedman, “Spoilers Problems in Peace Processes” (1997) 2 *International Security* 22, 5–53.

³⁵ James Fearon, “Commitment Problems and the Spread of Ethnic Conflict” in David Lake and Donald Rothchild (eds), *The International Spread of Ethnic Conflict* (Princeton University Press, Princeton 1998).

³⁶ Rifts between General ‘Alī Moḥsen and ‘Alī ‘Abdallāḥ Ṣāliḥ result from Ṣāliḥ’s attempts to strengthen his son’s military power in the 2000s; ‘Alī Moḥsen accused Ṣāliḥ of having planned his assassination; Ṣāliḥ was severely injured in June 2012 in an attack on the presidential mosque that almost took his life; since then, his partisans have stressed their opponents’ attempts to physically eliminate them. Stories of attempts by one side to eliminate the other side have enraged both sides.

D. The Libyan Case—Weak Military, Localism and Competing Militias

The situation is worse in Libya, which is even more volatile. The security sector (army and police) has given way to a myriad of armed groups: The disintegration of the Libyan state that was enfeebled by al-Qadhdhāfi's rule (and replaced for forty-two years by a mixture of vertical networks controlled by relatives of the colonel and of horizontal "revolutionary committees" charged with local governance) gave way to extreme fragmentation. Local factors are crucial in explaining mobilization. The four largest cities after the capital (Benghāzī, Bayḍah, Zawīyah, and Miṣrātah) rose up in mid-February 2011, initially acting peacefully. But they quickly resisted attempts by al-Qadhdhāfi loyalists to crush the Libyan uprising militarily with the help of defecting military personnel. Particularly after NATO's imposition of a no-fly zone on March 19, 2011, Benghāzī offered army defectors a safe area to set up a reconstituted "National Army" (NA) with the help of defecting soldiers. However, the NA was not very active on the battlefield, and it was circumvented by the emergence of several "revolutionary brigades" (*katā'ib al-thuwwār*). The NA also suffered from political infighting among its leaders. Most defecting soldiers returned home and revolutionary brigades were made up to a large extent of young civilian fighters with little military training who gained experience in battle.

In March 2011, numerous revolutionary brigades were set up in the West, most notably in the cities of Zintān, Miṣrāta, Zawīyah, and Nālūt (located in the Nafūsah Mountains, where a "Tripoli military brigade" established a strong foothold before the final battle for the capital). They were organized locally and led from the bottom up. Brigades came together in loose alliances but kept their local autonomy. Some groups harbored a strong ideological orientation. An influential group with an ideological Islamist leaning emerged in the form of the Libyan Islamic Movement for Change. Its members came from a group formerly known as Libyan Islamic Fighting Group (which led an Islamist uprising against the al-Qadhdhāfi regime between 1995 and 1998), made up of "Libyan Afghans", who had fought against the Soviets in Afghanistan and returned back to Libya. Its leader, 'Abd al-Ḥakīm Belḥāj, emerged as the head of the Tripoli Military Council in August 2011 (also called Liwā' Ṭrāblus, the Tripoli military brigade). Other brigades were headed by leaders close to the Muslim Brothers, others by Salafis, and even jihadists found a new basis to prosper.

There was some coordination to foil the regime's attempts to crush the uprisings which started on February 17, 2011, but brigades liberated the country in a piecemeal fashion, with local brigades fighting for their own towns and stopping outside to wait for local residents of other cities and villages to rise up. The military campaign was made up of rebels encouraging other towns to rebel and seeking the help of young defectors from the communities themselves and local elders to help them set up their own units. The situation in Tripoli was unique, and victory in the capital reflected the efforts of local residents and various militia from across the country, especially the Zintān and Miṣrātah brigades along with the so-called Tripoli military brigade.

The main driver of militia creation was not ideology but rather fragmentation and localism. Revolutionary brigades filled the vacuum left on the ground by the civil war and the disappearance of the police. The number of militias ranged from 100 to 300 (with 125,000 to 150,000 young Libyans who joined them), and they have been in a continuous process of dissolution or reconsolidation rooted in local dynamics. Militias have seized and stocked up huge quantities of weapons. They have set up structures to control cities, issuing their own warrants, issuing identification documents listing family names, arresting alleged suspects (former regime officials), manning their own jails, and guarding key installations. The brigades seized ports, customs, and duties points and controlled lucrative positions at borders, airports, and ports. Competition among militias was most visible in Tripoli, which

appeared to be “the golden goose” in financial terms. The crux of the Libyan transitional problem therefore has been to reinstate (civilian) political life in order to replace militias’ role in managing the country.³⁷

E. The Syrian Case: The End of the Syrian Military?

The same will presumably be true for Syria once the regime falls. The Syrian military has not acted as an “agent of change” or even as an arbiter; it has been engulfed in the civil war and has become an central object of contention between the al-Assad regime, on the one hand, trying to preserve the military’s coherence and the opposition (Free Syrian Army, FSA), on the other, trying to unravel the regime by encouraging defections from the military. The disorganized militarization of the uprising has given free rein to armed and fragmented local opposition groups (with attempts by activists or FSA commanders to impose order on local militias largely unsuccessful), not to speak of the whole mess of jihadist groups coming in. Conversely, the regime has made extensive use of numerous government-sponsored militias (*Shabiḥah*), newly formed paramilitary units, along with (in the first half of 2013) the increased intervention of Hizbullah, Iranian *Pasdaran*, and foreign Shi‘ah volunteers. Military fragmentation has increased in Syria.³⁸

V. HOW TO REASSEMBLE THE PIECES TOGETHER? TRANSITIONS IN INSTITUTIONAL TERMS

Comparative cases of transitions in Southern Europe, Latin America, and Eastern Europe display a picture of what is necessary for civil-military relations to really change and offer prospects for the so-called democratic control of the armed forces. Simply because a transition has occurred does not mean that the process of regime consolidation advances in lockstep across all fronts: In the aftermath of the fall of an authoritarian regime, what is consolidated is a bundle of diverse institutions or “partial regimes” organized around different principles or rules in relation to their domain and resources.³⁹ The crux of the problem is to reassemble them into a coherent regime, preferably a democratic regime, hence the importance of legal and constitutional considerations. Civil-military relations in transitional settings are an example of partial regimes, and they are strongly related to broader considerations of regime consolidation. The military is a sector which new civilian rulers essentially have to take into consideration, and furthermore, the institutional framework of civilian control over the military constitutes the focal point of democratic consolidation.⁴⁰ Regime transition offers the prospect of moving in the direction of civilian control, with the crisis leading up to a transition opening an important window of opportunity. Choices made during the period of transition will have an enduring effect upon the eventual outcome

³⁷ Philippe Droz-Vincent, “Libya’s Tentative State Rebuilding: Militias’ Moral Economy, Violence and Financing (In)Security” in E. Grawert and Z. Abul-Magd (dir), *Businessmen in Arms*, (Rowman and Littlefield, Lanham 2016).

³⁸ Philippe Droz-Vincent, “The Syrian Military and the 2011 Uprising”, in H. Albrecht, A. Croissant, and F. Lawson (eds), *Military Engagement in Mobilizing Societies* (University of Pennsylvania Press, Philadelphia, to be published).

³⁹ Philippe Schmitter, “Organized interests and democratic consolidation in Southern Europe” in R. Gunther, N. Diamandouros, and H. J. Puhle (eds), *The Politics of Democratic Consolidation* (John Hopkins University Press, Baltimore 1995).

⁴⁰ Adam Przeworski, *Democracy and the Market* (Cambridge University Press, Cambridge 1991).

that ensues and the quality of the resulting regime's performance (namely, its democratic character).⁴¹ Nonetheless, the redefinition of new relations (of control) between civilian (elected) rulers and the military, namely relations different from those prevalent in the authoritarian preceding setting (see Part II, above), is a very difficult endeavor. In the Arab world after 2011–2012, these preliminary steps and their potential restructuring in further institutional arrangements were not met, with the prevalence of heavy and domineering military tutelage, or the difficulty of reinstating state monopoly on violence, or military populism trumping everything else.

A. From the Specific Tunisian Case to Protecting the Military's Prerogatives Elsewhere

Most comparative studies of civilian control bear a strong "Latin American bias", with their essential imperative being the prevention of the specter of coup politics. However, this approach does not resolve all problems related to military interventions and even less so the issue of enduring military tutelage.

Indeed, few cases in the Arab world display the Tunisian model of a tiny and apolitical army traditionally removed from the center of political power. In contrast to many other Arab states, Tunisia has traditionally had a civilianized Ministry of Defense.⁴² Since 2011, some retired military officers, possibly acting as unofficial spokesmen for the whole military—officers know each other well, and retired and active officers maintain relations—have expressed resentment about their instrumentalization by the political leadership in the 1970s and 1980s. They have welcomed more consultation of the military on national defense issues in a democratic setting. Nonetheless, the Tunisian armed forces have been subjected to a form of civilian control under presidents Bourguiba (Būrqība) and Ben 'Alī (with different methods) and have not intervened since the fall of Ben 'Alī with respect to their position vis-à-vis the drafting process of the new constitution. Quite differently from other Arab armies (where the prospective downgrading of the armed forces' influence is essential for new rulers in the transitional period which is opened up by social mobilizations), the Tunisian transitional government reinforced the Tunisian military (first of all its manpower and its means) to secure Tunisian borders (especially with Libya) and to control the Southern restive and mountainous borderland with Algeria (Jabal al-Sha'ānbi) in 2012–2013, a move that is not synonymous with a renewed military influence in politics.

In strong contrast to Tunisia, the general case in the Arab world is that of a huge military apparatus stemming from the long authoritarian phase with large prerogatives, either negotiated with the former authoritarian regime or a product of a creeping expansion of the military corps to which the former regime had closed eyes for years (or a mixture of both). Indeed, the military is often exhausted by its visible role in the transitional period and prefers intervening behind the doors instead of exposing itself in open and complex political games, but the military is also bound to defend or even expand its prerogatives. Quite differently from Latin America in the 1980s, Arab armies in 2011–12 are not trying to

⁴¹ Philippe Droz-Vincent, "Prospects for Democratic Control of the Armed Forces" (2014) 4 *Armed Forces and Society* 40, 696–723.

⁴² The post of Minister of Defense has been held since the departure of Ben 'Alī by a civilian, a former Minister of Health (briefly) under Ben 'Alī, A Zbidi; and symptomatically, he has not been replaced since al-Nahḍah electoral victory (until March 2013). There has been no significant reshuffle of the military hierarchy and General 'Ammār has been promoted by the first transitional government for his role during the uprising (he announced his retirement from active service in June 2013 in a TV show on Al-Tunisiyah).

extricate themselves from politics or fighting a last-ditch battle after years in direct power. The military is entering transitions in 2011 as a proactive actor, either triumphant (Egypt) when it kept coherence or at least powerful (Yemen). And, during authoritarian times, Arab armies were not subordinated to a civilian authority (as in Franco's Spain) or to a single party (as in Eastern Europe or Russia), and their role in a given polity was larger and much more encompassing than the corporate autonomy of a military corps even endowed with a vague concern for public order and national security (as in Latin America).

B. The Case of Egypt: From Apparent Extrication to Military Tutelage

In authoritarian regimes, the military is a closed-off sector focused on its own corporatist interests in exchange for fulfilling the role of the military as a pillar of last resort for the regime. Egypt is a preeminent case and acts as a trendsetter. There are numerous enclaves of military autonomy within the state apparatus (in budget matters, in decisions concerning missions, organization and utilization of military means, etc.), reserve domains controlled by the military (with areas of political decision-making away from the government),⁴³ and institutional or informal military “veto points” in policy-making processes (exclusive control over state revenues, control over internal military intelligence agencies, etc.), along with a kind of immunity from social scrutiny—*al-jaysh khaṭṭ aḥmar*, the military is a red line, as the Egyptian expression puts it. Any debate on the military is forbidden by law in the name of state security, and civilians who dare to speak about the army are intimidated or even prosecuted. The military has gained wide-ranging administrative responsibilities in the state apparatus for years (for instance, in the Administrative Monitoring Authority, in local governments, in some provinces such as Suez or Sīnāʾi, etc.) and in securing borders (especially with Gaza and Israel) or restive areas (such as Sīnāʾi or the Western desert near Libya). Furthermore, the Egyptian military has a very special relationship with the United States as the recipient of an annual \$1.3 billion in military aid, which it manages autonomously, displaying a kind of foreign policy of the armed forces. These encroachments represent a military participation outside its primary mission. They are the “path-dependent” products of the specific relations between the former Mubārak regime and the military, and thereafter, of the military’s stance during the first transitional steps. These specific roles of the military were unquestioned in former authoritarian regimes where everything was subsumed under the regime’s exclusive grid of control (i.e., authoritarian rule); yet they are problematic in new, more open-ended systems where the redefinition of the perimeters of influence (between the military and civilian spheres) is *de facto* taking place with the emergence of new, open-ended (yet messy) political games (formal and contentious ones). As exemplified by Egypt after 2011, the crux of the problem for civilian rulers is how to streamline or blunt such military prerogatives, and for the military, there arises the question how to write in the constitutional “marble” its specific (and unquestioned before) posture and protect its privileges from civilian scrutiny.

As a transition proceeds and takes further steps, the military will try to ensure that such prerogatives are maintained, and it will attempt to shape the direction and content of transition to protect itself from external (civilian) control. Agreements and institutions that facilitated the “first” transition (the installment of a new regime with the help of the military) might be detrimental to the proper transition to a true civilian democratic regime (where,

⁴³ On the institutional prerogatives of the military in Latin America, Alfred Stepan, *Rethinking Military Politics* (Princeton University Press, Princeton 1988).

as stressed by Joseph Schumpeter, government-forming elections unambiguously “acquire the power to decide”). There is a risk of “perverse institutionalization”⁴⁴ when the military asserts itself as a tutelary power in this process and institutionalizes its own autonomous spaces by assuming control of areas of policy-making, taking it away from elected civilian politicians.

C. The Military and Egyptian Constitutions

In Egypt in the second half of 2012, after the failure of the SCAF’s direct rule (and its attempts to constitutionally enshrine its role as the country’s guardian), the writing of the constitution was a crucial milestone, and the Egyptian military forcefully tried to ensure its prerogatives. In parallel with other political, religious, and societal actors on other hot topics, the Ministry of Defense made its voice strongly heard through its representatives in the constituent assembly, objecting to a constitutional provision barring military trials of civilians (described as “unacceptable”) or fiercely resisting any civilian oversight of the military budget. In the Egyptian Constitution adopted by referendum in December 2012,⁴⁵ the generals worked for their own interests: Symptomatically, the role of the military appeared very early in the text of the constitution (Principle 8), quite differently from the 1971 one; there would be no parliamentary oversight over the military budget (it would be the preserve of a National Defense Council, Art. 197); the National Defense Council would be dominated by the military (and among the civilian “representatives”, only three would be elected); the armed forces would preserve their ability to try civilians (Art. 198); the Minister of Defense would be appointed from among officers (Art. 195); the “black box” of the Egyptian military economy was hence not opened (the representatives of the armed forces fought forcefully against this in the debates of the constituent assembly).

The constant guiding line in the Egyptian military’s behavior has been the adamant defense of its own prerogatives understood in a very large sense. In the second half of 2012, the essential task of the Minister of Defense, General al-Sīsī, who was newly appointed by President Mursī, was to restore the military’s credibility, an essential asset to protect its role in the Egyptian system and then its privileges. That was not antithetical per se with the Muslim Brothers’ rule, but along with a strong say of the military’s high hierarchy in the governance of the Egyptian polity: As stated by numerous high officers, a military intervention was an option, but not a foregone conclusion, and one that would be effective in case of the Muslim Brothers’ failure. The Egyptian military had a kind of tacit or implicit deal with the Muslim Brothers to extricate itself from direct rule in the summer of 2012 from its prisoner’s dilemma (see section IV B), with the Muslim Brothers controlling the presidency and pushing forward the constitutional process at the end of 2012. Conversely, the Muslim Brothers in (executive and legislative) power coddled favor with the military for the purpose of staying in power. The Muslim Brothers in fact controlled sectors that did not pose a direct challenge to the military’s interests.

The military then switched sides in 2013, after large parts of Egyptian society became disenchanted with the Muslim Brothers’ rule during the year that Mursi had been in power.

⁴⁴ Samuel Valenzuela, “Brazil, Weak Parties, Feckless Democracy” in Scott Mainwaring (dir), *Building Democratic Institutions* (Stanford University Press, Stanford 1995).

⁴⁵ The referendum was held at a time of huge demonstrations against President Mursī and the Muslim Brothers’ control of the constitutional process (hence a time of relative oblivion in Egyptian society of the SCAF’s despised rule in the seventeen months following President Mubārak’s fall, as the focal point of protests was the Muslim Brothers and their management of the constitutional process, not the military).

This disenchantment stemmed from the Muslim Brothers' tight grip over the constitution-drafting process, their increased control of state media, their ever more frequent issuing of charges of "insulting the president" or "contempt of religion" against media figures, their controversial legislation process through the *Shūrā* council which they dominated, their clash with the judiciary, and, more important, their inept socio-economic management of the country and their lack of decisive moves to restabilize the *Sinā'i*. The military's high hierarchy left the impression of giving Mursī the opportunity to mend his way—in December 2012, it invited the president for a "national dialogue" on Facebook, then canceled its invitation; it issued declarations stating its neutral stance but at the same time suggested it wouldn't let the country fall into the abyss. Eventually, the military hierarchy stepped in and overthrew Mursī on July 3, 2013, in an environment of generalized popular mobilizations (with the Tamarrod, a rebellion movement emerging in May–June 2013) that gave the military some legitimacy—it was a coup d'état with popular support, though many Egyptians resented Mursī but did not want the president overthrown by the military.

Thereafter, the main thrust of the military has been to further engrave its privileges in the constitutional "marble". The 2014 Constitution approved by referendum bears the weight of the military's reinforced influence (with new additional gains for the military when compared with the 2012 Constitution). The military (and the police) is granted wide-ranging autonomy, and in the constitutional text the military is a branch unto itself (Chapter eight), with provisions much more neatly defined than those covering the police; the Minister of Defense will be an officer (Art. 201) and approved by the SCAF for the next two presidential terms (transitional provision 234); a National Defense Council will discuss the military budget (with the military a plurality) and will be included in the state budget under one line (explicitly stated in Art. 203); military courts will have broad jurisdiction on civilians as defined in broader language ("military zones", Art. 204) and enshrined in more specific and compelling terms than in 2012; a National Security Council will allow the military to have a say in crucial political decisions (Art. 205).

D. Reinstating a Monopoly on "Legitimate Violence" or Falling into the Traps of Civil War in Libya and Yemen?

The problem is deeper and more intricate in other cases where the fall of the regime is a product of a civil war. Here, the basic problem is how to reinstate a Weberian monopoly of force in a context of extreme fragmentation of the security sector with the daunting threat of multiple revolutionary brigades/militias. In Libya in 2012–2015, there was no state monopoly on the use of violence in the hands of new rulers. The collapse of the weak Libyan state has left no institutions: The Ministry of Defense had no real organization, as the new cadres from the National Transitional Council (NTC) discovered; it has been rebuilt from scratch by the new authorities after the fall of the regime, but with no financial means (it had no funding until at least March or April 2012),⁴⁶ and it has been riven in 2012–2013 by rivalries at the top between the Minister of Defense (the former head of Zintān's military council, said to be a representative of the influential Zintāni brigades) and the chief of staff (a native from Misrata who retired from al-Qadhdhāfi's army just before the uprising), then overwhelmed by the domineering role of militias after 2013. The core rift has been located in a legitimacy conflict between revolutionaries (*thuwwār*) who fought al-Qadhdhāfi and former members of the security forces of al-Qadhdhāfi's regime who defected at some moment during the process of regime unravelling. Revolutionaries have harbored a great distrust of the military,

⁴⁶ Personal interviews, Brussels, March 2012.

as Eastern brigades defected quickly with the advent of the uprising starting on February 17, 2011, whereas numerous Western units fought (at least for some time) with the former regime. Conversely, officers have felt marginalized and have been struggling (in numerous “extraordinary conferences” held in the country) to rebuild the armed forces.

As a consequence, the Ministry of Defense has only set up the “Warriors’ Commission for Rehabilitation and Development” to register fighters in Libya, but has not really rebuilt a new regular army, a very complex task due to the shortages of personal, equipment, knowledge, and trust. In reality, during the process of gradual unravelling of the al-Qadhdhāfi’s regime, the NTC called on local communities to set up their own local self-defense groups, which were granted permission by the NTC to operate as “brigades” (similar to the original “revolutionary brigades”) and, after the fall of the al-Qadhdhāfi’s regime, nominally under the authority of the Ministry of Defense (or Interior). The internal command structure of militias has not been affected by their integration in the formal structures of the armed forces or security services. Furthermore, the revolutionary brigades, especially the most powerful ones from Zintān and Miṣrātah, have offered to compensate for the army’s deficiencies and have set up their own coalitions (called *tajamuʿ*): For instance, they received official sanction to build the Libyan Shield Force (Qūwat Dirāʾ Lībiyah), a kind of parallel army, in April 2012; another force arose under the name of the “National Guard” or Border Guards, self-entrusted with guarding key infrastructure in the country (ports, petroleum infrastructure, etc.). The military sector has remained institutionally fragmented in Libya. And the societal reactions have remained contradictory, with Libyans at the same time resenting militias’ rule in their day-to-day life, but also benefiting from militias’ influence to get resources (even at gun point) and extract concessions from the weak central government, and sharing a kind of distrust toward the prospect of a strong center (the specter of the evil center that might become a tyrannical power in the hands of a leader), a feeling that plays in the hands of militias and legitimates their rule.

The essential difference with other cases of warlord politics is that, in the first months, the Libyan militiamen harbored some sense of loyalty to the Libyan national state—also because the state provided them with salaries through their registered brigades/militias or at least were to some degree controlled by the local communities (cities, neighborhoods. . . and their respective elders or local authorities) they came from: Some were thugs and “greedy” actors; some were ideological actors (and had a broad agenda either of state reform or were connected to more global projects like al-Qāʾidah); but the majority were middle-class, educated Libyans (with a civilian background)—the Southern part of Libya might be different with deep-engrained tribal rivalries—and hence presented a very different picture from other cases of warlord politics as in Liberia, Sierra Leone, or Somalia, where militiamen have no education (because there is no education system at all),⁴⁷ have suffered from total anomie (in the strictly Durkeimian sociological sense, namely the absence of social ties except those created by their being members of militias), and have for years (or even decades) lived at war and from war (looting, rape, etc.) in militarized countersocieties.

But militia-nization has autonomized itself socially. Militias and their role of go-betweens have increasingly taken root in the Libyan social landscape, and, conversely, the institutional/constitutional process has not really taken off to offset the “perverse institutionalization” of militias in the Libyan polity. Militias have filled the institutional void left by the fall of al-Qadhdhāfi’s regime; they have even been integrated in the security sector (under the Ministry of Defense or the Ministry of Interior), though keeping their

⁴⁷ See the works on the economic causes of war, for instance, Paul Collier, *Breaking the Conflict Trap* (World Bank Policy Research Reports, Washington 2003). The nature of militias, their composition, and the existence (or not) of a viable education system are of exceptional importance.

autonomy of decision, and they have carved out for themselves fiefdoms in the post-al-Qadhdhāfi weak regime, especially by controlling key resources (oil and gas fields, ports, airports, infrastructures, border crossings, smuggling routes) they were supposed to protect or “police” (in their quality of security forces). Militianized actors have also used violence to protect their core interests, also a way to remain politically relevant (see Part IV, above). Conversely, the difficulty to reinstate political processes at the helm of the Libyan state has played into the hands of militias that have appeared as the only agents of change, as institutional processes have been blocked in deadlocks and political squabbles. The problem is not just the military/militias’ autonomy from the state (or what remains of state institutions), but their ability to play a role in re-emerging political games by using their firepower or even worse, to replace any political game/debate by the recourse to weapons.

And, in the summer of 2014, a threshold was crossed towards disintegration. In 2013–2014, members of the former Libyan army were increasingly targeted by a campaign of assassinations in the East, particularly in Benghazi and Derna, and began to take matters into their own hands. In May 2014, General Khalifah Hefatar launched an operation called “Dignity (Karamah)” against Islamist-leaning forces in Benghazi, targeting dreaded Salafist Anṣār al-Sharī‘ah in particular. Hefatar had taken part in the 1969 coup with al-Qadhdhāfi, served as commander of Libyan forces during the Libyan-Chadian conflict, and defected in the 1980s before returning in Libya in 2011. This move took place at a time of complete political stalemate: The GNC, which had been unable to craft a constitution and was crippled by political infighting, was disbanded in August 2014, after the election of a House of Representatives (HoR) in June 2014 that produced a poor showing for revolutionary new elites and the Islamists once dominant in the GNC (with a very low turnout). Localized and limited clashes between rival militias that were contained before morphed into the stirrings of a civil war in the second half of 2014, with two governments claiming to represent the legitimate will of the Libyan people, the reconvening of the GNC that has extended its mandate to continue operating, and a parliament (HoR) that has met in Tobruk with the support from militias aligned with General Hefatar. The Libyan fractious militias have lined up and given way to a mortal polarization between two warring “camps”, “Operation Dignity” of General Hefatar and Zentāni militias versus “Operation Dawn Libya (Fajr Libiyah)” of the Miṣrātān militias and some Islamist factions, both composed of volatile coalitions of militias and exemplifying at most the hijacking of the Libyan transition by armed actors. And regional actors, such as Egypt, Chad, Niger, Algeria, Tunisia, Sudan, Qatar, Turkey, and Saudi Arabia, have lined up in this emerging conflict, either to help mediate and/or to stand behind one coalition or another.

A similar setting is also exemplified by Yemen. The newly elected transitional president in Yemen set up, according to the guidelines of the transition plan (Sections 16 and 17), a Committee for Military Affairs to remove checkpoints and armed presence in the capital, to recombine some units after the split in the military, to remove influential high commanders linked to the former Ṣāliḥ regime from their posts (especially close relatives of President Ṣāliḥ), and to return army units to barracks (a kind of demilitarization of political games). External pressures have attempted to help: The UN Security Council even issued UNSCR 2051 on June 12, 2012, to threaten “non-military action” (sanctions) against those “obstructing the implementation of the Presidential Decree of April 6, 2012” concerning military and civilian appointments after the end of the Ṣāliḥ regime.⁴⁸ In December 2012, presidential decree number 104 announced a major reorganization of the main components

⁴⁸ However, external intervention, such as that of the United States, might in the first place also be contradictory: The United States leads a military/security reform advisory group in Yemen; but the United States might be less interested in the wholesale and complex reform of the security sector, than in building a

of the organizational structure of the armed forces, to be valid for five years (a transitional period, until a law is enacted): In particular, it disbanded both the Republican Guard and the First Division—the eldest son of Ṣāliḥ, Aḥmad ‘Alī Ṣāliḥ was the powerful chief of the Republican Guard, the most powerful unit in Yemen’s armed forces, built to counterbalance the potential threat from the First Division, al-Firqah al-Awwal led by ‘Alī Moḥsen; ‘Alī Moḥsen was named adviser to the president and Aḥmad ‘Alī Ṣāliḥ Ambassador to the United Arab Emirates. And, at the low and mid-levels, efforts have been pursued to streamline recruits and introduce some degree of professionalism, as recruitment in the Yemeni army in the 1990s and 2000s was plagued by “ghost soldiers” (see section II, officers present for rent-seeking motives only (hence corruption) and the necessity for ‘Alī Moḥsen or Aḥmad ‘Alī Ṣāliḥ in their respective units to claim the most important number of soldiers.

The end result of the process remains tentative: Most decisions have not been implemented on the ground (in units/brigades). The military has been the principal impediment to the transition as warring rivals escaping the president’s authority (warlords in other parlance) have been impeding real change: Military commanders turned autonomous have played on the control they exert on “their” units/brigades to foil change. Change was extremely gradual in Yemen, as rapid action might prompt a violent counterreaction by the losing side (those losing their life assurance, namely their military assets). Furthermore, important changes undertaken by President Hādī by presidential decrees were delayed by the necessity of relying on the very commanders who impeded the transition, in a difficult context of terrorism—in May 2012, a devastating suicide bombing took place in front of the Central Security Forces headquarters, and in September 2012, the Minister of Defense survived a high-profile assassination attempt—and under the threat of al-Qā‘idah in the Arabian Peninsula advancing in some provinces.

The Yemeni pattern in 2012 was messier when compared, for instance, with Yemen after unification in 1990–1993, when the essential task was the rebuilding of a unified Yemeni political system by nondemocratic forces (the Ṣāliḥ regime and the former Southern Socialists) that were pushed toward reunification by societal pressures yearning for democratization and that were unable to draw up a pact between them to reunify the former Northern and Southern militaries (and ended in war). The essential task at hand in Yemen in 2012–2013, short of any complex civilian control of the military (as the military has been penetrated and destroyed by the “logic of the Ṣāliḥ regime”), was to rebuild the military as a cohesive corps and at the very least to create some basic distinction between military and civilian realms, a very essential starting point.

In general, the temporary way out is the building of a democracy, perhaps not a brand-new democratic system as experts would dream of it in policy-oriented papers, but at least functioning democratic games—warring factions can settle on democracy, a “warlord democracy”, namely a democratic equilibrium beyond the state of belligerence because democracy can be an arbitration mechanism—and its deepening in order to eliminate its first pristine defaults—by the progressive demilitarization of politics. Beyond this, one important caveat should be kept in mind: Civilian control of the armed forces can be realized by appeasing factions or by pitting factions against each other, but the most stable configuration, however, is the institutionalization of some degree of control through adequate public policies (defense policies, security policies), therefore it entails a functioning democratic (civilian) political system.

counterterrorism force, hence ensuring that key military/security figures stay in place (this would mean close relatives of former president Ṣāliḥ).

A mixture of both (reforms toward institutionalization and betting on the equilibrium of military commanders turned warlords) was used by (or, in another interpretation, forced upon) President Hādī. Political games were revived through the National Dialogue with huge shortcomings. The National Dialogue committee had nine working groups, including one on the armed and security forces, and engaged in wide consultations in the country (reported on a well-resourced website) with the help (and heavy pressure) of the UN special envoy, Jamāl Ben ‘Omar. In September 2013, the Military and Security Working Group approved its final report on time and offered a series of “major questions relevant to the constitution” concerning army and security organizations.⁴⁹ In January 2014, in the closing ceremony of the National Dialogue, President Hādī pledged to form commissions to draft the new constitution; a document of some 1,400 recommendations was agreed upon—and delegates agreed that President Hādī, who was sworn in for a two-year term according to the transitional plan in February 2012, should remain in office until a new constitution has been approved and elections held. But the next challenging phase was the implementation of the outcomes of the National Dialogue—and many disagreements remained open, especially on federalism.

But, rather than reinvigorating political games, the whole process displayed the weaknesses and inabilities of the Hādī government and was overwhelmed in September 2014 by the sudden move of an outsider, the al-Ḥūthi movement (or Anṣār Allāh), into the capital Ṣana‘a, certainly with the tacit complicity of former President Ṣāliḥ and his supporters in the security apparatus, then the ensuing civil war with Saudi and Emirati interventions in 2015.

Militia politics short of the rebuilding of a state apparatus with institutions and a national project—perhaps not the brand-new Weberian model of state, but one in accordance with the various and complex socio-political contexts in Libya or Yemen—does not offer a robust solution. This is well exemplified by what has happened in Iraq after 2006, when Iraqi political actors regained a strong hand in Iraqi political dynamics (as the G. W. Bush administration under internal pressures from the US Congress was concentrated on finding an “exit strategy”). The rebuilding of the Iraqi armed forces from scratch (after their dissolution by Coalition Provisional Authority’s order number 2 in 2003) offered a window of opportunity to reinstate real civilian control. However, in Iraq, emerging political forces have controlled militias that constitute a form of “life assurance” for them, ensuring that they will get a reasonable share of the “political pie”. The new Iraqi political system has been based on an equilibrium of political parties backed by militias now integrated in the security forces and the military (with brigades or units cohesively recruited from a given political party). And for instance, Prime Minister Nūrī al-Mālīkī built a network of close associates circumventing the formal institutional structure of the Ministry of Defense. This network was at the core of his power base and complemented his fragile (democratic) political coalition—with his son Aḥmad al-Mālīkī as deputy chief of staff, with the “Office of the Commander in Chief” giving him direct channels to battalion commanders, with the proliferation of “Operational Centers” coordinating forces in provinces under the guidance of someone appointed by him, and with the Counter-Terrorism Bureau removing some forces from the oversight of the ministries of Interior and Defense under his direct supervision, etc. And this whole system displayed its inherent limits when it approached collapse in the summer of 2014 with the sudden advances of the Islamic State (*Dā‘ish*) in Mūṣul and Sunnī provinces, then in the direction of the capital. Such Iraqi lessons should be carefully

⁴⁹ See the website of the National Dialogue, at <http://www.ndc.ye/ar-default.aspx>, accessed September 8, 2015, and I rely on some documents from the Office of the UN special envoy.

observed in fragmented polities whose transition was eased out by the militarization of uprisings—or by the “military logic” as opposed to the “civilian logic”, namely nonviolent demonstrations in public spaces—taking the upper hand during transition.

E. Hijacking Transition in Egypt: A Return to Military-led Government or the End of Any Prospects for Democratic Control of the Armed Forces?

Transitions of whatever stripe create an opportunity to craft civilian control of the military. The setting was especially propitious in the Arab world in 2011 as there were high levels of societal mobilization or at the least a strong social awareness: Societal enthusiasm was an essential engine of change creating a new level of street politics unknown before.

There was a new kind of “moment of societal enthusiasm” in 2011: The term “moment of enthusiasm” was coined by L. Binder in a study dealing with political development in Egypt in the 1950–1960s to account for the ability of a small group of rulers (coming from the military by coups d’état) to rule a country and to build a rationalized apparatus of government (that was inherited by Sādāt from Nāṣer and then by Mubārak) by “surfing” on a foundational “moment of enthusiasm” energizing the country.⁵⁰ This pattern was replaced in 2011 by societal enthusiasm coming from below (from society). Ordinary people are hard to find in social science studies of regime change: They are either portrayed as “villains”, nurturing populist praetorianism and fostering instability,⁵¹ or are subsumed under the generic concept of “civil society”,⁵² a very complex notion that still retains a certain proximity to elite-centered studies of democratic transition. Nonetheless, the very activation of unorganized societal actors can change the whole setting, as exemplified by citizens’ revolts in the Arab world in 2011.⁵³ This was not a matter of democratic (vertical or horizontal) accountability or of rule of law in the making (these are institution-building issues), but rather a strong pressure coming from below, from society (even if it was a disorganized and contentious one): Ordinary people were moved in the streets by a sense of outrage against any attempt by a leader (the SCAF in 2012, President Mursī in 2013) to appear above the general public and treat them as subjects without a political will, as was the case under the former authoritarian Mubārak regime.

As a corollary (one that is a very new and important feature in Egypt), military issues were more openly discussed, at least for some time. Repression and threats (of military trials for those “insulting” the army) persisted, however, there was a new atmosphere that the military was not able to suppress, but which at the least it was only able to stifle. The army’s opportunistic sending of signals in support to the “rebellion (*tamarrud*) movement” against President Mursī in June–July 2013, and then ousting him, was a clear testament to

⁵⁰ L. Binder, *In a Moment of Enthusiasm* (Chicago University Press, Chicago 1978).

⁵¹ S. Huntington, *Political Order in Changing Society* (Yale University Press, New Haven 1968).

⁵² Civil society is not “a society against the state”, but rather works to establish relationships/negotiations with the state in order to limit the state’s encroachments on social processes, and at the same time in a way that does not impede on the ability of the state to work/govern; Ernest Gellner, *Civil Society and Its Rivals* (Allen Lane, London 1994).

⁵³ On the beginning of social movements against authoritarian rule, see Philippe Droz-Vincent, “Authoritarianism, Revolutions, Armies and Arab Regime Transitions” (2011) 2 *The International Spectator* 46, 5–21; Joel Beinin and Frederic Vairel (eds), *Social Movements, Mobilization and Contestation in the Middle East and North Africa* (Stanford University Press, Stanford 2011); Fawaz Gerges (ed), *The New Middle East, Protest and Revolution in the Arab World* (Cambridge University Press, Cambridge 2013).

the power that societal mobilizations have accumulated over 2012. Social mobilizations might have threatened the privileges the military had secured with the Muslim Brothers' rule, but the military's motto on July 3, 2013, may be summarized as: "better surfing on the wave of protests and anticipating changes than being engulfed by them." And to overthrow President Mursi in July 2013, the military played on the remobilization of Egyptian society with the "rebellion (*tamarrud*) movement" against the Mursi presidency.⁵⁴ The number of signatures for the *tamarrud* petition for his removal seems to have been inflated in pro-military outlets to 12 million to show that disapproval of the Mursi's presidency was widespread (and more numerous than the number of votes Mursi got in 2012 in presidential elections) and, as a consequence, to vindicate some form of military intervention.

Again, in September–October 2013, the articles dealing with the military in the constitution (undergoing amendment after the removal of President Mursi) were hotly debated, as requested, for instance, by the "No To Military Trials" group (calling for an amendment stating that no civilians will be tried before military tribunals and prohibiting exceptional courts). Repression placated for some time dissident voices, but it could not extinguish all protests. The Egyptian military managed to impose its will in the constitution-writing process in the end of 2013, but the debates, though placated by threats of trial before military tribunals for those too openly dealing with the topic and repression, were not extinguished. What was at stake was the possibility (within certain limits) of new civil-military relations in a newly emergent (yet anarchic) constitutional and legal architecture.

But, in Egypt, that "societal enthusiasm" was not translated into new dynamics for a transitional process (and institutionalized control on the military) moving on with the help of some political actors. And that moment was lost in Egypt after 2014.

Another dimension is crucial, in addition to societal pressures (if any), namely to help revamp civil-military relations. The main challenge facing this process is bringing constitutional, legalistic, and hierarchical considerations back in the complex relations between the military institution's high command and civilian elected rulers, whereas authoritarian regimes are based on an institutional/constitutional mess that gives ample room for maneuvering to the networks directly linked to the executive (or related to it by familial, regional, tribal, or ethnic ties) and incidentally to the military as an untouchable sector of the regime. The (re-)writing of the constitution is an essential first milestone to establish (or not establish) civilian oversight.

This process of re-institutionalization goes further and should not be taken for granted. As exemplified by comparative cases in other areas (but comparison does not imply any sense of servile imitation), the redefinition of civil-military relations toward deeper civilian control of the armed forces is a complex and costly process which requires a combination of political clout, institutional resources, and expert knowledge on defense topics.⁵⁵ The civilian control of the armed forces is a complex public issue that requires the devising of policies and strategies for the incorporation of the military into the institutions of a new democratic regime. In some cases, this process goes so far as to reunify the military under a single chain of command (whereas the military was fragmented by the former authoritarian regime) and to reorganize the armed forces on the basis of organizational constraints (and no longer political imperatives). Furthermore, civilian control entails the proper inclusion of the military in a new democratic regime: The issue of loyalty is a basic factor which

⁵⁴ Interview with General al-Sisi, *Al-Masri al-Yawm*, October 6, 2013, for some details.

⁵⁵ On the Spanish process that has been seriously documented, see Felipe Aguero, *Soldiers, Civilians and Democracy* (Johns Hopkins University Press, Baltimore 1995), and Narcis Serra, *The Military and Transition* (Cambridge University Press, Cambridge 2008).

necessitates sufficient changes in the values and professional profile of the military in order to preclude it from seeing itself as above the (civilian) political fray or as a savior of the country. The process of transition (or consolidation) cannot be considered to be finished if it does not manage to resolve the issue of the military in its two-sided dimensions: the exclusion of the military from political affairs (to end military interference in one form or another in policy-making processes) and the affirmation of the prerogatives of civilian authorities in military affairs.⁵⁶ Lessons learned from other cases demonstrate that the most important requirement for the control of the military is to make democracy work. As a corollary, the weakening of the re-emerging (civilian) political system will give the military some additional role in the transition.

This endeavor for control based on constitutional law and exercised by civilian institutions never materialized in Egypt. On the one hand, the primary civilian challenger to the military, the Muslim Brothers, never broached on the subject of control exerted on the military and catered for military interests (see Part V-C). Reforms in civil-military relations never materialized. And the civilian leadership (of the Muslim Brothers) from August 2012 to July 2013 had little incentive to learn about defense, because it was ensconced by its many other priorities (to stay in power and to advance some parts of its ideological agenda, though cautiously, in some sectors), and it was more likely to temporize and to choose to do nothing regarding military topics. On the other hand, a robust political system, with a governing coalition and an opposition consistently monitoring and censuring government action, never went to birth in Egypt. Instead it gave way to a deep ideological polarization between the Muslim Brothers and a motley group opposed to them spearheaded by young revolutionaries and secular parties: Political decisions were transformed into existential and ideological issues (identity, the identity of the state, the thematic of the “civic state”, the place of Shari‘ah, etc.). And the military emerged as the arbiter between polarized political forces, a setting not conducive to addressing the topic of civil-military relations. As a consequence, in Egypt in 2013, the thrust to subject the military to some form of democratic control has been blunted and the military left to its own devices since July 2013 has tried once again to maximize its influence.⁵⁷ This specific Egyptian setting left the military as the holder of the balance, then, as the sole institution keeping it afloat after a hectic process of transition (2011–2013).

In a further and different development since July 2013, the military’s high command has striven to create a new regime by extinguishing the above-mentioned trends, in the first place the unprecedented street activism and also a powerful Islamist political organization, the Muslim Brothers and at the end all political games. There has been a new militarization of power unknown before in Egypt: The military under Mubarak was an essential pillar of the regime, yet the Mubarak system stood above the military; this is no longer the case after July 2013. The military has now been at center stage, with an ability to serve as a convener for a new authoritarian coalition, an alliance of state institutions (the police, the judiciary,

⁵⁶ For some details on policy-oriented measures (revamping of ministries, parliamentary control, etc.), see Philippe Droz-Vincent, “Prospects for Democratic Control of the Armed Forces” (2014) 4 *Armed Forces and Society* 40, 696–723.

⁵⁷ President Mursi in his June 26, 2013, speech (just before being deposed by the military’s ultimatum) tried to highlight that he was in charge of the military (“we have succeeded in establishing successful civil-military relations,” “the president is the supreme commander of the armed forces”), with a final sentence which sounds like wishful thinking: “the country’s institutions, including the armed forces, are working in complete harmony as long as each plays its assigned role according to the constitution.”

and the bureaucracy), religious institutions (Al-Azhar, the Coptic Church), private businessmen, some Salafi parties, and some secular parties.⁵⁸

The military has been able to fully impose its own political narrative and to shape political outcomes according to its will. It has gained a legitimacy of its own, in a context of strong expectations (of a better socio-economic situation) and in a renewed era of military populism, along with a context of (unspecified) external and internal (the Muslim Brothers as a “terrorist organization”) threats against Egypt, crystallizing in the election of General (then Field Marshal) Al-Sīsī as president in 2014. The military has also used intensive repression to buttress its rule. Repression has been upgraded to punish opponents in pinpoint fashion and systematically, either the Muslim Brothers or young revolutionary activists (*shabāb al-thawrah*), who were opposed to them in July 2013 (but joined them in prison thereafter!), along with strong repression of independent voices and heavy propaganda in the media. The difficulty of pluralistic practices in transitional setting in 2011–2013 (and the ensuing polarization of politics) has made it easy for an incoming dictator to claim that a strong regime will be a necessary means. The ideological divisions in Egypt have seemed intractable and detrimental, as the structural problems that generated the January 2011 uprising were not addressed. And the al-Sīsī regime has gradually instilled among Egyptians a perception of unmanageability, what was perceived—and built through media and talk shows—as the loss of control by the Muslim Brothers and the exhaustion of democratic practices presented as dead ends. Furthermore, violence in Upper Egypt (Sa’id) or in the Sinā’i has been presented as paving the way to the rule of “a strong man” and military “effective” rule. And in this initial stage of military coup and also due to the high degree of exhaustion in Egyptian society, the new military-led ruling coalition has succeeded in imposing a complete demobilization of the Egyptian political space, at least temporarily.

VI. CONCLUSION

The military as an institution of the state has been a crucial actor, along with massive social mobilizations in public spaces against authoritarian rule, to open up transitional processes in the Arab world since 2011. The military was not well geared toward the management of change, even when it kept its coherence and harbored a strong will to assert itself—in some cases, it fractured and felt prey to fragmentation. In all cases, the military has been propelled into a period of radical changes, namely transitions from authoritarian rule to the exceptional circumstances of regime change with their high degrees of uncertainty. However, when it has kept its organizational coherence and has not been engulfed by the wave of changes in particular, it has tried to retain its prerogatives, namely all the roles the military had acquired during years of enduring authoritarian rule and in transition. The military has then had a tendency to try to translate its lingering power under authoritarian regimes into new rights in newly rebuilt systems by keeping veto powers on essential decisions in some domains away from the purviews of elected civilian leaders and in behind-doors closed deals, as exemplified by Egypt’s transitional process in 2011–2013. And in Egypt in 2013, it took power in a direct way. In cases where the military was severely weakened during the transitional process, this setting did not reveal itself as an asset for new civil-military relations, as exemplified by Libya, Yemen, and presumably Syria.

⁵⁸ Philippe Droz-Vincent, “Civilianizing the State, Reflexions on the Egyptian Conundrum,” Washington, Middle East Institute, May 14, 2014, <http://www.mei.edu/content/map/civilianizing-state-reflections-egyptian-conundrum>, accessed June 15, 2015.

What was at stake was the unraveling of all the prerogatives the military managed to carve out in any given polity during years of authoritarian rule. Herein lies the importance of constitutional and legal redefinitions of different spheres in civil-military relations and the possibility (or not!) of new relations between the military and emerging civilian political systems in the Arab world in transition. The enduring and complex transitions in the Arab world did not let lot of room for radical changes. Revolutionary activists and civil societies contemplated for some time in 2011–2013 the prospects of overseeing the military, but their role was not relayed by the workings of re-emerging political systems that might have helped foster control based on law and exercised by civilian institutions, an essential factor to create and then enhance control in civil-military relations. And the Arab uprisings have not led, five years after their promising beginnings, to the emergence of strong civilian authorities (meaning also a robust competition between incumbents and the opposition) able to play on institutionalization and professionalization to further control Arab militaries that were coming out an era of authoritarian enduring rule. Civil-military relations have changed since 2011, but not to the degree previously thought by proponents of civilian control.

The Changing Role of the Military in Mauritania

MOHAMED DRISS HORMA BABANA *

I. INTRODUCTION

In October 1960, a series of negotiations began in Paris culminating in the Treaty of October 19, 1960, under which Mauritania came out of the French Community to gain independence. The treaty was ratified by the French National Assembly on November 28, 1960, which was the first day in the history of the independent Islamic Republic of Mauritania. When Mauritania gained full independence, it was in a desperate state in all social, economic, and military domains. It did not have then a national army, except for a set of ground army units mostly formed of light Camel Corps, which were equipped with individual weapons and were limited in number and led by French officers who were attached to the National Authority. With colonialism coming to an end, Mauritania embarked on building itself under critical international circumstances which made it possible for it to accelerate the establishment of a Mauritanian Defense Force. Thus, the law establishing the Mauritanian army was passed three days before the declaration of independence, in view of its importance in building the state and accomplishing the establishment of its institutions. Law No. 60-189¹ providing for the establishment of the military structures under the name of the Armed Forces of Mauritania was issued on November 25, 1960. Consequently, work began on forming the military units inherited from French colonialism, whose role was to preserve the unity of the country and to defend it, maintain order and security, and ensure

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¹ Art. 1 of Law No. 60-189 of November 25, 1960, establishing the National Armed Forces of the Islamic Republic of Mauritania, provides: "Pour assurer la défense du territoire national, le maintien de l'ordre et le respect des lois des forces armées nationales sont créées en Mauritanie," Source: Journal Officiel de la République Islamique de Mauritanie 1961 49.

the application of laws and regulations. These armed forces consisted of light Camel Corps equipped with individual weapons and some light machine guns. As already mentioned, they were limited in number and led by French officers who were attached to the National Authority. The Camel Corps assumed the two roles of ordinary soldiers and judicial police. From a combat standpoint, they performed the same role assigned to other units. It should be noted, however, that the positions of the army chief of staff and heads of offices continued to be occupied by French citizens until 1964. Mauritanian armed forces nowadays consist of several formations, namely:

The National Army, which consists of ground forces, navy forces, and air forces, the National Gendarmeries, established under Law No. 62-121, issued on July 18, 1962,² as an integral part of the national army and are charged with tasks throughout the national territory for ensuring public security, protection of property, maintenance of order, and law enforcement, and the National Guards, armed formations directly attached to the Ministry of the Interior under the Legal Order 80-174, issued on July 22, 1980.³ They are charged with permanent tasks such as maintaining security and order in cooperation with the Gendarmeries and the police, and like the rest of the armed forces they contribute to the defense of the homeland. The National Guards are also charged with the task of intelligence and have for this purpose a large network covering all provinces and administrative centers in the country.

The fledgling state attached high hopes to the national armed forces in pushing forward the process of economic and social development while keeping them away from being indulged in the political domain so as to preserve their unity and effectiveness. However, the events of ethnic bloodshed witnessed by the country in 1966 made the government modulate the prevailing view of keeping the military away from politics. Therefore, it was decided to integrate the army in the People's Party of Mauritania; this was actually done in the party's second conference held in 1971 at which it was emphasized that the integration of the armed forces in the party would serve the supreme national goals. Pursuant to the decisions taken by the conference, forums were held for the leaders of the national army and the party during which a theoretical perception of the army's political direction was developed aimed at defending the territorial integrity, fighting poverty, maintaining national unity against regional, tribal, and racial conflicts, and consolidating a sense of duty.⁴

II. THE IMPLICATION OF THE CONFLICT BETWEEN THE AL-BIDĀN AND THE BLACK-AFRICAN POPULATION

The military establishment has played an important role in establishing security and order and exercising control over the state of chaos and putting a limit to the confusion resulting from the cultural crisis the country has experienced since its inception. These events

² Law No. 62-121 of July 18, 1962 on the service of the Gendarmerie Nationale, Source: Journal Officiel de la République Islamique de Mauritanie 1962 91/92.

³ Order No. 80-174 of July 22, 1980 repealing and replacing the Law No. 63-018 of January 18, 1963 on the organization and status of the National Guard, Source: Journal Officiel de la République Islamique de Mauritanie 1980 522/523.

⁴ Resolution of the Second Ordinary Congress of 1966, Source: Archives Nationales de Mauritanie, Nouakchott.

have also prompted the military toward seizing power. From the time France created Mauritania under the ministerial decree issued on December 27, 1899,⁵ Black-Africans living in Mauritania had been enjoying a distinct status as a result of their motivation to access French schools, which were vehemently resisted by *al-Bidān*, “the Arab race”. Therefore, individuals of the Black-African community had occupied important positions in the colonial power and also in the administration of Mauritania upon independence, due to the difficulty of finding Arabs with fluency in the French language during that period of time.⁶ The colonial power had fueled the nationalist sentiments of the Black-African community and their pride of Afrikaans, thereby spreading an atmosphere of distrust between them and the Arab community to the extent that if one community had intended to take a certain step, the other community would interpret this as being designed to damage its interests and compromise its own culture and identity. Consequently, access to and the maintenance of power, which were the focus of the conflict that raged between the two communities in independent Mauritania, were critical means for each community in preserving their gains and maintaining their cultural affiliations and specificities. Neighboring countries were not immune to the manifestations of the Mauritanian conflict between the Arab and Black-African communities. The former always looked forward to being linked to their Arab roots in the north, whereas the other tended toward the south on the grounds that their fellow compatriots constitute the communities of sub-Saharan African countries.⁷ In 1961, only one year after independence, the first flagrant conflict erupted between the two communities during the founding conference of the Mauritanian People’s Party, which was solely to lead the country until 1978, the time when Mukhtār Ūld Dādāh was overthrown.⁸ In that conference, dispute developed over the level of Black-African representation in the party, since the Black-African community felt that the number and quality of positions being assigned to its members in the party did not reflect their number and their influence in the new Mauritanian society.⁹ Thereafter, crises and conflicts rolled on between the two communities with the result that any decision taken by the ruling authority was seen by Black-Africans as a detriment to their interests and aimed at increasing their exclusion from decision-making positions and, even, at wiping them out of the state apparatus, which the Black-African community believed had been hauled by the Arab element since independence.¹⁰ In each of those crises and conflicts, the ruling authority in Mauritania did not exclude the possibility that Senegal had been playing a role, since it had always showed interest in, and support for, the Black-African movements. The most serious cultural conflict between the two communities broke out when the authorities imposed the teaching of the Arabic language in schools. This led to a strike by Black-African student classes in January and February 1966. Certain Black-African prominent figures showed solidarity with the state of turmoil, which escalated from protests in classrooms into clashes in which sticks

⁵ Philippe Marchesin, *Tribus, ethnies et pouvoir en Mauritanie* (Karthala, Paris 1992) 72.

⁶ Charles C. Stewart, “Une interprétation du conflit sénégal-mauritanien” (1990) 54 *Revue du monde musulman et de la Méditerranée* 161, 162.

⁷ Philippe Marchesin (n 5) 71.

⁸ Mukhtār Ūld Dādāh was the first president of Mauritania. Further reading on him and his governance: Alfred G. Gerteiny, *Mauritania* (Praeger, New York 1967).

⁹ Parti du Peuple Mauritanien (PPM): Congrès constitutif 1961, Source: Archives Nationales de Mauritanie, Nouakchott.

¹⁰ See in this connection: Amadou Tidiane Bal, “L’évolution de la politique extérieure de la République Islamique de Mauritanie depuis 1960 et ses incidences sur la question nationale,” mémoire de séminaire de relations internationales (I.E.P. de Grenoble 1984).

and edged weapons were used on the streets of many neighborhoods in the capital city of Nouakchott, resulting in several deaths and casualties.¹¹ Ethnic clashes recurred in 1968 when the Arabic language was announced as an official language along with French. The Black-African community was afraid that the steps being taken by the Mauritanian regime in the field of Arabization would threaten their status in the state and marginalize their role in the society while strengthening the ability of *al-Bidān* to control and their monopoly of power.¹² The Arabization procedures and the gradual departure from the Black-African environment led to increasing reactions on the part of the organized Black-African community.¹³ The community carried out several activities to translate its position into action, but was faced each time with repression and arrests. Its action movement reached a peaked in October 1987, when the then existing regime declared that it had thwarted an attempted coup hatched by officers of the Black-African community to seize power.¹⁴ This declaration was followed by extensive campaigns to purge the administration and the army of the *al-Takulor*,¹⁵ the execution of three Black-African officers, and the death of certain prominent Black-African figures who were reportedly tortured under detention.

III. THE MILITARY AND THEIR ROLE IN CONFRONTING CRISES

The role of the military is not confined to the traditional tasks of external defense in the event of war or to internal security, but they contribute more and more to the overall development effort. The following paragraphs will discuss two samples of crises which are at the core of the routine tasks assigned to the armed forces and which have contributed in one way or another to the evolution of the role of the military in society.

A. The Military and the Western Sahara Crisis

Desert warfare had a significant impact on increasing the numbers of the members of the national army, which did not exceed 1,500 troops in the first years of independence, but reached 35,000 troops with the end of War. Mauritanian foreign relations marked a qualitative change in the early 1970s. After Mauritania was recognized by Morocco, at a time when the region witnessed intensified tripartite activity to liquidate Spanish colonialism of the desert,¹⁶ the relationship between those two countries was characterized by Mauritania's subordination to the Moroccan track. Initially, the signing of the Treaty of Solidarity and Cooperation between Mauritania and Morocco took place on July 8, 1970, and the *Tlemcen* Algerian-Moroccan summit was held on May 27, 1970. The most important activity in this connection was the holding of the "Town of *Nouadhibou*" summit in Mauritania on September 14, 1970, which included the respective three heads of state and from which a tripartite representative committee emerged, comprised of the foreign ministers of the

¹¹ Agence France Press, "Six morts dans une bagarre raciale," *Le Monde* (May 13, 1967) 5.

¹² Pierre Biarnès, "L'ordre a été rétabli en Mauritanie mais le conflit ethnique n'est pas résolu pour autant," *Le Monde* (February 19, 1966) 4.

¹³ Amadou Tidiane Bal, "L'évolution de la politique extérieure de la République Islamique de Mauritanie depuis 1960 et ses incidences sur la question nationale" in *mémoire de séminaire de relations internationales* (I.E.P. de Grenoble 1984).

¹⁴ Philippe Marchesin (n 5) 340.

¹⁵ One of the components of the Black-African community in Mauritania.

¹⁶ By "tripartite activity," the author refers to the cooperation between Mauritania, Morocco, and Algeria in the face of the conflict over the former Spanish territory of Western Sahara.

three countries for the purpose of following up on the political and diplomatic efforts aimed at decolonizing the desert. The final statement of the *Nouadhibou* summit reflected divergence of views among the three party states on the content of coordinating the matter of self-determination. Such divergence marked all subsequent bilateral and trilateral meetings alike.¹⁷ The follow-up committee met in Algeria on January 5, 1973, and in Nouakchott on May 9, 1973, to prepare the way for a tripartite summit, which was then held in Agadir, Morocco, on July 24, 1973, and culminated in the agreement of the three heads of state to adhere closely to the right to self-determination for the desert and to ensure the application of this principle within a framework, guaranteeing the desert population their right to express their will.¹⁸ During that period, Morocco sought to establish a bilateral coalition with one of the parties. It was extremely hard on Morocco to make concessions to Algeria. Therefore, making concessions to Mauritania, being the weaker link, was the only choice available so as to exclude Algeria from the tripartite claim, thereby exercising control over the desert, and to impose a *fait accompli* on it. Search went on in order to find a way to tempt the Mauritanian rulers to abandon their former ally, Algeria. During the conference of the Organization of African Unity held in Rabat in 1972, Morocco and Mauritania agreed on finding a bilateral solution to ensure the achievement of the respective interests of both parties.¹⁹ Morocco and Mauritania stepped up diplomatic efforts to resolve the desert issue. This was evident from the meetings which were held, almost daily, by the foreign ministers of the two countries with their Spanish counterpart and which led, following a number of developments, to Mauritania, Morocco, and Spain signing the Madrid Agreement on November 14, 1975. The Agreement provided for Morocco and Mauritania to take over the administration of the territory and for the Spanish presence to come to an end before February 28, 1976.²⁰ Based on the Madrid Agreement and the decision of the International Court of Justice on the desert issue,²¹ which opened the door to all kind of interpretations,²² Morocco annexed the northern part of the desert (i.e., al-Sāqiyah al-Ḥamarāʾ) to its territory, while Mauritania annexed the southern part of it (i.e., Wādī al-Dhahab). As a reaction to these events, especially following the incursion of Mauritanian and Moroccan troops into the desert land, Algeria sought to join and embrace the “Liberation Front of al-Sāqiyah Al-Ḥamarāʾ and Wādī Al-Dhahab”, known as the *Polisario*.²³ Immediately after the Spanish withdrawal on December 12, 1975, and the appointment of two governors in

¹⁷ Ali Al-Shami, *Western Sahara, the crux of fragmentation of the Arab Maghreb* [title translated from Arabic] (Arab World Publishing House, Beirut 1980) 232.

¹⁸ This, at least, according to the UN Resolutions. See only UN GA Res.3458 (December 10, 1975) UN Doc A/RES/3458.

¹⁹ Word went around then about a secret agreement concluded between Morocco and Mauritania to share the desert.

²⁰ For more information on the preparation for, as well as the consequences of the Madrid Agreement, see Carlos Ruiz Miguel, “Spain’s Legal Obligations as Administering Power of Western Sahara” (paper for the ARSO—Association de soutien à un référendum libre et régulier au Sahara Occidental), <http://www.arso.org/CRuizPretoria.pdf>, accessed April 1, 2014.

²¹ *Western Sahara* (Advisory Opinion) 1975, <http://www.icj-cij.org/docket/index.php?sum=323&p1=3&p2=4&case=61&p3=5>, accessed April 1, 2014.

²² See in this connection: Maurice Flory, “L’avis de la C.I.J. sur le Sahara occidental (16 octobre 1975)” (1975) 21 Association Française du Droit de l’Informatique 253; Maurice Barbier, “L’avis consultatif de la Cour de La Haye sur le Sahara occidental” (1976) 30 Revue Juridique et Politique Indépendance et Coopération 67; Charles Vallée, “L’affaire du Sahara occidental devant le Cour de La Haye” (1976) 71 Revue Maghreb-Machrek 47; Mohamed Bennouna, “Le Sahara occidental devant la Cour internationale de Justice” (1976) RJPEN No. 1 81.

²³ The *Polisario* had an office in Nouakchott and have exercised their activities freely in Mauritania since 1973.

al-Sāqīyah al-Ḥamarā' and Wādī al-Dhahab to represent Morocco and Mauritania therein, respectively, Algeria mobilized its troops deep in the desert along with the *Polisario* fighters and insisted on securing the transfer of the largest possible number of the desert population to Tindūf, i.e., the western-most province of Algeria, under the pretext of an existing security vacuum and prospects of imminent war. Diplomatically, Algeria declared—following talks held in Libya—the creation of the “*Ṣaḥrāwī* [Desert] Arab Democratic Republic” on February 27, 1976, as a message addressed to the international community. *Ṣaḥrāwī*-Algerian coordination had later developed into a comprehensive diplomatic, media, and military action strategy against the Mauritanian-Moroccan coalition, which resulted in an abrupt end to Mauritanian-Algerian diplomatic relations on March 7, 1976, as well as to the Moroccan-Algerian diplomatic relations.²⁴ The *Polisario* managed to form a *Ṣaḥrāwī* force using the resources and means placed at its disposal by regional powers (Algeria and Libya). War of attrition had thus begun against the Mauritanian-Moroccan coalition. The *Polisario* began launching their military operations from the Algerian territory in December 1975, focusing on the Mauritanian side, which was the weaker of the two rivals in the struggle, in an attempt to force it to abandon Morocco, and so as to use it later on as a friend through whose borders attack on Moroccan forces would be facilitated. Mauritania incurred serious damage as a result of the *Polisario*'s intensive attacks, especially after the presidential palace in Nouakchott had been hit and the ore iron mines bombarded; the harshest of all was the Zouérate operation perpetrated in 1977, in which Mauritania incurred heavy losses.²⁵ With its meagre resources and given the fact that the Mauritanian army consisted then of 2,000 troops only, the government of Mukhtār Ūld Dādāh was confronted with two difficult choices as a result of the desert military operations; either it had to be aligned with the Moroccan plan while bearing its consequences, or it had to gradually withdraw from a war the brunt of which it could not endure.²⁶ Suffering from the *Polisario*'s blows, Mauritania was finally forced to sign a mutual defense treaty with the Kingdom of Morocco on June 18, 1977, which provided for the formation of the “Supreme Moroccan-Mauritanian Defense Body” under which 9,000 Moroccan troops had been deployed in garrisons on the Mauritanian soil. France also intervened in the conflict following the bombing of the ore iron mine in Zouérate, a main supplier to the French car factories, under the pretext of protecting the French community in the north of Mauritania, especially after the capture and killing of French persons. The French intervention was manifested in the provision of “Jaguar” fighter air cover for the Mauritanian-Moroccan combat forces. This French move was regarded as a retreat on the part of the Mauritanian regime from the gains it had achieved at the beginning of the 1970s.²⁷ Grumbling began developing about the war, which threw Mauritania once again into the arms of the former colonial power and turned it

²⁴ There was talk at the beginning of 1975 about a secret agreement concluded between Spain on the one hand and Algeria and the *Polisario* on the other hand, whereby Spain would bring the desert to independence through controlled self-determination guaranteeing the interests of the former colonial power with the Spanish troops abandoning their positions gradually in favor of the *Polisario* in exchange of the release of captive officers held by them. See: Constant Hames C.R.E.S.M., C.E.A.N. “Introduction à la Mauritanie” (1979) 48 *Archive des sciences sociales des religions* 273.

²⁵ For further reading: Philippe M. Voute, “Zouérate 1978—Supporting Air Operations, an Army Team Amidst France's African Strategy” (1997) USAWC strategy research project.

²⁶ Cf. Daniel Junqua, “La Mauritanie prise au piège,” *Le Monde* (February 15, 1978) 3.

²⁷ Guy Feuer, “La révision des accords de coopération franco-africains et franco-malgache” (1973) *Annuaire français de droit international* 730; Robert Taton, “Les accords de coopération: réaménagement ou révision fondamentale?” (1972) *Europe—Ostre-mer* no. 512 7–10.

into a playing yard for Moroccan forces.²⁸ The situation got worse day by day, with the result that on July 10, 1978, a military coup overthrew the civilian government and announced the country's withdrawal from the desert war, which it described as "fratricidal war".

B. The Military and Environmental Crises

In Mauritania, the Sāḥal, i.e., coastal, region has been exposed to waves of migrant locusts and bird populations, which are serious agricultural pests that cause damage to crops and spoil pastoral areas. Such disasters have resulted in negative residuals which are harmful to agricultural and animal wealth. To address this situation, the armed forces, especially the Air Force, have conducted extensive campaigns in cooperation with the departments of the Ministry of Rural Development, in which large areas of the country have been sprayed with insecticides, thus helping to eliminate most of these pests and reduce their negative effects. Also, in the context of the fight against desertification and in the field of re-vegetation, and with a view to reducing the remnants ensuing from the long years of drought which the country has experienced since the beginning of the 1970s, the armed forces have implemented a large part of the relevant strategy set in that regard. Many flights have been conducted over wide regions of the country in which a process of aerial seeding has been carried out, resulting in considerable areas of land being afforested and creeping sand in vital areas being stabilized. Such efforts have also encouraged major segments of the population to stay in their places of origin, thus enabling them to engage in pastoral and agricultural activities. It must be noted as well that the armed forces have been carrying out search-and-rescue operations and providing assistance to stranded people in remote areas of the country. Such activities have saved the lives of many people, whether by way of providing them with medical evacuation or providing guidance to afflicted people who go astray or fall thirsty in difficult terrains of the country. In addition to the armed forces' contribution in various areas of economic and social development, they are committed to countering many threats posed by piracy, smuggling, terrorism, and illegal immigration.

IV. THE POWER OF THE MILITARY IN THE CONTEXT OF GOVERNMENT

The interest of the Mauritanian army in politics has been clearly demonstrated through the toppling of existing regimes and the seizure and exercise of power. The phenomenon of seizure of power by the military through military coups is a global phenomenon which began developing in the 1920s. It gained momentum in the 1950s and 1960s until it has become a general, striking phenomenon in Latin America, Africa, and Asia. The number of military regimes in these regions has exceeded that of the civil regimes altogether, whether totalitarian or democratic. In other words, military coups have developed as the most prevalent way of gaining control of the supreme power in such regions. The intervention of the military in politics mostly results from two factors, namely: First, the military's inability to achieve their political goals through persuasion and expressed desire, which drives them to resort to a military coup. Second, the nature of the political system and its negative features, which may sometimes drive the military to intervene with the intent of undertaking correctional action or exerting pressure in favor of one party or another.

²⁸ See in this sense: Howard Schissel, "Le prix de la Guerre des sables: la Mauritanie dans l'engrenage saharien," *Le Monde diplomatique* (June 1977) 1, 23.

A. The Impact of Military Coups d'État in Mauritania

Like other states, Mauritania passed through a series of military coups during the past four decades. The first phase, which started in 1978, was marked with direct intervention of the military in the management of the political system, while the second phase, which started in 2005, to a varying degree involved civilians in the political game, but under the tutelage of the military leadership. The coup of July 10, 1978, was the first direct move of the military to seize power. It was carried out by a group of officers who formed what was known as the "Military Commission for National Rescue" headed by Colonel Muṣṭafā Ūld Muḥammad Sālak. Within one year Officer Muḥammad Ūld Būsif carried out a new coup, converting the aforementioned military body to the "Military Commission for National Salvation." The cycle of internal coups in the Military Commission and the numerous counter coup attempts altogether led to significant change in the Military Commission, which brought Colonel Mu'āwiyah Ūld Ṭāya' on December 12, 1984, to the chairmanship of the Military Commission and the presidency of the state.²⁹ Mu'āwiyah's rule was also confronted with many failed coup attempts until on Wednesday, August 3, 2005, the "Military Council for Justice and Democracy" succeeded in overthrowing this rule, which had lasted for twenty-one years. Three years later, another coup took place, on August 6, 2008, led by General Muḥammad Ūld 'Abd al-'Aziz, by which he ended the powers of President Sīdī Ūld Shaykh 'Abdallāhi. The phenomenon of military coups, especially on the African continent, has been studied with varying interpretations.

Many African countries have acquired independence while lacking the means of survival due to the nonexistence of the necessary infrastructure, economic backwardness, and a nomadic state of life, which are usual in communities that are unable to successfully regularize their entry into a modern state. In these countries, the army then is the only organized force, and the seizure of power by the armed forces is not a transient state, but rather a natural stage in the evolution of the respective communities.³⁰ Nevertheless, the idea that the military's seizure of power is attributed to the mentality of civilians who always drive the state toward an abyss due to their inefficiency and the spread of corruption in their ranks and the political rivalries which paralyze them³¹ is inconsistent with the situation in Mauritania, where many of the coups and coup attempts were actually directed against existing military regimes.

The coups witnessed by Mauritania led to constitutional charters being drafted, which gave absolute powers to the armed forces in running the country and even went to the extent of rendering the armed forces alone the sovereign power as provided for in the Charter of 1985.³² These charters differ in the degree of involving civilians in the conduct of public affairs, and they are also characterized by lack of detail in organizing public authorities on the grounds that their period of validity is of a temporary and transitional nature pending the establishment of institutions to rule the country. The reasons usually advanced by the military to justify their toppling of a regime, which are often the lack of democracy or the deviation from the right track, have raised the ire of many writers, especially in Egypt, after the success of the revolution and the control of power by the Military Council, when

²⁹ Ūld Ṭāya' was the fifth president of Mauritania since the state's independence from France and after Ūld Sālak the second to gain the presidency of the state by means of a coup d'état.

³⁰ See Mustapha Benchenane, *Les coups d'Etat en Afrique* (Editions Pubisud, Paris 1983) 30.

³¹ Mustapha Benchenane (n 30) 17.

³² See in this connection: Ahmed Salem Boubout, "Regard sur la Charte Constitutionnelle du 9 février 1985" (1987) 2 *Revue mauritanienne de droit et d'économie*; and Pierre Robert Baduel, "Baath, crise du Golfe et relance démocratique en Mauritanie" (1992) *Annuaire de l'Afrique du Nord* 26.

President Husnī Mubārak stepped down in January 2011. They have amply explained that democracy and militarism are two opposites which proceed on two parallel lines that will never intersect at any single point and that nothing else is more hostile to real democracy and genuine pluralism than the military due to the nature of their upbringing, their duties, and the objectives assigned for them to fulfill. Therefore, how could they be affiliated with democracy? In an article published in the *New York Times*, Steven Cook, an expert at the American Council on Foreign Relations, emphasizes that “the interests of the military are in conflict with the fundamentals of democracy which encompass the concept that the people shall be the source of legitimacy and that the activities of the military shall be subject to civilian control”.³³ It is certain that the armed forces in Mauritania, which advance the foregoing justifications to support their actions, did not claim that the military entities they set up for the purpose of running country’s affairs were democratic, even though such entities made “democracy” part of their names.³⁴ Nor did they claim that they only exercised control on the institution of the head of state while unleashing the elected parliament and the political parties and public freedoms, such as the Supreme State Council of 2008, to play their respective roles. It is also certain that all these military entities had decided that they were of a temporary nature and that they would disappear once the democratic institutions they were putting in place had been established during a longer or shorter term, depending on the amount of internal and external pressures.³⁵

B. External Factors Influencing the Military’s Role in Government, Leading to Internal Reform

External factors have had a clear impact on accelerating an end to the control of the Military Commission for National Salvation, which carried out the first coup in Mauritania in 1978, and on reaching an acceptable conclusion of the democracy which had been promised and awaited for thirteen years.

Mauritania was afflicted by the plight of its dispute with Senegal and the second Gulf War and the resulting deterioration of Mauritanian-Western relations. France sided in favor of Senegal in the crisis that erupted between the two neighbors in April/May 1989, whose devastating repercussions undermined the relations between ethnic groups. Also, the Second Gulf War in 1991, during which Mauritania showed sympathy with Iraq, caused damage to the Mauritanian diplomacy, whose margins of movement shrank significantly.³⁶ Inevitably, the Mauritanian authorities then had no choice but to shift over in the direction of Paris as a way to avoid the collapse of the state due to the suffocating and dreary isolation they were passing through because of their position in the Gulf War and the reluctance of the financial community to lend a helping hand to them as a punishment for the position they had taken in favor of Baghdad. The new international order of “market democracy” which had become the main driving force and the pillar of the international order after the fall of the Berlin Wall led to the speech made at the La

³³ Steven Cook, “Egypt’s Never-Ending Revolution,” *New York Times* (February 10, 2012).

³⁴ Such as the Military Council for Justice and Democracy of 2005.

³⁵ For an overview on the military governments and their objectives, including relevant declarations and the evaluation thereof, see Anthony G. Pazzanita, “Historical Dictionary of Mauritania” in Jon Woronoff (ed), *Historical Dictionaries of Africa* (3rd edn Scarecrow Press, Lanham 2008) 160 et seqq.

³⁶ Pierre Robert Baduel, “Chronique mauritanienne: 1990–1991, de la répression à l’esquisse d’une transition démocratique ou capacité d’adaptation d’un régime autoritaire” (1991) *Annuaire de l’Afrique du Nord* 886.

Baule summit, which linked provisions of aid to democratization and which is referred to by African regimes “to ease” their totalitarianism under the labels of multiparty systems and democracy, by way of adopting a variety of procedures and methods. In that French-African summit held in La Baule, in June 1990, French President Mitterrand announced in his speech the principle that would govern French-African relations. The granting of French aid to African states would henceforth be linked to the efforts made by them to establish a democratic system.³⁷ The French president specified the nature of democratic systems which would be eligible for support, namely those which were based on a multiparty system, free elections, and respect for human rights.³⁸ This speech was fully understood by the Mauritanian military regime. It led democratic changes with support from France and in the absence of the opposition, which was more preoccupied with personal differences and did not pay attention to laying down a social base or developing a political program. In the following year, 1991, a referendum was conducted on a constitution,³⁹ which was based on the principles and foundations of respect for human rights; adoption of political and intellectual pluralism; promotion of growth of civil society organizations; adoption of the principle of separation of powers and respect for the independence of the judiciary; provision of the requirements for achieving political participation; and adoption of the principle of peaceful transfer of power. Thus, political parties were established; and legislative elections were held, in which the party led by the head of state won. Also, presidential elections were held, in which the head of state, namely, Mu‘āwiyah Ūld Ṭāya, won as well.⁴⁰ This old-new regime continued until it was overthrown on the morning August 3, 2005, by a military coup led by Colonel E‘li Ūld Muḥammad Wall, who, as stated in the first communiqué, moved together with his compatriots to put an end to the despotic practices of that regime which the people had suffered from during recent years and which led to serious deviations threatening the future of the country. The new leaders promised to establish a genuine democratic system. They launched a national dialogue which resulted in a referendum on constitutional amendments reducing the presidential term from six to five years, preventing the renewal of such term more than once, and banning the amendment of these constitutional provisions. In 2006 and 2007, municipal, legislative, and presidential elections were organized without any member of the ruling military council or the government running for elections.⁴¹ A new civilian regime was set up based on the amended 1991 Constitution under the leadership of Sidi Muḥammad Ūld Shaykh ‘Abdallāhi, who was ousted after one year and four months in a coup on August 6, 2008, led by the two generals Muḥammad Ūld ‘Abd al-‘Azīz and Muḥammad Ūld Shaykh Muḥammad Aḥmad (the latter known as Al-Baghzuwānī), both of whom were discharged with others from the leadership of the Republican Guard and the National Chiefs of Staff,

³⁷ François Mitterrand, speech at the Franco-African summit in La Baule (1990), http://www1.rfi.fr/actufr/articles/037/article_20103.asp, accessed August 21, 2015.

³⁸ Interview with François Mitterrand, *Le Monde* (June 20, 1990) 3.

³⁹ Constitution de la République Islamique de Mauritanie, Source: Journal Officiel de la République Islamique de (1991) 763.

⁴⁰ See in this connection: Ahmad Salem Boubout, “La nouvelle constitution mauritanienne” (1994) *PENANT* (RDPA) 815, 129; Pierre Robert Baduel, “Baath, crise du Golfe et relance démocratique en Mauritanie” (1992) *Annuaire de l’Afrique du Nord* 263.

⁴¹ For further information about the two transitional periods, see: Ahamdy Ould Hamady, “Système politique mauritanien: d’une transition militaire à une autre: 03 Août 2005–18 Juillet 2009” (Mémoire DEA Université Gaston Berger de Saint-Louis 2007–2008).

respectively, just a few hours before they staged their coup. The Supreme State Council stressed, five days after the former president was overthrown, that

the intervention of the armed forces and security forces was the result of republican institutions being paralyzed, living conditions of citizens being deteriorated and the collapse of the state, in addition to the irresponsible and the totally illegal decision dismissing all leaders of the armed forces and security forces.⁴²

The intervention “came on this occasion to revive the high-level and responsible national conduct of the armed forces and security forces which were almost driven by that unusual decision to a state of rivalry among themselves.”⁴³ The new military regime, in turn, promised to take the necessary measures in order to ensure the continuity of the state and to oversee—in consultation with institutions, political forces, and civil society—the work of organizing presidential elections, which would enable the democratic process to be resumed in the country as well as be re-established on solid and permanent foundations. It also stressed that these elections would be organized within the shortest possible period and that the Council would ensure conducting them in a free and transparent way to enable a continuous and consistent exercise of constitutional authorities in future. Mauritians have been split for the first time in such circumstances into two directions, one of which follows the Mauritanian Front to Defend Legitimacy—which considers the coup in August 2009 as destroying legitimacy and as a setback and calls for the reinstatement of the elected president and distancing the army from political affairs—while the other direction, which includes the former opposition parties, sees that the coup was a necessary step to set the political scene in a more organized manner as a prelude to entering in a robust and steadfast way into a safe democratic system. The political parties have obligated the Military Council, *inter alia*, to specify the period of the transitional phase in order to ensure rapid return to normal constitutional life, and to set the transitional phase program in consultation with the various political actors in the country, and to involve all political actors in the implementation of such a program, taking into account the criterion of competence and integrity in the selection of the officials needed for the transitional phase, and to provide serious assurances about holding free and transparent elections.

Presidential elections were organized in July 2009 under the supervision of a coalition government, two-thirds of its members were from the opposition, which rejected the coup, and of an independent election commission, whose chairmanship was entrusted to the opposition with international observers being present. These pluralistic elections resulted in the victory of the head of the Supreme State Council, i.e., the former head of state, upon his resignation from the Council. The question that arises in this connection is: What are the grounds that sustain the responsibility of the armed forces to seize power in order to ensure respect for human rights, assertion of freedoms, expansion of political participation, adoption of the principle of separation, and cooperation of powers and achievement of the peaceful transfer of power? It was stated in the first military constitutional charter dated July 10, 1978,⁴⁴ that the armed forces, conscious of their responsibilities toward the people, have seized power to save the state and the nation from collapse and fragmentation and to safeguard national unity and the continuity of the state. In this context, the provisions of the constitution relating to legislative and executive powers have been abolished. The National

⁴² Article in *Horizons* (August 12, 2008) 1.

⁴³ Article in *Horizons* (August 12, 2008) 3.

⁴⁴ Journal Officiel de la République Islamique de Mauritanie (1978) 474–475.

Assembly and the only existing party, namely, the Mauritanian People's Party, have been dissolved. The Military Council for Justice and Democracy, led by E'li Ūld Muḥammad Wall, emphasized in the constitutional charter, which it issued in 2005,⁴⁵ on the organization and functioning of the constitutional public authorities during the transitional period, that the armed forces and security forces had taken upon themselves the pledge toward the people of Mauritania on August 3, 2005, to create conditions conducive to fair and transparent democracy and to establish genuine democratic institutions after the completion of a transitional period not exceeding two years. Also, it announced the discontinuation of certain provisions of the constitution and dissolved the parliament. While the text of the Constitutional Order of 2008,⁴⁶ which governs the interim powers of the Supreme State Council, provided that the powers of the President of the Republic who took office on April 19, 2007, were conclusively ended and that the Supreme State Council was exercising, in a collective manner, the powers entrusted to the President of the Republic by the Constitution of July 20, 1991, as amended, it also pointed out that the armed forces and security forces were exercising, through the Supreme State Council, the necessary powers to reorganize and run the state and public affairs during the period needed to organize a presidential election. In fact, this role utterly contradicts what is stated in Art. I of Law No. 60-189, issued on November 25, 1960, which provides for the establishment of the national armed forces of the Islamic Republic of Mauritania. It reads: "In order to ensure that the national territory be defended and to maintain order and respect for laws, armed forces have been established in Mauritania." The aforementioned law was issued by the late President Mukhtār Ūld Dādāh. Perhaps he had that article in mind on the day the military turned against his rule. He reported in his memoirs, entitled *Mauritania Is Destined for Major Challenges*,⁴⁷ that the military escort who approached him on the coup day had said to him: "Mr. President, the army has withdrawn its confidence in you; would you be kind to accompany me?"⁴⁸ He also reported that he was overwhelmed by a fleeting desire at that moment to get engaged in a legal discussion in order to explain that the army could not grab what was not its property and that it ought to adhere to the bounds of lawful legality. No one can deny that whenever the military succeeds in seizing power, crowds march and demonstrate, in an apparently automatic way, in support of the new rulers. Could this be ascribed to what was expressed by Jean Biddle Bokassa I, the Emperor of Central Africa, who was showing off how his people gave him support in whatever he did, but was interrupted all of a sudden by a journalist, who said to him that the people, nevertheless, had rejoiced at his fall in a military coup; Bokassa retorted confidently: "[T]he reason is that peoples are eager for change".⁴⁹ It is certain in Mauritania that despite the support a coup receives, thinking starts focusing immediately thereafter on preventing the reasons that usually lead to it and on setting up obstacles to avoid its recurrence. The Military Council for Justice and Democracy emphasized in 2005 that one of the most important reasons for coups was the exasperation caused by the length of time spent by one person at the head of the state, thereby referring to the twenty years' rule by Mu'āwiyah from 1984 to 2005. Therefore, it found a solution to this by amending the constitution to reduce the presidential term and by only allowing its renewal once. When things devolved to the president-elect, he took the

⁴⁵ Journal Officiel de la République Islamique de Mauritanie (2005) 1100.

⁴⁶ Journal Officiel de la République Islamique de Mauritanie (2008) 1173.

⁴⁷ Moktar Ould Daddah, *La Mauritanie contre vents et mares* (Editions Karthala, Paris 2003).

⁴⁸ *Id.* 20.

⁴⁹ Interview "Jeune Afrique fait parler Bokassa," *Jeune Afrique* (September 2, 1981).

initiative to ratify the African Charter on Democracy, Elections, and Governance,⁵⁰ which condemns nonconstitutional means to gain power and refuses to recognize coup perpetrators and prohibits standing for pro elections in the signatory countries. The interlocutors in the dialogue held in Dakar, in 2009, for developing a road map to address the crisis caused by the 2008 coup, stressed the necessity of defining the role of the military, thereby expressing their refusal to let the armed forces be involved in politics. It was also agreed by interlocutors in the dialogue held in 2011 between the majority supporting President Muḥammad Ūld ‘Abd al-‘Aziz and certain opposition parties to include within the amendments to the constitution a provision to the effect that “political power shall be acquired, exercised and devolved within the framework of the peaceful transfer of power in accordance with the provisions of this constitution. Coups and other forms of change of power that are contradictory the constitution shall constitute crimes not liable to limitation. Perpetrators and those who collide with them shall be punishable under the law, whether they are natural or legal persons.”⁵¹ This article has been detailed by Law No. 2013-010 on January 23, 2013, on combating coups crimes and other forms of unconstitutional power change as crimes against the security of the state⁵² Senior state officials are still lauding the results of the dialogue held in 2011, “which prohibits the military from undertaking politics.”⁵³

V. CONCLUSION

Mauritania acquired independence in 1960 and spent most of its existence under the control of military authorities. Therefore, the role of the armed forces in shaping the Mauritanian political scene cannot be ignored. However, the greatest difficulty in this connection lies in defining the role of the military in the political system,⁵⁴ as reflected in the adoption, but in the abolition thereafter, of a second paragraph to Art. 34 of the draft revision of the constitution, which was introduced at a plenary meeting of the parliament in February 2012 for adoption.⁵⁵

The paragraph in question reads as follows: “The armed forces and security forces shall constitute a republican institution which shall be guarantor of national sovereignty and territorial integrity of the State and shall be dedicated to the task of defending democracy and the State of law”.

⁵⁰ Law No. 2008-016 of April 29, 2008, authorizing the ratification of the “Charte Africaine de la Démocratie, des Elections et de la Gouvernance” signed in Addis-Abeba on January 30, 2007, Source: Journal Officiel de la République Islamique de Mauritanie (2008) 1169.

⁵¹ Constitutional Law No. 2012-2015 of March 20, 2012, revised form of the Constitution of July 20, 1991, Source: Journal Officiel de la République Islamique de Mauritanie (2012) 1262.

⁵² Journal Officiel de la République Islamique de Mauritanie (2013) 98.

⁵³ “Intervention of the Prime Minister of Mauretania in front of the Parliament,” *Horizons* (June 10, 2012) 1, 3.

⁵⁴ Some people argue that the best way to shut the door against the return of the military to power is not to let leave completely, but to retain them in one way or another. See in this connection: Ahmed Baba Miské, “L’armée et la démocratie” (2006) Nouakchott Info quotidien indépendant 1132.

⁵⁵ For an English version of the constitution, see https://www.constituteproject.org/constitution/Mauritania_2012.pdf, accessed March 17, 2014.

The Grip of the Army on Algeria's Political System

MADJID BENCHIKH*

I. INTRODUCTION

There are many countries where the army has played or still plays an important and even a predominant role in political life. The circumstances under which the army comes to power obviously differ from country to country, as do the institutions and policies they usher in. Regardless of the particular characteristics of the army's place and role in a country's political system, it is apparent that, in every case, the political systems they have established are authoritarian in nature. Although this article will only discuss the place and role of the army in the Algerian political system, it is useful to recall interventions by armies in Latin America, Africa, Asia, and sometimes even in Europe. Although the aim is to examine, through the role of the army, the forms and content of the authoritarian political system, one should constantly keep democratic principles and laws in mind—partly because for several decades, many armies, in particular in Algeria, have been saying that it is these principles they want to apply, and partly because democracy has been a central demand of popular uprisings in North Africa and the Middle East during the Arab Spring, which puts it squarely on the agenda. This article will discuss the authoritarianism of a political system militarized by the grip, stranglehold even, of the army, but in order to explain the situation it is worth considering how the democratic rights of populations are violated as a result. In the political and legal spheres that are our own, the reality of the army's role in the political system cannot be understood by relying solely on the rhetoric of those in government or the provisions of the laws that they have promulgated. In Algeria, the army has no political power under the terms of the constitution. However, this article will show that it does in fact exert a strong, indisputable grip on all the country's institutions. Both in the single-party framework that existed from 1963 to

* The author and the editors sincerely thank Ms. Rebekka Yates for translating this article into English.

1989, and the multiparty framework that has been in place from 1989 to date, the army has remained at the center of a system that its leaders, having established it, continue to direct. This is why understanding the Algerian political system requires us first to examine the place and role of the army in said system. This in turn is a difficult task because unlike its counterparts in many other countries, the Algerian Military Command neither claims to exert nor admits to exerting power. The Algerian army is careful to take center stage only very rarely and for relatively short periods of time. Both under the single-party system established shortly after the declaration of independence on July 5, 1962, in the 1963 Constitution, and during the multiparty system established by the constitutions of February 1989 and November 1996, the Military Command has denied the execution of any significant political power within the country. On the contrary, it claims that the army is at the service of and under the civilian authority of the Republic. The Algerian political system has deliberately presented itself as a democratic, nonauthoritarian system based on a democratic constitution, both under the single-party system and in the current multiparty context. The constitutions developed by the leaders after independence, as well as the National Charters (the Algiers Charter of 1964 and the Algerian National Charter of 1976), describe Algeria as a democratic regime in which the army does not exert any political powers. However, neither these core texts nor the rhetoric of the leaders are consistent with the political practice. We will see, for example, that in Algeria no President of the Republic—the core of the institutional system—has ever been nominated or elected without the consent of the Military Command. Moreover, the President of the Republic is not the only authority which is subject to this method of selection for the execution of important power.

It follows from these observations that it is not possible to analyze the role of the army simply by looking at the provisions of the constitution or examining the political rhetoric; the methodology of this article will need to include an examination of political practice in order to discover how the system works. When looking at the historical background, one might wonder how the Algerian people, who were able to organize and lead a renowned war of national liberation against the army of a superpower to live freely, ended up living under a militarized authoritarian regime. To shed light on this question, one must look at how the army, or more precisely the Military Command, established itself in political life in order to finally construct a system over which it could exert its grip. To explain the army's role in or grip on the Algerian political system, the author will first examine the circumstances under which the army established itself (Part II) and then how it currently exerts power (Part III).

II. THE CIRCUMSTANCES LEADING TO THE ARMY'S GRIP ON THE ALGERIAN POLITICAL SYSTEM

In Algeria, the question of the army's place in political life was raised and discussed within the organizations of the revolution even before the country's independence. The question was not posed in the same way before the revolution as it was after the gaining of independence. The questions concerning the relationship between the military and politics remain, however, even when they are not being discussed.

A. The Army's Role in the Nationalist Movement and during the Fight for Independence

As early as 1947, the nationalist movement, through the intermediary of the Algerian People's Party (APP), created a military organization called the Special Organization

(SO).¹ In fact, it was the political authority, the APP, who decided to establish the Special Organization and put individuals, chosen from among its main leaders, in charge of it. The military body was thus formally placed under the authority of the political organization and was run by political activists. This doubtlessly is what participants of the first Congress of the National Liberation Front (FLN) and the National Liberation Army, which was held in al-Šūmām in August 1956, would call “the superiority of the polity over the military”. This article shall later return to the circumstances in which this principle would be applied during the war of liberation. Insofar as the Special Organization is concerned, it is worth noting the manner in which Muḥammad Balwizdād and especially Ḥusayn Āyt Aḥmad, who succeeded him, operated at the heads of this organization. In terms of organization, recruitment, training, and the search for weapons, Āyt Aḥmad, who became head of the Special Organization, was the key instigator, both in theoretical and practical terms. As is often the case in clandestine and repressive circumstances, it is difficult to be specific as to the superiority of civilian or political power over military power. But there are other more important questions.

First of all, we can point out, as others have done,² that the president of the AAP, Maṣālī al-Ḥāj, distrusted the Special Organization. Maṣālī and some political leaders wanted to keep control of the organization of young people whom they considered too militant and who seemed to get carried away. In fact, some of these young militants later formed the “Group of 22”, who decided to resort to armed struggle against French colonialism, while others united in the “Group of Nine”, who began the armed fight on November 1, 1954. However, none of these militants resorting to violence can be characterized as soldiers.³ As G. Meynier writes, “the matrix of the FLN stems from the SO”. This also holds true for the first groups in the National Liberation Army (ALN), insofar as they predominantly comprised former activists of the SO. The initial architecture of the ALN was the result of the work done by the Special Organization and its activists. In practice, the superiority of the “military” thus seems established.

However, any clear separation of the military from the polity within the national liberation movement must not be overestimated, or systematized. Even during the entire period devoted to military-style organization, training, and implementation, those at the head of

¹ Although there had always been nationalist activists in favor of forming armed groups to fight against colonial occupation, it was not until February 1947 that the Congress of the Algerian People's Party (APP), by far the most important party in the nationalist movement, agreed to create the Special Organization (SO). This was a military and paramilitary organization tasked with providing military training to nationalist activists and establishing a weapons stockpile. A member of the political Bureau of the APP, Muḥammad Balwizdād, was given responsibility for the organization, with another member of the political Bureau, al-Ḥusayn Āyt Aḥmad, as his deputy. Āyt Aḥmad subsequently took over as head of the organization after Balwizdād fell ill. Between 1947 and 1949 he put in place the architecture of the SO, established the first groups, and acquired some small stockpiles of weapons. Following the so-called Berber crisis, Āyt Aḥmad was dismissed and replaced by Ben Bella, who would later be arrested. The SO was disbanded by the French colonial authorities from the early 1950s. For further information (in French), see Mohammed Harbi, *Le FLN, mirage et réalité* (Editions Jeune Afrique/STD, Paris 1985) 40. See also Mabrouk Belhocine, *Le courrier Alger-Le Caire 1954–1956* (Editions Casbah, Algiers 2000) 27 et seqq. See also Hocine Ait Ahmed, *Mémoires d'un combattant* (Edition Bouchène, Algiers 1990). Mahfoud Bennoune, *The Making of Contemporary Algeria 1830–1987* (Cambridge University Press, Cambridge 1988) 80. See also Phillip C Naylor, *Historical Dictionary of Algeria* (Scarecrow Press Inc., Lanham 2006) 373.

² Mohammed Harbi and Benjamin Stora, *La guerre d'Algérie* (Robert Laffont, Paris 2004) 422.

³ Mohamed Harbi and Benjamin Stora (n 2) et seqq.

the Special Organization, in particular its founder, Āyt Aḥmad, never stopped thinking of themselves as political activists. This partly explains why from the very beginning a distinction was made between the FLN, a political organization, and the ALN, a military-style organization—even though it was only after the Ṣūmām Congress in 1956 that the military's rules of engagement, *modus operandi*, and ranks were clearly enunciated. This article will try to explain the implications of the principle according to which polity would have superiority over the military, as decided by the Ṣūmām Congress.

The fact that this principle was adopted by the Congress must first and foremost be viewed positively, due to its suggestions that political efforts were to take precedence, both in terms of the mobilization of the people and diplomatic efforts to isolate France and promote, through the FLN, the prospect of independence. The principle of the superiority of the polity over the military did not flow from a desire to exclude those in charge of the ALN from decision-making. In the context of a war of liberation, an approach of that kind would have undoubtedly been fatal to the resistance. The heads of the *wilāyah*, or military regions, were the colonels of the ALN who exercised political and military responsibilities within the geographical limits of their respective *wilāyah*. The Ṣūmām Congress implicitly confirmed this practice through accepting that its members could also hold the posts of colonels or commanders in the ALN, thus simultaneously acting as political and military leaders.⁴

However, the principle of the polity's superiority over the military continued to be of critical importance as the armed struggle intensified, the battle zones grew larger, and the number of fighters increased. In addition to the arguments mentioned above concerning the importance of the political fight domestically and at the international level, there was also a need to coordinate initiatives and to prevent the *wilāyah* heads from setting themselves up as warlords of their own regions. This seems to point to the fact that the leaders recognized that the military must not subjugate populations by force and that the army must serve the political plan, thereby promoting the construction of a nonmilitarized state, as a precursor to the construction of a democratic state.

Gradually, the conditions of war on the ground and the assassinations of two leaders who were key advocates of this principle, al-ʿArabī Ben Mahidī (who was assassinated by the French Army), and ʿAbān Ramḍān (who was killed by ALN colonels carrying out a plot), served to ensure that the colonels were predominantly involved in the execution of the Algerian revolution. The Coordination and Implementation Committee (CCE) and subsequently the Provisional Government of the Algerian Republic (GPRA, hereinafter Provisional Government) did not have the means to control what was happening on the ground in any meaningful way. Once the colonels had disposed of ʿAbān, whose level of influence they had feared, they took decisions without bothering to obtain the permission of other members of the Provisional Government, even outside Algerian territory. Both external direction and internal resistance were therefore controlled by "soldiers". Even before the country's independence, the principle of the superiority of the polity over the military had turned into empty words.

On the eve of independence, and in particular after the signing of the Evian Accords March 19, 1962, the depletion of the forces, composed of internal resistance fighters, and the existence of an organized military force on the territories of Tunisia and Morocco

⁴ On the composition of the Ṣūmām Congress and the Coordination and Implementation Committee (CCE) that it appointed as well as the members of the various provisional governments of the Algerian Republic (GPRA) and of the National Council of the Algerian Revolution (CNRA), see Saad Dahlab, *Mission accomplie* (Editions Dahlab, Algiers 1981) 229.

allowed what was known as the "Frontier Army" (*l'armée des frontières*) to impose its choices more and more effectively. Finally, the Frontier Army took over power following Algeria's Independence.

Without going into the various conflicting ideas and competing personalities that led to the predominance of first the colonels, the original intention of the then Frontier Army behind the recruitment of the *junūd* (soldiers) to the Tunisian and Moroccan Frontier was to provide the guerrilla fighters in the internal ALN with trained armed forces. Unfortunately, the French Army succeeded in establishing huge electrified fences and surveillance that made moving weapons and troops extremely difficult. An external General Staff was thus constituted at the Frontier, which took advantage of the divides and disagreements which were known to exist between the ministers of the Provisional Government. Another influencing factor was that some of the leaders of the General Staff were eager to play an important role in the revolution.⁵ Particularly during the last year of the armed struggle, the General Staff of the Frontier Army was constantly asserting its power and its ambition. Since they were not responsible for any actions which occurred during the fighting, they could afford to criticize the Provisional Government. The General Staff also challenged the Provisional Government's claim to exercise authority over the ALN in its entirety, the Frontier Army, and the Army of the Interior. In order to undermine the Provisional Government, the Frontier Army publicly held them responsible for: the failings of the resistance within the country, problems with the Tunisian authorities, and the supposed or real inconsistencies of certain ministers, in particular at the level of the Inter-ministerial Liaison Committee. Claiming to be more nationalistic than the others, the General Staff also openly criticized the Evian Accords of March 19, 1962, which were concluded between the French government and the Provisional Government of the Algerian Republic. The General Staff tried to give the impression that it would have done a better job at defending the interests of the revolution by ensuring greater independence from France. Relations between the Provisional Government and the General Staff of the Frontier Army were such that coexistence became impossible. Eventually, the Provisional Government made the decision to disband the General Staff of the Frontier Army, but this tardy decision, taken on the eve of independence at a time when many leaders were preoccupied with the accession to power and seeking out the alliances that would get them there, remained a dead letter.⁶

After the Evian Accords, even before independence was declared, the General Staff of the Frontier Army no longer disguised its intention to play a key role in the independent state. It sought alliances everywhere—within the *Wilāyāt* of the interior and among the key political leaders. It won considerable support, amongst personalities such as Aḥmad Ben Bellah, one of the nine historic leaders of the revolution, and Farḥat 'Abbās, the former president of the Democratic Union of the Algerian Manifesto (UDMA), a political party, and former president of the Provisional Government. Other political or military leaders shilly-shallied or made up their minds based on what would be most profitable for them personally, rather than considering the nature of the state which the respective groups were planning to found, and without paying attention to the political plans of those with whom they were forming an alliance. After the ceasefire agreed on in the Evian Accords of March 19, 1962, the General Staff commanded by Colonel Huwārī Būmadyan decided to move the troops of the Frontier Army back into Algeria. Thanks to the various alliances that it

⁵ See Mohamed Harbi, *FLN, mirage et réalité* (Editions JA, Algeria 1980), and Gilbert Meynier, *Histoire intérieure du FLN* (Fayard, Paris 2002).

⁶ See Mohammed Harbi and Gilbert Meynier (n 5), Saad Dahlab (n 4), and Ali Haroun, *La septième wilaya. La guerre du FLN en France, 1954–1962* (éditions Le Seuil, Paris 1986).

had managed to forge and due to the neutrality of the leaders, Colonel Būmadyan gradually came to be seen as the leading power in independent Algeria. It was in this context that some *wilāyah* leaders (ALN of the interior) in the East and West of the country rallied or stood by without responding. *Wilāyah* IV, at the center of the country and close to the capital, confronted the Frontier Army in fratricidal and murderous battles. These one-sided battles affirmed the superiority of the Frontier Army. Gradually, all the forces that had joined or supported the command led by Colonel Būmadyan established themselves and played the most important role in the foundation of the structures of the new state.

B. The Frontier Army Marches towards the Control of Power after Independence

However, it should not be concluded that Colonel Būmadyan had complete power from then on. The situation was too complex, too unstable, and too delicate to allow him to establish himself unchallenged. Moreover, he was little known and had no political experience. For this reason, he got back in touch with key nationalist leaders such as Āyt Aḥmad, Aḥmad Ben Bellah, Muḥammad Būḍiyāf, and Muḥammad Khīḍar, even before they were released by France. Only Ben Bellah explicitly agreed to cooperate with him, hoping no doubt to outclass him thanks to his popularity and his earlier legitimacy in the liberation movement. The National Council of the Algerian Revolution, convened in Tripoli after the signature of the Evian Accords, failed to reach consensus and the decisions it took were badly worded, so that everybody went away thinking they could carry on as before. In Tlemcen, the General Staff and Colonel Būmadyan backed Ben Bellah, Farḥat ‘Abbās, Khīḍar, and other FLN political leaders, while other key leaders, including Āyt Aḥmad, Būḍiyāf, and Krim Belqāsim—to mention only the most well-known—sought to drum up forces to contain the former group or to get rid of them. The FLN completely collapsed. As one of the leaders of the French Federation of the FLN says, the summer of 1962 really was “the summer of discord”⁷.

But the divisions within the FLN as a political organization also applied to the ALN as the internal military organization. Without going into the details here (these can be found in the various works cited previously), the colonels, the *wilāyah* chiefs, responded in various ways, both to the stand taken by Būmadyan as chief of the General Staff of the Frontier Army against the Provisional Government and to the use of force by the Frontier Army against *Wilāyah* IV and the collapse of the FLN.

In 1962, following the signature of the Evian Accords and the cessation of hostilities, Algeria was left damaged by a war of liberation that had lasted for more than seven years, as well as by a chaotic political and military situation that had resulted from the divisions between the leaders of the FLN and ALN and the use of force by the General Staff. No other force had been able to pull together the military or political means to thwart the General Staff’s efforts. Even the General Union of Algerian Workers, a trade union organization set up by FLN trade union activists at the initiative of ‘Ayssāt Idir, decided not to back either of the protagonists and adopted the slogan “seven years, that’s enough”, thus seeming to dismiss the various players equally. This position of neutrality benefited the party that was

⁷ See Mohamed Harbi and Gilbert Meynier (n 5), Saad Dahlab (n 4), and Ali Haroun (n 6). See also Benyoucef Benkhedda, *L’Algérie à l’indépendance: La crise de 1962*, (éditions Dahlab, Algiers 1997), and Ferhat Abbas, *Autopsie d’une guerre* (Livres éditions, Algiers 2011). Benkhedda was the second president of GPRA, Abbas was the first.

strongest on the ground, which is to say the General Staff under Colonel Būmadyan and his allies, of whom Ben Bellah, Khīḍar, and ʿAbbās were the most prominent.

After independence was declared on July 5, 1962, Ben Bellah, the main ally of the General Staff, was made president of the governing council, with Būmadyan as vice president and minister of defense. Several younger members of the General Staff, promoted by Būmadyan, were appointed as ministers despite being unknown and lacking any political experience, among them Aḥmad Madaghri (interior), Sharīf Belqāsim (education), and ʿAbd al-ʿAzīz Būteflīqah (tourism). But his allies also took on important posts, notably ministerial roles: The National Constituent Assembly was presided over by Farḥat ʿAbbās; Khīḍar, a former historic leader, was appointed general secretary of FLN, which was extensively restructured under the new balance of power.

The first reshuffle began in 1963. ʿAbbās, president of the National Constituent Assembly, resigned following the adoption of the constitution under the aegis of a group in the party without his involvement. Al-Ḥāj Ben Allāh, loyal to Ben Bellah, was appointed president of the National Assembly. Following disagreements with Ben Bellah, Khīḍar, the general secretary of FLN, left the party and went into exile abroad. His place was taken by Ben Bellah, who thus accumulated the functions of President of the Republic, president of the Council, and general secretary of the only party (FLN).

Būḍiyāf, the coordinator of the group of historic leaders who had decided to declare the war of liberation on November 1, 1954, was arrested and then released. He was the first to establish an opposition party (the Socialist Revolution Party) and sought refuge in Morocco. Āyt Aḥmad created the Socialist Forces Front and conducted a resistance army from 1963 to 1965, before being imprisoned near Algiers, from where he escaped and fled to Switzerland. The rebellion by Colonel Shaʿbānī of the liberation army in the *wilāyah* in the south of the country was scaled down. His trial, before an improvised military tribunal, ended in his execution. The war declared against Algeria by Morocco in 1963 made any opposition to or dissidence against the establishment even more difficult. The head of the ALN's *Wilāyah* III, Colonel Muḥand ʿŪlhāj, who had supported the rebellion led by Āyt Aḥmad, rejoined the establishment to fight the Moroccan attack. Ben Bellah took advantage of this to seize the extraordinary powers afforded to him by the constitution in such circumstances. Būmadyan, with staff chosen by him, led the organization of the People's National Army (ANP). The Ben Bellah-Būmadyan duo seemed to be triumphing.

But disagreements quickly built up, as became apparent when it came to choosing staff and ministers. The decisions by Ben Bellah—President of the Republic, president of the council, and the general secretary of the only political party—to appoint a chief of staff of the new ANP, and then to dismiss ministers close to Būmadyan (Madaghri, minister for the interior; Būteflīqa, minister of foreign affairs) convinced Būmadyan to take action, no doubt for fear that he would in turn be dismissed himself. On June 19, 1965, Colonel Būmadyan—minister of defense and vice president of the Council—arrested the head of state, the president of the National Assembly, and some ministers and staff members who were close to Ben Bellah or hostile to the coup. The constitution, already suspended by Ben Bellah, remained suspended under Būmadyan, who appointed a “Council of the Revolution” composed of his cronies and padded out with some allies who had abandoned Ben Bellah. Colonel Būmadyan became president of the Council of the Revolution and head of state and remained minister of defense. From that point on, there was no civilian rival to the Military Command for the exercise of power. However, the exercise of power without the constraint of consistent civilian political power did not mean that struggles for power could not arise within the military itself.

In 1967, the army chief of staff, al-Ṭāhar Zbīrī, decided to stage a coup against Būmadyan. He succeeded in mobilizing some of the army and made for Algiers, but was stopped by the

air force. Colonel Sayyid 'Abid, the commander of the military region of Algiers-Blidah who had refused to allow the troops under his command to take part in this attempt, died under suspicious circumstances. All political and administrative staff suspected of being close to the instigator of the attempted coup were fired. From that point on, Colonel Būmadyan controlled all the powers in the country, which would remain without a constitution until 1976. He was the undisputed chief of the army and of the executive. The army's grip on the political system, despite the civilian government, was henceforth firmly established.

These various stages that mark the success of Colonel Būmadyan's march toward hegemonic power should suffice to show that the Military Command is at the heart of Algeria's political system. In Algeria, this conclusion has to be acknowledged, despite the claims of the Military Command leader that the army is in the service of the political powers and that it does not govern the country. This argument would at first glance seem to be made all the more credible by the fact that almost all ministers, heads of administration, and company heads are civilians. This means that on the question of the role of the army in the political system, not only is there an official rhetoric that denies that the army plays any political role, but there is also a semblance of an almost exclusively civilian composition of the government and various institutions. Būmadyan himself stopped appearing in military uniform. His military successors have followed this rule strictly. Whenever an officer is appointed as the head of a ministry or an important institution, he leaves the employment of the military and becomes a civilian, although he of course remains close to the army. This particular point naturally serves to strengthen the appearance of the government and other various institutions being mainly civilian, which is the intention if the political role of the army is to be denied. But it also makes it possible to avoid the risk of officers promoted to political roles getting ideas about trying to obtain more influence than they are given in a particular sector. Moreover, in an authoritarian political system, where the most important political personalities may be behind the scenes, ministers often do not play a genuinely political role: Instead, ministers are managers of economic and social sectors and not political leaders.

Certainly, the Military Command, as we have shown, cannot deny that it has intervened to support or dismiss groups or individuals, or much more seriously, to oust the President of the Republic as it did in June 1965. It will also be demonstrated that following the transformation of the system through the 1989 Constitution and the adoption of a multiparty system, the Military Command intervened in January 1992 to cancel the elections and pressure the President of the Republic, al-Shādhli Ben Jadid, into resigning. However, the Military Command, except in the case of the coup against Ben Bellah, has justified its interventions by claiming that it was only acting on government decisions. The Military Command also denies that it chooses heads of state before having them elected by universal suffrage; it denies any interference in favor of any candidate to the elected assemblies or the presidency of the Republic. This shows how much the Algerian army wants to maintain a civilian façade. Therefore, this article will have to look beyond the rhetoric and examine how the political system actually works. Before that, the reasons behind the Military Command refusing to admit that it exercises power will be considered.

III. HOW THE POLITICAL SYSTEM WORKS

The Algerian political system has operated under two modes of government: first, the one-party system that functioned following the country's independence, with the constitutions of 1963 and 1976; second, the multiparty framework that began with the 1989 Constitution, revised in 1996, which is the system that is still in place today. Descriptions of the various

institutions, an analysis of the conditions, and the scope of their transformations can be found elsewhere;⁸ the task here is to examine how the Military Command has exerted its grip on political power in these different political and judicial frameworks. As the one-party system was abolished in 1989, more attention will be paid to the current period.

A. The Army's Grip on the System of Government

Under the terms of the 1963 Constitution, the FLN, purged of its main opponents, was the only party, and was defined as a revolutionary vanguard. The party "realizes the will of the people," whose "aspirations it translates."⁹ Both theoretically and constitutionally, the single party instigated and controlled the direction of the state and the legislative power. Candidates in the presidential and legislative elections were nominated by the party, before being submitted to universal suffrage. If we are to judge by the rhetoric and the text of the constitution, Algeria was a one-party state, which is moreover how it has been described by constitutionalists who have attempted to analyze this regime.¹⁰ This system corresponds, at least from a theoretical point of view, to the Soviet model of the time. Thus as Juan J. Linz recalls, the official summing up of the Soviet philosophy says "only the party expressing the interest of the entire nation [...] is qualified [...] to control the work of all organizations and organs of power. The party realizes the leadership of all State and public organizations".¹¹ Before evaluating this system and examining how the army is placed within it, it is worth looking at the 1976 Constitution which, despite differences in drafting, adopts an entirely comparable system.

The 1976 Constitution was adopted on November 22, 1976, to succeed the 1963 Constitution after Colonel Būmadyan had held power for more than ten years following the 1965 coup.¹² After this constitution was adopted, Colonel Būmadyan was elected President of the Republic after being nominated by the FLN. One chapter addresses the "public function", which details the preeminent role of the party, and another chapter covers the People's National Army (ANP). As far as the single party is concerned, it remains the one upon which "the institutional system rests" (Art. 94). "The leadership of the country is the embodiment of the unity of the political leadership of the Party and of the State" (Art. 98).

In such a system, how is the army able to play the role that the various interventions referred to above suggest it plays? In Algeria, the party had not overcome the divisions that had shaken the FLN after the crisis in 1962. Neither Ben Bellah, general secretary of the party and President of the Republic, nor Būmadyan, who would govern the state and the party from June 1965 until his death in December 1978, allowed the party to play the role described in the constitution. In the Algerian journal *El Watan* of June 4, 2012, the historian

⁸ Madjid Benchikh, *Algérie: Un système politique militarisé* (L'Harmattan, Paris 2003); Madjid Benchikh, "La démocratie de façade au Maghreb: transition démocratique ou catégorie de systèmes autoritaires" in Jean-Louis Autin and Laurence Weil (eds), *Etudes offertes au professeur Michel Miaille* (Montpellier University, Montpellier 2008); Madjid Benchikh, "Constitutions démocratiques et réalités autoritaires au Maghreb: la démocratie de façade" in Yadh Benachour, Jean-Robert Henry, and Rostane Mehdi (eds), *Etudes en l'honneur de Ahmed Mahiou: Le débat juridique au Maghreb* (Publisud, Paris 2009).

⁹ See the preamble and the provisions of the Constitution of September 10, 1963, *Journal Officiel de la République Algérienne* (Algier September 10, 1963).

¹⁰ Maurice Flory and Jean Louis Miège, *La Constitution algérienne. Annuaire de l'Afrique du Nord* (Volume 2, Editions du CNRS, Paris 1964) 9–21.

¹¹ Juan José Linz, *Totalitarian and Authoritarian Regimes* (L. Lynne Rienner, Boulder 2000) 81.

¹² See *Journal Officiel de la République Algérienne* (Algier November 24, 1976).

Mohamed Harbi wrote that Colonel Būmadyan was opposed to the creation of a military commission within the single party, signifying his refusal to allow the party to interfere in the affairs of the army.

Let us suppose that the party plays the leading and decisive role described by the constitutions of 1963 and 1976; the predominant role of the army could then only be realized by it controlling the party, either by choosing the members of governing bodies or by having military officers sit on such governing bodies. In practice, although the party never played a leading role, the Military Command used two methods to exert its grip on political and social life. A quarter of the members of the party's Central Committee consisted of members of the military. This of course did not give the army a majority, but the purpose of their presence was not to sway the voting. For the FLN at least, there was never any question of contesting the decisive role of the Military Command, especially after the coup of June 1965. The strong army presence in the Central Committee of the single party suggests that the army was participating in political thinking and action. During the single-party era, the army's presence in the Central Committee was a signal to the politicians and to the population that the army "that liberated the country" was standing guard and participating in the country's "political and economic development". In practical terms, the army's presence in the Central Committee enables the other members to be informed of the Military Command's views with regard to the policies on the agenda. The army representatives stand guard and provide others with an example to follow.¹³

From the 1965 coup until the 1976 Constitution, Algeria lived without a constitution, under the leadership of Colonel Būmadyan—as head of state, president of the Council of the Revolution, minister of defense, and army chief of staff. He was the true leader of the single party, although other leaders, such as Sharif Belqāsim, Aḥmad Qāyid, Colonel Yaḥyāwī, or Sharif Massā'adiyah, were appointed to "administrate" the single party with his agreement or that of his successor.¹⁴ The party's responsibility was defined officially as "the responsibility for the Party Machine". In truth, the Military Command never wished to build the party from the base up, even in the context of the democratic centralism being tried or displayed in the USSR or in the other people's democracies of the time. That is to say, in this system it is not the party that exerts a grip over the army, but precisely the reverse. The single party is a tool used by the Military Command to govern political and social life. Furthermore, the single trade union and the professional organizations, like women's or farmers' organizations, were tied to the single party and thus clearly and definitively placed under the grip of the Military Command.

During the single-party era, neither the 1963 Constitution nor the 1976 Constitution reflected this situation. The 1963 and 1976 constitutions are written along the same lines: The FLN Party is supposed to guide and direct the policies of the state, but little is said about the role of the army. Indeed, under Art. 8 of the 1963 Constitution and Art. 82 of the 1976 Constitution, "The National People's Army, successor to the National Liberation Army and defender of the Revolution, shall have as its permanent duty the task of protecting independence and national sovereignty. It shall have responsibility for assuring the defense of the unity and integrity of the country, as well as the protection of its air space and its territory, its territorial waters, its continental shelf and its exclusive economic zone. The

¹³ Those who lived through the time of the single party were able to see how votes were made unanimous on Algerian television, often in a sort of orchestrated movement of hands that rose one after the other, starting from the seats occupied by the military.

¹⁴ All the successive leaders of the FLN Party were under the command of Colonel Būmadyan in the army staff known as the Frontier Army during the war of liberation or shortly after it.

National People's Army, the instrument of the Revolution, shall participate in the country's development and the construction of socialism."

Granted, the constitution does indicate that the army shall "participate" in the policies for the development and the construction of socialism—in other words, in everything that is deemed to matter. However, under the terms of the constitution, the army is nonetheless an instrument of the revolution, directed by the party. This depiction of the political system in the text of the constitution is what constitutionalists have described as "government by the Party".¹⁵ However, in practice the relationship between the single party and the Military Command is precisely the reverse of what it is said to be according to the constitutions: The single party is an instrument used by the Military Command to control political life. The single trade union and the professional organizations are tasked with controlling economic and social life, under the watchful eye of the Military Command.

This conceptual organization would seem to define the Algerian political system as a totalitarian one, as it is sometimes accused of being by political forces opposed to the regime.¹⁶ It is not possible to go into the differences between a totalitarian state and an authoritarian state here. Neither the party, the organizations mentioned above, nor the influence of the army by means of military security have exerted sufficient control to enable complete control of society. Consequently, there can be no comparison with the Soviet or Nazi systems in terms of the power and role of the parties within society, or with the objectives and actions of security services and political police. The Algerian political system is an authoritarian system that displays none of the elements needed to define it as a totalitarian system, either in its ideology or in how it exerts social and political control.

In Algeria the political police—the key body of political and social control—has gone successively under the names of Military Security (MS) and later the Department of Intelligence and Security (DRS). This huge body is part of the army. This means that the backbone of the political system, despite its importance and its decisive role in political affairs, is entirely dependent on the Military Command. The main objective of the political police is not to control society in order to constrain it to a particular way of thinking, but to ensure that nothing is done to organize or effect a regime change. It has never been directed by politicians, still less by ideologues. The objective of retaining power can even justify a change in ideology or orientation, as has happened several times in moving from socialism to economic liberalism, without the Military Command ever being ousted from the heart of the system.

Ever since independence, the MS and subsequently the DRS have always been headed by a senior officer from the Military Command. The body is officially entrusted with matters of espionage and counterespionage, but also has other duties vital for the survival and functioning of the political system. While it has neither admitted to nor taken responsibility for, such duties are nonetheless omnipresent. The body was built out of the remains of the former Ministry for Armament and General Liaisons, which had been headed by Colonel Būṣūf during the fight for national liberation. Upon independence Colonel Būmadyan appointed one of his close collaborators, Qaṣḍi Marbāḥ, who would subsequently be made a colonel, to organize and develop the political police. It gradually became the eyes and the political driving force of the system. On Būmadyan's death, Colonel Marbāḥ played a vital role in the transition and arbitrated in favor of Colonel al-Shādhli Ben Jadīd, who with the support of Colonel Marbāḥ was eventually chosen by the Military Command to become

¹⁵ See Maurice Flory and Jean Louis Miège (n 10).

¹⁶ See Juan J. Linz (n 11) 79 et seqq; see also Hannah Arendt, *The Origins of Totalitarianism* (Houghton Mifflin Harcourt, New York 1973).

President of the Republic. This article will show that Marbāḥ's successors as heads of the DRS have never relinquished this vital prerogative which allows the Military Command to select the President of the Republic. However, once this selection has been made, the procedure for getting the army's preferred candidate elected by the people is different under the single-party (1963–1988) and multiparty (after 1989) systems. During the single-party era, once the Military Command had chosen the "candidate" there was no difficulty in having this choice endorsed by the single party and the other trade unions and professional organizations. But to play its role as the driving force behind political strategies and the controller of political life, the MS and subsequently the DRS established a direct presence by recruiting agents *in situ* in most of the country's decision-making centers. From then on it was not so much the case that the party, nor even the so-called organizations of the masses, such as the General Union of Algerian Workers (UGTA) and other socio-professional organizations, were the system's biggest weapon, but rather that the political police feigned that they were. It is without a doubt this presence that creates the impression that the DRS decides everything and that it makes decisions alone. The article will analyze how this system works and in particular how the political police have intervened since the adoption of multipartyism through the 1989 and 1996 constitutions.

B. The Army's Grip on the Multiparty Political System: The Cosmetic Democracy

It would seem difficult, at first glance, to establish a comparable level of control over political and social life when moving from the system of "government by the Party" that we have just considered, to a system based on multipartyism and political competition, such as was adopted through the constitutions of 1989 and 1996. It is certainly easier to pass messages and decisions along very narrow and selected channels in a single-party system than it is to try to keep power and govern in a "democratic" multiparty context. But this is the project that the Algerian Military Command—not without some difficulties and internal struggles within the army and then at the cost of serious misjudgments that led to a civil war—decided to put in place. The single-party system, especially after the public demonstrations of October 1988, appeared to be deadlocked and incapable of resolving the country's problems or avoiding interfaction fighting.¹⁷ The move from a single-party system to multipartyism was carried out under difficult circumstances and with some improvisation, but with a sense of certainty that took the place of actual strategy among the military groups surrounding the presidency of the Republic. The move to multipartyism was to overcome the deadlocks of the single party, to respond to the criticisms of a large proportion of young people and to expand the base of the regime, while making it possible to get rid of elements of the civilian and military leadership who were opposed to change of any kind. Although this article cannot go into the details of the manipulations that surrounded the public demonstrations of October 1988 or the changes of government and constitutional changes that followed, we note that the security services (political police) underwent profound restructuring. The new head of government (prime minister) was Colonel Marbāḥ, former head of the MS. It was under his government that the first features of multipartyism were put in place. He was replaced by Mülūd Ḥamrūsh, former Lieutenant-Colonel, who had become

¹⁷ Madjid Benchikh (n 8) 5, *Algérie: un système politique militarisé*; Keith Sutton, Ahmed Aghrout, and Salah Zaimeche, "Political Changes in Algeria: An Emerging Electoral Geography" (1992) 17 *The Maghreb Review* 3; Yahia H. Zoubir, "Stalled Democratization of an Authoritarian Regime: The Case of Algeria" (1995) 2 *Democratization* 109.

General Secretary of the Presidency and was close to the President of the Republic, al-Shādhli Ben Jadid. This means that the transition from government by the party to a multiparty democracy was made to seem like a new alternative thanks to multipartyism. But there was no real regime change as “the deciders”, as the holders of real power are known in Algeria, are appointed or recruited by the Military Command. In order to understand how this system works, it is necessary to examine the democratic system that was put in place by the 1989 Constitution and modified by the 1996 Constitution to see what it consists of and to ascertain the role that the Military Command plays in it.

Looking only at the constitutional provisions, the regime established under the 1989 Constitution and confirmed by the 1996 revision is indeed a democratic regime with a separation of legislative, executive and judicial powers. The President of the Republic, invested with broad powers, is elected by universal suffrage; the government, appointed by the head of state, is accountable to the National Assembly, which is also elected by universal suffrage. Under the terms of the constitution the judiciary is independent and the press is free, as is the establishment of parties, trade unions, and associations. Human rights and democratic freedoms are recognized and guaranteed (Arts. 29 to 59). The only duties assigned to the army under the constitution are the “safeguarding of national independence and the defense of national sovereignty. It is responsible for assuring the defense of the unity and territorial integrity of the country, as well as the protection of its territory, air space and the various zones of its maritime domain” (Art. 25 of the 1996 Constitution).

If we keep to the text of the constitution, the army is strictly confined to the role that is given to armies in democratic countries. Under the terms of the constitution, the army is thus subject to the democratically determined political power. This situation is exactly what the Military Command has claimed in its rhetoric since independence.¹⁸ As we have seen throughout the history of the nationalist movement, since the Special Organization (SO) was established at the Congress of Šūmām organized by the FLN/ALN in 1947, political and constitutional rhetoric has claimed that the army is in the service of the political authorities and not the reverse. In adhering to this concept, the Algerian Constitutions remain loyal to the ideal of the acquisition of freedoms “by the people and for the people” that dominated the nationalist movement. Today this rhetoric serves to demonstrate that the army’s role is to always be at the service of the people by intervening to prevent the consolidation of personal political power (leaving aside President Ben Bellah, who the army helped to get elected in 1965, or the adventurism of the chief of staff in 1967 and yet again in January 1992) to “save Algeria and democracy” by, for example, canceling legislative elections such as those largely won by the Islamic Salvation Front (*Front Islamique du Salut*—FIS).

These interventions were either actual coups in 1965 and 1992, or actions taken in complete secrecy, such as the bombings ordered by Colonel Būmadyan against the troops led by the army Chief of Staff Colonel Zbīrī in 1967, or the resignation of the President of the Republic, General Zaruwāl, who justified his departure more than a year before his mandate ran out by saying he was resigning “because he had realized all his objectives”.

In every case, the army’s actions were never accompanied by a military government. Whenever the army has intervened to impose its solution, it has taken care to stay behind the scenes and put “its civilians” in government. In 1962, the intervention by the Frontier Army was destined to impose the accession to the presidency of Aḥmad Ben Bellah, a civilian. In 1965, the coup, characterized as “revolutionary adjustment”, resulted in a civilian government and a mixed Council of the Revolution. In 1992, responsibility for the coup

¹⁸ To be convinced of this, one need only look at the *Journal of the Ministry for Defense*.

was no longer claimed by the military. The president himself declared that he had resigned but “naively” provided the argument that made his “resignation” a genuine coup, by saying that “decisions had been made of which he did not approve”. The decisions in question were those made by the Military Command to cancel the elections. Under the terms of the February 1989 Constitution, such decisions could only be taken by the Constitutional Council. General Major Nazzār, minister of defense and the main author and spokesman for the cancellation, declared that he had acted at the request of the civilian government to save democracy. In order to replace the head of state, the Military Command decided not to organize elections as provided for under the constitution, but instead to establish a High Committee of the State, the presidency of which it would be entrusted to a “historic leader” of the revolution, Muḥammad Būḍiyāf, who had been exiled since 1962.¹⁹ In 1999, the Military Command eventually recalled Būmadyan’s former minister for foreign affairs, ‘A. Būteflīqa, a Frontier Army veteran and “a civilian”—to be elected President of the Republic. This was done despite the withdrawal of all the other candidates a few days before the election date, including several former prime ministers and ministers. These candidates were informed by their former intermediaries in the system that the army, which had started to vote, had taken measures to vote in favor of Būteflīqa.

As can be seen, even after the adoption of democratic multipartyism through the 1986 and 1996 constitutions, the Military Command continued to choose the candidate to be elected President of the Republic. An outcome of this kind can only be explained if the Military Command has the means to neutralize the key elements of a democratic regime, i.e., free and fair elections on the one hand and the existence of autonomous and representative parties on the other. It is therefore worth examining how the Military Command has effected control of elections and how it has neutralized the political stage and especially the political parties, trade unions, and associations, while feigning the existence of democracy.

As explained above, immediately after independence Colonel Būmadyan established the MS, tasked in particular with the role of a political police force found under an authoritarian system. In principle, the transition to a multiparty democracy should have resulted in the dissolution of this political police. But officially, the Military Command did and does not admit that there is any such political police. Since one cannot dissolve something that does not exist, the new constitutional provision therefore operated under the control of the MS, which was renamed the Department of Intelligence and Security (DRS). Instead of the relatively easy work to which it had been accustomed in the single-party context, the DRS now had to learn to work in a more complex landscape, with multiple and varied actors. One cannot simultaneously make a declaration guaranteeing human rights and democratic freedoms while grossly manipulating the ballot boxes; nor can one authorize multipartyism while preventing electoral competition. At the same time, if the holders of power do nothing, the democratic system will lead to a regime change, which would mean the end of the Military Command’s grip on power.

This is precisely what happened to the local elections (municipal and regional) of June 1990 and the legislative elections of December 1991, both overwhelmingly won by the Islamic Salvation Front. We have explained at length the reasons for the inaction of the DRS, which had just been restructured and was working in a context of political improvisation. Each leader of the DRS was waiting for a colleague to make a mistake in order to be able to blame that colleague for the failures of the system, while others were asking

¹⁹ Madjid Benchikh (n 8) *Algérie: un système politique militarisé*, see also our interview on these issues and the references in the Algerian journal *El Watan*, January 2012. See also Ahmed Aghrout and Redha M. Bougherira (eds), *Algeria in Transition: Reforms and Development Prospects* (Routledge, London 2004) 184.

themselves where the “adventure with multipartyism” would lead “a country that is not ready for a democratic experiment.”²⁰ Consequently, the local elections in 1990 and the legislative elections of 1991 were not manipulated by the DRS. This election was the first free one in Algeria. One could say, that through this free election, Algeria went through its own Arab Spring. Unfortunately, the same cannot be said of the presidential elections of 1995 and 1999, which saw the candidates named by the Military Command return large majorities in the first round of voting, although the candidates had been far removed from political action for almost twenty years.

Confirmation of the result of the legislative elections of 1991 would have meant that those who held power accepted the transfer of power to the Islamists in accordance with the provisions of the constitution. However, the objective of transforming the system had been to make the system more open in order to be better able to retain power, that is to say, to prevent regime change. The true nature of the system established by the 1989 Constitution and confirmed by the 1996 Constitution is thus revealed: It is a cosmetic democracy, a display to mask the real authority of the political system. It is a solution that the authoritarian power has thought up to ensure its own survival when the formula of government by the party was no longer capable of resolving social and political crises or even deadlocks in the system itself. That is why the Military Command decided to call off the elections before the second round of voting.

This cosmetic democracy cannot, however, function under the aegis of the army, if the army is content to merely choose and have elected the President of the Republic. To function, the cosmetic democracy also requires the DRS to take measures in relation to political parties, trade unions, and other associations, i.e., the various actors on the political and social stage, as well as the media. To render the democracy credible without risking the loss of the military's grip on the system, the DRS must now act on every stage, while still leaving enough room for a variety of other actors.

To prevent regime change, no autonomous party seeking to obtain power may be allowed to gain representation on the ground or the capacity to mobilize populations that would threaten to oust the holders of power. Since the Military Command established its grip on power, only the FIS has come close to achieving this before its electoral victory—the result of strong mobilization of the poorest populations and the middle classes—resulting in an intervention by the army and the dissolution of the party. It was precisely this experience that led the DRS to step up its initiatives in order to prevent the same thing happening again with any other party. The control of the army is not just intended to prevent Islamists from coming to power but also to exclude all political allegiances. Moreover, we can see that the Military Command has advocated various ideologies and political systems since independence. It experimented with Algerian socialism and self-management from 1962 to 1965, then with socialist enterprises and the agrarian revolution of the 1970s in the context of state capitalism before adopting economic liberalism from 1989 onward. Under the aegis

²⁰ Madjid Benchikh (n 8), *Algérie: un système politique militarisé*. On a point of interest relating to this period, ten years afterward, the former head of state Chadli Bendjedid, explained that the victory of FIS was not predicted by the surveys of the Security Service, which had projected that it would not get more than a third of the votes. See on this period, Khaled Nezzar, *Algérie: Echec d'une régression programmée* (Publisud, Paris 2001); see also Kisaichi Masatoshi and Watanabe Shoko, “Interview with Chadli Bendjedid, former president of Algeria (December 4, 2008)” in (2009) 27 *The Journal Sophia Asian Studies*, which was reprinted by the Algerian papers *Liberté* (in French) and *El Khabar* (in Arabic). See also Ahmed Semaine, “Interview with General Major Larbi Belkheir in Ahmed Semiane,” *Octobre, ils parlent* (Editions Le matin, Algiers 1998), also available at <http://www.algeria-watch.org/farticle/88/88belkheir.htm>, accessed September 3, 2015.

of the Military Command, the constitutional system, too, has moved from the single party to multipartyism. This demonstrates that the Military Command acts and governs in the most pragmatic manner possible, according to what appears most opportune with regard to the domestic and international balance of power.

There are multiple examples that, despite the opaqueness of the system, illustrate the DRS's attempts to destabilize a party or a group. The Islamist parties established by 'Abdallāh Jāballāh have all experienced splits that resulted in the creation of new parties closer to the leaders. An activist influential in the Socialist Forces Front, an opposition party, was suddenly made a minister; others quit this party to join a party closer to the security policies decided on by the Military Command. Parties with no credence have obtained a substantial number of seats in the National Assembly or in the Senate, which indicates to the president of the National Assembly that he should put an end to the "policy of quotas", thus confirming long-held public opinion that the results of the legislative elections are based on quotas concocted by "the deciders", which means first and foremost the DRS.

The manipulation of political and social actors can take other forms to encourage the formation of groups calling for reform or for decisions previously called for by political or trade union opponents. The Human Rights Defense League (LADDH), created by human rights activists who had been in prison, was not authorized for several years; another Human Rights League, which was cooperating with the government, was authorized without hindrance and obtained premises and subscriptions. Ayt Aḥmad, a famous figure of the revolution and president of an opposition party (FFS), created together with members of civil society an "Autonomous Democratic Forum". Very quickly, members of this Forum who were close to power created a "Democratic Forum", which recommended an equivalent program under virtually the same name. Autonomous trade unions created by the trade unionists who denounced the exploitation by the authorities of the large historic union, the General Union of Algerian Workers (UGTA), opened up social negotiations. To divide and create confusion, trade unions also calling themselves "autonomous" were created to compete with and to discredit the original ones. The problem is that these "creations", dubbed "clones" by some trade unionists and intended to frustrate the demands and discredit the proposals of the opposition, gradually ended up casting doubt on the democratic project itself, creating the belief that democracy only leads to division and to empty rhetoric. As has been described, manipulation, of which the political police is grand master, has become a method of government.²¹

The war against Islamic terrorism and social uprisings has unfortunately given the military authorities an opportunity to expand the scope of their sphere of action and to increase their manipulation. The infiltration of armed Islamist groups by the security services, or of groups of opponents in Kabylie, has prompted some to ask the question: "Who is killing whom?" The slow process of fragmenting the fabric of society has a double effect: On the one hand, by creating fear and division, it makes the rise of a democratic movement that might constitute a credible force for regime change difficult. On the other, the incongruity between rhetoric and practice has created a gulf of separation between the people and those who govern, who are losing all credibility.²² In this system there is indeed a plurality

²¹ Madjid Benchikh (n 8) 188, Algérie: un système politique militarisé.

²² There are some interesting accounts of this: see in particular the work of the Permanent Tribunal of the Peoples (TPP) during its November 2005 session in Paris on the site <http://www.algerie-tpp.org/>, accessed September 3, 2015, as well as on <http://www.algeria-watch.org>, (suivre "liens Algérie"), accessed September 3, 2015. See also Habib Souaïdia, *La sale guerre* (La Découverte, Paris 2001); Yous Nesrallah, *Qui a tué à Bentelha? Algérie: chronique d'un massacre annoncé* (La Découverte, Paris 2000), and Luiz

of parties: trade unions and associations, although most of them are in one way or another dependent on the system that created them. It is as though, to exist, the parties, trade unions, and associations that are hostile to the authorities must stand up to or condemn not the true holders of power, who are elusive, but instead the bodies without popular representation that the system has helped to put in place. This system thus turns the political stage into a theater where one acts without impacting on reality.

Even now, more than twenty years after authorization was granted to the private media, most of Algeria's media is controlled directly by the state, notably the radio stations and the only television channel. The government media, whether print, radio, or televised, continues to operate as it did during the single-party era, without freedom of tone and without controversial debate, except during some electoral campaigns. Commentators often talk, however, of the existence of freedom of the press. In fact, there is indeed a freedom of tone and a vivacity in the Algerian private print media that is not found in the press of other authoritarian systems in the region. It is this point that one must focus on and briefly contextualize to understand its impact and its limits.

Some of the private sector media in Algeria does sometimes open its columns to points of views and analysis that are critical of governmental policies. Journalists sometimes even hold very militant views, including views opposed to governmental policies. Moreover, academics sometimes have access to various discussion platforms to develop critical studies. However, if we observe the private media over a long period of time to examine the type of criticism that is voiced there, it can be seen that freedom of tone, when it exists, cannot be interpreted as freedom of the press. Examining the criticisms raised by some journalists about the policies of the President of the Republic, it can be seen that they are the same difficulties that the president has when he is faced with one of "the deciders" who nominated him.²³ The power is not "one" and the private press feels it—i.e., some journalists have sometimes engaged as stakeholders or interested parties, depending on the case, in battles entrusted to them by groups with links to power. In most cases the freedom to criticize is quashed without explanation in matters that involve individuals close to the president or the Military Command, like when a journal has to remain silent because the political powers don't need it to speak up any more. Even more clearly, it is easy to see that the freedom of tone is not exercised against those who are known in Algeria as "the deciders", or the real holders of power. One can search in vain even in the supposedly independent private press to find a study that is critical of the role of the Military Command in the Algerian political system (this work cited above addressing exactly these issues has never been reflected in newspapers published in Algeria). This situation of the press recalls the famous quote from Beaumarchais's *Figaro*, who said: "provided that I did not speak [. . .] about religion, government, nor about people in positions [. . .] nor about anyone who insists on anything [. . .] I could print everything freely". In fact, while being careful not to overstep boundaries that the journalists and editors of papers know as well if not better than others, the private press, thanks to its freedom of tone and its sometimes acerbic commentary, helps to lend a little credibility to a system that, at times when nothing seems to threaten its existence, can permit some criticism and sometimes even some debate. Moreover, the private press itself

Martinez, *La guerre civile en Algérie* (Karthala, Paris 1998). See also the many special reports by Amnesty International that refer to the annual reports of this organization, especially over the years 1993–1999. See also Reporters Sans Frontières, *Algérie, le livre noir* (La Découverte, Paris 1997). See the references in the various reports on these issues cited in this volume.

²³ See the examples given and El Hadi Chalabi, *La presse algérienne au-dessus de tout soupçon* (Edition Inayas, Algiers/Paris 1999).

often complains of its treatment at the hands of the government and in particular of prosecutions of journalists. The press is ultimately, like other entities judged to be of strategic importance, an object of the surveillance by the Military Command. However, this does not mean there is “a censor” behind every journalist. In other spheres of political activity, there should not be yet another manipulation by the DRS behind every initiative. Neither the DRS, nor the Military Command for which it acts, can nor wants to control everything. The objective in the current day and age is to ensure that the Military Command retains supreme control, while protecting, particularly during periods of civic peace, the margins of democratic freedoms that allow it to present a credible democratic façade. This system therefore needs the press to help it create an impression of democratic life through its criticism and the discussion platforms and debates that it organizes. Thanks to the private press, some academics are allowed to express their views, and some trade unions, associations, and parties can make some points of view known. Thereby, the private press “lend(s) a little life to a democracy that has no substance.”²⁴

IV. CONCLUSION

One can now attempt to legally and politically describe the political system in Algeria, taking the role that the Military Command plays into account. As we have shown, during the single-party era, the system was evidently authoritarian, but it was not a case of government by the party, because the party was a tool of the Military Command. The current constitution is democratic in its provisions, but analysis of practice suggests a more complex picture. It remains to be seen, how far the constitutional reform announced by President ‘A. Būteflīqa in 2011 in the wake of the Arab Spring and relaunched in December 2014 will be democratic and which role the army will be play in it. A special attention to the political practice after the implementation of the emerging constitution should be still paid.²⁵ As we have explained, the Military Command is always at the heart of the system, but not everything is controlled by the Military Command or by its DRS.

There is also a degree of democratic practice. There are not many parties, not many trade unions, and not many independent and representative associations, but there are also not bodies that are only controlled or manipulated by the DRS. Every authority has some room for maneuvers, particularly the President of the Republic. He is by necessity at the heart of the Military Command that has “crowned” him, while understanding that he is not its chief. He knows that there are boundaries and that it is not in his interest to cross them, as the history of his predecessors demonstrates. However, he can move these boundaries, transform the balance of power, and nurture alliances within the very heart of the system. This system seems to offer the advantage of being elusive by providing little for adversaries to get hold of, but it passes responsibility down to those with cameo roles, hiding the “holders of real power”. It is a system where the apparent leader is constantly dependent on a group that obeys rules that are known but unwritten. This is in practice a flexible but circuitous system, which makes decision-making more difficult than it seems.

Because the Military Command continues to play such a strong role, this system cannot be described as a democracy. It does, however, remain a cosmetic democracy when one defines a cosmetic democracy as a system that not only has a democratic constitution but that also permits a level of democratic practice. Some authors, such as Samir Amin, talk of

²⁴ Madjid Benchikh (n 8) 214, Algérie: un système politique militarisé.

²⁵ Magharebia, “Algeria: Constitutional Reform Re-Launches After Three Years,” <http://www.constitution-net.org/news/algeria-constitutional-reform-re-launched-after-three-years>, accessed September 3, 2015.

"a limited democracy", others such as Bertrand Badie analyze these regimes as "a limited multipartyism".²⁶ Others still prefer to talk of an authoritarian system, adding a qualification to authoritarianism to take account of the liberal aspects that it authorizes. Juan J. Linz proposes, for example, the terms "multipartisan" or "electoral authoritarianism"²⁷. The Algerian historian Harbi prefers to talk in the case of Algeria today of "authoritarian decompression". Alain Rouquié provides several examples of militarized systems in Latin America, where military leaders have gradually enlarged their grip on the political, economic, and social fabric of a country by means of the liberal vote or by state capitalism.²⁸

In describing the current Algerian system as a cosmetic democracy, we hope to take account of not only the existence of a democratic constitution but also of a level of democratic practice. Since this practice transforms social and political life, it must be integrated into our concepts and analysis and not relegated to the description of "partisan" or "electoral". However, this democracy remains cosmetic because it masks an authoritarian system overseen by the Military Command. This system was conceived and implemented to realize the objectives of those who hold power and thus to overcome the difficulties and the impasses of the single party or of authoritarianism accepted in its entirety. It is therefore neither a democratic transition defined as a gradual progress toward democracy nor a step toward democracy. It is a new category of authoritarian political system, although other similar forms have sometimes been tried out in Latin America with a different balance of powers.²⁹ In Algeria, the cosmetic democracy was envisaged to allow the dominant powers to survive in the long term by meeting democratic demands. This is the contemporary response of authoritarian systems to take account of the new balance of power in the domestic and international social struggles characterized by a clear emergence of human rights and democratic freedoms.

²⁶ Samir Amin, *Etat et politique dans le Tiers-Monde* (L'Harmattan, Paris 1994) 162–164, and Bertrand Badie, *Les deux Etats* (Fayard, Paris 1997) 253.

²⁷ Juan Jose Linz (n 11) 338.

²⁸ Alain Rouquié, *L'Etat militaire en Amérique latine* (Seuil, Paris 1982) 362–369.

²⁹ *Id.* 357.

The Role of the Army in a Multicommunity Society

The Case of Lebanon

ANTOINE MESSARRA *

I. INTRODUCTION

Lebanese constitutional research has tended to neglect examination of the role of the army and army-government relations in a multicommunity society; behind optimistic and patriotic talk there hides a deep crisis, loaded with all the accumulated tensions of the past.

Repetitive and accusatory discourse about Chehabism,¹ the Second Bureau, and the televised coups d'état, as well as divergent political views about the army's intervention in domestic problems, is met with weariness. Will we finally learn the lessons of our past? Unfortunately, the experiences accumulated through history do not always bear fruit in this regard, because mankind does not learn from history but in history. Yet provided we can set aside the fear of guilt, consideration of past experiences can offer an insight into the prospects for the future.

First of all, it is important to avoid an approach of simplification and reduction. The spectacle of coup d'état in Arab political regimes elsewhere fosters the illusion that Lebanon is sheltered from any crisis in relations between the army and those in power, by virtue of its multicommunity structure, a structure that is both paralyzing and protective. The reality is, however, that whereas in some Arab regimes this crisis is visible, in Lebanon it is cloaked

* The author and the editors sincerely thank Ms. Rebekka Yates for translating this article into English.

¹ Policy during the presidency of Fuad Chehab. His policy was characterized by maintaining a relative harmony between the nation's Christian and Muslim populations. He followed the path and principles of dialogue and moderation accompanied by public reforms.

behind optimistic rhetoric.² Another attempt to camouflage Lebanon's suppressed conflict can be seen in the reduction of the problem to a personal matter for a head of state or an army general.

Most studies on the Lebanese army continue to be formal and general in nature, when what is needed is case studies and microanalysis. However, there is no lack of significant events demonstrating the misfortunes of the national armed forces: politicization, marginalization, isolation, neutralization, involvement in internal conflicts, or demoralization of the army.

Writings on the army, of which there are few and which are of inconsistent merit,³ cannot be separated either from the studies on Chehabism, or from the attitude of President Chehab himself when faced with the problem of change, which he expressed in his speech of August 4, 1970.⁴

As early as November 7, 1969, the chronic nature of the crisis was revealed in a communiqué from some politicians to the President, Charles Hélou, calling for intervention by the army to be blocked and for the army to be brought under unconditional political control. The communiqué explicitly sought to limit the army's function to border defense and denied it any role except that of national defense and additionally called for the repeal of laws that separated the army from the executive power.

And yet, in the contemporary international system, it is from within that small countries are most often threatened. Lebanon's chances of a stable and effective political system will depend on the nature of the relations that emerge from the Lebanese crisis. As for the army, is it to remain at the mercy of those who hold executive power? Will it be a *ma'mūr*, a servant, in the Ottoman sense of the word, or will it become an effective partner in power?

² Scarlett Haddad, "Armée-gouvernement: Des rapports difficiles mais toujours sous contrôle," *L'Orient-Le Jour* (August 2, 1997).

³ See generally on the Lebanese army: F. 'Aūn, *Wa yabqa al-jaysh huwa al-hall* (Beirut, 1988) 287; F. Awad, *Al-Tariq ilā as-sulṭah* (Beirut 1977); General Bitar, *Armée de métier et service militaire au Liban* (1982) (unpublished); J. Bustānī, *Akdār wa-tawaqu'āt, 1972–1976* [Destinies and circumstances, 1972–1976] (Beirut 1980); S. Dagher, "Jeunesse libanaise, service militaire et sens de l'Etat. Perspective de formation" *ap.* L.-M.; L. M. Chidiac, A. Kahi, and A. Messarra (dir), *La Génération de la relève* (Publications du Bureau pédagogique des Saints-Coeurs, Beirut 1989) XX 305–311; EID N.S., "L'armée libanaise pour un rôle d'avant-garde" (1988) 50 *Panorama de l'actualité* 7–10; A. Freiha, *L'Armée et l'Etat au Liban* (LGDJ, Paris 1980); M. Jabbour, *L'armée libanaise. Entre le professionnalisme et le destin national, 1945–1989*, mémoire de maîtrise en science politique (Université Saint-Joseph, Beirut 1989); F. Laḥūd, *Ma'sāt jaysh Lubnān* (Beirut 1977); S. Rihana, *Histoire de l'armée libanaise contemporaine (1916–1926)* (Beirut 1984); A. Serhal, *L'Armée libanaise face à la crise de 1958, mémoire* (Paris 1972).

⁴ See generally on Chehabism: B. El-Jisr, *Fu'ād Shehāb, Zālikat al-majhūl* (Charikat al-matbū'āt lil-tawzī' wal-nashr, Beirut 1988); A. Messarra, *Le modèle politique libanais et sa survie* (Publications de l'Université Libanaise, Beirut 1983) in particular chap. IV: "La crise chronique de l'autorité et l'expérience chéhabiste"; A. Messarra, *Théorie générale du système politique libanais* (Paris-Cariscrypt et Beirut-Librairie Orientale 1994) in particular chap. VIII; R. Murphy, *Un diplomate parmi les guerriers* (Laffont, Paris 1965) in particular chap. XXVII; G. Naccache, "Un nouveau style: le chéhabisme" (1961) 15th year no. 4 *Conférences du Cénacle*; I Riashī, *Ru'asā' Lubnān Kamā 'ariftuhum* [The Presidents of Lebanon as I have known them] (al-Maktab al-Tijārī, Beirut 1966); P. Rondot, "Quelques réflexions sur l'expérience politique du chéhabisme au Liban" (1960) 16 *Orient* 43–50; F. Sa'īd, Akl, *Falsafat al-shahābiya* (Beirut 1964); G. Tuwaynī, *Al-Dimūqrāṭiyyah al-muntaṣirah "alā man? an-Nahār* (October 12, 1970).

II. POLITICAL ATTITUDES TOWARD THE ARMY

What are the dominant political attitudes toward the army, such as they emerge from the Lebanese political experience? We note three attitudes which characterize relations between the army, the authorities, and the population.

A. Contrition

Some politicians and the general population almost unanimously deplore a policy which has served to demoralize and paralyze the army. While the consistent policy of all Arab countries is to rely heavily on the army, Lebanon is set apart by its unique position. The Lebanese army has always been the subject of smear campaigns about the balance of communities in its ranks, its military competences, and its sectarianism (*fi'awīyah*). Since the 1950s, the military policy of community leaders has been based on the assumption that if the army intervenes in a situation where there is a political split, there is a risk that the army in turn may split. This concern may have helped to minimize the costs of the 1958 conflicts. However, the 1969 crisis was approached in the same vein. During the sixteen years of multinational wars in Lebanon (1975–1990) the same fearful attitude prevailed: We were afraid for the army. But deep down, was this a fear for the army or a fear of the army? In the light of accumulated experience, the most operational approach to the question of the army today is a pragmatic one. The risk of a split in the army—presuming it exists—is less worrying, both in Lebanon and the Arab world in general, than the fragmentation, or break-up of the country into districts, streets, and alleyways. In the hypothetical event of a split within the army, the chances of reunification would be greater and the date of that reunification would come sooner, than in the event of a proliferation of heavily armed militia dependent upon foreign patrons. In a system of multicommunity agreement with multiple equilibriums, national unity is heavily dependent on the recognition of the army's role in the country's defense. The most perceptive account ever written of this essential reality can be found in the reasoning for the bill submitted to the Chamber of Deputies by virtue of Decree No. 1358, dated June 28, 1971, regarding the allocation of LBP200 million⁵ for weapons. The reasoning was fiercely defended by the then Minister of Defense, Elias Saba. What does it say?

The aim of the proposal to allocate 200 million to weapons is the defense of the country understood in a wider sense. Lebanon is under threat, either of an attack from abroad, and that needs no further illustration than that the Palestine affair has not been resolved, or of an attack intended to destroy its political regime by an organized and activist minority, which dominates popular forces [. . .]. The army must defend the social, civic, economic and political structure, and safeguard order when Lebanon is the victim of a destructive attack which aims to paralyze government action, topple the regime and sow anarchy (emphasis added).

This report gave rise to a long-running controversy in parliament, crucial for the study of relations between the political class and the army.

B. Mistrust

An ineffective army inevitably awakens mistrust toward an institution that does not defend the security of citizens. Militias were not the cause of the weakness in the military

⁵ The equivalent of USD61 million at the time or USD351 million today.

institution, but rather were the effect of the army having been prohibited from carrying out its domestic role, as defined above by Minister Elias Saba. When politicians are afraid of the army carrying out its defense role domestically (whether out of fear for or of the army), it is also to be feared that society itself will divide into factions seeking to guarantee their own security. When it is successful, the politicization of this attempt paves the way to outside interference. No matter how strong it may be, a militia will always need patronage, and this can quickly transform into subservience to patrons, unstable alliances, and collaboration. Mistrust of the army can be seen in the day-to-day language of those known as “isolationists”: “The army isn’t ours” is understandable, or even “community safety”. Above all, this mistrust translates into the renewed “veto” that has blocked the intervention of the army in its role of civic protection. This attitude of mistrust leads to the conclusion that true defense of citizens must still, even post-war, be achieved via proper self-defense.

C. Frustration among Military Personnel

The repeated calling into doubt of the army’s patriotism, as well as of its unity and its capacity to intervene legitimately against foreign or domestic threats, results in persistent feelings of frustration among military personnel. Several facts attest to a deep and ongoing crisis. Let us quote, among others, the denunciation by President Fouad Chehab of the “cheese-eater” politicians (*fromagistes*); his statement on August 4, 1970, in which he deplored the impossibility of a change in the structure of the existing political forces; or indeed the attempted peaceful coup by ‘Abd al-Ḥamīd Ahdab; and finally, the communiqué dated September 19, 1988, from the army command. There is indeed a muffled and suppressed rebellion against the subjugation of the army into the role of an instrument in the service of politicians.

III. THE SIX SCHOOLS AND THEIR COMMON DENOMINATOR

Is there now room for a merger between society and the army, despite the persistence of a policy that is dangerous because it lacks national scope? Under the pressure of profound changes in attitudes and faced with a sense of Lebanese identity that has matured and been strengthened by years of shared suffering,⁶ relations between the army and those in power must be reconsidered. There are six discernible schools of thought among politicians with regard to the army.

A. Demoralization of the Army

The army has its professionals, who do not belong to one community to the exclusion of another. In Lebanese political history, researchers will not be lacking in documents on the provocation techniques and dilatory procedures which sought to demoralize the army and thereby paralyze its capacity to intervene. Studies of the Ministry of Defense archives establish the reality of the balance of communities within the army.⁷

⁶ Cf. Chidiac, Kahi, and Messarra (dir) (n 3) and Fondation libanaise pour la paix civile permanente, *Huwīyat al-mu’ānāt an-Nahār* (February 6 and 7, 1991); Mass and Optem, *Les Libanais et le Liban*, opinion poll 29 Sept. 1989 to 11 Oct. 1989 (Ceroc, Beirut 1990) 72.

⁷ M. Jabbour (n 3).

B. Concern for the Unity of the Army

Out of a desire to protect the army, politicians have, albeit in good faith, paved the way to the neutral army theory (*al-jaysh al-muḥāyid*): The army safeguards its unity in the multi-community Lebanese society by doing nothing. This attitude can be seen, for example, in a communiqué dated October 2, 1990, which reads: "The Lebanese army, which is answerable to its official command, strictly followed the orders [...] and did not fire a single shot, either at the demonstrations, or in any other direction." Why does the army find itself in the position it is now? Is it decorative, like a room ornament? It doesn't shoot, allows others to shoot, and just watches! By way of analogy, the army is like the schoolboy told off by his teacher, who cries: "But I didn't do anything!" The risk of this school of purported concern for the unity of the army is thus that the army becomes useless, a powerless witness, a false witness.

C. The Army Subordinate to the Politicians

The relationship between the army and politics in Lebanon is complex and ambiguous. Lebanese people want to strengthen and do not want to strengthen the army, both at the same time. The main reasons to consider are valid fears. On the one hand they fear a confrontation with Israel, on the other they fear the Fedayeen and would like the army to control their actions. The question therefore is, how, under such circumstances, a sound basis for building up an army can possibly be created.⁸

Moving away from the Ottoman idea of a servile army (*ma'mūr*), some authors have increased contacts with political leaders, convinced that the army should first and foremost "obey orders". The many changes that have affected the army command in the past, at frequent intervals, attest to the predominant idea of the army as an administrative body like any other, whose subjugation would be achieved by decree. This idea was strengthened by the lack of successful coups in Lebanon, unlike in other Arab countries. This idea, which is largely supported by politicians and lawyers during debates, is expressed in a way that attests to residual feudal thinking incompatible with the statute and the demands of a modern army.

For example, there are speakers who claim to be surprised that the army should formulate an assessment on a motion by the executive power. In the same way, some leaders showed, in addition to an obvious desire to customize the army, a presumption to place the governor of the Central Bank under political control, contrary to the statutes of the world's banking system. It is surprising, to some in the ranks of executive power, that the governor of the Central Bank could say "no" to a request from government. But these days no one is a *ma'mūr*, an unconditional subordinate.⁹ The rule of law protects civil servants, employees, and workers against employers and institutions. The spirit of docile subordination is henceforth incompatible with the responsibilities of certain posts, such as the management of the Central Bank, the Rector of Lebanon University, the High Council of the Judiciary, the Civil Service Council, the Auditor General, or the Commander of the Army.

⁸ This is also expressed by the Lebanese politician Fouad Lahoud.

⁹ E. Na'im, *Difā' 'an dawlat al-qānūn an-Nahār* (April 6, 1990).

D. The Army as Broom

Another idea, not without ambiguity, is that of the army as an instrument (*adāt*) of the regime. In Lebanese terminology, this means politicians using the army to clear away rival forces on the ground. The operation complete, the soldiers are sent back to their barracks as soon as they have swept an area of undesirable elements of political competition. Leaders make use of this kind of arrangement, which serves their interests, with current and potential allies. What they want is an army of street-sweepers, not a body that participates in institutions in the framework of an operational relationship between equals.

E. The Army as Militia

Using the army “in sections” (*bi-l-futāt*), or implicating it in others’ struggles by subsequently ordering it reproachfully to withdraw immediately, means purely and simply transforming the army into militias. In this regard, we refer to the comments of a head of government to a *muhāfiẓ* (governor) following problems in one particular region: “I want the army to withdraw within the next quarter of an hour [. . .]. I don’t want anyone coming into this region to see any trace of a soldier.”

This kind of policy leads to the emergence of armed forces that are responsible only for regional security as situations arise, and leads to the perception of the army as a body for parade and protocol.

F. The Army as Taxi

Closely related to the previous school, this idea tended to be the rule in Lebanon during the war years; “security by accommodation” (*al-amn bi-l-taradi*) and differing opinions on who would guarantee safety. The army? The gendarmes? Under what circumstances, in what locations, and in what way? This use of the army has resulted in its paralysis, or in its use for the protection of politicians when they are traveling to the Presidential Palace on official business. The army is thus reduced to the humiliating role of a taxi-army, or sometimes helicopter-army, for official travel.

IV. THE ARMY, PROTECTOR OF SOVEREIGNTY

Every time the Lebanese army was challenged by politicians, paralyzed, or involved by them in sectarian competition, there was a violation of the rule of law, and of the day-to-day safety of Lebanon’s citizens.

The six “schools” described above have in common the idea that the army is an institution in the service of those in power and not the wider interests of the nation. The danger of a violation from within of the sovereignty of the state persists, while a policy of accommodation to excess prevails in relations with the army. Thomas Fleiner-Gerster, Director of the Institute of Federalism at Freiburg University, writes in his *General Theory of the State*:

As soon as the State is no longer capable of carrying out its responsibilities for protection, these are very quickly taken on by individuals who, in certain circumstances, may even create popular self-defense militias. That development quickly leads to the destruction of the sovereignty of the State from within, and therefore to anarchy. In that regard, a sadly well-known example can be seen in the case of Lebanon over recent years. Well

before the civil war, the Palestinians already controlled a large part of the country, which provoked the reaction of Christian militias, and then the intervention of the Syrians.¹⁰

In the area of national sovereignty, as concerns the state's ability to govern without outside interference and to assume authority, Lebanon finds itself facing two problems, in addition to the problem of intercommunity diplomacy: the function of the army and the intelligence service.

The independence of the army from political factions is an essential requirement. In Great Britain, for example, the armed forces must maintain strict neutrality during a strike, whether the elected government is on the side of the workers (Labour) or the employers (Tory). The system is more complex in a multiparty power-sharing system, where the army must be above all the political parties. The army finds itself divided between a segmental vision, which could be patriotic in a crisis situation, and a united vision, which might also be patriotic. It is therefore up to the leaders to define the situation, as a result of which ambiguity reigns and each defines the national vision based on their own segment criteria. As far as the Chehabist school is concerned, "the patriotic situation" was formulated by President Chehab like this: "Where there is no national unity there is no patriotism."

Since independence, President Chehab's comments have provided an image of what the function of the army might be:

In the army, the emir mixes with the poor, eats the same bread, lives the same life and obeys the same rules. It is in the army that I became acquainted with democracy and, contrary to appearances, we became more democratic than people from outside. Each of us has served in Marja'iyūn, Fayāḍīyah, Ablaḥ, Qulī'āt, Tripoli [. . .]. We knew before others how to act with parents, neighbours, friends and strangers, superiors and subordinates. The army is necessary not only to fight the enemy, but also to consolidate the unity of Lebanon and of the Lebanese people. The army is a school [. . .]. If we do not want the army to have all the power, we must improve the process of calling on the army to control certain situations, in particular the source of danger and the explosive areas of the country. There is no way that democracy can persist in Lebanon without authorising the army to help within defined and agreed limits, if not, there will be anarchy, which is the path to dictatorship.¹¹

The stability of a system based on agreement like that in Lebanon requires the army as a system that is above all the communities and is mandated in particular to establish—and re-establish—order. Georges Naccache puts it like this: "This political paradox, the rescue of democracy by military power, is certainly the central point of the Chehab experience."¹²

President Chehab declared to a *Hay'ah Waṭaniyah* delegation in 1964:

I am tired of the *fromagistes* (cheese-eaters) and extremist capitalists. The situation in Lebanon requires rapid reform. A reorganization of that kind would indicate direct power, but direct power would not be tolerated by Lebanon. In Lebanon, we cannot impose a political reorganization by force. That would be contrary to the Constitution

¹⁰ J. F. Braillard (tr), T. Fleiner-Gerster, *Théorie générale de l'Etat* (PUF, Paris 1986).

¹¹ See *al-Ḥawādith*, no. 1135, August 4, 1978.

¹² G. Naccache (n 4).

and would lead to a true dictatorship. I could have done that, but that would have been contrary to the democracy which is the basis of Lebanese politics.¹³

The other problem that Lebanon had regarding the army is that of the Second Bureau. Established in 1945 at the same time as the army, the Second Bureau remained separate from politics until the coup by the Syrian Popular Party on December 30, 1961. From then on, the Second Bureau played an important role, becoming "one of the best in the Arab world"¹⁴ and between 1964 and 1970 exercised a guardianship over civil power, which was known as the duality (*izdiwājīyah*) of power, in fact, a true parallel power. The duality of the two powers, civil and military, reached its peak between 1965 and 1968. It then declined after the spring elections of 1968, with the triumph of the Tripartite Alliance, or *hīlf*. The election in 1970 of Sleiman Frangié as President of the Republic led to a "summit transfer" in September 1970 and the dissolution of the Second Bureau. The trial of its leaders in March 1973 led to the vilification of that office by public opinion. However, its disappearance left a gap in the state apparatus. The new experience of democratization, which began in 1970, led neither to greater efficiency, nor to a more stable system: In the absence of an intelligence service, every state is flying blind. However, on the other hand, an intelligence service demands an elevated understanding of public affairs on the part of those who run it. Speaking plainly, those who manage the secret service should, as stated by Alexandre de Marenches, not have "any kind of political ambition."¹⁵

Discontent within the armed forces is rarely the origin of a coup. The cause is more commonly a serious and long-lasting crisis within democratic institutions that political leaders are unable to resolve: civil war, chronic inflation, the collapse of public order, or blatant and persistent political corruption which gives rise to the military taking on a principal role. The main reason for an intervention by the armed forces is not the nature of the military institution itself but a deficit in the democratic system. However, the armed forces offer no more than a palliative solution, because they are unable to bring a long-term solution to society's problems, much less a democratic solution.¹⁶

The intelligence system and the demands of regional coordination pose problems that have not been studied in depth. These are, however, more complex in the turbulent Middle East, in a hegemonic international system and in particular for states which have a minimum level of democracy. The contemporary state also draws its strength from its intelligence services. To strengthen the Lebanese state, the national view of its intelligence services must be reviewed, a view which is often apolitical and pejorative.

The place and the function of the army in Lebanon cannot be defined by talking in abstract terms about its nature and composition, which throw light on its relationship with those in political power. The question of community balance in the army has always been exploited by politicians in analyzing the possible actions of the armed forces. The statistics show that the imbalance, when it exists, does not justify the extent of the ongoing polemic. Table 1 shows that between 1968 and 1980 the number of Muslim soldiers was greater than that of Christian soldiers. However, this imbalance was offset by the greater number of Christian officers. That offsetting was often brought about by handing out promotions. In 1945, five Christians were promoted and one Muslim; in 1950, there were seventeen Christians promoted and twelve Muslims; and in 1962, thirty Christians compared to

¹³ (1964) 16 *Orient*.

¹⁴ Statement from *Figaro*, April 11, 1973.

¹⁵ C. Ockrent and A. De Marenches, *Dans le secret des princes* (Stock and France-Loisirs, Paris 1986) 113.

¹⁶ D. Beetham and K. Boyle, *Démocratie* (Unesco, Paris 1995) 164, 102–103.

TABLE 1 Evolution of the composition of the Lebanese army by community¹⁷

| Year | Soldiers | | Officers | |
|------|----------|------------|----------|------------|
| | Muslims | Christians | Muslims | Christians |
| 1945 | 191 | 150 | – | – |
| 1955 | 718 | 762 | – | – |
| 1962 | 390 | 572 | – | – |
| 1968 | 487 | 461 | 25 | 38 |
| 1974 | 753 | 710 | 24 | 33 |
| 1980 | 1460 | 649 | 98 | 100 |
| 1986 | 797 | 850 | 225 | 225 |

nineteen Muslims. Subsequently, following the mandate of President Chehab, the parity of officers has been the rule in the army's composition.

One of the problems lies in the small number of Christians who enroll in the army. Various unsuccessful attempts have been made to increase the number of applicants. There is however one exception: In early 1983, 3500 young Lebanese citizens from Christian communities joined the army in the space of six months.¹⁸

How can the state be and then remain an entity above communities, across communities, being made up of representatives from different communities? The state can only be built if its fundamental institutions (army, central bank, judiciary, domestic security forces, university . . .) are protected from the confessional *fromagisme* ("cheese-eating") and the politicization which can harm their prestige and their morals. It is also incumbent on the politicians in power to exercise proper authority to ensure the dignity of the army; as the army, although it is a mirror of society, is the basis for national cohesion and the emergence of a supra-community state.

To say that the Lebanese civil society is profoundly divided and that the army is the reflection of that "deep division" is a biased claim which must now be proven. The sixteen war and post-war years (1975–2005) have produced Lebanese citizens who demand rule of law. This desire should however be nurtured and made to flourish through work on remembrance and education. The Chehabist period from 1958 to 1964 remains a positive model realized in an institutional framework; what it teaches can bring the rule of law, despite some flaws which are exaggerated and excessively emphasized by politicians.

Lebanese pluralism has been beneficial in that it has averted military coups in Lebanon. However, it has been disastrous for the relationship between the elite in power and the army. Convinced that, despite national difficulties, the Lebanese army was incapable of carrying out a successful coup, political leaders acted in an unbridled manner, safe from any control and regulation mechanism. The parliament did not truly exercise its control function. This disfunctionality is explained by the fact that the ministerial cabinets are often mini-parliaments. The work of the Assembly is therefore blocked by community "para-parliaments".

The extent of the drama between 1975 and 1990 requires a radical rethink of the effective functioning of the army and clarification of its relations with those in power. The army should no longer be reduced to the role of a public administration body. As guarantor of

¹⁷ The table contains figures from M. Jabbour (n 3) 113.

¹⁸ M. Jabbour (n 3).

national sovereignty, rule of law, national unity, and institutional permanence, the army can only be a partner (*mushārik*) in power, and not its instrument (*adāt*)—let alone the instrument of those in power. Cleaning up relations between the army and those in power will be achieved through the sovereignty of the law and the prohibition of attacks on the army's morale or of using it for party political ends.

The question of armament and of developing the capacities of the Lebanese army does take on a regional and international dimension. However, ignoring or despising the internal information that stands in the way of the army being strengthened does not help to construct the rule of law and interferes with implementation of the best of agreements. All the roles carried out by the Lebanese army between 1975 and 1990 only resulted in finalizing the “state-icide”, the death of the state. A dramatic past, filled with mistakes, lies, and political exploitation have led to a desire for change.¹⁹ However, that desire for change still comes up against the persistent traditional approach of accommodation. The accountable and pragmatic approach of researchers in this field, their analysis of the past, and the accumulation of knowledge are leading to the emergence of a political culture where the citizen, society, and the army are all integral parts of a state based on the rule of law.

The policy of resistance implemented by the Lebanese, using compatible or varied resources, against the Israeli enemy and then after, using resources no less compatible or varied, must lead to a Lebanese defensive strategy; and in line with Arab solidarity, a strategy of not only being armed but also of protecting civil peace. In a regional and international system where armed conflicts take place by proxy in small, fragile, or weakened nations, as was the case in Lebanon, with the complicity or powerlessness of the larger nations,²⁰ it is important to cultivate a culture of prudence and positive neutrality from now on.

The “wars for others” factor in Lebanon, as well as the occupation and post-occupation factor, must be taken into account when studying pragmatically and experimentally the future relationship between those in power and the army. The Arab model of the praetorian army, subordinate to the defense of politicians in power, has survived. The army is a partner in a democratic regime, even more so in a small country like Lebanon located in a hostile environment which, in the best case scenario, is undergoing a transition to democracy. The dilemma is as much institutional as cultural.²¹

¹⁹ Al-Ḥam Nāṣir Ṭābit, *Al-jaysh wa-l-mujtamaʿ fī Lubnān, 1990–1995 mémoire de DEA*, (Institut des sciences sociales II, Université Libanaise 1997) 162.

²⁰ Gilbert Achcar, “Avec la complicité de l’Occident: Le monde arabe orphelin de la démocratie,” *Le Monde diplomatique* (June 1997) 7.

²¹ See Jean-René Belliard, *Beyrouth, L’enfer des espions* (Nouveau Monde Editions, Paris 2010); Stephen D. Biddle and Jeffrey A. Friedman, *The 2006 Lebanon Campaign and the Future of Welfare (Implications for Army and Defense Policy)* (CreateSpace, December 31, 2010); Florence Gaulo, *Rebuilding Armed Forces (Learning from Iraq and Lebanon)* (CreateSpace, May 16, 2011); Howayda al-Harithy, *Lessons in Post-War Reconstruction (Case Studies from Lebanon in the Aftermath of the 2006 War)* (Routledge, Abingdon Oxfordshire 2010); Sure Haugbolle, *War and Memory in Lebanon* (2d ed Cambridge Middle East Studies, Cambridge University Press, Cambridge 2010); Aida Kanafani-Zahar and Antoine Garapon, *Liban: La guerre et la mémoire* (PU Rennes, 2011); Stéphane Malsagne, *Fouad Chéhab (1902–1973). Une figure oubliée de l’histoire libanaise* (Karthala, Paris 2011); Delphine Resteigne, *Le militaire en opérations multinationales (Regards croisés en Afghanistan, en Bosnie, au Liban)* (Bruylant 2012).

PART

4

THE FRAGILE BASIS
OF DEMOCRACY AND
DEVELOPMENT

The Anatomy of the Arab Spring (2011–2015)

M. CHERIF BASSIOUNI

I. INTRODUCTION

In the Book of Ecclesiastes, it is recounted that “to everything there is a season”, noting that in every season there is “a time to break down, and a time to build up”.¹ The same may be said of the “Arab Spring”, which was a season for breaking down repressive governments and attempting to build up new systems to realize the long-repressed needs and desires of the peoples of the Arab-Muslim states, namely: freedom, justice, and dignity.² These were

¹ Ecclesiastes 3 (King James version).

² For example: M. Cherif Bassiouni, “Egypt’s Unfinished Revolution” in Adam Roberts et al. (eds.), *Civil Resistance in the Arab Spring* (Oxford University Press, Oxford 2016); M. Cherif Bassiouni, “Editorial” (2014) 8 *International Journal of Transitional Justice* 325; M. Cherif Bassiouni, “Egypt in Transition: The Third Republic” (2014) 4 (4) *PRISM* 3; Stephen R. Grand, *Understanding Tahrir Square: What Transitions Elsewhere Can Teach Us About the Prospects for Arab Democracy* (Brookings Institution Press, Washington DC 2014); Adel Iskander, *Egypt in Flux: Essays on an Unfinished Revolution* (The American University in Cairo Press, New York 2013); Esam al-Amin, *The Arab Awakening Unveiled: Understanding Transformations and Revolutions in the Middle East* (American Educational Trust, Washington 2013); M. Cherif Bassiouni, “The ‘Arab Revolution’ and Transitions in the Wake of the ‘Arab Spring’” (2013) 17 *UCLA Journal of International Law and Foreign Affairs* 133; Layla al-Zubaidi and Matthew Cassel (eds), *Diaries of an Unfinished Revolution: Voices from Tunis to Damascus* (Penguin Random House, London 2013); Marc Lynch, *The Arab Uprising: The Unfinished Revolutions of the New Middle East* (Public Affairs, New York 2012); Wael Ghonim, *Revolution 2.0: The Power of the People Is Greater than the People in Power: A Memoir* (First Mariner Books, New York 2012); Dr. Aly el-Samman, *Egypt: From One Revolution to Another: Memoir of a Committed Citizen Under Nasser, Sadat and Mubarak* (Gillgamesh Publishing, London 2012); Ashraf Khalil, *Liberation Square: Inside the Egyptian Revolution and the Rebirth of a Nation* (St. Martin’s Press, New York 2011); Robert Solé, *Le Pharon Renversé: Dix-huit Jours qui ont Changé l’Égypte* (Les Arènes, Paris 2011). The use of

the themes heard throughout the Arab world. Implicit in them was democracy, but understood as a means to achieve certain ends and not an end in itself. The “Arab Spring” revolutionary movement started in Tunisia in 2010, spreading to Egypt in January 2011, Syria in March, Libya in October, and Yemen in November 2011. In all these Arab states it started as a reformist movement. Later, with the exception of Tunisia, it was overtaken either by Islamists, ethnic religious groups or the military.

Arab states consider themselves Muslim because that is the dominant religion that is embraced by over 90% of the some 320 million people in the twenty-two countries that constitute the League of Arab States. Some of these states however, like Sudan, Mauritania, Djibouti, and the Comoros Islands are African Sub-Saharan states that are neither ethnically Semitic nor culturally Arab, except for cultural assimilation.³ North African states like Libya, Algeria, Tunisia, and Morocco have different ethnic compositions amongst their population. Thus, the “Arab Spring” was not only about ethnicity and culture. It was about a shared heritage, common historical experiences, shared values, similar hopes and aspirations. But just as there was a season for the advent of the “Arab Spring,” there came a season of its winter. Regrettably, its participants never felt the warmth of summer.

The Arab-Muslim world is like a seismic plate on which there is a different volcano in each country. Even though underground movements may affect some or all of the volcanoes, each one has its own characteristics, and each erupts in its own time. On occasion several erupt simultaneously or in sequence, but they remain distinct from one another. Their sizes also differ. Some volcanoes are bigger than others, e.g., Egypt with its large population is a big volcano, whereas Tunisia is a relatively small one. But big or small, it is the force of their eruption that determines their respective consequences. The fact that some volcanoes are currently inactive, such as Algeria, Morocco, and Jordan, does not mean that they will not erupt at some time in the future. To understand why the “Arab Spring” erupted, it is necessary to contextualize the different but related uprisings and root them in the history of the post-World War I Arab world and the broader history of the Muslim world since the seventh century.⁴ The history of the Arab world is intrinsically linked to that of the Muslim

the term Arab-Muslim is not intended to exclude non-Muslims, mostly Christians who live in many of these societies in varying numbers and percentages of the population. Such societies include Egypt (10% of over 88.4 million), Jordan (2.2% of over 8 million), Palestine (1-2.5% of almost 2.8 million in West Bank, <1% of almost 1.9 million in Gaza), Syria (10% of over 17 million), Lebanon (40.5% of almost 6.2 million), Iraq (<1% of 37 million), Tunisia (<1% of over 11 million), Algeria (<1% of over 39.5 million), Morocco (<1% of over 33.3 million). See United States Central Intelligence Agency, “The World Factbook,” <https://www.cia.gov/library/publications/resources/the-world-factbook/>, accessed March 14, 2016. But over almost fourteen centuries they have been impacted by many similar historical factors as their Muslim counterparts. They have absorbed so many of their social characteristics. Nevertheless, at different times and in different ways, they have suffered under Muslim rulers the same fate as their national Muslim counterparts have suffered at the hands of foreign rulers. There is no doubt in the end that these are Arab Muslim societies dominated by Muslim values, or whatever is so propounded, ruled by Muslims, where non-Muslims are not treated as equals to their Muslim counterparts (and that is, in many cases, a very mild way of putting what is at times outright discrimination and unequal treatment).

³ For example: Albert Hourani, *A History of the Arab Peoples* (Faber & Faber, Blackstone Audio, Ashland, US 2013); Ira Lapidus, *A History of Islamic Societies* (Cambridge University Press, Cambridge 2014).

⁴ In this context, it is of course also important to remember that the past is also contextual and can be appropriated for many causes. As Orwell cautioned in 1984, “He who controls the past controls the future. He who controls the present controls the past.” George Orwell, *1984* (1941). It is certainly true that many across the Arab-Muslim world are manipulating the past for their own cynical purposes. However, as this article argues, the reality and gravity of foreign hegemony and exploitation cannot be repudiated.

world, with the former having been an integral part of the latter since its birth. In fact, the Muslim world was briefly (during its formative years) an outgrowth of the Arab world.⁵ But it was not until the end of World War I that what we now know as the Arab world would emerge out of the Turkish Ottoman Empire⁶ and gain its own particular socio-political characteristics.⁷

The conventional political assessment of the “Arab Spring” has been that its causes were: corrupt autocratic national regimes mostly established and/or supported by Western imperial powers, the Israel-Palestine conflict, anti-Westernism, Muslim fundamentalism, and domestic socio-economic and political factors and problems similar to the earlier colonial periods of each respective country’s history.⁸ Many of these assessments do not sufficiently emphasize the persistent, pervasive, and pernicious effects of political, economic, and social repression of the masses over the years and the collective emotional consequences. My views, which I still hold today, were published in 1972 in *Storm Over the Arab World: A People in Revolution*,⁹ for which Professor Arnold Toynbee kindly wrote the foreword. Some forty years later, what I had then labeled the “Arab Revolution” re-emerged, as the “Arab Spring”, a term to signify the wave of new hope that was to be ushered in by the peoples of certain Arab states. In his 1979 book *Orientalism*, Edward W. Said categorized such developments as the Arab world’s reaction to Western imperialistic and racist policies and practices.¹⁰ Notwithstanding the links of Arabism and Islam that have connected the Arab peoples¹¹ for almost fourteen centuries, each Arab country retained its own distinct characteristics because of its distinguishable historic, cultural, ethnic, and socio-political factors. The idea that there is something called the “Arab Revolution” which is common

⁵ See (n 3).

⁶ For example: M. Sükrü Hanioglu, *A Brief History of the Late Ottoman Empire* (Princeton University Press, Princeton 2008); Lord Kinross, *The Ottoman Empire* (Folio Society, London 2003); Donald Quataert, *The Ottoman Empire, 1700–1922* (Cambridge University Press, Cambridge 2005).

⁷ See (n 3).

⁸ For example: Robert Wright, “Hidden Causes of the Muslim Protests,” *The Atlantic* (Washington DC, September 16, 2012), <http://www.theatlantic.com/international/archive/2012/09/hidden-causes-of-the-muslim-protests/262440/>, accessed August 25, 2015. Wright argues that the “hidden causes” of the September 2012 protests across the Arab-Muslim world were the consequence of America’s foreign policy, namely: (1) the use of drone warfare; (2) support for Israeli policies vis-à-vis Palestine; and (3) the continued presence of American troops in the region. While these arguments are certainly salient and help to explain the most recent protests, these rationales fail to provide the necessary context to explain why these issues matter in the first place. Certainly such conditions are evident in other states and regions where there hasn’t been such a response. Understanding the past eighteen months and the Damoclean sword that hangs over region requires a deeper assessment of why these issues matter so much and the origins of the psychology of ordinary people who rail against them. This article attempts to provide such an analysis.

⁹ Eugene Fisher and M. Cherif Bassiouni, *Storm Over the Arab World: A People in Revolution* (Westchester, US 1972). Unfortunately, the book has been relegated to total obscurity because an organization that I have never been able to identify convinced the publisher to withdraw the book from publication, even though pre-distribution had yielded some very positive reviews. Some 200 copies appear to have been saved, and a few of them can still be found.

¹⁰ Edward W. Said, *Orientalism* (Vintage Books, New York 1978). For another early critic of these perspectives, see also Maxime Rodinson, *The Arabs* (Chicago University Press, Chicago 1979); Maxime Rodinson, *Marxism and the Muslim World* (Monthly Review Press, New York 1982; new edition published by Zen Books, London 2015). But these views also represent a Western intellectual perspective.

¹¹ The term “Arab peoples” refers to the populations inhabiting each Arab state, as it is now known, and which subject to boundary differences and name differences, existed as far back as at least the fourteen centuries.

to all Arab peoples and which co-exists with each people's separate revolutionary pathway is, however, still misunderstood in the West, even though it has been a sporadic ongoing process since the end of World War I.¹² But it is also misunderstood in the Arab world, where the level of human development has consistently gone down since the intellectual and political nationalistic movements of the 1920s and '30s, essentially because of demographic increases and the failure of the educational systems.

Another misunderstanding fostered by Western elites and Western public opinion is that Israel constitutes the central part of what they see as the Arab unrest. For them, all matters involving the Arabs are interpreted as driven by the Arab people's animosity toward Israel, even though the "Arab Revolution", which started in 1917, predates the establishment of Israel in 1948. Undoubtedly, Israel's establishment in 1948 over half of what used to be Palestine and its gradual expansion through the illegal seizure of Palestinian territory since then, as well as its repressive treatment of Palestinians has had a traumatic effect on the Arab psyche. That is part and parcel of the Arab revolutionary cause.¹³ But it is not its *raison d'être*. This misunderstanding is due in part to Israel's political propaganda and in part to Islamophobia, which may or may not be related to a pro-Israel, anti-Arab, and anti-Muslim stance. This propagandistic approach is in part intended to generate a negative counter reaction by Arab Muslims and other Muslims in order to enhance the escalation of animosity between the Arab world and the Muslim world and the West in general. In other words, the more the Arab world and the Muslim world are at odds with the West, the more the pro-Israel exponents believe their interests are best served. Arab resentment also stems from the United States' actions in the region as the protector of Israel, because this links American neo-imperialism to Israel's territorial expansion and oppression of the Palestinians; and from the United States' support of oppressive and corrupt dictatorial Arab regimes.¹⁴ This in turn brings up another significant factor in the dynamics of this phase of the Arab Revolution, namely, the geopolitical dimension. The United States and Israel are not alone in this equation, as Iran's imperial goals have become obvious. These external geopolitical factors are no different to the situation during the Cold War with its rivalry between the United States and the USSR, later Russia, from 1948 to date.¹⁵ Geopolitical factors have always had an important influence in the affairs of the Arab world. One need only look at oil in the Gulf States, the Suez Canal in Egypt, the USSR's and now a resurgent

¹² *supra* note 2.

¹³ US support for the gradual territorial expansionism of Israel since 1948 has in recent years reached a level of unconditionality, further undermining Arab trust in the United States. For a historical perspective, see Michael B. Oren, *Power, Faith, and Fantasy, America in the Middle East, 1776 to the Present* (Norton, New York 2007); Ibrahim Abu-Lughod (ed), *The Transformation of Palestine: Essays on the Origin and Development of the Arab-Israeli Conflict* (Northwestern University Press, Evanston 1987); Walid Khalidi (ed), *From Haven to Conquest: Readings in Zionism and the Palestine Problem Until 1948* (Institute for Palestine Studies, Washington DC 1987); Walid Khalidi (ed), *All that Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Institute for Palestine Studies, Washington DC 1992); Walid Khalidi, *Palestine Reborn* (I.B. Tauris and Company, London/New York 1992); Walid Khalidi, *Khamsuna 'aman a'la taqsim Filistin* (Dar Al-Nahar, Beirut 1998); Walid Khalidi, "Dayr Yasin: al-Jum'a, 9/4/1948" [*Dayr Yasin: Friday, 9 April 1948*] (Institute for Palestine Studies, Beirut 1999).

¹⁴ Rahsid Khalidi, *Brokers of Deceit: How the U.S. Has Undermined Peace in the Middle East* (Beacon Press, Massachusetts 2013); cf. Daniel Kurtzer and others, *The Peace Puzzle: America's Quest for Arab-Israeli Peace, 1989–2011* (Cornell University Press, New York 2013).

¹⁵ Such as Russia's interest in Syria and the use of two of its ports in the Mediterranean as naval facilities.

Russia's access to the Mediterranean, or Iran's imperial ambitions and its use of the historical Shī'ah-Sunni conflict to expand its regional influence.¹⁶

Another influencing factor is the rise of violent radical Islamic groups affiliated with *al-Qā'idah* network, and since 2011 with the Islamic State organization referred to as ISIS or IS. Alliances between these groups and other Muslim fundamentalist ones, such as the Muslim Brotherhood, have been reported to exist. More recently, the Islamic State (IS) has expanded its violent activities from Iraq and Syria to Egypt's Sinai and Libya and is actively recruiting among Muslim communities worldwide.¹⁷ This development has brought about a new geopolitical dimension to this offshoot of the "Arab Spring", as has the sectarian civil war in Yemen between the Houthis Shī'ah supported by Iran and the Sunni Yemeni Tribes supported by Saudi Arabia, some Gulf States, and Egypt—all of whom are Sunni.¹⁸

II. HISTORICAL CONTEXT

The "Arab Revolution" cannot be understood without an appreciation of the Arab peoples' common history and separately, the history of each Arab country. These historical narratives take place across the last five centuries of Ottoman domination,¹⁹ its post-World War I successor, the Western colonial powers,²⁰ the subsequent US imperial successor after World War II,²¹ and in turn, the subservient regimes of a monarchical or military character, established and/or supported by the former colonial or imperial regimes. All of these regimes, both external and internal, have oppressed and exploited the Arab peoples, and as human experience has taught us this eventually leads to revolution.

In short, from the Ottoman rule starting in 1522, until the "Arab Spring" of 2011 the Arab peoples have been in an almost constant state of subjugation by foreigners, as well as by their own rulers acting either as surrogates for foreigners or supported by foreign regimes. They have been deprived of their basic human dignity, as well as their opportunities for human and economic development. They have pursued their separate struggles, which have nevertheless remained part of the larger "Arab Revolution". This is considered by some as a reason why this phase of the "Arab Revolution" is referred to as "the Arab Spring". Thus far, this phase has taken place in Tunisia, Libya, Egypt, Yemen, and Syria. In Tunisia and Egypt it is still a work in progress. In Syria and Yemen it has degenerated into a civil war. Libya has become a failed state. However, the actual spring of the "Arab Revolution" was not in 2010, but rather in the post-1919 period. This was when the Ottoman Empire broke apart and Arab peoples in different lands hoped to gain their independence and their dignity after centuries of foreign domination. They believed the implicit promise of President Woodrow

¹⁶ In Iraq, Lebanon, Syria, Bahrain, Yemen, and in the eastern province of Saudi Arabia.

¹⁷ Graeme Wood, "What ISIS Really Wants" (Issue), *The Atlantic* (Washington DC, March 2015), <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/>, accessed August 25, 2015.

¹⁸ The IS fighters, who originated in Iraq, went to Syria to fight alongside those who opposed the Shī'ah 'Alawī regime of al-Assad, which is supported by Iran. See M. Cherif Bassiouni, "Misunderstanding Islam on the Use of Violence" (2015) 37 *Houston Journal of International Law* 643

¹⁹ See (n 6).

²⁰ See (n 2).

²¹ As of the 1970s a new factor has emerged, namely sectarian Sunni-Shī'ah rivalries. This is fanned by Iran entering the fray by encouraging the historic seeds of Sunni-Shī'ah rivalry, using sectarianism as a way of expanding its own imperial designs and geopolitical interests, as is evident in Syria, Iraq, and Lebanon. See Oren (n 13).

Wilson in his Fourteen Points for a post–World War I era of peace and justice.²² But this was not to be. Wilson’s uplifting message to people in search of “self-determination,”²³ like President Obama’s at the University of Cairo on June 4, 2009, while well-intentioned and heartfelt, could not withstand the tests of domestic and international political realities.²⁴ Then, as now, the values and principles of freedom, justice, and dignity for the Arab peoples remained hollow words. These goals still have to be earned by the people in question through revolution, one at a time, and then will have to be consolidated over time through stable institutions of government. This is the bitter lesson of history that the Arab-Muslim world continues to learn, one incomplete revolution after another, one faltering step after the other. The United States’ failure to support these peoples’ legitimate claims and aspirations diminishes their faith in what they had hoped for from that country. Regrettably, when it comes to the choice of either supporting the people’s demand for the Jeffersonian principles enshrined in the United States’ Declaration of Independence and the Constitution,²⁵ or supporting tyrannical, oppressive, and corrupt regimes that are compliant with US policy, the option has always prevailed, even during this ongoing “Arab Spring.” In the end, there is nothing that produces distrust and enhances radicalization like raising expectations only to let them come tumbling down.

To this day the essence of the post–World War I “Arab Revolution” has remained essentially unchanged—it is about freedom, human dignity, and justice, and that implicitly includes democracy.²⁶ However, all of these aspirations are not easy to attain. They require, *inter alia*, organization, a political program, the ability to learn from the past’s mistakes, discipline, and patience. Arab societies are far from being there because of their levels of social and human development. At this point, the Arab peoples’ struggle is one for the basic needs of life. This struggle is about putting food on the table and providing security for the family. And this is proving to be quite a challenge for most Arab societies. Such history

²² Woodrow Wilson (Message to the Congress, January 8, 1918), Source: Records of the United States Senate, Record Group 46, National Archives.

²³ Robert Friedlander, “Self-Determination: A Legal-Political Inquiry” (1975) 1 *Detroit College of Law Review* 71, 73; M. Cherif Bassiouni, “Self-Determination and the Palestinians” (1971) *The American Journal of International Law* 31. For the perspective of the British and French colonial aspirations, see James Barr, *A Line in the Sand: The Anglo-French Struggle for the Middle East: 1914–1948* (W.W. Norton & Co., New York 2012).

²⁴ For a critical assessment, see Bahieddin Hassa, “Open Letter to President Obama,” *Al-Ahram News Weekly* (Cairo, February 7, 2013), <http://weekly.ahram.org.eg/News/1328/21/Open-letter-to-President-Obama.aspx>, accessed August 25, 2015. See also M. Cherif Bassiouni, “Egypt’s Unfinished Revolution,” in Adam Roberts et al. (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* 53 (Oxford University Press, Oxford, UK 2015).

²⁵ Thomas Jefferson in the Declaration of Independence succinctly described this in the following terms: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute a new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

²⁶ As described in Lynch (n 2), the challenges facing the Arab world are: legitimacy, identity, independence, sectarianism and ethnocentrism, social justice and economic development, modernity, and geography (and Israel).

is, to paraphrase Joyce, the nightmare from which Arabs are trying to awaken today and which the “Arab Spring” sought in its own hopeful and naïve way to address.²⁷ But then, as Faulkner wrote, “The past is never dead. It’s not even past.”²⁸ The memory of external and internal domination, repression, and exploitation in the Arab-Muslim world is neither dead nor past. Neither, of course, is the continuing reality of internal and international domination, repression and exploitation.

The range of human needs starts with the most basic needs of survival. It is only after these needs are met that others become necessary. Democracy and what it takes to make it happen and to make it work are often a luxury when contrasted with the essentials of physical survival. The Arab peoples are still, for the most part, struggling for their human survival while aspiring to democracy, even if it is still beyond their reach. That is why in the course of the Arab Spring there has been so much emphasis on laying down the foundations of tomorrow’s democracy. And that is why such a significant amount of energy has been put into developing new constitutions that would pave the way to democracy.²⁹ To date, however, these gains have been formal and not real. New constitutions have been drafted, and with the exception of Tunisia, they have been instrumentalized by the new regimes, as in Egypt’s case, and by the old ones such as Syria. What is noteworthy, however, is that since the formal end of Ottoman domination in 1919 many Arab states have witnessed a popular demand for constitutions and this has been evident in the “Arab Spring” countries of Tunisia (2014), Egypt (2014), Libya (draft awaiting referendum), and Yemen (draft awaiting referendum). In other countries, like Jordan and Morocco, their respective monarchs, seeking to stay ahead of the curve, have amended and enacted new constitutions respectively, both in 2011.³⁰ But many other Arab states do not have constitutions.

III. EVOLUTION OF THE ARAB IDENTITY

The Arab-Muslim world, as it is understood today, stretches from the Persian-Arabian Gulf in the East to Morocco and Mauritania in the West, from Syria and Iraq in the North to the Sudan, and the Sāḥel in the South, consisting of twenty-two individual states. In this article the term “Arab” is used to describe the peoples of these twenty-two states in general, although this includes non-ethnic Arabs, non-Semites, and non-Muslims as well. Nonetheless, because over 90% of the people who inhabit the Arab region are Muslims, these Arab states are referred to as Arab-Muslim states.³¹ Here the term is not used to refer

²⁷ James Joyce, *Ulysses* (Shakespeare and Company, Paris 1922).

²⁸ William Faulkner, *Requiem for a Nun* (Random House, New York 1951).

²⁹ In 1997 the Inter-Parliamentary Union, at its Cairo meeting, adopted a resolution based on a text prepared by this writer reflecting the need for a strong rule-of-law system to support a functioning democracy. In turn, the rule of law requires an independent, impartial, fair, and effective judiciary and respect for and observance of human rights. See Inter-Parliamentary Union, “Universal Declaration on Democracy,” September 16, 1997, <http://www.ipu.org/cnl-e/161-dem.htm>, accessed August 25, 2015. In its 2015 Report Human Rights Watch addresses the status of Human Rights in all Arab countries. See Human Rights Watch, “World Report 2015, Events of 2014” (2015), http://www.hrw.org/sites/default/files/wr2015_web.pdf, accessed August 25, 2015.

³⁰ Neither one of these constitutions brought any change in the status quo ante. The cosmetic changes they made are in keeping with the saying of Giuseppe Tomasi di Lampedusa in *The Leopard* (Random House, New York 1958): “If we want things to stay as they are, things will have to change.” And so, new constitutions are adopted.

³¹ For an explanation of this term, see (n 2).

to the other thirty-seven Muslim states that also belong to the Organization of Islamic Cooperation.³²

The first historically identifiable Arabs lived in what is today Yemen as different tribes who had developed contacts with one another in the centuries leading up to the formation of Islam under the Prophet, but the term has come to identify the peoples of the Arabian Peninsula and after World War I, many other peoples, including those of the Levant, Egypt, North Africa and the Sudan.³³ With the advent of the Islamic nation, in its various forms, after the death of the Prophet in 632 CE, it lost its ethnic significance to acquire a political one. There were simply too many ethnic non-Arabs in the Islamic nation that extended from Morocco to the Indian subcontinent, Asia Minor, and sub-Saharan Africa. The beginnings of Arab identity proper can be traced to the early part of the seventh century, when Islam first spread across the Arabian Peninsula and then beyond, moving into the Levant in 637 CE and North Africa in 642CE, up to the fifteenth century when the Turkish Ottoman Empire had come to dominate the Muslim world.³⁴ This dominance lasted until the end of World War I when a modern Arab identity emerged. In a complex way, this outward expansion represents both the birth of a common cultural and political Arab identity as well as the subsequent experience of these proto-Arabs who became dominated by Turkic and then Western European powers. As this writer argued in *Storm Over the Arab World*, "The Prophet had planned a vast nation of Islam to embrace the world, but his armies were chiefly Arab, and the central state that they created became an Arab (not primarily an Islamic) empire."³⁵ Part of the attraction of Islam lay in its universality, which looked beyond the particular characteristics of individuals and groups and provided them with a larger, universal identity, thereby assisting its cultural and religious expansion and acceptance. Moreover, it must be remembered that, unlike most invasions, the purpose was not singularly empire: When non-Arabs came under the control of the growing Arab Islamic Empire, they were incorporated as full members, and this new Islamic consciousness of nationhood which persisted through the centuries that followed and which was strongly influenced by the Arab culture.

This consciousness of an Arab Islamic nationhood, which is a shared identity, is founded on certain common denominators. First and foremost, it is predicated on a shared Islamic faith. But that religion's common language is Arabic, and it necessarily reflects an Arab culture. There is no way of avoiding that with the Qur'an and the Prophet's *Sunnah* being in Arabic, as are most theological, doctrinal and interpretive works. Second, it is based on a common experience of foreign domination, colonization, and victimization over nearly 1,400 years.³⁶ These two factors underpin the common Arab-Muslim experience of what is now considered the Arab world even though there is no homogenous Arab-Muslim identity, and there are differences between the various peoples of the Arab-Muslim world, something which is evident from the political fractures in the region. Pre-Arab cultures and traditions survive across the region, as do linguistic and religious differences. These differences still cause turmoil 1,400 years after the birth of Islam, as evidenced by the sectarian conflicts in Iraq, Syria, and Yemen, and the simmering one in Lebanon.³⁷

³² The Organization of Islamic Cooperation was formerly called the Organization of the Islamic Conference, but changed its name in 2011. Its membership consists of 57 states.

³³ Fisher and Bassiouni (n 9) 331.

³⁴ See (n 6).

³⁵ Fisher and Bassiouni (n 9) 9.

³⁶ See (n 3).

³⁷ For certain socio-psychological differences, see Raphael Patai, *The Arab Mind* (Recovery Resources Press, Tucson, US 2007).

The greatest level of integration and unitary control of the Arab world came between the middle of the fifteenth century to the middle of the seventeenth century when the Ottoman Empire spanned from modern day Iran in the West to Algeria in the East, and as far as Yemen in the South to what has previously been part of the Habsburg Empire as it reached toward Vienna in the North.³⁸ The Ottomans approached Arabs and the region as a single unit, though they administered each unit separately. Between the experiences and memories of the Arab-Islamic past and their experiences under the Ottomans, the Arab peoples retained the consciousness of being Arab Muslims.

The Ottomans did not approach their Arab subjects as equals, but rather as inferior persons from which they could extract taxes and labor. While not as oppressive as later external domination, Ottoman rule was hardly benign, it was cruel. It was also not uniform, and by the middle of the seventeenth century the Sublime Porte in Constantinople started to weaken and central control splintered, leading to the rise of regional leaders who exerted increasing control over their new fiefdoms.³⁹ It should also be remembered that while the Ottomans were Muslims, they were not ethnically Arab, nor were they culturally Arabized. They were mostly Aryans, with some Turkic ethnicities and a very distinct culture and historical background. They had little in common with the Arab peoples.⁴⁰ As such, the Arab peoples did not particularly welcome the Ottomans, and Arab nationalist movements, mostly Western-inspired, sprang up across the region during the latter part of their rule. Despite internal opposition, Ottoman dominion over the Arab-Muslim world continued until the end of World War I when the Empire was dismantled, as evidenced by the Treaty of Sèvres in 1922. In the wake of the World War I, the peoples of the Arab-Muslim world hoped to realize their nationalist demands and finally gain freedom and independence. This hope was short lived, however, as colonial authority passed from the Sublime Porte to London and Paris, the victorious powers in World War I, where it would remain for nearly thirty years. Spain and Italy were also colonial powers in Morocco and Libya, respectively. Despite the fervent wishes of the peoples of the region, the Arab-Muslim territories of the Ottoman Empire did not gain independence, rights, or liberties from their new colonial masters and certainly did not enjoy the dignity of self-determination. There were undoubtedly differences between Ottoman and Western rule, but in practical terms the Arabs remained the objects of foreign occupation and control.

Opposition to colonial rule increased after World War I when a wave of nationalist fervor washed across the region in response to the British and French colonialism. This was accompanied by similar developments in Morocco and Libya against Spain and Italy. In each Arab-Muslim state, a revolutionary ideology evolved, based on the specific experiences of the country and the policies and practices of its respective colonial authority. In these countries only modest success was achieved, as colonial authorities suppressed or co-opted opposition movements whenever possible while only rarely granting concessions, as they did in Egypt in 1922, leading to that country's independence and its first constitution in 1923. But the prolonged socio-psychological impact of foreign domination over the peoples of the region is evident in the post-“Arab Spring” experiences of the respective Arab states. Tunisia is the only state that is holding on to the hope of success: Libya is a failed

³⁸ See (n 6).

³⁹ Perhaps the most famous of these was Muḥammad ‘Alī, an Albanian who established independent control over Egypt in 1805. See P.J. Vatikiotis, *The History of Modern Egypt: From Muhammad Ali to Mubarak* (4th ed., Johns Hopkins University Press, Baltimore 1991); Afaf Lutfi Al Sayyid Marsot, *A Short History of Modern Egypt* (Cambridge University Press, Cambridge 1985).

⁴⁰ See (n 6).

state with two parliaments and governments in Benghazi and Tripoli (seeking nonetheless to reconcile their differences), Egypt has regressed into a military regime, Iraq is divided and struggling, and Yemen and Syria have fallen into civil wars.

The colonial and neo-imperial eras were bleak for the Arabs, who not only were denied their civil and political rights but also their economic and social ones. As stated in *Storm Over the Arab World*, “[I]mperial rulers and foreign entrepreneurs took far more than they gave. Revolution breeds best where the fruits of progress are most unfairly distributed. It is not in the nature of man of be content with the scraps dropped from another’s table. In the Arab Muslim world western wealth stood forth on boastful display. . . . Western films revealed such luxury as no ordinary Arab dreamed of. Even the common soldiers in white armies could hire native servants. Few Arabs learned to read and write. They had no schools. Those who achieved a little learning had small hope of higher education.”⁴¹ As a whole, the Arab-Muslim world became divided between the overwhelming majority who were poor and downtrodden and the few who were rich and superior. The scale of this poverty and inequality was in inverse measure to the ostentatious wealth of those who were not and it stood in sharp contrast to the economic, social, and human development of the West.⁴² The Arab experiences also stood in sharp contrast to the post-World War II progress made by Asian societies, such as China, South Korea, Taiwan, and Malaysia to name only a few, the latter of which is a Muslim society. The questions arising from the disparities between these societies, Western societies (including Eastern and Central European ones after 1989), and the Arab-Muslim world are not only enormous but also perplexing as to the significant deficit in human development and the disintegration of the social fabric that once bound these societies together. Islamists throughout the Arab-Muslim world and elsewhere attribute it to the decline in individual and social values that an Islamic form of government would achieve. But that seems more politically self-serving than realistic as Islamists offer their slogan “al-Islam Hoa al-Ha”, Islam is the Solution.

The end of World War II, however, weakened the hold of colonial and imperialist power and independence became inevitable, as France and the United Kingdom were weakened and no longer able to enforce their rule. Into this power vacuum, however, stepped the United States as it began to exert control over the region, effectively taking over many of the United Kingdom’s functions as the new global hegemon. Eventually the region was freed from colonialism and power passed to nonrepresentative monarchs and military dictators selected or supported by Washington, London, and Paris. Some of these monarchies

⁴¹ See Fisher and Bassiouni (n 9) 336. In *The Wretched of the Earth*, Frantz Fanon remarked on the contrasting conditions of the Arab town and settler town, remarking scathingly: “The settlers’ town is a strongly built town, all made of stone and steel. It is a brightly lit town; the streets are covered with asphalt, and the garbage cans swallow all the leavings, unseen, unknown and hardly thought about. The settler’s feet are never visible, except perhaps in the sea; but there you’re never close enough to see them. His feet are protected by strong shoes although the streets of his town are clean and even, with no holes or stones. The settler’s town is a well-fed town, an easygoing town; its belly is always full of good things. The settlers’ town is a town of white people, of foreigners. The town belonging to the colonized people, or at least the native town, the Negro village, the *madīnah*, the reservation, is a place of ill fame, peopled by men of evil repute. They are born there, it matters little where or how; they die there, it matters not where, nor how. It is a world without spaciousness; men live there on top of each other, and their huts are built one on top of the other. The native town is a hungry town, starved of bread, of meat, of shoes, of coal, of light. The native town is a crouching village, a town on its knees, a town wallowing in the mire. It is a town of niggers and dirty Arabs.” Franz Fanon, *The Wretched of the Earth* (Grove Press, New York 1963).

⁴² UN Development Programme, “Arab Development Challenges Report 2011” (2012).

subsequently morphed into military oligarchies that continued to be tied to their former or new imperial powers in the region, such as the USSR. In effect, the colonial era passed into the imperialist era in which Western states and the USSR (until 1989) attempted to maintain control over the region through local proxies, much as had been the case under Ottoman and pre-Ottoman control.

The socio-economic and human development of Arab-Muslim states at the time of their respective gaining of independence was low. This did not improve thereafter except in economic terms for the indigenous people of the oil-rich Gulf States. For the Arab peoples, the successor rulers maintained the policies of their predecessors, in repressing and exploiting local populations. These new regimes perpetuated the imperial dominance of the colonial powers and suppressed the legitimate desires and needs of their people, including benefitting the oligarchies they created. Such relationships have not changed to date, the “Arab Spring” notwithstanding. For the peoples of the Arab-Muslim world, the more things changed, the more they stayed the same.⁴³ In a perverse way, the wealthy Gulf States did not fare much better in terms of human and social development. Their power/wealth remained in the hands of the few. This reality is also likely to come to an eruption soon, particularly in Saudi Arabia with a population of 25 million and 5 million living at or below the poverty line.

IV. NATIONALISM AND THE RISE OF ISLAMISM

Nationalism dominated the Arab-Muslim world between the 1920s and the 1960s when pan-Arabism became ascendant, eventually bringing a number of Arab nationalists and pan-Arabists to power, including Gamel Abdel-Nasser in Egypt⁴⁴ and Aḥmad Ben Bella in Algeria, the Baʿth Party in Syria and Iraq, and Muʿammar al-Qadhafi in Libya.

None of these ideologies and political movements managed to bring about good or effective governments. They also failed to satisfy the economic needs of the people. The Arab revolutions that sprang up across the region in the 1950s and 1960s were a product of the need to remove outside control, to establish good and effective government and to achieve economic and social development, thereby completing the circle of full political self-determination.⁴⁵ Confronted by a failing economy and the increasingly repressive policies of its advocates, nationalism, pan-Arabism, and Baʿthism lost their standing among the Arab peoples once they realized that only the faces in leadership changed, but not the peoples’ conditions.

The outcome was a transformation of the ideological character of Arab activism from nationalist and secularist movements to religious ones. Islamism replaced nationalism and other ideologies as the dominant political ideology on the street as of the 1970s. However,

⁴³ See M. Cherif Bassiouni, “Egypt’s Unfinished Revolution”, in Adam Roberts et al. (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* 53 (Oxford University Press, Oxford, UK 2015).

⁴⁴ See *id.*; Bassiouni, “Egypt in Transition” (n 2); Bassiouni, “Editorial” (n 2); Abdel Rahman el-Rifaʿi, *Thawrat 23 July 1952: Tarikhoha Al-Qawmi Fi Sabrʿo Sanawat: 1952–1959* [History of the 23 July 1952 Revolution and Its National Impact: 1952–1959] (Dar El Maʿref, Cairo 1989).

⁴⁵ Fisher and Bassiouni (n 9) 333 et seq. (“Nasser in Egypt and Ben Bella in Algeria argued that the Arab revolution is a product of Arab experience designed to serve Arab needs, and the observer is forced to accept their analysis.”) However, as noted in *Storm Over the Arab World*, “The revolutionaries’ determination to destroy foreign ownership and management of the economy, in order to protect their new political grip, left their states with very few native citizens capable of operating the existing economy, and there was no alternative except total control by government.”

religious revival also had another function, namely to remind Arabs of the greatness of their past and the transcendental values of their religion and culture, something which perhaps had not been sufficiently acknowledged by the more secular nationalist leaders.⁴⁶

To be clear, Islamism is not about the religion of Islam per se. It is an ideological precept built on selected religious values, principles, and norms conveniently interpreted to provide both the legitimate basis of the given political group; including its methods, particularly when they violate the values, principles, and norms of Islam. But Islamist political ideology gives solace to the weak and the dispossessed through the manipulation of faith and hope that the disenfranchised so direly need. Muslim rule has never been about freedom of the people or democracy. It has also never been about the accountability of rulers. It has been about the preservation of power by the ruler and his sharing it with his ruling regime.⁴⁷ Certainly, there have been Muslim rulers through fourteen centuries who have provided more justice and fairness to the flock they ruled than others. Nonetheless, when Arab nationalist movements failed between 1920 and 1960, religiously inspired political movements were able to argue that they could call upon a greater power and a higher justice. Their appeal resonated with the masses more than that of the nationalist slogans whose failure had been proven in the everyday living conditions of the Arab masses. It did not matter whether the religious-political agenda realistically had a better chance of succeeding in providing better answers to existing problems. If nothing else, it offered hope to those that had lost all hope. Thus, in Egypt since the late 1980s, the Muslim Brotherhood has had the simplest response to the peoples' woes: "Islam is the solution". Who could dispute or argue with that statement? Of course there was the question of "how"—but that was to come later once the party was in power. And when that happened in 2012, it failed.⁴⁸ But then no nationalistic slogan managed to become more appealing to the downtrodden Egyptian masses.⁴⁹ Pro-democracy secularists pushed forward their agenda and offered new constitutions, but they too failed—as had the post-World War I era of constitutional democracy in some countries of the Arab world—because their attempts were instrumentalized by oppressive and corrupt dictatorial regimes.⁵⁰ Thus far very little has changed, though there is still some slim hope.⁵¹ What is important to note here is how the secular democratic constitutional movement, throughout the Arab-Muslim world, has overlooked the Islamic identity of its peoples. Furthermore, they have overlooked the moral and ethical uplifting appeal that emotionally moves the masses in the drafting of post-"Arab Spring" constitutions. In a cultural sense, they have borrowed too much rhetoric from the West and not enough enforcement capabilities, which are sorely needed to translate constitutional rhetoric into reality.

⁴⁶ Fanon (n 41) 213 ("The struggle for national liberty has been accompanied by a cultural phenomenon known by the name of the awakening of Islam. The passion with which contemporary Arab writers remind their people of the great pages of their history is a reply to the lies told by the occupying power.").

⁴⁷ See M. Cherif Bassiouni, "Misunderstanding Islam on the Use of Violence," (2015) 37 *Houston Journal of International Law* 643; M. Cherif Bassiouni, *The Shari'ā and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, Cambridge, UK 2014).

⁴⁸ Adam Roberts and others (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* 53 (Oxford University Press, 2015); Bassiouni (n 2). See also Chapter IV in M. Cherif Bassiouni, *Chronicles of the Egyptian Revolution: 2011–2015* (Cambridge University Publishing, forthcoming).

⁴⁹ *Id.*, see Chapter V.

⁵⁰ *Id.*, see Chapter VI.

⁵¹ *Id.*, see Chapter XIV.

As is often the case with religious movements, however, the Islamist movement has become increasingly fundamentalist with a tendency toward violence. This means a call for a return to the early and simple days of the Prophet, including the indiscriminate use of the sword, as IS and Boko Haram have so tragically demonstrated between 2013–2016. The message has been the same one from the days of Ibn Taymiyah (1293–1328) to the Salafis and Wahhābīs of today.⁵² Inevitably in this Islamist ideology, everything that resonates negatively with the people is an opportunity ripe for ideological and political exploitation. As is apparent, the United States in particular and the West in general have become prime objects for Islamist opprobrium. In this new ideology, it matters little whether the reasons are logical or relevant: Movies by crackpot amateurs in California and cartoons in Denmark or Paris are legitimate sources of anger and resentment, as are drone strikes on innocent civilians in Afghanistan and Pakistan, torture at Abū-Ghrayb and Guantánamo, and support for Israel's attacks on Palestinians and ongoing seizure of Palestinian lands.⁵³ This comes in addition to the United States' and Israel's double standards, exceptionalism, and Islamophobia. All combined, these factors make for a strong case for the Islamists, and violence is the inevitable and tragic outcome of this anger, frustration, and feeling of despondency. Passivity is seen as the continuation of the post–World War I colonialism and its continuation after World War II under the United States' imperialism, maintained up to the present day proxy regimes. The rise of the *al-Qā'edah* network of organizations, groups, and individuals since the 1980s attest to this phenomenon. Nonetheless the limited effectiveness of their approach—September 11, 2001, notwithstanding—has given rise to the next historical stage, namely a more unified organization that operates from a defined territory, whose recruits, mostly young, come from all over the world.⁵⁴ This is what IS is.

The rise of contemporary Islamism and its resort to violence is not only due to the profound psychological toll that history has taken on Arab Muslims but is also due to the failure of the secular democracy movement in the region. This can be mainly attributed to the disorganization of its various liberal/nationalistic/secular/pro-democracy groups and their inability to organize and coalesce into effective political organizations. More important, the

⁵² See M. Cherif Bassiouni, "Misunderstanding Islam on the Use of Violence" (2015) 37 *Houston Journal of International Law* 643.

⁵³ M. Cherif Bassiouni, *The Institutionalisation of Torture by the Bush Administration: Is Anyone Responsible?* (Intersentia, Cambridge 2010); Laurel E. Fletcher and Eric Stover, *The Guantánamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (University of California Press, Berkeley 2009); Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave MacMillan, Basingstoke 2008).

⁵⁴ The sources and causes of violence are multifaceted. They have been so throughout history, even though the pursuit of power and wealth seem to be the primary motivators at the collective level. This pursuit of power has frequently taken the form of religious belief. See M. Cherif Bassiouni, "Misunderstanding Islam on the Use of Violence" (2015) 37 *Houston Journal of International Law* 643; David Nirenberg, *Neighboring Faith: Christianity, Islam and Judaism in the Middle Ages and Today* (University of Chicago Press, Chicago 2014); Jack David Eller, *Cruel Creeds, Virtuous Violence: Religious Violence Across Culture and History* (Prometheus Books, New York 2010); see cf. M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, Cambridge 2014), showing that Islam prohibits certain forms of violence in much the same way as contemporary International Humanitarian Law; Christopher Bail, *Terrified: How Anti-Muslim Fringe Organizations Became Mainstream* (Princeton University Press, Princeton 2014), describing the cultural and political environment in the United States that has led to anti-Muslim fringe organizations, and the role of the media in shaping perceived Muslim identity as "terrorist."

debilitating effect of corruption on Arab societies has resulted in a weakening of its social fabric, thus making reform and renewal ever more difficult.

V. IDENTITY AND VIOLENCE

The single most important factor in understanding the events of 2011–2015 is the cumulative interactive experience of Arab societies with socio-economic-political factors, including the debilitating effects of corruption on each and every Arab society, that brought about the peoples' alienation, despair, and anger. This is in addition to the demeaning and disenfranchising experience of colonialism, neo-imperialism, and of the abusive and corrupt national regimes that followed. And last, but not least, of the increasing human and social development deficit that developed in so many Arab societies.

That violence would result from such characteristics is hardly surprising or revelatory.⁵⁵ Throughout history people have fought for much less. The resentment of American settlers toward King George was based on a fraction of this and was considered legitimate grounds for dissent and war, resulting in the deaths of tens of thousands. A more modern corollary comes in the struggle of black Americans against second-class status in the post-Civil War United States. Langston Hughes, the African American poet, pointedly asked, "What happens to a dream deferred?" and answered with another, similarly provocative question, "or does it explode?"⁵⁶ The Arab-Muslim world has lived with a dream deferred for centuries, but especially the last decades. And now it is exploding—not surprising, given the history and context of the situation. But regrettably for most people, this dream is once again being suppressed. In such a tense situation Arab Muslims and non-Arab Muslims who live under the same conditions register and amplify every slight, no matter how significant or serious, in ways they otherwise would never have. These slights include the cartoons of the Prophet published in *Jyllands-Posten* in September 2005, the release on YouTube of the slanderous film *The Innocence of Muslims* in July 2012, or the incessant anti-Islamic attacks by Islamophobes and others.⁵⁷ Such provocations reopen old wounds and add insult to the existing injury of colonialism and neo-imperialism, not necessarily because they are offensive in and of themselves, but because they recall a period of emasculation and foreign domination. There is an old aphorism about the cornered animal being the most dangerous, and in some sense Arabs and Muslims have been cornered by colonialism, neo-imperialism, and corrupt national regimes. In this context ongoing slights of their religion and morality are seen as continuations of the past. In the context of the history of the Arab-Muslim world

⁵⁵ Fanon (n 41) 60 (emphasis added). Fanon, in a particularly insightful section of *The Wretched of the Earth*, describes the duality of the colonizer and the colonized: "The colonial world is a Manichean world. It is not enough for the settler to delimit physically, that is to say with the help of the army and the police force, the place of the native. As if to show the totalitarian character of colonial exploitation the settler paints the native as a sort of quintessence of evil. Native society is not simply described as a society lacking in values. It is not enough for the colonist to affirm that those values have disappeared from, or still better never existed in, the colonial world. *The native is declared insensible to ethics; he represents not only the absence of values, but also the negation of values. He is, let us dare to admit, the enemy of values, and in this sense he is the absolute evil. He is the corrosive element, destroying all that comes near him; he is the deforming element, disfiguring all that has to do with beauty or morality; he is the depository of maleficent powers, the unconscious and irretrievable instrument of blind forces.*"

⁵⁶ Langston Hughes, "Harlem," in *The Collected Poems of Langston Hughes* (Knopf, New York 2007).

⁵⁷ These acts of aggression include the threatened burning of 200 Qur'ān by Pastor Terry Jones in 2011, the vitriolic attacks of the polemicist Robert Spencer, and the desecration of Qur'ān by soldiers in Afghanistan and Guantánamo by urinating or burning the Muslim holy book.

and the perpetual denial of basic respect, fundamental rights, and accountability, whether directly by the West or through its proxies, these matters take on existential importance.⁵⁸

One of the most tragic manifestations of the Arab colonial past is its persistence under indigenous rulers' internal repression. The oppressed person continues to be transformed from a subject into an object, unable to affect the condition of his or her life. As the French saying goes, the more it changes, the more it remains the same. So what is left to do? One of the very few acts of independence left is resorting to violence. Fanon interpreted the violence of oppressed people as an act of agency. This view is perhaps the best way to understand what has been going on in the Arab-Muslim world. Indeed, all too often the only avenue of agency open to the oppressed is violence, an action whereby they can claim some sort of control.⁵⁹ In a world in which weapons are cheap and political accountability largely nonexistent, people eventually strike out however and wherever they can. Given the nature of society, in which the powerful wall themselves off and forcefully police the political, social, and economic subaltern, in a perverse way the people themselves become the targets of violence. As seen in the Arab Muslim world, as the oppression and repression of those in power increases, so does the popular reaction as an expression of resistance and agency—Some would also say as an expression of last resort. These lessons have not been learned in the West as they continue to react to violent phenomena as a manifestation of “terrorism” *tout court*—and that is why they are failing to stem the violence.

The majority of victims in Syria, Iraq, and Yemen suffer at the hands of other Muslims. The same is true in Nigeria with the actions of Boko Haram, in Somalia with the Shabāb, to name only these two non-Arab arenas.⁶⁰ The more recent violence of IS is particularly cruel and so blatantly contrary to Islam's values, principles, and norms. Nonetheless, all these individual actors claim Islam as their justification, despite the fact that there is no basis for it whatsoever. To them and to other so-called fundamentalists, everything else has failed: nationalism, communism, democracy, and whatever else one might care to list. The only ideology left is Islam, and that is without any limits on its means, because to them the end justifies any means.⁶¹ Islam itself, however, rejects the postulate that the ends justify the means because it is a religion grounded in higher values and principles, requiring that both the ends and the means conform to these values and principles as well as its specific legal dictates. Therefore, violent conduct toward Muslim and non-Muslim civilians is contrary to Islam,⁶² whether such acts are committed by groups such as IS,⁶³ Shabāb in Somalia,⁶⁴

⁵⁸ M. Cherif Bassiouni, *Post-Conflict Justice* (Martinus Nijhoff, Leiden/Boston 2002); Jane E. Stromseth (ed.), *Accountability for Atrocities: National and International Responses* (Martinus Nijhoff, Leiden/Boston 2003); Neil J. Kritz (ed.), *Transitional justice: How Emerging Democracies Reckon without Foreign Regimes* (3 volumes, United States Institute of Peace Press, Washington DC 1995); Bassiouni (n 2).

⁵⁹ This is why some revolutionary leaders, like Gandhi, Mandela, Tutu, and King, are so remarkable, precisely because they are the rare exception to the norm.

⁶⁰ Bassiouni (n 50) 1–17.

⁶¹ The dictum is attributed to G. M. Anselmi and E. Menetti (trs), Niccolò Machiavelli, *Il Principe* (1st published 1532, Le grandi opere politiche volume 1, Bollati Boringhieri, Turin 1992).

⁶² Bassiouni (n 50); Bassiouni (n 18); see M. Cherif Bassiouni, “Misunderstanding Islam on the Use of Violence” (2015) 37 *Houston Journal of International Law* 643.

⁶³ Syrian Observatory for Human Rights, “About 2000 People Killed by Islamic State Since the Establishment of ‘Caliphate’” (December 28, 2014), <http://syriahr.com/en/2014/12/about-2000-people-killed-by-islamic-state-since-the-establishment-of-caliphate/>, accessed August 26, 2015.

⁶⁴ For example: Human Rights Watch, “No Place for Children: Child Recruitment, Forced Marriage, and Attacks on Schools in Somalia” (Report) (February 20, 2012), <http://www.hrw.org/reports/2012/02/19/no-place-children>, accessed August 26, 2015.

Boko Ḥarām in Nigeria,⁶⁵ Anṣār Al-Dīn in Mali,⁶⁶ Ṭālibān in Afghanistan,⁶⁷ or suicide bombings by Palestinian resistance fighters.⁶⁸ All of this having been said does not absolve the Arab peoples from their social and political failures. Other people from other cultures have been in similar negative historic contexts and have outgrown them. The Arabs have not, and that is their own fault. It reveals a weakness in the Arab Muslim societies that is so obvious in every such community, no matter how large or small or where it is located. In contrast, individuals, when taken out of the Arab-Muslim societal or group context, seem to easily transcend the collective weaknesses of corruption, self-interest, lack of discipline, failure to organize, fairness to one another, collective solidarity, and the art of consensus-building. In part, this is described in the ensuing section concerning the failure of economic development.

VI. ECONOMIC FAILURE

Today most of the Arab-Muslim world remains one of contrasts with ostentatious wealth existing side by side with extreme poverty. The region is essentially underdeveloped and in some areas desperately impoverished. As noted above, in economic terms, the West has taken much more from the Arab-Muslim world than it has given, but this applies even more so to the region's despotic and corrupt indigenous rulers. It is one thing to be oppressed and exploited by external colonial and neo-imperial foreigners, it is quite another to be subjected to these same treatment by one's own people. The former brings injury, the latter adds insult, thus fueling the prospects of violent revolutionary outcomes. Arab economies are still the products of colonial and neo-imperialist policies designed to extract as much benefit as possible as quickly as possible, for the benefit of the few and to the detriment of the many.⁶⁹

Over the past thirty years East Asian economies have grown significantly by following an orderly path of industrialization and economic development planning, while the

⁶⁵ Adam Nossiter, "In Nigeria, New Boko Haram Suicide Bomber Tactic: 'It's a Little Girl,'" *New York Times* (New York, January 10, 2015), http://www.nytimes.com/2015/01/11/world/africa/suicide-bomber-hits-maiduguri-nigeria-market.html?_r=0, accessed August 26, 2015.

⁶⁶ For example: Adam Nossiter, "Saying Mali is 'Our Country,' Militias Train to Oust Islamists," *New York Times* (New York, August 5, 2012), <http://www.nytimes.com/2012/08/06/world/africa/mali-militias-poorly-armed-but-zealous-to-oust-islamists.html>, accessed August 26, 2015.

⁶⁷ Anand Gopal, *No Good Men Among the Living: America, the Taliban, and the War through Afghan Eyes* (Highbridge Company, Minneapolis, US 2014); Robert D. Crews and Amin Tarzi (eds), *The Taliban and the Crisis of Afghanistan* (Harvard University Press, Cambridge, US 2009). See also Atia Abawi, "Afghan woman whose nose, ears cut off travels to US," *CNN* (Atlanta, US August 26, 2015), <http://edition.cnn.com/2010/WORLD/asiapcf/08/04/afghanistan.mutilated.girl.update>, accessed August 26, 2015. The report recounts the story of a 16-year old girl named 'Ayshah who was sold into marriage to an abusive Ṭālibān fighter in order to pay off a family debt. 'Ayshah ran away from her husband, and when she was found, she was tried before a court. Here she was sentenced to having her nose cut off and being left in the mountains to die. She survived, and subsequently traveled to Los Angeles for reconstructive surgery. See also "Reports of the Independent Expert, United Nations Commission on Human Rights, on Human Rights in Afghanistan" (September 21, 2004) UN Doc A/59/370, "Report of the independent Expert on the situation of Human Rights in Afghanistan, M. Cherif Bassiouni" (March 11, 2015) UN Doc E/CN.4/2005/122.

⁶⁸ Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (Random House, New York 2005); James Feldman and Robert Pape, *Cutting the Fuse: The Explosion of Global Suicide Terrorism and How to Stop It* (Chicago University Press, Chicago 2010).

⁶⁹ UN Development Programme (n 42).

Arab-Muslim world has been stuck in a low gear, especially since 1990.⁷⁰ The United Nations Development Program's (UNDP) *Arab Development Challenges Report* of 2011 pointedly ties the lack of freedom, justice, and dignity to past oppression and the gross underdevelopment of the region, noting:

A resurgent Arab region is seeking an end to a system marked by the political economy of renter states and demanding a move towards developmental states with commitment to freedom, social justice and human dignity. From the outset, those in control failed to understand the underlying dynamics that were driving popular discontent, built up over many years in a system characterized by political repression and economic and social inequality. Repressive tactics were employed to silence or contain dissenting voices, but so deep seated was pent up popular opposition towards ruling elites that in response to this repression, large and diverse segments of the Arab populations joined the youth who stood at the movement's vanguard.⁷¹

However, as the report notes, Arab economies and development schemes have become top-heavy, having become "increasingly concentrated in the hands of political and economic elites with preferential access to crucial assets and resources".⁷² Ultimately, the UNDP concludes:

Poverty, whether measured in terms of human capabilities or in money metric terms of income or expenditure, reflects the convergence of social, economic and political exclusions, which is glaring for the majority of the Arab rural population. Indeed, the severity of rural poverty and the large disparities between rural and urban development reviewed in this report are indicative of failed rural development policies. It is sufficient to note that 50% of the Arab population is rural, while agriculture, their primary economic activity, accounts for no more than 15% of Arab GDP [. . .] Therefore, it would be safe to conclude that despite some notable progress, the region has generally failed to transform its massive oil-wealth into commensurate improvement in human well-being and decrease in human deprivation. Furthermore, the absence of effective social protection mechanisms exacerbates the risk of falling into poverty, as the poor are at the receiving end of economic systems that favor patterns of consumption for the rich, such as investment in luxury and speculative real estate projects, while those sectors that can create decent and more stable employment opportunities languish. Failing to institute and respect mechanisms of participation and accountability, Arab regimes missed many opportunities for course correction and even failed to understand people's aspirations, thus creating conditions that led to popular uprisings.⁷³

These problems are laid bare in the UNDP's 2011 Human Development Report and since then they have increased in large part because of demographic increases, lack of economic and social development, including education, and the perpetuation of corrupt oligarchies and dictatorial regimes. The Arab region has an average Human Development Index score of 0.641, placing it just barely within the group of "medium development states". As a point of reference, "very high human development" starts at 0.889, "high

⁷⁰ *Id.*

⁷¹ *Id.* 1.

⁷² *Id.* 2.

⁷³ *Id.* 3–4.

human development” starts at 0.741, “medium human development” starts at 0.630, and “low human development” starts at 0.456.⁷⁴ It should be pointed out that only three Arab states have climbed into the highest category of development, namely the United Arab Emirates, Qatar, and Bahrain.⁷⁵ In comparative terms, current growth in the region is the lowest in the developing world. While South Asia and East Asia fare worse on some indices, their regional HDI scores are still growing at a faster pace than the Arab-Muslim world. Indeed, only Europe and Central Asia are growing more slowly, which more can more likely be explained by their own shortcomings than by great achievements on the part of the Arab states. As a whole, the Arab region comes out below the global average and just barely above the category of low human development. In most respects the region approximates the level of human development level of small island states. Moreover, the aforementioned very highly developed Arab states appear to have moved up the tables not so much because of their achievements but because of their small populations and fantastic wealth.

Economic and social development, as well as human development, have been noteworthy failures in most Arab states, including those with a high per-capita income. The extent of these failures varies in each society. Jordan, Lebanon, and Morocco are among those relatively less affected than, for example, Egypt, Algeria, and Yemen; since the war in Syria, that country, along with Yemen, has been the most negatively impacted. The correlation between economic development and social and human development is definitely significant, and all three impact stability, democracy, and human rights, whether it be in the Arab Muslim world or anywhere else.

VII. GEOPOLITICAL FACTORS, EXCEPTIONALISM, AND DOUBLE STANDARDS

World powers have clearly taken an interest in the events of the “Arab Spring” but have done little to help support pro-democracy movements in different states. While the carnage in Syria goes on, the international community turns a blind eye to it. In 1990 the United States and a coalition of supporters raised an army of almost 800,000 troops to oust Ṣaddām Ḥussein from Kuwait,⁷⁶ even though he had committed to voluntarily withdraw from Kuwait.⁷⁷ His occupation of Kuwait caused less than 100 casualties.⁷⁸ However in

⁷⁴ *Id.* 130.

⁷⁵ UN Development Programme, “Human Development Statistical Annex” (2011), http://www.undp.org/content/dam/undp/library/corporate/HDR/2011%20Global%20HDI/English/HDR_2011_EN_Tables.pdf, accessed August 26, 2015.

⁷⁶ United States Central Command, “Operation Desert Shield/Desert Storm, Executive Summary” (July 11, 1991), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB39/document6.pdf>, accessed August 26, 2015.

⁷⁷ Though he never announced any specific dates or other specifics about the withdrawal.

⁷⁸ Media reports of the time put the number casualties from the occupation as high as 4,000+ though it was never confirmed or documented. This author worked with the Ministry of Justice of Kuwait at the time of the establishment of the Iraq Special Tribunal to document the casualties of Kuwaitis and non-Kuwaitis killed by Ṣaddām forces and was only able to obtain evidentiary record on some ninety-one cases. This was never formally documented nor formally reported, probably because it could have been interpreted in a way that overlooks the prohibition of aggression in international law. See William M. Arkin, Damian Durrant, and Marianne Cherni, “On Impact: Modern Warfare and the Environment. A Case study of The Gulf War 45” (Greenpeace study) (May 1991) (“current interviews suggest the figure is a couple of thousand”), <http://www.greenpeace.org/international/Global/international/planet-2/report/1991/6/on-impact-modern-warfare-and.pdf>, accessed August 26, 2015; Abdullah M. Al-Hammadi, *Torturing a Nation—A Document Study of the Iraqi Aggression Towards Kuwaiti People (August 2, 1990–February 26, 1991)* (Al

Syria, with an estimated 400,000 casualties and eleven million refugees and internally displaced persons by 2015, by the Assad regime supported by Iran and Russia, nothing is done to stop the carnage. Geopolitical interests have and continue to dominate the scene in the Arab world. Exceptionalism and double standards characterize approaches to the region by influential countries such as the United States, Russia, Iran, Saudi Arabia, and Israel.

Typically, it has been the United States and other Western powers, who have meddled in the affairs of the Middle East, but recently Russia and Iran have grown in influence as well. In the case of Syria, Russian, and Iranian actions and influence have provided military, economic and political support to the Assad regime. China has also acquired much influence over the Sudan and is making inroads in Egypt. Saudi-Arabian actions in Yemen are another recent manifestation of this accepted phenomenon.

After years of living in conditions comparable to a pressure cooker, the people of Tunisia erupted in opposition as a result of a single incident involving a single person. Shortly thereafter the peoples of Libya, Egypt, Yemen, and Syria also burst into revolt. In each case, the international community, and more particularly the United States, reacted in differing and inconsistent ways. The gamut of Western response has ranged from military intervention in Libya,⁷⁹ to political support in Egypt,⁸⁰ to military assistance in Yemen, some military action against IS in Iraq and Syria, and to general paralysis regarding the larger Syrian civil war.

On the whole, the people of the Arab world have regarded these responses negatively. Their perception of such conduct is that it is part of a Machiavellian plot to destabilize or destroy the Muslim Arab world, mostly for Israel's interest. Arab political discourse is often prone to looking for conspiracy theories to explain internal affairs and looking toward external actions in particular as a way of explaining their own failures. No conspiracy is far-fetched enough to be discarded; everything is possible. This is understandable in the case of people whose destinies have been controlled from abroad for centuries, and then from within by ruling elites. For the disenfranchised, anything is possible and everything that happens is for a reason. Those who tend toward such outlooks cannot comprehend why major powers like the United States and NATO might at different times act pragmatically, opportunistically, or in response to domestic internal considerations. They certainly cannot grasp how such disregard for the Arab peoples persists in Washington, London, and Paris. Therefore, there is always a perceived imaginary plan or scheme, in short a conspiracy of sorts.

Wazzan International Press Co, Kuwait 1995) 109–119 (cites one study that there were “465 victims of war injuries,” as well as a second study indicates 373 casualties “of which, 180 were Kuwaitis”). See also Human Rights Watch, “Human Rights Watch World Report 1992, Iraq and Occupied Kuwait” (1992), <http://www.hrw.org/reports/1992/WR92/MEW1-02.htm>, accessed August 26, 2015 (“Over 280 people are still missing after having been arrested or disappeared during that period . . . But there is insufficient evidence to support the widely circulated reports by the Kuwaiti government-in-exile and repeated by U.S. officials that substantially larger numbers were executed in retaliation for the beginning of Desert Storm on January 17”); Judith Miller, “Standoff in the Gulf; Atrocities by Iraqis in Kuwait: Numbers Are Hard to Verify,” *New York Times* (New York, December 16, 1990), <http://www.nytimes.com/1990/12/16/world/standoff-in-the-gulf-atrocities-by-iraqis-in-kuwait-numbers-are-hard-to-verify.html>, accessed August 26, 2015.

⁷⁹ M. Cherif Bassiouni (ed), *Libya: From Repression to Revolution: A Record of Armed Conflict and International Law Violations, 2011–2013* (Martinus Nijhoff, Leiden/Boston 2013).

⁸⁰ Adam Roberts and others (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* 53 (Oxford University Press, 2015); M. Cherif Bassiouni, “Egypt in Transition: The Third Republic” (2014) 4 (4) PRISM 3.

Many Egyptian secularists believe that the United States conspired to assist the Muslim Brotherhood in destabilizing the country in 2011-2013, and Yemenis are convinced that ‘Alī ‘Abdullāh Ṣāliḥ, the deposed tyrant, still sits at the levers of power in Ṣana‘ā’ as part of a ploy to maintain control over the strategically important country. Similarly, the Sunni Arab-Muslim world is broadly convinced that the United States selected the Shī‘ah as a tool to use for political domination in Iraq, thereby facilitating the subjugation of Sunni Iraqis for geopolitical reasons. In other words, Iran was given Iraq and now Syria to fulfill its imperial designs in exchange for its renunciation of nuclear weapons and aggressive actions against Israel. An earlier example of this thinking was the Arab perception of the West’s relationship with Sudan and the widespread belief that the United States directly caused the breakup of the country in 2011 by supporting the Southern Peoples Liberation Movement. No one believes that the United States lacks the power or capacity to remove the Assad regime in Damascus, irrespective of the positions of Russia and Iran. It seems to Arabs that the ongoing war in Syria serves the geopolitical interests of the United States and Israel, and that this primarily explains why NATO warplanes bombed Libya but not Syria. The truly confused and confusing policies of the United States, which supported intervention in some places but not in others, and which prop up regimes in one country but not another, are set against a backdrop of some sixty years of clumsy neo-imperial policy and practices in the Arab-Muslim world, particularly its unequivocal support for Israel and failure to resolve the Palestinian Question. Notwithstanding the violations of international law committed against Palestinians, Israel continues to have the unqualified support of the United States. Can there be any different contextual framework for understanding US policy and practices in the Arab world? Conspiracy theories flow thick from this premise, streaming into popular perceptions of why the United States supports corrupt, dictatorial regimes, while failing to support democratic movements in Arab countries.

Russia, like its predecessor the USSR, also engages in the same game of geopolitics, exceptionalism, and double standards whenever it can. The fact that it is so blatant is almost breathtaking. But in doing so, Russia also slaps the United States in the face, as the latter remains unable to act due to its internal political limitations. All of this means that the laudable goals of the “Arab Spring” movement have been overtaken not only by internal power-politics but also by external geopolitical considerations that are beyond the Arab peoples’ control. But it also means that in this era of globalization, the post-World War II human rights have been overtaken by power and wealth interests.⁸¹

VIII. ASSESSING THE “ARAB SPRING” OUTCOMES

The “Arab Spring” started in Tunisia, followed by Egypt, Yemen, Libya, and Syria, respectively. Tunisia is so far the only country in which regime change and the path toward democracy have progressed. In Egypt, regime change has occurred twice between February 2011 and July 2014. However, democracy did not survive with a military regime taking over from July 3, 2014, onward, with a strong majority of public support. Libya has disintegrated into a failed state, and Yemen is in the throes of a civil war likely to result in its break up into two states. The Syrian Assad regime has survived thanks to the Russian and Iran’s direct military involvement and political and economic support, notwithstanding the aforementioned deaths of an estimated 400,000 civilians and eleven million internally displaced persons and refugees. Iraq, though not one of the “Arab Spring” countries, is also in the throes of a

⁸¹ M. Cherif Bassiouni (ed), *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Intersentia, Brussels 2015).

latent civil war with IS and an ongoing low-level conflict between Shī'ah and Sunni with the former being supported by Iran.

The ongoing conflicts in both Syria and Iraq are influenced by the involvement of external powers. This involvement is in part for their respective geopolitical interests, and in part because of sectarian rivalries which in turn have an impact on other political and military interests in other states. Russia supports the Assad-led 'Alawī regime for its own geopolitical interests. Russia's interest in Syria is to make sure it has port facilities on the Mediterranean, and thus to remain a world naval power. It is Syria's primary, if not exclusive, arms supplier and provider of military and technical assistance and support. There are also an estimated 30,000 Russian nationals residing in Syria. Though how much it can influence the Al-Assad regime is questionable. Iran's interests are the consolidation of political and military power and influence in Iraq, Syria, and Lebanon, all of which are states where sizable Shī'ah communities exist. These communities look to Iran's religious *marja'iyah*, which means leadership, for spiritual guidance. As a result however, this has an effect on more than just religious questions. In time, the joint platform of Iraq, Syria, and Lebanon will give Iran the opportunity to exert its influence in the oil-rich Gulf States through the respective Shī'ah minorities in Kuwait and the eastern province of Saudi Arabia as well as the Shī'ah majority in Bahrain. The *Hūthī* Shī'ah in Yemen are in control of half of the country.

As of 2014, Iran has a new interest in the Iraq-Syria arena, namely combating the so-called "Islamic State" or IS. In a bizarre way, this results in Iran and, indirectly, the Assad-led 'Alawī-Shī'ah of Syria siding with the United States, Russia, and the Sunni Gulf States as well as Jordan and Egypt in fighting IS. This new conflict is taking place within the context of (or at least on the same territory as) two other political-sectarian conflicts in Iraq and Syria, and has made some strange bedfellows. As the IS movement expands in both the Arab and broader Muslim world and brings new recruits into its fold, including Muslims from the Western world, it is acquiring a dimension that transcends the Arab and Muslim worlds and thus involves many more states and their respective interests, not the least of which is what they perceive of as domestic terrorism. Another development of the ever expanding IS phenomenon is its political-military extension to other Arab states, such as Libya, Tunisia, and Egypt's Sīnā'i Peninsula. For all practical purposes, IS, which is driven by a religious ideology of its own making, has overtaken the loosely connected network of *al-Qā'edah*. Unlike the *al-Qā'edah*, which had the characteristics of a franchise, to use a commercial organizational model analogy, IS is an organization with a vertical power structure and a territorial base. Therefore, its military capabilities and the military/political dangers it poses are more significant. These harmful effects include worldwide terrorism.

Russia and Iran provide military aid to their client state of Syria while Iran also aids Shī'ah factions in Iraq, Hizbullāh in Lebanon, and the *Hūthī* in Yemen. The United States aids Egypt military and also provides modest economic aid to Tunisia, which not only needs it but is moreover the only "Arab Spring" partial success story to date.

None of the "Arab Spring" countries have thus far developed effective methods for transitional justice and post conflict justice.⁸² In specific terms, this means that none has addressed the needs of victims.⁸³ Tunisia, Egypt, Libya, and Yemen have made changes in

⁸² M. Cherif Bassiouni, "Editorial" (2014) 8 International Journal of Transitional Justice 325.

⁸³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (December 16, 2005), UN DOC A/Res/60/147 (December 16, 2005); Special Rapporteur M. Cherif Bassiouni, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN DOC E/CN.4/2000/62 (January 18, 2000); M. Cherif Bassiouni, "International Recognition of Victims' Rights" (2006) 6 Human Rights Law Review 203.

their constitutions, but only Tunisia has successfully withstood the test of implementing its new Constitution of 2014. It is the only country in which democracy seems to be progressing in the right direction. Egypt has not fully implemented its 2014 Constitution since all of its human and civil rights provisions await enactment into law—these laws can also strongly restrain these rights. The repressive measures undertaken since 2013 have proven their point.⁸⁴ In Egypt and in every other “Arab Spring” country, democracy has regressed.

The “Arab Spring” has also bolstered the Kurdish national claim, which at this time is divided into four components: Iraq, where a *de facto* Kurdish state already exists; Syria, where efforts to establish a regional government in Kurdish areas are underway; Turkey, where guerilla warfare is ongoing between Kurds and the government; and finally the still to arise claim by Kurds of Iran. In the first two cases the Kurds took advantage of the tumultuous situation in the Arab world to advance their claims. The latter two have to face regimes that will use every available force to prevent any Kurdish ethnic claims.

The outcomes of the “Arab Spring” can be judged in different ways, but any such assessment has to be made in accordance with its original goals, namely: the pursuit of freedom, justice, and human dignity. These are a reflection of fundamental human values, ones which can be said to be part of the commonly shared values of all human societies since recorded history began. Nonetheless, there are those who argue that these values have different cultural contexts and societal applications. While this is true in our contemporary global society, there is an ongoing harmonization of these differences, which are largely a reflection of the economic, social, and human development of different communities. In modern terms, there are a number of categories through which these fundamental human values find their expression and application. Such categories include those of democracy, the rule of law, the constitutional process, accountability, and the redressing of wrongs. These specific categories are singled out here because all those involved in the “Arab Spring” movements throughout the Arab states expressed their desire for them. They are also what civil society organizations in Arab states have called for and long advocated. The same is true in the other Arab states that have not experienced the “Arab Spring” directly, but where these objectives are being consistently advocated.

An important matter to note here is that in a number of Arab states, including those which have been part of the “Arab Spring”, a constitutional reform effort has been undertaken, such as that in Tunisia, Libya, Egypt, and Yemen. These constitutional efforts have borne some fruits not only because new constitutions have been enacted but also because their provisions have been invoked, and in varying respects they have been adhered to. Here again the most successful experience is the Tunisian Constitution of 2014. The proposed new Yemeni Constitution, drafted between 2012 and 2014, has not been capable of preserving the country’s unity in and of itself, while Libya’s 2011 Constitution has been invoked as a unifying force for the different factions that have rendered it dysfunctional. This dysfunction is why the interim Libyan Constitution of 2011 is still in the process of being amended. Egypt’s Constitution of 2014, which was drafted with significant influence from the present regime, has worked for the benefit of that regime.⁸⁵ Only Tunisia has managed to establish a democratic process which it followed through on with legislative elections 2014 and a presidential election in 2015. Egypt also had a presidential election of sorts in 2014; however, its result was foregone conclusion with Field Marshall ‘Abd al-Fattāḥ al-Sīsī

⁸⁴ See Chapters VIII, IX, and X in M. Cherif Bassiouni, *Chronicles of the Egyptian Revolution: 2011–2015* (Cambridge University Publishing, forthcoming 2016).

⁸⁵ See M. Cherif Bassiouni and Mohammad Helal, *al-Goumahūriyya al-Thānīa fī Misr* [*The Second Republic in Egypt*] (Dar el Shorouk, Cairo 2012).

being elected to office. The 2015 legislative elections were controlled and guided by the military establishment.⁸⁶ In Tunisia the contested presidential elections were carried out fairly and resulted in a challenger to the incumbent president being democratically elected. In Yemen and Libya no constitutionally based presidential elections have taken place. Syria remains the greatest focal point of tragedy in the Arab world, with its dictatorial regime of Bashār al-Assad, the successor of his father Ḥāfeẓ al-Assad, a military dictator who took the country over in 1970. Syria was part of the “Arab Spring” in that its initial local demonstrations aimed at obtaining minor reforms in the dictatorial regime of the Assad family. This family comes from the Shī‘ah minority community of ‘Alawī (which makes up an estimated at 12% of the total population of Syria), and the demonstrations against them resulted in massive repression as described above.

In conclusion, it can be stated that the “Arab Spring’s” goals and objectives of democracy, freedom, justice, and human dignity have been co-opted by domestic interests and groups and overtaken by geopolitical realities. Contrary to widespread popular belief, IS is not the main obstacle to these goals and objectives. The main impediment is the lack of economic, social, and human development. The Arab peoples’ history of oppression, lack of freedom, absence of democracy, injustice, and human indignity appear to be continuing under new guises. But this does not mean that such goals and objectives are no longer present among many in the Arab masses or that they will not resurface at another time. In other words, while the short-term “Arab Spring” may have come and passed, the long-term Arab Revolution, as described above, is simply preparing to enter its next phase when the time is ripe.

⁸⁶ See Hossam Bahgat, “Anatomy of an Election: How Egypt’s 2015 Parliament Was Elected to Maintain Loyalty to the President,” *Mada Masr* (Cairo, March 14, 2016), <http://www.madamasr.com/sections/politics/anatomy-election>, accessed March 19, 2016.

The Difficult Path toward Democracy

New Electoral Systems in Egypt, Libya, and Tunisia

KAOUTHAR DEBBECHE*

I. INTRODUCTION

The Arab revolutions share “some edifying similarities”:¹ They were unexpected, spontaneous, and contemporaneous. For the Arab world, the revolutions brought enthrallment, and hope of proceeding at last to the bed of democracy. There have been a variety of paths taken toward this shared democratic objective, in a disconcerting acceleration of the constitutional histories of the countries concerned. In Tunisia, the path was shaped by a “political pact”;² sealed by the Higher Authority for Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition (ISROR).³ In Egypt, following the deathblow delivered to the regime of Ḥusnī Mubārak, ownership of the democratic transition paradigm was taken by the Supreme Council of the Armed Forces (SCAF).⁴ In Libya, which had previously resisted any attempt at institutionalization, it was on the battlefield that the

* The author and the editors sincerely thank Ms. Rebekka Yates for translating this article into English.

¹ S. Belaid, “Les révolutions arabes contemporaines: quelques édifiantes similitudes” in H. M’rad and M. L. F. Moussa (eds), *La transition démocratique à la lumière des expériences comparées* (International Symposium held on May 5–7, 2011, in Tunis, University of Carthage, Tunisian Association of Political Studies, Tunis 2012) 11–21.

² M. Lieckfett, “La Haute Instance et les élections en Tunisie: du consensus au ‘pacte politique’” (2012) 82 *Confluences Méditerranée* 133–144.

³ See E. Gobe, “Tunisie an I: les chantiers de la transition” (2012) VIII *L’Année du Maghreb*, VIII, 2012; M. Lieckfett (n 2) 133–134.

⁴ For more on this subject, see B. Rougier, “Elections et mobilisations dans l’Egypte post-Moubarak” (2012) 1 *Politique étrangère* 86–87.

National Transitional Council (NTC) seized the reins of power, in an internationalized crisis.⁵ These three institutions, embroiled in the dialectic between break and continuity with the old orders they were supposed to dismantle, were the main actors of transition, mandated to prepare elections that should, by one means or another, lead to the development of a new constitution that embodied the break with authoritarianism and assured the path to democracy.

Tunisia, which was blessed with the most orderly transition process, chose the path of direct election of the constituent body. In Egypt, SCAF, in application of the (original) Constitutional Declaration of March 30, 2011, first organized elections to the People's Assembly (PA) or lower chamber of parliament, the epicenter of Egyptian political life, which was in turn called upon to help appoint a constituent committee. In Libya, the NTC drafted the necessary legislative provisions for the election of the General National Congress (GNC), a kind of an omnipotent parliamentary assembly tasked with forming a government and appointing a constituent committee.⁶ Another characteristic that all three countries had in common, despite the variety of their approaches, was their focus on elections.

In their focus on elections one might think the actors of transition had not strayed from the democratic path; after all, according to traditional liberal theory, elections are the alpha and omega of democracy.⁷ Yet accepting this gives a Schumpeterian tone to democracy. The function of the electoral ballot in this formal and instrumental democracy "consists of giving birth to a government"⁸—no more, no less. Yet although elections are inevitable as the modern means of appointing representatives,⁹ the electoral principle alone is not enough: History has taught us that democracy does not flow directly from the ballot box, which, as an example, the Nazi experience shows, can also produce a dictatorship.¹⁰

The solution is therefore to be found in "the construction of a moderate democracy based on Abraham Lincoln's logic of "government of the people, by the people, for the people", which would protect the people from itself and make individuals the source of power (sovereignty of the people), the means of power (electoral body, referendum) and the purpose of power (individual rights)".¹¹

In this context, the electoral system denotes "in its simplest form [. . .] the translation of votes cast, in a general election, into seats won by the various parties and candidates. The key variables in this are the voting system (a majority or proportional system and the mathematical formula used to calculate the allocation of seats) and the size of the constituencies

⁵ See UNSC Res 1973 (March 17, 2011) UN Doc S/RES/1973; see also M. Mokhefi, "Maghreb: Révolutions inachevées?" (2012) 1 *Politique étrangère* 74–75; F. Gaub, "Libye: le rêve de Kadhafi devient-il réalité?" (2012) 3 *Politique étrangère* 653.

⁶ See Art. 30 of the Constitutional Declaration of August 3, 2012.

⁷ See P. Pasquino, "Le principe de majorité: nature et limites" la vie des idées, http://www.laviedesidees.fr/IMG/pdf/20101214_principe_de_majorite_.pdf, accessed May 4, 2015.

⁸ J. Schumpeter, *Capitalisme, socialisme et démocratie* (Payot, Paris 1965) 372.

⁹ It was during the Middle Ages that elections succeeded random selection by lot, an ancient method of designating representatives, P. Martin, *Les systèmes électoraux et les modes de scrutin* (3rd edition, Montchrestien, Paris 2006) 13.

¹⁰ K. Gossweiler, *Hitler l'irrésistible ascension? Essais sur le fascisme* (Aden editions, Brussels 2006) 13–54.

¹¹ E. Millard, "L'État de droit, idéologie contemporaine de la démocratie" in J-M Février and P. Cabanel (eds), *Question de démocratie* (Presses Universitaires du Mirail, Toulouse 2001) 4–5, <https://halshs.archives-ouvertes.fr/halshs-00126251>, accessed September 15, 2015.

(i.e. not how many voters but how many representatives there are per constituency)¹²—and of course the organization of the electoral process. From the perspective of a formal democracy, the systems in the countries of the Arab Spring have suffered from birth defects, having not been “democratically established”—i.e., they were not “determined [...] by those who are governed”,¹³ either through their representatives or in a referendum. The systems were created by non-elected institutions, namely, ISROR in Tunisia, NTC in Libya, and SCAF in Egypt. But, although these institutions did not enjoy the legitimacy bestowed by election, they were, rightly, given as their principal mandate the task of ensuring the organization of democratic elections, and it is this that affords them a degree of “teleological legitimacy”. Among the main pitfalls that lay in their way, we might mention the burden of historical legacy that lends a negative charge to elections in Egypt and Tunisia; the absence of an electoral tradition and of institutional infrastructure in Libya; the security challenges; and, on top of that, the relentless pressure that the actors of transition were under due to the heavy weight of expectations and to revolutionary fervor. In a climate of uncertainty, the electoral systems, although nondemocratic in origin, were paradoxically obliged to lead the way toward democracy. We will consider the systems of Tunisia, Egypt, and Libya from this perspective, in order to assess how well they have enabled progress toward the goal of democracy.

Given the electoral experiences of the three countries, achieving the goal of democracy will entail meeting a triple test: first, the challenge of organizing free, fair, and transparent elections (Part II); second, the test of choosing an appropriate voting system (Part III); and third, with the groundwork thus laid, the test of putting that newly won democracy into practice (Part IV).

II. CONQUERING DEMOCRACY: THE CHALLENGE OF ORGANIZING FREE, FAIR, AND TRANSPARENT ELECTIONS

“A masquerade in which the results are known in advance”—such was the damning description of the electoral process under Egyptian and Tunisian authoritarianism. The first challenge that these two countries had to face was purging the management of elections of all the slippery arrangements that had served to make election fraud an institutionalized practice, decoupling democracy from its purpose—i.e., the potential for a change of regime—and sapping the elections of their very essence—i.e., a competition that is entered into on the basis of trust that the vote count would be fair. Both countries, and Libya which followed in their footsteps, had to rise to the challenge of ensuring a credible electoral process overseen by an independent electoral authority (Section A) and organizing competitive elections (Section B).

A. A Credible Electoral Process Overseen by an Independent Electoral Authority

In Tunisia, the executive, through the Ministry of the Interior, took sole responsibility for the organization of elections at the central and local level—from voter registration, the counting of votes, the designation of polling stations, to monitoring the election campaign.

¹² A. Reynolds and B. Reilly, *Electoral System Design: The International IDEA Handbook* (2002) 7, http://www.idea.int/publications/esd/upload/ESD_French_full_book.pdf, accessed May 4, 2015, available in English in a revised version at <http://www.idea.int/publications/esd/index.cfm>, accessed May 4, 2015.

¹³ S. Laghmani, “Existe-t-il un mode de scrutin démocratique” in A. Amor, P. Ardant, and H. Rousillon (eds), *Le suffrage universel* (Presses de l’Université des sciences sociales de Toulouse, Toulouse 1994) 100.

Every stage of the electoral process was locked under the control of an authority enslaved to the incumbent power:¹⁴ the electoral maps, distributed by agents sympathetic to the party in power, who withheld them from the opposition; the polling stations, of which there were a particularly high number, so as to make it difficult for the opposition to monitor the vote; the election campaigns, which were conducted under the control of the government and with the forced complicity of the state-owned mass media, which were monopolized by the candidates of the parties in power with utter disregard for the principle of equality between candidates. On polling day, voting was conducted in public and the counting in secret, under the watchful eye of those who were in charge of the polling stations and had been appointed by the governor, who was fiercely loyal to the regime. The various reforms made to the electoral code in order to improve the transparency of the process were in practice little heeded. Dead people “voting”, spoiled ballots, and stuffed ballot boxes were commonplace. In addition to the polling stations’ lack of neutrality, intended to fix the results, there was a puppet election monitoring arrangement. The creation in 1999 of a national observatory of elections tasked with ensuring proper adherence to election procedure only served to legitimize the fraudulent practices, as in the absence of any legal framework the institution was completely dependent on the President of the Republic. It was impossible to put the brakes on the wheels of manipulation in these elections, which were constructed of bland ritual, provoking in citizens if not disdain then at least disinterest.¹⁵

The situation in Egypt was not very different, although the elections there were more disputed, the press considerably freer, and the clientelism more flagrant, the latter further perverting the election process. Moreover, the characteristic trait of the Egyptian elections, far more than the systematic fraud all too familiar under authoritarian regimes, was the violence that punctuated the elections, and of course the monetization of votes. Those responsible were the National Democratic Party (NDP) and the Muslim Brotherhood, as they were the only ones with vast financial resources. “Corrupt, make loyal”—these were “the ‘legitimate’ methods used in the Egyptian electoral competition”.¹⁶ But another characteristic peculiar to Egypt is the introduction of judicial oversight over election procedures, which—although it has not completely eradicated fraudulent practices—has substantially reduced them.

Before 2000, supervision of polling stations was the responsibility of the Ministry of the Interior. Judicial oversight of the entire election process was established by a decree of the Egyptian Supreme Constitutional Court (SCC).¹⁷ Despite the irregularities observed in the 2000 and 2005 elections, they are nonetheless considered to have been the most transparent ones for decades. However, in 2007 the pre-2000 situation was re-established by an amendment to Art. 88 of the constitution,¹⁸ adding grist to the opposition’s mill,

¹⁴ The question was initially regulated by the first chapter, “General Provisions,” of Act No. 69-25 of April 8, 1969, containing the Electoral Code, *Journal Officiel de la République Tunisienne*, No. 14 of April 15, 1969, 422–432.

¹⁵ For more on this subject, see K. Debbeche, *Le droit électoral tunisien: vers la rupture avec la tyrannie* (Altaïr, Tunis 2011) 25–48 (in Arabic).

¹⁶ I. Farag, “Corrompre, fidéliser: Les ressorts ‘légitimes’ de la compétition électorale égyptienne” (2011) 7 *Egypte/Monde arabe*.

¹⁷ See N. Bernard-Maugiron, “Le juge, interprète de la constitution. La Haute Cour constitutionnelle et les élections parlementaires en Egypte” (2005) 2 *Egypte/Monde arabe*.

¹⁸ Art. 88 of the 1971 Constitution, as amended in 2007, provided: “The law shall establish the criteria that the members of the People’s Assembly must fulfil, as well as the arrangements governing the elections and the referendum [. . .],” our translation of the French version of the Egyptian Constitution quoted by N. Bernard-Maugiron, “Nouvelle révision constitutionnelle en Égypte: vers une réforme démocratique?” (2007) 72 *Revue française de droit constitutionnel* 852.

already highly critical of the government's maneuverings. The authorities gave a series of justifications for the amendment¹⁹ but could not give the real reason, which was to withdraw oversight of voting procedures from the judiciary following the mobilization of the judges in spring 2005 for the independence of the judiciary and the transparency of elections, dubbed the "Spring of the Judges."²⁰ Art. 88 did establish an improved Electoral High Commission composed of active or retired members of the judiciary and tasked with overseeing the vote in its entirety. But the institutionalization of judicial oversight, which does allow us to classify the Egyptian system, with some reservations, as a mixed model of election management, was in fact nothing but a step backward. In truth, only the general polling stations, where the count was to take place, were required to be overseen by a member of the judiciary. Auxiliary polling stations, no longer mentioned by the constitution, may be under the supervision of a civil servant—especially as staggering of the vote was prohibited, meaning that the elections must now take place on a single day.

The electoral legislature of the three countries of the Arab Spring attempted to comply with international standards for democratic elections; these require professional and impartial management of the electoral process by an independent election authority, which is considered to be an indispensable requirement for free, multiparty, transparent, and fair elections. In this context, the United Nations' Committee of Human Rights recommends that "an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly [and] impartially."²¹ Although "independence" remains difficult to define, it seems to be accepted today that the best guarantee of independence is the creation of an independent election management body. This model offers better protection than the two other models, namely, the government model discredited in pre-revolutionary Tunisia and the mixed model that was distorted in Mubarak's Egypt. Let us consider how effectively the legal frameworks established in the three countries have allowed this requirement of independence to be met.

The three countries took different approaches depending on the nature of the transition process and of the interim authorities. Egypt, which chose the option of legal tinkering throughout the transition process, stuck to the old model of supervision by entrusting responsibility to a judicial body, called the Judicial High Elections Commission, that was granted higher status and stronger powers than its predecessor, being now mandated to oversee the election process in its entirety.²² ISROR, which really wanted to sweep the board clean on election management, established an Independent Higher Election Authority (ISIE).²³ This served to set the standard, and the Libyan electoral legislature followed the lead of its Tunisian counterpart in establishing the High Commission of Elections.²⁴ In

¹⁹ See N. Bernard-Maugiron (n 18) 853.

²⁰ N. Bernard-Maugiron, "Le printemps des juges et la réactualisation autoritaire en Egypte" (2007) 108 *Politique africaine* 4, 67–85.

²¹ UNCH "General Comment 25," "§ 20 General Comments adopted by the Committee of Human Rights under article 40, paragraph 4, of the International Covenant on Civil and Political Rights" (August 27, 1996) UN Doc CCPR/C/21/Rev.1/Add.7.

²² Chapter 1 bis of the Act on the exercise of political rights (Act No.73 of 1956) on the High Commission for Elections was introduced by Act No. 173 of 2005 and amended by Act No. 18 of 2008, before being amended again by Decree-Law No. 46 of 2011.

²³ Decree-Law No. 201 (April 18, 2011) establishing an independent higher election authority, *JORT*, No. 27, (April 19, 2011) 484–486.

²⁴ Provided for under Art. 30 of the Constitutional Declaration cited above, the High Commission for Elections was organized by Act No. 4 of 2012 on the election of the General National Congress, NTC (January 28, 2012).

order to assess the degree of independence that these three bodies enjoy, we will need to analyze the legal framework that regulates them, whilst bearing accepted international standards in mind.

In this regard, the context in which the commissions were established, characterized by the suspension of constitutional texts and the absence of elected authorities, made it impossible to ensure the specific legal arrangements required for an independent body.²⁵ However, the Tunisian and Libyan election bodies in particular did enjoy the reflected legitimacy of the authorities that had established them, afforded by their consensus-based composition, and were generally accepted by the various political actors; this later encouraged acceptance of the results of the vote. ISIE was established by a Decree-Law adopted by ISROR and thus benefited from the consensus that prevailed within that body.²⁶ The Libyan High Commission was established by the Constitutional Declaration of August 3, 2011, and organized by Act No. 4 regulating the elections of the General National Congress. The Egyptian Judicial High Elections Commission was established under the Constitutional Declaration of March 30, 2011, and organized on the basis of an amendment to the Act on the exercise of political rights, overseen by SCAF.²⁷ Despite the shaky framework of transition, the judicial nature of the commission served to confer a measure of impartiality due to the respect enjoyed by the magistrature as a result of having been one of the principle vectors of resistance against the oppression of the Mubarak era.

Another factor in an authority's independence is its composition, as well as the procedures for recruiting and appointing the members of the commission and its chair, which must be by consensus. The members of the body must not form part of the executive, but strong leadership is also necessary, through the appointment as chair of a high-ranking magistrate, a respected public figure or somebody known for their neutrality, so as to be able to stand up to the influence of the executive and to the political parties.²⁸ In that regard, the three election authorities vary in their composition. Whereas in Egypt it is an entirely judiciary body, in Tunisia and Libya it is more heterogeneous. That being so, since appointment to these commissions is dependent neither on the executive nor on the political parties—the selection being made by the authorities holding transitional legislative power, namely, ISROR in Tunisia and NTC in Libya—they do *a priori* satisfy international standards on the question of independence.²⁹

A further guarantee of independence is budgetary autonomy. In fact, to ensure independence it is recommended that the election management authority have control of its own budget, which could constitute a percentage of the state budget, which it manages without being accountable to the executive. This requirement seems to be satisfied by all three commissions, which were, according to the instruments that established them, also endowed with legal personage and administrative autonomy.³⁰ Next, let us examine the mandate given

²⁵ "Administration électorale et Monde arabe: Expériences comparées" (April 2011) UNDP 6, http://www.undp.org/content/dam/undp/library/Democratic%20Governance/ELECTORAL_ADMINISTRATION_ARAB_WORLD_EN.pdf, accessed May 4, 2015.

²⁶ See Part III. Section A. 1, below.

²⁷ *Id.* (n 22).

²⁸ "Administration électorale et Monde arabe" (n 25); Gestion électorale, un aperçu du guide d'International IDEA (2008), http://www.idea.int/publications/emd/overview_fr.cfm, accessed March 23, 2016.

²⁹ See on this subject (n 25) 5.

³⁰ Art. 3 of the Tunisian Decree-Law No. 2011-27. For Egypt, see Art. 3 (bis A) of Act No. 73 of 1956 on legal personality, Art. 3 (bis I) on administrative autonomy by means of a General Secretariat and Art. 3 (bis j) on financial autonomy.

to the three bodies and the responsibilities entrusted to them. All three commissions were mandated to organize multiparty and transparent elections³¹ and were given full responsibility for the organization of elections in accordance with international standards. Their scope of competence includes the registration of voters,³² the registration of political parties and candidates,³³ the regulation of media access for parties and candidates standing for election,³⁴ the organization of voting procedures and the counting of votes,³⁵ the announcement of preliminary and final results,³⁶ accreditation of national and international observers,³⁷ and last, certain responsibilities as regards the arbitration of complaints concerning the electoral process, with election disputes being, however, largely entrusted to the courts. The three bodies were thus given broad powers for the supervision of elections. However, independence implies not only supervision but also exercising full responsibility for implementation. In this there is a clear difference between the Tunisian and Libyan authorities and the Egyptian High Elections Commission: The Egyptian High Elections Commission entrusted all responsibility for implementation of its mandate and the decisions that it adopted to a general secretariat.³⁸ It is this general secretariat, comprising a representative of the Ministry of the Interior among others, that is ultimately tasked with direct administration of the elections. This suggests that the Egyptian High Elections Commission cannot be considered to be an independent electoral commission; in our view, it comprises the independent component of a mixed model working in collaboration with this general secretariat, which has a strong executive component. Although the role of this judicial body does seem to have been strengthened and to enjoy higher status, these considerations have led some observers to conclude, not without regret, that this model is no different from the model of control established in 2005. Moreover, the Carter Center, which was one of seven observers accredited by the Electoral High Commission, noted that the latter could rely on the assistance of the Ministry of the Interior, which had made available all the necessary logistical resources and had taken on the task of distributing election materials.³⁹ As for the power of regulation, this was exercised in collaboration with SCAF,⁴⁰ which only further made its independence questionable. The situation seems to have been different in Tunisia and Libya.

³¹ Art. 2 of the Tunisian Decree-Law No. 2011-27, Art. 3 of the Egyptian Act No. 73 of 1956, amended, and Art. 1 of the Libyan Act No. 4 of 2012.

³² Art. 4 of Tunisian Decree-Law No. 2011-27, Art. 3 (bis f) of the Egyptian Act No. 73 of 1956, amended, and Art. 8 of the Libyan Act No. 4 of 2012.

³³ Art. 4 of the Tunisian Decree-Law No. 2011-27, and Art. 12 of the Libyan Act No. 4 of 2012.

³⁴ Art. 4 of the Tunisian Decree-Law No. 2011-27, Art. 3 (bis f) of the Egyptian Act No. 73 of 1956, amended, and Art. 19 of Libyan Act No. 4 of 2012.

³⁵ Art. 4 of the Tunisian Decree-Law No. 2011-27, Art. 3 (bis f) of the Egyptian Act No. 73 of 1956, amended, providing that the High Commission shall appoint the polling and counting stations and Art. 26 of the Libyan Act No. 4 of 2012.

³⁶ Art. 4 of the Tunisian Decree-Law 2011-27, Art. 3 (bis f) of the Egyptian Act No. 73 of 1956, amended, and Art. 33 of the Libyan Act No. 4 of 2012.

³⁷ Art. 4 of the Tunisian Decree-Law 2011-27, Art. 3 (bis f) of the Egyptian Act No. 73 of 1956, amended, and Art. 43 of the Libyan Act No. 4 of 2012.

³⁸ See Art. 2 of the application circular of the Act on the exercise of political rights, Electoral High Commission, Decision No. 1 of 2011, <http://www.elections2011.eg/images/Laws/lae7a.pdf>, accessed May 4, 2015.

³⁹ "Final Report of the Carter Center Mission to Witness the 2011–2012 Parliamentary Elections in Egypt," Carter Center (2012), http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/egypt-2011-2012-final-rpt.pdf28, accessed May 4, 2015.

⁴⁰ See, for example, Decree-Law No. 130 of 2011 on voting by Egyptians abroad, adopted by SCAF (November 19, 2011), <http://www.elections2011.eg/images/Laws/out-of-country-voting.pdf>, accessed May 4, 2015.

Unlike the Egyptian authority, which limited itself to supervisory powers over the elections, the Electoral Commissions also carried out administrative tasks directly, in accordance with the powers accorded to them. The instruments establishing them had bestowed considerable regulatory power as well as the status of legal personage, and a financial and administrative authority that afforded them a logistical framework and access to resources. Although critical for completing a lacuna in the legal framework, this power complicated the task of the Electoral Commissions and necessitated the adoption of a stream of decisions in a short space of time, at the expense of legal security. That is what was revealed by the European Union observation mission in Libya, which criticized the legislative powers entrusted to the High Commission as being too broad for an administrative body.⁴¹ In Tunisia, the accompaniment of the election process left ISIE with the burdensome task of adopting a considerable apparatus,⁴² which altered the direction of its role, rendering it sometimes incapable of implementing its own decisions.⁴³ Nonetheless, it has to be said that self-regulatory powers are a factor for independence, even if the tight schedule and lack of institutional memory did make the task rather more difficult.

B. Competitive Elections

In order for an election to express a free choice, political pluralism is of undeniable importance. In Tunisia and in Egypt, that expression of free choice had been curbed not only by a security regime, intent on smothering any dissident voices and dissuading any attempt at opposition, but also by a legal framework that curtailed the freedoms of partisan activity and election campaigns. The interim authorities in Tunisia and Egypt faced the challenge of breaking away from such practices and introducing adversarial debate during the elections in order to allow a free vote by the electorate. As for post-revolutionary Libya, it faced the challenge of establishing a legal framework for a multiparty system for the first time, as political parties had been criminalized under Act No. 17 of 1972 on the Prohibition of Partisan Activity, which stipulated that “anyone who joins a party is a traitor,”⁴⁴ which al-Qadhafi had adopted as a means of controlling the masses to prevent them from joining the opposition.⁴⁵

To start with, both Tunisia and Egypt had, under Ben ‘Ali and Mubarak, established controlled “multipartyism” in which one party/state was at the center of political life. In fact, both countries evolved, step by step, from a one-party system to a system of a dominant party with satellite opposition parties, eliminating indefinitely any possibility of a change of power. It was within that authoritarian framework that the laws regulating political parties

⁴¹ “Preliminary statement, Historic elections lay foundation for democratic development of Libya” (Tripoli, July 9, 2012) European Union Election Assessment Team, http://eeas.europa.eu/eueom/missions/2012/libya/reports_en.htm3, accessed May 4, 2015.

⁴² ISIE, “Rapport relatif au déroulement des élections de l’Assemblée Nationale Constituante” (February 2012) 40–50, http://www.isie.tn/Fr/le-rapport-de-lisie_11_158. Unofficial French translation of the original Arabic found here: <http://aceproject.org/ero-en/regions/africa/TN/tunisie-rapport-relatif-au-droulement-des>, accessed May 4, 2015.

⁴³ D. Petit, “Analyse du cadre juridique. Election du 23 octobre 2011 de l’Assemblée Nationale Constituante” Tunisian Republic, International Foundation for Electoral Systems (IFES) (February 2012), http://www.ifes.org/~media/Files/Publications/Reports/2012/Legal_Framework_Assessment_French.pdf64, accessed May 4, 2015.

⁴⁴ Act No. 17 of 1972 on the prohibition of partisan activity (*Tajrim el hizbiaa*) *Libyan Official Journal* (May 30, 1972) 206–208.

⁴⁵ M. Ouannes, *Militaires, élites et modernisation dans la Libye contemporaine* (L’Harmattan, Paris 2009) 114–115.

were adopted, as a means of perpetuating the hegemony of these parties over the political competition. The revolutions of winter 2011 shifted this landscape that had been disrupting the electoral playing field, and left the interim authorities facing an enormous challenge: how to open up political competition, whilst also streamlining it.

In this context, the “permissive” attitude⁴⁶ of the interim authorities allowed the creation of a plethora of parties, and facilitated their involvement on the political stage. To reflect the new liberal practices, the Tunisian ISRO adopted new legislation on political parties that repealed the 1988 Act. In Decree-Law No. 87 of September 24, 2011, on political parties,⁴⁷ based on the principles of freedom of political association, the system of prior authorization was abolished and replaced by a system of declaration to the prime minister (Arts. 6–16). State authorities were prohibited from directly or indirectly impeding the functioning of parties (Art. 5). The financial management and accounting rules for parties were carefully set down (Art. 19), which was an innovation per se.

Unlike the Tunisian ISRO, the Egyptian SCAF was content to amend Act No. 40 of 1977 on political parties by means of Decree No. 12 of 2011.⁴⁸ Maintaining the previous restrictions, including notably the prohibition on parties of a religious or sectarian nature, the amendment primarily served to change the nature of the Political Parties’ Commission responsible for accrediting new parties: It replaced the administrative commission with a judicial committee based at the Court of Cassation, to comprise two vice presidents of the Court of Cassation, two vice presidents of the Council of State, and two vice presidents of the Court of Appeal. Decree No. 12 also removed another barrier to the creation of political parties, by repealing Art. 18 of Act No. 40 of 1977, which limited the guarantees and advantages of that Act to parties with at least ten seats in parliament. This liberalization enabled the creation of thirty parties in 2011, of all political directions: liberal, leftist, social-democrat, Islamic democrat. In this context emerged, in addition to the Muslim Brotherhood, which established its own party, the Freedom and Justice Party, several other Salafist parties, including the al-Nūr Party (literally “the Light”), the Party of Construction and Development, and the Authenticity Party. Former members of the National Democrat Party were also able to create seven small parties.⁴⁹

In Libya, in the absence of any previous legal framework, the NTC had to intervene to organize partisan activity—especially in light of the proliferation of political parties after the Revolution. The NTC first adopted a law repealing Act No. 17 of 1972 on the Prohibition of Partisan Activity, which was judged to be “contrary to the objectives of the Revolution of February 17”;⁵⁰ it then adopted Act No. 29 of 2012 on the Organization of Political Parties,⁵¹ which recognized in Art. 1 the right of any citizen to form a political party

⁴⁶ M. C. Sarsar, “La transition démocratique et les partis politiques en Tunisie” in H. M’rad and M. L. F. Moussa (eds), *La transition démocratique à la lumière des expériences comparées* (n 1) 284.

⁴⁷ JORT No. 74 of September 30, 2011, 1993–1996.

⁴⁸ Decree-Law No. 12 of 2011 amending some provisions of Act No. 40 of 1977 on political parties, *Official Journal*, No. 12 (bis A), March 28, 2011.

⁴⁹ T. A. Aclimandos, “Comment les législatives se négocient: quelques réflexions sur les élections égyptiennes” (2012) 82 *Confluences Méditerranée* 78; A. A. Feyed, “Les Salafistes en Egypte: entre la légitimité de la Fatwa et la légitimité électorale,” *Al Jazeera Centre for Studies* (July 1, 2012), <http://studies.aljazeera.net/reports/%7BUrl%7D>, accessed May 4, 2015.

⁵⁰ Art. 1 of Act No. 2 of 2012 on the prohibition of partisan activity, available on the website of the National Transitional Council, http://www.ntc.gov.ly/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=4&Itemid=17, accessed May 4, 2015 (in Arabic).

⁵¹ Act No. 29 of 2012 on the organization of political parties (May 2, 2012), available on the website of the National Transitional Council, http://www.ntc.gov.ly/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=4&Itemid=17, accessed May 4, 2015 (in Arabic).

or to join one. The parties had to conform, in their objectives and their programs, with the Constitutional Declaration (Art. 8 (1)) and must not create military or quasi-military groups, nor use violence, foster discord and hate, or disseminate an ideology contrary to Shari'ah or call for tyranny (Art. 9). The Act also prohibits any party reference to abroad (Art. 8 (4)) and any form of financing from abroad (Art. 18 (1)). The management rules are also meticulously detailed.⁵² The Act also adopted a system of prior authorization, by creating a political parties commission with the responsibility to consider requests (Arts. 10, 11, 12). The rejection of a request to register a party gives rise to a right to recourse before a judicial body appointed by the Supreme Court. We note that, under pressure from Islamists and Federalists, the NTC abandoned a prohibition on political groups based on religious or tribal considerations.⁵³

Furthermore, the political opening up seen in the three countries involved, as well as the liberalization of the activities of political parties, also involves creating the conditions for open and healthy competition, breaking away from the corrupting practices of old, meticulous but crafty regulation in Tunisia, and benefiting from a more succinct framework in Egypt, where voters are in the habit of monetizing their votes. The challenge did not look like it was going to be easy to win, given the tight timetable, the financial disparities between the parties, which suggested very unequal election campaigns, in addition to the real risk of the biased use of religion since there were Islamist candidates in the running. In this respect, the different paths taken by the three countries had an impact on the regulation of the election campaigns. Whereas in Egypt the framework for intervention by the Judicial High Elections Commission is provided by Art. 11 of Act No. 38 from 1972 on the People's Assembly, on election campaigns, Tunisia and Libya chose to adopt very detailed regulation on the issue so as to ensure equality of opportunity between candidates. Electoral corruption was solemnly prohibited in all three countries,⁵⁴ as was the instrumentalization of religion.⁵⁵ The election authorities adopted specific rules on the financing of election campaigns,⁵⁶ in accordance with the requirements for electoral legislation to prohibit among other things the diversion of public funds to finance campaigns and foreign financing.⁵⁷ Free access to information media, on the basis of nondiscrimination between the candidates, was also provided for.⁵⁸

⁵² Arts. 17, 18, 19, 20, 23, 24, 25, 26.

⁵³ "La Libye autorisera les partis religieux," *Flash Actu* (May 2, 2012), available at <http://www.lefigaro.fr/flash-actu/2012/05/02/97001-20120502FILWWW00573-la-libye-autorisera-les-partis-religieux.php>, accessed May 4, 2015.

⁵⁴ See Art. 18 of the Tunisian Decree-Law on political parties; Art. 2 (8) of the Decision No. 21 of the Egyptian Judicial Electoral High Commission, on the rules organizing the electoral campaign for the elections of the People's Assembly; and Art. 8 of Decision No. 59 of 2012 on election campaigns, adopted by the Libyan Electoral Commission.

⁵⁵ See, for Egypt, Art. 2 (2) of Decision No. 21 of the Judicial Electoral High Commission cited above as well as its Decision No. 67 of 2011; and Art. 38 of Decree-Law No. 35 cited above and Art. 8 of Decision No. 59, cited above, for Tunisia and Libya, respectively.

⁵⁶ ISIE Order No.3 establishing the rules and procedures for the election campaign September 3, 2011, published in *JORT* (in Arabic), No. 67 of September 6, 2011, 1734–1738 and the Libyan Decision No. 59, *op. cit.*

⁵⁷ In Tunisia, Art. 39 of Decree-Law No. 35, cited above, prohibits the use of public money or resources in campaigns and Art. 52 of the same instrument prohibits the campaign finance from "foreign resources of any kind." Analogous prohibitions can be found in Libya in Art. 21 of Act No. 4 of 2012 on the election of the National General Congress, cited above. See also Arts. 2 (3), 4, and 6 of the Egyptian Decision No. 21, cited above.

⁵⁸ See Art. 45 of the Tunisian Decree-Law No. 35 cited above and Art. 19 of the Libyan Act No.4 also cited above. The Tunisian ISIE adopted an order on the conditions for production and transmission of radio

Notwithstanding some flaws in the regulation and some irregularities on the part of candidates, a line does seem to have been crossed in progressing toward the organization of competitive elections, heralding genuine political openness. Paradoxically, this openness was achieved at the expense of the exclusion of some political actors. First of all, the hegemonic parties of the old regime were legally dissolved in Egypt and in Tunisia. This was a measure imposed after the revolutions as a precaution against the dreaded return of these parties. We should not forget that on January 14, 2011, in Tunisia and in February 2011 in Egypt, determined crowds chanted slogans not only against the dictators but also against the parties in power, accused of mafia-like practices and a cronyism that was corrupting political life and governance. This rejection had subsequent repercussions for the legal framework of the elections, as it deviated from the right to be elected, which according to international standards may not be restricted on grounds of political affiliation.⁵⁹

In fact, Art. 15 of the Tunisian Legislative Decree on the elections of the NCA denied eligibility to former heads of the Democratic Constitutional Rally (RCD), members of the government under the Ben 'Ali era who had been RCD members, and persons who had called for President Ben 'Ali to stand in the 2014 elections. These three grounds for ineligibility resulted in the exclusion of 8100 people. Seeming to be contrary to international standards, this process of exclusion raised questions about transparency, as well as the problem of notifying ineligible individuals and their right to appeal before the courts—a complaint that was identified by election monitoring missions.⁶⁰

Libyan legislation made more extensive exclusions. The grounds for ineligibility listed in Art. 10 (4) of the electoral act included having held a position in the executive committee—a kind of government—or the position of president in a local committee, which was the authority that managed the affairs of the executive under the al-Qadhdhāfi regime, with no time restriction. Art. 10 of the electoral act introduced the criteria of national integrity, as defined by Decision No. 192 of 2011 adopted by the National Transitional Council, which rendered ineligible anybody who had belonged to or acted within the revolutionary committees (Art. 3) or who had glorified the al-Qadhdhāfi regime or engaged in propaganda for the ideology of that regime directly or in the media (Art. 5).⁶¹ With this in mind, a High Commission for Integrity and Patriotism Standards was created to oversee the application of these criteria; that body established a right to appeal against those decisions before the courts.⁶²

A similar approach to exclusion had been expected in Egypt. The new political parties called for former members of the National Democratic Party to be barred from standing

and television transmissions relating to the electoral campaign, September 3, 2011. Decision No. 64 of the Libyan Electoral Commission, on election campaigning in public and private media, was also adopted on May 13, 2012. Art. 2 (14) of the Egyptian Decision No.21 cited above provides for equality of access to information resources, specifying the modalities for achieving this.

⁵⁹ Art. 25 of the International Covenant on Civil and Political Rights of December 16, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, accessed May 4, 2015.

⁶⁰ “National Constituent Assembly Elections in Tunisia, October 23, 2011, Final Report,” *The Carter Center*, http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/tunisia-final-Oct2011.pdf20, accessed May 4, 2015.

⁶¹ Decision No.192 of 2011 on the criteria for national integrity, available on the National Transitional Council website, <http://www.ntc.gov.ly>, accessed May 4, 2015.

⁶² High Commission for the Application of Standards of Integrity and Patriotism, established by Decision of the National Transitional Council No. 16 of 2012, <http://www.ntc.gov.ly>, accessed May 4, 2015.

in the elections to the People's Assembly. However, the highly controversial political isolation law was not adopted until April 2012, by the newly elected Assembly,⁶³ and was struck down as unconstitutional a few days before the second round of the presidential elections in June 2012.⁶⁴

The debate is still ongoing, in Tunisia around a bill on the "political immunization of the Revolution", which aims to extend the exclusions intended to apply to the elections of the National Constituent Assembly to subsequent elections,⁶⁵ and in Libya concerning a bill on political isolation.⁶⁶ The electoral legislatures in the countries of the Arab Spring have found themselves caught as though in a noose, trapped between the requirements of "multipartyism" and the zeal of revolution.

The test of organizing free, fair, and transparent elections was not an easy one, but the challenge was met, more or less. Next we will consider the second test: the choice of voting system.

III. EXPRESSING DEMOCRACY: THE TEST OF CHOOSING A VOTING SYSTEM

Amid the climate of uncertainty that characterized the pre-election period in the countries of the Arab Spring, it was necessary to negotiate a formula in which all the actors of the transition could find their place—one that favored a consensus solution, that represented the various interest groups, and that embodied the break with the past. These requirements go a long way to explain the rejection of a majority electoral system (Section A). In order to achieve sufficient representativeness, the electoral legislators in all three countries opted for proportional representation systems, although the weighting allocated to the votes varied (Section B).

A. A Resounding Rejection of the Strict Majority Option

Majority voting allows the winning candidate or list in a constituency to take all the seats available. Uninominal or plurinominal, with one or two rounds, majority voting comes down to the same thing: The winner takes it all. It was this that the political powers in all three countries rejected. As well as being tarred by the way it had been used in the past, a majority system is also unpredictable. With fraudulent practices having been eliminated, there was a risk that the freely expressed will of the electorate might return a majority that ought not to be over-represented; the social contract that was being renewed through the establishment of a constitution could not countenance that. Haunted by the specter of Islamism, but also by the fear of returning to the symbols of the old regimes, the electoral debates in all three countries rejected the option of majority voting, which was the system that had applied in Tunisia and in Egypt before the wave of revolution had swept over them.

⁶³ Act No. 17 of 2012, amending Act No. 73 of 1956 on the exercise of political rights.

⁶⁴ See Part IV; Section A. 3, below.

⁶⁵ Bill No.85/2012, November 29, 2012, <http://www.anc.tn/site/main/AR/docs/projets/projets.jsp?n=85&a=2012>, accessed May 4, 2015.

⁶⁶ S. Bsikri, "Libya: Security Challenges and their Effects on the Political Operation," *Reports, Al Jazeera Centre for Studies* (May 5, 2013), <http://studies.aljazeera.net/reports/2013/05/20135592422219718.htm>, accessed May 4, 2015 (in Arabic).

1. Tunisia

In Tunisia, ISROR, the architect of transition, was a new authority that included twelve political parties, nineteen trade unions, civil society, or professional associations, and personalities from across the political spectrum (moderate Islamist, socialist, nationalist, Ba'thist, Trotskyist, and Maoist), as well as representatives of the regions and of the families of martyrs of the Revolution. Greatly criticized, it had not really translated the balance of political power after the Revolution.⁶⁷ ISROR's legitimacy was called into question too, given that it had not come from the ballot box. And yet it worked. Despite its purely consultative role, the dynamic of the body shows that it functioned like a parliamentary assembly. It was the main deliberative forum of transition, where the new political rules of the game were negotiated. The electoral law particularly stirred up debate, due to the nature of representation and the means of decision making within ISROR, which favored consensus.⁶⁸ This is what paved the way to the quest for compromise: The intermingling of diverse political movements, represented equally within ISROR in a distortion of their true weight on the political chessboard, was not without influence in the definitive choice of a system capable of representing the various political actors, and thus of avoiding the hegemony of any one political group in the future assembly.

In truth, the starting point was to avoid the resounding failures of list-based majority voting, as a result of the hegemonic past of the party in power, in order to avoid a repetition of history.

However, the nature of the constitutional mandate was well suited to uninominal majority voting, which explains why this option was set out in one of the two drafts presented by the committee of experts, which proposed two-round, uninominal majority voting. This draft⁶⁹ was favored by eminent Tunisian academics who saw in it a break from the bitter experience of list-based majority voting. However, the advantages presented were not sufficient to convince the majority of ISROR members, notably among the representatives of political parties.⁷⁰ A two-round uninominal voting system can result in contests between individuals, rather than competing ideas and programs. The parties and candidates standing may effectively have been encouraged to base their election campaigns on tribal and regional ideas, which might have favored local notables, and the return of the symbols of the old regime.⁷¹ Another complaint leveled against uninominal majority voting is that it does not allow the application of a gender-based approach and the representation of women, something to which many members of ISROR attached importance.⁷² In the end, this draft was quickly eliminated, largely because it would have penalized the political parties.

In reality, the official line within ISROR was to talk about the quest for a diverse assembly that represented all parties and ethnic sensitivities, whilst allowing the political parties

⁶⁷ R. Ennaifar, "L'organisation transitoire du pouvoir en Tunisie, de l'après 14 janvier 2011 jusqu'à l'élection de l'Assemblée Nationale Constituante (en arabe)," Tunis, Altair éditions, 2011, pp. 30–31.

⁶⁸ Art. 5 of Decree-Law No. 2011-16 on ISROR, cited above, stipulates that decisions shall be adopted by consensus, or if this proves impossible, by majority.

⁶⁹ This draft proposed uninominal constituencies (with one seat in play per constituency) calculated on the limits of delegations (numbering 268), which would have made it possible for all regions to be represented regardless of how many inhabitants they had.

⁷⁰ "Débats de l'Instance supérieure de la réalisation des objectifs de la Révolution, de la réforme politique et de la transition démocratique" sessions of March 31, 2011, Volume I, from the months of March to May 2011, published in January 2012, 103, 107, Session of April 11, 2011, 122 (in Arabic).

⁷¹ *Id.* 98.

⁷² *Id.* 98–99, 107.

to be represented in the future assembly. The challenge was a difficult one, but meant rejecting majority voting in favor of proportional representation.

2. *Egypt*

In Egypt, the deal was different. SCAF had sealed the transition period and had to work with the various actors already in place, which goes some way in explaining its decision to revive an electoral law that the opposition had long vilified, by making some amendments to it. The law in question was Act No. 38 of 1972 relating to proportional representation, which already embodied a vacillating electoral policy. It had in fact undergone a torrent of amendments. Uninominal proportional representation in 1972, a party-list voting system with proportional representation in 1983, a mixed voting system in 1987, and back to the uninominal system in 1990—it would be difficult to explain all this to-ing and fro-ing between uninominal and party list proportional representation without relating it to a policy of deliberate disassociation with “the partisan fate of the electoral competition in the conquest and exercise of political power.”⁷³

The elections in Egypt were thus affected by this instability in the rules of the game, which changed from one election to the next. After the blow delivered to the Mubārak regime by the Revolution of February 25, 2011, this electoral jockeying no longer made sense: It was time to clean up the legal framework. Yet SCAF chose instead to tinker with the legal framework once again, by opting for a mixed system, creating yet again instability in the rules of the game.

In fact, over the course of four months various formulas for the mix were outlined: majority voting for two-thirds of the People’s Assembly on May 30, 2011, equal cohabitation with proportional representation on July 20, 2011, before deciding on September 25, 2011, to concede one-third to independent candidates. This provoked violent reactions from various political groups, who feared the return of the caciques of the old regime. How can these vacillations by SCAF be explained, after it had brought about such a strong mobilization on the Tahrir Square and the organization of demonstrations in which Islamists and revolutionaries took part?

In fact, the results of the elections were determinative in making SCAF’s control over the transition process lasting. These “concerns [. . .] seem to have fluctuated during this time between a ceiling—using the electoral law to prevent the emergence of an independent political power capable of creating a power counterbalance to the military—and a floor—ensuring at all costs the organization of free elections in order to fulfill the promise that formed the basis of its legitimacy, within Egyptian society and in the international community.”⁷⁴ In abandoning the strong majoritarian dose, the military opted, under pressure from the various political actors, for the least contested solution. Although the Islamists were not strongly in favor of uninominal majority voting, which did not benefit identity voting, it was above all the non-Islamists who criticized uninominal majority voting.⁷⁵

Yet the resistance to uninominal majority voting is surprising given that it is a system more beneficial to smaller parties, because it is thought to allow them to stand for election in smaller constituencies. Yet paradoxically the liberal coalition strongly rejected this system, not only because it was associated with the cronyism of old and would have allowed the return of the caciques from the old regime but also because a strong majority dose was judged to be too favorable to the Muslim Brotherhood. After all, it was uninominal majority voting that had allowed them to win 20% of seats in 2005. Well-structured, and taking

⁷³ S. Ben Nefissa, “Les partis politiques en Egypte entre les contraintes du système politique et le renouvellement des élites” (1996) 81–82 *Revue des Mondes Musulmans et de la Méditerranée* 57.

⁷⁴ B. Rougier (n 4) 88.

⁷⁵ T. A. Aclimandos (n 49) 79–80.

advantage of the social anchorage that the Muslim Brotherhood enjoyed as a result of its long-standing social, sanitary, and religious works,⁷⁶ the Islamist political movement which had always been the exception in the murky picture of the Egyptian party system was by all accounts expected to be the favorite in this electoral consultation⁷⁷.

3. *Libya*

Unlike the designers of the new electoral systems in Egypt and Tunisia, the Libyan NTC did not have the option of putting right the perverse effects of a previous voting system: Everything had to be built from scratch. Developing a voting system without an electoral reference point left the National Transitional Council facing countless difficulties: In a fundamentalist, tribal country with leanings toward the East, and with multiple political parties with no practical experience, it was a Herculean task.

That being said, the NTC had to contend with an impressive plethora of voting systems and an infinite number of possible combinations, but with one big advantage, namely, the very recent experience of its immediate neighbors, Tunisia and Egypt, where the Islamists had triumphed at the ballot boxes. Initially, the NTC had expected to adopt uninominal majority voting, which was judged to be the pragmatic choice in a tribal society that, after decades in which any form of intermediary body was prohibited, had no political institutions nor any real civil society.⁷⁸ Except that adopting majority voting alone would have worried the political groups that were starting to take shape. They weighed in with all their might in the debates of the National Transitional Council, a heterogeneous college comprised of dissidents from the old regime, tribal representatives, and representatives of civil society and of course the Islamists,⁷⁹ who, in spite of having been persecuted under the al-Qadhdhāfi regime they did not enjoy the socio-political anchorage characteristic of the Muslim Brotherhood in Egypt, were an important component of the political offer in post-revolutionary Libya. These members had to come to an agreement in order to develop the new electoral law, the main function of which was to avoid producing a hegemonic majority. The weight of historical baggage and the peculiarities of the post-revolutionary political power balance led the electoral legislatures in all three countries to reject the straightforward majority option in favor of systems that would ensure greater representativeness. This prompted them to turn to a proportional solution, in various forms.

B. The Goal of Proportionality, Variouslly Expressed

Arend Lijphart considered proportional representation to be the system best suited to new democracies, which are by definition fragile. The advantages of this method include respect for representation, protection of the interests of minorities, and encouragement of voter participation.⁸⁰ It is moreover not surprising that it was this method that was preferred by

⁷⁶ On the electoral strategy of the Muslim Brotherhood under the Mubarak regime, see M. Vannetzel, "Les voies silencieuses de la contestation: Les Frères musulmans, entre clientélisme et citoyenneté alternative" (2008) 1 *Raisons politiques* 23–37.

⁷⁷ See on this Islamist exception, S. Ben Nefissa (n 73) 57 et seqq.

⁷⁸ M. S. Di Noguez, "Rapport d'évaluation des élections du Congrès National Général," *Libya, IDEA* (July 7, 2012) 14 (in Arabic).

⁷⁹ A. A. Ahmida, "The Libyan National Transitional Council: Social Bases, Membership and Political Trends," *Reports, Al Jazeera Center for Studies* (October 30, 2011), <http://studies.aljazeera.net/ResourceGallery/media/Documents/2011/11/30/2011113072932155580Dr%20Ahmidas%20Libyan%20National%20Council.pdf>, accessed May 4, 2015.

⁸⁰ A. Lijphart, "Constitutional choices for New Democracies" (1991) 2 *Journal of Democracy* 81.

the electoral legislatures in the three countries, albeit in different ways. Entirely proportional in Tunisia, the system was mixed in Libya and Egypt, but with the stated goal of proportionality.

1. *Tunisia*

In Tunisia, the watchword of the electoral debates was representation—of various political sensitivities, of women, and of the regions. After rejecting two-round uninominal majority voting, ISROR voted, in Art. 32 of Legislative Decree No. 35, *op. cit.*, quasi-unanimously for party-list proportional representation using the largest remainder method.⁸¹ In opting for limited proportional representation,⁸² which presupposes a plurality of constituencies, the problem of the remaining votes and seats, which is unavoidable in proportional systems, was resolved using the largest remainder method, which is beneficial to small political parties. The method was intended to be representative. First, with regard to women, the lists had to be gender equal and moreover, under threat of rejection, were required to list male and female candidates in alternate order.⁸³ Second, with regard to the regions—although large constituencies were retained—corresponding to the governorates, there was positive discrimination in favor of governorates that had a low population density or were economically marginalized, with these being allocated additional seats in order to reduce the distortion of representation that would have been created by an equal distribution of seats.⁸⁴ This pursuit of representativeness prompted ISROR to ratify a voting system that, despite the bold measures that went alongside it, ran the risk of voter abstention due to the complexity of the party lists, of which, when the legislative decree was adopted, there were a great many.

In fact, this system is just a revised version of one of the two drafts submitted by the committee of experts to ISROR, which instead of the greatest remainder system had proposed the highest average method,⁸⁵ as that is the most proportional way of redistributing the remainders. Another change was in the composition of the lists, as the draft had proposed short, gender-equal lists of just two or four names, which would have been closer to the uninominal majority voting system and would simultaneously have enabled women's representation and simplified the choice open to the electorate. So, given that the constituent body was mandated to invest and control a government, why were these changes, that have only served to amplify the risks inherent with proportional representation (namely, the multiplication of parties within the assembly and therefore the risk of governmental instability), made to the draft?

⁸¹ The Decree-Law was adopted by a strong majority, with 5 against and 4 abstentions, "Débats de l'Instance supérieure de la réalisation des objectifs de la Révolution, de la réforme politique et de la transition démocratique," vol I, session of April 11, 2011, 240.

⁸² Under limited proportional representation, there are two phases to the distribution of seats—first, seats are distributed between the lists, then the remainder is allocated. Electoral laws determine the method for allocation of the remainder. Under Art. 35 of the Decree-Law, the greatest remainder method was chosen, which consists of allocating seats, successively, to the lists that won the greatest of the remainder, C. Debbasch, J-M Pontier, J-M Bourdon and J-C Ricci, *Droit constitutionnel et institutions politiques* (Economica, Paris 2001) 69.

⁸³ Art. 16 of the Decree-Law No. 35, cited above.

⁸⁴ Art. 31 of the Legislative Act cited above stipulated one seat per 60 000 inhabitants.

⁸⁵ This method involves looking at the average number of voters that each list would have had, if each one had been allocated the seat or seats available. The list that won the biggest average then wins the remaining seat.

This last method of seat redistribution was presented as being the only method capable of combining justice and efficacy, representativeness of the small political parties, and a comfortable presence by the big parties. What lay behind this change was the hopes of the parties of the left and center-left represented within ISROR of being able to obtain a large enough number of seats to act as a counterweight to the al-Nahḍah Party,⁸⁶ which at the time was “leading in the polls.”⁸⁷ The al-Nahḍah Party, although it would have preferred the highest average method,⁸⁸ was obliged to concede due to the balance of power within ISROR, and also in order to reassure public opinion, domestically and internationally.⁸⁹ It also did not put up any resistance to parity,⁹⁰ as a means of attesting to its unconditional adherence to the Tunisian social contract, based largely on the status of women.

2. Egypt

In Egypt too, it was proportional representation using the greatest remainder method that was chosen—for two-thirds of seats. The other third, as we have already discussed, was reserved for uninominal two-round majority voting. A compromise solution that made it possible to satisfy the various political actors, Islamist and non-Islamist, who all preferred proportional representation, and a large section of the electorate who preferred there to be a direct relationship with the elected representatives⁹¹—not, it has to be said, without risk of cronyism. The mix turned out to be beneficial for the political parties, due in part to the strong proportional representation component of two-thirds of seats, but also to the bonus afforded to them by the compromise, which allowed party candidates to stand in the one-third of seats reserved for uninominal majority voting. It was to that end that Act No. 38 on the People’s Assembly was amended.

As well as reverting to a mixed voting system, the amendments to the Act also maintained the quota for workers’ and farmers’ representation at 50% of members of the People’s Assembly,⁹² with a different arrangement for the quota of women: 46 constituencies were assigned to list-based proportional voting to contest 322 seats (two-thirds of the 49 elected seats).⁹³ Every list must include at least one woman, and half of the candidates must be workers or farmers.⁹⁴ A threshold of 0.5% of votes cast was required in order to be able to aspire to parliamentary representation.⁹⁵ The remaining one-third of seats, amounting

⁸⁶ S. Belaid, “L’épouvantail,” *La presse* (May 8, 2011).

⁸⁷ M. Lieckefett (n 2) 136.

⁸⁸ See “Débats de Instance supérieure de la réalisation des objectifs de la Révolution, de la réforme politique et de la transition démocratique,” session of April 11, 2011, 222.

⁸⁹ E. Gobe (n 3).

⁹⁰ See “Débats de Instance supérieure de la réalisation des objectifs de la Révolution, de la réforme politique et de la transition démocratique,” session of April 11, 2011, 222.

⁹¹ T. A. Aclimandos (n 49) 80.

⁹² Art. 1 (1) of Act No. 38, as amended by Decree-Law No. 120 of 2011 of the Supreme Council of the Armed Forces amending some provisions of Act No. 38 of 1972 on the People’s Assembly and Act No. 120 of 1980 on the Senate, *Journal Official*, No. 38 bis, September 26, 2011, 3–5, http://www.masrlaw.com/Legislations/Egypt_Legislations_Images.aspx?ID=279117, accessed May 4, 2015 (in Arabic).

⁹³ Art. 3 (2) of Act No. 38, as amended by the Decree-Law cited above. On electoral division, see Decree-Law No. 121 of the Supreme Council of the Armed Forces, amending Act No. 206 of 1990 on the determination of electoral constituencies for elections to the People’s Assembly, *Official Journal*, No. 38 bis, September 26, 2011, 8, http://www.masrlaw.com/Legislations/Egypt_Legislations_Images.aspx?ID=279118, accessed May 4, 2015.

⁹⁴ Art. 3 (5) of Act No. 38, as amended by Decree-Law No. 120, cited above.

⁹⁵ Art. 15 of Act No. 38, as amended by Act No. 188/1986, Act No. 201/1990, and Decree-Law No. 108 of 2011.

to 166 seats, was filled by two-round uninominal majority voting, in 83 constituencies,⁹⁶ whilst respecting the 50% rule for workers and farmers.

SCAF seemed to want to adapt the voting system to a new political reality characterized by a complex mesh of parties, by giving the parties that were standing a free hand to form coalitions and develop strategies, by putting forward independent candidates for uninominal voting and lists for the proportional representation seats. Although purportedly beneficial to the most structured political groups, in this case the Islamists and what was left of National Democratic Party, the system chosen presented opportunities for smaller political groupings forged in the excitement of the revolution, by means of the greatest remainder method. Moreover, the electoral divisions affirm this intention, in retaining fairly small constituencies that did not penalize the smaller political parties.⁹⁷ It was in this way that compromise was reached between SCAF and the various electoral powers.

The representativeness of political sensitivities was not all that was at stake in the choice of voting system; other categories needed to be represented too. Thus, the non-Islamists defended proportional representation because it would have enabled the representation of women and minorities.⁹⁸ Paradoxically, it was another kind of representativeness that was given priority, namely, that of the workers and farmers. Moreover, the system that was chosen unfortunately reduced the potential for proportional representation to represent women and minorities. In abandoning the women's quota that had been reintroduced into the Egyptian system in 2007 and making do with the minimal requirement of having at least one woman on each list, the system that was chosen was incapable of ensuring a gender-balanced approach and was in all events far inferior to the Tunisian and Libyan models, which required lists to have gender parity, and for men and women to be listed in alternating order. As for the tendency for proportional representation to favor the representation of minorities, in this instance the Copts—that depended on parties feeling inclined to put them in a strong position on their lists. Since their sphere of influence is limited to Cairo and Alexandria, the Copts had little chance of winning seats elsewhere.⁹⁹

Tangled up in a difficult transition process, SCAF opted to adapt a legislative provision charged with negative connotations. True, the provision was purged of the prominent elements of electoral manipulation, by re-establishing judicial control, but in terms of the voting system, the amendments did preserve some vestiges of the past, namely, the representation of workers and farmers, condemned as artificial, as well as ten appointed members of the People's Assembly. As for the mixed system, this was a high-risk option, adopted by SCAF under the sword of Damocles of a ruling of unconstitutionality by the Supreme Constitutional Court, which had already dissolved the People's Assembly twice, and, as we shall see, would indeed dissolve the People's Assembly again in 2012.¹⁰⁰

⁹⁶ Art. 3 (3) of Act No. 38, as amended by the Decree-Law No. 120 cited above.

⁹⁷ For the 46 constituencies reserved for PR, 4 to 12 seats were available, but three-fourths of constituencies are small in size, varying between 4 and 8 seats as follows: 15 constituencies of 4 seats, 1 constituency of 6 seats, 19 constituencies of 8 seats, 9 constituencies of 19 seats, and 12 constituencies of 12 seats. See *Elections in Egypt, Analysis of the 2011 Parliamentary Electoral System*, IFES Briefing Paper, November 2011, <http://www.ifes.org/>, accessed March 23, 2016.

⁹⁸ T. A. Aclimandos (n 49) 79–80.

⁹⁹ *Elections in Egypt, Analysis of the 2011 Parliamentary Electoral System*, op. cit. 11.

¹⁰⁰ See Part IV, Section A. 3, below.

3. *Libya*

A mixed model was adopted in Libya too, under Art. 5 of the Libyan Electoral Act, but using a different formula: single-round majority voting for 120 seats and party-list proportional representation using the greatest remainder method to distribute the other 80 seats. For the proportional representation seats, Art. 15 requires that the lists must, under threat of being ruled void, respect the rule of vertical and horizontal alternation of candidates by gender.¹⁰¹ This was a revolutionary measure by the NTC, having abandoned a draft quota for women set at 10% of seats. In relation to the elections, electoral divisions on a geographical and demographic basis were adopted under Art. 4 of the Electoral Act.¹⁰² To remedy demographic disparities between the regions, 100 seats were allocated to Tripolitania (West), the most populous region, 60 to Cyrenaica (East), and 40 to Fazzān (South). This division was condemned by federalists in the east who perceived a flagrant inequality that brought back bad memories of the old regime's centralist policy. In an attempt to appease the anger in this rebel region of Libya, which hinted at independence and had threatened to boycott the elections, the National Transitional Council announced—two days before the elections, on July 5, 2012—an amendment to Art. 30 of the Constitutional Declaration. From then on, the members of the constituent commission that was to appoint the members of Congress would be elected, and the 60 seats envisaged for that commission would be distributed equally between the three regions.¹⁰³

In the end, the Libyan solution turned out to be a limited proportional system, bringing together proportional representation with the greatest remainder method for 80 seats, and majority voting using a single nontransferable vote. This system, classed as being a proportional system designed to represent minorities, is considered to be a majority vote with proportional effects.¹⁰⁴ It has to be said, however, that the system can appear complicated.

Art. 6 of the Electoral Act stipulates that for the 120 seats allocated to majority voting, the candidate that has won the majority of votes shall be declared to have won in the uninominal constituencies. Although in some constituencies there are several seats to be filled, it will be a single nontransferable vote that will be used to separate the candidates. Under this system, each elector has a single vote regardless of how many seats there are to fill in a constituency. The winning candidates are elected on a pro-rata basis in relation to the number of these seats.¹⁰⁵ The system is undeniably complex, but it is simple for voters, who need only vote for one candidate. The complexity of the system did not put candidates off from standing, nor the electorate from turning out to vote: Turnout was recorded at

¹⁰¹ Vertical alternation means the position of the candidates on each list alternating by gender, whereas horizontal alternation requires them to be alternately positioned at the top of the list from one constituency to another.

¹⁰² In this perspective, the territory was divided into 13 constituencies, subdivided into 73 subconstituencies: 50 for mixed voting, 19 for majority voting, and 4 for proportional representation. Given that the electoral legislature opted for a mixed voting system, two levels of constituency were adopted, namely 20 plurinominal constituencies for the list-based ballot and 21 constituencies for majority voting, with overlap for some constituencies in which the electors are asked to vote for lists and for independents, Act No. 4 of 2012 on the election of the National General Congress, cited above, and Act No. 14 of 2012 on the determination of electoral constituencies for the election of the National General Congress, NTC, February 12, 2012.

¹⁰³ See Part IV, Section B. 1, below.

¹⁰⁴ P. Martin (n 9) 61–62.

¹⁰⁵ *Id.* 64.

62%, to choose between 2,501 independent candidates and 1,206 candidates standing in the list-based ballots.¹⁰⁶

Between satisfaction and surprise, combing over the elections did reveal some flaws: wastage of votes, particularly under the Tunisian electoral system that encouraged the multiplication of lists¹⁰⁷ and inequality between voters in the counting of the votes but also in the electoral weighting¹⁰⁸ under the Libyan and Egyptian systems. But that observation aside, there is one question that needs answering: Are the three systems truly representative, as those that created them seem to claim?

A quick glance over the results of the parliamentary elections is enough to see that the electoral systems did meet the challenge, but to varying degrees. If we look at the first winners in each country, we can see that in Tunisia, proportional representation using the greatest remainder method allowed the Islamist movement al-Nahḍah to take home 41.02% of seats for 37.02% of votes, the Congress for the Republic 13.36% of seats for 8.69% of the votes, and the Democratic Forum for Labor and Liberties 9.22% of seats for 7.03% of votes. In Egypt, across the whole election (uninominal and plurinominal), the Freedom and Justice Party took 47.02% of seats for 37.5% of votes, the al-Nūr Party 24.6% of seats for 27.8% of votes, and the New Wafd Party 7.6% of seats for 9.2% of votes. In Libya, for the 80 seats filled by proportional representation, the National Forces Alliance was able to take 49% of the seats for 68% of the votes and the Justice and Construction Party, 21.3% of seats for 12% of votes.¹⁰⁹

Truth be told, the disproportionality that can be seen between the number of votes and the number of seats is due, among other things, to the greatest remainder method adopted in all three countries. But was that battle not led by the small parties, like in Tunisia? Moreover, the “mathematical paradoxes”¹¹⁰ that characterize the greatest remainder method allowed some small parties, like Congress for the Republic (CPR), to win seats and join the government coalition. The whims of the greatest remainder method therefore shaped the Tunisian political regime during the transition period, having allowed CPR to become the second political force of the country with 352,825 votes. As well, only 7,000 votes allowed the Libyan coalition Wādī al-Ḥayāh to win two seats. Still in the context of Libya, there were other paradoxes and amplifications that could be seen: Due to the adoption of the single transferable vote for the 120 seats allocated for majority voting, it took 40,207 votes to win

¹⁰⁶ Figures available on the website of the High National Elections Commission, <http://www.hnec.ly>, accessed May 4, 2015.

¹⁰⁷ The lists of candidates who did not win any seat won 809,387 votes, which is 20% of the total electorate, Independent High Authority for Elections. See “Report on the elections of the National Constituent Assembly,” *op. cit.* 191. On declaration of the final election results, see the Order of November 13, 2011, *JORT* (in Arabic), No. 87 of November 15, 2011, 2729–2738.

¹⁰⁸ According to the Code of Good Practice in Electoral Matters, “Equality in voting power, where the elections are not being held in one single constituency, requires constituency boundaries to be drawn in such a way that seats in the lower chambers representing the people are distributed equally among the constituencies, in accordance with a specific apportionment criterion.” See “Code of Good Practice in Electoral Matters”. Guidelines and explanatory report, adopted by the Venice Commission at its 52nd session (18–19 October 18–19, 2002), <http://www.venice.coe.int/>, accessed March 23, 2016; M. S. Di Noguez (n 78) 16; “Final Report of the Carter Center Mission to Witness the 2011–2012 Parliamentary Elections in Egypt” (n 39) 31.

¹⁰⁹ Results available on the website of the High National Elections Commission, <http://www.hnec.ly>, accessed May 4, 2015.

¹¹⁰ P. Martin (n 9) 73.

a seat in Benghazi, whereas in the constituency of Ajdābiyā, a seat could be won with only 276 votes. This distortion was due to the high number of candidates and to poor turnout in that constituency.¹¹¹

Reasonably fair and representative, what else would one want of a voting system? A “proportionalist” would want to see representation of a variety of political leanings, even at the expense of some distortion of opinion. But in any case, some degree of mismatch between the percentage of votes and the percentage of seats is inevitable, not just given the small dose of majority voting in Egypt and Libya but especially due to the rather “impure” proportional representation methods that were adopted: the division of constituencies and the method for redistributing the remainder.¹¹² In the end, although proportional representation “is not such a true snapshot of opinion as its proponents claim,”¹¹³ it is certainly a truer representation than produced by majoritarian systems, which cause even bigger mismatches between the proportion of votes cast and the proportion of seats won.

So if the will of the electorate was accurately reflected, why the rhetoric of electoral surprise that characterized analysis of the results in all three countries? It was really the “divine surprise.”¹¹⁴ Whereas the electoral debate in the three countries had centered on the search for the magic formula that would make it possible to avoid an electoral landslide, and the potential for hegemony that went with that, this was paradoxically exactly what happened in Egypt, in favor of the Islamists. In Tunisia, the Islamist movement, with 41% of the seats in the NCA, was able to take the reins of the political game after the elections. In Libya, the “Libyan exception” that broke the rule needs to be put into context.¹¹⁵ Although out of the total of 80 seats allocated for voting by party list, the National Forces Alliance, the liberal coalition headed by Maḥmūd Jibrīl, was able to take 39 seats compared to only 17 for the Islamist Justice and Construction Party; it would seem that 80% of the (120) uninominal seats went to Islamist candidates among the conservative personalities and preachers of the mosques.¹¹⁶

In fact, by releasing fairly clear Islamist majorities in Tunisia and Egypt, and creating in Libya a confused landscape, with a rather liberal majority, the elections resulted in a strong bipolarization of political life: conservatives versus moderates. The resulting fission makes the last test that a fragile democracy must overcome even more complicated: the exercise of power.

¹¹¹ European Union election assessment team, “Final report, General National Congress Elections” (July 7, 2012), http://eeas.europa.eu/eueom/missions/2012/libya/reports_en.htm35, accessed May 4, 2015.

¹¹² See M. Duverger, *Les partis politiques* (Armand Colin, Paris 1981) 491.

¹¹³ *Id.* 492.

¹¹⁴ Y. Ben Achour, “Religion, Révolution et constitution: le cas de la Tunisie,” *Lecture recorded at the Center for Middle Eastern Studies, Harvard University, Boston* (September 17, 2012), http://www.leaders.com.tn/uploads/FCK_files/file/Harvard%20Anglais%20derni%C3%A8re%20version.pdf, accessed May 4, 2015.

¹¹⁵ See, for example, the article by B. Barthe and H. Sallon, “Libye: les libéraux donnés gagnants des élections,” *Le Monde* (July 9, 2012).

¹¹⁶ In sum, the National Forces Alliance would have totted up 65 seats across the whole Assembly and the Justice and Reconstruction Party 35 seats, S. Bzikri, “The elections of the Libyan National Congress and the options of the winning political blocks” (in Arabic), *Reports Al Jazeera Center for Studies* (July 23, 2012), <http://studies.aljazeera.net/ResourceGallery/media/Documents/2012/7/24/201272410518348734Libyan%20National%20elections.pdf2-3>, accessed May 4, 2015.

IV. CONSOLIDATING DEMOCRACY: THE ULTIMATE TEST OF EXERCISING POWER

Whereas in Egypt the results of the parliamentary elections were the prelude to a real institutional crisis that, despite a succession of electoral consultations, is still ongoing, and did not manage to appease tensions in the country, in Tunisia the results paved the way for an enormous quest for compromise. In Libya, the polarization of the GNC, grafted on top of other fault lines and adding to the prevailing security instability, produced a faltering power that had difficulties in asserting its authority. These characteristics were confirmed in the exercise of power during the transition period (Section A), but also apply to the exercise of constituent power (Section B).

A. Majorities Put to the Test by the Exercise of Transitional Power

The functions of the elected assemblies varied in scope. The Egyptian parliament was primarily restricted to selecting the members of the Constituent Assembly,¹¹⁷ but the Tunisian and Libyan assemblies were elected to appoint and oversee a cabinet as well as draft the new constitution. With an omnipotent assembly, enjoying electoral legitimacy and superior to the government that came from it, the Tunisian NCA and the Libyan GNC embodied “the principle of government by assembly (namely) that the government and the parliament cannot, and consequently should not, be equal authorities, either in law nor in fact.”¹¹⁸ This is what explains why the instruments regulating the transitional authority do not include the power to dissolve the assembly normally afforded to the executive.

In addition to the constituent mandate, the electoral systems were designed to elect assemblies that were representative, so as to ensure the investiture of a governing elite that would, until the end of the transition period, embody electoral legitimacy, and ensure a stable transition toward democracy. The voting systems that were adopted, left open the option of a consensus deal, and were intended to pave the way not for competition and rivalry, but for collaboration, especially given the fragile context of transition.¹¹⁹ So the first few months in which authority was exercised by the majorities chosen at the ballot box were rather a mixed bag, with government crises in Tunisia, institutional paralysis in Libya, and an institutional quarrel in Egypt.

1. Tunisia

In Tunisia, the camps organized themselves ready to govern as soon as the results of the elections were declared. In this respect, the need to weave government coalitions after elections by proportional representation is a “*pons asinorum*” of political regimes. But in Tunisia it is in the management of the coalition that the shoe pinches. The relative majority won by the al-Nahḍah Party, insufficient for it to be able to govern alone, prompted it to forge a coalition with the two parties that followed it. A tripartite coalition, or what the Tunisians liked to call the “Troïka”, emerged. Decried as an unnatural alliance (a social-democrat party, a party of the center-left, and an Islamist party), the coalition was also described as a fallacious alliance, in the light of the legal regime that had established it.

¹¹⁷ Art. 60, cited above, of the Constitutional Declaration of March 30, 2011.

¹¹⁸ C. Debbash, J-M Pontier, J-M Bourdon, and J-C Ricci, *Droit constitutionnel et institutions politiques* (Economica, Paris 2001) 69.

¹¹⁹ P. Martin (n 9) 136.

This is indeed the prototype of an “unequal alliance”,¹²⁰ with the al-Nahḍah Party dominating and the other parties revolving around it. The heated debates that animated public opinion during the discussions on the bill that established provisional organization of the authorities who would determine the rules of the game during the transition period show, however, the battle the two allies fought in order to bring the scales back into balance. Last, the “little constitution”,¹²¹ established an unstable three-legged authority, and the bribes for power that had been let out, drop by drop, by the party with the relative majority were nothing but feeble concessions to its allies. The three-legged power is embodied by three presidencies, shared between the leaders of the three parties: President of the Republic from CPR, President of the National Constituent Assembly from the Forum, and as head of government, none other than the secretary general of the al-Nahḍah Party. The powers of the president of the National Constituent Assembly are limited to the exercise of certain constitutional prerogatives,¹²² the President of the Republic is reduced to an honorary role,¹²³ and the head of government becomes the axis of the political system during the transition period,¹²⁴ leaving open the specter of the concentration of powers thought gone. True, the law does provide for mechanisms of government control by the National Constituent Assembly, the repository of constituent power and the sole holder of the legislative function and the function of control over the government that it established, which it has the power to sack by means of an absolute majority. However, the majority has arranged matters so that it is able to pull the strings, by requiring the President of the Republic, under Art. 15, to task the candidate of the party that has won the highest number of seats in the National Constituent Assembly with forming the government.

In sealing a union between parties of very different allegiances, the coalition fell victim to several crises, revealing the fragility of the compromise and the flaws in its coordination. The Gordian knot of the crisis was the attempt by the party with the relative majority to get its hands on the machinery of the state (departments, public enterprises . . .). This hegemony, having been condemned by the opposition, eventually made the other parties of the coalition unhappy, who threatened more than once to break it up. During the months of January and February 2013 a profound political crisis swept the country, and the

¹²⁰ H. M’Rad, “Alliances stratégiques et potentielles des partis en vue de la Constituante” in *Les nouveaux acteurs du jeu politique tunisien* (Les Ières Conférences de l’ATEP, Friday October 14, 2011, Tunisian Association of Political Sciences, 2011) 44.

¹²¹ Constituent Act No. 6 of 2011 establishing provisional organization of the State authorities, *JORT*, No. 97, December 20 and 23, 2011, 3111–3115.

¹²² See Art. 14 of the Constituent Act No. 6 of 2011.

¹²³ Art. 11 of the Constituent Act gives the President of the Republic the task of promulgating the laws and agreements approved by the National Constituent Assembly. Although the act confers on the president the power to appoint the head of government, Art. 15 by way of counterweight requires the head of government be the candidate of the party with the most seats in the NCA. The determination of foreign policy and the power of appointment to senior military and civil, diplomatic, and consular roles are exercised by joint agreement with the head of government. Moreover, the President of the Republic shall declare a state of emergency only after the head of government and the president of the NCA have concurred in this. The government of the Central Bank is appointed after consultation between the President of the Republic and the head of government.

¹²⁴ The scope of the competencies accorded to the head of government is considerable. The head of government was granted under law the power to preside over the council of ministers, the power of appointment to senior civil positions, the power of general regulation, absolute control over the administration, public enterprises, territorial collectivities, and state forces.

compromise of a ministerial reshuffle to break up the majority party's grip on power over the state seemed impossible. The three parties entered into interminable talks,¹²⁵ before convening a new coalition government, once again presided over by the al-Nahḍah Party, but with neutralization of the ministries of sovereignty (defense, interior, foreign affairs, and justice).

It must be said that the coalition could have averted both the crisis that it went through and the virulence of the opposition, which was accused of practicing a policy of obstruction. The coalition remains nonetheless fragile and the hegemony of the Islamist party is still blown out of proportion. The parties of CPR and the Forum, allied to the party with the relative majority, are subject to internal crises and disputes, constantly accused of betraying the secular thinking they claim to support by having entered into an absurd coalition. Yet in the eyes of its defenders, this kind of conservative/moderate coalition is unavoidable and is the only way of responding to the post-revolutionary political offer and creating a barrier against authoritarian drift.

2. *Libya*

Rather than a governmental crisis, what Libya went through after the establishment of the General National Congress was a true institutional crisis, typical of multiparty parliamentary regimes. The problem was that according to the institutional design outlined in the Constitutional Declaration and the interior regulations developed by the General National Congress, the government was supposed to come out of the General National Congress. The resulting organization of powers in fact created a confusion of powers, borrowing from assembly regimes the superiority of Congress, which, according to Art. 1 of the internal regulations, embodied "the supreme power in Libya, tasked with exercising the prerogatives of supreme sovereignty, including legislative power, control, and the elaboration of the general policy of the state and is the only representative of the Libya people". Congress is therefore the driving force, whose dominance is also visible in its power of control over the executive, the members of which it appoints and repeals by absolute majority of the members.¹²⁶ Moreover, the executive is single-headed, having only the head of government above it. There is no counterbalance to the GNC's powers by way of a power of dissolution. That makes it "a parliamentary regime minus the dissolution" that has been established, in a model not unlike the one in Tunisia.

The internal dynamic within Congress, which includes a well-organized Islamic movement¹²⁷ under the leadership of the Justice and Construction Party, means that every decision is subject to the law of compromise, unavoidable in proportionalist regimes, which is how the Libyan regime can, with reservations, be characterized. The first challenge of appointing a head of government after the elections proved monumental. It reveals that the head of the liberal coalition, despite being majoritarian, was unable to become elected by the GNC in order to form the first government. We should also clarify that the reason this was so difficult is not just tensions with the Islamists but also the need for it to be composed

¹²⁵ The crisis came to a head on February 6, 2013, with the assassination of Shukri Bel'ayd, an outspoken opposition leader with the Democratic Patriots' Movement, a pan-Arab party based on Marxist-Leninist principles.

¹²⁶ Art. 140 of the Internal Regulations of the GNC.

¹²⁷ It seems that a coordination committee was created for the Islamist parties represented within the Congress. It included the Justice and Construction Party, the Party of the Nation, the Homeland Party, the Salafist party Aṣālah, and some independents. See S. Bsikri, "Abushagur's Leadership amidst Division," *Reports, Al Jazeera Centre for Studies* (October 8, 2012), <http://studies.aljazeera.net/en/reports/%7BUrl%7D>, accessed May 4, 2015.

of the various interest groups in Libya and to appease the centrifugal tendencies of certain regions. These considerations were omnipresent in the negotiations and explain the difficulty in forming the first government. In fact, the independent technocrat Abū Shāqūr, who was elected head of government on September 12, with the support of the Justice and Construction Party, ended up being ousted after an unexpected rapprochement between the National Forces Alliance and the Islamist Party. This unexpected rapprochement between two blocks determined to lead a government of national unity that represented all the regions and the various political leanings motivated the rejection of two government lists proposed by Abū Shāqūr.¹²⁸ Ministerial portfolios consequently had to be distributed, not so much on the basis of political affiliation as was the case in Tunisia, but on the basis of regional considerations.

In other words, the conservative/moderate split produced by the ballot boxes in Libya was not enough to enlighten the dynamic of the exercise of power in Libya. This split was grafted on top of other fault lines, regionalist ones as it happens. The Libyan example demonstrates the difficulties inherent with governments of national unity under proportionalist systems. Moreover, some months after the establishment of the new government headed by ‘Alī Zaydān, the Justice and Construction Party, having obtained only 5 of 33 ministerial portfolios, condemned the hegemony of the liberal movement in the government, and brandishing a map for retreat.¹²⁹

3. Egypt

In the test of the exercise of power, the majorities in Tunisia as well as in Libya, for different reasons, seem to have been forced to seek a compromise. In Egypt, a completely different scenario has come about, casting the Egyptian political system into an institutional quagmire after the election of the People’s Assembly. The Egyptian paradox is that the challenge to power is increasing exponentially with every successive electoral consultation.¹³⁰

It is true that it was the Islamist/liberal rift that created the tidal wave that destroyed the elected People’s Assembly. The People’s Assembly was embroiled in a battle between the Muslim Brotherhood and SCAF. In the course of their open conflict, exacerbated by the presidential elections, it was the People’s Assembly that was dissolved, hugely muddying the political waters. That is where we found ourselves in December 2012, with a referendum on the text of a constitution developed by a flawed constituent, among other things because its members had been elected by a People’s Assembly that the Supreme Constitutional Court had ruled unconstitutional. Indeed, the Supreme Constitutional Court found itself at the center of the institutional conflict¹³¹ that pitted the Islamists against SCAF, when it was their alliance that would have made it possible to map out the transition with the referendum of March 11, 2011, and the adoption of the voting system. Yet the strong majority won by the Islamists led them to put forward a candidate to the presidential elections, repudiating the original agreement set out in the Constitutional Declaration of March 30, 2011.

¹²⁸ “Formation du gouvernement libyen: Abū Shāqūr paye le prix d’un rapprochement entre libéraux et islamistes” (October 9, 2012), <http://www.lexpressiondz.com/internationale/161727-abou-chagour-pay-le-prix-d-un-rapprochement-entre-liberaux-et-islamistes.html>, accessed May 4, 2015.

¹²⁹ Information available at <http://www.m3n4.com/20/02/2013/worldnews/105596>, accessed May 4, 2015.

¹³⁰ S. Ben Nefissa “Trajectoires transitionnelles et élections: Egypte, Tunisie” (2012) 82 *Confluence Méditerranée* 9–29.

¹³¹ V. Collombier, “Egypte: les Frères musulmans et la bataille pour le pouvoir” (2012) 3 *Politique étrangère* 617.

Shady deals between the Islamists and SCAF, reported by several other analyses,¹³² go some way toward explaining SCAF's U-turn the day before the second round of the presidential elections. In any event, its position in the open dispute with the Islamists was supported by the ruling handed down by the Supreme Constitutional Court on June 14, 2012, which rendered a third of the People's Assembly invalid.¹³³

In fact, following referral by the Council of State, the Supreme Constitutional Court was faced with a prejudicial question as to the constitutionality of the electoral law, that allowed political parties to compete in the elections by list for up to the maximum of two-thirds of the seats of the People's Assembly, and also to put forward candidates for the uninominal voting, for the remaining one-third of seats, where they could compete through individual candidates. In affirming this to be discriminatory against independents, who could not compete in the uninominal elections and did not enjoy the same financial and moral support as was provided to party candidates, the Supreme Constitutional Court not only declared the provisions of the electoral law to be unconstitutional in this regard but also declared invalid the composition of the entire People's Assembly, since it had been elected on the basis of a law that was unconstitutional. The court took the view that the organization of the party lists for the two-thirds would have been different if the electoral law had not allowed members of the parties to put forward candidates for the one-third of seats allocated for uninominal voting. Since the flaw of unconstitutionality affected the electoral law as a whole, the court ruled for the complete dissolution of the People's Assembly and without the need for a specific measure, as the ruling of unconstitutionality had the force of *res judicata* and was binding on the state authorities.

The invalidation of the elections of the People's Assembly by the Supreme Constitutional Court was not without precedent. In fact, the court was merely upholding its own jurisprudence, having in 1987¹³⁴ and again in 1990¹³⁵ struck down the Electoral Act as unconstitutional on the same grounds of inequality of opportunity between party and independent candidates. The court was therefore merely reinforcing its earlier jurisprudence and confirming the "juridification"¹³⁶ of the electoral debate that it had initiated with its 1987 decision. That being so, its decision aggravated the climate of suspicion between the Muslim Brotherhood and the judicial body, accused of collusion with SCAF—suspicions that were stirred up again by another decision by the Supreme Constitutional Court declaring the law on political ostracism unconstitutional, making it possible to validate the candidacy of Aḥmad Shafiq.¹³⁷

By dissolving the People's Assembly, the Supreme Constitutional Court had crossed the Rubicon, jeopardizing its own authority. The decision was indeed followed by a stream of forceful protests by the newly elected president, Muḥammad Mursī. On July 8, 2012, he initially annulled the decree adopted by SCAF annulling the People's Assembly. The General Assembly of the Supreme Constitutional Court therefore convened as a matter of urgency and decided to stop the execution of the presidential decision, on the grounds that

¹³² T. A. Aclimandos (n 49) 77 et seqq.; S. Ben Nefissa (n 130) 15.

¹³³ SCC, June 14, 2012, No.20/34e. See text of the judgment in M. Abdulghani and R. Dechaux, "Les arrêts de la Cour constitutionnelle suprême égyptienne du 14 juin 2012. La juridictionnalisation des transitions démocratiques en question" (2013) 2 *Revue internationale de droit comparé* 379–384.

¹³⁴ SCC, May 16, 1987, No.131/6e in Rec., vol. 4, 43–44.

¹³⁵ SCC, May 19, 1990, No. 37/9e in Rec., vol. 4, 256 et seqq.

¹³⁶ S. Ben Nefissa and A. Arafat, *Vote et Démocratie dans l'Égypte contemporaine*, (Khartala-IRD, Paris 2005) 138.

¹³⁷ SCC, June 12, 2012, No. 57/34e. See text of the judgment in M. Abdulghani and R. Dechaux (n 133) 384–388.

it constituted a material obstacle to implementation of the court's ruling on the invalidity of the entire People's Assembly, a decision confirmed on July 17, 2012, by the Council of State that heard appeals against the presidential decree.¹³⁸ Of course, in the end President Mursi did comply by declaring that the Assembly would indeed be dissolved out of respect for the Rule of Law. Yet the People's Assembly survived, *de facto*, after its dissolution, as it had contributed to the appointment of the members of the Constituent.

In the end, although the various actors in Tunisia and Libya did manage, after a fashion, to achieve compromise, this seems impossible in Egypt, where there are very strong tensions between the majority and the opposition, by means of a proxy. Displays of strength by one side and the other have continued regardless, with the chief consequence of disrupting the institutional game, and very often the instrumentalization of, even disregard for, the law.

B. Majorities Face the Test of the Exercise of Constituent Power

"The constitution is not about the majority", could be read on placards held aloft by Egyptian protestors during one of the periods of dissent in Egypt. The phrase is so simple and sums up so well the misgivings that are felt with equal force in Tunisia. It is the Gordian knot of the constituent process, which has been generally permeated by the results of the elections. True, the speed of the process was not the same in all three countries. At the time of writing, the Egyptian Constitution is already promulgated, the Tunisian Constitution is in the third draft stage,¹³⁹ and the Libyan Constitution is still far off on the horizon. But a constitutional debate has been launched, allowing us to consider what the majorities produced by the ballot boxes have, in the grip of the hubris of power, made of the process of elaborating constitutions (Sub-section 1) and their substance (Sub-section 2).

1. The Elaboration of Constitutions: A Process "Peppered" with Uncertainties

In Tunisia, which was blessed with the least turbulent transition process, the majority set out to reproduce the balance of political power in the composition of the permanent legislative and constituent commissions tasked with redrafting the constitution.¹⁴⁰ Of the 22 members of each commission, 9 belonged to the al-Nahḍah Party, which had the relative majority. Given the composition of the commissions and of the mode of decision making,¹⁴¹ we understand that the majority party was able to weigh in heavily in the preparation of the draft constitution, although resistance by the opposition and the mobilization of civil society did prompt them to give way on several issues.

The question about the method of taking decisions is most frequently asked about the method of adopting the constitution. In this respect, the majority initially proposed that the constitution be adopted by absolute majority, article by article, and by a two-thirds majority for the draft constitution as a whole—a proposal strongly criticized by an opposition that perceived this to be an attempt by the majority party to dominate the constituent process. The heated debate on this issue, during the negotiations on the bill on the provisional organization of powers, resulted in a compromise that consisted of recourse to a referendum, but only as a third hypothesis: The project had first to be adopted, article by article, by an absolute majority of members of the National Constituent Assembly; the

¹³⁸ N. Bernard-Maugiron (n 17) 123.

¹³⁹ First bill dated August 13, 2012, second bill dated December 14, 2012, and third bill dated April 22, 2013; all three texts available at <http://www.anc.tn/>, accessed September 16, 2015.

¹⁴⁰ See Art. 42 of the NCA's Internal Regulations, *JORT*, February 14, 2012, 469 (in Arabic).

¹⁴¹ See Art. 60 of the NCA's Internal Regulations (n 140) 470.

text adopted in this way then had to be adopted as a whole, by a two-thirds majority; if that did not happen, a second reading of the draft was required within a month, in order that it might be adopted by the same majority. If the draft still did not pass, it would be put to popular referendum for adoption by the majority of the electorate.¹⁴²

In Libya, the method of appointing the constituent committee was determined in an atmosphere that was a long way from consensus. Art. 30 of the Constitutional Declaration, which set out the road map for transition and the political nature of the transitional authority, was revised several times in line with political contingencies. Having initially provided in paragraph 6 for a Constituent Committee to be chosen by the General National Congress to prepare a draft constitution that it must approve, before being put to a referendum, this article was first revised on March 13, 2012, by the National Transitional Council to strip Congress of its constituent prerogative,¹⁴³ with Art. 30 (6) henceforth providing for the appointment by the General National Congress, from outside its membership, of a Constituent Committee composed of 60 members following the model of the Committee of 60 that had been created to draw up the 1951 Constitution.¹⁴⁴ On the eve of the elections of July 7, 2012, the Transitional Council had to revise Art. 30 once again, in order to appease complaints by the Federalists of Barqah, who had brought the oil terminals to a standstill and were threatening to disrupt the electoral process if their main demand was not met, namely, equal representation of the three regions of the country.

The newly elected Congress went back to look at the question again, and after having tasked a special committee with leading a national dialogue on the method of appointing the Constituent Committee, it then interrupted that consultation process and decided on February 6, 2013, by a majority of 87 of the 97 members present, to ratify direct election, thus endorsing Constitutional Act No. 3 adopted by the National Transitional Council and retaining for itself the right to accept or reject the draft developed by the Constituent Committee.¹⁴⁵ The constitutional difficulties and controversies continued with an appeal against that act before the Constitutional Chamber of the Libyan Supreme Court. The court declared itself competent to control constitutional laws and judged that the revision had been adopted by a majority of two-thirds of those present in violation of Art. 36 of the Constitutional Declaration that required a majority of two-thirds of members.¹⁴⁶

In declaring the decision by Congress invalid, the court thwarted the National Transitional Council's announcement of the indirect election of the 60 members of the Constituent Committee. This enterprise would without a doubt have been strewn with obstacles and would have exacerbated the wind of discontent blowing from the south and the east. The Federalists had always expressed their fears that indirect selection by Congress would disadvantage the regions of Fazzān and Barqah, and enshrine once again the hegemony of Tripoli,¹⁴⁷ which (as already mentioned) kept for itself 100 out of the 200 seats in Congress.

¹⁴² Art. 3 of the Constituent Act on the provisional organization of the public authorities, cited above.

¹⁴³ "Libya's transition without a Constitutional Map," *Position papers*, Al Jazeera Centre for Studies (March 25, 2013), <http://studies.aljazeera.net/en/positionpapers/2013/04/20134282438798512.htm>, accessed May 4, 2015.

¹⁴⁴ Constitutional Act No. 1 of 2012 amending certain paragraphs of Art. 30 of the Constitutional Declaration, NTC, March 13, 2012.

¹⁴⁵ Decision No. 9 of 2013 of the General National Congress, on election of the Constituent Committee by a direct ballot, February 27, 2013, available on the website of the General National Congress.

¹⁴⁶ Supreme Court, Constitutional Chamber, Judgment of February 26, 2013, No. 28/59.

¹⁴⁷ (n 143).

It therefore seems strange that the 1951 Federal Constitution should be at the heart of an impassioned debate between those who favored it as the starting point for a legal framework and those who rejected it. The first camp is represented by the alliance of liberal forces that were victorious in the elections, the second by the Supreme Council of Revolutionaries, who claimed in the name of revolutionary legitimacy a right to influence in political life and the perennialization of the state of revolution.¹⁴⁸ The crisis over the method of appointment has emphasized the fault lines that fracture Congress. As well as a degree of bipolarization between the Islamists and the Liberals, regional, tribal, and military interest groups weighed in heavily on the political chess board, as already revealed by the negotiations about the composition of the government. The balancing act seemed difficult and choosing a method of appointment for the Constituent Committee proved intractable; eventually Congress gave in and endorsed direct election.¹⁴⁹

In Egypt, the only trace that remains of the dissolved People's Assembly is the Constituent Assembly that had developed the draft constitution that was put to a referendum. The long ups and downs that punctuated its short history speak volumes about the lack of consensus. Under Art. 60 of the Constitutional Declaration of March 30, 2011, the 100 members of the Constituent had to be chosen by the elected members of the two chambers of parliament. The silence of the Constitutional Declaration on the criteria for selection opened up a dispute between the military and the Muslim Brotherhood, jostling to control its composition, resulting in a web of court appeals, legal documents and political compromises that was difficult to untangle. In their session of March 17, 2012, the two assemblies decided to choose half the members of the Constituent from within parliament,¹⁵⁰ clearly subverting the wording of the Declaration and opening the way for the hegemony of the Islamist parties, who had a clear majority within the Parliamentary Assembly and the Senate. This maneuver was decried by the liberal parties and the parties of the left who had not taken part in the vote. A claim was filed before the Council of State by a coalition of lawyers and liberal political parties asserting that the composition of the Constituent was unconstitutional. In a decision handed down on April 10, 2012, Cairo's Administrative Judicial Court of the Council of State decided to suspend the Constituent, as the Constitutional Declaration had mandated parliament to elect the members of the Constituent, not to choose them from within its own members.¹⁵¹

The crisis thus apparently averted, a new composition for the Constituent had to be agreed upon. An agreement was reached between the representatives of the political parties, notably the Islamists, and SCAF, on a composition more representative of the various sensitivities.¹⁵² It was also agreed that decisions within the Constituent would be adopted by a majority of 67% of its members, probably to prevent the hegemony of the Islamists. The general terms of this agreement were set down in a bill adopted by the People's Assembly

¹⁴⁸ *Id.*

¹⁴⁹ Decision No. 30 of 2013 of the GNC on the establishment of a committee to prepare a draft electoral law for the election of a constituent committee mandated to draw up the draft permanent constitution, April 11, 2013.

¹⁵⁰ N. Bernard-Maugiron (n 17) 124–125.

¹⁵¹ CS, 10/4/2012, No.26657/66.

¹⁵² This agreement gave 39 seats to representatives of political parties with seats in the PA, 6 to judges, and 9 to legal experts. The armed forces, the police, and the ministry of justice were given 1 seat each; 13 seats were given to trade unions, 21 to public figures, 5 to Al-Azhar, the Sunni religious authority based in Cairo, and 4 to the Christian churches of Egypt including the Coptic Church, the largest in the country. See "Choosing the members of the constituent: compared experiences and lessons learned", *Discussion paper* (in Arabic), IDEA (November 2012) 1, <http://www.constitutionnet.org/files/finalidea.pdf>, accessed May 4, 2015.

on June 12, 2012, and its members were indeed elected at a joint meeting of the People's Assembly and the Senate on June 13, 2012. Except that SCAF did not promulgate the law in accordance with Art. 56 (5) of the Constitutional Declaration of March 30, 2011,¹⁵³ preferring to publish an addendum to the Constitutional Declaration establishing the right to form a new Constituent if the current body is prevented from completing its work. In the escalation of the battle with SCAF, President Mursi promulgated Act No. 79 on the selection criteria for members of the Constituent,¹⁵⁴ adopted by a People's Assembly that had just been declared to be unconstitutional! A jurisdictional battle ensued and an appeal was lodged with the Council of State against the decision on the composition of the Constituent Assembly adopted by the People's Assembly and the Senate on the grounds that it violated the ruling by the Council of State handed down April 10, 2012, prohibiting parliamentarians from belonging to the Constituent, whereas the second Constituent included members of the Senate and of the dissolved People's Assembly. The Administrative Judiciary Court of the Council of State was obliged in its judgment of October 23, 2012, to defer its ruling and refer the constitutional question to the Supreme Constitutional Court.¹⁵⁵

The withdrawal of representatives of the opposition and of the church from November 13, 2012, refusing to endorse a draft Islamist constitution, in effect amounted to a new appeal against the Constituent. The president therefore had to adopt a new Constitutional Declaration on November 21, 2012, in which he, among other things, immunized the Senate and the Constituent Assembly against any jurisdictional claim attempting to dissolve them. That Declaration strengthening the prerogatives of the president, which also put all presidential decrees beyond all judicial recourse,¹⁵⁶ opened a new round of very violent disputes. In the whirl of bloody confrontations between supporters and opponents of President Mursi, the opposition called for the referendum process to be interrupted. To appease the toxic atmosphere, President Mursi was obliged to annul the Declaration of November 2012, whilst maintaining its effects,¹⁵⁷ and the constitution was put to a referendum.

With a poor turnout (32.9%), the draft constitution put to a referendum on December 15 and 22, 2012, was approved by 63.8% of voters.¹⁵⁸ The Egyptian referendum had not appeased the simmering conflicts in Egypt and the losing minority discredited the process.¹⁵⁹ The legitimacy of the popular verdict was not enough to achieve compromise,¹⁶⁰ which laid the foundations for subsequent conflicts in the country.

¹⁵³ According to Art. 56 (5) of the Constitutional Declaration, "the Supreme Council of the Armed Forces shall manage the country's affairs, and has the right to have immediately the following powers: . . . 5. Promulgate legislation or to oppose legislation," Declaration cited above.

¹⁵⁴ Act No. 79 of 2012 on the criteria of election of the Constituent Assembly's members, *Official Journal*, (in Arabic) No. 28 bis, July 12, 2012, 3–5.

¹⁵⁵ Case No. 45931, October 23, 2012.

¹⁵⁶ Constitutional Declaration of November 22, 2012, available at <http://www.sis.gov.eg/Fr/Story.aspx?sid=39769>, accessed May 4, 2015. See on this subject: "Egypt's Constitutional Decree Crisis," *Position paper, Al Jazeera Center for Studies* (December 6, 2012), available at <http://studies.aljazeera.net/en/positionpapers/%7BUrl%7D>, accessed May 4, 2015.

¹⁵⁷ Constitutional Declaration of December 8, 2012, available at <http://www.sis.gov.eg/Fr/Story.aspx?sid=40051>, accessed May 4, 2015.

¹⁵⁸ Results available at <https://referendum2012.elections.eg/results/referendum-results>, accessed May 4, 2015.

¹⁵⁹ See L. Morel, "La pratique dans les démocraties libérales," *Le référendum, Pouvoirs*, (April 1976) 38.

¹⁶⁰ See "Egypt's Plight: A political game without rules," *Position paper, Al Jazeera Centre for Studies* (February 7, 2013), <http://studies.aljazeera.net/en/positionpapers/2013/02/201327103350815755.htm>, accessed May 4, 2015.

The main point of convergence between the three countries is the constant challenging of the legitimacy of the elected assemblies, despite the “original regularity”¹⁶¹ drawn from the election. The reasons are manifold: failure to respect the preexisting schedule in Tunisia, the vacillations of the General National Congress under pressure from the various actors of transition in Libya, and the insistence by the Islamists—who had been victorious in the legislative elections in Egypt—that the composition of the Constituent should reflect the composition of the parliament that had been elected by universal suffrage. Nonetheless, all this brings us back to the ontological question of democracy: Can one rely on the legality of instruments in order to do whatever one wants? That would be, as Pasquale Pasquino puts it, a “suicide pact of total alienation in favor of the majority,”¹⁶² who must not be allowed to “decide everything about everything,”¹⁶³ especially when it comes to establishing a constitution.

2. Constitutional Debates Characterized by Points of Tension

One tension point in the constitutional debate in Egypt and Tunisia, and less so in Libya, seemed to be the question of the constitution as a secular instrument, with Islamist parties being well placed to impose a constitution permeated by religiosity. In Tunisia, this was about the Shari‘ah as the source of law, about male/female equality, and freedom of expression versus respect for that which is sacred. The same tension points could be detected in the Egyptian constitutional debate, which resulted in an instrument elaborated by a Constituent that was boycotted by the liberals, and there are indications of a similar preoccupation in Libya, although the rhythm of the constituent process there is working at a different speed.

On the first point of tension, namely, the Shari‘ah as the source of the law, Tunisian public opinion was animated by a very passionate debate on this issue, on the basis of a draft constitution that clearly emanated from the party with the relative majority, al-Nahḍah, presented around March 2012, Art. 10 of which provided that the Shari‘ah would be one of the main sources of legislation and for the creation of a “High Shari‘ah Council” to verify the conformity of laws with Shari‘ah. A large protest held on March 20, 2012, voiced participants’ visceral rejection of the rampant Islamization of society, which eventually dissuaded the majority party, who announced the withdrawal of the Shari‘ah draft on March 25. In the end, Art. 1 of the former 1959 Constitution was preserved, being judged sufficient to affirm the presence of Islam in the constitution.¹⁶⁴ That article provides that “Tunisia shall be a free, independent and sovereign state, its religion shall be Islam, its language Arabic and its regime a republic”.

Interpreted as being a formulation of identity with no normative value,¹⁶⁵ Art. 1 constitutes a compromise that satisfies “all the contradictory demands and leaves the real sticking points unresolved, thanks to its ambiguous wording.”¹⁶⁶ Although a decision on the

¹⁶¹ C. Eisenmann, “Sur la légitimité juridique des gouvernements” in *Annales de philosophie politique*, No.7, *L’idée de légitimité* (PUF, Paris 1967) 115.

¹⁶² P. Pasquino (n 7) 11.

¹⁶³ *Id.* 10.

¹⁶⁴ Y. Ben Achour (n 114).

¹⁶⁵ S. Belaid, “L’article 1^{er} : La Tunisie est un Etat libre, indépendant et souverain, sa religion est l’islam [...]” (En arabe), Les dispositions générales de la Constitution, Actes du colloque de commémoration du cinquantenaire de la promulgation de la constitution tunisienne du 1er juin 1959, édité par le soin de l’Association tunisienne de droit constitutionnel, Tunis, 23–24 janvier 2009, Tunis, 2010, 36.

¹⁶⁶ C. Schmitt, “La Théorie de la constitution” (PUF, Paris 1993) 162.

religious anchoring of the Tunisian state has been suspended for more than 50 years, a rigid interpretation cannot now be excluded. Especially as, unlike the 1959 Constitution, which was only weakly religious in tone,¹⁶⁷ the third draft makes reference to Islam not only in the preamble, talking of “constants of Islam” but also by prohibiting in Art. 136 any constitutional revision attacking “Islam as religion of the State”. The wording contains worrying ambiguities, and the redundant reference to the civic nature of the state¹⁶⁸ does little to dispel this.¹⁶⁹ And just what are the “constants of Islam”? The reference to “its values characterized by openness and tolerance”, although pointing toward a final reading that is contrary to a rigid interpretation of Islam, seems misplaced, given that these constants are not specified. Moreover, the writers of the third draft were at pains to confirm that the preamble is an integral part of the constitution and “has the same value as (its) other provisions” in terms of Art. 138, which could, gradually, reduce everything to these “constants of Islam”. Moreover, whereas the second draft of the preamble made reference only to the principles of human rights, the “universality of human rights” was in the end included in the third draft, but “in conformity with the cultural specificities of the Tunisian people [*sic!*]”. This formula sounds like an oxymoron. It is for the least ambivalent and threatens to block the improvement of women’s legal status in Tunisia. As it stands, cultural relativism could be invoked to oppose the reception of international instruments related to women’s rights.¹⁷⁰

The Egyptian Constitution went much further than this in its religious anchoring of the state. Indeed, Art. 2 provides not only that “Islam shall be the religion of the State”,¹⁷¹ but adds, without equivocation that “the principles of Islamic Shari‘ah shall be the main source of legislation”, principles comprising according to Art. 219 “its global evidence, fundamentalist and jurisprudential basis, as well as the significant sources, in the legal schools of the people in the tradition of the prophet and of the community”. A reference that could lead to a rigid interpretation of Islam. The text also makes reference to Al-Azhar, the prestigious Islamic authority, which “proceeds to the propagation of the Islamic predication, theological sciences, the Arabic language in Egypt and in the world. The opinion of the authority of the great ‘ulamā’ (Islamic scholars) of the Al-Azhar University in Cairo shall be taken in matters relating to Islamic Shari‘ah” (Art. 4). A reading of Arts. 2 and 4 taken together makes this religious authority the ultimate source of the law, accelerating fast toward the institution of a theocratic state. Whilst on the one hand being long-winded in listing rights and freedoms, with the other, the constitution established a hierarchy of rights, by, under Art. 81, making the exercise of those rights subject to respect for the principles set out in the chapter “the State and Society”, which covered among other things the reference to Shari‘ah.

In Libya, the question of Shari‘ah seems to have been resolved immediately after Libya’s declaration of independence. Indeed, on October 23, 2011, Muṣṭafā ‘Abd al-Jalil, then president of the NTC, declared that the Shari‘ah would be the source of the law. Furthermore,

¹⁶⁷ In addition to the declarations in the preamble of fidelity “to the teachings of Islam” and Art. 1, Art. 40 requires candidates to the highest office to be of the Muslim faith.

¹⁶⁸ It makes reference to the civic state in the preamble to the draft, in Arts. 2 and 136.

¹⁶⁹ Y. Ben Achour, “Rapport introductif” in Tunisian Association of Constitutional Law and the Association for research on democratic transition (eds), *Lecture de l’avant-projet de la Constitution. Evaluation et propositions* (Tunis March 2013) 9.

¹⁷⁰ See S. Ben Achour, “Les chantiers de l’égalité au Maghreb” (2004) 13 Policy paper, 3.

¹⁷¹ An unofficial English translation of the constitution is available on the website of the State Information Service, <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2603#.VQFm3vmsWVO>, accessed May 4, 2015.

the issue seems to be a matter of consensus among the political powers represented in the GNC.

In the same spirit, the status of women is a second point of tension in the constitutional debate. This is true even in Tunisia, although it had led the way on the emancipation of women, thanks among other things to the Code on the Status of the Individual adopted by Bourguiba (Bürqiba). The fear that those rights might be rescinded was aroused by Art. 28 in the first draft, which rendered women “an authentic partner, with man, in the construction of the country and through their complementary roles within the family”. This complimentary notion, putting women back into an inferior status, was virulently rejected by civil society, and was in the end abandoned¹⁷² and replaced with a more satisfactory wording, by the provision in Art. 11 of the third draft, that “woman and man shall be partners in the construction of society and the State”. Male/female equality is not perfect however. Although it is true that equality before the law is enshrined in Art. 6 and that the state guarantees, under Art. 41 (1), “the protection of women’s rights and the strengthening of the *acquis*”, Art. 41 (2) adds that “the State shall guarantee equality of opportunity between women and men to assume various responsibilities” and paragraph 3 added that “the State guarantees the elimination of all forms of violence against women”. With a sense that it has been deliberately left unfinished, the drafters do not mention the elimination of all forms of discrimination against women. It is only clear that the equality of men and women will be appreciated in terms of the “constants of Islam”, and the universal standards of human rights shaped by cultural relativism. And moreover, parity was not written into the third draft of the constitution, despite strong mobilization in support of this.

Male/female equality seems to have been further undermined in the Egyptian Constitution. Even though Art. 33 does provide that “citizens shall be equal before the law” and that they “have the same rights and the same general responsibilities, without distinction between them”. Nonetheless, this equality is often threatened, not only by Art. 2 that makes the Shari‘ah the main source of the law but also by Art. 10 (3), which tasks the state with “reconciliation of the responsibilities of a woman towards her family and her public activity”. Women are purely and simply under the guardianship of the state and the laws that will decide the manner in which she must manage her private life. In Libya, too, there is a risk that a lower status for women will be enshrined, given the Constitutional Declaration that, despite declaring equality before the law in Art. 6, associates this in Art. 5 with children, elderly people, and other vulnerable categories. Regardless of what becomes of this, the future status of women under the constitution remains uncertain, and given a recent judgment by the Constitutional Chamber of the Supreme Court lifting the restrictions on polygamy that had been introduced by al-Qadhdhafi,¹⁷³ one might legitimately fear a regression in women’s rights.

Last, let’s consider the third point of tension in the constitutional debates, namely, the place of “that which is sacred”. The criminalization of attacks on that which is sacred found its way into the first draft of the Tunisian Constitution in an article that provided “the State shall guarantee freedom of religious belief and practice and punish any attack against the sacred values of religion. In the end, the article was abandoned, but protection of the sacred retained a strong position in Art. 5 of the third draft, which provides that “the State shall protect religion; it shall be the guarantor of freedom of religion and the exercise of worship, protector of the sacred and guarantor of the neutrality of places of worship from party propaganda”. This leaves wide open the potential for curtailing freedom of expression. In Egypt,

¹⁷² Y. Ben Achour (n 114).

¹⁷³ Libya Supreme Court, Constitutional Circuit, Constitutional Appeal No. 03/59 JY, February 2013. See *A Revolution for All, Women’s Rights in the New Libya*, May 27, 2013, on the website of Human Rights

in addition to a rigid interpretation of Art. 11 that tasks the state with watching over “the mores, morality, public order, [. . .] religious values”, Art. 44 prohibits “any denigration or defamation of any of the messengers and the prophets”.

The issues mentioned above are not the only points of tension in the constitutional debate. At the time of writing, Tunisia is still locked in negotiations between the majority party and the other political powers represented within its National Constituent Assembly as to the nature of the political regime. As for Libya, it is on the breach of engaging a vivid debate on the State form. In Egypt, the jury is still out, in spite of the promulgation of a constitution which seems unable to carry out the democratic transition. Completed in 2013, this comparative study of the electoral systems in Tunisia, Egypt, and Libya has been conducted in the context of bewildering—sometimes striking—political and legal developments. However, in Tunisia, the constituents have managed to consensually adopt a new constitution,¹⁷⁴ and the shift of power in the parliamentary elections of October 26, 2014, has seen a democratic and peaceful transition of government in Tunisia from the formerly ruling, moderate Islamist al-Nahḍah Party to the secularist Nidāʾ Tūnis Party.¹⁷⁵ As the transition of government and political authority from one party to another, can be seen as one of the most crucial tests and milestones in the establishment of viable democracies, the results have sealed Tunisians fortunate and successful leading role in the democratic process that started with the Arab spring. A mere month later, Tunisia conducted the first free presidential election ever since its independence in 1956. After the first round of elections yielded no definite majority for any one candidate, the second round showed that the candidate of the Nidāʾ Tūnis Party, Aa-Bāji Qāʾid al-Sabsī, had won a majority over the incumbent al-Munṣif al-Marzūqī.¹⁷⁶ In a period just shy of three months, Tunisia thus faced a democratic and peaceful transition of power in both parliament and the office of the president. Unfortunately, the other countries researched in this article faced a more tumultuous and dramatic interruption of their democratic development.

Libya from the start faced huge security challenges and the need to consolidate its still embryonic institutions; the task was much more difficult, with political decisions often adopted in a Congress besieged by militia.¹⁷⁷ While, after a months’ long struggle, a cabinet could be reached under Prime Minister ʿAlī Zaydān, public unrest and discontentment with his administration grew, ultimately leading to him being replaced by ʿAbdullāh al-Thānī. The election for the Council of Deputies on June 25, 2014—which was to replace the General National Congress as the new legislative authority—brought a disappointing outcome to Islamist candidates and instead saw nationalist and liberal candidates garner the majority of the seats. As the election was marred by violence and generally produced a low turnout, the losing political fractions declared the continuation of their mandates in the new General National Congress and thus ignored the election results and the authority of the newly established Council of Deputies. The representatives of the Council of Deputies viewed

Watch, <https://www.hrw.org/report/2013/05/27/revolution-all/womens-rights-new-libya>, accessed September 15, 2015.

¹⁷⁴ The Constitution of Republic of Tunisia promulgated on January 27, 2014, a nonofficial translation of the constitution provided by the UNDP Project Supporting the Constitutional Process, the National Assembly and National Dialogue, available at <http://www.venice.coe.int/files/Constitution%20TUN%20-%202014.pdf>, accessed September 4, 2015.

¹⁷⁵ Results by the Independent High Authority of Elections are available at <http://www.isie.tn/resultats/resultats-legislatives/>, accessed May 4, 2015.

¹⁷⁶ Results by the Independent High Authority of Elections are available at <http://www.isie.tn/resultats/resultats-presidentielles/>, accessed May 4, 2015.

¹⁷⁷ S. Bsikri (n 66).

this as a coup d'état and shifted their seat to the city of Ṭubruq, away from the outbreak of even more sectarian violence and street fighting which broke out in the streets of the capital of Tripoli.¹⁷⁸ The subsequent event brought almost all the achievements of the previous months to naught. While the Islamist-led General National Congress managed to reassert its control over the capital and large parts of the region of Tripolitana, several cities of the area (including Darnah and Sirt) fell to the onslaught of *jihādī* groups, such as the Islamic State and Anṣār al-Sharī'ah. An additional uprising by Touareg groups in the Southwest, removed also the region of Fazzān largely from central authority. The internationally recognized government around the Council of Deputies with its seat in Ṭubruq, thus exercised effective control over little more than the Eastern part with violent uprising and sectarianism prevalent in most areas of the country. The foreseeable future of Libya's democratic process can therefore only be called discouraging.

In Egypt, the situation had become increasingly volatile following the draft Constitution of 2012, which was seen by many as giving too much power to the presidency. Finally, a mere year after the election of President Mursī on the June 30, 2013, people took to the streets in unprecedented numbers to express their discontentment with the economic and political development of the country and with what they perceived as a clandestine Islamization of both political and public life in Egypt. As the death toll and the number of protesters rose over the following day, the Egyptian Army gave the president a 48-hour ultimatum to restore order.¹⁷⁹ As on July 3, the widespread protests showed no sign of abating, the head of the armed forces, 'Abd al-Fattāḥ al-Sīsī, declared the deposition of President Mursī and the suspension of the constitution. The interim-government, under the former Chief Justice of the Supreme Constitutional Court, 'Adlī Maḥmūd Maṣṣūr, was charged with drafting a new constitution, which was approved by a majority of 98.1% in a referendum on January 14 and 15, 2014, which was also raised concerns about the low turnout of just 38.6% and various irregularities.¹⁸⁰ The head of the armed forces, General 'Abd al-Fattāḥ al-Sīsī, subsequently declared his decision to lay down his military command and run as a candidate for the presidential elections. In spite of the landslide victory he managed to garner, the low turnout of 46% and the call for boycott of the elections by various political and social groups proved yet another disconcerting factor in Egypt's recent development.¹⁸¹

In spite of the similarities the countries have shown in the beginning of their struggle for a democratic state under the rule of the law and the similar obstacles they faced along the way, the outcome of the process could hardly be more different. With Libya being torn apart by sectarian violence, *jihādī* and tribal uprisings, and two separate national governments which show no signs of will to compromise; with Egypt on the one hand stabilized from month-long protests and public unrest and rid of a government which was seen as a threat to its secular society, but on the other hand at least on the road of an authoritarian, army-backed, presidential regime, not entirely unlike the Mubārak era; and finally Tunisia, which proved its position as a role model for democratization and peaceful transition in the Arab world by not only integrating Islamist groups in its political makeup, but also managing a peaceful, democratic transition of power in two subsequent elections.

¹⁷⁸ <http://www.reuters.com/article/2014/10/02/us-libya-security-insight-idUSKCN0HR1GO20141002>, accessed August 29, 2015.

¹⁷⁹ <http://english.ahram.org.eg/News/75414.aspx>, accessed August 28, 2015.

¹⁸⁰ <http://english.ahram.org.eg/NewsContent/1/64/91874/Egypt/Politics-/UPDATE---approves-postJune--constitution.aspx>, accessed August 28, 2015.

¹⁸¹ <http://www.reuters.com/article/2014/06/03/us-egypt-election-results-idUSKBN0EE1UO20140603>, accessed August 28, 2015.

Centralized or Decentralized State Structures?

Tendencies in the Arab Transition States

XAVIER PHILIPPE

I. INTRODUCTION

This chapter deals with the issue of centralization and decentralization, with a focus on Arab states facing situations of political and legal transition in the form of constitutional transformation. Countries at the heart of the “Arab Spring” revolutions of 2011—such as Tunisia, Egypt, Yemen, and Libya—did not place particular emphasis on the issue of constitutional structures with a view of establishing democracy and new political regimes. Although contexts were quite different in each case, the primary aim of each revolution and uprising was to overthrow the old authoritarian regimes, which were considered to be corrupt and violators of basic rights. As one author¹ rightly puts it:

Decentralization (in times of transition) is a consequence of democracy and, at the same time, a necessary condition to its survival and improvement. It is an instrument to exercise power at the intermediate level in the territory, which should in turn, link the activities of the center to regions and communities.

¹ Allan R. Brewer-Carías, “The 1999 Venezuelan Constitution-making process as an instrument for framing the development of an authoritarian political regime” in Laurel E. Miller (ed), *Framing the State in Times of Transition* (USIP, Washington D.C. 2010) 509.

II. THE LIMITED ATTENTION PAID TO THE ISSUE OF DECENTRALIZATION

The “Arab Spring” initiated various constitution-making processes, which have, up to now, taken considerably different routes. All of them have been driven by the same idea: establishing a new balanced political regime that works in the interests of the well-being of the people. Even though the Western media often presented this goal in an idealized manner, the need for a new constitutional agreement did not specially focus on constitutional structures of the state. More precisely, the issue at stake in this contribution—“decentralization or centralization”—was not a central issue in the lively constitutional discussions which took place after the previous authoritarian regimes were overthrown. Still today, nobody can predict exactly to what extent this matter will be considered a key issue in constitutional negotiation processes.

Replaced into the global debate on constitution-making processes, the issue of states’ constitutional structures² is only considered as key in transitional states in post-conflict situations when such structures are a matter of contention during negotiations between rival parties.

Even if each political transition is unique and focuses, in most cases, on the choice of a new political regime and the protection of human rights, provisions dealing with the distribution of powers between the central government and local governments always have to be addressed; and taking these matters into account is generally considered to be a defining characteristic of modern constitutionalism. The question at stake therefore lies in the influence of new state structures on the overall reshaping of constitutional provisions and on the constitution-making process as a whole. The ensuing dilemma arises from the fact that any country going through a transitional phase has to reconcile two contradictory objectives: On the one hand, there is a need to accommodate all the parties within the constitution-making process, which requires the making of political concessions when necessary. On the other hand, state structures have to be conceived in an efficient manner and with a long-term perspective, with a view to ensuring their long-term existence. This means that the final decisions reached are based on a mixture of both political and technical considerations.

There are also a number of factual elements to take into consideration before one can ascertain any answers to this dilemma. First, there is a need for an all-encompassing approach to drafting any given new constitutional text that takes state structures into account as part of the equation. Constitutional provisions are intertwined with one another, and even though some provisions of a constitution seem more important than others in a given specific context due to political controversies over certain issues, authorities in charge of implementing these constitutional provisions have to include territorial organization within the new constitutional framework. Such consideration can be seen primarily as a tendency of modern constitutionalism.³

² Sometimes referred to as the “horizontal and vertical division of powers.” The “vertical division of powers” is defined as the division of powers and competencies between the legislative, the executive, and sometimes the judiciary, while the “horizontal division of powers” is made between the different levels of government (central government and subnational entities).

³ The World Bank paid specific attention to this phenomenon and published a number of papers on the issue of “Decentralization and Developing countries.” See J. Litvack, J. Ahmad, and R. Bird, “Rethinking Decentralisation in Developing Countries” in *Sector Studies Series* (The International Bank for Reconstruction and Development/World Bank); see also D. Rondinelli, “Government Decentralization in Comparative Perspective: Theory and Practice in Developing Countries” (1989) 47 *Int’l Rev. of Administrative Sciences* 133–145.

Second, such constitutional choices are not neutral and are made within a certain political context and framework, driven—by definition—by the nature of each transition. Such choices include the possibility of major political transformations, and they cannot be seen as limited to the making of a simple and interchangeable technical choice. It is necessary to know how to interpret these factors and weigh up the advantages and disadvantages of different constitutional options before the “best” or “least bad” possible solution can be identified.

Third, the choice of state structures is quite often the result of a compromise between political forces acting within a certain historical context which also includes geopolitical considerations, as is the case, for instance, in Tunisia, Libya, or Iraq. The past often determines the future, and this is an unavoidable factor in the constitution-making process. The result can sometimes be seen as a mixture of varying types of solutions which are not always completely rational from a legal point of view.

In order to bring the debate on “centralization or decentralization” within Arab transitional states into focus, one can consider the possible combinations and degrees of decentralization which can be chosen by constitution drafters (Section III) and try to examine the various factors influencing the final choice. This will show that the final choice is not merely a technical one but one also driven by a balance of interests (Section IV). Arab transitional states are no exception in this regard.

III. CENTRALIZATION OR DECENTRALIZATION: THE POSSIBLE COMBINATIONS

The choice between centralization and decentralization in a new constitutional arrangement is invariably made within a broader debate over the redistribution and sharing of political power. As these factors are clearly part of the fundamental foundations of a state, the choices made relating to them will always be complicated ones when set in the context of a transitional period. In most post-conflict or post-revolutionary situations, there is a natural tendency to compensate for the faults of the past regime by opting for a more balanced division of power, both vertically and horizontally. Following authoritarian or dictatorial regimes, newly elected public authorities tend to place various limits on the concentration of power, especially on powers in the hands of the executive.

One common feature of Arab states in transition and their former leaderships is that power was exercised, officially at least, in the framework of highly centralized and concentrated forms of government.⁴ If subnational structures (i.e., local or regional government) did exist, they were usually headed by individuals who were either closely linked to the central government or appointed by them. The worst outcome of this tendency was that in many cases local governments became corrupt and thus created a feeling of complete distrust and lack of confidence amongst the population, as they were seen as mere representatives of the central regime. Moreover, the quality of provision of public services was very low and fell far short of the expectations of local populations. This was the case, for instance, in Tunisia’s governorates and municipalities,⁵ in Egypt, where the system was

⁴ See, for example, the series of briefing papers on decentralization published by the “Obstacles to Decentralization: Lessons from Selected Countries” Conference, Andrew Young School of Policy Studies, International Studies Program, Georgia State University, September 21–23, 2008, which confirms the high degree of centralization in Arab countries.

⁵ See Governance & Local Development, “Decentralised administrative structure in Tunisia,” Gold Maghreb, UNDP, available at http://appi.nazioniunite.it/download/decstruct_tunis_eng.pdf, accessed September 4, 2015.

highly centralized (especially in terms of human resources) and in Libya, where territorial divisions have always been regarded as a possible source of discontent.⁶

The debate taking place in Arab countries facing constitutional transformation, however, needs some clarification regarding the concepts of “centralization” and “decentralization” before engaging in a deeper contextualized analysis, as the terms are quite often confused with various forms of federalism.

There is no official or single definition of “centralization” or “decentralization”. Rather than a single concept, these antonymic words describe a phenomenon and are used to identify the singularity or the diversity of sources of decision-making powers within a state.⁷ As highlighted by many authors,⁸ decentralization has become associated with so many other concepts—such as federalism, regionalism or provincialism—that it has become difficult and confusing to speak about it in an abstract manner and without first clarifying its exact intended meaning.⁹ Nonetheless, the ideas behind these two words can be summarily explained in the following manner: Centralization implies a single level of political decision-making power, where the making of every kind of decision is directly or indirectly traceable back to this level as its source. Decentralization, in contrast to this, implies multiple levels of delocalized decision-making power, allowing for differences and contextualized decisions. Between these two poles, a wide range of possible forms of organization can be identified.

Decentralization can be more clearly understood by comparing its definition in different fields of study. This leads us to understanding the term in a twofold manner: One can speak of the political understanding of decentralization or of its legal understanding. From a political point of view, decentralization is seen functionally as a means of division of power, based on the idea that, considering the theory of good governance, decision-making powers should not all be concentrated in the hands of a single central government. As most post-conflict situations are driven by questions of respect for ethnic, linguistic, religious, economic, or other minorities, constitutional decentralization can, under certain circumstances, also be seen as a means of pacification. This perception is the one held by many international organizations engaged in political processes of peace building and transformation. The World Bank, for instance, defines decentralization in very broad terms as “the transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent government organizations and/or the private sector”.¹⁰ This refers to various aspects, including the transfer of political, fiscal and administrative powers to subnational entities. This view and approach is the one most often denoted by the term “decentralization” in the field of political science and it includes all kinds of constitutional arrangements that transfer competencies from the center to the periphery. In

⁶ See Alex Warren, “On decentralization in Libya,” March 10, 2012, available at <http://battlefortheArabSpring.wordpress.com/2012/03/10/on-decentralisation-in-libya>, accessed June 15, 2015; Lin Noueihed and Alex Warren, *The Battle for the Arab Spring—Revolution, Counter Revolution and the Making of a New Era* (Yale University Press 2012).

⁷ This was the definition of the opposition between the two notions made by H. Kelsen and A. Wendberg (tr), *General Theory of Law and State* (Harvard University Press, Cambridge 1945) 308.

⁸ See, for example, M. Böckenförde, “Decentralized forms of Government” in *A Practical Guide to Constitution Building* (IDEA 2011).

⁹ See, for example, Art. 161(1) of the 2011 Constitution of *South Sudan*, providing for the principle of decentralization but referring to Federal States features.

¹⁰ Decentralization Thematic Team, “What Is Decentralization? General Information on Decentralization,” Site Index. Contributor: World Bank.

contrast to this, the legal definition of decentralization is much narrower and only deals with the transfer of certain executive competencies originally belonging to the central government. Decentralization, in this latter sense, is usually seen as a specific feature of a unitary state, granting administrative powers to subnational entities or local governments but leaving the final word in decision-making processes with the central state authorities when needed. The central state authorities remain the source of power and no devolution of legislative or judicial power is granted to subnational governments. From this perspective, decentralization does not even necessarily need to have a relationship with the state's constitution.¹¹ This purely legal definition can, however, hardly ever be used on its own in the context of transformational states and it is therefore usually blurred together with the political one.

From a constitutional point of view, state structures can usually be defined with reference to the core distinction between federal and unitary states. This differentiation is, however, neither sufficient nor comprehensive and can lead to confusion. Federalism implies certain specific features such as the existence of a federal state and constituent states, each of which have the same specific features and the same allocation of exclusive and concurring competencies. In contrast to this, decentralization can exist within the framework of a unitary state. Moreover, a variety of intermediate options exists and these are amongst the issues negotiated throughout the constitution-drafting process that can lead to very different resulting state structures from one state to another. The final choice on constitutional provisions in relation to such questions can be seen as analogous to a cooking recipe, where all the ingredients are first placed on the table but the final result depends upon the mixing and preparation processes. What then are the different ingredients and what are the possible combinations of mixing? One of the first issues is the identification of the authorities that are to be vested with decision-making power. The key question to be asked in this context is whether or not the constitution drafters in question are ready to accept the possibility of various kinds of political choices being made by noncentral state actors. This is both a crucial question to answer within the constitutional process itself and it also defines a central feature of the resulting political regime, as the answer will automatically imply a certain degree of autonomy for any such noncentral state bodies. This, once again, brings us back into line with the distinction between political and legal decentralization. Nonetheless, the choice faced by constitution drafters is not so clear-cut: The envisaged decision-makers could be representatives of the central government who make decisions in a particular region (de-concentration), they could be selected or elected local decision makers who make decisions under the supervision of central authorities (delegation) or such elected decision makers might even be able to act directly and independently with no possibility of their decisions being overturned by the central authorities (devolution). This obviously leads to different margins of discretion for decision makers, even though the difference between these various formulas is much more one of degree rather than one of nature.

Decentralization implies more than one level of government; however, the question of precisely how many remains open. The answer will obviously depend not only on the historical and geographical context in which the constitutional process takes place, but also on the workability of multiple subnational entities. It should be remembered, however, that a greater number of levels of subnational structures is neither a guarantee of efficiency nor of greater political independence.

¹¹ See J-P Derosier, "La dialectique Centralisation/décentralisation Recherches sur le caractère dynamique du principe de subsidiarité" (2007) 1 *Revue internationale de droit comparé* 108.

Another essential ingredient is the determining of the boundaries of decentralized territorial units. This is probably one of the most contextualized issues. Territorial delimitation can be based on existing objective elements, such as geographical configuration, populations, languages, etc., and usually takes these elements into account to at least some degree. However, using "natural" or preexisting factors can become dangerous if territorial delimitations closely follow previous sources of division. In a context of secession, using such criteria for territorial delimitation could divide a country rather than unite it, thus opening Pandora's box. To a certain degree, Yemen can serve as a good illustration of this danger. If there has been, since the beginning of the revolution, a claim for decentralization in this country, then the use of the previous territorial lines of division between the north and the south of the country might revive the possibility of full secession. Territorial delimitation, therefore, cannot be based solely on such natural factors. This predicament can also be observed in the case of Iraq, where territorial divisions are strongly influenced by the economic factor of oil resources and their locations.

In addition to territorial delimitations, the issue of symmetrical or asymmetrical devolution is perceived as a way of fine-tuning the effects of decentralization. Asymmetrical devolution of powers means inequality between subnational structures despite their identical constitutional or legislative status. Asymmetry can be found here through the recognition of different governmental competencies to subnational entities, creating some discrimination between them. Asymmetrical devolution can also be strictly limited to certain issues such as language or cultural policy. Alternatively, it can be broader in nature and include not only specific powers but also specific institutions, thus giving greater political freedom to the subnational entities specified. This is usually considered to be a tool for granting greater autonomy to territories claiming the right to self-determination or threatening to secede.

A closely related question is that of which kind of competencies and powers are to be included into the decentralization process. Generally, three kinds of competencies can be delegated to subnational entities: administrative, fiscal, and political. These competencies can however be granted in various degrees. If decentralization, strictly speaking, does not encompass legislative or judicial power or autonomy, the situation can be tremendously different from one country to another. In strictly legal terms, decentralization is first and foremost a means of sharing administrative competencies between various power blocs. To oversee these administrative competencies, there is, however, a need for financial resources: this need can be met through the transfer of fiscal or taxation powers.¹² Administrative and fiscal competencies are therefore fundamentally linked to each other, as the former cannot be exercised without the latter. There are, nonetheless, a variety of possible combinations for the granting of greater or more limited power to subnational entities. Political competencies go a step further than the aforementioned scenario, as they clearly give subnational entities an additional significant dimension. Granting political competencies to subnational entities means allowing them to freely choose the goals they want to work toward and achieve within the framework of the national constitution and/or legislation. It is therefore necessary to define precisely which types of competencies are to be included in the devolution measures that empower subnational entities. We should note here that the transfer of competencies to subnational entities is usually taking place in an interdependent system, that is to say a system in which competencies are intertwined. The granting of a specific political

¹² Richard M. Bird and Robert D. Ebel, "Fiscal Federalism and National Unity" in Ehtisham Ahmad und Giorgio Brosio (ed), *The Handbook of Fiscal Federalism* (Cheltenham, Northampton MA 2006) 499–520.

or even administrative competence without fiscal powers (i.e., taxation) or resources is often purely formal and leaves the real decision-making power in the hands of central state bodies. This was, for instance, the case in Tunisia before the 2011 Revolution when the governorates and municipalities were run from the central government and not from the subnational entities.

Centralization can be used to unify a country that has been fragmented or torn apart by the actions of an ousted regime or through conflict. However, centralization can also be used as a means to impose the rule of law where it did not previously exist. Therefore, centralization can also be seen as a means to restructure and unify the various groups of population within the new state in cases where conflict has divided them. This point should not be understood as a universal acclamation of the use of centralization in all post-conflict situations, but it can nonetheless be seen as a possible way of tackling specific key issues within a transitional period.

Decentralization can be seen as a way to maintain and reinforce an already existing situation in terms of addressing its geographical, ethnic, sociological, and other such aspects. In each constitutional transition, there is a need for such an adaptation to the context to take place. Decentralization can also be used to stabilize opposing parties or forces after a conflict, as a tool to restore a kind of “balanced peace” and to forestall one or more particular groups from pulling out of the constitutional framework.

Nevertheless, there is never a completely ideal solution. The choice between centralization and decentralization is not about good and bad, or right and wrong. The choice is about fine-tuning, to the greatest possible degree, the best constitutional solution while taking into consideration the variety of factors represented by the given context and the possible future evolution of the transitional state. In relation to Arab transitional states, one can understand how the possible choices and answers will not be identical in the different countries. While in Tunisia the size of the country, the technical adequacy of subnational structures, and a need for efficiency could lead to a balance between “centralization” and “decentralization”, in Libya, a clear call for political decentralization—perhaps including some kind of federalism—can be expected. This is due to the country’s larger territory, the existence of tribal groups, and its historical divisions. Nonetheless, the key question here will remain of whether and to what degree such political claims will be the more accurate during the negotiation stage of the constitutional process.

Behind the words “centralization” and “decentralization”, one can find many different forms and structures ranging from something close to a federal state to a centralized state with autonomous subnational entities, autonomous appointments, and elections to governing bodies and autonomous powers, finances, etc. The choice of possible solutions is wide-ranging.

Arab states in transition are currently faced with such choices on “decentralization”. Today, none of them have, as yet, shown any clear preference for one type of constitutional structure or another. The following analysis will be made according to the information currently available and taking into consideration the fact that all these states, except Tunisia and Egypt, are still working on their constitutional drafts and no final choices have yet been made.

In addition to theoretical knowledge and understanding of technical solutions related to “centralization and decentralization”, we must also consider a number of features unique to transitional states and transitional law. Transitional states—including those Arab states currently undergoing transition—do not find themselves in a “normal” situation and have to cope with many specific factors related to the context of transition in general and challenges arising from their specific transitional setting. The following sections will focus on these features and try to identify their influence on the final constitutional agreement found as regards to the relationship between the central state and subnational structures.

A. Transition

The very premise of a state in transition leads to specific answers that will shape the overall debate on constitutional structures and the final constitutional text and steer in one direction or another. “Transition” is understood as an intermediate period between political chaos and the reconstruction of state structures that undoubtedly influences the content of that state’s constitution. During this period, the drafting of the constitution is usually seen as a way to overcome the current problems relating to the lack of political stability, while it is also expected that the text satisfy two different kinds of demands. First, decentralization can be considered to be a tool to correct the past, and it must constitute a solution to past abuses and negligence. It can thus be seen as a kind of “curative treatment”. Second, it must also take the future into consideration and create a workable and efficient institutional agreement that fulfills the role of a “preventive treatment”. These two goals are, however, sometimes contrary to each other. For example, the choice of a political constitutional regime is usually made to avoid the repetition of past mistakes and especially too high a concentration of powers. However, there could also be a fear that a completely new type of political regime would not be adapted to the mind of the people and the country. Consequently, despite criticisms made against the previous regime, there is a tendency to reproduce the same pattern of institutions. The 2014 Tunisian Constitution is a good example of this tendency.

The structural choice between “centralization” and “decentralization” within the context of transition is deeply influenced by the constitution drafters’ political evaluation of and reactions to the previous regime as well as the ideas and ideals they wish to promote. The importance attached to the debate on decentralization within the overall constitutional process plays a decisive role and it will be directly reflected within the constitutional document, whether the unity of the state was a key issue before or during the transition or not. If not, “decentralization” can be seen as an opportunity to create or redesign relationships between national and subnational entities. The choices made during the transition period to address critical problems are intended to rationalize the future political regime. The role played by former subnational structures in the previous constitutional arrangement and the trust toward these subnational structures by the new public authorities plays a key role in defining the future shape of the state in terms of centralization or decentralization. In the case of Tunisia, for instance, it is well known that under the Ben ‘Alī regime, subnational structures were completely controlled by the central executive power and were seen as the arm of central government. In Libya, prior to the “Arab Spring”, there was a division between the western part of the country (containing the capital, Tripoli) and the eastern part of the country (home to the country’s second city, Benghazi). It is not surprising that one of the first matters of contention to arise in the post-revolution constitutional process was the number of members of parliament allocated to the western part of the country, as this was considered by the eastern representatives to be—and a continuation of—the bias in favor of the Tripoli region. The situation worsened later, and four years after the Revolution the question of territorial division remains highly contentious and a major source of conflict. One can see from these two examples that prior forms and effects of centralization are playing an undeniable role in the current transitional process.

The level of priority given to questions of “decentralization” during the constitutional-drafting process serves as an indicator of the degree to which the constitutional text will utilize this feature for establishing a constitutional balance. The challenge, therefore, is to correctly ascertain the appropriate amount of concern to be given to the issue of decentralization, neither overstating nor underestimating its importance. The choices made in this regard during the constitutional process should

not be based only on immediate short-term interests but should also take a more long-term perspective into account.

B. The Role Played by Subnational Structures

As already briefly mentioned, in a number of cases, like in the transitional Arab states, subnational structures already existed before the uprisings and revolutions. We turn now to the question of the extent to which these subnational structures might play a role in the new constitutional agreements.

The political repercussions of the form and actions of subnational structures under the previous regime will obviously impact on their role and responsibilities within the new constitutional agreement. Initial questions include whether they should have an active or passive role and whether this role should be an administrative or a political one. These are not merely technical questions as the role of subnational structures will largely depend on the degree of political autonomy and margin of discretionary power to act granted to subnational structures. This should be decided within the constitutional text and the drafters have to be very precise regarding the types of relationship they want to establish between the central and local governments. If political choices—i.e., the freedom to decide on particular matters—are assigned to local governments without interference from the national government, then this constitutes authentic devolution. Here again a wide range of intermediary arrangements can be found ranging from complete freedom to limited and narrowly constrained decision-making powers, granting no margin of decision-making power to the local government. However, transferring the “right to decide” to local governments is not always so clearly organized, as the transfer needs to include the financial means to exercise these transferred powers. Financial means and, moreover, financial autonomy—i.e., the right to impose taxes and levies—is one of the cornerstones of true autonomy. The question of how this is organized within a constitution therefore must be addressed. If financial autonomy is granted, there will be authentic empowerment of the subnational bodies and government, but also a risk of mismanagement of funds (not to speak of corruption), especially if local governments’ officials have no specific skills or previous experience in fulfilling their new competencies. In the context of transition, this question is even more problematic as the gap between the desired and actual ability of individuals to fulfill certain competencies can be extremely wide. Therefore, during the constitutional drafting process various possible arrangements, sometimes very different from one another, can be considered under the single heading of decentralization. However, a final and concrete choice has to be made eventually.

The situations found in different transitional Arab states seem to be highly diverse. In Tunisia, for instance, local governments were seen as politically relevant but considered to be badly run and almost invariably corrupt. The question now is that of assessing whether or not existing local government bodies are sufficiently reliable to allow them to be granted the competencies and powers with which they have shown themselves to be unreliable in the past. In Libya, subnational structures did not formally exist. However, the political history of this country has witnessed territorial division of some description between its three regions (Tripolitania, Cyrenaica, and the Fazzān) and questions of decentralization might therefore be addressed on this basis.

C. Boundaries

Boundaries and territorial division of subnational structures are often a highly contentious and divisive issue. With the exception of basing such decisions purely on natural boundaries and geographical criteria, there is almost always a political agenda behind territorial

divisions. This means that a set of “rules of play” should be established by constitution makers. Despite the fact that this process can often seem politically neutral in nature on its surface, the political importance and potential political ramifications of setting regional boundaries should not be underestimated.

Constitution makers face a choice between a broad range of useable criteria when it comes to deciding on boundaries. On one hand, they can take natural and existing territorial divisions based on ethnicity, language, religion, or any form of cultural specificity into consideration wherever they already exist. Or, on the other hand, they can create new delimitations in an attempt to prevent such factors as these becoming sources of division or conflict, such as claims for greater autonomy or even future attempts to secede. There is no single answer to this question, and the best way to approach it will obviously depend on context.

Whatever the final settlement reached may be, constitution makers ought to be aware of the route they are embarking on when such a decision is made. Once a choice has been made, it is very difficult to bring about change on the precise issue it relates to at a later date. A preliminary assessment of the advantages and disadvantages of each possible combination should be carefully made, even though in each context such a choice could be limited by external objective factors such as population number and territorial coverage. Within this context there are two major risks, each of a different nature. The first risk lies in the inability of a subnational structure to properly fulfill a certain competency because of its size, lack of resources, or lack of qualified administrative staff. This will lead to a failure of the decentralized system or to some form of inequality between the territorial divisions (subnational structures) if they are not placed on an equal footing in terms of resources or capacities (such disparities might even be simply the result of purely geographical differences). The question of how to prevent such problems and resulting disparities from arising therefore naturally presents itself. One possible solution to be considered in such a scenario is that of asymmetric structures, which in some contexts are sufficient to establish a kind of equality where it otherwise would not naturally exist.

The second risk lies in the slow but continuous undermining of national unity which occurs if some subnational structures are designed in such a way that they inherently and unavoidably go on to call for greater autonomy or even move toward secession. If subnational structures exist in a defined territory which is sufficiently identifiable through any form of cultural specificity of its population and if this territory is running its competencies in an efficient manner, a claim for greater autonomy will almost certainly follow. Drawing boundaries in a manner that is not completely in line with these criteria might serve as a way of avoiding such problems and serve as a means of promoting a culture of national unity. However, this is not always possible due to specific political contexts.

In some transitional states and especially in situations following armed conflicts, like in Libya or Yemen, political divisions have developed in close line with territorial divisions. In such circumstances the pivotal question is to what extent constitution makers are able to redesign territorial delimitations between the subnational structures. Constitution makers should ask themselves how wise it is to try to create new demarcations between subnational structures when their chances of being accepted are obviously low. This dilemma can be summed up as a simple question: Are divisions between population groups the result of political will or is this the result of an unchangeable political fact?

D. Trust

The level of trust that exists between state structures and subnational structures is also a key component and probably the most important aspect to be taken into consideration when selecting a centralized or decentralized system. In this regard, the drafters of constitutions

must ask whether subnational authorities could be seen as reliable and efficient or as incapable of properly assuming and fulfilling their responsibilities. Two different factors need to be taken into account when approaching this issue. The first is the technical ability of subnational structures to fulfill competencies granted to them by the central state. If there is a lack of expertise and technical knowledge amongst the political and administrative staff of subnational structures, no trust will be held in them and any kind of arrangement between the different levels of government will end in failure. The second factor is that of the existence of political distrust between the central and subnational structures. The lack of confidence due to misunderstandings or badly resolved conflicts, the existence of parallel agendas and the political desire to later call for secession will lead to greater distrust and damage relations between the different structures. This is a highly subjective element and is based on political balance of forces, but it cannot be ignored in the context of a debate on choosing between various forms of decentralization.

This brings us to the question of the actual relationship to be established between the different levels of governance. "Decentralization" will only be seen as a valuable transition management tool if there is no, or a very limited, risk of conflict or clash between national and subnational structures. Constitution drafters will not wish to fall into the trap of being responsible for establishing a system in which the risk of failure is very high. However, such calculations are often impossible in situations when a strong case for autonomy or independence exists. Despite such risks, negotiations have to take place without overlooking the official and possible agendas of subnational structures in relation to aspirations for autonomy or independence. One possible negotiation strategy is to establish and clarify limits for the possible scope of devolved powers and to integrate safeguards into the constitution to prevent the country from disintegrating into its constituent parts. Here it is vital to understand that the issue at hand is not a legal but rather political one and a relationship of confidence usually has to be built up before it can be translated into a constitutional provision. Inserting constitutional and statutory safeguards to counteract or neutralize threats to the unity of the state is a necessary measure, but they are never a full guarantee that the implementation of constitutional provisions on decentralization will work out as originally envisaged.

E. Rights and Freedoms

The central issue of fundamental rights and freedoms is not, at first sight, directly linked to the choices on decentralization made by constitution drafters. Nonetheless, the drafting process of a constitution in a transitional setting has to take account of this dimension, as the transformation process will be reflected in the implementation mechanisms in terms of efficiency of protection of rights and freedoms (regardless of what is protected by the constitutional provisions on this matter). The role granted to subnational entities in this regard must be decided, especially in relation to socio-economic rights, such as the right to shelter or the right to access to basic needs such as water or food for which local authorities are placed at the forefront of the reality.

One important fact which should be taken into account is what can be called the "position of proximity", which subnational entities enjoy: In terms of safeguarding rights and freedoms they are quite often, by their very nature, concretely closer to the population concerned (i.e., the bearers of rights and freedoms) than the central state is. It is also easier for individuals to establish direct contact with local authorities and this can work to the benefit to subnational structures in areas where they are able to function effectively and fulfill their competencies. This constitutes a significant challenge in the area of rights and freedoms, as subnational authorities must be both sufficiently empowered and also have

access to the necessary administrative and specialized resources and financial means to fulfill these duties. Efficacy in this area will also depend on the political will of subnational authorities.

A second important fact is that of the political constraint of public authorities in implementing human rights in a post-conflict or post-crisis situation. Constitutional drafting processes are usually accompanied by a high demand from the public to guarantee and safeguard those rights and freedoms which had been violated most often. The promise made within the constitution through the provisions or chapters dedicated to protect rights and freedoms should include implementation mechanisms. For a number of rights and freedoms, the role and responsibilities of subnational authorities will come into question as they are in direct contact with the bearers of rights and freedoms. Subnational authorities have, in some areas, the advantage of being able to initiate programs more effectively at local level due to their better understanding of and sense for the real needs of the population concerned. However, there is quite often a lack of trust between central authorities and local governments due to the impression of lack of technical expertise from subnational entities and lack of understanding of concrete problems from the central state. This is especially true in the MENA (Middle East and North Africa) region where subnational authorities have often been seen as being nothing more than the representatives of the central government (operating essentially as de-concentrated structures) rather than as local authorities possessing the autonomy to decide on issues concerning rights and freedoms. Whatever the situation is in relation to the competencies of and levels of trust in subnational structures, the issue of their role in relation to rights and freedoms needs to be taken into account in the future constitutional agreements of these countries.

F. Capacity Building of Subnational Structures

In many cases, subnational authorities already exist but in a purely administrative form. Their efficiency and capacities, however, are quite often very low due to lack of trained staff and limited management abilities. This is a phenomenon which occurs independently of any new constitutional process, but it will directly impact on the success of the process of decentralization.

Empowering subnational structures through new constitutional provisions can be easily done. However, transforming them into bodies that operate efficiently within the new state structures is a separate challenge. The drafting of a constitution is not an isolated independent exercise. Reconstructing public services and subnational entities through the constitution drafting process should be viewed as a unified holistic exercise.

Creating subnational entities and a decentralized state without properly addressing the way in which concrete issues are to be dealt with can be equated to the creation of an empty shell.¹³ This means that constitutional and administrative reforms should be closely linked to one another and this should be clearly demonstrated right from the outset. One possible route in this regard is providing for the gradual empowerment of subnational structures. This means that the constitution-making body would have to conceptualize and design an evolving system of subnational structures that would gradually be granted increasing levels of autonomy.

¹³ Richard Vengroff Dean and Hatem Ben Salem, "Director Assessing the impact of decentralization on governance: A comparative methodological approach and application to Tunisia" (1992) 12 *Public Administration and Development* 473–492.

IV. CONCLUSION

Three main points can be identified from this analysis of the respective merits of “centralization” and “decentralization”.

First, one has to remember that a constitution is just a starting point and not a final aim. Therefore, the choices made during the constitution-making process should be more regarded as an important first step than a conclusive solution. Constitutional provisions on “decentralization” should be more focused on general principles and on a clear division of powers than on solutions trying to resolve precise or technical issues. Any movement toward “decentralization” implies a certain amount of autonomy and a certain amount of cooperation. Finding a suitable balance is not easy, and this can be a particularly difficult task when the design process has to start from scratch. Arab countries faced with this dilemma will have to make choices knowing that the final result might not be an ideal one.

Second, the constitutional text will not be sufficient to ensure the survival of the political deal agreed on during the peace and constitution-making processes. There is a need to ensure the schema laid out in the constitutional is implemented in reality and herein lies the primary challenge. Quite a number of constitutional agreements on local government are perfunctory and are accompanied by neither the sufficient level of political will nor follow-up actions which would allow for the actual implementation of the division of powers agreed upon.

Third, constitution-making processes usually face opposing views from the parties that should participate in the process of compromise. The question of centralization or decentralization is no exception. This can be the result of contextual factors but can also be the result of an imperfect understanding of the modern role of subnational entities. Once a new constitutional system starts to take shape, finding a balance between all the provisions of the new constitutional text is unavoidable and coherence is imperative. The choice on vertical divisions of power (i.e., centralization or decentralization) is no exception and should be integrated into the overall constitutional picture. This is probably where another aspect of the challenge lies on a longer term basis: will the compromise be sufficiently wise to be a workable solution?

A constitution always entails a gamble on the outcome of future developments and never provides absolute certainty. Nonetheless, constitution makers should endeavor to make the most reasoned and reasonable bets possible.

The Legal Status of the Kurds in Iraq and Syria

BAWAR BAMMARNY

I. THE KURDS AS A PEOPLE AND AS A MINORITY

As of yet, there is still no universally accepted definition of minorities in international law. In fact, to date a fixed definition of what constitutes a minority has been deliberately avoided in international legal instruments designed to protect minorities.¹ However, a minority can be said to exist when a group is objectively different from others and its members subjectively see themselves as such and have a sense of community. The objective characteristics are often unclear. Though some claim that there are “races” of the human population, the world is so old and complex that there are no ethnically “pure” groups, and certainly not in Mesopotamia, where the cradle of civilization lies.

The Kurds themselves are characterized by a heterogeneous mix of religions and denominations, though their traditions are not fundamentally different from those of other peoples in the region. The Kurds have their own language, which belongs to the Indo-European family of languages, but also includes extremely exotic dialects that are sometimes very difficult to understand, even for other Kurds. Some of these dialects resemble Ancient Persian. The subjective criteria have been clearly evident in the case of the Kurds since the beginning of the 20th century. In response to the waves of nationalism affecting other peoples in the region, the Kurds also developed a stronger sense of identity.²

¹ Rainer Grote, “The Struggle for Minority Rights and Human Rights” in Doris König (ed), *International law today: new challenges and the need for reform?* (Springer, Berlin, Heidelberg [et al.] 2008) 221 et seq., 228 et seq.

² Kenneth Bourne and D. Cameron Watt (eds), Part II, Series B, Vol. 15. – British documents on foreign affairs: Turkey, Iran, and the Middle East, 1918–1939 (Univ. Publ. of America, Frederick, MD 1987) 216–217; David McDowall, *A modern history of the Kurds* (3rd edn Tauris, London 2010) 4; ‘Abdulrahmān al-Bazāz, *al-‘Irāq min al-iḥtilāl ḥatta ‘l-istiqlāl* (3rd edn al-‘Ānī Press, Baghdad 1967) 285 et seq.

The concept of the nation state is a European phenomenon that initially moved into the center of the political arena in the 19th century and gradually became accepted worldwide. The Kurdish population is estimated at between 30 and 38 million people, with the majority, residing in Turkey, Iran, Iraq, and Syria. As such, they rank among the largest populations in the world to have no state of their own and have become victims of international and regional politics.³ They have been denied the right to exist (as a sovereign nation-state), even though they have a prehistory in the areas where they live. Thus, in Turkish language literature one often finds the claim that the Kurds are of Turkish origin and they are therefore referred to as “Mountain Turks”.⁴ The fact is that the Turks settled in the Middle East much later, originally migrating there from Central Asia. Their immigration started only in the 11th century.⁵

More mystifying, several famous standard works of authors adhering to Islamic Shī‘ah⁶ claim that the Kurds did not descend from Adam and Eve, but instead from the Jinn, spirit creatures mentioned in the Qur’ān and other Islamic texts.⁷ Thus, Muslims are supposedly forbidden to marry Kurds or do business with them. Supposedly, these are statements from the two most important figures in Shī‘ah Islam; first, *Imām* ‘Alī (600–661), the cousin and son-in-law of the Prophet Muḥammad, and second, the sixth great *Imām* Ja‘far al-Ṣādiq (702–765), the grandson of the Prophet and founder of the Islamic Shī‘ite Ja‘fari school of law, which is currently the official Islamic school of law in Iran (Art. 12 of the Iranian Constitution).⁸ Falsified statements of the Prophet Muḥammad and great *a‘immah* (pl. of *imām*) that often even contradict the Qur’ān are not uncommon in the Islamic world. Some researchers attribute these negative allegations against the Kurds to the role of the Kurdish Ayyubid dynasty, and particularly to the Kurdish leader *Sulṭān* Ṣalāḥ Al-Dīn (Saladin; 1138–1193), which resulted in the decline of the largest Shī‘ite Islamic empire in history, the Fāṭimid Caliphate (909–1171), which dominated Egypt, North Africa and Syria.⁹ However, these allegations are older than the decline of the Fāṭimid Empire (1171). The

³ In this regard, see: Gerard Chaliand (ed), Michael Pallis (tr), *People without a country. The Kurds and Kurdistan* (Zed Press, London 1980).

⁴ Jacob M. Landau, *Exploring Ottoman and Turkish history* (Hurst, London 2004) 67; Martin Strohmeier and Lale Yalçın-Heckmann, *Die Kurden* (Beck, München 2010) 25.

⁵ Ernst Werner and Walter Markov, *Geschichte der Tuerken von den Anfaengen bis zur Gegenwart* (Akademie-Verlag, Berlin 1979) 8 et seq., 315.

⁶ Abū Ja‘far Muḥammad ibn Ya‘qūb ibn Iṣḥāq al-Kulaynī, *al-Kāfi ‘fi ‘Ilm al-Dīn* vol. 5 (Islamic Library, Tehran, 1958) 158, 352; Abū Ja‘far Muḥammad Ibn Ḥassan al-Ṭūsī, *Tahdhīb al-aḥkām*, vol. 7 (2nd edn Islamic Library, Najaf 1961) 405; Muḥammad bin al-Ḥassan b. ‘Alī b. al-Ḥusayn al-‘Amilī, *Wasā’il al-Shī‘ah li taḥṣīl masā’il al-shāri‘ah*, vol. 6 Part 2 (Islamic Library, Tehran 1962) 307.

⁷ According to the Qur’ān they are made of a smokeless and scorching fire (Qur’ān 15: Sūrah 27). They are older than human beings, and some are good and some are bad, just like human beings (Qur’ān 11, 14: Sūrah 72).

⁸ Article 12 [Official Religion]: The official religion of Iran is Islam and the Twelver Ja‘fari school, and this principle will remain eternally immutable. Other Islamic schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills), and related litigation in courts of law. In regions of the country where Muslims following any one of these schools constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school, without infringing upon the rights of the followers of other schools.

⁹ Farsat Mar‘ī, *al-Shī‘ah wa taḥdīd al-Akrād bi al-Mahdī al-muntaẓar* (Albayān No. February 27, 2013), <http://www.albayan.co.uk/MGZarticle.aspx?ID=2498>, accessed August 9, 2015.

prominent Shī'ite historian al-Mas'ūdī (ca. 895–957) describes this theory in his famous 10th-century book *Murūj al-dhahab wa ma'ādin al-jawāhir* [Meadows of Gold and Mines of Gems].¹⁰ These claims can also be found in the famous standard works of the Shī'ites from the 10th and 11th century, for example, in *Kitāb al-Kāfi* (940) by the great Shī'ite scholar al-Kulaynī (864–941), or in *Tahdhīb al-ahkām* (1022), which was also written by a great Shī'ite scholar, al-Ṭūsī (995–1067). These books are not merely historical works but remain of great importance to Shī'ite Islamic law to this day.

One reason for the negative Shī'ite views on Kurds could be the differences in faith and political direction between the two groups, with origins that predate the Ayyubid dynasty. However, in recent decades, a political alliance between Shī'ites and Kurds has emerged, particularly in Iraq, because they both suffered under Ṣaddām Ḥusayn's regime and thus worked together against a common enemy. Furthermore, today there is also a Shī'ite Kurdish minority.¹¹ In addition, this negative view is often propagated by some chauvinists to underpin the theory that the Kurds are not originally from the areas where they now live. However, it is undisputed that northern Mesopotamia has a long and storied history. It was there that people created the first settlements in the world and it was from there that a migration to the southern part of Mesopotamia began, where writing and numbers were first invented.¹² However, for the Kurds to qualify as a minority, the fact that they are not recognized as a group in some countries is not crucial, because the existence of a community is not a question of law but one of fact.¹³

II. STATUS OF ETHNIC AND RELIGIOUS MINORITIES UNDER ISLAMIC LAW

The Kurds mainly live in parts of states that are currently dominated by Islam. The Kurds are mostly Sunnī Muslims. Shī'ite Kurds are a minority within the Kurdish community. In addition, there are other religious minorities amongst the Kurds, such as Yazidī, Ahl al-Ḥaqq, Zoroastrian (Magi), Christians, and Jews.

¹⁰ 'Alī Ibn al-Ḥusayn al-Mas'ūdī, *Les prairies d'or* 3 (Impr. Impériale, Paris 1864) 249.

¹¹ Nevertheless Shī'ite theologians' judgments about Kurds remain predominantly harsh, based on the allegations mentioned above. A recent example from 2012 is *Shaykh* Jalāl al-Dīn 'Alī al-Saghīr, an Iraqi politician and former member of the Iraqi parliament, constitutional committee of the Iraqi parliament, and *Imām* of the Shī'ah Burathah Mosque in Baghdad. In a lecture in which he discussed political events, al-Saghīr described the Kurds as "rogues" and claimed that *Imām Mahdī* would take revenge on them when he appeared. Al-Saghīr also said the first war that *Mahdī* would fight would be against the Kurds. These statements sparked huge protests on the part of the Kurds, prompting al-Saghīr to relativize his statements. See: *Shaykh* Jalāl al-Dīn 'Alī al-Saghīr, "Kurdish movement and Vanguard dawn," Lecture at al-Mahdī Burathah Intellectual Forum Baghdad, August 3, 2012: <http://www.liberalls.org/vb/showthread.php?t=23097>, accessed August 9, 2015; relativized statements: <http://www.sh-alsagheer.com/index.php?show=news&action=article&id=782>, "Al-Shaykh Jalāl al-Dīn al-Saghīr, *yad 'alā ithārāt kurdīyah fi sha'n muḥāḍirah: al-ḥarāk al-kurdī wa-ṭalā'i' al-fajr al-mahdawī, wakālat anba' burāthā*," accessed August 9, 2015.

¹² In this regard, see: Robert J Braidwood and Bruce Howe, *Prehistoric investigations in Iraqi Kurdistan* (Chicago University Press, Chicago 1960); also: Harriet E. W. Crawford, *Sumer and the Sumerians* (Cambridge University Press, 2004); Helmut Uhlig, *Die Sumerer* (Lübbe, Bergisch-Gladbach 1989) 12.

¹³ "The existence of communities is a question of fact; it is not a question of law," *The Greco-Bulgarian "Communities"* (Advisory Opinion) Series B No 17 [1930] PCIJ 22.

Islam does not distinguish between different ethnic groups (Qurʾān 49: Sūrah 13), but rather between different religions.¹⁴ In the Qurʾān only Jews, Christians, and Sabians are recognized (Qurʾān 2: Sūrah 62).¹⁵ In Iran, persons adhering to these religions are recognized religious minorities, as are the Zoroastrians (Art. 13 of the Iranian Constitution).¹⁶

When Islam spread to the Kurdish areas in the 7th century the majority of the Kurds, like the other peoples of their region, converted to the emerging religion. Some of them, however, retained their old faith, their Mesopotamian religions. These religions still exist, but they are veiled and concealed under various names. By these means they have managed to spare themselves a good deal of harm and to elude their opponents. Some “daughter religions”, like that of the Yazīdīs (actually Ezīdī) and the Ahl al-Ḥaqq, also Yarsan or Kakaʿī, disguise their faith in Islamic trappings.¹⁷

It is reported that the Yazīdīs were the target of genocide 72 times, and that 80% of them were eradicated.¹⁸ It is a miracle that they have survived in Muslim areas to the present day at all, but in the high mountains, their strong faith and *ṭāqīyah*¹⁹ [stealth] have enabled them to remain in their homeland. In the 12th century their legendary leader *Shaykh* ʿAdī brought about a major change for the Yazīdīs by disguising their religion as a form of Islam. This has led many Arab and Muslim researchers to view the Yazīdīs as a peripheral Islamic denomination, but they are mistaken. It can be easily proven that Yazīdīs are not Muslims, as all Muslims turn to Makkah when they pray, while the Yazīdīs turn toward the sun. Between 35,000 and 50,000 Yazīdīs live in Syria today,²⁰ and approximately 500,000 Yazīdīs (from a total of roughly 1 million worldwide) live in Iraq. Nearly 60,000 Yazīdīs live in Germany. Their mother tongue and language of prayer is Kurdish.²¹

¹⁴ Qurʾān 49: Sūrah 13, “O people! We created you from a male and a female and made you into nations and tribes that you may recognize one another, undoubtedly, the most respected among you in the sight of God is who is more pious, verily, God is Knowing, Aware.”

¹⁵ Qurʾān 2: Sūrah 62, “Indeed, those who believe and those who are Jews or Christians or Sabians, those who believe in God and the last day and live righteously, have their reward with their Lord, and no fears trouble them, nor do they grieve.”

¹⁶ Article 13 [Recognized Religious Minorities]: Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

¹⁷ The Yazīdīs were also believed to be followers of Zarathustra, but archeology confirms that the older Mesopotamian religions and the followers of Zoroaster were even influenced by this religion. Between the Tigris and Euphrates, archaeologists discovered the word Ezidi in cuneiform inscriptions dating from around 3000 BC. The word means: “Good Spirit, pure, and the way of truth.” Near the city of Mūṣul there is a Yazīdī Temple dating from the specified time. The areas in which the Yazīdī lived were referred to as the Deiva Yasna (field of devil worshipers) by the legendary Zarathustra (583–660 BC), who came from south-east of Lake Urmia (Kurdish territory).

¹⁸ Ṣādiq al-Damlūjī, *al-Yazīdiyyah* (Alittiḥād Press, Mūṣul 1949) 439.

¹⁹ *Ṭāqīyah* is a means of circumvention, by using dissimulation to avoid a risk, for example, by showing verses of the Qurʾān on the entrance of the Yazīdī holy temple Adi or giving Yazīdī children Muslim names so that Yazīdīs are considered Muslims and thereby avoid being persecuted by Muslims. Among the Shīʿites, “stealth” is a common concept.

²⁰ Kurdwatch, “Yeziden in Syrien. Zwischen Akzeptanz und Marginalisierung” (December 2010) 5–7, http://www.kurdwatch.org/pdf/kurdwatch_yeziden_de.pdf, accessed August 9, 2015.

²¹ In this regard, see: Khalil Jindi, *al-Yazīdiyya wa al-imtiḥān al-saʿb* (Aras Press, Arbil 2008) 46 et seq.; Khalil Jindy, *An approach to the essence of Yazīdian religion* (Rabun, Uppsala 1998) 177.

Most Jews and Christians among the Kurds have retained their faith. Islamic law recognized them as revealed Abrahamic religions and their adherents were therefore considered *ahl al-dhimmah* [the people of the *dhimmah*]. Some researchers see the legal position (*ahl al-dhimmah*) of Christians and Jews in Islam as very similar to that of foreigners in the Roman Empire and comparable to the *fides contract* in Roman law.²² However, Christians and Jews had more rights in Islam than they did according to the “*fides*” in the Roman Empire. Christians and Jews could practice their faiths, create their own laws, and even had their own courts for family law, civil law, and criminal law, as well as enjoying independence in the administration of justice. The state authorities even assisted in the enforcement of their decisions.²³ However they had to pay *jizyah*, a kind of tax for Christians and Jews. Sometimes even financial and tax officials were Christians and Jews.²⁴ The needy also received help from the state, regardless of their religion.²⁵ The Abrahamic faiths enjoyed freedom of religion for quite some time, their churches and synagogues were protected and new ones were even built. Churches were allowed to ring their bells and display crosses.²⁶ Consumption of alcohol and pork were prohibited in Islam, but this restriction did not apply for Christians or Jews. Many Christian missions were sent into Islamic areas in Asia, such as those in 636, 650, 661, 743, and 778.²⁷ After the decline of the ‘Abbāsīd Caliphate (750–1258) in Baghdad, the heart of the Christian faith shifted from central Iraq to Kurdistan.²⁸ Beginning in the 17th century, France became very active in attempting to convert oriental Christians who belonged to the Nestorian and Jacobite Orthodox churches. Though they achieved some success and these Christians converted to Catholicism, it sparked protest from the oriental churches, which used their influence to close the mission centers in Baghdad. Therefore, these centers were moved to northern Iraq. It was only after the deterioration in relations between the Islamic Ottoman Empire and France, following the French occupation of Egypt in 1798, that Christians began encountering major problems.²⁹ In the 19th and early 20th centuries the confrontations with Christians turned violent. This, however, was not the case with the Jewish community owing to the fact that it was not politically active,³⁰ and upon the creation of the state of Israel, Jews became more politically active and most emigrated to Israel. In Syria, the rights of the Jews were restricted in 1949, for example, by the denial of freedom of movement and their being prohibited

²² Noel J. Coulson, *A history of Islamic law* (Edinburgh University Press, Edinburgh 1964) 27.

²³ Suhayl Qash‘ah, *Ta’rikh Naṣarah al-‘Irāq* (Dār Al-Rāfiḍayn, Beirut 2010) 181 et seq., 564 et seq.

²⁴ *Id.* 208.

²⁵ *Id.* 198.

²⁶ *Id.* 181.

²⁷ *Id.* 198 et seq.

²⁸ *Id.* 619 et seq.

²⁹ The Armenian Orthodox Christians had used the opportunity to accuse the Catholics of having burned down their churches, and therefore the state authorities demanded major reparations from the Catholic Church. This was refused, which led to looting and the destruction of Catholic churches. Many Catholics were arrested, including the Catholic bishop of Mûsul, based on claims that they were French puppets. The religious leaders of the Orthodox Jacobites had also received a decision from the state to be returned their churches. The British were also very active in pursuing the mission of the Anglican Church. However, they achieved little success. Suhayl Qash‘ah, *Ta’rikh Naṣarah al-‘Irāq* (Dār Al-Rāfiḍayn, Beirut 2010) 625 et seq.

³⁰ In this regard, see: Erich Brauer, *The Jews of Kurdistan* (Wayne State University Press, Detroit MI 1993) 69, 71, 72; Ronald S. H. Stafford, *The Tragedy of the Assyrians* (George Allen a. Unwin Ltd., London 1935) 22; ‘Alī ‘Uthman, *al-Kurd fī al-wathā‘iq al-briṭāniyah* (Mukiryani Establishment For Research & Publication, Arbīl 2008) 308.

from working in the civil service or at banks. They were even denied driver's licenses, their bank accounts were frozen, they were prevented from selling their own property, and their schools and foundations were first closed and later confiscated. In 1950 the Iraqi government enacted a law revoking the citizenship of Jews who had left Iraq (Law No. 1, 1950). Jewish property was seized and administered by the state (Law No. 5, 1951 and Law No. 12, 1951).³¹ The new Iraqi Constitution of 2005 declares Islam the state religion (Art. 2, para. 1), but at the same time other religions—Christianity, the Yazīdī, and Sabian religions—are recognized (Art. 2, para. 2). No mention is made of Jews. In addition, the Islamic and legal practice in Iraq and Islamic countries emphasized that, with regard to questions of personal status, family and inheritance law, the religious law of the different religious communities shall apply. In Iraq, 17 different religious communities³² are recognized, including the Kurdish Yazīdīs. The new Syrian Constitution of 2012 takes a similar approach (Art. 3, para. 4), though it does not recognize the Kurdish Yazīdīs as a religious community.³³

III. THE LEGAL STATUS OF KURDS AND KURDISH TERRITORY IN IRAQ

The Kurdish question in Iraq has long been and still remains the main political controversy in the country. The creation of the Iraqi state after World War I and the declaration of the British Mandate of Mesopotamia and Iraq, as well as the entry of Iraq into the League of Nations in 1932, were all closely linked to the Kurdish question. Therefore, no meaningful study of the legal status of Kurds in Iraq is possible without first presenting this background information.

A. The Mūṣul Question

Today's Iraq is composed of three provinces of the Ottoman Empire—Mūṣul, Baghdad, and Basra—which cover the greater part of the territory of old Mesopotamia. Most Kurds live in the province of Mūṣul. In the Ottoman Empire, however, the province of Mūṣul covered five of today's Iraqi provinces: Niniveh, Arbīl, Kirkūk, Sulaymanīyah, and Duhūk. It was not until 1638 that the Ottoman Empire succeeded in establishing its rule over the region of Mūṣul. From 1835 to 1879 Mūṣul was subordinated to the government in Baghdad. For most of the reign of the Ottoman Empire it was the official policy and practice that the provinces and the various peoples enjoyed considerable autonomy. This policy proved to be a success for the Turkish rulers, and it was only after it was discontinued that serious problems started to arise. In 1918, Britain managed to supersede the Ottoman rule over the entire region of Mūṣul by means of an armed invasion and occupation.³⁴ In 1920, the Treaty of Sèvres between the Entente powers and the Ottoman Empire was drafted. Pursuant to Art. 62, Kurdish areas were to be granted autonomy; other local peoples and religious minorities like Assyrians and Chaldeans were also granted protection as recognized minorities. Furthermore, the possibility of national independence for the Kurds was

³¹ In this regard, see: Kazīm Ḥabīb, *al-Yahūd wa al-muwāṭṭanah al-ʿIrāqīya* (Hamdi Foundation for Printing and Publishing, Sulaymanīyah 2007).

³² Apart from Islam there are 17 recognized religious groups: 14 Christian religious communities, the Jewish religious community, the religious community of Sabians (or Mandaeans), and the Yazīdīs.

³³ According to Law No. 60 of March 13, 1936, 11 Christian religious communities, 5 Islamic religious communities, and the Jewish religious community are recognized in Syria.

³⁴ Faḍīl Ḥusayn, *Mushkilat al-Mūsul* (Sevilla Press, Baghdad 1977) 105.

outlined in Art. 64. In order for this to be achieved, the Kurds had to prove that the majority of them wanted independence within one year of the Treaty's enactment. The League of Nations would then decide whether or not the Kurdish population was ready for independence. If independence was to be achieved, the Allies would have to give up their claims to Mûşul and the Kurdish residents of Mûşul would have to be granted voluntary access to the Kurdish state. However, the Treaty was never ratified by the Ottoman parliament because the latter was dissolved by the *Sulṭān*. The agreement was also rejected by the nationalist movement in Turkey, which established the successor state to the Ottoman Empire.³⁵ Many Kurds still consider the terms of the Treaty of Sèvres as the foundation for establishing an independent state. However, Turkey negotiated another treaty with the Allies at Lausanne. On July 24, 1923, the Treaty of Lausanne was signed, and thus the unratified Treaty of Sèvres was abandoned. Unlike the Treaty of Sèvres, the Treaty of Lausanne contained no provisions for the establishment of autonomous regions. Only the existence and protection of Christian and Jewish minorities were mentioned. Although the Kurds were not mentioned in the Treaty of Lausanne, they were nonetheless the subject of discussion in the negotiations. During the Conference of Lausanne, Turkey asserted that the Mûşul province should remain in Turkey, claiming that the population of Mûşul was predominantly Turkish. Britain objected, arguing that the majority of the population was in fact Kurdish. Under the Treaty Britain and Turkey agreed to bring this issue before the League of Nations. The League of Nations established a Commission of Inquiry, which submitted its report in 1925. The Commission found that the majority of the population was clearly Kurdish and the Mûşul region should belong to Iraq. It was also recommended that the Kurds be granted autonomy and cultural rights. The Assembly of the League of Nations accepted the Commission's proposal.

B. Recognition of the Kurds during the British Mandate

On April 25, 1920, after the collapse of the Ottoman Empire following the World War I, the Allies merged Mesopotamia (or Iraq) with Palestine and Jordan under British mandate, while Syria and Lebanon were placed under French mandate. According to Art. 22, the British Mandate of Mesopotamia was a Class A mandate of the League of Nations. This move provoked an outcry in Iraq.³⁶ Therefore, Britain took several steps to form an Iraqi government and to draft a constitution for the country. In 1925 the Basic Law, which was the country's first constitution, was successfully adopted. Thus, Iraq was declared an independent and indivisible sovereign state, according to Art. 2, and the constitution stipulated that Iraq was a constitutional hereditary monarchy with a representative government.

Although the Kurds were not mentioned by name, the constitution implied that several nationalities and religions existed in Iraq. Under Art. 6 of the constitution, all Iraqis were declared to be equal, regardless of their nationality, religion, or language. The constitution

³⁵ Kenneth Bourne and D. Cameron Watt (eds), *British documents on foreign affairs: Turkey, Iran, and the Middle East, 1918–1939* (Part II, Univ. Publ. of America, Frederick, MD 1987) 216–217; David McDowall, *A modern history of the Kurds* (Tauris, London 2010) 32.

³⁶ Phebe Marr, *The modern history of Iraq* (Westview Pr., Boulder, CO [et al.] 1985) 29 et seq.; in this regard, see: Charles Tripp, *A history of Iraq* (Cambridge University Press, 2001); Amal Vinogradov, "The 1920 Revolt in Iraq Reconsidered: The Role of Tribes in National Politics" (1972) vol. 3 No 2 *International Journal of Middle East Studies* 123–139; 'Abdullāh Fayyad, *al-Thawrah al-irāqīyah al-kubrā sanat 1920* (Dār al-Salām Press, Baghdad 1975) 245 et seq.

also included a number of basic rights and freedoms that applied equally to all Iraqis (Arts. 5–18).

In April 1930 the Iraqi government issued a statement. Thus, according to Art. 17³⁷ of the Iraqi Constitution, the Kurdish language became the official language in Kurdish areas. The government also vowed to deliver on what had been promised to the Kurds in Iraq.³⁸ In 1931 the Language Act, Act No. 74, was adopted and published in the Iraqi Official Gazette, *al-Waqāʿi al-ʿIrāqīyah* No. 989.³⁹

Under Art. 2 of the Language Act, court hearings in twelve areas of the provinces of Mūṣul, Arbīl, Kirkūk, and Sulaymanīyah were to be held in Kurdish. In six further areas the language could be either Arabic or Kurdish. These areas were Duhūk, Sheihan, Arbīl, Makhmur, Kirkūk, and Kofri. The Court was to decide on a case-by-case basis which language was to be used (Art. 3). However, defendants had the right to have court hearings verbally translated into Arabic, Kurdish or Turkish in all cases. In addition, they had the right to have the court decisions translated into any of these languages. Any person could also submit applications in any of these languages (Art. 4). The law also specified 15 regions in which the Kurdish language was to be the official language. In Kirkūk and Kofri either Kurdish or Turkish could be used (Art. 5). In these areas the language of education was to be determined according to the native language of the majority of the students (Art. 6). It is worth noting that Art. 8 indicates that different dialects are spoken in the Kurdish regions. In the province of Mūṣul—the Duhūk region—the population could determine for itself whether to use its own dialects or the dialect spoken in Sulaymanīyah, Kirkūk, and Arbīl. The problem of different dialects in Kurdish regions of Iraq is one yet to be solved. Kurdish publications are also written in different dialects.

C. Obligations of the Iraqi State under the League of Nations

Under the British Mandate, several Iraqi governments were formed. All of these governments sought to bring about Iraq's entry into the League of Nations as quickly as possible and, in so doing, to end the British Mandate.⁴⁰ However, it took several years to achieve this and Iraq ultimately joined the League of Nations in 1932. Iraq was the first case of a country under a League of Nations mandate to join the League of Nations.⁴¹ This precedent met with fierce resistance from France, because France feared that other countries that were under its own mandate would follow suit.⁴² The League of Nations demanded that Iraq recognize its ethnic and religious diversity and protect it by law as a prerequisite for the country's admission to the League. Therefore, the Iraqi parliament adopted a Declaration of Commitment on May 5, 1932, that included this requirement.⁴³ This

³⁷ Article 17 provides: "Arabic shall be the official language, except as may be prescribed by it special law."

³⁸ The law is published in the Iraqi journal *al-Bilād* No 128, dated April 10, 1930; 'Abd al-Razāq al-Ḥasanī, *Ta'rikh al-wizārāt al-ʿirāqīyah*, vol. 3 (7th edn The General House of Cultural Affairs, Baghdad 1988) 14–15.

³⁹ The law is printed in: Farīd Asāsard, *al-Mas'alah al-kurdīyah ba'dah qānūn idārat al-dawlah al-irāqīyah* (Kurdistan Center for Strategic Studies, Sulaymanīyah 2004) 120.

⁴⁰ In this regard, see: 'Abd al-Razāq al-Ḥasanī, *Ta'rikh al-wizārāt al-ʿirāqīyah*, vol 3 (7th edn The General House of Cultural Affairs, Baghdad 1988); also: 'Abdulrahmān al-Bazāz, *al-ʿIrāq min al-iḥtilāl ḥattā al-istiqlāl* (3rd edn al-ʿĀnī Press, Baghdad 1967).

⁴¹ Susan Pedersen, "Getting out of Iraq—in 1932: The League of Nations and the Road to Normative Statehood" (2010) 5 (4) *The American Historical Review* 975 et seq.

⁴² In this regard, see: 'Abd al-Razāq al-Ḥasanī, *Ta'rikh al-wizārāt al-ʿirāqīyah*, vol 3 (7th edn The General House of Cultural Affairs, Baghdad 1988) 194.

⁴³ Peter Sluglett, *Britain in Iraq: 1914–1932* (St. Antony's Middle East monographs, Ithaca Press, London 1976) 211 et seq.

document consists of 10 articles with Art. 1 stating that it was to have legal precedence in Iraq. No law, order, or act of government was allowed to contradict its terms, nor could this requirement be changed in the future. According to Art. 2 all Iraqis had the same rights to the protection of life and freedom, rights they enjoyed comprehensively and indivisibly, regardless of their origin, gender, ethnicity, language, or religion.⁴⁴ The residents of Iraq were to have the right to exercise their faith or religion freely in both public and private spheres provided doing so did not violate the public order or morality.⁴⁵ Under Art. 4, all Iraqi citizens were to be equal before the law. They enjoyed the same civil and political rights, regardless of their ethnicity, language, or religion.⁴⁶ Therefore, all had the same right to be appointed to public office, high functions, and all other forms of employment and occupations.⁴⁷ All Iraqi citizens were to enjoy unrestricted freedoms in terms of their languages and their domestic, commercial, and religious affairs, in the press and publications of any kind as well as freedom of public association.⁴⁸ The electoral system sought to ensure an equitable representation of ethnic, religious, and linguistic minorities.⁴⁹ According to Art. 5, Iraqi citizens who belonged to ethnic, religious, or linguistic minorities were to have both legal and factual equality, like all other Iraqis. In particular, they were to have equal rights to establish nonprofit religious and social institutions, to establish their own schools and other educational institutions, and to finance, manage, and control them.

The minorities had the right to use their own language in these contexts and to practice their religion freely.⁵⁰ In addition, the Iraqi government was obliged to take all steps necessary to enable all religious minorities to practice their own laws in matters of family law and personal status. These laws were to be designed to comply with the customs and habits of these minorities.⁵¹ Art. 7 addressed the Christian and Jewish religious minorities but made no mention of other religious minorities in Iraq, such as the Yazīdī Kurds, of whom there were roughly half a million in Iraq. The Iraqi government was also nominally committed to supporting Jewish and Christian places of worship. These religious communities were also to have the right to establish and administer their own religious foundations, which also had the right to run and manage their own taxes and finances. However, this was to be done under state supervision, as was also the case for Islamic foundations. Art. 8 stipulated that in the cities and regions, where a minority constituted a substantial part of the population, the education of its members could be provided in their mother tongue, in accordance with the Language Law of 1931. In those places where the ethnic or religious minorities made up a large proportion of the population, these minorities were to receive a fair share of the state budget in order to pursue their own goals concerning education and religion, and to support their general welfare.

Art. 9 was of special importance with regard to the Kurdish minority. According to this article, the official language was to be Kurdish in those areas of the provinces of Mūṣul (as well as Duhūk, Arbīl, Kirkūk, and Sulaymanīyah) where the Kurds were a majority. In addition, state officials in these places had to be proficient in the Kurdish language. The Iraqi

⁴⁴ Complies with Arts. 6 and 7 of the Iraqi Basic Law of 1925.

⁴⁵ Complies with Art. 13 of the Iraqi Basic Law of 1925.

⁴⁶ Complies with Art. 6 of the Iraqi Basic Law of 1925.

⁴⁷ Complies with Art. 18 of the Iraqi Basic Law of 1925.

⁴⁸ Complies with Art. 16 of the Iraqi Basic Law of 1925.

⁴⁹ Complies with Art. 37 of the Iraqi Basic Law of 1925.

⁵⁰ Complies with Arts. 6, 16, and, 112 of the Iraqi Basic Law of 1925.

⁵¹ Complies with Arts. 78, 79, and, 80 of the Iraqi Basic Law of 1925.

government was also to employ, to the extent possible, state officials in these areas who came from them. Under Art. 10, the obligations outlined above concerning the ethnic, religious, and linguistic minorities were to enjoy international legal validity. They were under guarantee of the League of Nations and any change in these obligations was permitted only with the consent of a majority of the League. All disputes pertaining to these obligations were considered matters of international law and could therefore be brought before the International Court of Justice. The decisions of the International Court were binding with no possibility of appeal and were seen as falling under Art. 13 of the League of Nations Agreement.

D. The Legal Status of Kurds in the Republic of Iraq

On July 14, 1958, General ‘Abd al-Karīm Qāsim took power in Iraq and declared the country a republic, thus ending the era of monarchy. The Constitution of 1925 was repealed and on July 27, 1958, a new transitional constitution was adopted. This constitution was very brief, consisting of only 30 articles. However, for the first time the Kurds were recognized not only as a minority but as equals alongside the main Arab nation. Hence Art. 2 reads: “The Arabs and the Kurds are partners in this country and the constitution secures their rights under national Iraqi unity.” Art. 9 also stressed that all citizens were equal before the law. Discrimination on grounds of sex, origin, language, religion, or belief was prohibited. In fact, under the Republic, Iraq had a pioneering role in the Arab and Islamic world in terms of the constitutional equality of its citizens. Thus, in 1959, an extremely progressive family and inheritance law (compared to all other Arab countries) was adopted. In the same year, for the first time in Iraq and in the Arab world, a woman held a ministerial position and also the first woman became presiding judge of a court in the Arab world. This Kurdish woman, Judge Zakīyah Ismā‘īl Ḥaqqī, played an important part in implementing the above-mentioned law. However, the growing nationalist movement in the region also encouraged the Kurds to strive for greater autonomy in their regions. Another reason for this trend was that the Republic of Iraq, only a short time after its foundation, experienced frequent military changes of power. Therefore, unrest and instability prevailed, unlike in the previous period of the Kingdom of Iraq.

On March 11, 1970, the Kurdish national movement and the Iraqi government were able to agree upon a joint statement. In this statement the same obligations of the Iraqi state were stressed as those at the time of Iraq’s joining the League of Nations in 1932. The statement also went a step further by emphasizing an additional point, namely, that the Iraqi population consisted of two major nations, the Arab nation and the Kurdish nation, and that this should be recognized and addressed in the new Iraqi Constitution. This was in fact emphasized in Art. 5, para. 2 in the new Iraqi Constitution of July 16, 1970.

In 1974 the Iraqi government passed Law No. 33 concerning the autonomy of the Kurdistan Region, according to which the Kurdish areas largely constituted the Autonomous Region of Kurdistan. The Iraqi Constitution of 1970 was amended (Art. 8 of the Iraqi Constitution of 1970), to state that although the majority in some areas was Kurdish, these areas were excluded from the autonomous region. This led to discontent among the Kurds. The main contentious issue remains the province of Kirkūk. There are huge oil reserves in Kirkūk that no Iraqi government has ever been inclined to give up and leave to the Kurds, and therefore neither side has showed any willingness to compromise. This shows the government’s fears of possible Kurdish separatism in the future and thus also explains why the Iraqi government clearly stressed in Law No. 13 that the Autonomous Region was an indivisible Iraqi territory and its population was an inseparable part of the Iraqi people (Art. 1, para. 4).

Arbil, one of the oldest permanently inhabited cities in the world, was declared capital of the Kurdistan Autonomous Region (Art. 1, para. 5). According to law, the Kurdish

language was the official language next to the Arabic language (Art. 2, para. 1). The Iraqi Constitution of 1970 was also changed accordingly on March 11, 1974 (Art. 7, para. 2). Furthermore, education in the Autonomous Region was to be provided in both the Arabic and Kurdish languages (Art. 2, para. 2). Everyone there was to have a free choice on whether to attend an Arabic or Kurdish school (Art. 2, para. 4). According to the Autonomy Law, legislative power and executive power were granted to the Autonomous Region (Arts. 10–15). However, practice has shown that Ba‘th Party officials and the Iraqi security forces had much more power than the administrative bodies of the Autonomous Region, which is typical in police states. The Iraqi Ba‘th regime also carried out intensive expulsions of Kurds and followed a policy of Arabization in areas rich in oil. Arab tribes were settled in these regions and were given land, while it was strictly forbidden for Kurds to purchase real estate there. During the Ba‘th regime, under Resolution No. 5 of 1975,⁵² all Arabs, with the exception of the Palestinians, could receive Iraqi citizenship without any preconditions, whereas the Iraqi Fayli Kurds⁵³ were denaturalized by Resolution No. 666 of July 5, 1980,⁵⁴ and their property confiscated on the grounds that they were originally Iranians and were not faithful or loyal to the Iraqi homeland, the state, or to the higher goals of Arab nationalism and the Iraqi revolution. By 1988 at least 300,000 Fayli Kurds had been deported to Iran, which accepted them.⁵⁵ This obviously violated Art. 19 of the Iraqi Constitution of 1970, according to which all Iraqi citizens were equal before the law, regardless of gender, ethnicity, language, origin, or religion. The year 1988 was a particularly harsh year, as thousands of Kurdish villages were demolished and their populations expelled. The Iraqi military government used internationally banned chemical weapons against Kurds on multiple occasions. After the second Gulf War in 1991, the Kurds feared a repetition of these events, and therefore millions fled from Iraqi Kurdistan to Turkey and Iran. Consequently, the UN Security Council adopted Resolution No. 688 dated April 15, 1991. In accordance with this resolution the region of northern Iraq was declared a no-fly zone for the security of its population. As a result, the Iraqi regime withdrew its administrative apparatus and armed forces from these areas. Thus, the Kurds were faced with a great challenge and a great opportunity, which have had enormous consequences to this day and will continue to do so in the future. In the early years, serious disputes emerged between the main Kurdish political parties, which had no experience in administration, but rather in partisan warfare.⁵⁶ However, over the years these parties have been able to reach agreements and administer the region successfully, which they have continued to do today.

E. The Legal Status of the Kurds after the 2003 Occupation of Iraq by the US-led Coalition

In 2003, the United States initiated a war in Iraq, but without a resolution from the UN Security Council. Not until they had occupied Iraq was this occupation “legalized” by UN Security Council resolutions No. 1483 of May 22, 2003, No. 1511 of October 16, 2003,

⁵² Published in the Iraqi Official Gazette (al-Waqa‘i‘ al-‘irāqīyah No. 4234, dated January 18, 1975).

⁵³ The settlements of the Iraqi Fayli Kurds are mainly in central Iraq. The Fayli Kurds have two characteristics inimical to the Iraqi Ba‘thist regime, as they are both Kurds and Shi‘ites.

⁵⁴ Published in the Iraqi Official Gazette (al-Waqa‘i‘ al-‘irāqīyah No. 2776 dated May 26, 1980).

⁵⁵ See: Kazem Habib, *Mihnat al-Krād al-failiyīn fi al-‘Iraq* (May 6, 2003) No. 509 al-Ḥiwār al-mutamaddin, Baghdad.

⁵⁶ James Ciment, *The Kurds. State and Minority in Turkey, Iraq and Iran* (Facts on File, Inc., New York 1996) 192.

and No. 1546 of June 8, 2004. Thus, under the American occupation an Iraqi government was formed by various Iraqi parties with various political orientations. The Kurds were represented in the government by five persons. Two Kurdish officials also temporarily led this government.⁵⁷ On March 8, 2004, an interim constitution, the Law of Administration for the State of Iraq for the Transitional Period (TAL), was adopted. This document was the result of difficult negotiations and compromises between the Iraqi political parties that represented the various political, religious, and ethnic forces in Iraq. This process was significantly facilitated and supported by representatives of the American occupation forces.⁵⁸ The interim constitution indeed recognized Iraq's ethnic and religious diversity, but nonetheless declared it a federal state (Art. 4) based not on ethnic or religious factors, but rather on geographical and historical factors and the separation of powers. According to Art. 9 the Arabic language and the Kurdish language were the official state languages throughout Iraq. Other languages, such as Turkmen, Sirjani, Syriac, and Armenian, were also recognized (Art. 9). The Iraqi Kurdistan Region was also recognized (Art. 9). This recognition applied to all areas of the provinces of Duhūk, Arbīl, Sulaymaniyah, Kirkūk, Diyālā, and Mūşul or Niniveh that were administered by the government of the Kurdistan Region before March 19, 2003 (Art. 53, para. 1). Going a step further, the interim constitution provided for regional control of the police and security forces in the Kurdistan Region as well as control of finances in the region (Art. 54, para. 1).

In addition, in the case of a contradiction between regional and national legislation in respect to matters outside the exclusive authorities of the federal government, the regional power was to have the right to amend the application of the national legislation within its borders (Art. 54, para. 2). Of fundamental importance here is Art. 58, according to which the Iraqi government was to take steps as soon as possible to reverse the Arabization policy of the former regime in Kirkūk and other specified areas. Accordingly, a census was to be held followed by a referendum in Kirkūk and other disputed areas to decide on their futures: whether they wanted to belong to the Kurdistan Region or preferred a different solution. Under Art. 61, a permanent constitution for Iraq was to be adopted no later than August 15, 2005.

Owing to his considerable influence, the Islamic Shī'ite leader 'Alī al-Sistānī was able to ensure that the permanent Iraqi Constitution was decided upon only after elections, as is also called for in the preamble of the Iraqi Constitution. In 2005, approximately 80% of eligible Iraqis approved the new constitution in the first referendum held in the country's history. This constitution represented a compromise between various Iraqi parties. According to Art. 1 of the new constitution, the Republic of Iraq was declared a federal democratic state with a representative parliamentary system. At the same time Iraq was designated a unitary state and the constitution guaranteed its unity. The background to this emphasis on Iraqi unity in the 2005 Constitution is that some political forces, mainly Arab Sunni, saw federalism as a threat to Iraq's unity and argued that the path of federalism would lead to its fragmentation.⁵⁹ Meanwhile, these political forces have themselves been calling for this system, since Arab Sunnis in Iraq are a minority and they now see more rights and benefits for themselves in federalism. Nonetheless, some Kurds noted that the Iraqi Constitution emphasized self-determination in its preamble and therefore they could make corresponding demands to those made in the case of South Sudan.⁶⁰ In the Arab countries, much more

⁵⁷ On June 1, 2004, the interim Iraqi government was recognized by the League of Arab States.

⁵⁸ L. P. Bremer and Malcolm McConnell, *My year in Iraq: The struggle to build a future of hope* (Simon & Schuster, New York 2006) 286 et seq.

⁵⁹ Muḥammad Aḥmad Maḥmūd, *Ta'dīl al-dustūr al-irāqī* (Iraqi Parliament Press, Baghdad 2010) 86 et seq.

⁶⁰ Ṭāriq Jambaz and Rosan Deaiy, *Kurdistān al-irāq wa Janūb al-Sūdān* (Shahab Press, Arbīl 2008) 50.

emphasis is placed on the meaning of preambles, in contrast to the West where the main articles are decisive. Under Art. 117, the Kurdistan Region was recognized as the only federal region in Iraq. The executive, legislative, and judicial branches in the Kurdistan Region that existed prior to the adoption of the constitution were also recognized.

The new Iraqi Constitution of 2005 also shows very clearly the diversity of Iraqi society. According to Art. 3, para. 1, Iraq consists of different nations, religions, and denominations. Arabic and Kurdish are the official languages. Moreover, the constitution specifies that the Iraqi Official Gazette is to be published in both official languages, and the recognition and publication of official documents and communications are to be prepared in both languages. Both languages can be used in parliament, the Council of Ministers, in the courts, and at official conferences, as well as in the education system (Art. 4, para. 2). Some legal experts who have worked in the Iraqi Constitutional Reform Commission see these details as redundant and as actually more of a barrier to communication.⁶¹ The language question will become an even more serious issue in the future, as the younger generation in the Kurdistan Region are now receiving their education mainly in Kurdish and may not be proficient in Arabic in the future.

IV. UNRESOLVED ISSUES BETWEEN BAGHDAD AND ARBĪL

A. Federal and Regional Competencies

The Iraqi Constitution of 2005 granted the Kurdistan Region very broad powers, while certain areas were exclusively dealt with on a national/federal level. The exclusive competencies of the Federal authorities are described in Art. 110 as follows:

First: Formulating foreign policy, diplomatic representation, debt policies, negotiating, signing, and ratifying international treaties and agreements; negotiating, signing and ratifying and formulating foreign sovereign economic and trade policy;

Second: Formulating and executing national security policy, including maintaining and managing the armed forces to protect and guarantee the security of Iraq's borders and to defend Iraq;

Third: Formulating fiscal and customs policy, issuing currency, regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy and establishing and administering a central bank;

Fourth: Regulating standards, weights and measures;

Fifth: Regulating issues of citizenship, naturalization, residency and the right to apply for political asylum.

Sixth: Regulating telecommunications and mail policy.

Seventh: Drawing up the general and investment budget bills.

Eighth: Planning policies relating to water sources from outside Iraq, and guaranteeing the rate of water flow to Iraq and its fair distribution in accordance with international laws and norms.

Ninth: General population statistics and census.

⁶¹ Shibli Mallāt, *Dalīl al-dustūr al-ʿirāqī* (Global Justice Project: Iraq, College of Law, The University of Utah, Baghdad 2009) 33.

Some powers are shared between the federal government and the Iraqi Kurdistan Region, such as the power (Article 114):

First: To administer customs in coordination with the governments of the regions and governorates that are not incorporated in a region. This will be regulated by law.

Second: To regulate the main sources of electric energy and its distribution.

Third: To formulate environmental policy to ensure the protection of the environment from pollution and to preserve its cleanliness in cooperation with the regions and governorates that are not organized in a region.

Fourth: To formulate the development and general planning policies.

Fifth: To formulate the public health policy in cooperation with the regions and governorates that are not organized in a region.

Sixth: To formulate the public educational and instructional policy in consultation with the regions and governorates that are not organized in a region.

Seventh: To formulate and organize the main internal water sources policy in a way that guarantees fair distribution. This will be regulated by law.

However, Art. 115 grants significant power to the Kurdistan Region and stipulates that, in the case of differences or disputes with common competencies, priority shall be given to the law of the Kurdistan Region. All other powers not provided by the constitution, also fall within the competence of the Kurdistan Region.

B. Oil and Gas Issues

The provisions mentioned above are of great importance to the long-standing disputes between Arbil and Baghdad over oil and gas production. In the view of the Iraqi Oil Ministry, the Kurdistan Region cannot conclude contracts with foreign companies on its own. This Ministry has threatened to boycott all foreign companies that engage in such transactions with the Kurdistan Region. The Oil Ministry in Baghdad bases its argument on Art. 111 of the Iraqi Constitution, according to which Iraq's oil and gas are the property of the entire Iraqi people in all regions and provinces. According to the Iraqi Ministry of Oil, the provisions of Art. 112 on the production and management of oil and gas should be interpreted in keeping with Art. 111.

However, the Kurdistan Region has a position of its own based on Art. 112⁶² of the Iraqi Constitution. Thus, according to this article, only oil fields that had already been developed

⁶² Article 112 of the Iraqi Constitution states:

First: The federal government with the producing governorates and regional governments shall undertake the management of oil and gas extracted from current fields provided that it distributes oil and gas revenues in a fair manner in proportion to the population distribution in all parts of the country with a set allotment for a set time for the damaged regions that were unjustly deprived by the former regime and the regions that were damaged later on, and in a way that assures balanced development in different areas of the country, and this will be regulated by law.

Second: The federal government with the producing regional and governorate governments shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encourages investment.

(Antiquities and antiquity sites, traditional constructions, manuscripts, and coins are considered part of the national wealth that are the responsibility of the federal authorities. They will be administered in cooperation with the regions and governorates, and this will be regulated by law.)

are to be jointly managed with the federal government and all fields that were developed after the constitution went into effect do not fall within the scope of Art. 112.

The government in the Kurdistan Region ratified the Law for Oil and Gas in the Kurdistan Region on August 6, 2007. This law emphasizes the competencies of the Kurdistan region with regard to oil and gas issues. Under Art. 115 and Art. 121⁶³ of the Iraqi Constitution, no laws, treaties, agreements, or any acts of the federal government may contradict this law unless the Kurdistan Region agrees.

It is remarkable that in this law the Iraqi government stipulated that in contentious areas such as Kirkūk no new acts concerning oil questions were to be passed until the planned referendum according to Art. 140 of the Iraqi Constitution had been held (Art. 19, para. 4). However, the Iraqi government also sought to restrict the powers of the Kurdistan Region. Thus, among the many proposals made by the Iraqi Constitutional Reform Commission in its final report on July 19, 2008, one called for the formulation contained in Art. 112 of the Iraqi Constitution relating to current oil fields to be removed and for these matters to instead be made the responsibility of the federal government. In addition, it was recommended that Art. 115 of the Iraqi Constitution be amended to conform to a new proposal that the primacy of Kurdish regional laws in shared competencies between the Federation and the region should not apply to issues of oil and gas. In cases of dispute, federal law and not regional law has been decisive to date.

In addition, in 2007 the Iraqi government drafted a national law for oil and gas, which has, however, still not been ratified by the Iraqi parliament. In this Act the competencies of the Kurdistan Region are again limited. However, as just mentioned, Art. 115 of the Iraqi Constitution grants priority to the laws of the Kurdistan Region in issues of common competencies and, therefore, in the context of this dispute the Kurdistan region can claim that its laws should take precedence.

C. Kirkūk and Other Disputed Areas

The Iraqi Constitutional Reform Commission and all parties behind it have not been able to solve the old problem of Kirkūk and other disputed territories. Therefore, as a compromise, some steps were taken in the Iraqi Constitution of 2005 to settle the issue. Under Art. 140 of the Iraqi Constitution, the steps of normalization,⁶⁴ census, and a subsequent

⁶³ Art. 121 of the Iraqi Constitution states:

First: The regional authorities shall have the right to exercise executive, legislative, and judicial authority in accordance with this constitution, except for those powers stipulated in the exclusive powers of the federal government.

Second: In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive powers of the federal government, the regional authority shall have the right to amend the application of the national legislation within that region.

Third: Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge its responsibilities and duties, but having regard to its resources, needs and the percentage of its population.

Fourth: The regions and governorates shall establish offices in the embassies and diplomatic missions, in order to follow up on cultural, social and developmental affairs.

Fifth: The Regional Government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces and guards.

⁶⁴ The term is not further defined in the constitution; in the political debate, it is used by the different parties for their own interests.

referendum in Kirkūk and other disputed areas are to be pursued, so that the future of these areas can be decided in accordance with the will of their inhabitants. This was to happen no later than December 31, 2007. The fact is, however, that no Iraqi government has ever been prepared to cede Kirkūk to the Kurdistan Region. Policies have moved in the opposite direction and after the establishment of the Iraqi state after World War II, Kirkūk was systematically Arabized.⁶⁵ In 1924, according to statistics from the League of Nations Commission, the Arab population accounted for only 20% at that time. As the censuses show, the size of the Arab population steadily increased, reaching 28% by 1957, 45% by 1977, and 72% by 1997. In turn, the Kurdish and Turkmen populations shrank from 48% Kurds and 21% Turkmens in 1957 to 38% Kurds and 17% Turkmens by 1977, and to 21% Kurds and 7% Turkmens by 1997.⁶⁶

The Kurds still insist that Art. 140 be implemented. However, some Iraqi politicians claim Art. 140 is no longer valid, because, in their view, its implementation was tied to the deadline set for the end of 2007. From the Kurdish perspective, the Iraqi government still has an obligation to follow through on the measures provided for in Art. 140, namely, to take steps to resolve the question of Kirkūk and other disputed areas. The Kirkūk question is actually the greatest single political problem in Iraq, as well as the main reason why the proposed constitutional amendments to Art. 142 of the Iraqi Constitution have not been made. This is because many Iraqi politicians wanted to go so far as to repeal Art. 140 through a constitutional amendment. The Kurds have therefore blocked the work of the Constitutional Reform Commission and all amendments to the constitution because of the unresolved Kirkūk question, and Art. 142 has never been amended.

The Kurds have a right to veto constitutional amendments, since Art. 142, para. 4 implies that no constitutional change can be passed if three provinces vote against it. The Kurds hold an absolute majority in three Iraqi provinces, namely in Duhūk, Arbīl, and Sulaymaniyah. Therefore, the Kurds can block any constitutional change they take issue with. Arab Sunnis enjoy the same veto power, as they also have a majority in three Iraqi provinces.⁶⁷

V. THE LEGAL STATUS OF KURDS IN SYRIA

Syria has a shared history with Iraq. Though the proportion of Kurds in Syria is smaller than that in Iraq, they nonetheless form the largest ethnic minority in Syria, constituting an estimated 10% of the population. They mainly live along the Turkish border in north-east Syria.⁶⁸ The Kurds have at times played an important role in Syrian history especially during the rule of the Ayyubid dynasty in the 12th and 13th centuries, which was administered from Damascus. Present-day Syria was also part of the Ottoman Empire, but unlike Iraq, which fell under British rule after the Ottoman Empire, Syria was placed under French Mandate. As well as the British Mandate of Mesopotamia, the French Mandate of Syria

⁶⁵ See: Liam D. Anderson and Gareth R. V. Stansfield, *Crisis in Kirkuk: The ethnopolitics of conflict and compromise* (National and ethnic conflict in the 21st century, University of Pennsylvania Press, Philadelphia 2009); Nūrī Ṭalabānī, *Manṭaqat Kirkūk wa muḥāwalat taghyīr wajhihā al-qaumī* (3rd edn Aras Press, Arbīl 2004) 38 et seq.

⁶⁶ See: Liam D. Anderson and Gareth R. V. Stansfield, *Crisis in Kirkuk: The ethnopolitics of conflict and compromise* (University of Pennsylvania Press, Philadelphia 2009); Nūrī Ṭalabānī, *Manṭaqat Kirkūk wa muḥāwalat taghyīr wajhihā al-qaumī* (3rd edn Aras Press, Arbīl 2004) 64.

⁶⁷ The Sunni Arabs have a majority in the provinces of Mūsūl, Ṣalāḥādīn and al-Anbar.

⁶⁸ <http://www.minorityrights.org/5266/syria/syria-overview.html>, accessed September 4, 2015.

including the territory of present-day Lebanon was, as already mentioned, a Class A mandate according to Art. 22 of the Covenant of the League of Nations.

Under French rule the Kurds, like other ethnic and religious minorities in Syria, were supported by French policy. After Syria was declared independent in 1946, some Kurds were able to attain the highest offices of the country's government.⁶⁹ In fact, in the 1940s and 1950s three of the first Syrian presidents were Kurds, namely Ḥusnī al-Zaʿīm (1894–1949), Sāmī al-Ḥinnāwī (1898–1950), and Fawzī Selw (1905–1972).

In the 1950s, Arab nationalism gained momentum and any calls for minority rights were seen as disloyal or even acts of betrayal.⁷⁰ In 1961 Syria was proclaimed the Arab Syrian Republic. Repressive measures were taken against the Kurds, notably in the al-Ḥasakah province on August 23, 1962. The Syrian government issued a decree (No. 93) as a result of which some 120,000 Kurds were stripped of their Syrian citizenship based on claims that they had immigrated to Syria from Turkey. In reality, given the fact that Syria was part of the Ottoman Empire and it was not uncommon for people from different ethnic and religious groups to resettle within the Empire's different regions, this was just as true for Kurds as it was for other ethnic and religious groups. The fact that only Kurds were denaturalized in 1962, however, shows that it was not a matter of denaturalizing people who were residing in the country illegally, but rather of depriving a part of the Kurdish population of their rights as Syrian citizens, and of demonstrating that Syria was an Arab-dominated country.

Syrian government officials used this law to settle old scores and implemented it arbitrarily. In many families, some members lost their citizenship, while others did not.⁷¹ Under the pressures created by the Syrian uprising, Syrian President Bashār al-Assad issued Decree No. 49 on April 7, 2011, according to which these stateless Kurds can now be naturalized.

Pressures in connection with the Syrian uprising also prompted the adoption of a new Syrian Constitution in 2012. Though the new constitution offers improvements in some respects, it still contains many questionable points. The preamble claims that Syria is an Arab country, its population is an indivisible part of the Arab nation, and the Syrian Arab Republic is to work to achieve Arab unity. Art. 1 of the Syrian Constitution also stresses that Syria is an Arab country and part of the "Arab Home", and that the Syrian people are part of the Arab nation. Thus the existence of Kurds in Syria is completely ignored. The new Syrian Constitution no longer asserts the leading role of the Arab Socialist Baʿth Party, but represents a commitment to the multiparty system. The main goal of the Baʿth Party, however, is to forward Arab nationalism, and Arab unity is repeatedly emphasized in the new Syrian Constitution. It is noteworthy that Art. 8 of the new constitution prohibits parties and political organizations that are founded on the basis of religion, creed, or ethnicity, as well as activities related to such forms of politics. Nonetheless, theoretically, the Baʿth Party is itself an ethnic Arab party. In practice, however, the Alevi minority dominates both the party and the entire power structure of the Syrian state. The Syrian Constitution contradicts itself by emphasizing, in Art. 3, that the President of the Syrian Republic must be a Muslim, while enshrining the exclusion of religion, creed, and ethnicity from politics in Art. 8. This also represents a contradiction to Art. 33 of the Syrian Constitution, according

⁶⁹ In this regard, see: Muḥammad ʿAlī al-Suwirkī, *Maʿjam aʿlām al-Kurd* (Bnkaizhin, Sulaymanīyah 2006) 61, 90, 92, 95, 131, 221, 265, 576.

⁷⁰ Jordi Tejel, *Syria's Kurds: History, politics and society* (Routledge, London, New York 2009) 41.

⁷¹ In this regard, see: Human Rights Watch, "Syria, The Silenced Kurds" (October 1996), <http://www.hrw.org/sites/default/files/reports/SYRIA96.pdf>, accessed August 9, 2015.

to which all citizens have equal rights and obligations—no discrimination may be practiced on the basis of ethnicity, religion, or belief, and the state guarantees equality.

On the one hand, the Kurds in Syria, like all other Syrian minorities, felt certain sympathy for Alevis in Syria. On the other hand, the needs and aspirations of the Syrian Kurds had been an issue that constantly resurfaces with the passage of time, more than ever when they saw a flourishing Kurdish region in Iraqi Kurdistan, which further inspired desire to enjoy greater recognition and autonomy. The problem why gaining such an autonomy seemed to be very difficult was that the Kurdish areas of Syria are geographically separated from each other, partially fragmented and difficult to define, in contrast to Iraqi Kurdistan. In addition, there are contentious rivalries between the Kurdish political parties in Syria. Some are dependent on the help of the leading Kurdish parties in Iraqi Kurdistan, while others have ties to Kurdish parties in Turkey.

Among the more recent developments, the *de facto* autonomous region of Rojava in northern and north-eastern Syria is particularly worth mentioning. In the course of the Syrian Civil War Kurdish militias forced the Syrian army to withdraw from the main Kurdish inhabited areas of the country in 2012. Subsequently, the two main political organizations in the area, Partiya Yekîtiya Demokrat (Kurdish Democratic Union Party, PYD)⁷² and the Encûmena Nîştîmanî ya Kurdî li Sûriyê (Kurdish National Council, KNC) created the Kurdish Supreme Committee by cooperation agreement of July 12, 2012, in order to establish their own government structures. On January 6, 2014, the Legislative Assembly of the Rojava Administration of Democratic Autonomy adopted the so-called “Social Contract of Rojava Cantons in Syria”⁷³ in a session held in the city of Amûdê. The document can be considered a regional interim constitution.⁷⁴ Three days later Rojava was officially proclaimed as an autonomous region. Until the end of January 2014, three cantons named Efrînê (in Arabic: Afrîn), Kobanê (Kûbânî), and Cizîrê (Jazîrah) were created, which are held together by a sort of confederalism.

The Rojava Constitution is extraordinarily progressive. Already the preamble declares freedom, justice, dignity, democracy, equality, environmental sustainability, human rights, and liberties, and—not surprisingly—the peoples’ right to self-determination its main principles. It further continues:

In building a society free from authoritarianism, militarism, centralism and the intervention of religious authority in public affairs, the Charter recognizes Syria’s territorial integrity and aspires to maintain domestic and international peace.

Art. 3b of the Rojava Constitution reconfirms that the Cantons of Efrînê, Kobanê, and Cizîrê form “an autonomous part of the Syrian territory”. It is important to note that it does not declare them to constitute a new Kurdish state or other political entity.⁷⁵ Groups

⁷² The PYD is affiliated with the controversial Turkish Kurdistan Workers’ Party (PKK) and considers PKK founder Öcalan as its ideological leader.

⁷³ English translations of the text of the Rojava Constitution can be found on different websites, such as http://www.academia.edu/9335103/The_Constitution_of_the_Rojava_Cantons_Revolution_The_Social_Contract_of_Rojava_Cantons_in_Kurdistan_Syria and <http://civiroglu.net/the-constitution-of-the-rojava-cantons>, accessed September 4, 2015.

⁷⁴ Erin McGrath, “Against All Odds: The Kurds, Comparative Constitutionalism and Kobane” (2014) Int’l J. Const. L. Blog, available at: <http://www.iconnectblog.com/2014/11/against-all-odds-the-kurds-comparative-constitutionalism-and-kobane>, accessed September 4, 2015.

⁷⁵ See also: “Syrian Kurds Spending Plans Reflect Rising Ambition,” *New York Times* (July 28, 2015).

forming the “people of Rojava” include “Kurds, Arabs, Assyrians, Arameans, Turkmens, Armenians and Chechens” (preamble);⁷⁶ an enumeration of the religious groups residing in the Canton of Cizîrê adds “Muslim, Christian and Yazîdi communities” (Art. 3c).

Rojava is open for the accession of “all cities, towns and villages in Syria which accede to this Charter” and “may form Cantons falling within Autonomous Regions” (Art. 7). It considers itself “a model for a future decentralized system of federal governance in Syria” (Art. 12). Rojava has its own Legislative Assembly, Executive Councils, Municipal and Provincial Councils, a High Commission of Elections, and even a Supreme Constitutional Court. The text of the constitution spells out further constitutional principles such as equality before the law and equal rights and duties (Art. 6) and the separation of powers (Art. 13) and contains a modern human rights catalogue. It incorporates the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and—rather unspecifically—“other internationally recognized human rights conventions” (Art. 21). Nevertheless some human rights abuses concerning the right to fair trial, prison conditions, the use of children for military functions, as well as an infringement of the right to life through unsolved killings have been reported from the area.⁷⁷ The constitution also contains some provisions that aim at preventing economic exploitation, such as the prohibition of monopolies (Art. 42) but it also guarantees the right to private property (Art. 41).

The constitutional reality of this *de facto* autonomous region in northern and north-eastern Syria is widely unknown, and its possible success cannot be judged so far.⁷⁸ However, it must be noted that many of the original ideas of democratic constitutionalism have been pronounced in the Rojava Constitution, which is surprising given the adverse circumstances. It might indeed be considered “one of few bright spots . . . to emerge from the tragedy of the Syrian revolution.”⁷⁹

VI. CLOSING WORDS

A visitor who traveled to Iraqi Kurdistan and then to other areas of Iraq today might well think that they were different countries. The wealth of Iraqi Kurdistan becomes apparent as soon as one lands at the airport in Arbîl, while serious security problems and corruption have left their regrettable marks on other areas of Iraq. This situation makes the Kurds confident about the future, and they are even seen as role models for the entire region. However, it is a completely open question as to whether or not this self-awareness will move the Kurds to declare their full independence in the future, or whether they will prefer to remain as they are, continuing to play an important role in Iraq and reaping the many benefits this great land has to offer.

If the visitor travels on to the autonomously administered Kurdish territories in northern and north-eastern Syria, he will be again surprised of an almost utopian approach to

⁷⁶ Chechens settled in the region around 1850 during the Caucasian War and during and after the Stalinist deportation in 1944.

⁷⁷ Human Rights Watch, “Under Kurdish Rule—Abuses in PYD-Run Enclaves of Syria” (June 2014), <http://www.hrw.org/sites/default/files/reports/syriakudrs0614webwcover.pdf>, accessed September 4, 2015.

⁷⁸ Politically neutral information about the situation in Rojava is rare. Most reports, articles and books written from a sympathetic activist perspective, such as Anja Flach, Ercan Ayboğa, and Michael Knapp, *Revolution in Rojava* (VSA, Hamburg 2015).

⁷⁹ Davis Graeber, “Why Is the World Ignoring the Revolutionary Kurds in Syria?,” *The Guardian* (October 8, 2014).

establish a free society during times of war. In some regards the report from Rojava reminds us of the Spanish Civil War, where libertarian socialist organizational principles were implemented throughout various portions of the country between 1936 and 1939. It remains to be seen how much of the interim government structures in northern and north-eastern Syria will remain in the long run.

Though many Kurds still dream of a great Kurdish state, like those in South Sudan in 2011, Kosovo in 2008, and East Timor in 2002, they nevertheless feel it impossible to attain at present given the events of recent years. The Kurds know that Kurdistan is currently divided between several states and that none of those countries' governments would welcome their unity. Furthermore, roughly a century of the Kurdish population being scattered among the different countries of the region has undoubtedly left its marks, and the resulting differences are not easy to overcome.

Our world is currently one marked by contradictions, as the borders are crumbling in some regions, while in others, small countries are growing even more fragmented. In a globalized world, the logical conclusion would be that we were all equal citizens of that globe. In fact, if democracy and freedom become realities, then Kurds in Syria, in Iraq, and in any other country where they live should not face any problems. Given the events of recent years, however, it remains doubtful whether democracy can be fully achieved in the Middle East in the foreseeable future. A democracy cannot truly work if people feel a stronger connection to their particular religion or ethnic group than to their own country, as the history of Iraq has shown.

The Separation and Distribution of Powers under the New Moroccan Constitution

FRANCESCO BIAGI

I. INTRODUCTION

During the demonstrations—and, in some cases, even revolutions—that broke out in the Arab world between the end of 2010 and the beginning of 2011, the protesters, largely composed of young people, called for profound constitutional and political reforms. These reforms included constraints on the prerogatives of heads of state, and the strengthening of the independence and powers of parliaments, judiciaries, and constitutional courts. In a nutshell, they hoped to reinforce the separation and balance of powers. This aspiration, however, was only partially achieved, and it was implemented in different ways depending on the country. In Jordan, for example, the 1952 Constitution was amended in 2011. On the one hand, judicial independence was strengthened slightly, the government's power to issue temporary laws when parliament is not in session was partially limited, and a constitutional court was established for the first time in the country's history. On the other hand, however, it is significant that Chapter IV, Section I of the constitution—devoted to “The King and His Prerogatives”—was left intact. This means that the monarch continues to hold almost the same powers that he held in the past.¹

In Tunisia, while the new 2014 Constitution undoubtedly possesses many merits, it also has flaws. Thus, for example, it strengthened the independence and the powers of the Constitutional Court by changing the appointment procedure of constitutional justices (as it grants a key role to each branch of government) and by introducing (in addition to *ex ante* review) concrete constitutional review. Moreover, the new constitution established that no one can be elected president for more than two full terms and that this limit applies regardless of whether the two terms are consecutive or separate. Furthermore, the constitution

¹ The only relevant exception is the fact that he has lost the power to indefinitely postpone elections.

cannot be amended to increase the number or length of presidential terms. At the same time, however, there are some constitutional provisions concerning the semi-presidential form of government that are cause for concern, notably those referring to the president combining the role of head of state and head of government, which led to a certain degree of uncertainty as to who is the chief of the executive.²

Egypt adopted two constitutions in the span of one year: The first came into force in December 2012, while the second—following President Mursi's removal from office—was adopted in January 2014. As far as the distribution of powers is concerned, the two texts differ significantly. The 2012 Constitution reduced the prerogatives of the president, while the parliament came out as one of the “winners”. Indeed, the latter was given significant oversight powers and authority in government formation and dismissal processes; parliament was also protected from arbitrary dissolution. On the contrary, the 2014 Constitution “decisively swings the pendulum back in favor of the president”,³ who enjoys, *inter alia*, very important appointment powers over the prime minister, the ministers of Justice, Interior, and Defense, as well as in the selection of 5% of the parliament's members. It is also important to stress that the military continues to enjoy a high degree of independence and privilege.

Morocco was the first country involved in the Arab upheavals to adopt a new constitution in July 2011. The document assigned the principle of separation of powers an extraordinary importance, at least from a formal point of view. Indeed, Art. 1 states: “The constitutional system of the Kingdom shall be based on the separation, balance and cooperation of powers [. . .]” Moreover, the new constitution is divided into sections that no longer refer to bodies (parliament, government)—as was the case in the previous constitutions—but instead specifically delineate powers. Thus, Chapter IV is devoted to legislative power, Chapter V to executive power, Chapter VI deals with relations between the branches of power, and as Art. 107 states: “the judicial power shall be independent of the legislative power and the executive power”.

The aim of this chapter is to show if and to what extent the new constitution has introduced real change in the distribution and separation of powers. I focus only on the horizontal separation of powers (i.e., their distribution between the monarchy, the legislature, the executive, and the judiciary), and not on the vertical separation of powers (i.e., their distribution between the central government and the local government, which consists—in the case of Morocco—of regions, prefectures, provinces, and communes).

Accordingly, this chapter proceeds in five steps. First, I analyze the distribution of powers before the adoption of the 2011 Constitution, and I show that the Moroccan constitutional order was characterized by both the principle of the separation of powers and the principle of unity of power. I then discuss the reform of the “old” Art. 19 and the (formal) separation between temporal and spiritual power. Third, I examine the form of government and I argue that Morocco has not turned into a parliamentary monarchy (where the king reigns but does not rule). In the fourth and fifth sections I analyze the legislative and judicial power, respectively (including some references to constitutional justice), and I stress the influential role that the monarch still plays in these branches of government. Finally, I draw concluding remarks.

² J. O. Frosini and F. Biagi, “Transitions from Authoritarian Rule following the Arab Uprisings: A Matter of Variables” in J. O. Frosini and F. Biagi (eds), *Political and Constitutional Transitions in North Africa: Actors and Factors* (Routledge, London 2015) 159 et seq.

³ Z. Al-Ali, “Egypt's Third Constitution in Three Years: A Critical Analysis,” <http://www.constitutionnet.org/news/egypts-third-constitution-three-years-critical-analysis>, accessed September 6, 2014.

II. THE DISTRIBUTION OF POWERS BEFORE THE 2011 CONSTITUTION

The concept of the separation of power is not new in Morocco.⁴ Indeed, all three kings who have reigned over the country since its independence have stressed the importance of such a principle. Thus, on November 18, 1955—just a few months before Morocco became independent—Muḥammad V announced to the country his intention to set up “democratic institutions . . . founded on the principle of the separation of powers, in the framework of a constitutional monarchy”. Similarly, Ḥassan II, on March 3, 1963—three months after the referendum that ratified the 1962 Constitution—pointed out that the new constitution confirmed “without any ambiguity the principle of separation of powers”. Even Muḥammad VI, on October 8, 1999, in his first speech given before parliament, declared, “the separation of powers is the foundation of democracy”.⁵ It comes as no surprise, then, that Muḥammad VI stressed the relevance of this principle in his speech of March 9, 2011, when he announced his decision to complete a “global constitutional reform.”

Notwithstanding these solemn declarations, before the adoption of the 2011 Constitution, the principle of separation of powers had never been implemented in the way it is implemented in Western consolidated democracies.⁶ Indeed, the Moroccan constitutional order used to place above it another principle—that is, the principle of unity of power (*unité du pouvoir*), which is represented by the monarchy. As pointed out by Abdeltif Menouni, this power, which is “one of the fundamental realities, keystones and cement of the Moroccan constitutional system”, is “unique, originary and oriented”.⁷ It is unique because the king is the only authority to enjoy simultaneous religious, historical, and legal-rational legitimacy. He is above the political parties and electoral competition.

It is an originary power because the constitution is not the source of legitimacy for royal power, but only acknowledges the existence of the monarchical institution and identifies the consequences of the king’s supremacy. Moreover, it is the sovereign who holds the constituent power and who decides the moments and the extent of constitutional reforms.

It is oriented power because the power held by the king is not without limits. For instance, according to Art. 19 of the previous constitutions (which were adopted in 1962, 1970, 1972, 1992, and 1996), the sovereign is in charge of guaranteeing the continuity of the state, the respect for Islam and the constitution, the protection of the rights of citizens, the independence of the nation, and the territorial integrity of the realm.

The Moroccan constitutional order was then characterized by two principles: the principle of the separation of powers—which has its roots in Western liberal thought⁸—and

⁴ See A. Adnane, *Legitimación y reparto del poder en la Constitución marroquí* (Tirant lo Blanch, Valencia 2010) 85 et seq.

⁵ The speeches of the three kings are cited by A. El Maslouhi, “Séparation des pouvoirs et régime parlementaire dans la nouvelle Constitution marocaine” in Centre d’Études Internationales (ed), *La Constitution marocaine de 2011: Analyses et commentaires* (L.G.D.J., Paris 2012) 86.

⁶ See A. El Maslouhi (n 5) 86.

⁷ A. Menouni, “Constitution et séparation des pouvoirs” in D. Basri, M. Rousset, and G. Vedel (eds), *Trente années de vie constitutionnelle au Maroc* (Librairie générale de droit et de jurisprudence, Paris 1993) 180.

⁸ It should be noted, however, that “rudimentary forms of the separation of powers can be traced back to the earliest phases of Islamic statehood,” even if this concept differs from the one that emerged in Europe: Indeed, “the separation of powers in Islamic law is mainly based on the distinction between the realms of rulers and religious legal scholars” (T. J. Röder, “The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives” in R. Grote and T. J. Röder (eds), *Constitutionalism in Islamic Countries. Between Upheaval and Continuity* (Oxford University Press, Oxford 2012) 323).

the principle of unity of power—typical of Islamic political tradition and thought.⁹ The leading literature, the case law of the Constitutional Chamber of the Supreme Court and the official royal speeches have acknowledged the existence of both principles within the Moroccan constitutional order, but they have also repeatedly pointed out that the monarchical institution was not involved in the separation of powers. Indeed, the king was above such separation. Thus, according to Abdeltif Menouni:

[. . .] the Constitution, and especially the practice of the institutions, is crossed by two movements whose nature is different, but which mutually complete and clarify each other. The first affirms the unity of the political power and defines the channels through which it will spread; the second, more restricted, present especially at the level of constitutional sub-system, allows for a separation of the bodies and a collaboration among the political functions, but only [. . .] within significant limits.¹⁰

On October 27, 1970, Aḥmad Baḥnīnī, president of the Constitutional Chamber, declared:

Asserting that the Constitution has transferred the sovereignty from the King to the Nation is not correct [. . .] What clearly emerges from the Constitution is that the nation has wanted to ascribe to the King a supremacy with respect to the heavy responsibilities that the Constitution, the function of Imam and the Islamic tradition [. . .] have assigned to him. In the light of this supremacy, the King, among his prerogatives, holds the power to control all the gears of the State, without any exception.¹¹

Ḥassan II, in his speeches, most clearly expressed the idea of the king's noninvolvement in the separation of powers. For example, on May 22, 1977, he specified: "If there is a separation of powers, this would not be at our level, but at a lower level, because the King was asked to supervise and decide the politics of his country, with the help of the executive power represented by his Government, and of the legislative power: the Parliament".¹² Similarly, on October 9, 1987, he declared: "I have said and I repeat that for me, humble servant of God and first servant of Morocco, there is not a separation of powers. I am the father of everyone, of the legislator and of the executor, of the young and of the old man, of the strong and of the weak [. . .]."¹³

III. THE REFORM OF THE "OLD" ART. 19: THE END OF THE "CONFUSION" BETWEEN TEMPORAL POWER AND SPIRITUAL POWER?

There is no doubt that one of the most relevant innovations (at least in formal terms) introduced by the 2011 Constitution results from the fact that Art. 19 of the previous constitutions was "split" into two different provisions. This article, defined within the literature as the "Supra-Constitution"¹⁴ or "a Constitution within the Constitution",¹⁵ represented the

⁹ See A. El Maslouhi (n 5) 86.

¹⁰ A. Menouni (n 7), 179 et seq.

¹¹ Cited by A. El Maslouhi (n 5) 87.

¹² Cited by A. El Maslouhi (n 5) 87.

¹³ Cited by A. Menouni (n 7) 193.

¹⁴ A. Bouchkars, *Politics in Morocco: Executive Monarchy and Enlightened Authoritarianism* (Routledge, London 2011) 42.

¹⁵ A. Tourabi, *Constitutional Reform in Morocco: Reform in Times of Revolution*, Arab Reform Initiative, http://www.arabreform.net/sites/default/files/Morocco_EN.pdf, accessed September 6, 2014.

cornerstone of the Moroccan constitutional system and the most important source of the near-absolute powers of the sovereign. It stated:

The King, Amir al-Mouminine [that is, the Commander of the Faithful], Supreme Representative of the Nation, the Symbol of the unity thereof, Guarantor of the perpetuation and continuity of the State, shall ensure the respect for Islam and the Constitution. He shall be the Protector of the rights and freedoms of the citizens, social groups and organizations. He shall guarantee the independence of the Nation and the territorial integrity of the Kingdom, within its authentic borders.

This article was peculiar in that it assigned to the king both spiritual and temporal powers, thus creating “confusion” between the two. The sovereign then held “both the spiritual legitimacy—which refers to religious affairs (*dīn*)—and the temporal legitimacy—which refers to the earthly affairs (*dunyā*)”.¹⁶

As far as religious legitimacy is concerned, it is important to stress that the Moroccan sovereign, as a member of the 350-year-old ‘Alawī dynasty, claims direct descent from the Prophet Muḥammad, and this is one of the main reasons why he continues to be very popular among the population. Bernard Lugan has emphasized that it is on the basis of their descent from the Prophet that the ‘Alawītes:

[. . .] accumulate all the functions of the slight and complex Muslim hierarchy. Thus, the Moroccan Sovereign is at the same time Malik (King), Chérif (since he is a descendant of the Prophet), Sultan (since he holds the authority), Emir (because he is the Commander in Chief), Imam (chief of the national religious community), Khalife (since he is at the same time lieutenant and sword of God) and finally Amir al-Mouminine (Commander of the Faithful).¹⁷

In his capacity as *Amīr al-Muʿminīn*, the king is entitled “to make all the necessary decisions based on the hermeneutic effort—*itjihād*—according to the necessities and the general interest (*maṣlaḥah*) of the community, in particular the nation and the people”.¹⁸ Therefore, he “has jurisdiction to carry out *itjihād*: he is *mujtahid* [i.e., the person who is entitled to carry out *itjihād*] and, as a consequence, he is entitled to issue the legal texts which are necessary to the common good”.¹⁹ It was precisely in their capacity as *Amīr al-Muʿminīn* that the kings have made some great historical decisions for the country, such as in 1975, when Ḥassan II called his people to participate in the Green March,²⁰ or in 2004, when Muḥammad VI decided to reform the Code of Personal Status—the *Mudawwannah*.²¹

¹⁶ C. Saint-Prot, “L’Islam au Maroc” in C. Saint-Prot and F. Rouvillois (eds), *L’exception marocaine* (Ellipses, Paris 2013) 56.

¹⁷ B. Lugan, *Histoire du Maroc des origines à nos jours* (Perrin-Critérion, Paris 2000) 290.

¹⁸ C. Saint-Prot (n 16) 56.

¹⁹ *Id.*

²⁰ The Green March was a mass demonstration of some 350,000 Moroccans in furtherance of Morocco’s claim of sovereignty over the territory of the Western Sahara, which had been a Spanish colony since 1884 (see J. B. Weiner, “The Green March in Historical Perspective” (1979) 33 *The Middle East Journal* 20 et seq.).

²¹ The amendments to the Code entailed a significant improvement (at least from a formal point of view) to the status of women. See Ministère de la Justice, “Guide pratique du Code de la famille”, Association de Diffusion de l’Information Juridique et Judiciaire, Collection des guides pratiques, 6 (2005) Rabat.

As stated above, the 2011 Constitution “split” Art. 19 of the previous constitutions into two provisions: Arts. 41 and 42. The intention was to separate spiritual power from temporal power in order to remedy the “confusion” of powers.

Art. 41 in particular sets forth the king’s prerogatives in the religious sphere:

The King, *Amir al-Mouminine* [Commander of the Faithful], shall ensure respect for Islam. He shall be guarantor of freedom of worship. He shall preside over the Higher Oulema Council, which shall be entrusted with studying the issues submitted to it by the King. The Council shall be the only body empowered to issue officially approved religious opinions (*fatwas*) on the issues submitted to it, on the basis of tolerant principles, precepts and objectives of Islam [. . .] The King shall exercise, by royal decree, the religious prerogatives inherent in the institution of the Commandership of the Faithful, which are exclusively assigned to him under this article.

Art. 42, on the contrary, refers to the powers of the king in the secular domain:

The King, Head of State, Supreme Representative, symbol of the unity of the nation, guarantor of the permanence and continuity of the State and supreme arbitrator between institutions, shall ensure compliance with the Constitution, proper functioning of constitutional institutions, protection of the nation’s democratic options and of the rights and freedoms of citizens and communities, as well as compliance with the international commitments of the Kingdom. He shall be guarantor of the independence of the country and of the territorial integrity of the Kingdom, within its authentic borders [. . .]

From a symbolic point of view, the reform of the “old” Art. 19 is undoubtedly a true revolution. For the first time in 50 years (that is, since the 1962 Constitution) the most important provision of the Moroccan Constitution has been changed, thus losing its “sacredness”. However, a closer examination reveals that the novelties may be overstated. For example, according to the new constitution, the person of the king ceases to be “inviolable and sacred” (as it was in the 1996 Constitution), and is only defined as “inviolable, and respect shall be due to him” (Art. 46). If at first sight this provision represents an important step toward a greater secularization (the king is no longer considered sacred), in reality this clause seems to state two different things depending on the language used. In fact, in Arabic Art. 46 reads: “The King’s person is inviolable and *ih̥tirām* [respect] and *tawqīr* are owed to him.” As Ahmed Benchemsi underlines:

[. . .] *ih̥tirām wa tawqīr* is an ancient expression used to signify the privileged status of those who claim descent from Muhammad himself . . . Though dictionary definitions of *tawqīr* vary, the most commonly found are “reverence,” “veneration,” “adoration,” and “obeisance.” Some thesauruses also propose “augustness,” “exaltation,” and “glorification.” To be fair, “respect” can be found among the alternate translations, but if *tawqīr* is simply meant as another word for *ih̥tirām*, one wonders what they are doing in the same sentence. More importantly, why would one of them—the bolder and more dramatic—be quietly left out when the Western public is watching? Has Morocco’s King really renounced his “sacred” character . . . or has he merely rephrased it, resorting to an ancient formula that stems from deeply archaic roots?²²

²² A. Benchemsi, “Morocco: Outfoxing the Opposition” (2012) 23 *Journal of Democracy* 62.

Furthermore, it is emblematic that on July 31, 2011, just one month after the referendum that ratified the new constitution, government officials and dignitaries were once again lined up to bow to the monarch in the classic ritual of the *bay'ah* [allegiance], which is the annual ceremony where nobles, politicians, tribe chiefs, *Oulemas* ('*Ulamā*'), and dignitaries from across Morocco pledge allegiance to the king. According to many, this ritual "has turned out to be one of the most symbolic acts of obedience and servitude."²³

Another element that moderates the extent of the division of the "old" Art. 19 refers to the legislative power of the sovereign. One of the most relevant consequences resulting from this division consists of the fact that the legislative power reserved to the king under the terms of the "old" Art. 19 of the previous constitution no longer exists. In fact, in his capacity as *Amīr al-Mu'minīn*, the king had a monopoly on legislation pertaining to religious matters, family law, and the protection of rights and freedoms. However, as stressed by David Melloni, the division of Art. 19 does not mean that it will be impossible for the sovereign to legislate, but rather heralds the start of legislative power-sharing with parliament, in which the new constitution vests, inter alia, competence over family status and marital status, citizenship and the status of foreigners, and fundamental rights and freedoms (Art. 71).²⁴ However, in actual fact, Muḥammad VI had consented to the parliament's intervention in these fields even in the past: In fact, both the new Code of Personal Status from 2004 and the new Nationality Code from 2006 were adopted by the parliament, in spite of the fact that they related to areas in which, in his capacity as *Amīr al-Mu'minīn*, the king had always held sole competence.²⁵

In the light of these facts, it emerges that notwithstanding the reform of Art. 19, the distinction between spiritual and temporal powers is far from clear, at least in practical terms. Indeed, despite the changes, the Moroccan king still wears two hats: He continues to be both a temporal and a spiritual chief.

IV. SEPARATION OF POWERS AND THE FORM OF GOVERNMENT: TOWARD THE ESTABLISHMENT OF A PARLIAMENTARY MONARCHY?

Interestingly enough, Art. 1 of the 2011 Constitution states that the Moroccan constitutional system is based not only on the "separation" but also on the "balance and cooperation" of powers. This wording highlights that one of the main objectives of the constitutional reform was to strengthen the parliamentary dimension of the relations between the king, the government, and the parliament. It is not by coincidence, then, that Art. 1 specifies that the Moroccan monarchy is not only "constitutional", "democratic", and "social" but also "parliamentary". In this section I examine the relations between the king, government, and parliament, and I show that the new constitution has undoubtedly reinforced the prerogatives and the autonomy of the government, but the country has remained—albeit, on a more limited scale compared to the past—an "executive" monarchy.

²³ International Institute for Democracy and Electoral Assistance, *The 2011 Moroccan Constitution: A Critical Analysis* (International Institute for Democracy and Electoral Assistance, Stockholm 2012) 50.

²⁴ D. Melloni, "Le nouvel ordre constitutionnel marocain: de la 'monarchie gouvernante' à la 'monarchie parlementaire'?" in Centre d'Études Internationales (ed), *La Constitution marocaine de 2011: Analyses et commentaires* (L.G.D.J., Paris 2012) 38 et seqq.

²⁵ D. Melloni (n 24) 38 et seq.

A. The Strengthening of the Government's Powers

The 2011 Constitution significantly reinforced the powers of the government. While under the 1996 Constitution the king was the effective holder of executive power (and the government often limited its action to the mere execution of the king's wishes), under the new constitution this power is shared between the sovereign and the government—more specifically, the head of government (which replaced the title of “prime minister”). Thus, the 2011 Constitution created a sort of “executive dualism”, even if (as discussed below) the king clearly prevails over the head of government.

The principal novelty refers to the appointment of the head of government. In fact, whilst under the previous constitutions the prime minister was appointed at the discretion of the king, the 2011 Constitution stipulates that the sovereign appoints the head of government from the party “arriving ahead in the elections of the members of the Chamber of Representatives, and with a view to their results” (Art. 47). This practice was introduced by Hassan II at the end of his reign and was followed on two occasions (following the 1997 and 2007 elections), although since it had no constitutional status it could be disregarded at any time, as occurred following the 2002 elections. This means that the sovereign will now be unable to appoint a head of government without referring to election results; thus, it will de facto be the people who choose the prime minister. At least in theory, this popular investiture should strengthen the position of the head of government vis-à-vis the king.

Art. 47 goes on to specify that members of the government are appointed by the sovereign, acting upon a proposal by the head of government; the latter may in turn request the king to remove one or more members of the government from office, either on his own initiative, or following their individual or collective resignation.

Title V of the constitution, devoted to the “executive power”, guarantees the central position of government within the state apparatus and enhances its functions. According to Art. 89, the government exercises executive power and, under the authority of the head of government, implements its program and assures the execution of laws. Moreover, the government is now no longer responsible to the king and the parliament, but exclusively to the parliament; in fact, Art. 88 provides that the government is invested after having obtained the confidence of the House of Representatives.

Another significant novelty refers to the Council of Government. Indeed, whilst under the 1996 Constitution this body, chaired by the prime minister, had no official recognition under constitutional law and was limited to “a function involving the preparation of decisions adopted by the Council of Ministers”,²⁶ the new constitution expressly recognizes its status and vests it with important functions. It is chaired by the head of government, and it now makes decisions in domains previously under the exclusive competence of the Council of Ministers: general state policy prior to its presentation in the Council of Ministers; engagement of the responsibility of the government before the Chamber of Representatives; issues related to human rights and public order; draft legislation; international conventions before their submission to the Council of Ministers; and appointments to high public office (Art. 92).

Furthermore, the head of government exercises regulatory power and can delegate some of his prerogatives to the ministers (Art. 90). He also makes appointments to civil

²⁶ A. Harsi, “Séparation et équilibre des pouvoirs dans la nouvelle Constitution de 2011” in A. Bouachik, M. Degoffe, and C. Saint-Prot (eds), *La Constitution marocaine de 2011: Lectures croisées* (Série “Thèmes actuels” no. 77, Publications de la Revue marocaine d'administration locale et de développement, Rabat 2012) 55.

public offices and high-ranking positions in state corporations and companies (Art. 91). Moreover, he has the power to dissolve the Chamber of Representatives by a decree adopted in the Council of Ministers, after consultation with the sovereign, the president of the Chamber, and the president of the Constitutional Court (Art. 104). Under the 1996 Constitution, by contrast, this prerogative was vested exclusively in the king.

B. The King Reigns and Governs

Although, as illustrated above, the new constitution has significantly reinforced the head of government's powers, the king nonetheless remains the cornerstone of the system and continues to operate as the central figure in the country's most important decisions. First and foremost, he still chairs the Council of Ministers, the body that resolves matters of decisive interest for the state: strategic state policy orientations; proposed revisions of the constitution; draft organic and framework laws; general guidelines of the finance bill; draft amnesty law; draft texts relating to military domain; the declaration of states of siege and war; bills of decree regarding the dissolution of the House of Representatives, on the proposal of the head of government; appointments to high public office [. . .] (Art. 49). It is thus evident that the Council of Ministers is assigned "political, strategic and symbolic competences stronger than the ones held by the Council of Government".²⁷

The king presides over some extremely important bodies: Indeed, besides the Council of Ministers and the Higher *Oulema* ('*Ulamā*') Council,²⁸ he is the supreme commander of the Royal Armed Forces (Art. 53), and the president of the Higher Council of the Judicial Power²⁹ and of the new national security body, namely the Supreme Security Council (Art. 54). It should be noted that he could delegate the presidency of a meeting of the Council of Ministers and of the Security Council to the head of government (Arts. 48 and 54).³⁰

Among the king's prerogatives, it is important to mention the powers to dismiss one or more ministers after consultation with the head of government (Art. 47), to appoint military positions (Art. 53), to appoint half of the members of the Constitutional Court (Art. 130), as well as to dissolve the houses of parliament after consultation with the president of the Constitutional Court and after informing the presidents of the two houses of parliament and the head of government (Art. 96).

Art. 42 specifies that the king exercises his powers through royal decrees (*ṣaḥā'ir*), which must be countersigned by the head of government. In this regard one should point out that while the *ṣaḥā'ir* that do not require countersignature by the head of government are now the exception, they do relate to matters of crucial importance: In addition to appointing the head of government (Art. 47), they refer to the religious prerogatives inherent in the institution of the Commandership of the Faithful (Art. 41), the appointment of the ten members of the Regency Council (Art. 44), the dissolution of parliament (Art. 51), approving appointments of magistrates by the Higher Council of the Judicial Power (Art. 57), the proclamation of a state of emergency (Art. 59), the appointment of half of the members of the Constitutional Court (Art. 130), and the presentation of proposed constitutional amendments for referendum (Art. 174).

²⁷ D. Maus, "L'exécutif dans la Constitution marocaine de 2011" in Centre d'Études Internationales (ed), *La Constitution marocaine de 2011: Analyses et commentaires* (L.G.D.J., Paris 2012) 83.

²⁸ See Part III of this chapter.

²⁹ See Part VI of this chapter.

³⁰ According to Article 53, he can also delegate the right to make appointments to military positions. The constitution, however, does not specify the recipients of this delegation.

David Melloni has rightly stressed that the two powers that demonstrate with greatest clarity the “constitutional supremacy”³¹ of the king are the proclamation of a state of emergency and the presentation of proposed constitutional amendments for referendum.

The first of the two is a very sensitive power, especially in a country such as Morocco, which experienced a state of emergency from 1965 to 1970, when the 1962 Constitution was suspended. This condition is now subject to various provisions regulating its use. In fact, before a state of emergency can be declared, the sovereign must consult the head of government, the presidents of the two houses of parliament, and the president of the Constitutional Court; parliament cannot be dissolved during the exercise of emergency powers, and fundamental rights must be guaranteed; the monarch is required to guarantee the return to the ordinary operation of democratic institutions as quickly as possible (Art. 59). Notwithstanding these limitations, the king remains:

[...] the only body with authority to verify whether the aforementioned conditions are met and his powers, which are exercised without any requirement for countersignature, are not in any way circumscribed by a Parliament which, in contrast to the French example, is not automatically convened during a state of emergency and does not evidently dispose of the last resort—where such powers are abused—of the impeachment procedure.³²

As far as the second power constituting an expression of the “constitutional supremacy” of the king, it should be pointed out that the constitution provides that only the sovereign is entitled to present directly a draft constitutional amendment for referendum, irrespective of whether any proposal has been made by the government or of a preliminary assessment by parliament (Art. 172).³³ Moreover, the constitution grants the king the power to submit draft constitutional amendments to parliament (and not to the people), thereby avoiding the requirement for a referendum (Art. 174). For the first time in Moroccan history, the sovereign is therefore able to amend the constitution without any requirement for a referendum, simply by securing approval by parliament. The king also retains a “veto right”³⁴ over proposed amendments originating from parliament and the head of government, since these must be subject to a referendum, which may only occur according to a *ṣaḥīr* (Art. 174). As highlighted above, this royal decree does not require countersignature by the head of government, and is therefore classed as an act over which the sovereign enjoys full discretion. This means that the king is not obliged to present these proposed amendments to the people whenever he considers them to be inappropriate.³⁵ This interpretation appears to be confirmed by the fact that, in contrast to the situation for the promulgation of legislation, which Art. 50 stipulates must occur within 30 days, the constitution does not identify any time limit in relation to cases involving the presentation of proposed amendments for referendum.

³¹ D. Melloni (n 24) 42.

³² D. Melloni (n 24) 44.

³³ In fact, members of parliament have a right of initiative, although proposals will only be adopted if approved by two-thirds of the members of each House. In turn, a proposed amendment presented by the head of government must be submitted in advance to the Council of Ministers, which (as pointed out above) is chaired by the king (Art. 173).

³⁴ F. Rouvillois, “Les règles relatives à la révision dans la Constitution marocaine de 2011” in Centre d’Études Internationales (ed), *La Constitution marocaine de 2011: Analyses et commentaires* (L.G.D.J., Paris 2012) 363.

³⁵ F. Rouvillois (n 34) 364.

C. An “Ultimate Leader” and a “Second-in-Command”

From the analysis of the constitution it clearly emerges that whilst the latter attributes significant new powers to the head of government and limits the sovereign's prerogatives in some areas, it does not by any measure establish a parliamentary monarchy analogous to the British or Spanish monarchies, in which the king's role is limited largely to the performance of a ceremonial and representative function. In fact, Morocco, albeit in some ways on a more limited scale compared to the past, continues to be an “executive” monarchy. The 2011 Constitution created a bicephalous executive, but the two “heads” are in very different positions: In fact, the king is the real “ultimate leader” of the country, while the head of government is nothing more than a “second-in-command”.

This situation has been confirmed by practice. The victory of the moderate Islamic party *Parti de la justice et du développement* (PJD) in the November 25, 2011, elections was undoubtedly of major importance, not only because the *Parti authenticité et modernité* (PAM), considered by Moroccans as the party of the monarch, did not win the elections (as some observers had predicted)³⁶ but also because the winner was an Islamic party that was vested with the task—for the first time in Morocco's history—of forming a government.

For the moment, the government and the head of government, ‘Abd al-Ilah Benkirān, have announced a number of social and economic reforms, but only a few of them have been implemented. Moreover, they have encountered difficulties, especially during Benkirān's first few months in office, in exercising the powers expressly allocated to them under the constitution in full autonomy and in an effective manner. As Marina Ottaway, for example, has pointed out:

[...] the PJD still apparently consults with the palace even on the appointments the Prime Minister is entitled to make. In part, this is simply because the PJD does not have its own networks of expertise and contacts that would allow it to make independent choices. But in part it is also because the party does not want a confrontation with the King [...].³⁷

This deference of the PJD toward the monarchy may be explained in part as a psychological stance (“for the PJD government, as for so many Moroccans, the problem is not only the King but the King-inside-themselves”),³⁸ and in part by the desire to be accepted as a legitimate political player and to become fully integrated into the political-institutional system.³⁹ The weakness of the government has often allowed the sovereign to continue to exercise his powers and to make decisions in a discretionary manner, without any real political limitations (as occurred in the past).⁴⁰ For the time being, Benkirān has not managed to establish himself as a serious “counterweight” to Muḥammad VI.

³⁶ See E. Dalmasso, “Surfing the Democratic Tsunami in Morocco: Apolitical Society and the Reconfiguration of a Sustainable Authoritarian Regime” (2012) 17 *Mediterranean Politics* 218 et seqq.

³⁷ M. Ottaway, “Morocco: Can the Third Way Succeed?” Carnegie Endowment for International Peace (July 31, 2012), <http://carnegieendowment.org/2012/07/31/morocco-can-third-way-succeed/d3op>, accessed September 6, 2014.

³⁸ J. Traub, “The Reform of the King,” *Foreign Policy* (Washington D.C. October 8, 2012), http://www.foreignpolicy.com/articles/2012/10/08/the_reform_of_the_king, accessed September 6, 2014.

³⁹ See M. Ottaway and M. Muasher, “Arab Monarchies: Chance for Reform, Yet Unmet” (2011), The Carnegie Papers, Carnegie Endowment for International Peace, http://carnegieendowment.org/files/arab_monarchies1.pdf, accessed August 24, 2015.

⁴⁰ See F. Abdelmoumni, “Le Maroc et le printemps arabe” (2013) 145 *Pouvoirs* 136 et seq.

V. THE LEGISLATIVE POWER: THE PARLIAMENT, THE GOVERNMENT, AND A (LAME) KING-LEGISLATOR

Historically, the Moroccan parliament has been a weak and not very effective body. The 2011 drafters tried to remedy to this situation by strengthening its powers and functions.

According to the new constitution, the parliament is composed of two chambers: the House of Representatives, whose members are elected by direct universal suffrage (Art. 62), and the House of Councilors, which is elected by indirect universal suffrage, and whose members are representatives of local authorities, and professional and employee organizations (Art. 63). The bicameralism is therefore confirmed, but now the House of Representatives clearly prevails over the House of Councilors, both regarding its legislative power and its control over the government. Indeed, it is the House of Representatives that gives its “initial” confidence to the government (Art. 88) and can vote a motion of no confidence (Arts. 103 and 105). Moreover, draft bills are deposited in priority with the Bureau of the Chamber of Representatives, including the Finance Act (Arts. 75 and 78). Only the draft bills related to local government, regional development and social affairs are deposited in priority with the Bureau of the Chamber of Councilors (Art. 78). Furthermore, it is the Chamber of Representatives that adopts in last resort the laws (Art. 84).

As far as legislative power is concerned, the 2011 Constitution marks a significant discontinuity from the past, stipulating, for the first time in Morocco’s history, that “Parliament shall exercise the legislative power” (Art. 70). Moreover, the number of areas falling within the exclusive remit of the legislature has increased significantly. Indeed, the *domaine de la loi* has passed from ten matters—as provided for in the 1996 Constitution—to thirty matters, all of great importance (Art. 71). As was previously the case, all other matters belong in the regulatory domain (Art. 72). This is undoubtedly a significant strengthening of the legislative power of the parliament, which is now entitled to pass laws in almost all areas of social, economic, and political life; this consequently limits the regulatory domain. The latter, however, continues to enjoy a privileged status in some situations. For example, texts adopted in legislative form can be changed by decree, after confirmation from the Constitutional Court, in cases where they may intervene in a domain devolved to the regulatory power (Art. 73). Moreover, the government can deny the receipt of any proposal or amendment that does not fall within the *domaine de la loi* (Art. 79).⁴¹

The new constitution has also reinforced the government’s powers in the legislative domain. Indeed, Art. 70 states that an enabling act can allow the government, for a limited time and a specific objective, to take by decree measures that normally fall within the remit of the legislature.⁴² Art. 78 stipulates that the initiative of law belongs concurrently to the head of government and to the members of the parliament. According to Art. 81, the government can, between sessions, adopt decree-laws that must be submitted for ratification in the next ordinary parliamentary session. Furthermore, the government sets the legislative agenda (Art. 82), and the right of amendment belongs to the members of parliament and to the government (Art. 83).⁴³

⁴¹ See B. Bouazzaoui, “Le pouvoir réglementaire dans les Constitutions marocaines” in l’Association marocaine de droit constitutionnel (ed), *Cinquante ans de vie constitutionnelle au Maroc. Quel bilan?* (2013) 76.

⁴² The decrees have to be submitted for ratification by parliament within the period specified by the enabling act.

⁴³ See A. El Maslouhi, “L’évolution du domaine de la loi dans la Constitution marocaine: rupture ou continuité?” in l’Association marocaine de droit constitutionnel (ed), *Cinquante ans de vie constitutionnelle au Maroc. Quel bilan?* (2013), 68 et seq.

The aforementioned articles, together with other constitutional provisions (such as Art. 47, which stipulates that the sovereign appoints the head of government on the basis of the results of the elections, and Art. 88, which provides that the government is invested after having obtained the confidence of the House of Representatives) seem to confirm the “tendential merging of the legislative and executive branches”, characterized by a “concentration of powers in the hands of a partisan majority which rules both the Parliament and the Government”.⁴⁴ Given this tendency, which is typical of most contemporary parliamentary systems, the role of the parliamentary opposition becomes crucial to establishing an effective counterweight to the majority.⁴⁵ The 2011 Constitution, which has significantly strengthened the status of the parliamentary opposition,⁴⁶ supports this direction.

An analysis of the legislative power in Morocco, however, would not be complete without discussing the role of the king. Indeed, the royal institution has been of the utmost importance in the legislative domain since the beginning of last century. It was the 1912 Treaty of Fez—which made Morocco a French protectorate—that removed the *Oulemas* (*ʿUlamāʾ*) from their quasi-legislative monopoly and the Moroccan *Sultān* expressly received legislative power. The *Sultān* (who assumed the title of king in 1957) continued to exercise this power between 1956—when Morocco gained independence—and 1963, when the first constitution came into force. The sovereign was then described by the literature as a “legislator”.⁴⁷

The constitutional history of independent Morocco shows that the king exercised legislative power—through royal decrees—both in exceptional circumstances and ordinary situations. He exercised an “exceptional legislative power”⁴⁸ during states of emergency (such as in the period 1965–1970) and—until 1996—even during the periods of constitutional transitions, when the monarch took the legislative measures necessary to implement the institutions provided for in the new constitution, and to manage public affairs.⁴⁹ The sovereign also exercised exceptional legislative power (based on an expansive reading of Art. 19 of the constitution)⁵⁰ during the periods of suspension of the activity of parliament, as well as following the dissolution of parliament, when he was allowed to legislate until the new parliament was elected. The 2011 Constitution has almost entirely put an end to all these prerogatives, leaving to the king significant powers only during states of emergency.⁵¹

Regarding ordinary situations, one should distinguish between “the power to decree and the power to block”.⁵² The former refers to the positive action of the king to legislate in the domains assigned to him by the constitution. As discussed above,⁵³ following the

⁴⁴ A. El Maslouhi (n 43) 105.

⁴⁵ A. El Maslouhi (n 5) 106.

⁴⁶ See Arts. 10 and 60.

⁴⁷ P. Decroux, “Le souverain du Maroc, législateur” (1967) 3 *Revue de l’Occident musulman et de la Méditerranée* 31 et seqq.

⁴⁸ D. Melloni (n 24) 40.

⁴⁹ The constitutions, however, did not stipulate any time limit and therefore this temporary regime could last weeks or even years, as was the case following the 1972 constitutional reform (from March 1972 to October 1977, when the parliament was installed). It was only with the 1996 Constitution that the prerogatives concerning the temporary regime were assigned to the House of Representatives. See A. El Maslouhi (n 43) 63.

⁵⁰ A. Menouni, “Le recours à l’article 19: une nouvelle lecture de la Constitution” (1984) 15 *Revue juridique, politique et économique du Maroc* 25 et seqq.

⁵¹ See Part IV B of this chapter.

⁵² A. El Maslouhi (n 43) 64.

⁵³ See Part III of this chapter.

division of the “old” Art. 19, the new constitution dictates the end of the king’s monopoly, in his capacity as *Amīr al-Muʾminīn*, on legislation pertaining to religious matters, family law, and the protection of rights and freedoms, and heralds in this field the start of legislative power shared with parliament.

Furthermore, the presidency of the opening of the first session of parliament (which is reserved under Art. 65 of the constitution to the sovereign) provides the king with the opportunity to provide inspiration for and to guide legislative action. The speech, given by the Moroccan monarch, then, has nothing to do with the speech given by his counterpart in England, who merely recites a speech that is actually prepared by the prime minister. On the contrary, to a certain extent, the Moroccan king’s speech is more analogous with the “State of the Union address” delivered by the US president.

With regard to the “power to block”, before the adoption of the 2011 Constitution the sovereign could slow down or even stop the legislative process in three ways.⁵⁴ The first one referred to the promulgation of laws, which, until the 1992 constitutional reform, was not subject to any time limit. Afterward, the king had to promulgate a law within 30 days following its receipt by the government, but the constitution did not state any time limit for the publication of the laws in the Official Gazette. The 2011 Constitution has remedied this situation by stipulating that the law must be published in the Official Gazette within one month of the date of the royal decree through which it was promulgated (Art. 50).

The previous constitutions also vested the king (after he requested a second reading by parliament) with the power to submit any draft bill or proposed law to referendum, except in the case of those submitted for a new reading that were adopted or rejected by a two-thirds majority in the parliament. This royal prerogative disappeared with the 2011 Constitution. The only “power to block” maintained in the new constitution consists of the king’s power to request a second reading by parliament.

Therefore, following the 2011 constitutional reform, the Moroccan sovereign has undoubtedly lost much of his power in the legislative domain, and should thus be described as a lame king-legislator. Nevertheless, he still holds some very relevant prerogatives, which allow him to continue to play an influential role even in this area.

VI. JUDICIAL POWER, CONSTITUTIONAL JUSTICE, AND THE KING’S “INTERFERENCE”

The weak independence of the judiciary has been considered a major *punctum dolens* of the Moroccan regime for a long time. The new constitution introduced some relevant novelties aimed at remedying this problem. First, the judiciary was elevated from a mere “authority” (as defined under the 1996 Constitution) to the status of a full-blown branch of the state, independent of legislative and executive powers (Art. 107). Such independence, as granted by the king (Art. 107), is guaranteed through a number of constitutional provisions. Indeed, the presiding magistrates (*magistrats du siège*) are irremovable (Art. 108), and the decisions of the judges are rendered on the sole foundation of the impartial application of the law (Art. 110). Moreover, the magistrates enjoy freedom of expression and can belong to associations or create professional associations within the bounds of respect for impartiality and the independence of justice. However, since magistrates not only have to be impartial but also must appear as such, they cannot belong to political parties or to trade-union organizations (Art. 111). Art. 109 stipulates that in their judicial function, judges cannot

⁵⁴ See A. El Maslouhi (n 43) 65 et seq.

receive injunction or instruction, nor be submitted to any pressure whatsoever. Each time a judge considers his or her independence to be threatened, the judge must refer the matter to the Higher Council of the Judicial Power. This body, which replaces the High Council of Magistracy, is still chaired by the king; however, under the new constitution, the executive president is not the Minister of Justice (as provided under the 1996 Constitution) but is the first president of the Court of Cassation, thus making this body more independent (Art. 115). The Council applies the guarantees accorded to the magistrates, most notably concerning their independence, appointment, advancement, retirement, and discipline. It can also draw up reports on the status of justice and the judiciary, and make recommendations in this field (Art. 113).

It should be noted that the constitution now stipulates: “individual decisions by the Council [...] may be challenged before the highest administrative jurisdiction in the Kingdom [i.e., the Administrative Chamber of the Supreme Court], on the grounds of abuse of powers” (Art. 114), and that the king approves by *ṣahīr* the appointment of the magistrates by the Council (Art. 57). This means that if such an appointment were interpreted as an individual decision of the Council, the *ṣahīr* of appointment could be then challenged on the grounds of abuse of power.⁵⁵ Therefore, this form of appeal would depart from the tradition of immunity accorded to royal *ṣahāʾir*.⁵⁶ However, as has been stressed by part of the literature,⁵⁷ this type of *ṣahīr* is not a genuine royal *ṣahīr*, but a decision made by the Higher Council of Judicial Power (which is chaired by the king).

In September 2013, the High Authority for national dialogue on the reform of the justice system, which was established by Muḥammad VI in May 2012, presented the results of its work, consisting of a Charter on the Reform of the Judiciary System. This document, containing a number of proposals aimed at implementing the constitutional provisions in the field of judicial independence, undoubtedly represents an important step, and therefore its proposals should be turned into law as soon as possible.

It is also important to mention that the new Constitutional Court⁵⁸ (which is not part of the judiciary) has been assigned the competence “to look into an exception of unconstitutionality raised in the course of a trial, when one of the parties argues that the law on which depends the outcome of a trial undermines the rights and freedoms guaranteed by the Constitution” (Art. 133). Thus, in addition to the *ex ante* review (already provided for under the previous constitution), the drafters—probably influenced by the 2008 French constitutional reform, which gave the *Cour de Cassation* and the *Conseil d’Etat* the power to submit legislative provisions to the *Conseil Constitutionnel* for a review of their constitutionality—decided to introduce concrete constitutional review. Such *ex post* review appears to be extremely important in order to enable the Constitutional Court to reinforce its position as

⁵⁵ Contra J. J. Ruiz Ruiz, “La Constitución marroquí de 2011 y el ensayo de parlamentarización de la monarquía” (2014) 164 *Revista de estudios políticos* 33, 64 et seq.

⁵⁶ On this tradition, see the judgments of the Administrative Chamber of the Supreme Court: *Abdelhamid vs le Ministre de la Justice* of June 18, 1960, and *Société Propriété agricole Abdelaziz vs Président du Conseil et Ministre de l’Agriculture* of March 20, 1970.

⁵⁷ Y. Gaudemet, “Le pouvoir judiciaire dans la Constitution marocaine de 2011” in Centre d’Études Internationales (ed), *La Constitution marocaine de 2011: Analyses et commentaires* (L.G.D.J., Paris 2012) 203; B. Mathieu, “L’émergence du pouvoir judiciaire dans la Constitution marocaine de 2011” (2013) 145 *Pouvoirs* 57.

⁵⁸ It replaces the Constitutional Council provided for in the 1996 Constitution.

a counter-majoritarian body and may thus contribute to the transition to democracy more effectively than in the past.⁵⁹

Notwithstanding the aforementioned novelties aimed at strengthening the independence and power of the judiciary and the Constitutional Court, it is important to point out that the king continues to “interfere” in the domains of the judicial system and constitutional justice. Indeed, according to Art. 124, the judgments “are rendered and executed in the name of the King and by virtue of the law”, thus confirming the well-rooted principle according to which in Morocco justice is a delegated function.⁶⁰ Moreover (as seen above) the king approves by *zahir* the appointment of the magistrates by the Higher Council of the Judicial Power. The latter, still chaired by the sovereign, is composed of several members who are appointed by him. Indeed, in addition to the five members directly nominated by the monarch, one must include the mediator and the president of the National Council of the Rights of Man, both of which were appointed by the sovereign through royal decree. The king also plays a key role in the appointment of the twelve justices of the Constitutional Court: Indeed, the parliament nominates six, and the monarch selects the other six as well as the president (Art. 130). Finally, the monarch exercises the right of pardon (Art. 58).

VII. CONCLUDING REMARKS

As far as the distribution and separation of powers is concerned, this chapter demonstrates that the 2011 Moroccan Constitution both breaks from and maintains continuity with the past. Indeed, on one hand, the powers of the government and parliament have been strengthened, and the judiciary is now more independent. Moreover, although the form of government has remained the same (Morocco continues to be an executive monarchy), several constitutional provisions have reinforced the parliamentary dimension of the regime.

On the other hand, however, the continuity with the previous constitutional order is still very evident. Indeed, the principle of unity of power that characterized Morocco before the 2011 constitutional reform is still in place and continues to prevail over the principle of the separation of powers. The latter has been undoubtedly strengthened, but it continues not to be implemented in the way it is implemented in Western consolidated democracies. The keys of the constitutional system are still in the king’s hands. In fact, the constitution was “granted” by the sovereign, and did not result from a democratically elected constituent assembly.⁶¹ Therefore, Muḥammad VI has continued to pursue the tradition of a “constituent king”.⁶² Furthermore, notwithstanding the division of the “old” Art. 19, the “confusion”

⁵⁹ See F. Biagi, “The 2011 Constitutional Reform in Morocco: More Flaws than Merits” (2014), Jean Monnet Occasional Papers, http://www.um.edu.mt/__data/assets/pdf_file/0020/208307/JM_Occasional_Paper_no_7_final_5th_March_update.pdf, accessed September 6, 2014.

⁶⁰ Historically, indeed, the judge is the authority delegated by the *sulṭān* to exercise the judicial power. On this topic, see A. Menouni (n 7) 190; see also the judgment of the Administrative Chamber of the Supreme Court *Société Propriété agricole Abdelaziz vs Président du Conseil et Ministre de l'Agriculture* of March 20, 1970.

⁶¹ See F. Biagi, “The Pilot of Limited Change: Mohammed VI and the Transition in Morocco” in J. O. Frosini and F. Biagi (eds), *Political and Constitutional Transitions in North Africa: Actors and Factors* (Routledge, London 2015) 56 et seqq.

⁶² B. Cubertaftond, “La transition marocaine après le printemps arabe et la nouvelle Constitution” (2011) Les Etudes et Essais du Centre Jacques Berque no. 5, http://www.cjb.ma/images/stories/publications/Cubertaftond_EE_5.pdf, accessed September 6, 2014.

between temporal and spiritual power does not seem to be completely over yet, at least from a practical point of view. Additionally, the monarchy continues to transcend the separation of the three branches of government; in fact, the king is still the real leader of the executive, maintains relevant powers in the legislative domain, and continues to “interfere” in the judicial system. Hassan II, with the aim of stressing his key powers over all the aspects of the state apparatus, once stated: “It is necessary that your King, protector of the Constitution and defender of everyone’s liberties, can at all times control and conduct the affairs of the State”.⁶³ This concept seems to still be very relevant in today’s Morocco.

⁶³ Royal address of December 11, 1965, cited by M. Daadaoui, *Moroccan Monarchy and the Islamist Challenge. Maintaining Makhzen Power* (Palgrave-Macmillan, New York 2011) 61.

The Quest for a New Economic Order in Egypt's Constitutional Transformation

KILIAN BÄLZ AND
ANJA SCHOELLER-SCHLETTER

I. THE ARAB SPRING AND THE QUEST FOR A NEW ECONOMIC ORDER

“Bread, Freedom and Social Justice.” Already the slogan of the 2011 Revolution demonstrates that the quest for social justice was a key issue of the Arab Spring. The protests started when the street vendor Muḥammad Bū‘azīzī burned himself in the Tunisian town of Sīdī Būzīd on December 17, 2010, and led to the toppling of the regimes in Egypt and Tunisia only weeks later. The small-scale trader could no longer bear the abusive treatment he had endured at the hands of the police, who had confiscated his goods and his scales, thus preventing him from running the business on which he relied to support himself and his family. The initial spark for the Arab Spring was therefore both economic and political. It was economic because widespread dissatisfaction with social injustice and corruption played a key role. This, however, became political because the political system was perceived as being responsible for the malaise and the discussion on social justice and transparency thus took place within a broader political context.¹

The economic frustration, which was reflected in the street vendor’s life (and death), was the by-product of rapid yet uneven economic development in Tunisia and Egypt over the last decade: Both countries liberalized their economies and succeeded in attracting foreign investors. Their economies grew at solid rates of between 4% and 6% per annum, and they were regularly hailed as “success stories.”² Their vicinity to Europe, the emergence of

¹ Jane Kinninmont, *Bread, Dignity and Social Justice: The Political Economy of Egypt's Transition* (Chatham House Briefing Paper, April 2012).

² Tibor Hargatai, *Review of International Law and Politics* (2011) vol. 7, 153.

new forms of manufacturing, the spread of information technology, and new cash crops in agriculture promised an economic and social transformation. The newly emerging middle class, however, was small, comprising maybe 2% to 3% of the population. The modern Arab dream, characterized by shiny shopping malls and exclusive compounds, imported consumer goods and travel abroad, international schooling and university education, remained the privilege of a few.³ The economy was dominated by a small business elite, which held a monopoly over business opportunities.⁴ There was a widespread dissatisfaction with corrupt practices and the lack of transparency.⁵

This contribution will focus on tracing the development of competing economic ideas and resulting ambiguous economic models throughout Egypt's recent constitutional history.⁶ Although there was wide spread dissatisfaction with the economic policy of previous regimes, it will be shown that no new or alternative models have been proposed to date. In neither of the constitutional debates—which focused on issues such as the role of Shari'ah, civil liberties, the powers of the president or the role of the army—did economic issues, beyond the general postulation of “economic and social justice”, play a prominent role.⁷ Beyond differences in detail, both continue the trend of the previous Constitution of 1971, which lacked a clear sense of direction in economic matters.

II. THE ECONOMIC PARADOX OF THE 1971 CONSTITUTION

Both the constitutional debate in Egypt preceding the Constitution of 2012 and the rather limited debate relating to the 2014 Constitution evolved against the backdrop of the 1971 Constitution. It is worth briefly revisiting the key economic principles contained therein, as these reveal a paradoxical attempt to reconcile a socialist economic order with the fundamentals of a free-market economy.⁸ This is especially obvious when contrasting the various provisions on property contained in the 1971 Constitution.

³ See Mark Allen Peterson, *Connected in Cairo: Growing up Cosmopolitan in the Modern Middle East* (IUP, Bloomington 2011); Mona Abaza, *The Changing Consumer Cultures of Modern Egypt: Cairo's Urban Reshaping* (AUC Press, Cairo 2006); Diane Singerman and Paul Amar (eds), *Cairo Cosmopolitan. Politics, Culture, and Urban Space in the New Globalized Middle East* (AUC Press, Cairo 2006); Diane Singerman (ed), *Cairo Contested: Governance, Urban Space, and Global Modernity* (AUC Press, Cairo 2009).

⁴ See: the detailed study of Stephan Roll, *Geld und Macht. Finanzsektorreformen und politische Bedeutungszunahme der Unternehmer- und Finanzelite in Ägypten* (Hans Schiler, Berlin/Tübingen 2010); Ahmad El-Sayed El-Naggar, “Economic Policy: From State Control to Decay and Corruption” in Rabab El-Mahdi and Philip Marfleet (eds), *Egypt: Moment of Change* (AUC Press, Cairo 2009) 34–50.

⁵ See: Mohamed A. Arafa, “Towards a Culture for Accountability: A New Dawn for Egypt” (2011) *Phoenix International Law Review* 5, 1.

⁶ Compare: Anja Schoeller-Schletter, “Die Verfassung Ägyptens von 2012. Betrachtungen aus verfassungstheoretischer Perspektive” in A. Cavuldak, O. Hidalgo, P. W. Hildmann, and H. Zapf (eds), *Demokratie und Islam—Theoretische und empirische Studien* (Heidelberg 2014), 329–353; and the studies of the recent Egyptian constitutions in their historic context prepared by Anja Schoeller-Schletter for the Hanns-Seidel-Foundation on the Constitutions of 2014 and 2012.

⁷ See: Tamir Moustafa, *Drafting Egypt's Constitution: Can a New Legal Framework Revive a Flawed Transition?* (Brookings Doha Center Paper Series No. 1, 2012).

⁸ See: Alper Y. Dede, “The Egyptian Spring: Continuing Challenges a Year after the Arab Spring” (2012) 5 *USAK Yearbook of International Politics and Law*, 103–104.

On the one hand, the 1971 Constitution contained the standard guarantees in relation to private property and economic activity, which are considered to be amongst the cornerstones of any free-market economy:⁹

- No sequestration of private property except in the cases specified in the law and under a court judgment (Art. 34, 1)
- No expropriation except for the public benefit and against fair compensation in accordance with the law (Art. 34, 2)
- No nationalization except for considerations of the public interest, in accordance with a law and against compensation (Art. 35)
- Prohibition of public sequestration (Art. 36)

From this perspective, the 1971 Constitution provided the basis for a market-based economic system. On the other hand, however, the 1971 Constitution (here in the wording prior to the constitutional amendments of 2007) also enshrined the key elements of a socialist economic order. Thus Art. 1 stated: “The Arab Republic of Egypt is a state with a socialist-democratic system [*niḡām ishtirākī dimūqrāṭī*], which is based on an alliance of the labor forces of the people.”

The economic system was further defined as “based on subsistence and justice”, while adhering to the obligation that “exploitation shall be prevented, the reductions of the gap between earnings shall be targeted, legitimate income shall be protected and the just distribution of public obligations and levies shall be safeguarded” (Art. 4).

These general provisions were complemented by Arts. 23 to 29 of the Constitution of 1971, which dealt with the “economic constituents” of society, thereby providing for the state development plan (Art. 23), the control of the people over the means of production (Art. 24), as well as cooperative and public property (Art. 29). In addition, the public sector was assigned a key role in economic development (Art. 30). These provisions, being in clear contrast to the fundamentals of private property and freedom of economic activity, were initially understood as entailing an orientation in favor of a socialist economic order.¹⁰

Therefore, the 1971 Constitution lacked clarity when it came to economic matters. It stands at a crossroads between a socialist and market liberal economic order and reflects the tendency among drafters to allow for some modifications to a strictly socialist economic model without abandoning state oversight and protection. It is important to note that the 1971 Constitution was by no means a manifesto of neoliberal doctrines, which by definition would give the market priority over the state and wouldn't enshrine the principles of public interest or subsistence for the poor through constitutional safeguards. The economic liberalization and transformation of Egypt, which started with Sādāt's open door policy in the 1970s and was continued by his successor Mubārak,¹¹ thus developed against the background of a constitution which established a strong mandate for the state and assigned the public sector a key role in economic development.

⁹ The Constitution of 1971 is cited from the official English translation. It should be noted that these provisions were amended in connection with the 2007 constitutional amendment.

¹⁰ See: the analysis in Kilian Bälz, “Marktwirtschaft unter einer sozialistischen Verfassung?” (1998) 704 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 703–711.

¹¹ See: Tarek Osman, *Egypt on the Brink. From Nasser to Mubarak* (YUP, New Haven and London 2010).

III. NEOLIBERAL REFORM AND CONSTITUTIONAL JUSTICE

Much has been written about the role of the Supreme Constitutional Court in the Egyptian political system. One of the most plausible explanations of why an autocratic regime opted to establish a strong and independent constitutional court is that this was a way of supporting the transformation to a market-based economic system. Tamir Moustafa in particular has argued that the Egyptian Supreme Constitutional Court was established in response to investors' needs for an independent institution to protect property rights. According to this reading, the Supreme Constitutional Court in Egypt is intrinsically linked with Sādāt's open door economic policy in the 1970s and the economic liberalization under Mubārak in the decades that followed.¹²

This is not the right place to discuss the merits of this approach in detail. It clearly would be wrong to attribute the shortcomings of the Egyptian economic transformation prior to the January 25 Revolution to the intervention of the Supreme Constitutional Court, which has, for example, emphasized the social function of private property and the corresponding responsibility associated with it in many of its rulings.¹³ It appears, however, that the Supreme Constitutional Court did play a major role in reshaping the constitutional framework of Egypt's economic order and that it did so by means of a reinterpretation of the provisions of the 1971 Constitution. This becomes apparent when one considers its decisions regarding three critical issues: nationalization, rent control, and the privatization of state enterprises.

The policy of sequestration and nationalization of privately owned land and assets during the Nāṣr era had created a large public sector. From its inception, the Supreme Constitutional Court was attributed the role to "exclusively undertake the judicial control of the constitutionality of the laws and regulations" and to "undertake in the manner prescribed by the law the interpretation of legislative texts" (Art. 175). In this regard, the Supreme Constitutional Court has acted to defend the sanctity of private property and repeatedly reinforced the principle of prohibiting nationalization without full compensation. As a result, the government was obliged to increase compensation payments and in some instances, decisions on nationalization were reversed altogether (with the result of properties being returned to their previous owners).¹⁴ The Supreme Constitutional Court thus reinforced the sanctity of private property and reversed the restrictions developed during the Nāṣr era.

Since the Nāṣr era, landlord-tenant relations in Egypt have been tightly regulated. Without going into the details of the complex rules, which distinguish between different classes of properties and different uses, it suffices to say here that under the respective laws, tenants often gained a legal position similar to that of property owners. Rents were fixed at a low (at times tokenistic) amount while the contracts were indefinite, could not be terminated, and were even transferred to family members by way of inheritance. The Supreme Constitutional Court, based on the principle of private property, significantly reduced these restrictions and thereby supported the transformation to a free rental market—a development which, in light of its social dimension, is not uncontroversial.¹⁵ Time and again, the

¹² Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge University Press, Cambridge 2007).

¹³ See: Kilian Bälz (n 10) 707.

¹⁴ Enid Hill, "The Supreme Constitutional Court of Egypt on Property" in *Le prince et son juge. Droit et politique dans l'Egypte contemporaine* (No. 2, Egypte Monde Arabe 1999), 55–91, 57 et seq.

¹⁵ *Id.* 71 et seq.

Supreme Constitutional Court reinforced the principle of private property, thus reducing the extensive legal protection enjoyed by tenants which had provided them with an owner-like status. As a by-product, the rental market, once paralyzed by rent control laws, was revived.

The Nāṣr era policies of nationalization created a sizable public sector, which dominated the Egyptian economy for the decades that followed. From the early 1990s onward, the Egyptian government pursued an ambitious program of privatization as part of a structural adjustment policy aligned with the International Monetary Fund and the World Bank. The public sector companies were transferred to holding companies and then sold either to investors directly or through the stock exchange. The privatization program was challenged in the Supreme Constitutional Court based on the argument that it was unconstitutional to dispose of public property and that such privatization was in violation of the socialist guarantees of the constitution. The Supreme Constitutional Court, in a landmark decision in 1997, dismissed these arguments and ruled that the Egyptian Constitution did not prohibit a transformation to a market-based economy. In doing so, the court safeguarded the transformation from a state-led to a market-based economy.¹⁶

In view of this, it is fair to conclude that the Supreme Constitutional Court indeed played a significant role in the economic transformation of Egypt and that it probably did so deliberately. It is noteworthy that the Supreme Constitutional Court emphasized the necessity to interpret the constitutional provisions in the light of changing economic circumstances and in doing so implicitly reserved the right to interpret for itself. In its landmark decision on the privatization of public enterprises, the court maintained:

The provisions of the Constitution may not be understood to provide a final and permanent determination of the economic system, which is detached from the realities of the time. [The provisions of the Constitution] are not adopted and enacted, with the purpose of being followed blindly . . . moreover, their meaning is to be determined in the light of the supervening values of its purpose, to free the nation and the citizen in political and economic respects . . . To subject the provisions of the Constitution to a ratio which is imminent in themselves contravenes the fact that these provisions are exposed to new horizons, the considerations of which society desires.¹⁷

Based on this, the court argued that the constitution (1971) did not contain a stipulation for any particular economic order. However, it did provide an arrangement in favor of economic and social development. In turn, achieving development requires the investment of capital, which may be public or private. The balance between public and private investment, according to the Supreme Constitutional Court, must be determined in the light of changing social and economic circumstances. A sale of public assets, the court argued, was not prohibited if it served as a source of public income, which helped to achieve development. In summation, the court had reinterpreted the provisions of the 1971 Constitution to permit a sale of state enterprises and dismantle the public sector.

Therefore, the constitutional principles, which framed Egypt's economic transformation, were not enshrined in the text of the 1971 Constitution. They were the product of a discursive process by Egypt's Supreme Constitutional Court, which reflected the political and economic changes that had occurred in the country. When the Constitutional Assembly

¹⁶ *Id.* 63 et seq. and Kilian Bälz (n 10).

¹⁷ Supreme Constitutional Court, Decision 17/16 of February 1, 1997, "*al-Jaridah al-Rasmiyah*" no. 7 of February 13, 1997, 3–17, 8.

in Egypt started to prepare the draft of a new constitution—a process that proved difficult in many respects¹⁸—it did so against the backdrop of a constitution that had once been based on socialist principles but which, however, had been transformed to correspond to the requirements of a free-market economy.

IV. THE ECONOMIC DEBATES IN THE CONSTITUTIONAL PROCESS

Discourse on economic issues in the aftermath of the January 25 Revolution in Egypt has brought together a wide range of loosely connected issues. In order to better understand the resulting economic provisions of the constitutions of 2012 and 2014, these issues may be grouped according to the economic demands raised in the public discussion and underlying ideological concepts amongst the various political actors who then “translated” these concepts into constitutional “solutions”.

A. The Economic Demands

Although the trigger for the Arab Spring was economic, it is difficult to determine the key economic demands in specific terms. The centrality of economic matters did not translate into clear-cut concepts or postulates. Rather, their articulation remained very general in nature, with the effect that they were difficult to translate into concrete policies. Many of the issues, however, can be grouped under the three headings of transparency, social justice, and employee’s rights.

The quest for transparency often is equated with the combating of corruption. It was, without any doubt, a key demand of the Arab Spring. It goes without saying that corruption, profiteering, and influence peddling are criminal offenses under Egyptian law.¹⁹ The implementation of the relevant rules, however, had certain shortcomings. In addition and more importantly, the lack of clear rules on conflicts of interest helped a politically connected business elite to monopolize many of the lucrative business opportunities within their small group of entrepreneurs. Furthermore, the structure of public budgets, in particular the widespread use of special funds, made any effective control of public finances difficult. From this it follows that the “transparency issues” in the Egyptian context are more complex than the simple implementation of penal law provisions for combating bribery. They require changes to the very fabric of the business world and its established patterns of practice.

The call for social justice comprises a number of demands, most of which are interestingly concerned with economic opportunities (and less with the actual distribution of wealth). This demand is related to the transparency issue to a certain extent; however, it represents an approach from a different perspective. Both Egypt and Tunisia have been blessed with rapid economic development over the last decade. Tourism, real estate, and manufacturing as well as financial services and investment all contributed to strong economic growth. In social terms, however, this economic growth generated new challenges as

¹⁸ This is not the right place to discuss the difficult and at times flawed process of drafting Egypt’s 2012 Constitution. For summary of the constitutional drafting process, *see also*: Anja Schoeller-Schletter (n 6) 332 et seq. As will be argued further below, the sections dealing with economic issues reflect the lack of a coherent program and consensus in the Constitutional Assembly.

¹⁹ *See*: Arts. 103 to 125 Penal Code, dealing bribery, the squandering of public funds, and abuse of power more generally.

it reinforced social inequality. The middle class, who directly benefited from the economic growth, remained small and there was no trickle-down effect. The distribution of wealth was uneven and social mobility was limited. As a result, society was “taken hostage” by its own economic success and economic growth created additional social challenges rather than easing them. On a societal level, economic growth may be considered to have been a curse rather than a blessing.

Finally, the Arab Spring revealed severe shortcomings in the area of employee rights.²⁰ For instance, trade unions had been tightly controlled in Egypt, with the effect that no free (independent) workers' representation existed. Thus the April 6 Movement, which played a significant role in the January 25 Revolution, grew out of a strike in the industrial town of al-Maḥallah al-Kubrā in the Nile Delta in 2008. When employee unrest spread following the revolution, it became apparent that there were no institutions through which such demands could be channeled for a solution negotiated.²¹ Putting industrial relations on a new footing emerged as a new demand, interestingly, from both the employees' and the employers' side. The lack of a system that allowed for the resolution of labor disputes became a significant challenge.

It should be noted that not all these issues are issues that are traditionally addressed in a constitutional document. Issues of combating corruption, social justice, and workers' rights can all only be dealt with effectively through the implantation of relevant statutory enactments—provided they are consistently applied. They are not “classical” issues of constitutional law, such as fundamental freedoms, the separation of powers, or electoral rights. Moreover, these issues are only loosely connected to the fundamental, systemic choices between a market-based or state-led economic system. Nevertheless, a constitutional document can provide certain guidance on these issues and on the priority assigned to them.

B. Competing Ideologies

In examining the competing economic doctrines amongst the political actors, the overall picture is not dissimilar to that relating to economic demands. There are, again, a range of ideas which are offered to address the aforementioned issues, and they loosely correspond to the issues on the “demand side”. The systemic choices on offer, however, are rather vague in nature. Similarly to the vagueness of the demands, this may also be due to the lack of theoretical depth in much of Egypt's economic discourse.

Following a strong populist current, the revival of the Nāṣrist ideas of a strong public sector, regulated markets, extensive subsidies, and rent control has been proposed as one possible solution.²² Whether this actually offers a feasible alternative is questionable. Although it is undoubtable that the economic liberalization of Egypt had shortcomings in the social sphere—a fact that is widely acknowledged—it is difficult to imagine how these ailments may be cured by a revival of clearly out-of-date concepts. The proposed return to Nāṣrism may indeed be charming and popular, as it harks back to a period of Egyptian history where the country was perceived as being strong and served as a role model for many

²⁰ See: Joel Beinin, *Justice for All: The Struggle for Worker Rights. A Report by the Solidarity Center* (Washington D.C., 2010).

²¹ Maha Abdelrahman, *In Praise of Organization: Egypt between Activism and Revolution, Development and Change* (Blackwell Publishing 2013) 577–579.

²² On the economic policies of the Nāṣr period, see: John Waterbury, *The Egypt of Nasser and Sadat: The Political Economy of Two Regimes* (Princeton 1983) 57–82.

developing countries well beyond the Middle East. Nonetheless, a revival of such concepts today would almost certainly not survive the test of modern reality.

In view of the parliamentary majority of Islamic parties in the first elections after the revolution, the question has arisen as to what role Islamic economic concepts should play. The doctrine of Islamic economics emerged in the 1950s and 1960s as an alternative to both socialist and capitalist economic ideologies.²³ It is based on the application of doctrines derived from traditional Islamic law, such as the prohibition of interest, speculation, and monopolization, which are underpinned by the overarching principles of fairness and social justice. Interestingly, the Egyptian Freedom and Justice Party, the political party affiliated with the Egyptian Muslim Brotherhood, was undecided when it came to Islamic economic principles, and has not advocated an Islamic economic order. This also may be due to the fact that these principles are hard to define with a level of precision that would allow for them to be put into practice.²⁴ With the end of the Mursi government in mid-2013, however, these discussions became moot. The 2014 Constitution does not contain any specific references to Islamic economic concepts.

Finally, there are proponents of the concept of a social market economy, as an economy which is based on market principles but where the market mechanism, however, is contained and tamed, thus balancing the market with social concerns. A debate about a social market economy is conspicuously absent in the Arab world,²⁵ and only recently have political parties in Egypt started to promote this principle. One possible explanation for this absence is that the struggle for social justice is often framed in an Islamic context. In addition, in the context of an economic transition from a state-dominated to a market-based economy, the idea of regulation may be subject to the general suspicion of preventing economic development. This, though, might mean that once the “neoliberal experiment” has been completed, the time will be ripe for such a discussion.

Consequently, when drafting the constitutions of 2012 and 2014,²⁶ there was a consensus that economic and social issues were key to the successful transformation

²³ See: Johannes Reissner, “Die innerislamische Diskussion zur modernen Wirtschafts- und Sozialordnung” in Werner Ende and Udo Steinbach (eds), *Der Islam in der Gegenwart* (5th edn C.H. Beck, München 2005) 151–162.

²⁴ On the different attempts of implementing Islamic economic concepts, see: Volker Nienhaus, “Islamische Ökonomik in der Praxis: Zinslose Finanzwirtschaft” in Werner Ende and Udo Steinbach (eds), *Der Islam in der Gegenwart* (C.H. Beck 2015) 163–198. It should be noted, however, that the Egyptian legislature article was debating a *ṣukūk* law at the time of writing this article, which is intended to facilitate the issuance of Islamic bonds (so called *ṣukūk*). In contrast to a conventional bond, a *ṣukūk* is asset backed and the investors acquire title to a certain asset (and, for the time of the *ṣukūk*, are entitled to a share in the profits of this asset). The law sparked a fierce debate, focusing, inter alia, on whether it was permissible to use state assets as underlying assets (meaning to use state property or assets to give value to the security/bonds, etc.), whether the proposed law was compliant with Shari’ah rules and, last but not least, whether *ṣukūk* are a suitable instrument to raise funds for the Egyptian government budget at all.

²⁵ See: the discussion in Konrad-Adenauer-Stiftung, *The Social Market Economy and Islamic Finance: Common Value Based Approaches* (Sankt Augustin, Berlin 2011). The papers were initially presented and discussed at a conference in Abu Dhabi in October 2010.

²⁶ It may be noted that the drafting process of both constitutions was marked by the dominance of a political “winner.” In both cases, a majority attempted to sideline the respective opposition groups, although within very different constituent procedures. While the constitutional draft of 2012 was the result of a constitutional assembly whose members were elected by a parliament dominated by Islamic parties, the draft of 2014 was written by commissions appointed by the military-led interim government. For the constitutional drafting process, see: Anja Schoeller-Schletter (n 6), respectively.

of Egypt.²⁷ The issues to be addressed by the new basic law, however, were not clearly defined. In addition, there was no coherent and overarching political philosophy guiding the constitutional process when it comes to economic questions.

V. ECONOMIC PRINCIPLES IN THE CONSTITUTIONS OF 2012 AND 2014

In view of the above, it will not come as a surprise that neither the 2012 Constitution nor that of 2014 continue to follow either a clear-cut Nāṣrist economic doctrine or straightforward free-market economic principles. Instead, both constitutions encompass a somewhat eclectic compilation of economic principles. These are intertwined by an overarching far-reaching mandate for state control. Upon reading, this arrangement may seem to fall short of any real clarity and the lack coherence of becomes obvious when considering how specific subject matters are regulated in the two constitutions.

A. General Principles

In both constitutions, a section entitled “Economic Elements” contains provisions on the “national economy”. This section describes the economy’s general function and enshrines certain general principles.²⁸ Placed in comparison with the Constitution of 1971, the introductory article states:

| 1971 | 2012 ²⁹ | 2014 ³⁰ |
|--|---|--|
| Art. 23: The national economy shall be organized in accordance with a comprehensive development plan which ensures raising the national income, fair distribution, raising the standard of living, solving the problem of unemployment, increasing work opportunities, | Art. 14: The national economy aims at steady and comprehensive development, at elevating the standard of living and realizing welfare, at combating poverty and unemployment, and at increasing job opportunities, production, and national income. | Art. 27: The economic system aims at achieving prosperity in the country through sustainable development and social justice to guarantee an increase in the real growth rate of the national economy, raising the standard of living, increasing job opportunities, reducing unemployment rates and eliminating poverty. The economic system is committed to the criteria of transparency |

²⁷ Amr Moussa, head of the Constitutional Assembly in 2013–2014, talked of a “constitution for social justice,” November 30, 2013.

²⁸ In Egyptian constitutions of the past half century, regulations relating to the economy have traditionally formed a separate section, called “Economic Foundations” in 1971 and “Economic Elements” in 2012 and 2014. In 1971, this section formed Chapter 2 of Part 2 of the constitution, called “Basic foundations of society” (Arts. 23–39), in 2012 it was Chapter 3 of Part 1 entitled “Elements of State and Society” (Arts. 14–30), in 2014 Section 2 of Chapter 2, called “Basic Components of Society” (Arts. 27–46).

²⁹ The translations of the Constitution of 2012 are based on the translation of Nivien Saleh.

³⁰ The translations of the Constitution of 2014 are based on the translation of IDEA.

| 1971 | 2012 ²⁹ | 2014 ³⁰ |
|---|---|--|
| <p>connecting wages with production, fixing a minimum and maximum limit for wages in a manner that guarantees lessening the disparities between incomes</p> <p>Art. 24: The people shall control all means of production and direct their surplus in accordance with a development plan laid down by the State.</p> | <p>The development plan works toward establishing social justice and solidarity, guaranteeing distributive justice, protecting the rights of the consumer, safeguarding the rights of the workers, engendering cooperation between capital and labor in defraying the costs of development, and ensuring a fair distribution of income.</p> <p>Earnings must be linked to production; income disparities must be lessened; a minimum level for earnings and pensions enabling a life of dignity for every citizen must be guaranteed, as well as an income cap for state agencies. There can be no exceptions unless this is grounded in law.</p> | <p>and governance, supporting competitiveness, encouraging investment, achieving balanced growth with regards to geography, sector and the environment; preventing monopolistic practices, taking into account the financial and commercial balance and a fair tax system; regulating market mechanisms; guaranteeing different types of ownership; and achieving balance between the interests of different parties to maintain the rights of workers and protect consumers.</p> <p>The economic system is socially committed to ensuring equal opportunities and a fair distribution of development returns, to reducing the gaps between incomes by setting a minimum wage and pension to ensure a decent life, and setting a maximum wage in state agencies for whoever works for a wage as per the law.</p> |

The Constitution of 1971 entailed the concept of a “comprehensive development plan” aimed at ensuring economic growth and a rise in the standard of living (1971 Art. 23, also Art. 32). This socialist outlook was an essential aspect of Nāṣrist ideology. The concept of a national “development plan” was still to be found in the 2012 Constitution, but here it is specifically aimed at establishing social justice and solidarity, a cornerstone of the ideology of Islamist parties (2012 Art. 14). In contrast to the other constitutions, economic growth is subordinated to the “national economy.” Although it was still found in a draft document (August 20, 2013), the term “development plan” was altogether dropped in the final version of the Constitution of 2014.

In the new constitution the term “national economy” is substituted by the more general wording of “economic system” (Art. 23), while the aims to be achieved remain unchanged, except in slight differences in the wording (“sustainable” instead of “comprehensive” development, see table above). Nonetheless, the Constitution of 2014 introduces a list of new criteria to be applied within the economic system, such as:

- Transparency in governance;
- Encouraging investment and competitiveness;

- Balancing growth with regard to geography, economic sectors, and the environment;
- Consumer protection;
- Regulation of market mechanisms.

A reduction in the income gap remains central among the social commitments addressed. In comparison the Constitution of 1971 already contained a general guarantee of minimum and maximum wages, the Constitution of 2012 provided for minimum pensions, while applying the concept of a maximum wage specifically to state agencies.

The proposed draft version of the 2014 Constitution expanded the scope of a maximum wage, encompassing not only state agencies but also public sector companies and the public business sector (Art. 23, draft of August 20, 2013). However this was finally dropped again, resulting in a maximum wage only in state agencies and only for “whoever works for a wage” (Art. 27).

State involvement in the economy has traditionally been strong in Egypt and this role is further elaborated in the constitutions of 2012 and 2014, especially with regard to the protection and development of certain industries.³¹ The Constitution of 2012 explicitly mentions the protection of agriculture (Art. 15) and industrial production (Art. 17), including small enterprises. In 2014, the scope and definition of economic production was expanded to include exports and investments (Art. 28), agriculture (Art. 29), fisheries (Art. 30), and the public media outlets (Art. 31).

In addition to a general commitment of protection and support, the new constitution, similarly to that of 2012, names specific measures to be taken by the state to develop these industries and economic sectors further. Such measures include the reclamation of additional land for agriculture (2012 Arts. 15 and 16; 2014 Art. 29), the introduction of new technologies (2012 Art. 17) and—for the first time—the use of renewable energies (2014 Art. 32).

In the Constitution of 2014, several ambitious state investment projects are mentioned, such as a housing program (Art. 41) and the development of the Suez Canal (Art. 43) and the Nile River (Art. 44).

The concept of environmental protection was already contained in the Constitution of 1971 (Art. 59). In the constitutions of 2012 and 2014, repeated references are made to the necessity of balancing economic growth with environmental protection. This aspect is mentioned in relation to the Nile (2012 Art. 19, 2014 Art. 44), the sea (2012 Art. 20, 2014 Art. 45) and the fishing industry (2014 Art. 30), but not the desert. The Constitution of 2014 defines a healthy environment a right of every citizen (Art. 46).

These provisions do not provide more than very general and vague principles. In view of the case law of the Supreme Constitutional Court, it is questionable as to whether any of these principles can be legally enforced.³² Rather, one may expect that when tested in court, they might prove to be void of any legal value or may only serve as a point of reference when interpreting other constitutional provisions. In addition, it seems as if they deliberately avoid any clear determination in relation to either a market-based or socialist economic order. Nonetheless, the constitutional document of 2014 demonstrates the effort made to integrate some standard principles into an approach based on modern social market economics and, with regard to the terminology used, further distancing of the state from traditional socialist ideas.

³¹ Compare similar developments in other countries. Anja Schoeller-Schletter, “Structural deficits in legal design and excessive executive power in the context of transition in Uzbekistan” in Paolo Sartori and Tommaso Trevisani (eds), *Patterns of transformation in and around Uzbekistan* (Reggio Emilia 2007) 134–149.

³² See: Supreme Constitutional Court, Case No. 7/16, 13. Here, the court took the view that the constitution’s protection of the “achievements of socialism” were too vague to vest legally enforceable rights on the citizen.

B. Property

The constitutions of 2012 and 2014 do not materially amend the system of property when compared that of 1971. The 2014 version drops “religious endowments” as constitutionally protected form of ownership, as was first introduced by the Constitution of 2012.

| 1971 | 2012 | 2014 |
|---|---|---|
| Art. 29: Ownership shall be under the supervision of the people and the protection of the State. There are three kinds of ownership: public, cooperative and private. | Art. 21: The State guarantees legal ownership, be it public, cooperative, private, or in the form of religious endowments, and protects it, as specified by law. | Art. 33: The State protects ownership, which is three types: public ownership, private ownership, and cooperative ownership. |
| Art. 30: Public ownership is the ownership by the people as represented in the ownership of the State and public legal persons. Art 33: Public ownership shall have its sanctity, and its protection and reinforcement are the duty of every citizen in accordance with the law. | Art. 22: The public funds are inviolable. Protecting them is a national obligation both for the State and society. | Art. 34: Public property is inviolable and may not be infringed upon. It is the duty of every citizen to protect it in accordance with the law. |
| Art. 32: Private ownership shall be represented by the unexploitative capital. The law organizes the performance of its social function in the service of national economy within the framework of the development plan without deviation or exploitation. It may not be in conflict, in ways of its use, with the general welfare of the people. Art. 34: Private ownership shall be safeguarded and may not be put under sequestration except in the cases specified in the law and by court judgment. It may not be expropriated save for the public benefit and against a fair compensation in accordance with the law. The right of inheritance too it is guaranteed. | Art. 24: Private property is inviolable. Managed ethically and without monopoly, it fulfills its societal function by serving the national economy. The right to inherit private property is guaranteed. Property may only be confiscated in circumstances specified by law. This requires a court ruling and is permissible only if doing so is in the public interest and fair compensation is provided upfront. All this happens as specified by law. | Art. 35: Private property is protected. The right to inherit property is guaranteed. Private property may not be sequestrated except in cases specified by law, and by a court order. Ownership of property may not be confiscated except for the public good and with just compensation that is paid in advance as per the law. Art. 36: The State encourages the private sector to fulfil its social responsibility in serving the national economy and society. |

| 1971 | 2012 | 2014 |
|--|--|---|
| <p>Art. 28: The State shall look after co-operative establishments of all forms and encourage handicrafts with a view to developing production and income levels.</p> <p>The State shall endeavor to reinforce agricultural cooperatives according to modern scientific bases.</p> <p>Art. 31: Cooperative ownership is the ownership of the cooperative organizations. The law guarantees its protection and self-management.</p> | <p>Art. 23: The State sponsors cooperatives in all their forms, supports them, and guarantees their independence.</p> | <p>Art. 37: Cooperative property is protected. The state cares for cooperatives, and the law guarantees the protection and support of cooperative property, and ensures its independence.</p> <p>It cannot be dissolved, nor its boards, except by court order.</p> |
| <p>Art. 35: Nationalization shall not be allowed except for considerations of the public interest, in accordance with a law and against compensation.</p> <p>Art. 36: Public sequestration of property shall be prohibited. Private sequestration shall not be allowed except by a court judgment.</p> | <p>Art. 29: Nationalization is illegal unless it occurs for the public good, in compliance with the law, and with fair compensation.</p> <p>Art. 30: The confiscation of public property is forbidden.</p> <p>The confiscation of private property is illegal unless it occurs with a court order.</p> | <p>Art. 40: Public confiscation of property is prohibited.</p> <p>Private confiscation is prohibited except based on a court judgment.</p> |

This means that the Constitution of 2014 essentially maintains the features of the 1971 Constitution: On the one hand, it distinguishes between three different kinds of property (public, private, and cooperative), therefore acknowledging forms of collective property in addition to private property. On the other hand, it guarantees the sanctity of private property.

The provisions on property, nevertheless, contain certain subtle amendments that are more in line with a social market model. The definition of public ownership as ownership by the people (1971 Art. 30) was removed in 2012 and not reintroduced in 2014. Also removed was the definition of private property as un-exploitative capital (1971 Art. 32), another formula going back to the Nāṣrist-socialist ideas. The Constitution of 1971 had assigned a social function to private property, which was to be organized by means of the national development plan (Art. 32). This idea has now been replaced by the concept of the social responsibility of private property (2012 Art. 24; 2014 Art. 36).³³ According to the Constitution of 2014, the state is only called on to encourage the private sector to fulfill its social responsibilities (Art. 36).

The protection of private property was already contained in the Constitution of 1971; sequestration and confiscation is possible only by law and by court order (2012 Arts. 32 and 36; Arts. 24 and 30; 2014 Arts. 35 and 40). Fair compensation was also already guaranteed in 1971, but this has now been now strengthened by the commitment to pay the

³³ See: Kilian Bälz (n 10) 707.

compensation prior to the act of confiscation (Art. 35). The regulation of nationalization in the Constitution of 1971 (Art. 35), still retained in 2012 (Art. 29), was removed in 2014. The protection of public property was considered the duty of every citizen in the 1971 document (Art. 33), of society in 2012 (Art. 22), and once again of every citizen in 2014 (Art. 34). The Constitution of 2014 regulates permissions granted for the exploitation of natural resources for the first time, limiting them to a maximum of 30 years.

Following demands by Islamist parties, the Constitution of 2012 reinforced the position of legal endowments, granting them explicit protection (Arts. 21 and 25). Religious endowments (*awqāf*) have played an important role in Egyptian history.³⁴ Traditionally, they provided independent funding for religious institutions, thus making them financially independent from the state. Over the 19th and the 20th centuries, government control over religious endowments gradually increased, changing the nature of these non-state organizations. In addition, secular forms of associations and foundations have been created and exist alongside religious ones. However, the pertaining clauses were removed again in the Constitution of 2014.

C. Taxation

In the Constitution of 1971, taxes had been dealt with in three separate articles (Arts. 25, 38, and 61). The content of all three was cooperated in one single article in the 2012 Constitution (Art. 26). The concept of social justice, already mentioned in 1971 (Art. 38), was placed at the center of the tax system, in accordance with the ideas of the Islamist parties.

A more elaborate regulation of taxes was introduced by the Constitution of 2014, including, after some debate, the concept of progressive taxation (2014 Art. 38). Progressive taxation is widely considered as an essential element in achieving social justice.³⁵ The

| 1971 | 2012 | 2014 |
|---|--|---|
| <p>Art. 25: Every citizen shall have a share in national income to be defined by the law in consideration for his work or his unexploitative ownership.</p> <p>Art. 38: The tax system shall be based on social justice.</p> <p>Art. 61: Payment of taxes and public charges is a duty, in accordance with the law.</p> | <p>Art. 26: Social justice is the cornerstone for assessing taxes and other ways of defraying public costs. The creation, amendment, and cancellation of the tax code can only happen through law. Only under circumstances specified by law may a taxpayer be exempted from taxation; and no one must be charged beyond these taxes and fees unless the law permits it.</p> | <p>Art. 38: The taxation system and other public levies aim to develop state resources, and achieve social justice and economic development.</p> <p>Public taxes cannot be established, modified, or cancelled except by law. There can be no exemptions except in cases prescribed by law. It is prohibited to require anyone to pay additional taxes or fees except within the limits of the law.</p> |

³⁴ See: Andreas Kemke, *Stiftungen im muslimischen Rechtsleben des neuzeitlichen Ägypten* (Peter Lang, Frankfurt/Bern/New York/Paris 1991).

³⁵ Maria Cristina Paciello, *Delivering the Revolution? Post-uprising Socio-economics in Tunisia and Egypt, The International Spectator: Italian Journal of International Affairs* (Taylor & Francis Online, 2013) 10–12.

| 1971 | 2012 | 2014 |
|------|------|---|
| | | <p>When imposing taxes, it must be taken into account that the tax system has multiple sources. The taxes imposed on the incomes of individuals are progressive multi-tier taxes that are in accordance with their tax capacity. The tax system ensures the promotion of heavy labor industries, and incentivizing their role in economic, social, and cultural development.</p> <p>The State commits to the development of the tax system, and adoption of modern systems to achieve efficiency, ease and accuracy in tax collection. The law specifies the methods and tools to collect taxes, fees, and any other sovereign returns, and what is deposited in the state treasury.</p> <p>Paying taxes is a duty, and tax evasion is a crime.</p> |

Constitution of 2014 also includes a commitment by the state to safeguard private savings for the first time (Art. 39, compare 1971 Art. 39; 2012 Art. 28).

D. Industrial Relations

The constitutions of 2012 and 2014 both deal with aspects of industrial relations in various articles. First, they continue to guarantee workers’ co-determination rights and rights to participation in the companies’ profits:

| 2012 | 2014 |
|--|--|
| Art. 27: The workers have a share in the management of projects and their earnings. They commit themselves to developing production, safeguarding its tools, and carrying out the production plan in their work units, as stipulated by law. | Art. 42: Workers have a share in the management of projects and their profits. They are committed to developing production and implementing the plan in their production units as per the law. Maintaining the tools of production is a national duty. |

| 2012 | 2014 |
|---|--|
| <p>The number of worker representatives in the management assemblies of the public sector units must approximate fifty per cent of total elected members.</p> <p>The law guarantees that small farmers and small craftsmen are represented with at least 80 per cent membership in the management assemblies of agricultural and industrial cooperatives.</p> | <p>Workers' representatives on the boards of public sector units are 50 per cent of the number of elected members. Their representation on the boards of public business sector companies takes place in accordance with the law.</p> <p>The law regulates the representation of small farmers and small craftsmen that is no less than 80 per cent of the boards of directors of agricultural, industrial and trade cooperatives.</p> |

Co-determination and profit participation are both prominent principles in Egyptian industrial relations. They were also contained in the 1971 Constitution as well as the Egyptian Company Law (1981). It does not come as a surprise, however, that these principles are not implemented rigorously. In practice, the income gap between normal workers and management is tremendous. Moreover, the participation in profits normally is limited to more senior management. Normal workers may occasionally be entitled to a bonus, which also depends on the company's performance, if they share in the economic results of their labor at all. The reiteration of these principles in the Constitution of 2012 and also 2014 may, therefore, not necessarily bring about fundamental material change. It is rather a form of traditionalism, where a principle of law, which has lost its "teeth" over time, is not openly abandoned.

Concerning the provision guaranteeing the participation of workers in the management of companies, changes may be noted in the number of workers sitting on the boards of public sector companies. The Constitution of 1971 called for a minimum of 50%. This minimal requirement was replaced by "must approximate 50%" in 2012 and subsequently by "exactly 50%" in 2014, thus in effect reducing the influence of workers on the management of public companies. In a draft version for the 2014 Constitution (August 20, 2013), it was sought to also apply the 50% clause to public business sector companies. Their representation in public business sector companies in the final constitutional document is now delegated to regulation by law. The representation of small farmers and craftsmen in cooperatives remains unchanged at no less than 80% throughout the constitutions.

Second, the constitutions of 2012 and 2014 deal with trade unions. The emergence of free trade unions is one of the key features which emerged in Egypt in the aftermath of the January 25 Revolution.³⁶ As mentioned, one of the youth movements at the center of the revolution, the April 6 Movement, grew out of the strikes at al-Maḥallah al-Kubrā in 2008. The Constitution of 2012 deals with trade unions in the context of the freedom of association:

Article 52 *The freedom to establish syndicates, unions, and cooperatives is guaranteed. They are legal persons, based on a democratic foundation, and freely engage in their activities. They serve society, raise the level of competence among their members, and defend their rights. Only in execution of a court ruling may the authorities dissolve them or their management meetings.*

³⁶ For the role of labor in the revolution, see: Maha Abdelrahman, *In Praise of Organization: Egypt between Activism and Revolution, Development and Change* (Blackwell Publishing 2013) 577–579.

Article 53 *The law regulates the professional syndicates and ensures their democratic management. It defines their financial resources and the method by which syndicate members, in exercise of their professional activities, are held to high ethical standards. There can be only one professional syndicate per profession.*

Only in execution of a court ruling may the authorities dissolve a syndicate's management meeting, and they may not put them under surveillance.

It is noticeable that in the 2012 Constitution, trade unions are just one further kind of association to be treated alongside professional syndicates and political parties. Here trade unions must be strictly discerned from syndicates, which organize the so-called “free” professions, including lawyers, medical doctors, and architects. Syndicates are a hybrid between a body representing their professionals’ rights and one for the policing of free profession (which is also reflected in Art. 53). Trade unions, moreover, are not vested with any collective bargaining rights. This means that the trade unions benefit from the general freedom of association. However, they are in no way provided with a special position that would protect their rights to represent the labor force at large. The limitation of one union per profession furthermore precludes the formation of labor pluralism.³⁷

The basic right to organize in labor unions was removed from the relevant article in 2014 (Art. 76), thus going back on the progress made in 2011. Unions are now mentioned only in connection with the agricultural sector (Art. 29). Also removed was the participation of unions in an Economic and Social Council (2012 Art. 207). Only the right to form professional syndicates was kept in place (2014 Arts. 76 and 77). In 2012 and 2014, this right was limited to one syndicate per profession, reducing their function as representative bodies. Instead of guaranteeing the right to form trade unions, the Constitution of 2014 guarantees the means for collective negotiations (Art. 13).

Third, the constitutions of 2012 and 2014 deal with the right to work. This, again, shows the repercussions of Egypt's socialist past, in providing:

| | |
|--|--|
| <p>Art. 64: Work constitutes a right, a duty, and an honor for every citizen. The State guarantees it on the basis of equality, justice, and equality of opportunity.</p> <p>Forced labor is permissible only to the extent stipulated by law.</p> <p>The public servant works to serve the People; the State awards government employment to citizens according to merit, without favoritism. Any deviation from this is a crime punishable by law.</p> | <p>Art.12: Work is a right, a duty, and an honor guaranteed by the State. There can be no forced labor except in accordance with the law and for the purpose of performing a public service for a defined period of time and in return for a fair wage, without prejudice to the basic rights of those assigned to the work.</p> <p>Art. 13: The State commits to protecting worker rights, and works on building balanced work relationships between the two sides of the production process.</p> |
|--|--|

³⁷ Labor movements independent of state regulation have been regarded as a threat by all successive governments. Maria Cristina Paciello (n 35) 15–16.

| | |
|--|---|
| <p>The State guarantees every worker's right to a fair income and vacation days. It also guarantees pensions, social security, healthcare, protection against occupational hazards, the availability of safety provisions in the work place, in accordance with the law.</p> <p>Workers may only be fired under circumstances that are specified by law.</p> | <p>It ensures means for collective negotiations and works on protecting workers against the risks of work, ensures that conditions for professional security, safety and health are met, and prohibits arbitrary dismissal. All the foregoing is as organized by law.</p> |
|--|---|

In 2012, the concept of equality, justice and equality of opportunity was added to the right to work. How such a provision would have been implemented remains unclear.³⁸ In view of the unemployment challenge which Egypt is presently facing, it seems unlikely that a court would have interpreted Art. 64 (1) in a way that would have granted every citizen the right to a job corresponding to the citizen's qualifications and expectations. Rather, one would expect that the courts would have interpreted the provision as containing a general programmatic guideline and a commitment from the government, but not an enforceable right vested in the individual citizen. The provision was removed again in 2014.

Finally, the Constitution of 2012 introduced a right to strike (Art. 64, 4). This provision was new and had no precursor in the 1971 Constitution.³⁹ In the Constitution of 2014, it constitutes a separate article (Art. 15). The provision provides workers with a right to strike peacefully, and thus acknowledges the contradiction between labor and capital in the workplace. It can be understood as a provision informed by free-market concepts, as socialist constitutions would tend to negate any contradiction between labor and capital—and consequently would also not provide for a right to strike. As is common in the constitutions of 2012 and 2014, however, the details are regulated by law. This means that the effectiveness of the right to strike will depend on how it is implemented in an amended labor law.

E. Economic Rights

Chapter 3 of the Constitution of 2012, entitled "Economic and Social Rights" contained an array of rights, which supplement the chapter on economic principles:⁴⁰

- Citizens have a "right to a high-quality education" (Art. 58);
- Freedom of scientific research is guaranteed (Art. 59);
- The Arabic language is an essential subject in the various stages of education (Art. 60);

³⁸ In fact, measures against unemployment were not a high priority in the period following the drafting of the constitution. See: Maria Cristina Paciello (n 35) 13–15.

³⁹ It should be noted, however, that the 2003 Unified Labor Law had explicitly legalized strikes. Due to certain de facto restrictions, the right to strike was difficult, if not impossible, to exercise (see: Justice for All p. 35 seq.).

⁴⁰ Economic rights have not been included in the section on economic components of society. In 1971 they were found either in Chapter 1 "Social and Moral Foundations" of Part 2 of the constitution (Arts. 13 and 14) or in Part 3 "Public Freedoms, Rights and Duties" (Arts. 59 and 61). In 2012, they were subsumed in Chapter 3 "Economic and Social Rights" of Part 2 "Rights and Freedoms" (Arts. 58–73). In 2014, this section was renamed "Social Components" and moved to Chapter 2 "Basic Components of Society" (Arts. 13–16).

- The State is committed to combating illiteracy (Art. 61);
- Citizens have a right to health care (Art. 62);
- Every person has a right to a healthy and undamaged environment (Art. 63);
- The State is under the obligation to honor the martyrs of the January 25 Revolution (Art. 65);
- The State guarantees social insurance services (Art. 66);
- The State shall provide adequate pensions to small farmers and non-unionized agricultural workers (Art. 67);
- Adequate housing, clean water, and a healthy nourishment are considered guaranteed rights (Art. 68);
- Physical exercise is a right of all (Art. 69);
- Children shall be given a proper name, care by the family, nutrition, health care as well as support in the religious, emotional, and intellectual development (Art. 70 (1));
- Child labor is restricted, by providing that as long as children are subject to compulsory education, they must not be employed in occupations which are not age-appropriate (Art. 70 (3));⁴¹
- The State provides care for children and youth (Art. 71);
- The State is committed to providing care and education for the handicapped (Art. 72); and
- Forced labor and the sex trade are prohibited (Art. 73).

The enumeration was shortened somewhat in 2014, but in principle it was kept in place. The list demonstrates that the constitution reflects various individual interests, without, however, succeeding in molding them into one coherent philosophy or system. It is questionable whether the freedom of academic research is properly classified as an “economic or social right”; with regard to the social rights (i.e., relating to education, health care, and housing), it is also not clear whether the constitutional provisions will actually confer legally enforceable rights on the citizens (as mentioned above, this is the same with the right to work). The restrictions on child labor, as well as forced labor and the sex trade will depend on the effectiveness of the respective penal laws enacted. Over all, therefore, the chapter demonstrates the range of different topics and interests that were present in the constitutional assembly; it does not provide any clear directions for the economic future of Egypt. In the hands of a creative constitutional court, however, the provisions should not be underestimated, as they could permit judges to take an activist stance on these issues.

VI. CONCLUSION

The economic principles in the Egyptian Constitution of 2012 as well as the Constitution of 2014 are the outcome of a hasty drafting process. In this regard, the stipulations regarding the economic order share the same fate as many other aspects of the constitution, which suffered from an ill-organized drafting process characterized by intense time pressure. Both were written by the dominating political faction, to the exclusion of others. The Constitution of 2012 was written by an assembly that was dominated by Islamist or Islamist-leaning parties, the Constitution of 2014 by a commission set up by the military. While in the first case liberal parties were sidelined, in the second the entire spectrum of Islamist parties was excluded.

Both in 2012 and in 2014 the attempt was made to remove Nāṣrist language from the constitutional text. Examples are the deletion of the term “national development plan” and

⁴¹ It should be noted that the provision was very controversial, as it does not entirely ban child labor.

the redefinition of public and private ownership. Nevertheless, both constitutions continue to propagate the protection of industries like agriculture and industry, a core concept of Nāṣrist thinking. In fact, some clauses can be interpreted as an expansion of state control over certain parts of the economy. Large-scale state investments mentioned in the Constitution of 2014 like the development of the Suez Canal are in fact highly reminiscent of Nāṣrist projects like the Aswan High Dam.

The Constitution of 2012 essentially replaced Nāṣrist thinking with concepts derived from Islamist ideologies. Examples are the introduction of religious endowments and the idea of placing social justice at the center of economic development. To what extent this was a concept that reflected concept upon is an open question. The Constitution of 2014 instead introduces the idea of sustainable economic growth for the first time, though only nominally. In addition, the Constitution 2014 makes reference to certain concepts of a social market economy, such as the need to control markets. The result of these diverse attempts is a mixture between Nāṣrist ideals, free-market elements, and concepts that might lead to a social market economy. Neither constitution contains an unambiguous call for economic reform.

The constitutions of 2012 and 2014 certainly do not proactively help to resolve the country's many social and economic ailments. The constitutions, in fact, only partially address the demands made in 2011. The call for greater transparency was answered only in some aspects. The responsibility of state officials in cases of corruption was enhanced. Noteworthy are the restrictions for economic activity on the part of government officials including the president. One central topic was, however, left unchanged: The budget of the armed forces remains under the auspices of the military secret, beyond the direct control of elected officials.

The constitutional texts of 2012 and 2014 clearly reflect an attempt to pander to the calls for social justice. The term "social justice" is mentioned in many articles. Several articles provide regulations for bringing about a more equal distribution of wealth and opportunities. Among the most effective provisions in this respect is the introduction of progressive taxation (2014 Art. 38). Whether the constitutional text by itself will be able to foster the social justice it calls for remains nonetheless doubtful.

A demand not met by the constitutions of 2012 and 2014 is the call for better representation of workers. In 2014 unions were removed entirely from the text and professional syndicates were restricted. Even the participation of workers in the management of public companies, an achievement of the Nāṣrist era, was reduced. A single exception is Art. 13 of the new constitution, which in general terms binds the state to ensuring means for collective bargaining.

In general, many constitutions around the world remain vague when it comes to economic principles and shy away from any clear decision on the economic orientation of their respective countries—possibly for good reasons. First, economic matters are particularly complex, and they are difficult to encapsulate in a constitutional document. Second, and perhaps more important, the economic system is probably less easily influenced by regulation in the form of constitutional principles than it is, for example, by the allocation of powers within the government, electoral principles, or classical fundamental rights. The juristic qualification of social and economic rights has still to be debated and any clear decision for or against a certain economic system would nevertheless have to be implemented against the backdrop of economic realities.

Since the start of the revolution in 2011, the economic situation of Egypt has worsened. Nonetheless, neither of the constitutions can be blamed for this, as they do not stand in the way of necessary and fundamental economic reforms. Whether the new Constitution of 2014, in turn, will actively contribute to the economic development in Egypt, and whether it will be referred to and interpreted in order to provide opportunities for positive developments, remains to be seen.

PART

5

LIBERTY, EQUALITY,
AND THE RIGHTS
OF MINORITIES

International Human Rights Law as a Framework for Emerging Constitutions in Arab Countries

SAID MAHMOUDI

I. INTRODUCTION

The political changes in the Middle East and North Africa that have happened since early 2011 highlight the pressing need for new constitutions in that region. In response to the popular demands or pursuant to the initiatives of the governments/heads of state in several Arab countries, constitutional reforms have either already taken place or have been promised.¹

The origin of the move to reform is the democratic aspirations of the people. It is therefore natural to expect that special attention be paid to the role and place of international human rights law in these countries' constitutions. However, the case of the Middle Eastern and North African countries differs somewhat in this respect from those of other countries that have reformed their constitutions to put an end to democratic deficiencies in their political systems.

In addition to the general constitutional shortcomings as regards guaranteed civil and political rights in the existing constitutions, emphasis on the Islamic features of political life, or on the supremacy of Islamic law over all laws, may occasion certain tension between the requirements of international human rights and these constitutions. The tension is due to an often-presumed discord between Islam and Islamic law on the one hand and the dictates of international human rights law on the other.

¹ Among others, mention can be made of the 2011 Constitution of Morocco (hereinafter referred to as the Constitution of Morocco) and the 2014 Constitution of Tunisia (hereinafter referred to as the Constitution of Tunisia).

The present paper touches upon some general aspects of the relationship between international human rights and the constitutions of the countries in the Middle East and North Africa, but the focus is more on the distinguishing feature of these countries, namely the fact, that Islam as their official religion permeates many provisions of their constitutions. In most of these states, Islam is either a principal source of law or the main source of legislation. Hence any reference to international human rights concepts in these constitutions should normally be assessed in terms of their compatibility with Islamic law.

II. HUMAN RIGHTS IN THE EXISTING CONSTITUTIONS OF ARAB COUNTRIES

Reference to human rights or international human rights in the constitutions of the countries under review can take various forms. Saudi Arabia formally has no constitution, but its Basic Law of Governance² refers to human rights in combination with Islam. Art. 26 of the Basic Law states: "The state shall protect human rights in accordance with Shari'ah." Some constitutions refer explicitly to the Universal Declaration of Human Rights or to the Charter of the United Nations. The Constitution of Yemen is an example.³ Reference to human rights can also be shown in more general terms without expressly mentioning any specific instrument.⁴ In addition to general references to the overall framework of international human rights, the constitutions under study normally refer to specific human rights in two ways. Some of them limit themselves to certain rights.⁵ Others mention in principle the whole catalogue of the rights and freedoms enshrined in the 1966 UN Covenants.⁶

² It is indeed the Qur'an that is considered as the Constitution. The Basic Law was promulgated in 1992 and entered into force in 1993. The Law is drafted in the form of a constitution. Art. 1 provides: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution [...]."

³ Art. 6 of the Yemeni Constitution provides: "The State shall abide by the United Nations Charter, the Universal Declaration of Human Rights, the Arab League Charter and the universally recognized rules of international law." Similar references can be found in, for example, the Constitution of Mauritania (preamble), Afghanistan (preamble and Art. 7), Bosnia Herzegovina (preamble) and the 2014 Constitution of Egypt (hereinafter referred to as the Constitution of Egypt) (preamble).

⁴ Art. 5 of the earlier Tunisian Constitution underlined the significance of international human rights law as follows: "The Tunisian Republic shall guarantee the fundamental liberties and rights of man in their universal, global, complementary, and interdependent understanding." In the present Tunisian Constitution, human rights have got an independent title consisting of 29 articles, which address practically all basic rights separately. The preamble to the present Constitution of Morocco also underlines the country's commitment to universal human rights, and stresses that it protects and promotes the requirements of human-rights and humanitarian law and to contribute to their development.

⁵ For instance, the Permanent Constitution of the State of Qatar contains provisions only on certain rights and freedoms such as freedom of opinion (Art. 47), association (Art. 45), the press (Art. 48), the right to property (Art. 52), and education (Art. 49). The Constitution of the Syrian Arab Republic as amended in February 2012 includes in a similar way provisions on a selected number of rights and freedoms such as freedoms of belief and expression (Art. 42) and assembly (Art. 44). The Constitution of the Republic of Yemen is equally brief in this respect, in Part Two of which, reference is made, *inter alia*, to the freedom of thought and expression, the right to vote, a fair trial, and to the prohibition of torture.

⁶ The International Covenant on Civil and Political Rights: <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>, accessed March 17, 2016 and the International Covenant on Economic, Social and Cultural Rights: <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>, accessed July 8, 2015. One example of a constitution with a whole catalogue of international human rights is the Interim National Constitution of the Republic of the Sudan of 2005. This contains a Bill of Rights including virtually all international human rights.

Irrespective of how international human rights are treated in the constitutions of the Arab countries, their realization is normally confronted by some problems. These problems are not limited to these countries, and can be found in many other constitutions and internal legal systems of the Muslim countries in general. One is the general attitude towards an individual as the bearer of rights and freedoms. It is not uncommon to find provisions in some constitutions that refer to the rights of God over those of human beings, implying that the individual is inherently the bearer of duties rather than rights.⁷ A possible consequence of this attitude is that rights will have a residual nature and are formulated subject to limitations to which the state, religion, or perhaps revolution have given rise.⁸

Limitations of rights and freedoms may be set out in a constitution. Such limitations may also result from leaving the further elaboration and application of the rights to later statutory regulation. An example of the latter is Art. 49 of the Constitution of Tunisia, which contains a general limitation clause, according to which: "The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law [...]". More often the limitation is inserted into the constitution itself. Art. 13 of the 1969 Constitution of Libya stipulated: "Freedom of opinion is guaranteed within the limits of public interest and the principles of the Revolution." Another example is the limitation on the freedom of the press in Art. 24 of the Constitution of Iran.⁹

Another problem is that the application of most of these rights is restricted in the said constitutions to the citizen of the country in question. As long as the limitation concerns core political rights such as freedom of association or the right to vote, it is not controversial and has equivalences in the constitutions of many Western countries. The problem is the limitation of rights, such as the right to equality before law that should be enjoyed by everybody including non-citizens.¹⁰

An important general shortcoming is the lack of a specific monitoring and enforcement mechanism so that when a right guaranteed in the constitution is allegedly violated that mechanism could provide a remedy. The result is that many provisions on rights and

⁷ See, e.g., Art. 56 of the Constitution of the Islamic Republic of Iran, a non-Arab member of the Organization of Islamic Cooperation with a constitution that is strongly influenced by Islamic law, which stipulates: "Absolute sovereignty over the world and man belongs to God, and it is He who has made man master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group." See also the preamble to Iraq's Constitution acknowledging "God's right over us." Cf. also the 1998 Constitution of Sudan, Art. 4, which provides "Supremacy in the State is to God the creator of human beings, and sovereignty is to the vicegerent people of the Sudan who practice it as worship of God, bearing the trust, building up the country and spreading justice, freedom and public consultation. The Constitution and the law shall regulate the same."

⁸ See, e.g., the preamble to the 1969 Constitution of Libya, which was replaced by a new constitution in 2011. It is also implied in the first provision of the section on rights and duties in the Basic Law of Saudi Arabia (Art. 23), which states: "The state protects Islam; it implements its Shari'ah; it orders people to do right and shun evil; it fulfills the duty regarding God's call."

⁹ Art. 24 reads: "Publications and the press have freedom of expression except when it is detrimental to the fundamental principles of Islam or the rights of the public. The details of this exception will be specified by law." Art. 39 of the Basic Law of Saudi Arabia gives even more room for limitations decided by the authorities. It says: "Information, publication, and all other media shall employ courteous language and the state's regulations, and they shall contribute to the education of the nation and the bolstering of its unity. All acts that foster sedition or division or harm the state's security and its public relations or detract from man's dignity and rights shall be prohibited. Details shall be specified by statute [...]."

¹⁰ Examples include the Constitution of Libya, Art. 6; the Constitution of Syria, Art. 33, and the Constitution of Egypt, Art. 53. Note that Art. 47 of the Basic Law of Saudi Arabia is an exception in this respect. It provides: "The right to litigation is guaranteed to citizens and residents of the Kingdom on an equal basis."

freedoms may simply be devoid of any practical significance due to the lack of a monitoring organ that can supervise the correct application of the right and, if necessary, refer an alleged violation to a court of law. There are, however, some rare examples of such monitoring mechanisms in some countries' constitutions. The 2005 Interim Constitution of Sudan provides for the establishment of a Human Rights Commission, which monitors the application of the rights and freedoms provided in the constitution and receives complaints about their violation. Another example is Art. 19 of the Constitution of Morocco. This establishes an authority responsible for combating any form of discrimination. Mention should also be made of Art. 128 in the Constitution of Tunisia on the establishment of a Human Rights Commission and its mandate.

One relevant question is how far the shortcomings expressed above and the unsuccessful drafting of the texts of the constitutions have a decisive role in the actual state of affairs in relation to human rights in the countries under examination. There is no doubt that elaboration of all the basic rights in a clear and unequivocal manner would facilitate their invocation by individuals. This is the method used in the Interim Constitution of Sudan as well as in the Constitution of Tunisia. Such an elaborate and detailed reference to rights and freedoms eliminates all the uncertainty that a hortatory reference to the Universal Declaration of Human Rights may entail. In this way, each right and freedom becomes justiciable in its own right.

Given the repeated alarming reports by independent and generally respected international entities of systematic violations of human rights in some Arab countries, the question is why the relevant constitutions have not managed to instill true respect for these rights. A related question is how far these constitutions really reflect the reality of political life when they all solemnly declare that sovereignty is vested in the people, the source of all power.¹¹

The problems relating to drafting a constitution are important and can have a negative impact on the effective and real achievement of human rights. However, more important is a well-equipped and sophisticated administrative infrastructure, which ensures the correct implementation of all laws on the one hand, and the perception and appreciation of the merits of a legal provision by the addressees of that law on the other.

Promotion of human rights requires that such rights are drafted in a constitution as a basis and frame for all other rights and obligations; at the same time that an individual's awareness of her or his rights is promoted and the state's administrative infrastructure enhanced.

III. THE EFFECT OF ISLAM ON THE HUMAN RIGHTS PROVISIONS OF THE CONSTITUTIONS OF ARAB STATES

The Islamic identity of the Arab countries has found expression in their constitutions both through emphasizing the Islamic nature of the political system and through referring to Islam as the official religion of the state. For instance, the preamble to the Algerian Constitution speaks of "Algeria, land of Islam". Bahrain's Constitution declares in Art. 1(a) that the Kingdom of Bahrain is an Islamic Arab State. The same provision can be found in Art. 1 of the Constitution of Yemen. The Constitution of Tunisia, which is probably the most modern and comprehensive constitution in the Arab world as regards inclusion of universal human rights in the country's basic law, states in its Art. 1 that Islam is its religion

¹¹ See, e.g., the constitutions of Algeria, Art. 6; Kuwait, Art. 6; Libya, Art. 1; Mauritania, Art. 2; Morocco, Art. 2; Qatar, Art. 59; Tunisia, Art. 3.

and this article might not be amended. The reference to Islam as the religion of the state, the official religion of the state and the religion of the people is frequent in practically all constitutions of Arab countries.¹² As regards the Islamic identity of the state and reference to it in practically all provisions of the constitution, the Basic Law of Saudi Arabia is certainly unique.

As mentioned earlier, most of the relevant constitutions refer to Islamic law (Shari'ah) as a main source of legislation. This is the case, for example, in the constitutions of Kuwait (Art. 2), Iraq (Art. 1), Syria (Art. 3), and Bahrain (Art. 2). In certain constitutions Islamic law is treated as the main source of legislation. Examples are Egypt (Art. 2), Qatar (Art. 1), and Libya (Art. 1). In a few cases, states have gone a step further and declared Islamic law as the only source of legislation. Examples are Sudan (Art. 5) and Yemen (Art. 3).

The Islamic identity of the political system, and particularly reference to Islamic law as a source or the source of legislation, may prompt the question of whether a state is in compliance with its international human rights obligations. The reason for such a question is the more or less established perception in many non-Muslim countries that there are several grounds for discrimination in Islam that are in variance with the basic assumption of equality of rights in international human rights discourse. Two such grounds are gender and religion. Moreover, the compatibility of some Islamic law requirements with international human rights, such as those relating to the procedure and substance of penal law, has been questioned.

A. Equality of Rights

Most Arab constitutions contain general provisions on equality of rights. Some follow the pattern used in international legal instruments that ensure equality of rights by prohibiting discrimination on various grounds. The Constitution of Egypt in Art. 53 declares: "Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason." Another example is Art. 31 of the Constitution of Sudan, which reads: "All persons are equal before the law and are entitled, without discrimination on the basis of race, color, sex, language, religious creed, political opinion or ethnic origin, to equal protection of the law".

The recognition of the equality of rights in a constitution is not always unequivocal and comprehensive. Sometimes, some grounds of discrimination are left out, probably for political reasons specific to a country or because of possible discord of that right with Islamic law. Art. 29 of the Constitution of Kuwait prohibits discrimination on the basis of race, origin, language, or religion. It lacks reference to, for example, sex as a ground of discrimination. Art. 35 of the Qatar Constitution refers to sex, race, language, and religion as the bases of discrimination. Ethnicity is not mentioned as a possible basis.

Morocco has applied another method as regards equality of rights. According to Art. 19 of that country's constitution, men and women equally enjoy the civil, political, economic, social, cultural, and environmental rights and freedoms that are enshrined in the constitution or in those international agreements that are ratified by Morocco. This should obviously mean that no discrimination on any of the grounds that are spelled out in the 1966 Covenants should be permitted in Morocco.

¹² See, for instance, Art. 1 of the constitutions of Qatar and Tunisia, Art. 2 of the constitutions of Egypt, Iraq, and Kuwait, and Art. 3 of the Moroccan Constitution.

States' various constitutional approaches to equality of rights notwithstanding, the question remains whether possible discrimination relating to rights due to the tension between Islamic law and international human rights is being, or can be, tackled. A closer look at the rights of women and minorities as two grounds of discrimination will elucidate the current situation.

B. Gender Equality

Women's rights under Islamic law are usually referred to as a prime example of discrimination. This claim is based on an assessment of women's rights under Islamic law compared with the same rights as enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the most important document in this area.

The Convention recognizes that men and women have equal rights and freedoms in political, economic, social, cultural, civil, and all other spheres. Some commentators express the view that the contents of the Convention are not compatible with Shari'ah. To support this proposition, they refer to certain verses of the Qur'an relating to divorce, polygamy, and inheritance.¹³ Other commentators, of course, try to justify the discrimination by explaining the social, political, and economic factors underlying this disparity.¹⁴

One verse of the Qur'an that has often been criticized by supporters of gender equality is verse 4:34, which is deemed to permit men to beat women.¹⁵ However, modern interpretations suggest that the passage should not be taken literally. The sanctions prescribed in the verse are, according to these interpretations, symbolic and should not necessarily take the form of actual physical punishments.

As regards gender equality, Islamic law scholars can be roughly categorized into two groups. Adherents of the conservative school of interpretation¹⁶ argue that the principle of equality is in contrast to Islamic law since it tries to make equal those who under Shari'ah must be treated differently. The other group, which adopts a modern approach in its interpretation, insist on the compatibility of the Qur'an's prima facie discriminatory passages with the principle of equality.¹⁷

Most members of the Arab League joined the Convention without any reservation. One argument is that there is no need for reservation since the rights of women and children are strongly protected under Islam.¹⁸ Bahrain, Iraq, Jordan, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syria, and Tunisia are in this group. Some other states have appended

¹³ Verses 2:228 (divorce), 4:3 (polygamy), and 4.11 and 4.12 (inheritance).

¹⁴ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 13–134.

¹⁵ "Men are made responsible for women, and God has endowed them with certain qualities, and made them the breadwinners. Righteous women will cheerfully accept this arrangement, since it is God's commandment, and honour their husbands during their absence. If you experience rebellion from women, you shall first talk to them, then desert them in bed, then you may beat them."

¹⁶ A strong representative of this group is the Indian-Pakistani Islamic scholar and imam Sayyid Abu 'l-A'la Mawdudi (1903–1979).

¹⁷ See, for instance, Baderin (n 14) 58–66.

¹⁸ Reference is sometimes made by these countries to provisions in their constitutions that are meant to protect motherhood and childhood. These provisions can be found in the constitutions of Egypt (Art. 11), Kuwait (Art. 9), Qatar (Art. 2), Sudan (Art. 15), Syria (Art. 20), and Libya (Art. 5). Reference to "motherhood" for attributing a specific role to a woman that should be singled out in the constitution is understandable given the significance that Islam attaches to the family as the cornerstone of society. However, from the perspective of gender equality, one could debate the appropriateness of such a distinction between mother and father in the constitution.

reservations to their instruments of ratification or accession. Since some of these countries have expressly noted in their constitutions that Islamic law is the principal source of legislation, it is not clear how they can fulfill their obligations under the Convention. One good example is Qatar, Art. 51 of whose constitution stipulates: "The right of inheritance is inviolable and is governed by Islamic law."

Other Arab countries have appended reservations to the Convention. Kuwait has reservations regarding several provisions, for example, Art. 16 relating to the right to marry.¹⁹ Libya has declared that its accession to the Convention is "subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shari'ah."²⁰ The United Arab Emirates have also made a reservation referring to Islamic law.

Irrespective of the place of Islamic law in the constitutions, Shari'ah has clearly influenced the contents of family law and thereby women's rights in Arab countries. Usually the differences between the rights of men and of women, for instance those relating to inheritance, will find expression in the legislation of the country even if the constitution is silent on the matter or prohibits discrimination.

One possible conclusion of the above is that even when states formally declare their acceptance of an international legal obligation to respect the equality of men and women in all respects, it should not be taken for granted that they will observe such obligations at national level.

C. Religious Equality

Some Islamic scholars are of the view that despite certain differences between the status of Muslims and that of non-Muslims in the law and practice of Islam, their equality is well established in some verses of the Qur'an and in the Sunnah.²¹ A reference is made in this context of verse 49:13.²² The contemporary practice of Islamic states with respect to religious minorities is divergent. In the countries where Islamic law is state law, the discrimination is more manifest and multifaceted. Normally Christians and Jews as People of the Book have certain guaranteed rights, whereas other faiths seldom enjoy any specific rights that are enshrined in law. In some Islamic countries, discrimination is implemented informally by imposing different sorts of limitations on the activities of religious minorities. These limitations normally relate to the rights to assemble for religious purposes, to establish charitable institutions, to write and circulate religious publications, to celebrate religious holidays, and to participate in similar activities.²³

¹⁹ Many other Arab states have appended reservations specific to Art. 16 of the Convention. They include Egypt, Iraq, Lebanon, Oman, Qatar, and Syria.

²⁰ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#33.

²¹ One example is the Lebanese author Şubhî Mahmassānî, who argues for the compatibility of the requirements of international human rights with Shari'ah as regards equality of Muslims and non-Muslims. For discussion, see Ann Elizabeth Mayer, *Islam and Human Rights: Traditions and Politics* (5th edn Westview Press 2013) 138–139.

²² "O people, we created you from the same male and female, and rendered you distinct peoples and tribes, that you may recognize one another. The best among you in the sight of God is the most righteous."

²³ In addition to general limitations against non-Muslims as regards certain high political or administrative positions in Islamic countries, some Muslim countries like Saudi Arabia and Bahrain impose informal discrimination against Shi'ah Muslims and Iran does the same against Sunni Muslims.

Another area of discrimination with important practical consequences is access to public office. Religious minorities are often denied such access in most Islamic countries. This form of discrimination is not always explicitly spelled out in laws, but is exercised in practice. The degree of limitation to the right of access to public office varies in various countries. In some, the limitation applies only to high-ranking positions such as cabinet ministers, high military commanders, and high judicial authorities. In others, particularly in those with Islamic law as their state law, the limitations are in principle all-embracing, and a non-Muslim's access to public office is a rare exception subject to specific authorization. The most contemporary commentators who propagate modern interpretations of Islamic law believe that it is possible to find compatibility with practices advocated by Western states on issues concerning the rights of women and religious minorities. They stress that the poor human rights record of many Islamic states is not due to the dictates of Islamic law, but rather to domestic politics and constitutional inadequacies in these states.²⁴

D. Penal Law

One other possible area of conflict between international human rights law and Islamic law is that of criminal law. What is generally referred to as Islamic criminal law consists of a number of rules relating to the punishment of certain categories of crime, together with aspects of criminal procedure relating to these crimes. Like all other criminal law systems, the categorization of crimes in Islam is based on their seriousness.

The most serious crimes are *hudūd* (an Arabic word for limits), which are considered to be crimes against God. There is no general consensus among all schools of Islamic law on which crimes are included in *hudūd*. Apostasy, revolt against the ruler, drinking alcohol, highway robbery, adultery, and slander are examples of crimes that may be placed in this category. There are mandatory penalties in Shari'ah for *hudūd*. They include amputation of hands, flogging, and death, sometimes by stoning. The second group of crimes is called *qisās* (an Arabic word for "retaliation"), which is the Islamic perception of the principle of an eye for an eye. *Qisās* includes crimes such as murder and the infliction of physical injury. The sanctions for *qisās* are either retaliation or compensation for the victim or his or her family. The third category of crimes is called *ta'zīr*. Islamic law prescribes no specific penalty for these crimes, and the punishment can be decided at the discretion of the judge or by a parliamentary act.

Hudūd and *qisās* punishments, such as amputation of hands and feet or stoning, fall reasonably within the definition of torture as defined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Nevertheless, of those Islamic countries that have so far ratified the Convention, only Qatar has made reservation for any "interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion."²⁵ Several Western countries have objected to this reservation. Pakistan has appended a declaration to its ratification to the effect that provisions of the Convention "shall be applied to the extent that they are not repugnant to the provisions of [...] the Shari'ah law."²⁶

The fact is that Islamic criminal law is not applied in the majority of the member states of the Organisation of Islamic Cooperation. There is thus no need for reservation to the

²⁴ Mayer (n 21) 204–205.

²⁵ For the text of this and other reservations: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en, accessed July 8, 2015.

²⁶ Ibid.

Convention. There are nevertheless countries that have ratified the Convention and exercise Islamic criminal penalties. Two examples are Saudi Arabia and Yemen.²⁷ For these countries and also those Islamic states that fully apply Islamic law but are not parties to the Convention, Sudan for example, Islamic punishments are not equal to torture since they are predetermined in Shari'ah as the will of God. According to these countries, torture and cruel treatment in the sense of the Convention are human-made concepts. Art. 38 of the Constitution of Iran specifically prohibits all forms of torture for the purpose of extracting confessions or acquiring information. This arguably means that the Islamic criminal punishments that are enforced in Iran are not considered by that country to be torture or cruel, inhuman, or degrading treatment.

IV. CONCLUSION

The status of human rights in the constitutions of the Arab countries varies. Some of these countries, such as Syria, obviously have secular governments despite reference to Islam in their constitutions. Others such as Sudan and Saudi Arabia are considered to have Islamic governments and are committed to strict application of Islamic law. The possible shortcomings of Arab countries with respect to the implementation of international human rights cannot be attributed solely to the assumed discord of these rights with the requirements of Islamic law. In a constitutional reform, attention must thus be focused on both the ordinary deficiencies of the legal infrastructure of a Third World country, and the possible obstacles that the Islamic identity of these countries may create in the realization of international human rights.

One possible question is why these countries should take international human rights as a framework for their constitutions. The adoption of certain international instruments such as the 1990 Cairo Declaration on Human Rights in Islam, the 2004 Arab Charter of Human Rights and the 2005 Covenant on the Rights of the Child in Islam may be an indication that these countries do not consider international human rights as sufficient or fully appropriate for their needs. One common denominator of these Islamic documents is that they are all silent on the most controversial issues as regards the rights of women and children. Thus, they cannot arguably be as comprehensive and elaborate as those international legal instruments that have clarified the full catalogue of international human rights as accepted by the majority of states.

Even if Islamic human rights documents can serve as an important means for further strengthening international human rights with due regard to cultural diversity, they should not substitute the latter. Moreover, the active participation of almost all Arab and Muslim countries in the drafting of the international instruments and their accession to these instruments leave no room for old-fashioned arguments of Western norms versus Islamic norms.

It is promising to read in the preamble to Morocco's new constitution that the country commits itself to universal human rights while underlining that it belongs to the Islamic *ummah*.²⁸ It further stresses that it "protects and promotes the requirements of human rights and humanitarian law and contributes to their development in their indivisibility and universality." It also "prohibits and combats all sorts of discrimination on the basis of sex, colour, creed, culture, social or regional origin, language, handicap or any other personal circumstances." It gives priority to the international conventions ratified by the country

²⁷ Art. 46 of the Constitution of Yemen states: "Crime shall be the sole responsibility of the culprit. Crime and the punishment shall be determined by the provision of Shari'ah and law [. . .]."

²⁸ Community of nations.

before its national legislation and harmonizes national law to these conventions. These lines all evidence a change of attitude toward the superiority of international human rights as a solid framework for drafting a new constitution.²⁹

Two concrete steps that can be taken to bring both the constitutions and the actual performance of the Arab countries into harmony with international human rights law are, first, the inclusion of all basic international human rights in the constitution and, second, establishing necessary supervisory organs for assessing compliance with the legal obligations. At a more pragmatic level, one way to overcome the problem of contradictions between Islamic law and human rights law such as polygamy and child marriage is to introduce such strict legal requirements in law as make these exercises almost impossible. The same pragmatic solutions can be found in certain national laws and practices with respect to issues such as inheritance, and custody or guardianship of the child.

²⁹ Similar references to universal human rights is made in the preamble to the Constitution of Tunisia, where people's commitment to the highest principles of universal human rights is underlined.

Civil and Political Rights as a Precondition for Democratic Participation

MOHAMMED AMIN AL-MIDANI*

I. PREFACE

The conference held by the Max Planck Institute on “Constitutional reforms in the Arab States” comes at a time in which the Arab world has been witnessing several indications and new developments depicting prospects in its horizons. These are different from those one may be used to and which one may have known throughout the decades of the second half of the last century and at the beginning of the third millennium. Hopefully the conference will resultantly contribute, through its research work papers, discussions, and recommendations, in providing some perceptions and suggestions for a better tomorrow to the benefit of future generations of the Arab world states and the Middle East.

This study will be divided into two parts: The first part will address the nature of the civil and political rights and their enforcement mechanism. The second part will see how the enforcement and activation of these rights contribute to democratic participation. One deems appropriate, however, to present in the introduction the theory of “generations of human rights”, and to set forth one’s position thereon.

II. INTRODUCTION

Karel Vasak introduced the theory of “generations of human rights” in the 1970s. He wrote about it and presented it; he, once again, defended it in the 1990s as well.¹ The gist of the theory entails the existence of three generations of human rights, namely, the following.

* The author and the editors sincerely thank Mr. Mohammad A. El-Haj for translating this article into English.

¹ Karel Vasak, “Le droit international des Droits de l’homme” (1974) *Recueil des Cours de l’Académie de Droit International de la Haye*, tome 140, 344–345; Karel Vasak, “Les différentes catégories de Droits de

First generation: Includes a set of civil and political rights which were the result of revolutions in both Europe and America, and the fruit of social ideas, human philosophies, and liberal concepts.

Second generation: Includes a set of economic, social, and cultural rights. First defenders of these rights were European nongovernmental human rights associations which adopted what had been known as a supplement to the Declaration of the Rights of Man and the Citizen of 1789. Furthermore, Warsaw Pact states played a role² in the discussion, approval, and accommodation of these rights within the framework of the United Nations' instruments. These rights were also supported by many Third World countries throughout the three decades of the second half of the twentieth century, which mirrored some of the socialist concepts, social demand issues, and national demands of developing countries which reclaimed liberty from the yoke of colonialism and looked toward a better future for their people.

Third generation: Includes a set of rights which featured the end of the twentieth century and were associated with the advocacy of a new economic system³ in the 1970s, as well as a new world order in the 1990s. Thus, the call came from the global nongovernmental domain promoting new rights which are mutually interconnected and have become known under the title of "solidarity rights", such as: the right to development, the right to peace, the rights of the elderly, and the rights of the disabled or people with special needs. The international community also shifted its attention to certain shameful and appalling social conditions and the need to fight poverty, homelessness, and disease.

Some people have also started to talk about a fourth "generation" of human rights, listing therein: the right to democracy and a welfare state, the right to human prosperity, and the right to preserve human dignity against the adverse consequences of scientific experiments, the right to training and rehabilitation, the right to acquire knowledge for all, the necessity of preserving biodiversity, et cetera.⁴ But this presentation of the various generations of human rights as such, and the recognition of the importance of these rights, their chronology as well as their development from intellectual and philosophical standpoints and of the variety of their degrees of enforcement, does not imply that the division of rights should be accepted into generations. One view is that civil and political rights on the one hand, and economic, social, and cultural rights on the other hand, complement each other. Furthermore, human rights are one entity; therefore, the separation of these two sets of rights is not definitive.⁵ Honoring these rights, defending them, instilling them through education, disseminating them, and promoting awareness of them are all but elements in one strategy. Yet it can be agreed that the enforcement of some of them, such as economic, social, and cultural rights, can be undertaken gradually,⁶ as well as phased into stages, depending on the economic and social levels of the respective countries. However, the enforcement and respect of civil and political rights do not require any economic or developmental level to be attained. It is

l'homme" (1990) *Les Dimensions universelles des Droits de l'homme*, Bruxelles, Bruylant, 297 et seq.; "Les différentes typologies des Droits de l'homme" (2004) E. Bribosia and L. Hennebel (dir), *Classer les droits de l'homme*, Bruxelles, Bruylant 11–23.

² Before the fall of the Berlin Wall and the concurrent collapse of this bloc.

³ Mohammed Bedjaoui, *Pour un nouvel ordre économique international* (Unesco, Paris 1979).

⁴ Heinrich Scholler, "L'universalité des droits de l'homme" (*Horizons et débats*, 2009), <http://www.horizons-et-debats.ch/index.php?id=1390>, accessed July 13, 2015.

⁵ Ahmad Al-Rashidi, *Human Rights, A Comparative Study in Theory and Practice* (2nd edn Al-Shorouq International Library, Cairo 2005) 143.

⁶ "Gradually" is meant in terms of enforcement, not in terms of importance. See: Mohammad Yusuf Alwan, *Human Rights in light of National Laws and International Charters* (without publishing house 1989) 130.

essential, therefore, that these rights are enforced without any delay or excuse. Finally, solidarity rights continue to be associated with the political, economic, and social aspects of various countries, with the result that their enforcement is also associated with economic and social conditions and the prevailing world order. At the same time, they are related to a set of priorities which themselves must be addressed and effectively resolved. On the other hand, if we admit that civil and political rights were historically recognized in a first stage, then the distinction between economic, social, and cultural rights should be considered “serious” in practice,⁷ due to the interconnectivity and overlapping between these two sets of rights. To illustrate this one finds, for example, that “the right to strike”, which is a form of the “freedom of expression”,⁸ is provided for in the International Covenant on Economic, Social and Cultural Rights (Art. 8, paragraph d). However, the Covenant does not provide for “the right to property”, in spite of its economic nature.⁹

Finally, it is noted that there is a group of “common provisions”¹⁰ between the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, such as the first article, which recognizes that all people have the right of self-determination, and the principle of nondiscrimination, which is provided for in both international covenants, as well as the principle of equality between men and women.

One proposes that the definition of “sets” of human rights is used instead of “generations” of human rights, because the latter term, in addition to what was previously stated, also suggests the preference of one generation over another, or a sequence in terms of importance, or a priority for one generation over another generation, while the use of the term “sets” helps to avoid confusion, debate, and uncertainty in the use of terms.¹¹

III. PART I: NATURE OF CIVIL AND POLITICAL RIGHTS

Various countries of the international community have recognized civil and political rights as a set of fundamental human rights, and have therefore included them into their respective national constitutions and legislation. International organizations have also adopted many international and regional conventions thereon, with a variety of related protection mechanisms.

⁷ Patrick Wachmann, “Les droits de l’homme” in *Connaissance du Droit* (Dalloz, Paris 2008) 55–56.

⁸ Ibid., 56.

⁹ Isam Mohammad Zanati, *Protection of Human Rights within United Nations, the Basic Institutional Baseline-Framework—Follow-up and Control Mechanisms* (Al-Nahda Al-Arabyiah [Publishing] House, Cairo 1997–1998) 77–78.

¹⁰ Alwan (n. 6) 129.

¹¹ *Soobramoney v. Minister of Health* (1999) 50 B.M.L.R.224 (Constitutional Court of South Africa): Although the Court did not decide in favor of the appellant, the comments of Arthur Chaskalson are relevant. Accordingly, the right to human life (a civil-political right) includes the right to health care, housing, food, water, work, and social security (socio-economic rights) as phrased by Justice O’Regan in *S v. Makwanyane* (1995) 1 LRC 269 (Constitutional Court of South Africa). Key decisions of the Supreme Court of India could also be cited, e.g., *Unni Krishnan, J.P., v. State of A.P. and Others* (1993) AIR 2178, and *Mohini Jain v. State of Karnataka* (1992 AIR 1858). The latter two decisions look at the protection of socio-economic rights (right to education) using political and civil rights (right to life). See also *Olga Tellis v. Bombay Municipality Corporation* (1985) 2 Supp SCR 51 and, from the Supreme Court of Bangladesh, *ASK v. Government of Bangladesh* (1999) 19 BLD 488.

To start with, this article will examine the nature of civil and political rights (Research Topic I), and continue then with an overview of the enforcement mechanism of these rights (Research Topic II).

A. Research Topic I: Nature of Civil and Political Rights

Recognition of these rights came in the early stages of the time when the international community, its states, and individuals started paying attention to human rights. Various national constitutions and legislation now provide for the right to life, prohibition of torture, prohibition of servitude and slavery, equality before the law, freedom of belief, freedom of expression, and other civil and political rights. They also provide for the protection of these rights and the criminalization of those who violate or abuse them.

On the other hand, civil and political rights are distinct in that those states which recognize and protect them are solely, but necessarily, required to “refrain” from interfering in the exercising process of such rights, or refrained from hampering the process of enjoying them and benefiting from them. The duty of such states is restricted to the regulation function of the exercising process of the rights in question so that they can be enjoyed in a way which is not detrimental to the rights and freedoms of others, on the one hand, nor disturbing public order, on the other hand. This also implies that civil and political rights ought to be enforced “immediately”, as well as honored in their entirety without resorting to any kind of discrimination.¹²

Civil rights are particularly characterized as “absolute”. They have not been recognized by virtue of national laws; they are part of human nature and deep-rooted in human dignity.¹³

In his inaugural lecture at the 1982 session of the International Institute of Human Rights, Professor Renè-Jean Dupuy clarified that any subject related to human rights involves two directions: the first being vertical, the other horizontal.¹⁴

The “vertical” direction implies the citizen’s relationship with his authority. In other words, such a relationship involves the rights that have the character of protest or claim, whereas the “horizontal” direction relationship involves the rights which require solidarity and cooperation. The international human rights law encompasses both directions. The vertical direction includes the civil and political rights that relate to the ties existing between the citizen and the authority. The horizontal direction is concerned with the economic and social rights which require a state, at the national level, to distribute resources adequately from the wealthy to the indigent.

At this stage, it is useful to refer to two points:

1. Although civil and political rights impose on a state, as already mentioned, the duty to “refrain” [from interfering in the exercise of rights], does not preclude the need for a state to intervene to regulate these rights and ensure their proper enforcement. Examples that can be quoted in this respect are: the right to a fair trial, where a state is under obligation to ensure that such right is duly applied, and the intervention for

¹² M. Bossuyt, “La distinction juridiques entre les droits civils et politiques et les droits économiques, sociaux et culturels” (2004) vol III, n° 4 *Revue des Droits de l’Homme*, 791.

¹³ *Id.* 790.

¹⁴ Renè-Jean Dupuy, “The universality of human rights” in Dr. Mohammed Amin Al-Midani (ed), *Translations in the International Protection of Human Rights* (The Human Rights Information and Training Center, Taiz, Yemen 2005) 13.

ensuring a fair trial by way of providing all the basic material means for the [smooth] functioning of the courts including their various departments and divisions, as well as ensuring that judges and lawyers do practice their duties.¹⁵

2. If the exercise of civil rights is established for everyone regardless of any form of segregation or discrimination, political rights are also primarily established for citizens, such as the right to participate in public affairs, or to hold public office,¹⁶ or to stand for elections or participate therein. This will be examined in detail, in Research Topic II of section B of this article.

It is perhaps useful to refer briefly to the nature of economic and social rights, which are at variance with the nature of civil and political rights, in that the civil and political rights place upon a state that recognizes them and, hence, includes them in the provisions of its legislation and law, the duty to “intervene” so that they can be exercised in a manner benefiting all segments of the society and all members of the society fairly and equally, as well as the duty to create the conditions that are conducive to their proper enforcement.

However, it must also be pointed out that the enforcement of economic, social, and cultural rights depends on the economic conditions and the financial resources of the respective states, which means that their enforcement is achieved in a “gradual”¹⁷ form and that the duty of economically developed states and those with rich resources, regardless of their nature, is more pressing, obligatory, and important than that of developing or poor states that seek to honor and enforce those rights, relying on their primitive potentialities and modest resources.

The civil and political rights include, *inter alia*, the following:

1. The right to life.
2. The right to security and safety.
3. Prohibition of servitude and slavery.
4. Prohibition of torture and inhuman or degrading treatment.
5. The right to respect for personal freedom.
6. The right to recognize the legal personality.
7. The right to nationality.
8. The right to respect for family and private life.
9. Freedom of belief and religious practice.
10. Freedom of opinion and expression.
11. Freedom of association and assembly.
12. Freedom of movement and choice of residence.
13. The right to participate in the management of public affairs.
14. The right to hold public office.
15. The right to fair trial.

Finally, it must not be forgotten that there are a set of restrictions on the exercise of civil and political rights in cases of emergency or exceptional circumstances.¹⁸

¹⁵ *Soobramoney v. Minister of Health* (n 11) para. 39 (Justice Madala), concerning the right to life and the positive duties of the State.

¹⁶ Ahmad Al-Rashidi, *Human Rights, A Comparative Study in Theory and Practice* (2nd edn Al-Shorouq International Library, Cairo 2005) 138–140.

¹⁷ Bossuyt (n 12) 788.

¹⁸ Art. 4 of the 1996 International Covenant on Civil and Political Rights.

B. Research Topic II: Enforcement Mechanism of Civil and Political Rights

It will be shown how this mechanism is put into effect at the international level (Requirement I), then at the regional level (Requirement II).

1. Requirement I: Enforcement Mechanism of Civil and Political Rights at the International Level

Civil and political rights are enforced at the international level by depending on the mechanism of the International Covenant on Civil and Political Rights, which was adopted by the General Assembly of the United Nations on December 16, 1966; it entered into force on March 23, 1976.

Part IV of this International Covenant provides for the establishment of a mechanism to implement its articles, and thus a committee called "Human Rights Committee" was established for this purpose.

The terms of reference of the Human Rights Committee are of three types:

1. Considering reports of states parties to the International Covenant (Art. 40 of the Covenant).
2. Receiving and considering communications (Art. 41). But communications under this article may be received and considered only if ten states' parties have announced their approval to that effect; this actually took place on March 28, 1979.¹⁹
3. Examining individual complaints based on the Optional Protocol to the International Covenant on Civil and Political Rights, which was adopted by the United Nations General Assembly on December 26, 1966; it entered into force on March 23, 1976.²⁰

Art. 1 of this Optional Protocol establishes as the competence of the concerned committee "to receive and consider communications from individuals subject to its jurisdiction, who claim to be victims of a violation by that State Part of any of the rights set forth in the Covenant".

2. Requirement II: Enforcement Mechanism of Civil and Political Rights at the Regional Level

A set of regional conventions on human rights provide for enforcement mechanisms related to civil and political rights. The following are among those regional conventions.

A. EUROPEAN CONVENTION ON HUMAN RIGHTS

It is the Convention for the Protection of Human Rights and Fundamental Freedoms which was adopted by the Council of Europe on November 4, 1950, and entered into force on November 3, 1953,²¹ and 14 additional protocols to the Convention for the Protection of Human Rights and Fundamental Freedoms, all of which entered into force as well.²²

¹⁹ As of 1/2/2012, only two Arab States have announced their approval to receive and consider such communications, namely Algeria and Tunisia.

²⁰ As of 1/2/2012, only five Arab States have ratified the Optional Protocol, namely: Algeria, Djibouti, Libya, Somalia, and Tunisia.

²¹ On this Convention and its articles, Mohammed Amin Al-Midani, *The European System for the Protection of Human Rights* (3rd edn Al-Halabi human rights publications, Beirut 2009) 45 et seq.

²² See a translation of this European Convention and some of its additional protocols in Dr. Mohammed Amin Al-Midani and Dr. Nazih Ksepe (trs), *The European Conventions for the Protection of Human Rights*

The enforcement mechanism of the European Convention on Human Rights depends on the terms of reference and activities of a single body, namely, the European Court of Human Rights, as this Court has issued several rulings and decisions relating to the civil and political rights set forth in that Convention.

B. AMERICAN CONVENTION ON HUMAN RIGHTS

It was adopted by the Organization of American States on November 22, 1969; it entered into force on July 18, 1978.

The enforcement mechanism of the civil and political rights, which is provided for in this Convention, depends on the terms of reference and activities of the Inter-American Commission on Human Rights²³ and the Inter-American Court of Human Rights.²⁴

C. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

It was adopted by the Organization of African Unity (African Union as of 2002), on June 26, 1981; it entered into force on October 21, 1986.

The enforcement mechanism of the civil and political rights depends on the work of the African Commission on Human and Peoples' Rights and its activities²⁵ on the one hand, and on the work of the African Court on Human and Peoples' Rights²⁶ on the other.

D. ARAB CHARTER ON HUMAN RIGHTS

It was adopted by the Arab summit conference held in Tunisia on May 23, 2004; it entered into force on March 16, 2008.²⁷

The enforcement mechanism of the civil and political rights in this Arab Charter depends on the work of the Arab Committee for Human Rights.²⁸

IV. PART II: ENFORCEMENT OF CIVIL AND POLITICAL RIGHTS CONTRIBUTES TO DEMOCRATIC PARTICIPATION

In this part, we will review how Arab states honor civil and political rights (Research Topic I), and we will also address the enforcement mechanism of these rights aimed at advancing the process of democratic participation (Research Topic II).

(publications of Cairo Institute for Human Rights Studies, a series of human rights educational publications 22, Cairo 2010) 33 et seq.

²³ B. Santoscoy, *La Commission interaméricaine des droits de l'homme et le développement de sa compétence par le système des pétitions individuelles* (P.U.F., Paris 1995).

²⁴ See on the formation of this American Court, its terms of reference and activities, Mohammed Amin Al-Midani, "The Inter-American Court of Human Rights (a study on its general system)" 3 (2007) the Yemeni Human Rights magazine, Sana'a, 99 et seq.

²⁵ F. Ouguergouz, *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité* (P.U.F., Paris 1993).

²⁶ See on the formation of this African Court, its terms of reference and activities, Mohammed Amin Al-Midani, "The African Court on Human Rights (the study in its public system)" (2010) 24 Journal (*Tolerance*), publications of Ramallah Center for Human Rights Studies, 143–160.

²⁷ See the text of this Arab Charter in the documents of the League of Arab States: ((ق.ق. 270 (16)—23/5/2004.

²⁸ See on the formation of this committee its terms of reference and activities, Mohammed Amin Al-Midani, *The Arab Charter on Human Rights, Human Rights Studies and Documents*; a series of issues of Al-Jinan University (Al-Muna Printing and Publishing House, Tripoli, Lebanon 2012) 134.

A. Research Topic I: Arab States and How They Honor Civil and Political Rights

A quick glance of the Arab States' participation in the adoption process of the two International Covenants will be provided, namely, the International Covenant on Civil and Political Rights, with which is primarily concerned here, and the International Covenant on Economic, Social and Cultural Rights (Requirement I), and the consequential Arab States' commitment to honoring the civil and political rights (Requirement II).

1. Requirement I: Arab States' Participation in the Preparation of the Two International Covenants on Human Rights

After the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly on December 10, 1948,²⁹ the Commission on Human Rights (Human Rights Council since 2006)³⁰ launched, for its part, the preparation of an international covenant and related enforcement procedures, and further the preparation of a second covenant. Drafts of both covenants were prepared within three periods, viz.:

First Period: The Commission on Human Rights prepared several drafts of an international covenant; it presented a first draft that included a list of civil and political rights.

Second Period: Another draft was prepared including a list of economic, social, and cultural rights.

Third Period: This period is known as a period of "hesitation"; it featured the divergence of opinions and differing views over the number of instruments to be adopted and the rights to be included therein. It was a stage characterized by a debate over what was termed as "a matter of principle and the problem of how it can be applied".³¹

In the first preparation period of the two International Covenants on Human Rights, the participation of Arab states was mediocre;³² only the delegate of Lebanon (Charles Malik), who was then Chairman of the Commission on Human Rights, took part in the preparatory work which was undertaken during that period.

During the second and third preparation periods of the two covenants in question, delegates of six Arab states, namely, Syria, Iraq, Egypt, Lebanon, Saudi Arabia, and Yemen, took part in the work undertaken by the Third Committee of the United Nations General Assembly. There is a distinction in this respect between two phases, i.e., one being "traditional" and the other "new".³³ It is perhaps useful to note that the delegates of Arab states were split over whether to adopt one covenant combining all the civil, political, economic, social, and cultural rights, or to adopt two covenants: the first of which to include the civil

²⁹ See on participation of Arab States in the preparation process of this Universal Declaration, Mohammed Amin Al-Midani, "Arabs and Drafting of the Universal Declaration of Human Rights" (2009) 33 Journal on Democracy published by Al-Ahram Society, Cairo, 161–172.

³⁰ In its resolution A/60/L.48, dated 15/3/2006, the United Nations General Assembly decided to replace the Commission on Human Rights with a new body, i.e., the Human Rights Council.

³¹ R. Cassin, "La Déclaration Universelle et la mise en œuvre des droits de l'homme" (1951) 79 Recueil des Cours de l'Académie de Droit International de la Haye 270.

³² M. A. Al-Midani, *Les apports islamiques au développement du droit international des droits de l'homme* (1987), Thèse d'État en Droit Public, Faculté de Droit et des Sciences Politiques, Université de Strasbourg III 221.

³³ See details of the participation of the delegates of Arab States and their position on this draft in Al-Midani, *The Role of Arabs* 26–27.

and political rights, and the second to include the economic, social, and cultural rights. In its resolution No. 543(6), the United Nations General Assembly eventually decided to adopt two international covenants.³⁴

2. Requirement II Arab States' Commitment to Honoring Civil and Political Rights

The 22 Member States of the League of Arab States are classified as the Arab states. Seventeen of these states have ratified the International Covenant on Civil and Political Rights, namely: Jordan, Bahrain, Tunisia, Algeria, Comoros, Djibouti, Sudan, Syria, Somalia, Iraq, Lebanon, Libya, Kuwait, Egypt, Morocco, Mauritania, and Yemen.

The first Optional Protocol to the International Covenant on Civil and Political Rights, which is concerned with the submission of individual complaints, was only ratified by four Arab states, namely, Tunisia, Algeria, Djibouti, and Libya. It is worth noting that Tunisia has ratified this Protocol, on June 29, 2011, after the success of its revolution.

As for the second Optional Protocol to the International Covenant on Civil and Political Rights, which is concerned with the abolition of the death penalty and was adopted by the United Nations General Assembly on December 15, 1989, and entered into force on July 11, 1991, it was only ratified by one Arab state, i.e., Djibouti.³⁵

B. Research Topic II: Guaranteeing Civil and Political Rights and Democratic Participation

Undoubtedly, the process of guaranteeing civil and political rights plays a fundamental role in achieving democracy. The enforcement of these rights helps to put into effect the principle of popular control on the one hand, and the principle of political equality on the other.³⁶ Popular control is achieved through the participation of citizens in the activation of state institutions and their activities with the protection of the civil and political rights in sight. The principle of political equality strengthens such control through achieving full equality for those citizens, regardless of any discrimination among them, in standing for public office, joining political parties, participation in the management of state affairs, and enjoyment and exercising of freedom of expression, so that integration of popular control and political equality is realized.

To start, "democracy" and its concept will be discussed, and forms of its enforcement (Requirement I); it will then be seen how democratic participation can be activated through the enforcement of political rights (Requirement II).

1. Requirement I: Democracy

The concept of "democracy" will be identified (first), then the forms of its enforcement (second), as well as the key areas to enhance such enforcement (third).

A. CONCEPT OF "DEMOCRACY"

It is important not to be caught in the midst of a debate over the definition of the concept of "democracy" and whether or not this concept corresponds to the concept of "*shūrā*" [consultation] in Islam³⁷ [Muslims to decide their affairs in consultation with those who will be

³⁴ *Id.* 27.

³⁵ <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=fr>, accessed June 15, 2015.

³⁶ David Beetham and Kevin Boyle, *Democracy, Questions and Answers* (UNESCO publications, Paris 1996) 106.

³⁷ See in this regard, Mohammed Abed Al-Jabri, *Democracy and Human Rights*, series of the National Culture (26), Arab Thought Issues (2), Publications of the Centre for Arab Unity Studies, Beirut, 1994, in particular the chapter entitled: "Shura is something [. . .] democracy is something else," 38 et seq.

affected by that decision]. However, there is not a sententious definition of the concept in question. Therefore, it is sufficient to choose some definitions which may possibly be identical with or close to what is presented in this article. Hence, democracy:

1. "is a political choice the purpose of which is to regulate social and political streams and forces in such a way that will allow them to interact with each other in order for them to exercise power or exercise influence thereupon within the framework of institutions and rules based on the legitimacy of disagreement and the freedom of elections and the law of the majority and respect for the minority, provided that differentiation between the majority and the minority will not preclude looking always for conciliation between various interests and opinions";³⁸
2. "involves two intertwined principles, namely the popular control of decision-making in this collective framework, and guaranteeing equal rights in the exercise of such control";³⁹
3. "allows these principles—freedom, equality and participation—to form the dimensions of the optimal democratic ideal, and sees the abuse of any of these dimensions as constituting an assault on that optimal ideal and a departure from it in equal measure."⁴⁰

It is submitted that there is no preference of one definition over the other; furthermore, there is no sententious definition of the concept of "democracy". Yet, one may perhaps extract from the above and other definitions a set of standards that helps to connect democracy on the one hand, with the civil and political rights on the other hand, through examining democracy enforcement forms and committing to achieving them.

B. DEMOCRACY ENFORCEMENT FORMS

These forms may be summed up in the following points:

1. Equal treatment. The concept of "equality" and the process to achieve it constitute a real challenge to enforcement of democracy in the Arab world. Undoubtedly, there are several points associated with this concept that require discussion, dialogue, exchange of views, and presenting proposals in a real and serious attempt to actually put it into effect.
2. It is essential for a government to attend to the needs of its people. Nobody can deny that it is generally known among citizens in the Arab world that governments do not attend, as necessary and as required, to the needs of their peoples. It can be further said that the peoples of the Arab world are convinced that efforts of members of their governments are primarily directed toward achieving their personal interests. Hence, there is need to change this belief by way of ensuring, through independent and fair institutions, that government officials will perform their duties well in the first stage, and make the effort in a subsequent stage to change the prevailing

³⁸ Abdel-Fattah Omar, "Political Culture and Democracy (general remarks about some aspects of political culture in the Arab states)" and "Education on human rights and democracy in the Arab world" (1994), the Arab Institute for Human Rights, Tunisia 17.

³⁹ Beetham and Boyle (n 36) 9.

⁴⁰ Ali Eddin Hilal, "Democracy and the Concerns of Contemporary Arab Man" in *Democracy and Human Rights in the Arab World* (Arab Future Book series (4), Publications of the Center for Arab Unity Studies, Beirut 1998) 10.

conviction among citizens and demonstrating to them that the government and its members are attending to their needs and working toward the achievement of their interests as citizens.

3. Maintaining dialogue and freedom of expression and demonstrating respect for the opinions of others are the most important democracy enforcement forms. It flanks a lot of factors that aid in democracy being honored and activated.
4. Protection of fundamental freedoms. There is undoubtedly an essential need to demonstrate the content of fundamental freedoms and their significance. Civil and political rights are among the fundamental freedoms which various state institutions in the Arab world must explain and streamline as well as familiarize the citizens with.
5. Rotation in holding office. Unfortunately, the Arab world's contemporary history has not witnessed rotation in holding office as a form of democratization. Monarchical regimes in the Arab world states are not of constitutional character. A king, a prince, or a *sulṭān* is the ruler with absolute authority, whereas ministers are merely and primarily an executive device. Furthermore, by looking at the republican regimes, one will find that a president remains in power for a long time extending up to three or even four decades as is the case in many Arab countries. Certain Arab republics have witnessed bequeathing office or attempts at bequeathing it. This situation places the principle of "rotation in holding office" at stake and poses a serious and dangerous challenge to the enforcement of and honoring democracy in the Arab world. The history of the Arab countries will need to witness new experiences in affirming the principle of rotation in holding office and in safeguarding it. Would the Arab revolutions and new regimes in certain Arab countries help to consolidate the principle of rotation in holding office? Perhaps the following areas can help in promoting enforcement of democracy and will play a role in this regard.

C. KEY AREAS FOR PROMOTING ENFORCEMENT OF DEMOCRACY

There are a number of key areas that allow promotion of democracy enforcement, including through the following.

1. Education on democracy. Education is a key area and vital for understanding the meanings of democracy and its dimensions, on the one hand, and for putting them into effect, on the other hand.

Whenever the importance of education on democracy, in particular, is raised—and education on human rights, in general⁴¹—one should also enquire at the same time about the educational methods being followed by families, schools, institutes, and universities in the Arab world,⁴² and whether they are preparing generations of people who believe in the concept of "democracy", its importance, and its role in achieving the required political and democratic participation which we aspire for.

The topic of "education" in general, "education on democracy" and "education on human rights" in particular, should be accorded primary attention in all educational and teaching projects which themselves must also be reviewed, developed, and improved in the countries of the Arab world. By reviewing the efforts made during the last decades in

⁴¹ For example, *Education on Human Rights and Democracy in the Arab World*; publications of the Arab Institute for Human Rights, Tunisia 1994.

⁴² Omar (n 38), 20–21.

various Arab countries on those projects, and the progress achieved therein, one would conclude that the results fell short of expectations. It is submitted that those results have not reached the goal of the conferences and seminars held, the courses and workshops organized, the funds spent, and for which research was conducted and studies and books were published. Space here does not allow for detail, but the lack of coordination and cooperation among the various stakeholders responsible for and supporting those projects, and the little attention and publicity accorded to them—especially by media and publishing entities—and the noninclusion of such projects among the priorities of the programs being undertaken by various governments in the Arab countries, combined with other reasons, have not allowed “education” in its different forms and types to play the desired effective and practical role in promoting democracy enforcement.

2. The essential role of the media and social networking. Media and social networking play an important and essential role in achieving and enforcing democracy.

The question that arises in this area is: To what extent did the media and networking succeed in playing their respective roles in the democratic participation process; did they lead to the success of the democratic participation process, or did they, otherwise, factor in its failure; and were they up to the level of such process or they failed to act with the result that the process failed to achieve its objectives?

The recognized media sources (press, radio, and television) have been described for several decades as the “fourth power” besides the three traditional powers: legislative, executive, and judicial. There is nowadays a “fifth power”: social media devices (Facebook, Twitter, and YouTube). Nobody can deny the role these devices have played in the transition to democracy in certain Arab countries (Egypt, for example), and how these devices are employed and rather exploited in other Arab countries. Of course, such a situation calls for examining the role being played by the traditional media and the social networking as well.

2. Requirement II: Activation of Democratic Participation through Enforcement of Political Rights

Democratic participation is activated through honoring political rights and their enforcement in the actual situation.

“Political rights” can be defined, in this area, as “a range of rights that are established for an individual in his capacity as a member of a particular political group, with the intention of enabling him to participate in the management of the affairs of the community to which he belongs and to which he is linked by nationality ties”⁴³

In other words, “citizenship” is a condition for exercising political rights through standing for elections and participating therein, as well as applying for public posts and occupying them.

The concept of “citizenship” acquires a critical, sensitive, and significant importance in the circumstances being currently witnessed by certain Arab countries, insofar as respect for and enforcement of this concept will allow for real equality in practice among all citizens of a state, regardless of any religious, sectarian, ethnic, or linguistic dimension, as long as everyone is a citizen and is, thus, eligible to participate democratically in the political life of their state.⁴⁴ This is the case on one hand.

⁴³ Al-Rashidi (n 5) 139.

⁴⁴ One recalls in this regard that certain states of the European Union have allowed citizens of other states in this Union to participate in municipal elections.

This entails, on the other hand, ensuring compliance with a set of legal rules and constitutional provisions in each state where a citizen can exercise his democratic right to political participation. Some of those rules and provisions relate to setting a legal age to stand for elections, allowing submission of applications to hold public posts, and participation in the elections.

Such political rights also have the character of “duties” where participation in political life is part of the responsibility of citizens, which also depends on their degree of political awareness, their willingness to assume responsibilities, and their keenness to bring about the success of the democratic participation in their countries.

V. CONCLUSION

Part I of this article has highlighted the distinct feature of the civil and political rights in that they only require states which recognize and protect them to “refrain” from interfering in the exercising process of such rights, or not to impede the process of enjoying them and benefiting from them; that is to say, in other words, the civil and political rights ought to be enforced “immediately” as well as honored universally without resorting to any form of segregation or discrimination.

The civil rights are regarded, as “absolute” rights, as they are part of human nature and deep-rooted in human dignity. On the other hand, the political rights are primarily established for citizens, such as the right to participate in public affairs or to hold public office, or to stand for elections or participate therein.

Research Topic II of part II of this article reviewed certain definitions of the concept of “democracy” and its enforcement forms, as well as to key areas for promoting this enforcement, focusing in particular on the role of education on democracy, and the fundamental and important role of the media and social networking in achieving democracy.

Additionally, this article has shown that activation of democratic participation takes place through honoring political rights and their actual enforcement. “Citizenship” was referred to as a condition for exercising political life as it allows the achievement of real equality in practice among all citizens of a state, regardless of any religious, sectarian, ethnic, or linguistic dimension, hence allowing citizens to participate democratically in the political life of their states.

Citizenship Rights in Selected Arab Constitutions

BADRIA ABDULLAH AL-AWADHI*

I. INTRODUCTION

This article outlines the status of citizenship rights in the legal systems of the monarchies on the Arab Peninsula, which represent the group of constitutions that has not been directly influenced by the events of the Arab Spring and its aftermath. These monarchies, all part to the Cooperation Council for the Arab states of the Gulf (GCC), are characterized by an extremely high ratio of non-citizens to citizens.¹ Large groups of the population consist of foreign workers with temporary residence and stateless individuals, which face, to varying degrees, disadvantages with regard to civil rights in comparison with regular citizens. Therefore citizenship rights and the right to citizenship are of a great significance especially on the Arab Peninsula.

This article will examine the present legal situation of citizens and non-citizens in the GCC States and draw a comparison with countries such as Egypt, Libya, and Tunisia, having recently adopted new constitutions as a consequence of the Arab Spring movement. Analyzing the changes in those Northern African countries will contribute to exposing insufficiencies in the GCC States and encountering those with possible measures to improve the citizenship rights and civil rights situation in the GCC States.

* The author and the editors sincerely thank Mr. Mohammad A. El-Haj for translating this article into English.

¹ For instance, out of the population of Qatar only 12% are Qatari citizens; see: Human Rights Watch, "World Report 2013: Qatar," <http://www.hrw.org/world-report/2013/country-chapters/Qatar>, accessed May 27, 2015.

II. SIGNIFICANCE AND RELEVANCE OF CITIZENSHIP RIGHTS

“Citizenship” denotes the status of a person as belonging to a particular region in which he lives permanently within a particular state or as holding the nationality of that state.² Additionally, it indicates that a person is taking part in the administration of the state’s affairs, being subject to the laws issued by the state and enjoying the same rights, obligations, and specific duties toward the state as other citizens and on an equal basis with them.³

Those encompass a range of fundamental human and civil rights set forth in national constitutions and basic international conventions and charters on human rights, which are ratified by states, including the states of the Gulf Cooperation. Some of these civil rights are limited to citizens. For instance, the right to vote, the right to join political parties, the freedom to choose his place of residence within the borders of the state and to leave it and to return to it, the right to participate in public life and to assume public office, or the right to assemble may only be exercised by citizens. However, some civil rights such as the presumption of innocence, personal freedom, and the prohibition of arbitrary arrest may be entitled to all persons residing in the respective state. Therefore one has to distinguish carefully between universal civil rights on the one hand and rights of citizens on the other, as the difference between citizens and non-citizens may have both significant legal consequences and effects in daily life.

This becomes even clearer when considering the situation in the GCC countries with their special demographic structure. Migrant workers make up a large part of the population and therefore are precluded from participation in public life and other basic civil rights that are denied to them due to their status as non-citizens. For instance, nearly 500,000 migrant workers officially live in Bahrain, which has a total population of approximately 1.3 million.⁴ The same goes for Saudi-Arabia, whose population of nearly 30 million includes approximately 9 million migrant workers.⁵

Additionally, individuals such as immigrants or descendants of Bedouins, which may have lived on the Arab Peninsula for decades, often face statelessness in the GCC countries. About 1,500 Qatari⁶ and 110,000 Kuwaiti residents are *bidūn jinsīyah* (without nationality) and claim their citizenship.⁷ These claims often end up in bureaucratic and difficult administrative processes. The government deliberately prevents the *bidūn* from acquiring the respective citizenship, which means that they are not able to register for education and other governmental institutions.⁸ As a further disadvantage, the government rejects the

² For a detailed analysis of the term “citizenship,” refer to Thomas Janoski, *Citizenship and Civil Society: A Framework of Rights and Obligations in Liberal, Traditional, and Social Democratic Regimes* (Cambridge University Press, Cambridge 1998) 8 et seqq.

³ Cf. UNESCO, “Citizenship” (Glossary Entry), <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/citizenship>, accessed May 27, 2015.

⁴ Human Rights Watch, “World Report 2013: Bahrain,” <http://www.hrw.org/world-report/2013/country-chapters/Bahrain?page=3>, accessed May 27, 2015.

⁵ Human Rights Watch, “World Report 2013: Saudi Arabia,” <http://www.hrw.org/world-report/2013/country-chapters/saudi-arabia>, accessed May 27, 2015.

⁶ International Observatory on Statelessness, <http://www.nationalityforall.org/Qatar>, accessed May 27, 2015.

⁷ Refugees International, Kuwait (country profile), <http://www.refugeesinternational.org/where-we-work/middle-east/kuwait>, accessed May 27, 2015.

⁸ Cf., for example, current reports on *bidūn* rights, <http://www.bedoonrights.org/category/citizenship>, accessed May 27, 2015.

registration of *bidūn* children at birth. However, there has been some progress in Bahrain regarding education and health care.⁹ Thus, large parts of the population of the GCC States are not entitled to the benefits that come with citizenship. Out of the Qatari and the United Arab Emirates' (UAE) population only 10% are citizens. The result is a significant difference inside the GCC States' populations regarding governmental treatment and guaranteed rights. For instance, the *bidūn* may not be allowed to acquire an identity card or driving license, may be excluded from any state service such as health care or education, and have no right to travel abroad or buy houses; additionally, they may be deported at any time.¹⁰ The described difficulties non-citizens face in daily life in the GCC States (may) constitute violations of rights such as the right to education or the right to health care that are provided for in international human rights conventions. Such violations have been documented by several nongovernmental organizations and human rights organizations supporting *bidūn* and migrant workers in the Gulf States.¹¹

Besides, a new notion may be observed, which tends toward a GCC citizenship, as citizens of GCC States more and more enjoy rights in other Gulf States that go further than the rights of regular foreign residents.¹²

To conclude, the importance of citizenship especially in the Gulf States must not be underestimated. An analysis of both citizenship and civil rights will follow in order to assess and analyze the legal situation and difficulties in the respective countries.

III. CITIZENSHIP RIGHTS ON THE ARAB PENINSULA

In order to assess the legal situation of citizenship rights on the Arab Peninsula, the following paragraphs will examine some of the key aspects in this regard in the Gulf States (Sections A and B) and then compare the legal framework of some states that have strongly been influenced by the Arab Spring (Section C).

A. The Right to Citizenship and the Prohibition of Nationality Abrogation and Deportation

The right of a person to acquire a nationality is inherent in the constitutions of the majority of Arab states as well as in international conventions and declarations. For example, Art. 15 of the 1948 Universal Declaration of Human Rights (UDHR)¹³ states: "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".¹⁴ This international principle has been codified in the Arab

⁹ Human Rights Watch, "World Report 2013: Qatar," <http://www.hrw.org/world-report/2013/country-chapters/Qatar?page=3> and "World Report 2013: Bahrain," <http://www.hrw.org/world-report/2013/country-chapters/Bahrain?page=3>, both accessed May 27, 2015.

¹⁰ Eric Andrew McCoy, *Iranians in Bahrain and the United Arab Emirates* (Umi Microform Pro Quest, Ann Arbor 2008) 47 et seq.

¹¹ See Bedoon rights, <http://www.bedoonrights.org> or the Gulf Center for Human Rights, <http://gc4hr.org>, both accessed May 27, 2015.

¹² Jane Kinninmont, "Citizenship in the Gulf" in Ana Echagüe (ed), *The Gulf States and the Arab Uprisings* (Fride, Madrid 2013) 48. The full text is available online at http://fride.org/descarga/The_Gulf_States_and_the_Arab_Uprisings.pdf, accessed May 27, 2015.

¹³ Universal Declaration of Human Rights, UNGA Res 217/A/III (December 10, 1948).

¹⁴ Further examples for the presence of the right to nationality in international conventions: Art. 7 of the 1989 Convention on the Rights of the Child, the 1997 European Convention on Nationality.

constitutions as the right to citizenship, whereby everyone has the right to acquire a nationality and his nationality cannot be abrogated. When analyzing the constitutions of the GCC States with regard to the prohibition of nationality abrogation and the principle of non-deportation, two different ways of implementation can be distinguished: Either those principles were awarded constitutional status, or they were stipulated in respective nationality laws.

According to the legislation of the majority of the GCC States, the principle of prohibiting nationality abrogation and deportation of citizens is embodied in the constitution in order to give it constitutional status. For example, this is introduced in the 1962 Kuwaiti Constitution wherein Art. 27 provides that “Kuwaiti nationality is defined by the law. No abrogation or withdrawal of nationality may be effected except within the limits prescribed by the law”. Art. 28 of the Kuwaiti Constitution states: “No Kuwaiti may be deported from Kuwait or prevented from returning thereto”. Arts. 15 and 16 of the 1996 Basic Law of the *Sultānate* of Oman¹⁵ and Art. 8 of the UAE Constitution, as amended in 2004, contain nearly fully coextensive provisions. The Bahraini Constitution, as amended in 2002, is generally consistent with the aforementioned constitutions with regard to nationality abrogation, except that Art. 17 (a) thereof provides that “Bahraini nationality shall be determined by law. A person inherently enjoying his Bahraini nationality cannot be stripped of his nationality except in case of treason and such other cases as prescribed by law”. It is also consistent with the Kuwaiti Constitution and the Omani Basic Law with regard to deportation.

Another two states left these issues to their nationality laws. Both the 1992 Basic Law of Governance of Saudi Arabia and the 2004 Constitution of the State of Qatar leave the matter of abrogation or withdrawal of nationality to the law, which regulates the terms and conditions on acquisition of nationality. For example, Art. 35 of the Basic Law of Governance of Saudi Arabia provides: “The law shall specify rules pertaining to Saudi Arabian nationality”. However, the Basic Law of Governance of Saudi Arabia does not specify the instances in which the state may withdraw or abrogate the nationality.

The aforementioned principles highlight the fact that the right to citizenship is a fundamental human right, and stripping any citizen of this right means depriving him of his national identity. It is possible to assert that the GCC countries have adopted an approach of prohibiting abrogation or withdrawal of nationality within in their constitutions or their nationality laws in order to assure the observance of the principles. However, there have been several incidents that contradict the aforementioned principles. For instance, in 2004 and 2005, the government of Qatar withdrew the citizenship of more than 5,000 Qataris, who were members of the al-Murrah tribe, since this tribe had allegedly attempted to overthrow the then-Emir in a coup in 1996. In the following year, most of the affected managed to retrieve the Qatari nationality except for 200 people, which remain stateless.¹⁶ In recent times, the abrogation of citizenship has been used by some GCC States as a measure of countering the Arab Spring uprisings.¹⁷

B. The Acquisition of Citizenship

All of the GCC States have implemented the right to citizenship in their nationality laws in order to define the group of people to which citizenship rights shall apply. When comparing the different nationality laws regarding the acquisition of citizenship, it becomes obvious

¹⁵ The Basic Statute of Oman and the Basic Law of Saudi Arabia may also be referred to as “constitutions” in the following.

¹⁶ Human Rights Watch, “World Report 2013: Qatar” (n 9).

¹⁷ Kinninmont (n 12) 52.

that the GCC States' nationality systems are built upon a common understanding and common principles. To a varying degree they follow the principle of *ius sanguinis*¹⁸ mixed with some aspects of the principle of *ius soli*.¹⁹ Furthermore, nationality can be acquired by naturalization.²⁰

Children born in or outside a GCC State to a father with that state's citizenship acquire the same citizenship automatically at birth. This is, i.e., stated in Art. 2 of the Kuwaiti Nationality Law: "Any person born in, or outside, Kuwait whose father is a Kuwaiti national shall be a Kuwaiti national himself". The nationality of the father is therefore the decisive factor regarding the citizenship of the child. Pursuant to that, the status of a mother as a citizen shall not qualify her children who are born in the GCC States to acquire her nationality. Thus, the *ius sanguinis* principle does not apply with regard to the nationality of the mother of the child.

However, the nationality laws of the GCC States provide for some exceptions, which may qualify the child of a woman citizen and a foreign father as a citizen. For example, Art. 3 of the Kuwaiti Nationality Law stipulates that a child whose parents are unknown becomes Kuwaiti. Furthermore, the Kuwaiti citizenship may be granted by decree to a child born in, or outside, Kuwait to a Kuwaiti mother whose father is unknown or whose kinship to his father has not been legally established. This means that a child of a Kuwaiti mother and a stateless father is not eligible for Kuwaiti citizenship at birth. A decree granting citizenship can also be based on Art. 5 (2) of the Kuwait Nationality Law, if a child of a Kuwaiti mother and a foreign father, who have been divorced, has maintained his residence in Kuwait. However, Arts. 3 and 5 of the Nationality Law, as amended in 2000, set strict legal conditions and controls constraining the right of Kuwaiti women to acquire citizenship rights on an equal footing with men, as the cases of acquisition of citizenship by the children of Kuwaiti women are purely based on humanitarian grounds and limited to certain categories, such as when a woman is divorced or widowed, thereby reducing the cases in which the nationality of the mother can be afforded to her children from a foreign husband. An exception can be made in cases of children of a Kuwaiti mother and a father, who is unknown or whose kinship has not been established. Given these circumstances, the individual may apply for the Kuwaiti citizenship at the Ministry of the Interior. However, this extraordinary measure is rarely used.

Art. 8 of the Kuwaiti nationality law allows the foreign wife of a Kuwaiti citizen to acquire the Kuwaiti nationality after completing 15 years of marriage. Generally, Art. 4 sets out the conditions that have to be met by a person applying for the Kuwaiti citizenship. Most important are the requirements of a lawful residence in Kuwait for 20 years, good knowledge of the Arabic language and that the applicant possesses qualifications or renders services needed in Kuwait. Finally, the applicant for naturalization has to be a Muslim. The authority to decide in these cases is vested in the Minister of the Interior, without himself being checked with respect to the justifiability of granting or denying the citizenship.

Similar provisions based on a common concept of citizenship can be found in the nationality systems of other GCC States except for Qatar. In addition to the exceptions

¹⁸ The principle of *ius sanguinis* indicates that citizenship is inherited to one's offspring. A child of a German couple that is born in France, for example, is still of German nationality.

¹⁹ The principle of *ius soli*, on the other hand, entails that one obtains citizenship by the fact of being born on the territory of a certain state. A child of Chinese parents that is born in the United States, for example, is of US nationality.

²⁰ The process of obtaining citizenship by naturalization varies from country to country. Typically, it includes a minimum legal residency requirement. Other requirements may be specified by the respective laws.

that allow children of a Kuwait mother and an expatriate father to acquire citizenship, some GCC States (Bahrain, the United Emirates, and Saudi Arabia) permit the transfer of nationality to the children of a female national and a stateless father.²¹

This is in contrast to the Qatari nationality system, which does not allow women to pass their citizenship on to their children under any circumstances.²² However, Art. 8 of the Qatari Nationality Law provides for the legal status of a foreign woman married to a Qatari citizen, as follows:

A woman who marries a Qatari citizen [...] shall become a Qatari citizen if she declares in writing to the Minister of the Interior her wish to acquire the Qatari nationality, and if the marital relationship lasts for five years from the date of that declaration. If the marital relationship comes to an end by divorce or by death of the husband before the expiry of the aforementioned period, and the woman has had a child or more born to her husband, she may be granted the Qatari nationality by Emiri decision, if she continues her stay in Qatar until the completion of that period. Subject to the requirements of the public interest, and before the expiry of the referred to period, the Minister of the Interior may issue a decision postponing the entry of the wife into the Qatari nationality for one year, extendable for a similar or other periods.

Art. 9 of the Qatari Nationality Law adds that the foreign wife of a Qatari citizen, who acquires the Qatari nationality in accordance with the provisions of Arts. 5 and 8 of that Law, shall not lose their nationality at the end of marriage, unless she has married in a way contradicting the provisions of Law No. 21 of 1989 referred to above, or has restored her original nationality, or has acquired the nationality of another state.²³

In the case of Bahrain, the approach to legally letting female nationals bequeath their citizenship is changing. It is inferred from the recent amendments to Arts. 4 and 5 of the Bahraini Nationality Law that the Bahraini legislator has narrowed the scope of eligibility for Bahraini nationality. Under those amendments, a child born to a Bahraini mother and a stateless father shall not be eligible for the nationality. Also, a child born in Bahrain to a stateless father even though the latter has made Bahrain his regular place of residence and did not leave the country throughout his life, shall not be eligible for the nationality. Under the amendments as well, the Bahraini legislator has accorded—as is the case in the majority of the Gulf nationality laws—a better position to a child born to an unknown father or whose kinship to his father has not been legally established, than to a child born to a Bahraini mother and a stateless father through valid marriage.²⁴

The UAE have changed or at least announced to change their policy toward the issue of children being born to a citizen mother and an expatriate father. With a 2011 decree the

²¹ UNHCR, “Background Note on Gender Equality, Nationality Laws and Statelessness 2014,” <http://www.refworld.org/pdfid/532075964.pdf>, accessed May 5, 2015.

²² *Id.*

²³ See also Convention on the Nationality of Married Women (adopted February 20, 1957, entered into force August 11, 1958) 309 UNTS 65.

²⁴ Under Decree Law No. 12 of 1989, the instance in which a child born to a Bahraini woman shall acquire the nationality if his father is stateless, has been abolished, although this is incompatible with the principle of justice and equality among individuals in terms of rights and duties and is in contrast with Art. 18 of the Bahraini Constitution which reads: “People are equal in human dignity, and citizens shall be equal in public rights and duties before the law, without discrimination as to gender, origin, language, religion or belief.” For further legal analysis of the 1989 amendments, see Hassan Ali Ismail, “Have the government

Emirati legislator introduced a regulation that allows children of a foreign father and a citizen mother to apply for citizenship, when they reach the age of 18.²⁵ Arts. 19 and 21 of the Emirati Nationality Law are similar to the provisions of the Kuwaiti Nationality Law with respect to the mechanism set to resolve disputes on matters of nationality, based on the rule that matters related to the grant or withdrawal of the nationality and to naturalization are sovereign acts connected with the state's supreme policy. Art. 19 of the Emirati law reads:

Requests on matters of nationality and naturalization shall be submitted to the Minister of the Interior. They shall be examined by an advisory committee to be formed by a decree issued by the Minister, consisting of native citizens of good standing and reputation representing the Member Emirates. The advisory committee shall submit its recommendations to the Minister of the Interior.

Art. 21 of the Emirati [Nationality] Law provides for the following:

Subject to the provisions of Art. 19, the Minister of the Interior shall be competent to decide on requests for proving original nationality or citizenship, or loss or recovery of nationality. Stakeholders may appeal to the Council of Ministers against the decisions issued by the Minister of the Interior within one month from the date they are notified of those decisions. Decision issued by the Council of Ministers on the appeal shall be final.

Furthermore, one special feature can be found in the UAE's nationality system. The Emirati legislator expands the scope of the concept of citizenship to include the granting of nationality to the nationals of three of the GCC States (i.e., Oman, Qatar, and Bahrain)²⁶ because of the tribal, family, and geographical links which bring them together, and of the small number of indigenous citizens in the Emirates, as well as to the nationals of three other categories of Arab states and other states, in accordance with special and flexible conditions, most important of which is the requirement of residency in the Emirates before and after the issuance of the law, for a specific period as defined by Arts. 6, 7, and 8 of the Emirati law.²⁷

amendments to the nationality law done justice to children of Bahraini women married to foreigners?!", Portal of Women in Bahrain, 11/4/2006.

²⁵ Wafa Issa, "Children of Emirati mothers, expatriate fathers offered citizenship," *The National UAE* (Abu Dhabi November 30, 2011), <http://www.thenational.ae/news/uae-news/children-of-emirati-mothers-expatriate-fathers-offered-citizenship>, accessed May 27, 2015.

²⁶ According to Art. 5 of the Emirati Nationality Law, State citizenship may be granted to the following categories:

a—An Arab of Omani, Qatari or Bahraini origin settling in the State continuously and lawfully for at least three years immediately before the date of submitting a naturalization application on condition he has a lawful source of living, be well reputed, and not convicted of commission of a crime against honor or trust.

b—Individuals of Arab tribes who emigrated from neighboring countries to the State and settled therein lawfully and continuously for at least three years immediately before the date of submitting a naturalization application.

²⁷ In addition to the previously mentioned cases, the Emirati Nationality Law, in Art. 9, embodies the rule of *Naturalization in Return for Honorable Services rendered to the State*, which is in force in the majority of Gulf States: "It is allowed to grant citizenship to any person who renders honorable services to the State without observing the residency periods specified in the preceding articles." At the same time, it emphasizes compliance in all cases of naturalization with the rule of *No Dual Nationality* set forth in its Art. 11: "naturalization shall not be granted to any person unless he renounces his original nationality."

Out of the modern Gulf nationality systems, the Saudi Nationality System issued in 1954 and amended in 2005, as well as the Executive Regulations of 2005 have successfully avoided many of the gaps in the provisions of the nationality laws of the GCC States. It is the most advanced with respect to regulating citizenship rights on the basis of objectivity and justice in accordance with the basic rule adopted by International Law since 1955, which requires that there shall be an effective link between the citizen and the state of his nationality. In addition, Art. 8 of the Nationality System allows the Minister of the Interior to grant the Saudi Arabian nationality to a child born in the Kingdom to a foreign father and a Saudi mother, if the child fulfills the general requirements that are also to be met by a foreigner in order to acquire Saudi citizenship by naturalization. Among these requirements is that Saudi Arabia has to be the permanent residence of the applicant including a Resident Permit (*iqāmah*) and that the applicant has to be fluent in Arabic. On the other hand, the Executive Regulations of the Saudi Nationality System regulate in detail the instances in which Saudi nationality shall be granted to a foreign resident in the Kingdom, when he meets the requirements set forth in Art. 9 of the Nationality System, which generally conform to the Kuwaiti regulations in this regard. Art. 16 of the Saudi Nationality System allows the Minister of the Interior to grant Saudi Arabian nationality to a foreign woman who marries a Saudi national, or a foreign widow of a Saudi national, if she applies to that effect and renounces her previous nationality. Under the same article, the Minister of the Interior may decide that she has lost the Saudi Arabian nationality if her marital relationship with the Saudi national ceases for any reason, or if she restores her previous nationality or any other nationality.

The Omani system is nearly identical to the one in Kuwait with regard to the actual conditions to acquire citizenship. However, the Omani legislator has been able to set up a legal regulatory body for resolving disputes related to nationality under which an Omani citizen can seek remedy against misuse of powers by a competent authority through Art. 15 of the Omani Nationality Law—unlike the nationality laws of Kuwait, Bahrain, Qatar, and the UAE. To that end, an executive judicial committee has been formed with the task to adjudicate nationality-related disputes and to impose relevant penalties as provided for in Art. 16 of the Omani Nationality Law.

Regarding the question of women's citizenship rights, according to the Omani Nationality Law there shall be certain negative consequences ensuing from the status of a woman who is married to a foreigner, the most important of which involves the violation of her constitutional right to equal enjoyment of citizenship rights, namely, her deprivation of a guaranteed stay for her husband and children in the *Sulṭānate*, which will pose a threat to family security after her children will have reached the age of 18, insofar as the law then requires minor children to join the nationality of their foreign father, with the loss of all rights and facilities that they have been enjoying as children of a citizen mother, before reaching such legal age.

In general, there are little differences between the GCC States' nationality systems. Especially with regard to women's citizenship rights, the nationality laws provide for very restrictive regulations. Also, the situation of the *bidūn* is alarming as well as symbolic for the policy toward citizenship in the Gulf States. This restrictive legal situation is both result and consequence of the demographic situation in the GCC States. As migrant workers and *bidūn* are not supposed to enjoy the advantages of citizenship, the naturalization is linked with strict conditions allowing for the naturalization only of highly qualified and economically needed specialists. In the aftermath of *bidūn* protests, some governments announced changes in the legal framework and the naturalization of a certain number of stateless individuals. The Kuwaiti government for example intends to grant the Kuwaiti citizenship to

4,000 *bidūn*.²⁸ According to the 2005 Nationality Law of Qatar, individuals are allowed to apply for citizenship after having resided in Qatar for 25 years. However, only 50 people per year may be granted the Qatari citizenship by naturalization.²⁹

Yet, these measures concern isolated cases, are merely of a symbolic character, and do not depict a structural or influential change in the respective nationality systems. They may also be seen as a way of both calming and suppressing the occurring protests.³⁰ Finally, the nationality laws are in some cases used to naturalize individuals of a specific religious denomination, which is politically desired in the respective country. For instance, the Bahraini government offered citizenship to a majority of Sunni applicants in the past decade in order to maintain a high influence of the Sunni population.³¹ The same is true for the Kuwait policy in the 1970s when thousands of Sunni Muslims were granted the Kuwaiti citizenship.³²

To conclude, the nationality systems of the Gulf States lack an objective system that treats women and men equally and thereby infringe international human rights standards. Political intentions dominate the government's attitudes toward naturalization.

C. Results and Comparison between the Arab Spring Countries

Before evaluating the above-examined constitutions and nationality laws, it will prove useful to draw a comparison to some other Arab states such as the Northern African states of Egypt and Tunisia. The interesting part is that those states come from a similar background like the GCC States, however, they are more advanced concerning issues like gender equality. Comparing those states to the GCC States, therefore, might enable an anticipation of the developments yet to come in the GCC States.

There have been severe changes in the legal systems and constitutions of Tunisia and Egypt. Those two states are considered to having been influenced the most by the Arab Spring movement, which intended to strengthen civil rights and fundamental freedoms.

Some Arab states have introduced substantial amendments to their citizenship laws in order to achieve equality between men and women with respect to enabling children to acquire their mother's nationality either at birth or when they reach the maturity age by allowing them to choose either their foreign father's nationality or that of their citizen mother. However, these amendments concerning citizenship rights have been adopted a long time before the events of the Arab Spring and can therefore not be seen as a result of the latter.

²⁸ See Elizabeth Dickinson, "Kuwait's biddon may still be in limbo," *The National UAE* (April 1, 2013), <http://www.thenational.ae/news/world/middle-east/kuwaits-bidoon-may-still-be-in-limbo>, accessed May 27, 2015.

²⁹ Human Rights Watch, "World Report 2013: Qatar," <http://www.hrw.org/world-report/2013/country-chapters/Qatar>, accessed May 27, 2015.

³⁰ "Kuwait warns bidoons against protesting," *The National UAE* (January 13, 2012), <http://www.thenational.ae/news/world/middle-east/kuwait-warns-bidoons-against-protesting>, accessed May 27, 2015.

³¹ Aryn Baker, "What lies beneath: Bahrain's 'New Citizens' fuel unrest," *Time* (March 11, 2011), <http://world.time.com/2011/03/11/what-lies-beneath-Bahrains-new-citizens-fuel-unrest/>, accessed May 27, 2015.

³² Jane Kinninmont, "Citizenship in the Gulf" in Ana Echagüe (ed), *The Gulf States and the Arab Uprisings* (Fride, Madrid 2013) 53. The full text is available online at http://fride.org/descarga/The_Gulf_States_and_the_Arab_Uprisings.pdf, accessed May 27, 2015.

Such an effort is clear in the case of Art. 6 of the Tunisian Nationality Law of 1968, last amended in 2010, which acknowledges the principle of equality of citizenship rights in regard to children's acquisition of their parents' nationality: "A child is Tunisian if born to a Tunisian father or a Tunisian mother." The Moroccan Nationality Law of 1957, as amended in 2004 sets out a clear and fair legal system which fulfills the principle of equal citizenship rights among citizens, men and women alike. Art. 6 provides that "a child is Moroccan if born to a Moroccan father or a Moroccan mother." Art. 7 states that a child shall also be Moroccan if it is born in Morocco to unknown parents. Similar provisions can be found in both the Algerian Nationality Law, as amended in 2005, and the Egyptian Nationality Law, as amended in 2004. In the case of the newly adopted Egyptian Constitution of 2014, Art. 6 states: "Nationality is a right to anyone born to an Egyptian father or an Egyptian mother [. . .]." Concerning the situation in Egypt, the UN Committee on the Elimination of Racial Discrimination³³ stated its concerns about the Egyptian nationality law then in force, which prevents an "Egyptian mother married to a foreigner from passing on her nationality to her children."³⁴ The Egyptian government acted on these concerns and amended the nationality law as described above. Furthermore, Morocco recently opened an office for stateless people and asylum seekers in Rabat, which will closely work together with the UN High Commission for Refugees.³⁵

It can be seen that the Arab Spring itself did not bring any crucial changes regarding citizenship laws in Egypt, Tunisia, and other countries that currently find themselves in a transitional phase. However, the nationality laws in these countries generally consist with the principle of equality between men and women in the framework of the acquisition of citizenship and also comply with international human rights standards set out, among others, in the ICCPR³⁶ and the CEDAW.³⁷

Comparing the nationality systems of those countries and of the Gulf States reveals clear and crucial differences especially with regard to women's citizenship rights. As for the rights of *bidun* a comparison is hardly possible: The question of stateless people in the GCC States is generally not of the same importance in the mentioned North African states. A politically motivated naturalization of Sunni Muslims or other specified groups has also not taken place in Egypt and Tunisia. Nevertheless, regarding the question of women's rights, states like Egypt or Tunisia could become a role model for the GCC States. The Gulf States' northern African counterparts have made great achievements in this field, which may be seen as a result of public pressure on the legislative, of efforts of international bodies such as the Committee on the Elimination of Racial Discrimination (in the case of Egypt), or of a traditionally "women-friendly" system and society (in the case of Tunisia). Today, traditional, religious, and political reasons still preclude the amendment of the current GCC nationality systems. But that might change in the future.

³³ For more information about the work of the CERD, see <http://www2.ohchr.org/english/bodies/cerd/>, accessed May 27, 2015.

³⁴ Concluding observation of the Committee on the Elimination of Racial Discrimination: Egypt, UN Doc A/56/18 (August 15, 2001) 278–297.

³⁵ "New Immigration and Asylum Policy: Morocco Opens Refugee and Stateless Persons Office" (September 25, 2013), <http://www.maroc.ma/en/news/new-immigration-and-asylum-policy-morocco-opens-refugee-and-stateless-persons-office>, accessed May 25, 2015.

³⁶ International Covenant on Civil and Political Rights (adopted December 16, 1966; entered into force March 23, 1976) 999 UNTS 171.

³⁷ Convention on the Elimination of All Forms of Discrimination against Women (adopted December 18, 1979; entered into force September 3, 1981) 1249 UNTS 13.

IV. CIVIL RIGHTS ON THE ARAB PENINSULA

The constitutions of the GCC States guarantee a number of fundamental rights and freedoms in their various articles. Those encompass the right to equality before the law, personal freedom, the right to elect and to be elected, the right to assemble, the freedom of opinion, or the right to education. Although fundamental, those rights distinguish between their bearers. First, there are civil rights that exclusively address citizens. Second, some articles refer to “all”, “all persons” or “individuals”. Finally, some articles are formulated in an indirect way by providing for a state obligation toward its people. Furthermore, domestic laws may restrict these rights to persons lawfully residing in the state. The fact that the variety in the different domestic laws has an impact on who the bearer of a civil right may be makes it difficult to undertake a general classification of civil rights with respect to their bearers applicable to all GCC States.

The following paragraphs nonetheless try to evaluate the GCCs’ constitutions with regard to the most important rights of citizens on the one hand (Section A) and rights of non-citizens and the most problematic issues regarding the situation of non-citizens on the other (Section B). A short look into the constitutions of some of the Arab Spring countries (Section C) will complement this article and help to draw a conclusion.

A. Civil Rights of Citizens in the GCC States

Citizens enjoy a wider and greater protection by civil rights than any other group of a state’s population. This is due to the fact that civil rights in their original form were designed to give citizens a defensive mechanism against state acts.³⁸ Moreover, those rights are to guarantee the ability to participate in the civil and political life of a state. Art. 25 ICCPR provides a summary of what one could call “core political rights” of citizens: “Every citizen shall have the right [. . .] (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections [. . .] (c) To have access, on general terms of equality, to public service in his country.”

Within the limits and characteristics of the respective political system the right to elect and to be elected is provided for the constitutions of Qatar (Art. 42), Bahrain (Art. 1), and Kuwait (Art. 80 para.1). The access to public service and the right to address public authorities is guaranteed in the constitutions of Oman (Art. 34) and Kuwait (Art. 45).

Furthermore, public jobs and offices are generally only entrusted to citizens (Art. 16a of the Bahraini Constitution and Art. 16 para. 2 of the Kuwaiti Constitution). Citizens’ rights generally also include the right to return to the home country (see above), the right to own property, and the protection through the military or diplomacy.

In addition, the GCC States’ constitutions provide for several more rights that are entitled exclusively to citizens and mostly concern state services or duties. For instance, the constitution of Bahrain in its Art. 13 and the Basic Law of Saudi Arabia in its Art. 28 oblige the state to guarantee job opportunities. The UAE’s Constitution similarly ensures citizens to be free to choose their occupation in Art. 34. The constitutions of Oman and Qatar restrict the right to assemble and to form associations to citizens. A further right generally

³⁸ In an international law context, civil and political rights are also known as the first generation of human rights. For more information and further references, see Javaid Rehman, *International Human Rights Law* (Pearson Education Ltd., Harlow 2010) 9 et seq., or Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 265 et seqq.

entitled to citizens is the freedom of movement and residence. Access to health care may also be restricted to citizens as it can be seen in Art. 8a of the Constitution of Bahrain.

Qatar and Bahrain furthermore ensure the right to education to their citizens, whereas the other constitutions only refer to education as a matter of which the state has to take care of. Duties of citizens refer to the duty to protect the country and to pay taxes (cf. Art. 42 of the Emirati Constitution). The Basic Law of Saudi Arabia lacks a number of these freedoms and rights and stipulates more generally rights and duties, which are not further specified and often refer to the Islamic Shari'ah and the Islamic creed. An example of rights explicitly entitled to citizens is Art. 27 of the Basic Law of Saudi Arabia, which guarantees "the rights of citizens and their families in cases of emergency, illness, disability and old age" and Art. 31, which obliges the state to provide health care for its citizens.

After all, it can be observed that the differentiation between rights only guaranteed to citizens and rights guaranteed to all is not present in all GCC constitutions. Especially Bahrain's Constitution does not mention the term "citizenship" in its civil rights chapter extending the rights and duties to all.

B. Civil Rights of Non-Citizens in the GCC States

There are several civil rights enshrined in the GCC States' constitutions that are entitled to citizens and non-citizens alike. Again, Saudi Arabia and Oman in part have taken an approach toward civil rights that differs from the constitutions of the other Gulf States. The right to equality before the law is ensured for non-citizens and "all people" in Bahrain, Qatar, Kuwait, and the UAE, whereas Oman and Saudi Arabia refer to equality as a government or state principle. The four constitutions encompassing the principle of equality before the law do so with different adjunctions comprising guarantees that there may not be any discrimination on various accounts. On the one hand, Bahrain and Kuwait nearly use identical words in their Art. 18 and Art. 29, respectively, stating that there may not be any distinction "on account of sex, origin, language or religion". Qatar uses a similar wording in its Art. 9, however, the criterion of "origin" is not enumerated. On the other hand, the Constitution of the UAE states that this principle is valid without "distinction between citizens of the Union on account of origin, place of birth, religious belief or social position" (Art. 25) and therefore only emphasizes the principle of no distinction with regard to UAE's citizens.

Also, all people are entitled to the right of any person not to be subjected to torture or degrading treatment and furthermore the presumption of innocence as well as the principle of *nulla poena* according to the constitutions of Bahrain, Kuwait, Qatar, and the UAE, as well as the Basic Statute of Oman.³⁹

However, there are some distinctive features. To begin with, the Constitution of Bahrain, especially Art. 18, is remarkable, as stipulates that the principle of human dignity applies to all persons. Freedom of religion is only provided for in the Constitution of Bahrain and the Basic Statute of Oman. Both Art. 22 of the Constitution of Bahrain and Art. 28 of Basic Statute of Oman refer to the freedom to perform religious rites unless this is not provoking conflicts with "custom observed in the country" or "public order" and "accepted standards of behavior", respectively.

Oman and the UAE introduced provisions that explicitly regulate the relation between citizens' rights and foreigner's rights. Oman's Art. 35 reads: "Every foreigner who is legally resident in the *Sultānate* shall have the right to protection of his person and his property in

³⁹ Art. 19 et seq. Bahraini Constitution, Art. 31 et seqq. Kuwaiti Constitution, Art. 36 Qatari Constitution, Art. 26 et seqq. UAE Constitution, and Art. 20 et seqq. Omani Basic Law.

accordance with the Law. Foreigners shall have regard for society's values and respect its traditions and customs." The UAE's Constitution states in Art. 40: "Foreigners shall enjoy, within the Union, the rights and freedoms stipulated in international charters which are in force or in treaties and agreements to which the Union is party. They shall be subject to the corresponding obligations." In this regard, the distinction can be made between residents, which are required to have a lawful residence permit, and other inhabitants, which do not have a residence permit is relevant to the respective rights they enjoy under the constitutions.

In contrast, the Basic Law of Saudi Arabia lacks a number of these freedoms and rights and stipulates more generally rights and duties, which often refer to the Islamic Shari'ah and the Islamic creed. For instance, the right not to be tortured, the freedom of belief and religion, and the freedom of press, writing, and publishing are not explicitly safeguarded in the Saudi Arabian Basic Law. Art. 26, which stipulates that the state "shall protect human rights in accordance with the Shari'ah", discloses that the system of Saudi Arabia's protection of fundamental freedoms is founded on the premise that all fundamental freedoms are subject to the compliance with the Islamic Shari'ah.

Non-citizens face several disadvantages and problems. The intensity of these disadvantages depends on the legal status of the respective individuals. Generally, non-citizens can be divided into the following categories: migrant workers, refugees, documented and undocumented aliens, and individuals who have lost their nationality.⁴⁰ On the one hand, non-citizens, which have a permanent residential permit, rank equal with citizens in many respects, except for the core rights of citizens such as the right to stand for (presidential) elections. On the other hand, migrant workers with short-term residence permits, workers that fall under the *kafalah* system,⁴¹ or the *bidun* face significant difficulties with regard to several legal aspects. Therefore this article concentrates on migrant workers and stateless people and is not referring to residents with a residence permit, which ensures them a secure stay. By focusing on five key aspects and central problems, the following will address the legal problems those non-citizens face in the Gulf States.

First, the right to education, which is guaranteed for all people in Art. 13, para. 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴² and in Art. 26, para. I of the UDHR, is not guaranteed to all people in most of the GCC States' constitutions. Often, the constitutions merely contain the obligation for the respective state to promote education without providing for the implementation. For example, it is in fact nearly impossible for *bidun* to send their children to public schools.

Second, the lacking recognition of *bidun* and migrant workers as residents in the Gulf States leads to several consequential problems. Most of them do not possess an identity card, which prevents them from acquiring driving licenses and other official documents. Children of *bidun* do not receive a birth certificate and therefore will face the same difficulties. The right to own property is restricted to citizens or *lawful* residents. This results in lawless and insecure status of non-citizen's possessions and legal status.

⁴⁰ UNCHR, "Final Report of the Special Rapporteur on the rights of non-citizens, David Weissbrodt" (May 26, 2003) UN Doc E/CN.4/Sub.2/2003/23, 28.

⁴¹ The *kafala* system (sponsorship system) is common in the GCC States. Its purpose is to monitor construction and domestic migrant laborers by obliging them to have an in-country sponsor, usually their employer, who is responsible for their visa and legal status. For more information, see Human Rights Watch, "As if I'm not human" (Report on abuses against Asian domestic workers in Saudi Arabia, New York 2008).

⁴² International Covenant on Economic, Social and Cultural Rights (adopted December 16, 1966; entered into force January 3, 1976) 993 UNTS 3.

Third, the access to health care is barely ensured in the Gulf States, even if some of the constitutions refer to health care either as a right or as an aim the state is promoting.

Fourth, non-citizens are often not able to get access to public authorities and to litigation. Certainly, other factors such as lacking language knowledge or illiteracy contribute to this problem.

Fifth, non-citizens often face deportation. This furthermore bares them from a free movement inside the states. Especially the *bidūn* are often subject to threats of deportation and resettlement. For instance, a member of the ruling family in Kuwait has called for the expulsion of all *bidūn* and others, that were involved in anti-government protests.⁴³

Even if there are civil rights and fundamental freedoms entitled to non-citizens in the Gulf States' constitutions they are not enforced. This is the result of broad restriction clauses common to the GCC constitutions that allow for the restriction of civil rights. Generally, the examined constitutions provide for possibilities to restrict civil rights due to specified reasons. For example, the public rights and freedoms set forth in the constitutions of the GCC States may not be exercised where they are in conflict with the public interests of the state or where they require the national legislator's intervention to indicate how they are to be exercised within the framework of restrictions and controls based on the principle of maintaining public order or public morals or in the context of respect for the rights and freedoms of others.⁴⁴

Such restrictions, according to Art. 4 ICCPR, are, however, to be strictly limited to the extent required by the demands of the emergency, are not to be in conflict with the state's other obligations under international law, and must not entail discrimination based on the grounds of race, color, sex, language, religion, or social origin.⁴⁵

Constitutional provisions in the GCC States stipulate the need for legislation restricting citizen's public rights and freedoms based on the following grounds: safeguarding the security of the state; ensuring the public good or the public interest; protecting the supreme interests of the state; taking into account the customs and traditions of the country; taking into account public order and respect for public morals.

Despite the legal legitimacy of these constitutional restrictions, they bear the danger of the conferring of broad powers to restrict civil rights upon the competent authorities as long as this goes in conformity with their political interests. This could be the case as such measures are implemented within the framework of national legislative procedures and procedures for senior governmental decisions, which the drafters of the respective constitutions refer to by regulating public rights and freedoms. In reality, this often leads to restrictions on the exercise of citizenship and civil rights in the GCC States, despite the fact

⁴³ Member of the Ruling Family Calls for the Expulsion of Bidūn (News report, October 7, 2013), <http://www.bedoonrights.org/2013/10/07/member-of-the-ruling-family-calls-for-the-expulsion-of-bedoon>, accessed October 23, 2014.

⁴⁴ Regarding the requirements and controls for imposing these restrictions, see Art. 4 of the ICCPR. This article outlines the measures and general restrictions that can be imposed by the state in exceptional circumstances or emergency situations. For a more comparative study in this regard, see Badria Abdullah Al-Awadhi's, *Limitation Clauses of Human Rights in the Constitutions of the Gulf Co-operation Council Countries*, (published in Arabic, Kuwait Times Commercial Printing Press, Kuwait 1984).

⁴⁵ Cf. International Covenant on Civil and Political Rights, "General Comment No. 29: State of Emergency—Article 4," available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/71eba4be3974b4f-7c1256ae200517361?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f-7c1256ae200517361?Opendocument), accessed June 16, 2015.

that they are acquired rights⁴⁶ or inherent human rights as emphasized by national constitutions and the various International Human Rights Conventions, which the GCC States have ratified.⁴⁷

Such a restriction has been currently imposed by the so-called Gulf Security Agreement.⁴⁸ All GCC States except Kuwait have ratified this agreement. Recent developments concerning this agreement give rise to increased concerns about the enforceability of human rights in the GCC region.⁴⁹

In conclusion, a lawless status is common for many residents in the GCC States, which partly comprise more than half of the states' population. Ensuring that the rights of those people are safeguarded should be a priority of the states concerned. Yet, it is not foreseeable that a balance might be achieved so that stateless residents may enjoy a similar protection status as citizens.

C. Results and Comparison

On the international human rights level, the equal treatment of citizens and non-citizens is required; distinctions between citizens and non-citizens are only admissible, if they "serve a legitimate State objective and are proportional to the achievement of that objective".⁵⁰ To codify the guarantees of a minimum set of non-citizens' rights, the United Nations adopted the DHRNC in 1985.⁵¹ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)⁵² would be a relevant international treaty regarding the specific situation in the GCC States as it *inter alia* provides for the right of a child to birth registration and nationality (Art. 29) and equality of access to public education (Art. 30). However, none of the GCC governments have ratified or acceded to this Convention.

The obligation to comply with international treaties and human rights standards is a common feature to the Gulf States' constitutions as it can be found for example in Art. 147 of the Constitution of the UAE: "Nothing in the application of this Constitution shall affect treaties or agreements concluded by member Emirates with states or international organizations [...]". However, with regard to civil rights, only Bahrain and Kuwait are parties to the ICCPR and to the ICESCR. Both states made reservations and interpretative

⁴⁶ The term "acquired rights" is here used in the sense of the Doctrine of Acquired Rights established in public international law, see Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2010).

⁴⁷ Badria Abdullah Al-Awadhi, *Limitation Clauses of Human Rights in the Constitutions of the Gulf Co-operation Council Countries* (published in Arabic, Kuwait Times Commercial Printing Press, Kuwait 1984).

⁴⁸ The agreement was adopted during the 33rd GCC summit in Bahrain from December 24 to 25, 2012. However, the public awareness of the agreement remained at a minimum, mostly because few websites published the text of the security agreement. See Jumana Al Tamimi, "GCC security pact divides Kuwait" (news report, March 2, 2014), <http://gulfnews.com/news/saudi-arabia/gcc-security-pact-divides-kuwait-1.1297430>, accessed June 16, 2015.

⁴⁹ Bahrain, "The GCC Agreement Imposes Further Restrictions on Public Liberties," *Bahrain Center for Human Rights* (March 14, 2014), <http://Bahrainrights.org/en/node/6799>, accessed June 16, 2015.

⁵⁰ UNCHR, "Final Report of the Special Rapporteur on the rights of non-citizens, David Weissbrodt" UN Doc E/CN.4/Sub.2/2003/23 (June 16, 2003) 2.

⁵¹ Declaration on the human rights of individuals who are not nationals of the country in which they live, UNGA Res. A/RES/40/144 (December 13, 1985).

⁵² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted December 18, 1990, entered into force July 1, 2003) 2220 UNTS 3.

declarations regarding several provisions of the ICCPR and ICESCR that may conflict with national laws. All of the GCC States have ratified or acceded to the Convention on the Rights of the Child (CRC)⁵³ and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), but not without declaring several reservations to those Conventions stating that their interpretation and the implementation shall not conflict with Islamic law and/or the rules of the Shari'ah.

The differing treatment of citizens and non-citizens is a complex problem that exists both in the Arab Spring states and the Gulf States. However, its consequences are much more crucial in the GCC States, since the portion of non-citizens is significantly higher in those states. The legal status of migrant workers and *bidūn* in the Gulf States is factually nonexistent, which is clearly contradicting the idea and concept of human rights.

Although well-elaborated systems of civil rights protection exist—at least in the examined constitutions—these rights partly do only apply to citizens and can often be too easily restricted on the basis of a restriction clause. The mere statement of general principles of fundamental rights in a constitution is not a sufficient response to the requirements of human rights law.⁵⁴

V. CONCLUSIONS AND OUTLOOK

The legal systems of the GCC States restrict civil rights not negligibly by means of constitutional and nonconstitutional limitation clauses. The guarantee of human rights, especially when women and non-citizens are concerned, is unsatisfactory. This might be due to the political tradition in the Gulf States where civil rights are not as much considered to be fundamental and inalienable rights entitled to all human beings, but are seen to be granted by the reigning monarch.

The promotion of citizenship rights in the GCC States would require first of all that the concerned states and the civil society organizations increase their efforts to erase or at least inhibit the spread of illiteracy among citizens in these countries. The Arab League Educational, Cultural and Scientific Organization (ALECSO) has already warned against the illiteracy issue in the Arab world in its 2007 report. Illiteracy levels are still high, given the fact that the number of illiterates has almost reached 100 million people.⁵⁵

Second, it would be essential to demonstrate to policy makers in the GCC States how serious it would be not to address the challenges and obstacles which lead to women being denied citizenship rights. This is particularly true for the region at a time when the international community, the United Nations, and regional organizations have been showing increased interest in the theme of citizenship rights.⁵⁶ The GCC States and other Arab countries should establish national committees as well as a regional center of representatives in

⁵³ Convention on the Rights of the Child (adopted November 20, 1989, entered into force September 2, 1990) 1577 UNTS 3.

⁵⁴ UNCHR, "Final Report of the Special Rapporteur on the rights of non-citizens, David Weissbrodt" UN Doc E/CN.4/Sub.2/2003/23 (May 26, 2003) 10.

⁵⁵ "ALECSO report: 97 million illiterates in Arab countries," *Middle East Monitor* (January 9, 2014), <https://www.middleeastmonitor.com/news/middle-east/9152-alecso-report-97-million-illiterates-in-arab-countries>, accessed June 16, 2015.

⁵⁶ See, e.g., UNHRC, Resolution 20/4 "The right to a nationality: women and children" (June 28, 2012) UN Doc A/HRC/20/L.8. See also UNHRC, "Human rights and arbitrary deprivation of nationality" (Report of the Secretary-General) UN Doc A/HRC/13/34 (December 14, 2009).

order to coordinate measures for fulfilling their international obligations and the development of national legislation on women's citizenship rights.

Third, it would be a good step forward to start teaching a curriculum on citizenship rights in accordance with the covenants and conventions on fundamental human rights, already ratified by these countries, at both secondary and university levels of education, in order to spread legal awareness and culture on citizenship rights among citizens, and promoting field studies and research in this regard in universities and scientific institutes with a view to identifying discriminatory methods against women and methods aimed at preventing the enhancement and enforcement of citizenship rights in these countries.

Fourth, a medium-term action plan should be developed in collaboration with civil society organizations and specialist jurists, politicians, sociologists, educators, and scholars in forensic science in the GCC States to elaborate national strategies on citizenship rights of Gulf citizens, pursuant to the national constitutional principles of these countries and their commitments to respect and apply the fundamental principles of human rights enshrined in ratified international conventions, especially the right to acquire a nationality without discrimination on the basis of gender.

And last, a national committee should be established as well as a regional committee formed of representatives of the GCC States to coordinate their international obligations and national legislations on citizenship rights in light of Art. 9 CEDAW.

Linguistic and Cultural Rights in the Arab Constitutions

From Arabism to Linguistic and Cultural Diversity

ALI KARIMI*

The thematic question of this article seeks to find out how constitutions in Arab states have started to recognize the linguistic and cultural rights of non-Arab communities living within their jurisdiction. Is the recognition of such rights evidence of change having taken place in the concept of Arabism, by moving from systems built on one “nation” to systems built on more than one nation, in the case of states where there are non-Arab communities? What is the current status of Arabism in those systems? Is it still as vibrant as it used to be, or has this changed due to the impact of the Arab Spring? The same rights have been placed on the table, albeit modestly, since the decolonization of the Arab world; yet, they did not find an echo except in the state of Iraq at the beginning of the seventies, when the 1970 Iraqi Constitution recognized Kurdish as an official language in the Kurdish region. Constitutions of other Arab countries neglected the subject, despite the presence of non-Arab communities inside their borders. This observation applies to some Arab Levant states—such as Syria, Lebanon, and Jordan—and the Arab Maghreb states—such as Libya, Tunisia, Algeria, and Morocco.

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I. INTRODUCTION: CULTURAL AND LINGUISTIC RIGHTS IN ARAB CONSTITUTIONS AND IN THE ARAB SPRING

The Arab Spring and its escalating uprisings have constituted a discursive turning point in dealing with linguistic and cultural rights in the region, the initial elements of which appeared in a range of states even before these revolutions, i.e., since the end of the Cold War and thereafter, with the beginning of the new millennium. However, the basic moment in heightened attention in this regard came with the protest movements during which new Arab constitutional experiments started to combine Arabism with the recognition of the linguistic and cultural rights of non-Arab communities and minorities that live in the Arab world, both in its heart and on its periphery. In various countries where uprisings erupted against violations of human rights, tyranny, and corruption, demands for recognition of the linguistic and cultural rights of non-Arabs had always been present, particularly in Morocco, Algeria, and Libya, where cultural and linguistic marginalization were linked to economic and social marginalization.

It is not possible to comprehensively understand the development that has taken place with regard to the recognition of linguistic and cultural rights, starting from the denial of those rights to the time they became enshrined in constitutional texts. Perhaps the Arab revolutionary movement beginning in 2010 is one of the factors that enhanced official recognition of these issues in some countries, whereas such recognition has been taking shape in other countries since the beginning of the 1970s. Whatever the case, the period between 1975 and 1995 is important and central in analyzing the subject. This is because the events of this era have had subsequent effects with respect to linguistic and cultural rights. The period from 1996 to 2011 was also of importance in this area, at least in Iraq and Morocco. In these countries, constitutions recognize the linguistic rights of ethnic communities, either as an official language alongside Arabic or as a national language.¹

There are two inseparable lines of development on which recognition of cultural and linguistic rights in the Arab world can be depicted. Either line has its own national, regional, and international political characteristics, and both are related to the development of the human rights system: first is the development of demanding rights which flourished with the entry into force in 1976 of the two 1966 International Covenants (International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights) and which reached a climax with the uprising of the Amazigh civil community in Arab Maghreb states under the so-called “New World Order” after the end of the Cold War that spread calls for the globalization of democracy and human rights. This line of development has continued since the 1970s up until the present day. The second trend is the constitutional recognition of rights, which has emerged from within the development of demanding rights and which is also associated with international and regional political requirements. Furthermore, it is associated with the national political requirements of each party separately, as well as with the evolution of human rights internationally and their globalization.

Both lines of development are connected with the issue of Arabism and Arab unity, as it has become clear that such unity is difficult to achieve due to certain obstacles; the biggest of which is the position taken by non-Arab communities refusing to be integrated into an unified sense of Arab national identity without the reality of their cultural and linguistic diversity being taken into account and recognized. This is an issue at the heart of the line

¹ Cf. Art. 4 of the Iraqi Constitution, Art. 5 of the Moroccan Constitution.

of development of demanding rights but is a central concern of this article. The article will focus only on the second line of development, i.e., constitutional recognition.

The Universal Declaration of Linguistic Rights has had an impact on various ethnic minorities located in the region stretching from the Atlantic Ocean on the west coast of Africa to the Gulf. The effects of the Declaration have been manifested in the constitutional recognition of linguistic and cultural rights in some countries, while other countries are still reluctant to take such measures, despite pressure being exercised as a result of the Arab Spring revolutions as well as previous protest movements calling for their recognition.

The author will try to limit the debate to the subject of constitutionalizing linguistic and cultural rights, first of all in states where Amazigh nationalism exists, that is to say, in the Arab Maghreb states.² The author will then turn to the Arab Levant states where vulnerable ethnic groups are found, alongside Kurdish nationalism, in Iraq, Syria, Lebanon, and Jordan in turn, such as: Armenians, Turkmen, Circassians, Chaldeans, and Assyrians.³ It is clear from the numbers of these ethnic minorities how those citizens are deprived of their cultural and linguistic rights, although the states to which they belong are signatories of various international instruments which emphasize respect for these rights. From here, the question arises as to how Arab constitutions have dealt with this phenomenon.

II. LINGUISTIC AND CULTURAL RIGHTS IN THE MAGHREB CONSTITUTIONS

An observer of the constitutional movement in the Arab Maghreb region, after independence, will realize how successive constitutions ignored Amazigh in terms of language, identity, and culture. The majority of these constitutions were drafted and enacted amidst the spread of the revolutionary tide of Arab nationalism.⁴ They mostly stress the Arabic language as an official language, and affiliations with Arab identity and Islam, or with Arab Maghreb identity, whereas they stay silent on the Amazigh dimension of these states, which necessarily means the denial of the linguistic and cultural rights of the Amazigh population. This is evident in the Moroccan Constitution, as well as in those of Algeria, Libya, and Tunisia. Following independence, the concerned national political parties did not allow ethnic diversity due to a perceived necessity of, and duty to, national cohesion;⁵ the regional political requirements stressing Arab unity have also had an impact on maintaining the silence about linguistic rights. If we add to all this the rigid international bipolar circumstances and absence of instruments for the protection of human rights applicable in the Arab countries, with the exception of the Universal Declaration of Human Rights, we can understand how cultural and linguistic rights came to be ignored in Maghreb constitutions.

² Statistics on these nationalisms are dramatically in conflict.

UNESCO, "Les droits culturels au Maghreb et en Égypte" (published by Saad Zoy and Johanne Bouchard, UNESCO, Rabat 2010).

³ Some people believe that those who speak Tamazight number approximately more than 30 million in the region stretching from Morocco through Algeria, Tunisia, and Libya, than Siwa Oasis in Egypt, and Mauritania, without counting the Amazigh in the diaspora.

⁴ Ali Karimi, "Maghreb Union as a Procedural Arab Unity," 65 *Al-Wehdah Magazine* (1990) 67.

⁵ Ayyad Bin Ashour, "the Political Complications of the Linguistic Problem in Maghreb Countries," 17 *Muqaddemat Magazine* (1999) 22.

A. Cultural and Linguistic Rights in the Moroccan Constitution

If these rights today are connected with the reform or revolutionary movement that imposed their recognition in the constitutions of the Arab region and Maghreb, the intellectual elite of Morocco—when they put forward the question of political or constitutional reform—did not sense the importance of the issue within the context of their reform demands at the beginning of the twentieth century,⁶ either because they had the feeling that they were ethnically Arab, or because the problem of the Amazigh/Arab identity issue was not among their concerns, as their final ambitious goal then was to develop a constitution that would keep pace with the constitutional movement then existing in the Arab and Muslim surroundings of Morocco. Their ultimate goal as such was reflected in the 1908 draft constitution⁷ in which the drafters emphasized their Arab identity, knowing well that a major part of the country's population at the time were Amazigh, not to mention a major part of the elite itself. Nevertheless, the draft constitution emphasized that a deputy of the nation shall be proficient in reading and writing Arabic, in total disregard of the cultural and linguistic rights of a substantial part of the population of Morocco.

1. From Governmental Recognition to Constitutional Recognition

The prevailing international climate at the end of the 1960s sharpened interest in Tamazight (the language spoken by the Amazigh population) in North Africa, particularly in Morocco and Algeria. The years 1966, 1967, and 1968 had symbolic significance in this regard. In 1966, the two International Covenants on Human Rights (International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights) were developed, and *L'Académie Berbère* was established. In 1967, the first ever association concerned with Amazigh heritage and culture was established in Morocco following the war of June 1967.⁸ Interest in linguistic and cultural rights increased substantially after the first UN International Conference on Human Rights held in Tehran in 1968 and also following the World Youth Protests of 1968.⁹ It should be recognized, however, that this phase passed without any important implications as far as the adoption of linguistic and cultural rights is concerned.

Later on, there came instances in which Morocco was influenced by the statement on human rights issued by the First Conference on Security and Cooperation in Europe in 1975, by the entry into force in 1976 of the aforementioned two International Covenants, and by the Democrats winning the US Presidency led by Jimmy Carter, who called for greater respect for democracy and human rights. In this context, an atmosphere of political openness developed, while a balanced and stable democratic climate was established.¹⁰ Influencing factors in Morocco at the time culminated with UNESCO's issuance of the "Declaration on Race and Racial Discrimination" in 1978, which followed the 1976 "Universal Declaration of the Rights of Peoples" that emphasized linguistic and

⁶ Memoirs of Abdulla Bin Said, 1901, and Memoirs of Haj Ali Zneiber Al-Sallawi, 1904; see 'Allal Al-Fassi, *Digging into the Moroccan Constitutional Movement* (published by the party of Istiqlal Moroccan, 1968).

⁷ The draft of the constitution was first published in the newspaper *Lisān Al-Maghrib* in Tangier in 1908 in consecutive installments.

⁸ Ali Karimi, "Tamazight and Human Rights" in AMREG (eds), *What Future Tamazight Has in Morocco?* (The Association's Publications on Cultural Exchange, Al-Ma'aref Al-Jadeedah Press, Rabat 2009) 18–26.

⁹ Ibid.

¹⁰ Ali Karimi, *Questions: Democratic Transition Issues in the Political and Constitutional Reform* (Nawafid publications, New Al-Najjah Press, Casablanca 2005) 85.

cultural rights in Arts. 13, 19, 20, and 21. Taking advantage of these articles and the existing climate of openness, the Amazigh movement made efforts to promote their cultural and linguistic rights through the media and publishing. A series of publications and collections of poetry and stories were released, and festivals and cultural events were organized. Associations were established; in 1978 two such organizations came into existence, one under the name of the new Association for Culture and Folk Arts,¹¹ and the other under the name of *al-Inṭilāqah al-Thaqāfiyah*¹² [Cultural Breakthrough Association].

It seems that political openness and allowing a democratic climate as adopted by Morocco had a tangible impact on the area of cultural and linguistic rights, especially when King Hassan II asked the government of Aḥmad ‘Uṣmān to prepare a report on “using Tamazight in teaching and education.”¹³ The report considered the teaching and learning of Tamazight to be a national duty. The government of the day also worked on preparing a draft law for establishing the “Institute of Amazigh Studies”, which was blocked in parliament in 1978.¹⁴

The Charter of Agadir of August 5, 1991, gave shape to the idea of making Tamazight an official national language.¹⁵ For the first time ever, there was legal constitutional dimension to the demands of the Amazigh cultural movement. This trend was spurred on by internal and external factors. Internally, the political openness of the 1990s contributed to a multiplication of Amazigh associations.

From an external perspective, important factors included the re-emergence of the ethnic and religious element as an important factor in international relations following the disintegration of the Eastern Bloc, the second Gulf War, and the holding of the Second World Conference on Human Rights in Vienna in 1993. The signing of influential parties in the Amazigh cultural movement thereon (on the Conference’s declaration) gave legal legitimacy to the demand for Tamazight to be constitutionally recognized as an official language. Through that conference, the Amazigh linguistic and cultural demands were thus internationalized, especially after the movement established networks with other minorities in Africa, Asia, and Latin America.¹⁶

Since its independence, Morocco has witnessed five constitutions between 1962 and 1996, none of which makes mention of Tamazight, although the 1992 and 1996 constitutions were preceded and accompanied by debates with the Amazigh cultural movement, which demanded that the language’s status be constitutionalized. Before the 1996 constitutional amendment, a group of associations sent a message to the royal court in which they suggested various wordings for the constitutionalization of Tamazight,¹⁷ whereas the

¹¹ This association was founded by a group of Sous student activists in the National Union of Students of Morocco, including persons who had just emerged from prison. They were mostly affiliated with the leftist March 23 Organization, which took a further Amazigh dimension after it was named *Betamenot* (“New”) in 1984.

¹² This association was founded in Nador, as well in 1984, by a group of progressive researchers.

¹³ *Id.* (n 2) 123.

¹⁴ The founding of the Institute was included in a bill complementing and supplementing the law of October 17, 1975, on the competence of university institutions, as stated in Art. 11 bis, but the idea was soon dismissed.

¹⁵ Ali Khadaoui, *Amazighité et Constitution: pour un État de droit* (publications de AMREC, Rabat 2002) 25.

¹⁶ Hassan Rachiq, *Usage de l’identité amazighe au Maroc imprimerie Najah el Jadide* (Konrad Adenauer) 38.

¹⁷ The memo focuses on the three dimensions of the Moroccan identity: Islam, Tamazight, and Arabic, on providing in the constitution for Morocco that it belongs to North Africa, and on establishing equality between Tamazight and Arabic with respect to all Moroccans.

memorandum of the democratic bloc parties submitted to the king on political reforms at the time did not include any reference to Tamazight.¹⁸ Nonetheless it can be asserted that signs of the official interest in Tamazight as an identity, culture, and civilization became evident with the delivery of the government's program to parliament in March 1998 by 'Abd al-Rahmān al-Yūsufi, in which care was accorded to Tamazight as an element of national culture and to the need for its integration into education.

This shift toward a general acceptance of Tamazight might be attributed to obstacles created against the inclusion of Tamazight in the public media, resistance to teaching it, as well as the harsh criticism directed to the Institute and its Administrative Council for failing, since its inception until 2010, to ensure the constitutionalization of Amazigh, to allow it a privileged position in the media or to have it properly integrated into the education system.

Achieving the demand of constitutionalizing Tamazight is now to take place under new domestic and regional circumstances. At the domestic level, progressive national political parties are recognizing Tamazight in their programs and in the decisions taken at their party conferences. This is the case with the Socialist Union, the Unified Socialist Party, and the Party of Progress and Socialism. At the regional level, Algeria recognized Tamazight as a national language in its 2002 Constitution,¹⁹ Morocco has chosen to use Tifinagh—a very old alphabet still used by Tuareq—and since 2005 in particular Libya also has begun to recognize Amazigh language and culture.²⁰

These factors suggest that a shift is taking place in favor of advancing constitutional recognition of Tamazight as a national language or official language, especially in light of the Arab and Maghreb Spring.

Nowadays, Tamazight is experiencing its Third Spring, following its First and Second Spring in Algeria, in 1980 and 2001, respectively. Signs of the beginning of the Third Spring, which capped the formal recognition of Tamazight after a bloody conflict from independence until today, appeared in Morocco with the speech made by King Muḥammad VI in June 2011 in which he declared the need to recognize Tamazight as an official language in the constitution. This speech was preceded during the period between 1996 and 2011 by changes in the positions of national democratic parties, which are Arab with leftist or Islamic orientations. For example, the Socialist Union of Popular Forces changed its position on the Tamazight issue by emphasizing the necessity of restituting a Moroccan sense of identity based on Arabism, Islam, and Tamazight, and proposed the integration of Tamazight in the education system in order to entrench the elements of national identity. The Unified Socialist Party went further by stressing the need to constitutionally recognize Amazigh identity and to adopt Tamazight as a national language. The Justice and Development Party went to the point of stating that Morocco is a country that constituted a great Arab-Amazigh civilization and demanding that the two dimensions of this identity be merged together in one melting pot. Previously, these three parties followed the same path

¹⁸ Memorandum of the democratic bloc parties: the Independence Party, the Socialist Union, The Party of Progress and Socialism, and the People's Democratic Action Organization. Its text can be found in the annex to: Hassan O'Zeidan, "Amazigh Cultural and Linguistic Rights in Morocco" (In-depth master's degree dissertation, Faculty of Law, Casablanca 2008).

¹⁹ Mohammed Bodhan, "After Tamazight has been constitutionalized in Algeria, would Tamazight become official national language in the Moroccan Constitution," *Tawiza Newspaper* (May 2002) 9.

See also: Salem Chaker, "La monarchie marocaine impose une transcription pour tamazight" (Interview by Kra Isallen, February 2003), <http://www.tamazgha.fr/La-monarchie-marocaine-impose-une-transcription-pour-tamazight,051.html>, accessed October 18, 2013.

²⁰ Les travaux du Vème: Congrès Mondial Amazigh, Meknes. 31/10–2/11/2008.

as the Independence Party, whose secretary-general declared that he would strive against recognizing Tamazight as an official language.²¹

There is clear variation and differentiation between parties with respect to their positions on constitutionalizing Tamazight. The radically leftist Democratic Approach Party demands that it be treated as an official language, while the positions of other parties range from recognizing it constitutionally as a national language, to recognizing Amazigh identity only as a component of the Moroccan identity. Generally, they all avoid talking about specifics of its constitutionalization. Nonetheless, their recognition of Tamazight and Amazigh culture as a component of the Moroccan identity was enough to pave the way for the constitutionalization of Tamazight as an official language in 2011.²²

2. Formalizing Tamazight in the 2011 Constitution

The Moroccan Constitution, as amended in the summer of 2011, recognizes Tamazight as an official language alongside Arabic, a demand that has been made by Amazigh civil society since the summer of 1991. After years of struggle, the preamble of the new constitution is a response to this demand; it emphasizes the multifaceted nature of the ethnic components of the Moroccan identity, including Arabism, Islam, Amazigh, and desert Ḥassanī, in addition to their mixture with other cultural influences, namely: African, Andalusian, Hebrew, and Mediterranean.

With a view to ensuring the recognition of increasingly demanded cultural and linguistic rights, the constitution now adds the components that allow for such recognition and on which extensive debates have taken place since the 1990s. Their identification takes more developed and expanded form, within the prospect of autonomy for the desert region. Thus, the preamble of the new constitution focuses on Tamazight and al-Ḥassaniyah (Ḥassani desert culture and language).

Art. 5 of the constitution addresses the shortcomings that were to be found in the various constitutions of Morocco since the 1908 draft constitution, by recognizing Tamazight as an official language alongside Arabic, as follows: “[. . .] Tamazight constitutes an official language of the State, being common patrimony of all Moroccans without exception [. . .] an organic law defines the process of implementation of the official character of this language, as well as the modalities of its integration into teaching and into the priority domains of public life, so that it may be permitted in time to fulfill its function as an official language”. However, this wording is open to various interpretations.

It is evident that the formalization of Tamazight's status is coupled with, and conditional upon, the issuance of a regulatory law. This may be the reason hindering the initiation of such formalization, especially as there is a (discouraging) memory associated with repeated use of the term “issuance of a regulatory law” in Moroccan constitutions since 1962. A case in point is the use of the term with respect to “strike”, about which constitutions provide that “a regulatory law shall be issued on how it shall be exercised.”²³ One can ask whether

²¹ Mohamed Sassi, *Constitutionalizing Tamazight in which Future for Tamazight in Morocco* (Publications of Cultural Exchange Association op, Rabat 2009) 62.

See also: the thesis of Hussein Wa'ez, *The Emergence of the Amazigh Cultural Movement in Morocco* (New Al-Ma'aref Press 2000) 104.

²² Abdul Latif Oknush, “Reflections on the problematic Tamazight constitutionalization” in *The Series of Tamazight Studies* (Moroccan Association for Research and Cultural Exchange, Faddalah Paper Press, Rabat 2002) 16–22.

See also: Ali Karimi, *An Intervention at the Seminar on Constitutionalizing Tamazight* (organized by the Lawyers Club, Casablanca, in June 2010, unpublished).

²³ Art. 14 of 1962 to 1996 constitutions.

the fate of regulatory laws on the enforcement of Tamazight formalization would not be the same as those on the strikes.

Alternatively, it could have been specified within the text of the new constitution which areas Tamazight could be used in, such as in concluding contracts, (public) administration, the judiciary, education, official documents, passports, and national identity cards.

Art. 5 of the constitution stresses the need to create an institution for promoting Moroccan languages and cultures, which would be entrusted with the task of developing Arabic and Tamazight and various forms of Moroccan cultural expressions from the standpoints of heritage and creativity. This institution is the “National Council of Languages and Moroccan Culture”. The wording contained in Art. 5 is borrowed from the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions to which Morocco is a party.²⁴

Inasmuch as the constitutional recognition of Tamazight as an official language in this way raises the ecstatic feeling of victory amongst defenders of Tamazight, it nonetheless gives rise to some concern and fear; as such recognition may be a political move to merely subdue Amazigh discontent for a period of time.

The integration of Tamazight into public life as an official language will require putting it into use in public administration, deliberations in parliamentary sessions, and in court hearings. However, it seems that there are various difficulties in doing this. Additionally, the issuance of regulatory laws to enforce the formalization of its status may be delayed indefinitely. Tamazight movement activists understand this very well and, therefore, appreciate that constitutionalizing Tamazight is a great and important attainment, but nonetheless, believe that its recognition together with Arabic as two official languages of the state, in two separate lines or paragraphs, implies an inferior ranking for Tamazight.²⁵ In their view, the recognition should have been made in one line as follows: “Arabic and Tamazight are two official languages of the state.”²⁶ They also lament the absence of any legal protection for it, along the lines of protection measures for Arabic. With this in mind, it seems that Tamazight should have been recognized as an official language, similar to the recognition of the Kurdish language in the 2005 Constitution of Iraq alongside Arabic and its use imposed in education throughout the country and in all matters of public life.

By way of aside, it is necessary to emphasize that there is a difference between the state being the entity to promote Tamazight, and the promotion of Tamazight being imposed on it as a result of the impact of the balance of powers in favor of the civil society defending it. The former case reflects the authorities’ will to frame a controlled Amazigh demand, while the latter reflects the response to a legitimate popular demand; therefore, there is a substantial difference between the cases.

The Moroccan experience that culminated in Tamazight being inserted into the constitution as an official language did not take place without having a significant effect on its status in the other Maghreb states, especially in Algeria, Libya, and Tunisia.

B. The Algerian Constitution and Consideration of Tamazight as a National Language

There exists in Algeria a substantial Amazigh community with an effective presence and influence in various political, economic, and military domains. However, despite

²⁴ Morocco ratified the Convention on the Protection and Promotion of the Diversity of Cultural Expressions at the Ministerial Council in the city of Oujda on July 8, 2008.

²⁵ H. El Moujahid, *Constitutionalizing Tamazight: Arab Maghreb Spring*, July 17, 2011.

²⁶ Assabah, *Ahmed Assid*, December 25, 2012.

the prominence of the Amazigh identity as a component of national identity, it is still obscured by a sense of Arab Islamic identity. In Morocco and Algeria, the issue of language is highly sensitive and very complex, as can be noted from the destabilizing reaction that ensued immediately in the post-colonial period, following attempts by France to promote Tamazight at the expense of the value placed on Arab culture. France resorted to this approach in pursuit of the objective of destroying Arab and Amazigh languages and cultures. The French knew that Tamazight was unable to become the language of science and that Arabic itself could not keep up with scientific development unless it was rehabilitated to that effect. At the time of independence, Algeria went along the same lines applied in the rest of Maghreb countries under the pressure of national movements.²⁷ Therefore, it laid down the cultural and linguistic fundamentals, focusing only on two dimensions—Arab and Islamic—while neglecting the Amazigh dimension despite its prominent presence in various areas of public life.

Referring to how the constitutional movement in Algeria has shown interest in Amazigh language and culture, we will find that the four constitutions, which were formulated successively since the country's independence up to the current constitution, declare: "Islam is the religion of the state" and "Arabic is the official national language of the state."²⁸ This illustrates the adoption of the policy of Arabization. Parallel to this, the French language has been considered to be the first foreign language—if not actually the official language. This is clear from the fact that there are more than 30 legal provisions on Arabization, none of which has been considered seriously.

Owing to the growing demands of the Algerian Amazigh cultural movement, the pressing international circumstances after the second Gulf War, and the preceding collapse of the Berlin Wall, as well as pressure from internal political, there developed a kind of timid recognition of Amazigh language and culture, which appears in a paragraph of the long and detailed preamble of the 1996 Constitution and refers to Tamazight as an essential component of Algerian national identity, thereby rendering it constitutionally recognized. Thus, following the independence of all Maghreb states, Algeria was the first to recognize Tamazight, alongside Arabism and Islam, as components of national identity.

Some initiatives had paved the way toward this recognition; they were connected with the political integration which the country had witnessed during the period 1988–1989, including "the establishment of the Division of Amazigh Language and Culture" at the University of Tizi Ūzū, and later "the establishment in 1991 of another similar Division at the University of Bijāyah."²⁹

That being the case at the level of education, there were also many other initiatives that contributed to the timid constitutional recognition of Tamazight, ranging from publishing newspapers, magazines, and specialized books to giving it tangible attention in the media, similar to what happened in Morocco between 1976 and 1978 up to 1991. This may lead to the question of whether these developments had paved the way to the First Tamazight Spring, in Morocco and Algeria at least. One would argue that such an assertion would require further investigation to be made. Nonetheless, it is definitely the case that the year 1995 saw developments that paved the way toward the constitutional recognition of Tamazight in Algeria. In this year, practical steps were

²⁷ Mohamed Tahar Ben Saada, *Le régime politique Algerien—de la légitimité historique à la légitimité constitutionnelle* (Anfass, Paris 1989) 82.

²⁸ Youssef Al-Fassi Al-Fihri, "International human rights law through constitutions of Arab Maghreb States" (Ph.D. thesis, Faculty of Law, Agdal–Rabat 1991) 62.

²⁹ Miloud Bengrbe, "Tamazight, tribalism and national dimension," *Lebanon's al-Mustaqbal Newspaper* (Beirut September 25, 2005) 19.

taken to raise its status, the most important of which perhaps was the establishment of the “Higher Directorate for Tamazight,”³⁰ the first of its kind in the Maghreb region. The Directorate’s task was to work closely with the presidency for developing and promoting Tamazight and to work for its widespread introduction into the educational system and media. The establishment of this institution constituted a significant shift in official policy toward Tamazight. Nonetheless, it should not be considered as a step toward recognizing it constitutionally.

The 1996 Constitution refers to Tamazight inexplicitly as being part of the country’s national identity, without specifying whether it is a national or official language. One reaches this conclusion by reading the preamble of the constitution which came into force shortly after the Higher Directorate for Tamazight was established in 1995.³¹ However, Amazigh associations in Algeria have viewed the activity of this institution as being very limited as regards to the development and promotion of Tamazight; hence, they demand that the language’s status be constitutionalized as would be the case in Morocco as well.

Indicators of the possibility of Tamazight being formally recognized in Algeria and establishing it as a national language, not just an official language, can be traced back to the referendum campaign on Civil Harmony held on September 16, 1996.³² At this time President Būteflīqah declared in the Tizi Ūzū region that Tamazight would never become an official language; and that if it was necessary for it to become a national language, this should be subject to approval by the entire Algerian people through a referendum. President Būteflīqah confirmed his conviction in this position after his election as president in April 1999.³³

In January 2002, the president announced that in order for Tamazight to become a national language, the constitution would first have to be amended to that effect. On April 8, 2002, the Algerian parliament recognized Tamazight as a national language alongside Arabic under Law No. 02-03 dated April 10, 2001, but it did not make it an official language. The proposed amendment to Art. 3 of the 1996 Constitution was as follows: “Tamazight as well shall be a national language and the state shall ensure its promotion and its use with its various expressions at the national level”. Regardless, its recognition was weakened by President Būteflīqah’s speech in Constantinople on October 4, 2005, in which he said that Tamazight would never be formalized in Algeria under the constitution.³⁴ Perhaps this is the reason why the concerned authorities have not taken any action since the language was constitutionally recognized, to put into effect what is provided for in the constitution. Therefore, it can be asserted that the recognition of Tamazight was just an attempt to subdue Amazigh discontent and to calm down its proponents.

³⁰ It will be useful for clarification of this aspect to refer to the thesis of Mustafa Antara, “Tamazight and management of multilingualism in Morocco” (doctorat faculte de droit, Rabat) 12.

See also: Lahouari Addi, “L’armée Algérienne confisque le pouvoir,” *Le monde diplomatique* (February 1998) 15–17.

³¹ Established under Decree No. 95-147, dated May 27, 1995.

³² Ezzedine Al-Manasra, *Tamazight Issue in Algeria and Morocco: Problematic Multilingualism* (Dar Al Sharq, Jordan 1999) 25–26.

³³ See Jacques Leclerc, “Les droits linguistiques des berbérophones” (2014), http://www.axl.cefan.ulaval.ca/afrique/algerie-4Berberes_ling.htm, accessed June 18, 2015.

³⁴ Ganja Muwaffaq, “Algeria: tribal conflict or conflict of classes,” *Le Monde Diplomatique* (Arabic version, issued by the Jordanian newspaper *Al-Rai*, July 2001) 12.

C. Constitutionalizing Tamazight in Libya and Tunisia

There are other countries in the Maghreb region, namely Libya and Tunisia, in which the Amazigh component constitutes a minority. Certain statistics set the number of Amazigh who live in Libya at nearly 10% of the total Amazigh population who live in all Maghreb region states, whereas in Tunisia, they account for approximately 1% of the total Amazigh population in the region,³⁵ but these ratios are apparently inaccurate and do not reflect the reality. However, their significance lies in the fact that they show how a section of the citizenry of such states is deprived of its linguistic and cultural rights. This situation undoubtedly contradicts the international commitments of the respective states as signatories of various international documents (instruments) which emphasize respect for linguistic and cultural rights. The question therefore arises as to how the linguistic and cultural rights have been addressed through constitutional measures as well as through ordinary laws in Libya and Tunisia.

1. *Libyan Constitution between Denial of, and Hesitation toward, Recognition*

In Libya, the Amazigh community constitutes a significant proportion of the population of some major cities such as Tripoli and Benghazi. They have a powerful presence in the areas of Zuwārah, in Nafūsa mountain region along the Tunisian border, in the Ifrān area, the Ghāt area, and Ghadāmīs.³⁶ Nevertheless, their cultural and linguistic rights have been continually denied since the pre-colonial period. This reality is reflected in a series of official texts, statements, and declarations. The 1969 Libyan Constitution³⁷ declares two specific dimensions of the Libyan identity, namely, Arabism and Islam. Libya has never ceased its continuous support for Arab nationalism, which automatically entails an explicit denial of the linguistic and cultural rights for a significant part of the country's population. Furthermore, the preamble of the constitution implicitly denied the existence of an Amazigh national identity by asserting that "this constitution has been approved by the Arab Libyan people", thus ignoring the existence of Amazigh who are a component of this people. Art. 1 of the constitution further deepens and clarifies this trend by providing that "Libya is an Arab country [. . .] the Libyan people are part of the Arab Nation. Their goal is [to achieve] total Arab unity. The name of the country is the Libyan Arab Republic". Moreover, legislation and administrative practices have consistently and systematically sought to obliterate Amazigh history, language, traditions, and culture in Libya. In this context, the use of other languages in official correspondence as well as non-Arab names have been forbidden.³⁸

Official discourse about Tamazight has witnessed some change in Libya since 2005, when Colonel al-Qadhafi announced: "We should learn Tamazight and Arabic in order to cut the colonial forces off [from committing evil acts]. We all want to learn Arabic as well as Tamazight [. . .], and we do not have any inferiority complex about learning it".³⁹ After

³⁵ Ibrahim Qaradah, "Tamazight: A look into the Libyan equation and its future" (Conference of the 50th Anniversary of Independence, Libyan Studies Centre, London April 28, 2002).

³⁶ Some people believe that they are numerically 1.2 million approximately of the population of Libya.

³⁷ Albert Bourgi and Pierre Weiss, *Régimes politiques du tiers monde: série constitutions Etats de la ligne arabe* (les nouvelles Ed Africaines, Paris 1979) 227.

³⁸ Law No. 24, issued in 2002, confirms what is provided for in the 1984 law, which prevents the use of any language other than Arabic in transactions. This new law additionally prevents the use of non-Arab or non-Islamic names, such as: Taziry, Idar, Axeel, Olmas, Mazea', Amnay, Priestess of Numidia, Eatrie, etc.

³⁹ Omelez Saad El-Farsi, "Les droits culturels en Libye" in Souria Saad-Zoy, Johanne Bouchard (eds), *Droit culturel au Maghreb et en Egypte* (UNESCO Rabat 2010) 132; available at <http://unesdoc.unesco.org/images/0019/001900/190009F.pdf>, accessed June 19, 2015.

this statement, he invited the World Amazigh Congress to visit Libya in order to familiarize itself with his perceptions of the Amazigh Cause. Following a meeting with a delegation from the Congress on November 5, 2005,⁴⁰ he stated that he was convinced by the arguments of the Congress representatives and that Tamazight and Amazigh culture would be officially recognized and taught.

However, in a speech on March 2, 2007, Colonel al-Qadhdhāfi, as per usual, renounced all that he had previously said, turning things upside down. Just a few months thereafter, in October 2007, Sayf al-Islām al-Qadhdhāfi (son of Colonel al-Qadhdhāfi), briefly authorized the convening of a national seminar on “Amazigh identity” for the first time in Libya. During the seminar he announced that the state recognized that Amazigh were entitled to use their own language and their own names.⁴¹

2. Tamazight and Formulation of a Draft Constitution after the Revolution

Amidst the victory of the Libyan revolution in 2011 and at the depth of the revolutionary transformations permeating the various entities of the Maghreb region, which has spread to almost all states of the Arab Region, Tamazight was raised in the debate in relation to it being recognized constitutionally in Libya as an official national language alongside Arabic. Libyan Amazigh are the ones who played an important role in making the revolution a success and, specifically, the fall of Tripoli and bringing it into rebel hands. They also earned the honor of the presidency of the World Amazigh Congress—its former president was a member of the National Transitional Council after the revolution.

When the drafting committee for the new constitution was formed, there was a heated debate between advocates of an Islamic State and Arabism, on the one hand, and, on the other hand, those who called for inserting the Amazigh dimension as a component of national identity into the constitutional text. Nonetheless, the text of the draft Constitutional Charter for the Transitional Stage stresses that “Libya is an Islamic state” and also that “Arabic is its official language [and that] the State shall guarantee the cultural rights for all components of the Libyan society and its languages shall be deemed national ones.”⁴²

The neglect of Tamazight had provoked the Amazigh community in various regions of Libya, particularly in the Nafūsah mountain region, where the community reacted speedily, after holding a mass demonstration in the city of Ifrān, which is one of the most important revolutionary strongholds in Nafūsah region. They issued a statement saying:

[. . .] the formalization of Tamazight in the constitution with all its dimensions in terms of language, culture, identity and civilization, is a fundamental demand of the Amazigh movement, it being not liable to delay or procrastination. Equally important is the emphasis on the gradual integration of Tamazight in all public utilities and in public life.⁴³

⁴⁰ Travaux du Vème Congrès Amazigh, Meknes, October 31–November 2, 2008, 16; *see also*: Chakir Salem, “L’interêt de la langue dans l’identité amazighe” *Journal Tassafout* (October/November 1993) 4.

⁴¹ Omelez Ali Saad El-Farsi, “Les droits culturels en Libye” in Souria Saad-Zoy and Johanne Bouchard (eds), *Droits culturels au Maghreb et en Egypte* (UNESCO, Rabat 2010) 129, 159 et seq.

⁴² For an English translation of the Draft Constitutional Charter, *see* http://portal.clinecenter.illinois.edu/REPOSITORYCACHE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZQ9pfnC4py-47DaBn9jLA742IFN3d70VnOYueW7t67gWxEs3XiVJJxM8n18U9Wi8vAoO7_24166.pdf, accessed October 28, 2013.

⁴³ Ali Chibani, “Les population amazighes croient en leur printemps” (Blog entry, July 28, 2011), <http://blog.mondediplo.net/2011-07-28-Les-populations-amazighes-croient-en-leur>, accessed October 28, 2013.

The Constitutional Declaration after the revolution, consisting of 37 articles, mentioned the Amazigh issue in its first chapter, immediately after the preamble. In the first article it says: “the Arabic language is the official language, while ensuring the existence of the Amazighi, Tabu and Tuareg linguistic and cultural rights and all Libyan social components”.

In this regard, it is not clear whether or not the Amazighi, Tabu, as well as the Tuareg languages are, with the Arabic one, official or national languages or whether these are neither the official nor the national one. Therefore the constitution still does not recognize them as languages in the educational system, in administrative handling, or in a complaint before courts, except in areas in which the population only speaks these languages.

It is worth noting that the various amendments adopted between the 2011 Constitutional Declaration and 2012 were not far from the spirit that prevailed beforehand concerning the position of the other languages. The Amazigh asserted that they represent 10% of the population of Libya and, in order to prove their strength, staged a mass demonstration in Martyrs’ Square, Tripoli. Formalizing Tamazight in the constitution was their main demand. Amazigh officials expressed their intention to set up an organization to realize their demands, stressing that constitutional recognition of Tamazight as an official national language must be resolved politically, not through violence.⁴⁴

In the 2014 draft constitutional provisions for a new Libyan Constitution—published by thematic committees of the Constitution Drafting Assembly (CDA)—cultural and linguistic rights are mentioned in chapter one, which covers the “Form of State and Fundamental Cornerstones” of a future Libyan state. Art. 7 states: “It [Libya] takes pride in all social and cultural components represented by the Arabs, Amazighs, Tuareg, Tebo and others. It shall establish the means to ensure maintenance thereof.” One can deduce from this article that the social and cultural diversity of Libya is to be recognized and accepted as an integral part and needs to be promoted. Art. 27 of section three of the suggested constitutional articles is supposed to address the languages(s) of Libya. The first thematic committee for the chapter of “Form of State and Fundamental Cornerstones” proposed two possible versions of this very article. The first one proposed by the majority states:

The Arabic language [. . .] shall be the official language of the State. Arabic, Amazighi, Tuaregi, Tebu, Hosa, Ghadamsi and other languages spoken by part of the Libyan people and considered part of its cultural and social legacy shall be national languages. The State shall commit to giving attention and teaching thereof and shall work towards perceiving these languages by all Libyans as part of their collective heritage.

The other proposal stipulates:

Arabic shall remain the official language of the State. Tawerghi, Tebu and Amazighi shall also be official languages being a joint legacy for all Libyans. [. . .] The provisions of this law shall ensure integration of Tawerghi, Tebu and Amazighi languages in the educational structure and other fields of public life to enable future fulfillment of function as official languages.

Art. 7 and both versions of Art. 27 of the draft constitutional provisions enhance an inclusive national identity by recognizing the Amazigh language. The articles in question underline an understanding of Amazigh as being one of the most present languages in the

⁴⁴ Youssef Siddiq, *A Preliminary Approach to Linguistic and Cultural Rights from the Perspective of the Amazigh Movement* (memoire master droit publique faculte de droit, Agdal Rabat) 43.

linguistic and cultural space in different areas of life. Finally the Amazigh language would at least be recognized as a national language, if not even as an official language next to the Arabic language. Key to the success of these provisions is, however, their enforcement. Thus the draft constitutional provisions mention a National Council on the Protection of Cultural and Linguistic Heritage. Art. 25 of the section on independent institutions states:

The Council shall undertake the development and advancement of Arabic, Amazighi, Tebbawi, Targhi as well as other languages; it shall also preserve the diverse cultural heritage of the Libyan people and works towards its documentation, identification and revival.

It appears that in order to ensure that the Council would be representative and carry out its work effectively, the drafters felt it is essential that the members of the Council have a profound understanding of the relevant cultural and linguistic issues. Thus Art. 26 stipulates that the Council shall be composed of members who are “representatives of linguistic components”.

Moreover in an unnumbered article on “Multiculturalism” in the rights and liberties part, the draft stresses the state’s commitment by enumerating the following measures to be taken by it in order to fulfill the notion of an inclusive national identity. Accordingly:

The State shall commit to [. . .] 1. Protect local languages and cultures, guarantee their prosperity as well as ensure that they are taught and used in media outlets. 2. Protect traditional knowledge and literature. 3. Protect and develop historic areas. 4. Teach the arts and increase the span of cultural services. 5. Protect manuscripts and artifacts 6. Prohibit acts that are harmful to the cultural, linguistic and historic heritage, provided that heritage protection related lawsuits are considered public lawsuits that shall incur no judicial fees.

3. The Tunisian Constitution: The Possibility of Recognizing Amazigh Cultural and Linguistic Rights as a Component of Amazigh Identity

Since its independence in 1956, Tunisia has always asserted that it is an Arab Islamic state, thereby following the footsteps of other Maghreb states. In the preamble of its 1959 Constitution it is stressed that “Tunisia shall remain faithful to the teachings of Islam [. . .] to its membership of the Arab community [. . .]”.⁴⁵ Art. 1 of the constitution emphasizes that “Tunisia is [. . .] an independent [. . .] state. Its religion is Islam, its language is Arabic [. . .]”. Art. 2 adds that “the Republic of Tunisia is part of the Great Arab Maghreb [. . .]”. These extraordinary provisions ignore hundreds of thousands of indigenous people in Tunisia, who have an identity of their own, based on language, traditions, practices, and culture. It was hoped that the Reform Movement of November 7, 1987, would seek the recognition of Amazigh cultural and linguistic identity but the 1988 National Charter denied it, despite the fact that its Maghreb neighbors (Morocco, Algeria, and Libya) had been witnessing Amazigh cultural movements. Thus, the official Tunisian identity is based solely on Arabism and Islam. It follows, therefore, that claiming any other sense of identity, such as Amazigh, is cause for depicting adherents to such identities as enemies of national unity.

⁴⁵ Albert Bourgi and Pierre Weiss, *États de la Ligue arabe (Régimes politiques du Tiers monde)* (Nouvelles éditions africaines, Abidjan 1979) 341.

Under the 1959 Constitution all aspects of official behavior and practices followed in Tunisia are of an exclusionary nature in relation to Amazigh. The Amazigh do not have the right to establish associations with a cultural or social character.⁴⁶ They are not allowed to use indigenous Amazigh names. Nor is there any Amazigh cultural production in either print or in audio-visual form. They are often not entitled to artistic and cultural expression in their own language, contrary to the principles of international human rights law, including related conventions and declarations.

In April 2011, immediately after the revolution, the first Amazigh national conference was held in Maṭmaṭah in southern Tunisia. The conference was held with a view of gathering and unifying Amazigh in Tunisia, whose proportion of the total population is estimated at approximately 1%.⁴⁷ One outcome of that conference was the founding of the “Tunisian Association for Amazigh Culture”,⁴⁸ which received official recognition from the new regime. This can be considered as an initial step toward official recognition of Amazigh linguistic and cultural rights in Tunisia.

In elections to the post-revolution Constituent Assembly, Tunisian Amazigh drew attention to their need to be represented therein as well as the need, for their language to be recognized in the ensuing constitution by stipulating therein, at the very least, that it can be taught in institutes and schools as an optional language.⁴⁹ However, such an express stipulation was not provided for in the 2014 Constitution.⁵⁰ Instead, the latter constitution shows a strong emphasis on the Arab identity of Tunisia. For example: The preamble refers to the Tunisia’s “Islamic-Arab identity”. Furthermore, it emphasizes the commitment to “strengthening Maghreb unity as a step towards achieving Arab unity”. That Tunisia is part of the “Arab Maghreb” is highlighted in Art. 5. Art. 1 affirms that the language of the state is Arabic—this provision is unamendable which, in turn, gives it more weight.

Furthermore, Art. 39 stipulates that the state shall “work to consolidate the Arab-Muslim identity and national belonging in young generations, and to strengthen, promote and generalise the use of the Arabic language and to openness to foreign languages”. Although reference is made to “foreign languages”, there is no explicit mention of Tamazight or, let alone, other another minority languages.

Art. 42 does affirm that the “right to culture is guaranteed” and that the state “supports the strengthening” of the diversity of national culture. Whether the linguistic and cultural rights of minorities falls under this is debatable. Even if so, it does not necessarily constitute a very strong protection of such rights.

III. CULTURAL AND LINGUISTIC RIGHTS IN THE CONSTITUTIONS OF ARAB LEVANT STATES

Although Arab Levant states are considered the historic heart of Arabism, they are not free of their own ethnic issues. Similar to Maghreb states, they have various communities of respectable standing. Corresponding to Amazigh nationalism in the Maghreb region, in the

⁴⁶ Kazem Habib, “Towards a serious and civil handling of Amazigh problem in Maghreb States,” *Civilized Dialogue* (2007) 8.

⁴⁷ They are concentrated in the south and on Island Freedom, renowned worldwide as a touristic resort, and mainly in Maṭmaṭah, as well as in Tunisian cities.

⁴⁸ Founded in July 2011, and chaired by Khadija Binsa’idan.

⁴⁹ “‘Tunisia is Amazigh’ according to pro-Amazigh Associations,” *The Tunis Times* (Tunis June 20, 2013).

⁵⁰ Available at <http://www.venice.coe.int/files/Constitution%20TUN%20-%202012014.pdf>, accessed in September 22, 2015.

Levant region there is Kurdish nationalism, which is centralized in Iraq, with a presence also in Syria, Jordan, and Lebanon. The Arab Levant has a strong diversity of ethnic minorities other than Kurds, such as, Armenians, Turkmen, Circassians, Assyrians, and Chaldeans.

In the Arab Levant region, there is a disparity in the measure of attention being given to the cultural rights of non-Arabs. In some countries in the region, there was recognition of these rights even before they became a subject-matter of outcry in the reports of the Human Rights Council, while in many other countries, they have been and still are being repudiated.

A. The Iraqi Constitution

1. *Iraqi Experience and Constitutional Recognition of Kurds' Linguistic Rights*

The Iraqi experience is a pioneering one in the Arab Regional Order as a whole, as Kurdish nationalism and Kurds' linguistic and cultural rights have been constitutionally recognized and given appropriate standing since 1970 under the rule of the Ba'ath Party, at a time when the fundamental international human rights instruments had not yet entered into force, as well as before such rights had been recognized in certain Western states. With reference to Art. 5 of the 1970 Iraqi Constitution, amended in 1973 and 1974, it can be noted how Iraq, despite being seen as an Arab state, and even, in a way, the heart of Arabism, recognized the cultural and linguistic rights of non-Arabs. This is confirmed by Art. 5: "Iraq is part of the Arab Nation".⁵¹ The constitution, in the same article, nonetheless recognizes: "The Iraqi People are composed of two principal nationalisms: the Arab Nationalism and the Kurdish Nationalism. This constitution acknowledges the national rights of the Kurdish People and the legitimate rights of all minorities within the Iraqi unity. Iraqi people consists of two nationalisms, namely Arab and Kurdish, and recognizes the national rights of the Kurdish people and the legitimate rights of all minorities within the framework of Iraqi unity." The minorities meant here are Chaldeans, Assyrians, Armenians, and Turkmen.⁵²

The recognition of minorities by Iraq at that time, if compared with the situation in other Arab states, can be seen as a revolutionarily progressive development toward overcoming obstacles to national unity. In order for the constitution to place a stronger emphasis on the linguistic and cultural rights of the Kurds and other minorities, it considers the Kurdish language as an official language alongside Arabic in the Kurdistan region of Iraq, while retaining Arabic as an official language throughout the country. This is confirmed in Art. 7: "Arabic is the official language. The Kurdish language is official, besides Arabic, in the Kurdish Region." Recognition of linguistic and cultural rights entails granting autonomy to the Kurdish region within the framework of the unified Iraqi national state. This, however, does not mean that the Kurdish region is purely Kurdish, void of an Arab element. The constitutional text itself then took note of Kurdish autonomy in Art. 8, para. c, which reads: "[...] the region where there is a majority of Kurdish population shall be autonomous according to the requirements of the law."⁵³

Recognition of the linguistic and cultural rights of non-Arab minorities is seen within the framework of the so-called "unity of diversity". As Iraq has been an advocate of the idea of Arab unity since and before the emergence of the Arab Regional Order, it has realized that Arab unity cannot be achieved if it did not work upward from a basis of national unity

⁵¹ See the text of the provisional Iraqi Constitution in Albert Bourgi and Pierre Weiss, *États de la Ligue arabe (Régimes politiques du Tiers monde)* (Nouvelles éditions africaines, Abidjan 1979) 155 et seq.

⁵² Jacques Leclerc, *Langue et société* (Mondia Éditeur coll. "Synthèse," Laval 1992) 708.

⁵³ Law No.147, issued by the Management Council of the Revolution on March 11, 1974.

first. Building national unity constitutes a step forward in promoting and building the unity envisaged at the regional level, based on variation and diversity. This fact was discerned in Iraq as early as the beginning of the 1970s.⁵⁴

In the past, no explicit attention was given to the rights of non-Arab communities who lived in Arab surroundings. They were often suppressed and persecuted when they demanded their cultural rights. This situation has now partially changed in light of the Arab revolutionary movement, and the issue of rights is now seen with a different logic to that which prevailed in earlier times. At the time of independence, constitutions used to emphasize Arabism and to ignore the existence of other languages and cultures; today, however, in light of new revolutions and probably a little while before, we have been witnessing the issuance of constitutions that recognize the existence of national identities other than that found in Arab nationalism, including recognition, albeit modest, of their rights. Does this indicate the beginning of transition from an Arabism-oriented sense of national unity to a multicultural one with an integrative and inclusive humanitarian dimension? Can such a transition help to establish a region of unity stretching from the Gulf to the Atlantic Ocean, without excluding different national components but rather integrating and involving them in the structures of power and economics? In such a process, economic unity might be desired as a step toward political integration. Perhaps the experience of the new constitutional experiment in Iraq should be used as guidance for others so that, if it is strengthened, the unity of this country can be maintained.

Having reviewed some elements of the Iraqi constitutional experience with Kurds in the 1970s (a revolutionary development at the time), we can now consider the present day, in a different internal, regional, and international climate and set of circumstances.

2. The Iraqi Constitution of October 15, 2005

The preamble of the 2005 Iraqi Constitution shows that this time efforts were made not only to ensure and protect Kurdish cultural and linguistic rights; it also makes additional reference to other non-Arab groups such as Turkmen and Armenians,⁵⁵ by “[. . .] invoking the pains of sectarian oppression inflicted by the autocratic clique and inspired by the tragedies of Iraq’s martyrs, Shi‘ite and Sunni, Arabs and Kurds and Turkmen and from all other components of the people [. . .]”⁵⁶ The preamble also recollects the fierce repression to which various ethnic and religious groups had been exposed. The authors of the constitution therefore clearly assert their ambition to build an Iraq that is no longer affected by sectarianism, racism, and ethnic conflict. In order for the pronouncement contained in the preamble to be given more binding power and so that it can be checked, detailed, and clarified, Art. 3 of the constitution tries to remove emphasis from Arabism as a characteristic of Iraq in favor of an emphasis on Islam. The said article provides that “Iraq is a country of many nationalities, religions and sects. It is a founding and active member in the Arab League and is committed to its charter, and it is part of the Islamic world”.

As we can see, no emphasis is placed on Iraq’s pan-Arab dimension, despite the fact that this country had always been the heart of Arabism since the ‘Abbāsīd era up until the beginning of the millennium. When it comes to referring to its Arab affiliation, Iraq is only

⁵⁴ Omar Shores Lassen, *Rights of the Kurdish People in Arab Constitutions: A Comparative Analytical Study* (Kurdistan Centre for Strategic Studies, Arbil 2005) 25.

⁵⁵ *Iraq Spectra: Source of Its National Wealth*, a study by Section on Minorities, Iraqi Ministry of Human Rights, 2011.

⁵⁶ For the English text of the Constitution including its preamble, see http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf, accessed October 24, 2013.

described as a founding and active member of the League of Arab States. Does this constitute an abandonment of Arabism?

Art. 4 of the 2005 Constitution reiterates what was provided for in the 1970 Constitution with respect to the following: "The federal and official institutions and agencies in the Kurdistan region shall use both [the Arabic and Kurdish] languages". Perhaps this is something which can be taken for granted, as long as the two languages are official languages at the national level. Thus, there has been no need for such an assertion once again, unless it is feared that the Arabic language might be prevented in the Kurdistan region. Art. 4 also asserts that "the Turkomen language and the Syriac language are two other official languages in the administrative units in which they constitute density of population." This does not only formalize the Arabic and Kurdish languages at the national level while declaring the Turkmen and Syriac languages to be official languages in areas where they are spoken, but it also entitles each region or governorate to adopt any other local language as an additional official language if the majority of its population so decide in a referendum. This is why Art. 4 of the new Iraqi Constitution is a model article in terms of inclusiveness, and it would be worthwhile for other states with ethnic and racial minorities to adopt similar articles with a view to maintaining minority cultural and linguistic rights.⁵⁷

Undoubtedly, this has already been made part of the Moroccan Constitution of July 2011 in its recognition of Tamazight as an official national language. Algeria may be inspired to follow suit having recognized Tamazight as a national language in its 2002 Constitution. It may nowadays be in the process of formalizing this language. The authors of the Libyan Constitution might also end up taking similar measures in the future.

One views as a serious indication reversing all what Iraq has done since the creation of the Arab Regional Order Institution when its representative at the founding consultations of this institution, which has a pan Arab regional dimension, stressed in defining the concept of Arabism what Arab means by saying: "An Arab is a person who speaks Arabic and believes in its Cause [. . .], etc."⁵⁸

The Iraqi Constitution emphasizes with some detail the term "official language", indicating that it shall be further defined by separate law; but it shall, however, encompass:

- Publication of the official gazette, in Arabic and Kurdish;
- Speech, conversation, and expression in official settings, such House of Representatives, Council of Ministers, courts, official conferences, in either of the two languages;
- Recognition and publication of the official documents and correspondence in the two languages;
- Use of both languages in any context where the principle of equality, requires it such as bank notes, passports, stamps, etc.

The Iraqi experience has been a source of motivation for Kurds, Armenians, Turkmen, and Circassians in neighboring states, particularly in Syria and Jordan. The next section of this article, therefore, deals with how the new constitutions in these states have dealt with the cultural and linguistic rights of such minorities.

⁵⁷ Omar Shores Lassen, *Rights of the Kurdish People in Arab Constitutions: A Comparative Analytical Study* (Kurdistan Centre for Strategic Studies Arbil 2004) 24.

⁵⁸ Jamil Matar and Ali Eddin Hilal, *Arab Regional Order* (Centre for Arab Unity Studies Beirut 1980) 120.

B. New Constitutional Experience in Syria and Jordan

Ethnic minorities in Syria and Jordan look to the Iraqi experience with hope and aspire to have the same opportunity to enjoy the rights granted to their counterparts across the border. They realize that international political circumstances can help them to achieve recognition of their cultural and linguistic rights and that regional and national political circumstances as well are more advantageous for them than ever before.⁵⁹

1. *The Jordanian Constitution: The Same Status as Before*

The position of Jordan in relation to minority cultural and linguistic rights did not change when the constitution was amended, following the call for political and constitutional reform which developed from escalating protest movements and the effects of the Arab Spring. Therefore, the subject of cultural and linguistic rights of non-Arab minorities has not witnessed any significant change. Amendments introduced into the new Jordanian Constitution, which were passed by the Senate and House of Representatives, approved by the king, and issued on September 30, 2011, do not recognize the rights of non-Arab minorities, such as Circassians and Armenians, and treat them as if they were nonexistent. Thus, the new constitution repeats what was provided for in the previous version, with emphasis placed on the Arab character of Jordan and its pan-Arab affiliation, without the slightest reference to the existence of minorities which are linguistically and culturally different from the Arab majority.⁶⁰ Art. 1 states: "The Hashemite Kingdom of Jordan is an independent sovereign Arab state. It is indivisible and no part of it may be ceded. The Jordanian people is a part of the Arab Nation [. . .]".⁶¹ In the operative part of this article a lack of interest in other communities which live within the state is evident. This is clearly manifested in Art. 2, which further describes Jordan's Arabism, but overlooks any recognition of the rights of other nationalisms while confirming that Arabic is the official language of the state and that Islam is its religion. The text keeps absolutely silent about other communities their cultures and languages. This article does not depart from what was provided for in the Constitution of January 1, 1952, and it merely repeats the operative part and the content of Art. 2 of the 2005 Constitution.⁶² There is a similarity to the position of Morocco prior to the Constitution of July 2011, and Algeria's position before the 1996 Constitution, which was amended in 2002 by designating Tamazight as a national language.

This position is reiterated in Art. 6 of the new Jordanian Constitution. It can be discerned from its first paragraph that there are other communities whose cultural and linguistic rights have not been recognized: "Jordanians shall be equal before the law with no discrimination between them in rights and duties even if they differ in race, language or religion." This paragraph recognizes the existence of non-Arab minorities within Jordan as well as the existence of non-Muslim minorities,⁶³ but, at the same time, denies them the right to enjoy their cultural and linguistic rights.

⁵⁹ Cf. Mohamed Al-Mahdi Ashour, *Ethnic Pluralism, Management of Conflicts and Annual Strategy* (1st ed, Publications of the Scientific Centre for Policy Studies, Jordan 2002) 45.

⁶⁰ For further information, refer to Burhan Ghalioun, *The Sectarian Question and the Problem of Minorities* (3rd ed, Arab Center for Research and Policy Studies, Doha 2012).

⁶¹ For the English text of the new Constitution of Jordan, see http://www.representatives.jo/pdf/constitution_en.pdf, accessed October 24, 2013.

⁶² Albert Bourgi and Pierre Weiss, *États de la Ligue arabe (Régimes politiques du Tiers monde)* (Nouvelles éditions africaines, Abidjan 1979) 169.

⁶³ Burhan Ghalioun, *The Sectarian Question and the Problem of Minorities* (Arab Center for Research and Policy Studies, Doha 2012) 52.

It can be ascertained, however, that those entrusted with the amendment of the Jordanian Constitution deliberately made things vague and ambiguous in Art. 19 so that at first glance it seems as if the constitution recognizes the cultural and linguistic rights of other non-Arab communities. It reads:

[these communities] shall have the right to establish and maintain their own schools for the education of their own members provided that they comply with the general provisions of the law and be subject to the Government control in their curricula and orientation.

Does this mean recognition of the right of ethnic communities and minorities of Circassians, Turkmen, and Armenians to teach their respective languages in their own schools, is it just about providing religious teachings for non-Muslim communities? The text of this article does not clarify what is meant by its operative part or its content, leaving things unclear and legally puzzling. Whatever the case may be, there are nonetheless minorities in Jordan as in Syria and the other Arab states that still retain their culture and language, without their cultural and linguistic rights being recognized. In this regard, the Syrian experience may seem similar to a large extent to that of Jordan. This requires an attempt to outline the Syrian experience in light of recent developments which have been triggered by the revolution there.

2. New Constitutional Experience in Syria and the Prospects for Non-Arab Linguistic and Cultural Rights

In Syria, as in other Levant states, there are non-Arab ethnic minorities which still retain their respective languages and culture. No attention has yet been given to them or to their linguistic rights. As is the case in Jordan, the Syrian experience has gone in a direction different from the Iraqi experience vis-à-vis Kurds, Armenians, and Turkmen.

Examination of the Syrian Constitution shows that it does not pay any attention to minority rights, but rather denies them. For example, Art. 4 of the Constitution of March 13, 1973, emphasizes what all Arab states' constitutions at the time have emphasized, that is to say, "The Arab language is the official language".⁶⁴ Part 3 (Educational and Cultural Principles) of Chapter I stresses the pan-Arab orientation of the Syrian State; it states that the goal of the educational and cultural system is to build up a pan-Arab, socialist, and scientifically oriented generation, filled with the spirit of struggle in the pursuit of achieving their nation's goals of unity, freedom, and socialism.⁶⁵ It ignores the cultural rights of the other components of the Syrian people, since it considers the socialist nationalist culture to be the basis for building the unified socialist Arab society, and aims at strengthening the moral values of the state as well as achieving the ideals of the Arab nation.⁶⁶

The Syrian regime's denial of the rights of other ethnic minorities within the constitution heightened cultural tensions and contributed to a mentality of revenge when the armed conflict erupted. Kurds, who make up the largest most powerful group amongst these minorities, have supported the armed opposition since its inception, spurred on by the repression they were exposed to and the nonrecognition of their linguistic and cultural

⁶⁴ For the English text of the 1973 Syrian Constitution, see http://www.servat.unibe.ch/icl/sy00000_.html, accessed October 24, 2013.

⁶⁵ Albert Bourgi and Pierre Weiss, *États de la Ligue arabe (Régimes politiques du Tiers monde)* (Nouvelles éditions africaines, Abidjan 1979) 319.

⁶⁶ Ibid.

rights and even their right to citizenship.⁶⁷ Even the new constitution, which was put to a referendum during the current revolution on February 12, 2012,⁶⁸ does not recognize the languages of minorities, such as Armenians. Art. 4 thereof is a reproduction of the 1973 Constitution; it reads: “The official language of the State is Arabic” and makes no mention whatsoever of other languages.

Proponents of the Kurdish cause ask whether maintaining the Arabic language as the official language of the Syrian Republic implies the exclusion of the Kurdish sense of national identity as the second major ethnic group, bearing in mind that parts of their homeland, i.e., Kurdistan, have been annexed by Syria, as well as exclusion of Assyrians, Armenians, and Circassians. They believe that the country will not become stable until the Kurdish issue has finally been resolved. Some proponents think that this problem can be overcome by having Chapter I of the Syrian Constitution, provided that “the Arab people in Syria are part of the Arab Nation” and the Kurdish people in Syria are part of the Kurdish Nation, whereas, in fact, both nations were fragmented under the Sykes-Picot Agreement of 1916. They also believe that the provision in Art. 4 of the constitution that “the official language of the State is Arabic” implies exclusion of the right of Kurds and others who account for 19% of the total population.⁶⁹ Therefore, they suggest the following wording: “The Arabic and Kurdish languages are the two official languages of the State and minorities shall be entitled to education in their mother tongue”.

It should be recognized, however, that the 2012 Constitution of Syria takes one step forward, albeit a modest one. This is a new development vis-à-vis cultural and linguistic rights, which has been dictated by the terms of the civil war. Art. 9 of the new constitution emphasizes for the first time in Syrian history:

As a national heritage that promotes national unity in the framework of territorial integrity of the Syrian Arab Republic, the constitution shall guarantee the protection of the cultural diversity of Syrian society with all its components and the multiplicity of its tributaries.

This article carries some sort of recognition of the cultural and linguistic rights of Kurds, Armenians, and Turkmen. It implicitly recognizes that the Syrian society consists of minorities of varying ethnicities, even though their languages are not recognized constitutionally, neither as official languages in areas where there is a majority of native speakers, nor as national languages.

IV. CONCLUSION

This article has illuminated the transformation that has occurred within the Arab constitutional movement, in which the emphasis has shifted from the concept of Arabism to the recognition of cultural and linguistic rights of other non-Arab communities. This recognition of the diversity of identity has begun to permeate the new Arab regional order as a whole and is leading in the direction of a new order based on multi-ethnicity. In short, there is a growing transition from the dominance of nationalism toward an ethos of ethnic pluralism.

⁶⁷ Some people suggest that the Arabic language be considered the official language of the State without exclusion of the Kurdish language since it is the language of a key component of the Syrian people, and be taught in schools as a second language.

⁶⁸ For the English text of the 2012 Syrian Draft Constitution, see http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/syria/Syria_82_Draft_Constitution.pdf, accessed September 22, 2015.

⁶⁹ Ismail Hassaf, *Syrian Draft Constitution between Pan Arab Ideology and Political Prevarication*, available at <http://amoude.net/>, accessed June 19, 2015.

Tunisia after the Arab Spring

Women's Rights at Risk?

IMEN GALLALA-ARNDT

During the upheavals in the Arab Spring countries, people from different social categories—men and women, Muslims and Christians, rich and poor—took to the streets guided by a common goal: the toppling of the authoritarian regimes. The people called for freedom and dignity for all without differentiation or discrimination. Nevertheless, once the dictators had been ousted, the people's sense of cohesiveness proved to be of a limited duration. As Egyptian women demonstrated for the promotion of women's rights on International Women's Day (March 8, 2011) in Tahrir Square, they were attacked and mistreated by the security forces and by violent counterdemonstrators.¹ In Libya the chairman of the Transitional National Council promised to lift restrictions on polygamy immediately after the success of the revolution against al-Qadhafi.² Astonishingly, also in Tunisia violence against women increased after the revolution.³

The disappointment of Arab women after the revolutions has often been described by reference to Danton's famous adage during his trial: "The revolution devours its children".⁴

¹ "Egypt's Million Woman March Fizzles into Shouting Matches," *CNN* (March 8, 2011), <http://edition.cnn.com/2011/WORLD/meast/03/08/egypt.women/>, accessed April 7, 2015.

² Adam Nossiter, "Hinting at an End to Curb on Polygamy, Interim Libyan Leader Stirs Anger," *The New York Times* (October 20, 2011), http://www.nytimes.com/2011/10/30/world/africa/libyan-leaders-remark-favoring-polygamy-stirs-anger.html?pagewanted=all&_r=0, accessed April 7, 2015.

³ "Séminaire sur les formes de violence contre les femmes en Tunisie post-révolution," *Babnet Tunisie* (November 24, 2012), <http://www.babnet.net/cadredetail-57107.asp>, accessed April 7, 2015.

⁴ Jacques Mallet du Pan, *Considerations sur la nature de la révolution de France* (1793) 80.

History shows that very often women's status suffers from a backlash during post-revolutionary periods.⁵ The rise of Islamists in society and on the political scene has made concerns about women rights in the post-revolution countries even stronger. In Tunisia the moderate Islamist party al-Nahḍah won in the election for the National Constituent Assembly (NCA).

Thus women's rights activists and secularists came to fear the negative impact of the Islamists on the status of women in Tunisia, which is the most progressive country in the Islamic world (with the exception of Turkey). Although the leaders of the parties assured the public that they would not call the advancements achieved by Tunisian women into question, they could not hide their socially conservative inclinations.⁶ In the meantime the post-revolution constitution is adopted and the first parliamentary and presidential elections organized on the basis of that constitution took place. In both the Islamist party al-Nahḍah was beaten by the liberal secular Nida' Tūnis.

Were the gains made in the area of women's rights in Tunisia jeopardized by the Islamists as they were in power and by the associations affiliated to them? What is the status of women in the first post-revolution constitution?

The purpose of this paper is to examine the situation of women after the toppling of the authoritarian regime of Ben 'Ali. This analysis of women's legal status before the revolution will help determine the real impact it made on women's rights during the different stages of the transitional period.

I. THE PRIVILEGED STATUS OF WOMEN BEFORE THE ARAB SPRING

Since independence in the 1950s, Tunisian women have enjoyed a privileged status in comparison to other Arab and Islamic countries. These privileges were evident in different areas. Women have the right to work and the freedom of movement. They are entitled to open a bank account and to run their own business without the permission of their father or husband.⁷ In fact, in 1993 a new article (5 bis) was added to the labor code prohibiting any work-based discrimination between men and women.⁸ As far as domestic violence is concerned, some improvements have been witnessed in the legal framework owing to the pressure from civil society.⁹ For instance, since a reform in 1993 the marital bond has been considered to be an aggravating circumstance in violence cases. Moreover, the law allowing for gender discrimination in the penalization of the murder of an adulterous spouse was lifted.¹⁰

The Code of Personal Status, the Tunisian Constitution and the status of CEDAW (the Convention to Eliminate All Forms of Discrimination against Women) in Tunisian law deserve particular attention.

⁵ Elisabeth Johansson-Nogués, "Gendering the Arab Spring? Rights and (In)security of Tunisian, Egyptian and Libyan Women" (2013) 44 *Security and Dialogue* 404.

⁶ *Id.* 395.

⁷ Lilia Ben Salem, "Tunisia" in Sanja Kelly and Julia Breslin (eds), *Women's Rights in the Middle East and North Africa* (Rowman & Littlefield, New York 2010) 488.

⁸ *Id.* 490.

⁹ *Id.* 497.

¹⁰ Art. 207 Penal code was struck out according to: Loi no 93-72 du 12 Juillet 1993, JORT no 53 (July 20, 1993) 1003.

A. Family and Inheritance Law

The 1956 Code of Personal Status (CSP) regulating family and succession law marked a revolution in the personnel status of Islamic countries, as it departed from classical Islamic law on many points. It prohibited polygamy. Tunisia is the only Islamic country, with the exception of Turkey, where polygamy is prohibited without exception. Polygamous marriages result in a three-year jail sentence. Furthermore, the repudiation was also abolished. Contrary to classical Islamic law and the positive laws in all Islamic countries, the husband is not entitled to end marriage unilaterally outside the court. Under Tunisian law the divorce must always be pronounced by a judge. Moreover, Tunisian lawmakers introduced the prerequisite of mutual consent of both spouses for marriages, abolishing the institution of *al-jabr*, which allows a father to marry off his minor daughter without her consent.¹¹

Contrary to the family laws of almost all other Islamic countries, the CSP does not contain a subsidiarity clause referring to classical Islamic law in cases where the law itself is silent or unclear about a given question.¹²

Moreover, the legislator intervened continuously to improve the situation of women and to respond to the needs brought about by societal changes. The minimum age of marriage for women was raised to give them the opportunity to complete their academic development. Mothers were given greater jurisdiction over their children. Thanks to a reform of the CSP in 1993, the consent of the mother became necessary for the marriage of a minor child (Art. 5 CSP). In addition to this, a divorced mother holding the custody of the child is given more prerogatives such as the permission for the child to travel as well as in issues related to the child's studies and to the management of the child's finances (Art. 67 CSP).

Until 1993 wives were under a legal obligation to obey their husbands. Fortunately, this obligation was abolished and replaced by the principle of "equal partnership" between the spouses.¹³

In spite of the numerous provisions in the CSP relating to gender equality, the status of women still suffers from various forms of inequality. For instance, the attempt to make the law of succession more equitable was doomed to failure due to the conservative forces in society which opposed the reform attempt as this law, in their view, had to be based on Qur'anic verses.¹⁴ Moreover, spouses' relationship during marriage remained characterized by inequality.¹⁵ Although the duty of obedience was abolished, the husband remains the head of the family.¹⁶ As a consequence, Tunisian judges continued to consider wives to be obliged to cohabit with their husbands in new homes which were chosen without consulting them.¹⁷

The legislative policy of the Tunisian state in the field of personal status has been characterized by an undeniable ambiguity. On the one hand, there has been a serious attempt to make gender equality a reality; on the other hand, the legislator has not been willing to spur the outrage of the conservative elements of society. This ambiguity often resulted in

¹¹ E. De Lagrange, "Le législateur tunisien et ses interprètes" (1968) 2 *Revue Tunisienne de Droit* 16.

¹² Ali Mezghani, "Réflexions sur les relations du code de statut personnel avec le droit musulman classique" (1975) 2 *Revue Tunisienne de Droit* 73.

¹³ Imen Gallala, "The Wife's Duty of Obedience to Her Husband under Tunisian Law" (2008–2009) 14 *Yearbook of Islamic and Middle Eastern Law* 27.

¹⁴ Sassi Ben Halima, "Religion et statut personnel en Tunisie" (2000) *Revue Tunisienne de Droit* 115.

¹⁵ Imen Gallala (n 13) 36–43.

¹⁶ Fawzi Belkani, "Le mari chef de famille" (2000) *Revue Tunisienne de Droit* 84.

¹⁷ Imen Gallala (n 13) 46–47.

unclear provisions in the CSP, which leaves it up to judges to solve the dilemmas which the legislator did not dare to face up to.¹⁸

The reluctance of the Tunisian system to deal with certain issues in the area of gender equality and discrimination on the basis of sex and religion is perfectly reflected in the problematic topic of interreligious or mixed marriages.¹⁹ According to classical Islamic law, a Muslim woman is only allowed to marry a Muslim man. Muslim men, however, enjoy a wider freedom of choice for their spouses as they are also allowed to marry women who belong to religions of the Book (i.e., Christians and Jews). The difference of religion between spouses is not mentioned in the CSP as an impediment to marriage. Contrary to the family codes of almost all Islamic states, the Tunisian code does not contain any explicit prohibition of the marriage of a Muslim woman to a non-Muslim man.²⁰ In the practice, however, such marriages cannot be carried out in Tunisia because the Minister of Justice issued a regulation in 1973 prohibiting the marriage registrar from concluding a marriage between a Muslim Tunisian woman and a non-Muslim man.²¹ It is interesting to note that the prohibition concerns only Tunisian Muslim women. Tunisian Muslim men are not affected by the prohibition. They are therefore allowed to marry even a nonmonotheistic woman, despite the fact that such a marriage is prohibited by Islamic law. This shows that the rationale for inequality between men and women is not always rooted in classical Islamic law but arises from and is imposed by dominant patriarchal conceptions existent in society.

After some hesitation the Court of Cassation (CC) followed the trend started by the trial courts and recognized the validity of marriages between Muslim women and non-Muslim men.²² In its famous decision of the December 20, 2004, it rejected the validity of any impediment to marriage on the grounds of disparity of religion, basing its ruling on the principle of equality enshrined in the Tunisian Constitution.²³ Furthermore, in a decision in 2009, the court argued that Art. 1 of the constitution, which stipulates that Islam is the religion of Tunisia, cannot be interpreted in isolation from the fundamental principles of the Tunisian legal order such as the principle of equality and freedom of conscience.²⁴ Nevertheless, the position of the CC has not been consistent or stable, as evidenced in the fact that it has reaffirmed in more recent decisions that the classical Islamic law is a material source of legislation and interpreted the indeterminate provisions of the CSP in accordance with Islamic law and not with the constitutional principles of freedom of conscience and gender equality.²⁵

¹⁸ Maaïke Voorhoeve, "Judicial Discretion in Tunisian Personal Status Law" in Voorhoeve (ed), *Family Law in Islam—Divorce, Marriage and Women in the Muslim World* (I.B. Tauris & Co. Ltd., New York 2012) 202.

¹⁹ Monia Ben Jémia, "The Management of Religious Diversity in Tunisian Family Law" in Alison Dundes Renteln, Marie-Claire Foblets, and Jean-François Gaudreault-DesBiens (eds), *Cultural Diversity and the Law—State Responses from around the World* (Éditions Yvon Blais, Brussels 2010) 563–564.

²⁰ For example, Art. 39/4 of Moroccan Family Code (February 5, 2004).

²¹ Lotfi al-Shādhli, "Zawāj al-muslimah bi-ghair al-muslim bayn al-nuṣuṣ wa ta'wiliha" in Kalthoum Meziou (ed), *Mélanges en l'honneur du Doyen Yadh Ben Achour* (Centre de Publication Universitaire, Tunis 2008) 456.

²² Sana Ben Achour, "Le code tunisien du statut personnel, 50 ans après: les dimensions de l'ambivalence" (2005–2006) 2 *L'Année du Maghreb* Para 32, <http://anneemaghreb.revues.org/89>, accessed April 7, 2015.

²³ Lotfi al-Shādhli (n 21) 466.

²⁴ Meriem Ben Lamane, "L'interprétation de l'article 1er de la constitution tunisienne au regard de la liberté de conscience. Quels risques?" in Mabaka Placide (ed), *Constitution et risqué(s)* (L'Harmattan, Paris 2010) 314.

²⁵ Meriem Ben Lamane (n 24) 315; Lotfi al-Shādhli (n 21) 466.

B. The Constitution of 1959

According to Art. 6 of the Constitution of 1959, all the citizens are equal before the law. In contrast to other Islamic countries, the Tunisian Constitution did not limit gender equality with any reference to Islamic law. For instance, Art. 11 of the old Egyptian Constitution of 1971, in force until the toppling of Mubarak, stated that “the State shall guarantee coordination between woman’s duties towards her family and her work in the society, considering her equal to man in the political, social, cultural and economic spheres without detriment to the rules of Islamic jurisprudence”. Such a provision could lead to discrimination between men and women in Egypt as the conservative interpretation of Islamic law is often incompatible with gender equality.²⁶ Contrary to this, enshrining gender equality in the Tunisian Constitution without any limitation functioned as a pretext for further legal reforms to reduce gender-based discrimination.²⁷

In addition, a constitutional amendment in 1997 significantly boosted gender equality in the Tunisian legal system. The notion of “principles pertaining to personal status” was integrated into the constitution and enjoyed its protection.²⁸ The amended Art. 8 of the constitution stipulated that political parties were not allowed to have matters of religion, region, or gender as a founding principles or objectives. In addition, it stipulated that political parties “must respect the sovereignty of the people, the values of the Republic, human rights and the principles pertaining to personal status”. However, what is meant by principles pertaining to personal status (PPS)? This notion appeared for the first time in a legally nonbinding but politically significant document: the National Pact of November 7, 1988, which was signed by all the major political forces of the time. In the National Pact the PPS were considered to be equivalent to the egalitarian provisions of the Code of Personal Status.²⁹ The incorporation of the PPS into the National Pact, into party law, and then into the constitution was the reaction of the Ben ‘Alī regime to a controversy arising after the toppling of Habib Bourguiba (Ḥabīb Būrqība) in 1987.³⁰ Bourguiba is rightly considered to be the architect of the Tunisian CSP and its egalitarian paradigm. After the accession of Ben ‘Alī to power some political forces, especially the Islamists, called for the abrogation of the egalitarian provisions of the CSP, considering them to be alien to the Arab-Muslim identity of the Tunisian people. However, the new Ben ‘Alī regime put a quick end to the issue and decided in favor of the CSP, considering the achievements of Tunisian women, especially gender equality in family law, to be irreversible.³¹

C. Tunisia and CEDAW

Tunisia ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1985.³² CEDAW aims at eradicating gender-based discrimination not only in the private but also in the public sphere.³³ It obligates the states parties to

²⁶ Mariz Tadros, “Egypt” in Sanja Kelly and Julia Breslin (eds), *Women’s Rights in the Middle East and North Africa* (Rowman & Littlefield, New York 2010) 92.

²⁷ Lilia Ben Salem (n 7) 488.

²⁸ Sana Ben Achour (n 22) para. 14.

²⁹ *Id.* para. 17.

³⁰ *Id.* paras. 12–13.

³¹ *Id.* para. 19.

³² Loi no 85–68 of July 12, 1985, JORT 618.

³³ Michele Brandt and Jeffrey A. Kaplan, “The Tension between Women’s Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia” (1995–1996) 12 (1) J.L. & Religion 106.

take all necessary measures in order to ensure gender equality and an improved status for women in law and society.³⁴ CEDAW succeeded in establishing women's rights as human rights. This has raised the same debate as human rights in general have, namely about the dichotomy between the universality of rights and awareness of cultural specificities.³⁵ Within a short period of time states ratifying CEDAW began to draw attention to the tension between the women's rights which the convention enshrines and their religion-based values and traditions. Therefore, they submitted official reservations in order to evade this dilemma.³⁶

Like other Islamic countries, Tunisia made specific reservations to CEDAW and a general declaration based on religious arguments, although Tunisia had always been a leader in the promotion of women's rights and women's equality to men.³⁷ Tunisia lodged reservations to Arts. 9, 15, and 16 of CEDAW. The general declaration stated that the Tunisian state would refrain from taking any administrative or legislative measure in the application of CEDAW which would be at odds with Art. 1 of the constitution. Art. 1 of the Constitution of 1959 referred to Islam as the state religion.³⁸ The reservation made about Art. 9 addressed gender equality in relation to the passing on of nationality to children. Art. 15 dealt with the right of a woman to choose her own domicile, while Art. 16 addressed gender equality in the field of marriage, family law, and succession. It is interesting that the Tunisian authorities stated upon the submission of these reservations that they would actually be temporary until Tunisia had adapted its legislation to the requirements of CEDAW.³⁹ In fact, under international and national pressure the Tunisian state amended its nationality code in December 2010 so that it would be compatible with CEDAW. The Law n°2010-55 of December 10, 2010, amended Art. 6 as follows: "The child born of a Tunisian father or mother is Tunisian."⁴⁰ Nevertheless, the nationality code still entails discriminatory provisions such as inequality between the maternal and paternal line for the acquisition of the Tunisian nationality by birth.⁴¹ A further inequality in nationality law relates to the rights of the foreign spouses of Tunisians. The foreign wife of a Tunisian man can acquire the right of residence in Tunisia and the Tunisian nationality much more easily than the foreign husband of a Tunisian woman.⁴²

³⁴ *Id.* 106–107.

³⁵ Ann Griffiths, "International Human Rights, Women, Gender and Culture: Perspectives from Africa" in Alison Dundes Renteln, Marie-Claire Foblets, and Jean-François Gaudreault-DesBiens (eds), *Cultural Diversity and the Law—State Responses from around the World* (Éditions Yvon Blais, Brussels 2010) 740; *about the issue in general see*: Susan Breau, "Human Rights and Cultural Relativism: The False Dichotomy" in Javaid Rehman and Susan C. Breau (eds), *Religion, Human Rights and International Law* (Martinus Nijhoff Publishers, Leiden 2007) 137 et seq.

³⁶ Michele Brandt and Jeffrey Kaplan (n 33) 109.

³⁷ *Id.* 133–134.

³⁸ Lilia Ben Salem (n 7) 491.

³⁹ Michele Brandt and Jeffrey Kaplan (n 33) 109.

⁴⁰ Loi no 2010-55 of December 1, 2010, modifiant certaines dispositions du Code de la nationalité [amending certain provisions of the Nationality Code] JORT No 97 (December 3, 2010) 3276.

⁴¹ UNFPA, "La levée des réserves à la convention "CEDAW" et le maintien de la déclaration générale," http://lib.ohchr.org/HRBodies/UPR/Documents/session13/TN/UNFPA_UPR_TUN_S13_2012_UNFPA_F.pdf, accessed April 7, 2015.

⁴² Monia Ben Jemia and H. Chekir, "UNFPA 2011, La levée des réserves à la convention "CEDAW" mais non au maintien de la déclaration générale," <http://www.unfpa-tunisie.org/images/stories/pdfs/cedaw%20francais.pdf>, accessed April 7, 2015.

Although progressive, personal status law in Tunisia still contains inconsistencies. The most flagrant is that of the inequality of inheritance law, which gives the male heir double the amount of what the female heir gets from the same relation. Additionally, the indeterminate provisions of the CSP on sensitive issues reflect in many parts the dominantly patriarchal character of society.⁴³

Moreover, women's rights issues were fully exploited for political purposes by the now ousted president and Tunisia's first president, Bourguiba, in order to foster their power. Engagement with women rights was determined by the balance of power between the regime and the Islamist factions present.⁴⁴

II. IMPACT OF THE REVOLUTION

Tunisians from all social categories took part in the uprising and called for the departure of Ben 'Alī and an end to his regime.⁴⁵ Moreover, Tunisian women were very active. Like their counterparts in the other countries of the Arab awakening, Tunisian women played a pivotal role during the uprising leading to the ousting of Ben 'Alī and the fall of his regime.⁴⁶ They took to the streets and staged significant protests. The contribution of the Internet to the revolution was also made possible by female bloggers and cyber-activists in general.⁴⁷ In other Arab lands, where the toppling of the dictator took more time, women supported the rebels by providing them with food and medicine and even, in some extreme situations, by smuggling ammunition.⁴⁸

During the uprising, the societies of the Arab Spring were united. A significant sense of solidarity characterized relationships across gender, religion, and class. Because they shared the same objective, the toppling of dictators, no one was excluded from the struggle.⁴⁹

A. During the First Transitional Period

Unlike in Egypt and Libya, women in Tunisia were involved in the rebuilding of the state during the first transition period. This period lasted from the ousting of Ben 'Alī until the election

⁴³ Muḥammad Sharfī, "Al-aḥwāl al-shakhsīyah bayn al-tashrī' wa 'l-qadā' wa bayn al-iṣlāḥ al-hā'il fi 'l-māḍi wa-l-iṣlāḥ al-manshūd fi 'l-mustaqbal" in Kalthoum Meziou (ed), *Mélanges en l'honneur du Doyen Yadh Ben Achour* (Centre de Publication Universitaire, Tunis 2008) 437.

⁴⁴ Monia Ben Jemia, "The Management of Religious Diversity in Tunisian Family Law" in Alison Dundes Renteln, Marie-Claire Foblets, and Jean-François Gaudreault-DesBiens (eds), *Cultural Diversity and the Law—State Responses from around the World* (Éditions Yvon Blais, Brussels 2010) 571.

⁴⁵ Khadija Mohsen-Finan, "From Revolution to the Project of Democracy: The Difficulties of Organising the Tunisian Transition" (2012) Med 15.

⁴⁶ For instance: Human Rights Watch, "A Revolution for All—Women's Rights in the New Libya" (May 27, 2013) 6, <http://www.hrw.org/reports/2013/05/27/revolution-all>, accessed April 7, 2015.

⁴⁷ Gabriella Borovsky and Amna Ben Yahia, "Women's Political Participation in Tunisia after the Revolution," National Democratic Institute (May 2012), <http://www.ndi.org/files/womens-political-participation-Tunisia-FG-2012-ENG.pdf>, accessed April 7, 2015; Nada Garrett, "The Arab Spring and Gender Inclusion in the Political Process" (April 30, 2012), http://www.ccd21.org/news/mena/Arab_Spring_Gender_.html, accessed April 7, 2015.

⁴⁸ Human Rights Watch, "A Revolution for All—Women's Rights in the New Libya" 11, http://www.hrw.org/sites/default/files/reports/libya0513_brochure_LOWRES.pdf, accessed April 7, 2015.

⁴⁹ Hela Esfandiari, "Introduction" in *Is the Arab Awakening Marginalizing Women?* Wilson Center Occasional Paper series (Summer 2012) 3, http://www.wilsoncenter.org/sites/default/files/Arab%20Awakening%20Marginalizing%20Women_0.pdf, accessed April 7, 2015.

of the constituent assembly in October 2011. During this period two main factors defined the impact of the uprising on the status of women: (a) the withdrawal of the reservations to CEDAW and (b) the recognition of the principle of gender parity in the new election law.

1. *The Withdrawal of the Reservations to CEDAW*

In the first transitional government following the revolution, one of the most internationally renowned Tunisian feminists was appointed as the head of the Ministry for Women's Affairs. In her role as minister, Lilia Labidi made a significant contribution toward improving the legal status of Tunisian women. With the support of the long-standing advocacy of civil society, she successfully pushed for the withdrawal of the reservations to CEDAW.⁵⁰ The government of the first transitional period withdrew the specific reservations to CEDAW but retained the general declaration.⁵¹ The lifting of these reservations was also published in the official journal of the Republic of Tunisia (JORT). The reservations were mainly concerned with Arts. 9, 15, and 16 of CEDAW. Unfortunately, the general declaration stipulating that the Tunisian state would not take any measure in application of CEDAW which violated Art. 1 of the constitution was retained. Art. 1 specified Islam as Tunisia's religion. The government of the first transitional period retained this declaration because Tunisia's 1959 Constitution was abrogated on March 3, 2011, and the new constitution had at that point not yet been adopted. This is why the withdrawal of the specific reservations could not lead to the immediate amendment of discriminatory provisions in Tunisian legislation.

2. *Gender Parity in Electoral Law*

During the first transitional period the High Commission for the Achievement of the Objectives of the Revolution undertook measures for political reform and democratic transition with the situation resembling a laboratory for Tunisia's fledgling democracy. Being composed of the main political parties and of representatives of the civil society, the High Commission was intended to discuss and adopt the main legal instruments necessary for the organization of the election for the Constituent Assembly.⁵²

One of the most commendable achievements of the High Commission for gender equality in the political field was the introduction of the parity and alternation principle in the election law. According to this principle, electoral lists have to have the same number of male and female candidates in alternation. According to Art. 16 of the Decree-Law no 35 dated May 10, 2011,⁵³ in the election for the National Constituent Assembly the candidates were to file their candidacy applications on the basis of parity between men and women: "Lists shall be established in such a way to alternate between men and women." Lists that do not follow this principle were, in general, not to be admitted and were to be accepted only if the number of seats in the relevant constituency is odd.

The principle of parity and alternation was also adopted during the Libyan transition. The Libyan Election Law of 2012 required parties to submit lists that alternate between men and women.⁵⁴ In an earlier draft of the Libyan Election Law a quota of 10% female

⁵⁰ Hela Esfandiari (n 49) 3.

⁵¹ Décret-loi no 103 of October, 24, 2011, JORT no 82, 246.

⁵² Imen Gallala-Arndt, "Constitutional Reforms in Tunisia, Egypt, Morocco and Jordan: A Comparative Assessment," *Med* 2012, 143; "Tunisie: Séance d'adieu pour la haute instance," *Jeune Afrique* (October 13, 2011), <http://www.jeuneafrique.com/Article/ARTJAWEB20111013142635/actualite-afriquetunisie-seance-d-adieu-pour-la-haute-instance.html>, accessed April 7, 2015.

⁵³ Décret-loi no 2011-35 of May 10, 2011, JORT no 33, 647.

⁵⁴ Isabel Coleman, "Libya's New Election Law: Part III," *Council on Foreign Relations* (February 10, 2012), <http://blogs.cfr.org/coleman/2012/02/10/libyas-new-election-law-part-iii/>, accessed April 7, 2015.

representatives in the General National Congress was required.⁵⁵ In the first Egyptian parliamentary elections after the toppling of Mubārak the parties were also obligated to place at least one woman on their electoral lists. Soon after the revolution the military council abolished the 64-seat gender quota in the Egyptian parliament.⁵⁶

The introduction of the principle of alternation and parity in the Tunisian and Libyan electoral laws was welcomed by the women's rights activists but was not free from criticism. On the one hand, this principle was thought to be inappropriate for political life in the Arab world, where women traditionally have had a marginal position.⁵⁷ On the other hand, parity and alternation were not enough to enhance gender equality in electoral law. In fact, the Tunisian law, like its Libyan counterpart, did not specify in what position women had to be placed in the electoral lists.⁵⁸ As expected, very few lists in Tunisia contained women at the top. Therefore, small parties with little chance winning multiple seats in the National Constituent Assembly very often won only one seat, and thus their female candidates could not act as representatives in the assembly.

Twenty-seven percent of the candidates who won in elections for the Tunisian NCA were female. This represents progress in women's representation in politics when compared to times before the revolution.⁵⁹ Nonetheless, imposing a gender quota in the NCA would have been more effective for ensuring greater participation of women in politics, given that women do not have a long tradition of political participation. They lack the self-confidence and techniques of persuasion which would have enabled them to play an active role inside their own parties and reach leading positions. A quota would have helped remedy this initial disadvantage. In spite of the fact that twenty-seven percent of the members of the National Constituent Assembly are women, only three women were appointed to the 41-member transitional government.

Nonetheless, one should emphasize that although women's representation in parliaments and decision-making structures is important, it is not sufficient to guarantee the promotion of women's rights. There are two examples of women representing the Islamists parties in Tunisia and Egypt which illustrate this incongruity: Su'ād 'Abderrāhim and 'Azza El-Garf. The first woman contended that single mothers did not deserve any state protection since these women, by having sexual intercourse outside marriage, chose deliberately to overstep the boundaries of religion and morality.⁶⁰ 'Azza El-Garf pushed for the decriminalization of female genital mutilation.⁶¹

⁵⁵ Democracy Reporting International, "Preliminary Assessment Libya's Draft Election Law for the General National Congress" 2 (January 2012), http://www.democracy-reporting.org/files/dri_bp_24_preliminary_assessment_libya_electoral_legislation.pdf, accessed April 7, 2015.

⁵⁶ Avni Shah (ed), "Have the Arab Uprisings Helped or Harmed Women's Rights?" 8, <http://www.el-karama.org/wp-content/uploads/2013/04/ArabUprisingsHelpedorHarmedTFFAW.pdf>, accessed April 7, 2015.

⁵⁷ Maria Cristina Paciello and Renata Pepicelli, "The Changing Role of Women in Society" in Olivier Roy and Cesare Merlini (eds), *Arab Society in Revolt—The West's Mediterranean Challenge* (Brookings Institution Press, Washington 2012) 68–69.

⁵⁸ Avni Shah (n 56) 10–11.

⁵⁹ Avni Shah (n 56) 5; Tunisia—Réponse de la Tunisie au questionnaire adressé aux gouvernements sur la mise en oeuvre du programme d'action de Beijing (1995) et des textes issus de la vingt-troisième session extraordinaire de l'assemblée générale (2000) (Mai 2004) 27.

⁶⁰ Frida Dahmani, "Tunisie: Souad Abderrahim, le passionaria d'Ennahdha se dévoile" *Jeune Afrique* (December 10, 2011), <http://www.jeuneafrique.com/Article/ARTJAWEB20111110160949/>, accessed April 7, 2015.

⁶¹ Moushira Khattab, "Egyptian Women After the Revolution: Lost in Translation?" in Esfandiari (ed), *Is the Arab Awakening Marginalizing Women?* Wilson Center Occasional Paper series (Summer 2012) 14.

B. During the Second Transitional Period

The National Constituent Assembly was elected in the autumn of 2011 to draft a new constitution. The moderate Islamist party al-Nahḍah won the majority of the seats in the assembly.⁶² Although the point is debatable, al-Nahḍah considered itself entitled not only to draft a constitution but also to run the country until the adoption of the new constitution.⁶³ It goes without saying that the victory of the Islamists after the election caused concern among advocates of women's rights.⁶⁴ What impact have the Islamists in power had on women's status in law and their political and social participation? The Islamists remained in the government until the adoption of the constitution on January 27, 2014. The impact of their presence in the government and in the constituent assembly can be measured through the examination of their attitude outside the Constituent Assembly, the drafting process of the constitution process, and then its adoption of the constitution.

1. *The Attitude of the Islamist Party outside the Constitution Drafting*

If we want to judge whether the advancements made by Tunisian women are at risk or not, we should not limit our analysis to the drafting of the constitution but examine also the attitude of the Islamist party al-Nahḍah and of its affiliated organizations outside the debates of the NCA.

In the al-Nahḍah-led interim government of December 2011 (immediately after the election of the NCA) only three women were appointed as ministers out of a total of 41, although they represented twenty-seven percent of the members of the NCA. The lack of female representation in the government was a political decision demonstrating that empowerment of women was not a priority on the agenda of the Islamist parties and of the other two parties in the coalition.

The attitude of the Islamist party al-Nahḍah toward CEDAW was also quite worrying. The al-Nahḍah-led government had not notified to the Secretary General of the United Nations of the withdrawal of the reservations to CEDAW. In fact the withdrawal of the reservations had been decided by the al-Sabsi government in October 2011. Consequently, the status of CEDAW in Tunisian law remained unclear.⁶⁵

The delay in the notification of the withdrawal of the reservations was all the more worrying in view of the fact that the papers and organizations close to al-Nahḍah led a denigration campaign against CEDAW. They attempted to manipulate public opinion about CEDAW by concocting lies about its content such as claiming that it would encourage promiscuity and a chaotic sex life.⁶⁶

⁶² "La victoire des islamistes confirmée en Tunisie" *Le Point* (October 28, 2011), http://www.lepoint.fr/monde/la-victoire-des-islamistes-confirnee-en-tunisie-28-10-2011-1390192_24.php, accessed April 7, 2015.

⁶³ Marie Verdier and Yadh Ben Achour: "La récupération des révolutions arabes par les partis islamistes peut être remise en cause," *La Croix* (July 5, 2013), <http://www.la-croix.com/Actualite/Monde/Yadh-Ben-Achour-La-recuperation-des-revolutions-arabes-par-les-partis-islamistes-peut-etre-remise-en-cause-2013-07-05-982744>, accessed April 7, 2015.

⁶⁴ Marianna Belenkaya, "What Price Women's Rights in Tunisia's New Democracy?" *RT* (November 22, 2011), <http://rt.com/news/ennahda-party-country-jebali-905/>, accessed April 7, 2015.

⁶⁵ Hafidha Chekir in an interview to the *Al Huffington Post Maghreb*, "Pourquoi faut-il fêter la fête des femmes cette année?," *Al Huffington Post* (August 13, 2013), http://www.huffpostmaghreb.com/hafidha-chekir/pourquoi-faut-il-feter-la_b_3743668.html, accessed April 7, 2015.

⁶⁶ "Égalité homme-femme: les mensonges d'Ennahdha sur la Cedaw dénoncés par l'Adli," *Kapitalis* (May 3, 2013), <http://www.kapitalis.com/societe/15896-egalite-homme-femme-les-mensonges-d-ennahdha-sur-la-cedaw-denonces-par-l-adli.html>, accessed April 7, 2015.

In the aftermath of the toppling of Ben ‘Alī public space was opened to groups and individuals close to Salafism (a radical form of Islam). They started preaching a Saudi-like puritanical form of Islam.⁶⁷ Women were often assaulted on the streets for not being dressed modestly or for not being accompanied by a male relative.⁶⁸ The coalition government led by al-Nahḍah did not address these violent acts with the necessary firmness. Even the justice system seemed indifferent to gender-based violence and, to the contrary, has even made the victim the offender as happened in the Maryam case. Maryam filed a complaint against three policemen for having raped her. Surprisingly, she was summoned to court for indecency charges.⁶⁹ In this context it is regrettable that the Tunisian government rejected the recommendation of the UN Human Rights Council to abolish ongoing discrimination against women not only in law but also in practice.⁷⁰

2. The Constitution Drafting Process

A. THE STATUS OF ISLAM

Constitutions do not only provide for the functioning of the state but also determine the values and the principles to which the state will aspire.⁷¹ What is the source of the ideals for the new Tunisian state? Will Islam or the universal principles of human rights instruments assume this function? The ideals upon which the new Tunisia is built will be decisive for the status of women. The fear that the Islamists will erode the advancements achieved in women’s rights in Tunisia was based on the assumption that they wanted to use Shari‘ah as a source of legislation and abolish anything considered to be incompatible with it. In addition, it is often assumed that international standards for women’s rights and empowerment are at odds with the position of women in Islam.⁷² In the NCA the opposition feared that the representatives of the al-Nahḍah Party would impose Shari‘ah as a source of legislation which in turn would probably lead to the abrogation of the CSP, which is considered by many Islamists to be incompatible with the requirements of Islamic Law and of the Islamic ideal of family and the role of women in the society.⁷³

As a result, the place of Islam in the state proved to be one of the most divisive political issues faced in the NCA.⁷⁴ After vehement debates between Islamists and secularists both inside and outside the NCA, al-Nahḍah officially stated its opposition to the incorporation of Shari‘ah into the constitution as a source of law.⁷⁵ Al-Nahḍah accepted the use of the old

⁶⁷ Tam Hussein, “The Rise of Salafism in Tunisia,” *New Statesman* (June 28, 2012), <http://www.newstatesman.com/blogs/politics/2012/06/rise-salafism-tunisia>, accessed April 7, 2015.

⁶⁸ Elisabeth Johansson-Noguès, “Gendering the Arab Spring? Rights and (In)security of Tunisian, Egyptian and Libyan Women” (2013) 44 *Security Dialogue* 393.

⁶⁹ Amnesty International, News: “Tunisia: Woman Allegedly Raped by Police Faces Prosecution” (September 27, 2012), <http://www.amnesty.org/en/news/tunisia-woman-allegedly-raped-police-may-face-jail-time-2012-09-27>, accessed April 7, 2015.

⁷⁰ *Id.*

⁷¹ John Liolos, “Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring” (2013) 36 *Boston Law Review* 219.

⁷² Zahra Langhi, “Factors for the Assumption of a complete Clash between Islamic Sharia and International Treaties on the Rights and the Empowerment of Women” in *Democracy Standards in an Islamic Context* DRI (June 2013) 11–15, http://www.democracy-reporting.org/files/islam_conference_report_en.pdf, accessed April 7, 2015.

⁷³ Sana Ben Achour (n 22) paras. 7–9.

⁷⁴ Avni Shah (n 56) 13.

⁷⁵ *Id.*

version of Art. 1 from the Constitution of 1959 which stipulated that Tunisia's religion is Islam.⁷⁶ This, unsurprisingly, upset the ultraconservatives in politics and society, especially the Salafists.⁷⁷ Nevertheless, the fear about the role of Shari'ah in the legislative process and its impact on women's rights emerged again very soon with the broadcasting of a video of the leader of the al-Nahḍah Party Rāshid al-Ghannūshī addressing young Salafists. In the leaked video, broadcast for the first time in April 2012, he advised them to be patient in pursuing their goals. He urged them to build schools and universities in order to anchor their views about the primacy of Shari'ah.⁷⁸ He also mocked the secularists who, in debate over the Art. 1, would accept Islam but rejected Shari'ah. He portrayed them as being "like those who accepted content but rejected the name itself."⁷⁹ All these statements deepen the fear of secularists and women's rights activists about the real intentions of al-Nahḍah.⁸⁰ Al-Ghannūshī assured the public on many occasions that al-Nahḍah would not undo the advancements made in women's rights brought about by the progressive CSP.⁸¹ This doublespeak on the part of al-Ghannūshī is due to the existence of a very conservative wing in the leadership of al-Nahḍah, such as CSP deputy al-Ṣādiq Shūrū, who expressed the view, citing the Qur'ān in a speech in the NCA on January 23, 2012, that the strikers were unbelievers who should be tortured and killed.⁸²

After a compromise was reached about importing Art. 1 from the 1959 Constitution, a passionate debate was sparked about giving Islam a supra-constitutional status.⁸³ Art. 141 of the draft constitution of June 1, 2013, determined the principles that cannot be affected by any constitutional amendment. Alongside the republican nature of the regime, the article also specifies "Islam as the state religion". The opposition and the country's mainly secular civil society feared that this would be interpreted as allowing Shari'ah to be source of law.⁸⁴ The prominent Public Law professor and head of the Higher Commission, Yadh Ben Achour, suggested avoiding the expression "state religion" and making only a reference to Art. 1, where the reference to Islam is considered to be descriptive of the identity of Tunisian society and rather than a religion of the state.⁸⁵

One could, however, argue that Art. 141 also makes a provision for the supra-constitutional status of the human rights and freedoms guaranteed by the constitution.

⁷⁶ Kareem Fahim, "Tunisia Says Constitution Will Not Cite Islamic Law," *New York Times* (March 26, 2012), http://www.nytimes.com/2012/03/27/world/africa/tunisia-says-constitution-will-not-cite-islamic-law.html?_r=0, accessed April 7, 2015.

⁷⁷ *Id.*

⁷⁸ Houda Trabelsi, "Leaked Ghannouchi Tape Raises Salafism Concern," *Magharebia* (October 15, 2012), http://magharebia.com/en_GB/articles/awi/features/2012/10/15/feature-01, accessed February 13, 2014.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Maria Cristina Paciello, "Tunisia: Changes and Challenges of Political Transition" (2011) 3 MEDPRO Report 17, <http://www.medpro-foresight.eu/system/files/MEDPRO%20TR%20No%203%20WP2%20Paciello%20on%20Tunisia.pdf>, accessed April 7, 2015.

⁸² Houda Mzioudet, "Sadok Chourou," *Tunisia Live* (November 26, 2012), <http://www.tunisia-live.net/whoswho/sadok-chourou/>, accessed April 7, 2015.

⁸³ Robert Joyce, "Tunisia's Constitution in Limbo," *Tunisia Live* (August 29, 2013), <http://www.tunisia-live.net/2013/08/29/tunisias-constitution-in-limbo/>, accessed April 7, 2015; Yadh Ben Achour, "La révolution et ses deux contradictions" (April 5, 2013), <http://yadhba.blogspot.de/>, accessed April 7, 2015.

⁸⁴ "La Constitution tunisienne, les remarques de Yadh Ben Achour" (April 25, 2013), <http://emmabenji.canalblog.com/archives/2013/04/25/27007403.html>, accessed April 7, 2015.

⁸⁵ *Id.*

Nevertheless, the concerns about women's rights still remain since these "rights and freedoms" might be provided for in such a way so as to comply with Shari'ah. The achievements in favor of women's rights in the CSP could be curtailed and abandoned on the basis that they are considered to be incompatible with Shari'ah as a source of legislation.

Such a reference to Islam in the constitution represents a lurking threat to women's rights in Tunisia. Although al-Nahḍah leaders assure the public that the reference to Islam is intended to safeguard the identity and the culture of the majority of Tunisians without having any implication at the legislative level, it is possible that judges or the legislator could use this ambiguity to curtail women's rights, something which they have already done in the past.⁸⁶ Additionally, this risk is made even more palpable by the ambiguous status of international treaties. According to Art. 19 of the draft constitution of June 2013, the international treaties ratified by Tunisia are superior to laws but inferior to the constitution. Such a formulation may tempt conservative forces in the future to suspend the application of international treaties on women's rights like CEDAW, arguing that they are not in line with Islam and as Islam is the religion of the state according to the constitution, the convention would lose its binding force in the Tunisian system.⁸⁷ Like the issue of the place of Islam and Shari'ah in the constitution, the status of women also sparked heated discussions both inside and outside the NCA.

B. THE STATUS OF WOMEN

In the first draft constitution of September 2012 the provisions regarding women's rights provoked the clear disapproval of women's rights activists and of civil society in general.⁸⁸ In fact, the committee of the NCA for "Rights and Freedoms", chaired by a female deputy from the Islamist al-Nahḍah Party, adopted what was then Art. 28 of the draft with the wording, "The State shall preserve woman's rights and achievements as partner of man in the building of the homeland and as his complement within the family". Mrs. Farīdah al-'Abīdī, Islamist deputy and chair of the committee, argued that "there is no absolute equality between men and women".⁸⁹ In fact, the Islamist gender discourse is familiar everywhere with references to different gender-based natural inclinations and thus exhibits a preference for equity rather than equality.⁹⁰ Considering women to be complements to men jeopardizes gender equality and opens the door to discriminatory interpretation of the law or even to the undoing of the advancements made by women in the Code of Personal Status. Women would not then be considered full citizens. They could not enjoy their rights as human beings or citizens, but only in the function of their role within the family as a mother or a wife. Such a provision could be used as a justification for the legalization of traditional gender roles with women confined to stay at home or justify polygamy if a first wife is barren.⁹¹

⁸⁶ Amna Guellali, "Tunisia: Political Crisis and Transition Priorities" (August 12, 2013), <http://www.hrw.org/de/node/118033>, accessed April 7, 2015.

⁸⁷ Human Rights Watch, "Tunisia: Draft Constitution Still Slights Rights" (January 23, 2013), <http://www.hrw.org/news/2013/01/22/tunisia-draft-constitution-still-slights-rights>, accessed April 7, 2015.

⁸⁸ Synda Tajine, "Will Tunisian Women Become 'Complementary to Men' by Law," *Al-monitor* (August 12, 2012), <http://www.al-monitor.com/pulse/politics/2012/08/tunisia-are-womens-rights-fading.html>, accessed April 7, 2015.

⁸⁹ *Id.*

⁹⁰ Maria Cristina Paciello and Renata Pepicelli (n 57) 64–65.

⁹¹ Meriem Ben Lamine, "La situation de la femme tunisienne selon l'avant-projet de la nouvelle constitution tunisienne," *Grotius international* (September 30, 2012), <http://www.grotius.fr/la-situation-de-la-femme-tunisienne-selon-l%E2%80%99avant-projet-de-la-nouvelle-constitution-tunisienne/>, accessed April 7, 2015.

Art. 28 brings the position of women in the Egyptian Constitution of December 2012 to mind, in which women were only mentioned as part of the family and no other specific rights outside that of the family context were specified for them.⁹²

Some al-Nahḍah deputies tried to circumvent criticism by pointing out that another article in the draft enshrined the principle of equality of all citizens without any discrimination.⁹³ However, given the particular post-revolution context in Tunisia, guarantees of gender equality should have been addressed specifically and with great caution. The rise of fundamentalism and the mixed messages from the leading al-Nahḍah party made the necessity for a strong defense of women's rights and gender equality sufficiently clear.⁹⁴

An alternative version of Art. 28 could not be adopted because it was not approved by the deputies of the al-Nahḍah majority on the committee.⁹⁵ The alternative version of the article stated that the state guarantees women's rights and their advancements in all fields and that it is prohibited to pass a law contradicting or undermining them in any way. Such a provision would definitely have been more favorable for the protection gender equality.

Given the vehement reaction against Art. 28, the last draft constitution of June 1, 2013, omitted the principle of complementarity. Art. 45 stipulates instead: "the state guarantees the protection of women's rights and supports their advancements. The state shall guarantee equal opportunities between women and men in carrying out various responsibilities". The new article is a positive step toward enforcing gender equality, but the principle has not yet been clearly articulated. First, Art. 45 guarantees the gender equality in "assuming responsibilities" but not "in accessing" those responsibilities.⁹⁶ As Human Rights Watch suggested, the draft should have entailed guarantees to undertake positive steps "to achieve the effective and equal empowerment of women".

C. THE ADOPTION OF THE CONSTITUTION

As already discussed above the drafting of the constitution provoked heated debates especially concerning the question of the identity of the Tunisian people, the status of Islam in the legal order, and the status of women.⁹⁷ The constitution was finally promulgated on the January 27, 2014.⁹⁸ Its adoption was the result of a compromise between the Islamist party *al-Nahḍah* and the rest of the political powers in the country.⁹⁹ The assassination of Shukri

⁹² Moushira Khattab, "Women's Rights under Egypt's Constitutional Disarray" (2013) 15 Wilson Center Viewpoints, <http://www.wilsoncenter.org/publication/women%E2%80%99s-rights-under-egypt%E2%80%99s-constitutional-disarray>, accessed April 7, 2015.

⁹³ Meriem Ben Lamine (n 91).

⁹⁴ *Id.* (n 91).

⁹⁵ *Id.* (n 91).

⁹⁶ Human Rights Watch, "Revise the Draft Constitution—An Analysis of Human Rights Concerns" (May 13, 2013), <http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution>, accessed April 7, 2015.

⁹⁷ Yadh Ben Achour, "La force du droit ou la naissance d'une constitution en temps de révolution (pour Farouk Mechri)" (25 Janvier 2015), http://yadhba.blogspot.de/2015_01_01_archive.html, accessed April 7, 2015.

⁹⁸ This essay relies on an unofficial translation of the constitution available at <http://www.venice.coe.int/files/Constitution%20TUN%20-%2027012014.pdf>, accessed April 7, 2015.

⁹⁹ Ferhat Horchani, "En Tunisie la constitution constitue une rupture par rapport au monde musulman et arabe," <http://www.rfi.fr/afrique/20140128-ferhat-horchani-tunisie-constitution-constitue-une-rupture-rapport-monde-musulman-a/>, accessed April 7, 2015. International Crisis Group, "L'exception tunisienne: Succès et limites du consensus" (June 5, 2014), <http://www.crisisgroup.org/fr/regions/>

Bel'ayd and of Muḥammad Brāhmī, both members of the leftist *front populaire*, respectively in February and July 2013 sparked a very serious political crisis leading to the suspension of the works of the constituent assembly.¹⁰⁰ Fortunately, thanks to the so-called “quartet” initiative of national congress of dialogue (organized by the General Union of Tunisians Workers (UGIT), the Trade and Handicrafts Union (UTICA), the Tunisian League for Human Rights (LTDH), and the National Bar Association), the political actors could reach a compromise and overcome the political and constitutional stalemate.¹⁰¹ According to this compromise, the al-Nahḍah-led government should resign in favor of a so-called government of nonpartisan technocrats and that the constituent assembly should continue its works and adopt soon the constitution. Concerning women, the technocrat government notified on April 17, 2014, to the Secretary General of the United Nations the withdrawal of reservations to CEDAW dissipating any doubt about the validity of this lifting.¹⁰²

The status of women in the new constitution is satisfactory. First, Art. 46 of the new constitution dissipated the fears about the loss of the achievements of women's rights. In fact this provision stipulates: “the state commits to protect women's accrued rights and work to strengthen and develop these rights”. This means that the since 1956 privileged status of the Tunisian woman (for instance, polygamy and repudiation prohibition) in comparison with the other Arab and Muslim countries is constitutionally guaranteed now. Moreover, Art. 21 of the new constitution provides for the principle of gender equality with a remarkable precision,¹⁰³ stating: “All citizens, male and female have equal rights and duties, and are equal before the law without any discrimination [. . .]”.

Moreover, the second part of Art. 46 stipulates: “the state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains”. At least twice the constitution addresses the issue of women representation in elected assemblies. The state is obliged to seek the realization of parity between men and women (Art. 46 and Art. 34 of the new constitution). In addition, Art. 46 of the new constitution provides that the state “takes all necessary measures to eradicate violence against women”. In dealing with the specific and major issue of gender violence, the constitution illustrates once again that the constitutional status of women has been bettered in Tunisia.

Furthermore the status of Islam in the constitution is very relevant for the examination of women's rights in Tunisia. Art. 1 stipulates that Islam is the religion of Tunisia. This is nevertheless considered as describing the identity of the people and not any theocratic nature of the state. An Art. 2 was added in the constitution to dissipate any doubt about the civil nature of the state. Correspondingly, the Shari'ah is not considered as a source of legislation.¹⁰⁴ This status of Islam in the constitution can only be favorable for the accrued rights of women in Tunisia and even for the development of these rights.

moyen-orient-afrique-du-nord/afrique-du-nord/Tunisia/b037-l-exception-tunisienne-succes-et-limites-du-consensus.aspx, accessed April 7, 2015.

¹⁰⁰ Yadh Ben Achour (n 97).

¹⁰¹ Yadh Ben Achour (n 97).

¹⁰² “La Tunisie lève ses réserves sur la CEDAW,” *GlobalNet* (April 29, 2014), <http://www.gnet.tn/actualites-nationales/la-tunisie-leve-ses-reserves-sur-la-cedaw/id-menu-958.html>, accessed April 7, 2015.

¹⁰³ Rahim Kherad, “Quelques observations sur la place des droits fondamentaux dans les nouvelles constitutions tunisienne et égyptienne” (2014) 6 *La Revue des droits de l'homme*, <http://revdh.revues.org/937>, accessed April 7, 2015.

¹⁰⁴ Yadh Ben Achour (n 97).

III. CONCLUSION

Women's rights used to be at risk in the wake of the Revolution of January 14, 2014. The rise of Islamism in Tunisian society represented a threat to women's rights. In fact, after the repression of religion under Ben 'Alī, a spiritual thirst strengthened by the deep economic crisis pushed important parts of the Tunisian society toward a very conservative version of Islam. The Islamist party al-Nahḍah, winner of the elections to the constituent assembly, gave room to fear about women's rights achievements. This party wanted to satisfy the conservative part of its electorate.¹⁰⁵ That is why al-Nahḍah members of the constituent assembly made some propositions during the drafting of the constitution which would have curtailed women's rights significantly. Thankfully, the constitution was adopted illustrating even advancement in the protection of women's rights. Many reasons can explain the disappearance of the risk. The drafting process was accompanied by a very active civil society committed to the protection of women's rights. Moreover, the political assassinations and the deplorable socio-economic situation of the country weakened the Islamist party and made it more willing to seek compromises. The victory of the secular party Nidā' Tūnis in the first parliamentary election after the adoption of the constitution represents an additional guarantee that women's rights are not at risk. In fact, the majority of the Tunisians supported Nidā' Tūnis, a party classifying itself on the line of Bourguibism (political doctrine and a philosophy preached and followed by the first president of the Tunisian Republic, Habib Bourguiba). One of the most salient pillars of Bourguibism is the advancement and steady protection of women's rights.

¹⁰⁵ Olivier Roy, "Islamic Revival and Democracy: The Case of Tunisia and Egypt" in Oliver Roy and Cesare Merlini (eds), *Arab Society in Revolt* (Brookings Institution Press, Washington DC 2012) 48.

Reflections on Women's Rights in Yemen

Opportunities and Challenges

HUDA ALI ALAWI*

I. INTRODUCTION

Yemen is passing through significant historical turning points and fundamental changes at various levels, which are affecting its political, economic, and social structures. The current facts and options have proven that the process of change was a pressing, substantive necessity to overcome the factors of backwardness, the causes of regression, and the features of injustice and oppression in their various forms. The process came as a result of great transformations in the wake of massive popular mobility in which women showed a remarkable presence within the masses' protest movement demanding justice, freedom, and a decent life as witnessed in more than one Arab country in the year 2011. Under a highly complex and painful situation, women in Yemen unexpectedly shared the revolution side by side with men. Women defied isolation and the prevailing stereotypes in Yemeni society and contributed as a driving force in the momentum of protests which were staged in streets and squares. They were an important factor in enhancing the power of protests and their impact on the movement of history, with women nurses and doctors working actively in field hospitals, media women appearing bravely at the sites of events, women activists assuming a leading role at the forefront of marches, and women academicians and lawyers mounting platforms to address the rebellious crowds either to arouse their enthusiasm or to motivate them to stay steadfast. TV screens showed large groups of women affiliated with radical Islamic and conservative parties participating in the protests, which surprised the world. Men accompanied their wives, sisters, and daughters at the revolutionary squares in the central capital, Ṣana'a, and other Yemeni cities.

* The author and the editors sincerely thank Mr. Mohammad A. El-Haj for translating this article into English.

The struggle of the feminist movement in Yemen in this regard is an experience worthy of study, research, and evaluation, as it involves historical experience marked with diversity and challenges whether before or after putting into effect the unification scheme of the Democratic People's Republic of Yemen in the South and the Yemen Arab Republic in the North, on May 22, 1990, and as the war in the summer of 1994 reflected adversely on the gains that had been achieved for women in the southern part of Yemen during the period of the socialist regime, insofar as the context of the evolution of the Yemeni women's rights in the South differed dramatically from the reality of the Yemeni women's situation in the traditional North, in such a way that can be monitored and measured.

The ramifications of the philosophy of governance on women's issues and the disorderly approach in addressing them up to the time of the revolutionary change in February 2011, the convening of the comprehensive National Dialogue Conference, and the great achievements that the Yemeni women were looking forward for, are indications of extremely profound impact.

The chapter begins with a brief background of the status of women in Yemen (Section II). This is followed by a closer look at the effectiveness of the feminist movement in seeking the advancement of women (Section III). This is done by looking at the achievement of the feminist movement within the framework of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Subsequently, the Yemeni women's participation in the revolutionary movement is highlighted, as well as the demands needed for achieving greater gender equality and women participation in the national dialogue conference. Notwithstanding positive developments, major challenges lie in the way of securing women's entitlements in the coming period. The section is concluded with a look at the position of the political establishment—official and party-wise—on women's issues. Section IV focuses on the constitutionalization of women's rights and the quota system. Section V examines the discourse of the Islamic movement on women in Yemen. This involves a discussion on the problematic nature of the Islamic discourse on women; the approach of Islamic parties and their approach in dealing with women's issues, including their position on women's labor and political participation.

The study concludes that the historical facts have proven that there has always been reluctance to interact with the discourse calling for the rejuvenation of the perspectives toward women's rights, as with addressing the excluded implementation of many legal provisions that had reinforced the value of women and held them in respect. This means that the suffering of Arab women in general and Yemeni women in particular has extended over a protracted period of time, while their rescue process is connected with the requirement that the rejuvenated jurisprudence surpass the jurisprudential conflicts over contentious issues in a way whereby it can be activated far from dormancy and narrow caveats.

The chapter seeks to extrapolate the overall picture of the status of women in Yemen, which reveals without the slightest effort that women's rights are flopping in the cycle of conflicts and contradictions and are, therefore, vulnerable to pressures and dictates which are practiced by the executioners of social heritage and a long chain of promoters of discriminatory concepts. The chapter also stresses the fact that the jurisprudential standardization in Yemen has been striving to legislatively elevate the standing of men over women. This is a fact which cannot be ignored or overlooked. Part of the Islamic jurisprudence has been exploited in order to sanction specific meanings of the Qur'an and al-Sunnah and project their interpretations publicly. The traditional way of thinking has also been employing illogical readings from history with the intention of enhancing the differences between men and women, thus rendering the discriminatory culture a hallmark of the Arab-Islamic societies.

II. HISTORICAL BACKGROUND OF THE STATUS OF YEMENI WOMEN

The Yemeni women's current status cannot be discussed without recalling as historical facts the uneven circumstances they had experienced under the *imāmah* in the North, on the one hand, and British colonialism, which lasted 129 years in the South, on the other hand. Women in North Yemen suffered for decades from the scourges of underdevelopment, ignorance, and various forms of injustice. Yet women's awareness in South Yemen of their social, economic, and political rights was shaped and enhanced by various aspects of modernization, which flourished in the town of Aden since the 1930s. This was made possible by the emergence and spread of the press in 1948 in that city, cultural, civilizational, and humanitarian cross-fertilization, and the establishment of audio-visual media institutions, which played an enlightening role in disseminating ideas on educating women and promoting their participation in public life.¹

With growing awareness and the emergence of cultural clubs and political parties in the mid-1940s, women's issues of participation in political life came to the forefront of the advocacy for the liberation of women. Before unification, the labor movement played an instrumental and effective role toward granting women equal rights with men in South Yemen, whereas, in North Yemen, women's participation in political and cultural life remained very limited.²

Furthermore, with the escalated development of the revolutionary tide following the revolutions of September 26 and October 14 in the first half of the 1960s, women entered a new phase with their struggle to secure their rights in the domains of justice and equality, but they remained governed by the vagaries of the political mood of the rulers, which resulted in the occasional rise and fall of their star, until the proclamation of the unified State of Yemen on May 22, 1990, by the two participant partners: the Yemeni Socialist Party and the General People's Congress. Thus, the preliminary concepts of a modern state had become relatively matured, pushing women's issues to the surface as one of the most important aspects of modernization, although it was fraught with opposing attitudes on the part of the hardline religious powers which attempted to weaken women's participation in public life. This opposition was encapsulated under the guise of religion, customs, and traditions, for political purposes.

It should be mentioned that, in light of the Fourth World Conference on Women in Beijing, held in September 1995, and the formation of the National Commission for Women in 1996, as the first ever follow-up governmental body on women's affairs—which developed many plans and programs to implement the themes of the Beijing Platform for Action—and given the accelerated and heightened demand of both international bodies and donors for reports to be submitted by countries supporting the advancement of women in their efforts to promote the role of women in the Yemeni society, active feminist organizations were formed in the field of empowering women and defending their rights in the political and economic domains to enable them to push the cause of women as one of the priorities for development in Yemen.³

¹ Tawfiq Mujahid, "The exclusion of women in Aden" in A Symposium on Political Empowerment of Women, Aden (July 22, 2012).

² Asmahan Aklan, *The situation of Yemeni women under the British Administration of Aden from 1937 to 1967* (University of Aden's Printing and Publishing House, Aden 2009) 23.

³ Radiyah Shamsheer, *Women's political participation* (Friedrich-Ebert-Stiftung, Aden 2008) 21.

III. THE EFFECTIVENESS OF THE FEMINIST MOVEMENT IN SEEKING THE ADVANCEMENT OF WOMEN AND SPONSORING THEIR PROBLEMS

If the feminist organizations are regarded among the main and important mechanisms for protecting human rights in general and women's rights in particular, and they work side by side with other mechanisms, be they governmental mechanisms or national institutions and others, in order to promote the principles of equality and justice among all members of the society, especially men and women, the feminist movement is regarded nowadays as a fundamental pillar for democratic transformation and achievement of equality among all members of the community. It is also an all the more frequently used indicator to measure the extent of the state's respect of women's rights. The achievements of the feminist organizations will be discussed first within the framework of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

A. Convention on the Elimination of All Forms of Discrimination against Women

In the context of its awareness-raising role, the Yemeni feminist movement has played a vital role in strengthening the society's orientation toward advocating women's issues, which resulted in a profound qualitative change at the level of its partnership with the governments. It has become an important balancing element in the reformulation of human rights concepts and the quest for achieving justice, freedom, and equality, and it stands as a bulwark in supporting the implementation of the conventions and agreements signed by the government. The feminist movement also plays an important role in urging the state to sign any agreement on women's rights, in addition to demanding that reservations to key conventions, such as CEDAW, be lifted.

It has been doing this by mobilizing the community and effectively changing its orientation toward exerting pressure on legal reform processes by way of conducting reviews of governmental policies and programs, clarifying their relevance to the Convention, and shedding light on practices and legislations that promote discrimination in all sectors and areas, for the ultimate purpose of advocating the necessity of harmonizing national legislations with the letter and spirit of the Convention and demanding the elimination of discriminatory provisions against women.

From this perspective, the process of monitoring the enforcement of the Convention is one of the most important roles undertaken by feminist organizations. In addition to its duty to look into relevant states' reports, the UN Committee on CEDAW, for its part, pays attention to the information provided by nongovernmental human rights organizations, especially the feminist federations. Furthermore, particular areas and times are allocated during the Committee's formal meetings for holding discussions with nongovernmental women's organizations and verifying the accuracy and credibility of the information provided on the situation of women, without interference on the part of government or any attempt by it to polish its image. This allows access to alternative reports in a careful and attentive manner.

The historic tracking of the programs offered by the feminist organizations indicates that they had been pastorally- and charity-oriented at the beginning, helping the poor and providing material aid to them. In a subsequent stage, they have paid attention to training projects which enabled women to acquire skills so as to secure a source of income to support their families, such as sewing, embroidery and secretarial work.⁴

⁴ The Ministry of Social Affairs and Labor offices in Yemen granted hundreds of legal licenses permitting civil society organizations to exercise their activities, including dozens of women's associations and federations.

The feminist activity has been characterized by a strategic-dimension methodology, thanks to the international community's intervention and the issuance of a number of agreements, conventions, and decisions aimed at addressing women's status and entrusting to the feminist organizations the task of handling the issue of empowerment of women, on the basis of which the development indicators in any society are measured. The truth is that, despite the remarkable achievements made by the feminist organizations, there are still expectations pinned on finding more effective mechanisms of pressure to advocate women's issues, most notably the application and enforcement of CEDAW.

B. CEDAW and Yemeni Reservations

CEDAW is a global Convention focused on the protection of women's rights and women-related issues. The Convention is concerned with achieving equality of rights between men and women and mapping directions toward enforcing them. Its aim is to improve the status of women and to put an end to discrimination against them, in the context of obligating the ratifying states to incorporate the principle of equality in their respective national constitutions and other legislations.

The international human rights instruments, including the 1979 Convention on the Elimination of All Forms of Discrimination against Women, constitute the cornerstone in the enforcement and protection regime of women's rights. The Convention was signed by the majority of the Arab States. Yemen signed it in 1984 and, thus, before the unification of its northern and southern parts, and it was ratified by the government of the Democratic Republic of Yemen. Thus, Yemen has been under obligation to apply its provisions. However, most of the signatory Arab States have filed reservations to the articles of the Convention that are related to equality between men and women because they are in conflict, as claimed by equality opponents, with the provisions of the Islamic Shari'ah. Certain Arab States, including Yemen, have not taken serious legislative measures to give effect to the provisions of the Convention—they have only filed their already mentioned reservations as a matter of formality.

Filing reservations to the principle of equality, which is one of the most important humanitarian principles, would certainly lead to destabilizing the spirit of the Convention and weakening its legal enforceability. This is so even though these countries have justified their reservations on the grounds that the contents of certain provisions of the Convention affect the vision inherent in the Islamic Shari'ah, which accommodates the wholeness of the justice concept versus the partiality of the equality significance, meaning that a conflict will inevitably arise with the norms of national legislation.

C. Universal Declaration of Human Rights and the Yemeni Constitution

A comparison between the Universal Declaration of Human Rights—which was issued on December 10, 1949—and the Yemeni Constitution demonstrates that the content of both documents are similar with respect to several aspects of human rights, but this does not eliminate the gap existing between the legislative framework and its practical enforcement at the local level.

It is worth mentioning that women's rights in Yemen have been exposed to outbidding because of the problematic lack of harmonization of national legislations with international conventions, although the Yemeni Constitution provides for such harmonization in Art. 6 thereof. Still, it does not give the international conventions an explicit standing which renders the principles of human rights and related women's rights as part of domestic law.

In fact, the Yemeni Constitution does not ignore the basic articles enshrined in the Universal Declaration of Human Rights, particularly those affecting the fundamentals of genuine human values such as justice, freedom, and equality. It also consolidates the pillars of the society's architecture based on the grounds of cooperation, compassion, and integration. These features are a reflection of the provisions of the Universal Declaration of Human Rights. Furthermore, many countries have automatically incorporated the contents of the Declaration into various chapters of their constitutions in an attempt to confirm their goodwill and demonstrate their willingness to abide by the recognized rules of international law and their respect of humanitarian principles in general. Still, the problem has not always been embodied in the provisions themselves which have been glamorous and advanced, but in the lack of their enforcement.

D. Yemeni Women's Participation in the Revolutionary Movement and the Harvest of Change

At the beginning of 2011, the Arab region witnessed protest movements demanding justice, equality, and a decent life. Women participated in all these revolutions strongly and effectively and made an impressive appearance in the revolutionary squares by unexpectedly and equally joining men in the sit-ins, under highly complex and painful circumstances.

It goes without saying that the Arab Spring revolutions have not only contributed to the overthrow of the tyrant regimes, but also erased the stereotypical image of women as belonging to the silent majority. Recent events have shown women devoting their voice and spirit to the success of the revolutions and the triumph of the popular movement.

It should be noted that the revolution in Yemen has generated extraordinary indicators as manifested in women's broad participation in effecting change. Women have been able to cross over the customs and traditions that had previously limited their movement. It has now become customary to see them around in the revolutionary squares to the extent that they are being exposed, like men, to beating and arrest because of their political options. Their effectiveness in protest marches and demonstrations is a positive development against the society's vision which did not allow women to step out to the domain of public affairs. It is now proven that they are a hard figure to be reckoned with, a fact raising their hopes in achieving equality and respect in a hoped-for society governed by freedom, respect for human rights, and the rule of law. It is unfortunate, however, that these hopes are obstructed by the painful reality of abandoning women in a usual scene which is familiar in certain Arab countries. Still, the comprehensive National Dialogue experience in Yemen has been successful in asserting women's rights in the coming period, especially as the output document of the National Dialogue provides for a *de facto* equality between male and female citizens. It is a significant document, as it lays the bases and foundations for the process of drafting the next constitution.

Yemeni women have struggled side by side with the help of feminist and human rights organizations and activists in order to achieve gender equality. While there have been indicators of noticeable progress being made toward the achievement of equality, such as the tangible improvement in female education, the gender gap still exists. In this regard, there has been retraction in the indicators to empower women with respect to their economic and political participation, although they have played a key role during the events of the revolution and appeared as a hard number to be reckoned with in the public opposition advocating their rights and demands on reforming national laws and amending the constitution to render them compatible with international standards, especially CEDAW. Women's rights are still at the forefront of national concerns because of the accumulated grievances,

the complexity of the political situation, the worsening conflicts, and the hegemony of the traditional power groups.

E. Equality in the Yemeni Constitution and Demands for Achieving Gender Equality

The constitution in force in Yemen does not explicitly recognize the principle of equality between men and women. Furthermore, it also leaves open a legal window for the legislator to issue a number of laws over the past years that have served as tools for undermining women's rights to gender equality. Several women's demands have been made in response to this and as part of the harvest of change. The demands can be summarized as follows:

- (1) Maintaining the rights of female and male on the basis of equality; hence, the terms citizen or citizens shall mean and include female and male.
- (2) Committing the state to accept women's representation so that they can actively participate in various entities, the state authorities, and the elected and appointed councils, with a proportion of 30% at least.
- (3) Prohibiting all forms of discrimination against women.
- (4) Committing the state to act in accordance with the UN Charter; the Arab League Charter; the Universal Declaration of Human Rights; the international conventions and treaties and the rules of international law, which have been ratified by Yemen's legislature. The state shall harmonize all domestic legislations with such instruments.
- (5) Including provisions in the constitution which will prevent the legislature from enacting laws disparaging, restricting or compromising women's rights.
- (6) Guaranteeing the right of every citizen to physical safety and compensating for damage caused by armed conflicts and arbitrary arrests.
- (7) Guaranteeing the freedom of movement in the country to every male or female citizen in a way that it shall not be restricted except as specified by law.
- (8) Asserting women's equality with men in blood money and indemnity.
- (9) Asserting women's equality with men in human dignity and ensuring that they can have independent civil personality and financial patrimony.
- (10) Criminalizing slavery, all forms of oppression and trafficking in women, children, sex, and humans.
- (11) Asserting that citizens are equal before the law and criminalizing any act of discrimination on grounds of sex, race, language, color, origin, profession, social or economic status, creed, sect, thought, opinion, or disability.
- (12) Criminalizing the assault on physical integrity (female genital mutilation), sexual harassment, and the exploitation of women in commercial advertisements in a way humiliating their dignity and by way of trafficking.
- (13) Criminalizing trafficking in refugee women and their exploitation sexually and physically.
- (14) Accelerating the enforcement of rulings against women who are proven to have committed offenses, and the law shall criminalize the exploitation of prisoner women in inhumane and unethical manner.

This is a nonexhaustive list of women's demands to counter gender inequality. There are other rights, whether economic or social, to be considered, including notably the requirement to set a minimum age of 18 years for the marriage of girls and to render its violation punishable.

F. Women Participation in the National Dialogue Conference

The Yemeni feminist movement has played a vital role at difficult turning points toward change, especially in promoting community support to women's demands through the massive political development process which was witnessed by Yemen within the framework of the comprehensive National Dialogue Conference. It has proved itself as an equal partner with various active forces in the community by developing itself significantly in concomitance with the accelerated tempo of the international community's support to women's issues. Women's participation in the process of change has led to unprecedented international recognition of the importance and the need to involve them in the process of building a civil, democratic state, as reflected clearly in the nomination of the activist Tawakol Karmān for, and her winning of, the 2011 Nobel Peace Prize, and the membership of the Minister of Social Affairs, Ama al-Razzaq Ali Hamad, on the team which signed the Gulf Initiative, at Riyāḍ, Kingdom of Saudi Arabia, on December 7, 2011.

The Gulf Initiative has not clearly provided for the participation of women in the process of change. Therefore, it did not meet their expectations, especially when considering their sacrifices during the revolution of change. However, the United Nations resolutions 2014 and 2015 have explicitly set the basis in a number of provisions for a genuine participation of women on an equal footing with men in the decision-making process during the transitional period. The Liaison Committee was formed on May 6, 2012, to undertake consultations and negotiations with certain parties representing the Southern peaceful mobility, on which one woman was appointed. Furthermore, the Technical Preparatory Committee for the National Dialogue Conference was formed on July 14, 2012, with 19% women's representation; however, this proportion declined to 16% when more male members were added to the Technical Committee later on.

The genuine and active women's participation in the Technical Preparatory Committee for National Dialogue Conference together with the international support to the principle of political empowerment of women in Yemen resulted in a quota of at least 30% for women's representation at the National Dialogue Conference. All parties were required to comply with this proportion in preparing their respective lists of participant members in the Conference. In fact, it had been hoped that the proportion of women's representation would reach 50%, because of their active participation in other components of the Dialogue, such as political parties and youth groups.

It should be noted that the actual proportion of women's representation in the National Dialogue Conference amounted to 29.4% (166 female members versus 399 male members),⁵ but they were indeed excluded from the presiding bodies of the Conference, except for one woman who assumed the position of Deputy Rapporteur. However, women were represented in the three independent participant components of the Conference (namely, women, youth, and the civil society).⁶ In a positive step for which the Presidency and the General Secretariat of the Conference should be credited, it had been decided that the heads of the working groups must be selected from the component groups which were not represented in the presiding bodies of the Conference. Hence, three women were nominated each to head the Working Group on Rights and Freedoms (Arwā 'Uthmān, author), the Working Group on Governance (Afrāḥ Badwīlān, judge), and the Working Group

⁵ According to the statistics of the General Secretariat of the Conference.

⁶ The Independent Women group indicated in its speech at the first plenary session of the Conference that the political leadership have dealt with these components as if they have been running a commercial advertisement such as "Shampoo 3 in 1," an indication to its lack of seriousness in dealing with these new powers.

concerned with Ṣaʿdah Governorate in which traditional powers refused that their Group be headed by a women; thus its work was disrupted for two months, but it was finally and inevitably headed by poet Nabīlah Zubayr.

Here, attention should be given to the role of political will in empowering women to occupy positions at a decision-making level, versus the opposing role of the traditional social groups. The political will sources have always been the main player in the empowerment of women throughout history. For that reason, the cultural discourse in Yemen has been proudly appreciating the legacy of the rules of Balqīs (Queen of Sheba) and Arwā (Queen of Jiblah).⁷

Observers have noted that women's participation in the comprehensive National Dialogue Conference was distinct, active, and effective as demonstrated by several indicators, such as their diligent performance and keen interest in discussions, the number of outputs on women and their strict attendance at the Conference sessions (92.4%) as compared to men's attendance (86.6%).⁸

A number of thematic women's issues (health, cultural, educational, economic, and political) were raised and discussed for the first time ever at such a high level of senior leaders and decision-makers, as well as widely broadcast and published in all audio-visual and print media channels and outlets.

It should be noted that certain political powers attempted, through the activities of the National Dialogue Conference, to exploit women's issues as bargaining and bickering tools. Therefore, representatives of both women and those powers finally reached an agreement on a code of honor entitled "women's issues are not subject to bargaining and bartering", which was signed by the majority of the female and male members of the Conference, including those in presiding bodies, the heads of the political components, and the representatives of the participant parties.

The conferees agreed on the principle of equality on the basis of citizenship, without discrimination on the grounds of sex, race, origin, color, religion, belief, sect, opinion, or economic and social status. The agreement was unanimous excluding (the Salafist) al-Rashad (Right Path) Party representatives, who expressed their reservations to the terms of "belief and sex"⁹ and to the phrase "the equality of women with men relative to blood money and indemnity", although noncompliance with these norms has already been considered discrimination against women in the Yemeni law for decades.¹⁰ Furthermore, a constitutional guiding directive already provides: "the State shall ensure the application of equality between men and women in a genuine manner and shall strive to eliminate any injustice in this area".¹¹

During that period, political alliances went on bargaining within the National Dialogue Conference. Certain parties, such as the Islamic Iṣlāḥ [Reform] Party and the Salafist

⁷ Intelq Al-Mutawakil, "The level of women's participation in the National Dialogue Conference and its effect on women's leadership roles in the future" in a working paper presented at the Center for Middle Eastern Studies (Berlin December 17, 2013).

⁸ *Id.*

⁹ Al-Rashad Party has a different opinion with regard to freedom of religious belief and has made reservation to the principle of equality on the basis of sex.

¹⁰ The Conference on Women (Equality as development for all, Sana'a, March 11, 2014).

¹¹ The forum of young women set up by the UN envoy Mr. Jamal Benomar helped, through workshops including all components of young women and the civil society, in cooperation with independent women groups and other alliances formed outside the framework of the National Dialogue as well as domestic and

al-Rashad Party,¹² carried a package of decisions to bargain over rendering the Islamic Shari'ah as the source for all legislations versus Shari'ah being the primary source of legislations.

The political leaders in Yemen have been used to grabbing gains out of various parties by titillating popular and partisan grassroots' emotions at the expense of women's issues, since women are the weakest link in the political formations, and women's issues are often associated with derogating the values of honor, dignity, and religion.¹³ In an interview during the National Dialogue Conference with leading women in the field of human rights, they asserted that they had encountered extended suffering as a result of the dogfight and the reversal attitudes of their own parties on women's issues.¹⁴

To sum up, women's participation in the National Dialogue Conference has been the most significant and unprecedented political representation realized by women in Yemen's contemporary history.

G. Major Challenges that Lie in the Way of Securing Women's Entitlements in the Coming Period

A number of current challenges, some more subtle than others, and recommendations can be outlined which need to be borne in mind in the quest to overcoming gender inequality and enhancing women's rights. These are as follows:

- (1) The governmental and societal approach being actually adopted at decision-making levels on the political empowerment of women within the women's quota system of representation is an extraordinary temporary measure to bridge the gap and fix the underlying flaw in applying the principle of gender equality. The quota system should not be treated as a grant or a gift being offered to women in order to enable them to access leadership positions.
- (2) The coalition of hardline religious groups and traditional powers in Yemen and their dogfight against undertaking modernization and civic programs, and their attempts to circumvent women's entitlements and any genuine initiatives seeking to apply the principle of gender equality.
- (3) The need to review school curricula and concepts promoting women inferiority; to reconsider the aspects of the education policy perpetuating a negative image of women within the education system; and to deliver a message to the effect that both genders and their responsibilities are equal in family and social life by seeking to integrate the values, principles, and concepts of women's rights in public education and university curricula. All this would eventually contribute to reducing the gender gap and enhancing respect for women's rights.

international experts, with drafting a constitution of their own including women's rights. The draft constitution was submitted to the Conference's Drafting Committee on Constitution.

¹² The party pushed its supporters to demonstrate against the women's quota for representation.

¹³ There is a famous incident related to bargaining over women's rights that reveals the reality of the games that were played for achieving political ends, in which women were defamed in public squares, accused of abusing their honor, and subjected to pressures in an attempt to isolate them from men. They were even beaten by some of their men colleagues in the revolutionary movement.

¹⁴ Activist Faṭimah Muḥammad asserted in a testimony that "all parties differed on everything but not on women's issues". This was also confirmed by the UN envoy at a meeting with women's groups.

- (4) The need to tackle the existing lack of unity within the feminist movement and the need for the movement to direct its discourse toward women's rights as a priority and to overcome the problematic issues of partisan political conflicts and their serious ramifications.
- (5) The disorderly status of the official political establishment in the swirl of intellectual and ideological polarizations. It seems to be subdued by the traditional discourse, on the one hand, while wooing the friendliness of international organizations and analyzing the reality of women's status as a matter of formality, on the other hand.
- (6) Tackling the issue of deficient women's participation and, sometimes, the lack of such participation, on an equal footing with men, at political and economic decision-making levels, as a basic element in the renaissance scheme and in the equal investment of creative human capacities in the community.

To illustrate, in more depth, some of the challenges facing women, the following section is worthy of discussion.

H. The Position of the Political Establishment (Official and Party-wise) on Women's Issues

Arab and Yemeni communities have witnessed, particularly in the past few years, a steady enhancement of the discourse on women's rights and their entitlements. This is due to the pressures being exerted by international organizations on national governments' institutions and authorities for empowering women in various political, economic, and social fields. There has been relative progress in the Yemeni women's status at all legislative, political, educational, and health levels, as compared to their status in previous decades. However, an in-depth study of the specificity of the real developments and challenges that accompany the advancement of women indicates otherwise. This is highlighted by the fact that Yemen has still been ranked last (rank 136) over the past four consecutive years with respect to gender equality and there is still quite a large number of legal provisions that are inconsistent with citizenship on the basis of equality which, in turn, affect the essence of human justice. Furthermore, gender indicators issued by the Organization for Economic Cooperation and Development in 2012 have demonstrated procrastination in achieving equality by Yemen, which ranks 83 among the 86 members of this organization in this regard.

Yemeni women endured a lot of suffering and oppression as well as the ravages of marginalization under the government's discourse on women, which was successful over many years in impairing awareness and spreading the misconception that women had gained their full rights, whereas the reality is that both men and women had been severely crushed by the former regime, which employed its media arsenal to falsely depict support to women's issues. Within its media discourse highlighting that Yemen had been living the brightest democratic eras, it was promoting the notion that women had acquired their rights at all levels. The regime was ultimately all the more affected by the collapse of moral, political, and economic values in the community.

The former regime's handling of women's rights as a negotiating issue has fed the community with extremely reactionary values about women's roles in an attempt to end up with superficial solutions to complex problems, on the one hand, and enhancing and pleasing the conservative orientations through blocking the advancement schemes for women development and emptying proposals on relative legal amendments of their content, on the other hand. Thus, only very modest legal amendments would be submitted from time to time. These were highlighted internationally as achievements for women in order to cover

up human rights violations against them and to conceal the miserable reality of their rights. For all this, women rose up side by side with men to voice their grievances in the sit-in and freedom squares.

Yemeni women are nowadays being accorded great attention by most political parties, especially with the approach of the time for election campaigns. Many women activists¹⁵ see the handling of the Yemeni women's cause as a mere slogan lacking genuine support. Political parties differ among themselves ideologically and programmatically, but unanimously agree that women should not be empowered to assume decision-making positions in the three state powers (executive, legislature, and judiciary) and in domestic party bodies. These parties, including the parties with Islamic orientation, seek to win women within their respective popular election bases, but they are reserved when it comes to nominating them as candidates to compete with men over occupying leadership positions. In another scenario, certain progressive parties seek to build up coalition with dominant traditional groups and reactionary powers, as a way of proclaiming attitudes in a collective way, as manifested in their stance in the sessions of the House of Representatives in Yemen relative to the amendment of the discriminatory laws on women's rights, where all powers flocked to influence the mind of the Yemeni legislator by exercising hegemony on the direction of his decisions.¹⁶

In fact, proponents of the feminist issue are predominantly preoccupied with political concerns and are usually employed to handle women's issues in the context of conflicts and polarizations toward the achievement of tight ends, without giving any consideration to the reality of women's status and its complexities. The fact is well known about parties of political Islam that they gear their initiatives in the process of setting up alliances with national and leftist parties toward cracking down on the ruling powers and destabilizing the political system, but without letting this to reflect positively, in the best circumstances, on their stance with regard to women's issues, as is the case with the so-called "Parties of the Joint Forum" in Yemen.

Despite the Yemeni government's attempt to show interest in gender issues and the integration of the gender concept into its plans and policies, and the substantial programs and projects that have received support from the international donor institutions for the purpose of achieving gender equality, these efforts have often been confronted with cultural constraints and reservations at decision-making levels. This has been as a result of narrow religious thinking which has reduced the applicability of gender equality to areas that are not of serious importance.

It is now important to review, through the discussion of the follow heading below, to what extent political and party institutions have interacted with the Yemeni women's issues, on legalizing their claims within what is called nowadays the constitutionalization of women's rights for empowering them to assume senior leadership positions by applying the so-called "positive discrimination system".

IV. CONSTITUTIONALIZING WOMEN'S RIGHTS

The country's constitution represents a framework of its legal system which determines women's economic and social status, in addition to their political status. The significant progress of women's participation in all phases of the process of democratic transition in

¹⁵ Activist Omayma Abdel-Latif, from the Carnegie Middle East Centre, stated, on February 11, 2007, that "women activists in the Islamic movement often complain and express dissatisfaction about their status and demand to be enabled and their leadership competencies be taken into consideration".

¹⁶ Due to this coalition, voting failed repeatedly in the House of Representatives on a proposed amendment of an article setting the marriage age at 18 years.

Yemen has contributed to building a more modern state with the increasing emphasis on the need for their participation in all phases of the constitutional process.

Although certain governments still believe that providing in a constitution's preamble for women and men being equal would be enough to ensure gender equality, the experience of formulating statutes by many countries confirms that solely providing for gender equality and nondiscrimination is not, in fact, sufficient to ensure equality among women and men citizens. This has justified for many feminist women's movements in several countries, especially Arab and Islamic countries, to demand that proposals and provisions be submitted in order to guarantee and protect women's rights,¹⁷ bearing in mind, as a special case, the Yemeni women's bitter suffering from previous constitutional provisions.

Yemeni women affiliated with various feminist and civil groupings, alliances, coalitions, and organizations, including women members of the National Dialogue Conference who acted as members on the constitutional drafting committee, have demanded that the constitutional directives approved within the final document of the National Dialogue Conference, be complied with and embodied in the draft constitution which is expected to be put to referendum, and that advocacy networks be set up to support the constitutionalization of their rights in accordance with that document. They have also called for marches to be staged and addressed reminders to the senior leadership to ensure that such constitutionalization is irreversible. They have also warned against any attempt to circumvent the inclusion of their full demands in the forthcoming constitution.

Hereunder are the most important constitutional guiding directives of the National Dialogue related to constitutionalizing women's rights in Yemen:¹⁸

The preamble to the Constitution

The preamble to the Constitution shall be worded in a way by which the principles of the Constitution reflect the outputs of the National Dialogue Conference and to embody that the principles of equal citizenship, the dignity and rights of all female and male Yemeni citizens and justice shall be ensured.

Definitions

Provisions shall be worded in masculine and feminine by referring to citizens as "female citizens and male citizens."

Equality

A proposed constitutional provision reads as follows: "female and male citizens are equal with respect to rights and duties and are indiscriminately equal before the law. The State shall guarantee for female and male citizens their private and public rights and freedoms and provide for their decent livelihood."

Equal citizenship

A proposed constitutional provision reads as follows: "Every female and male citizen has the right to vote, to stand for election, provided that she or he has reached the legal age of majority, and to enjoy the civil and political rights. The law shall provide for measures to ensure equal opportunities between women and men in accessing electoral functions."

¹⁷ Extract from the introduction of the constitutional directives on women, UN Team's Forum on Women and Youth, the Republic of Yemen, Sana'a 2013.

¹⁸ *Id.* 6.

Observing non-discrimination against women

A proposed constitutional provision reads as follows: "The state shall prohibit discrimination between female and male citizens on the grounds of gender, religion, creed, origin, race, colour, language, disability, social status, political or geographical affiliation, or for any other reason. The legislator shall develop provisions promoting positive discrimination towards achieving equality. Discrimination and incitement of hatred shall be crimes punishable by law. The state shall be committed to take the necessary measures to eliminate all forms of discrimination against women and the law shall regulate the establishment of an independent national body for this purpose."

Criminalizing violence against women

A proposed constitutional provision reads as follows: "Abuse of the moral or physical safety of any person under any circumstance, by any private or public entity, shall be prohibited. Violence against women in all forms and marrying off a male or a female child shall be prohibited. The State shall be committed to provide all types of protection for women and male and female children, without discrimination."

Women's quota

A proposed constitutional provision reads as follows: "The state shall be committed to take the measures that guarantee women's representation with a proportion of 30% in all legislative, executive and judicial authorities and in all designated and elected bodies and in the relevant decision- and law-making positions."

A. Women's Quota System for Their Representation

Art. 7 of CEDAW^{19, 20} provides for the following: "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country." Art. 4 thereof provides for the following: "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." Furthermore, the UN Economic and Social Council's resolution 15 (1990) calls for the participation of women in power structures and decision-making positions with a proportion of 30%; for mobilizing men and women in the society; for sensitizing the society in order to change the negative societal attitudes which are biased against women and their role in decision-making processes; and for putting in place mechanisms and procedures that will enable them to accomplish this, first and foremost of which is the so-called women's quota system. Within the same context, the Beijing Platform for Action of the Fourth World Conference on Women held in 1995, calls (in paragraph 190 thereof) upon all governments worldwide to increase women's participation in decision-making processes with a proportion of 30% at least.

Certain legislations have not adopted the women's quota system, relying on an argument that it breaches an important constitutional principle, namely: the principle of equality among citizens. However, certain Arab countries have actually introduced the women's quota system, following their adoption of electoral systems based on the principles of

¹⁹ The Convention on the Elimination of All Forms of Discrimination against Women was approved in 1979 and entered into force in 1981.

²⁰ Yemen signed the Convention without setting a substantial reservation other than a reservation to a procedural matter.

nomination and competitiveness, motivated by the fact women had previously failed to score victory in most legislative elections and in municipal and local elections. In many Arab countries, not a single woman had won in any election over decades, such as in Jordan, Kuwait, and Bahrain, and also in countries with appointed councils such as Qatar, the United Arab Emirates, Saudi Arabia, and Bahrain.²¹

The adoption of the women's quota system is likely to expand to include other Arab countries as a result of the weighty pressure being exerted by the civil society and women's movements to that effect, as manifestation of the phenomenon of women empowerment, and as it creates an appropriate environment in which the society will encourage women's participation in politics and public affairs.²²

The quota system has sparked debate in legal circles in Yemen, notwithstanding the significant roles it is expected to bring about if it is thoroughly applied. However, many people feel that it does raise problematic issues in its relationship with democracy, from the standpoint that it negates the principle of gender equality²³ and embodies features of favoritism that might dominate the process of ranking women in the lists allocated to them as per the quota system, thus ensuing in undesired results. However, because of the novelty of applying the system in a number of Arab countries recently, time is needed to make a judgment on its success or otherwise. Yet, there have been positive indicators looming in the horizon, in support of this extraordinary measure without which women's access to leadership positions will be hampered.

It remains to be noted that the reality of women's status in general is a reflection of the nature of the social, cultural, and political framework of their respective communities, which specifies particular roles to be played by a given individual in the society according to gender, not according to the capacities and capabilities of such an individual, bearing in mind the prevailing political climate and the area of freedom allowable to citizens in general and women in particular.²⁴ The women's quota system has a priority in the demands which the feminist movement in Yemen raised, especially to the National Dialogue Conference, in order to guarantee a quota of 30% at least for women's representation in decision-making positions, in the hope that it will be sanctioned in an explicit constitutional provision.

V. THE DISCOURSE OF THE ISLAMIC MOVEMENT ON WOMEN IN YEMEN

The document of the National Dialogue Conference has aroused the outrage of some religious scholars in Yemen, who considered its contents on women's entitlements prejudicial to the fundamentals of the Islamic faith. Part of these scholars made reservations to contentious issues, while others let off their atoning venom against the sponsors of that document, libeling them as non-Muslim advocates of moral decay. In fact, the document was based on the general principles of the Islamic Shari'ah (law), which calls for women to be taken care of and their rights be safeguarded.²⁵ Usually, there has to be a distinction between what is

²¹ Yemeni women have been represented over the years in the House of Representatives by one seat compared to 300 seats for men.

²² Women's Centre for Research and Training (ed), *The quota system and the possibility of applying it in Yemen (Field Study)* (Aden University's Press and Publishing House, Aden 2012–2013) 7.

²³ Fouad Al-Salahi, *Women's political participation* (Friedrich Ebert Foundation 2009) 5.

²⁴ *Id.* 7.

²⁵ Sheikh Mohammad Azzan, *A lecture on mainstreaming the outputs of the National Dialogue* (Aden September 17, 2014).

expressly provided for in Qurʾān and al-Sunnah [Prophetic Tradition], on the one hand, and what are apparent or potential matters of jurisprudential reasoning and matters not addressed by the legislator or written about in Qurʾān and al-Sunnah, on the other hand.²⁶

It is natural for communities to generate a series of concepts, customs, and traditions that are commensurate with their own circumstances and conditions. What they generated in the past was palatable and acceptable at the time, but with the change of circumstances, it has become necessary to come up with new laws and directives that are commensurate with temporal and spatial variables.

God has endowed women exactly as He did endow men with capacities and talents that are sufficient for them to assume their respective responsibilities and public and private humanitarian functions. From this perspective, the Islamic Sharīʿah places men and women on an equal footing within one framework.

Justice is an existential norm on the basis of which God has created the Heavens and the Earth. Civilizations can only develop and advance with justice. Islam as a faith emanates from a perfect and accurate system in order for man and universe to function properly. It is a law to govern all domains of life. Its provisions have undoubtedly entrenched all values of justice and equality among human beings as the underlying fundamentals of religion. Almighty God says in the Holy Qurʾān: "O you men! We have created you of a male and a female, and made you tribes and families that you may know each other; surely the most honourable of you with Allāh is the one who is most pious."²⁷

The position toward women is still generally governed by a set of circumstances and ramifications, which kept it locked within a rigid interpretive methodology that got more deep-rooted over past centuries as a result of the intermixing of religious thought with popular heritage and social customs. This inevitably led to a large confusion in texts in a way that the cultural heritage seems to be the ruling of the Islamic Sharīʿah.

In order to explore the political trends of Yemen's Islamic movement in reading women's issues, the following two points will be discussed.

A. The Problematic Nature of the Islamic Discourse on Women, between Extremism and Centrism

Against the background of its various intellectual trends and visions, the Islamic movement has had a dominant effect on the Arab communities' awareness in general and on the level of the Yemeni awareness in particular during the last three decades. Its discourse has attracted broad segments of the society, and its presentations and literature have provided a fertile ground for enlightenment and expectation together with a great deal of controversy and a state of intellectual and cultural mobility which has been ongoing until now.

It goes without saying that the women's cause is a noticeable example giving prominence to the phenomena of extremism, dereliction, excessiveness, and abuse against women. The discourse of Yemen's Islamic movement on women's issues has not been running on a single frequency, with the varied voices advocating or opposing women's rights. Its programs and goals have been entangled several times and differences have arisen from within to the extent that there have been accusations and counteraccusations between various factions in the movement, as a result of which partisan desires have been given preference over legal Islamic purposes. The varying attitudes of the movement's factions toward women have been

²⁶ It is stated in the Ḥadīth [Sayings of the Prophet] that "God has not spoken about certain things out of mercy towards you; so, do not ask about them".

²⁷ Āyah [Verse] 13 of al-Ḥujrāt [Sūrah in the Qurʾān].

narrowing the scope of addressing their issues. The advocates of these attitudes have often promoted discrimination relative to rights on the grounds that the Islamic Sharī'ah jurisprudence has placed men at a higher level than women. However, Sayyid Quṭb—a prominent Egyptian Islamic thinker and preacher—argues: “the creation makes a man to be a man and a woman to be a woman; therefore, the distinction between both is mentally of no value”.

Within the framework of those varying attitudes, many Islamic groups in Yemen have formulated their positions toward women from the standpoint of women being irrational and less religious and that they cannot manage their own lives or handle their affairs except under the direction and supervision of men. Their understanding as such has been deduced from some interpretations of Qur'ānic texts that grant guardianship to men and equalize the testimonies of two women to the testimony of one man.

It is evident, therefore, that if the Islamic purposes are to be judged by the actions of Muslims according to the above stated perspectives, inequality of women with men can be acknowledged in Islam. However, the acceptance of inequality as the basis to believe in Islam requires explicit connotations, bearing in mind the problematic nature of the religious interpretations which have, sometimes, failed to keep up with the requirements of modernization and, therefore, caused flaws in explaining some provisions and objectives.²⁸ Various aspects of interpretations necessarily require assimilating “the science of revelation”, which explains why Qur'ānic verses were revealed [upon Prophet Muḥammad], so as to carefully cope with the occasion on which a certain verse [Āyah] was revealed. It should be noted, however, that the universal nature of Islam implies that it is capable of bypassing history since its position at a certain point in time will never drain its practical effect.

Part of the attitudes and the literature of the political Islam movement in Yemen²⁹ has adopted the culture of intimidation against women and the diminution of their status through disseminating the underlying contents of forbiddance and concepts that are alien to Islam in terms of their vague meanings and difficulty to comprehend. In disseminating the values of inequality, the movement has formulated weak arguments on guardianship, custodianship, testimony, and the inadmissibility of a woman to travel alone without Muḥram [unmarriageable person, such as father, brother, uncle, etc.] and even on the requirement of a custodian's presence—due to the age factor of the girls to be married—so that a marriage contract can be considered valid.

In spite of the large space occupied by women's issues in the Islamic literature as compared to the measure of depth and earnestness with which they have been addressed therein—since many of the writings on women have been characterized with repetitiveness, traditionalism, and, sometimes, superficiality³⁰—the movement's literature continued to reflect a narrow-minded male discourse. This was inevitably governed by a critique approach attacking as false the reality of women's status in ancient communities and the injustices inflicted upon Arab women in the pre-Islamic era,³¹ taking this as a criterion to measure the qualitative variable in the rights gained by women in recent decades.

Some people believe that the problem of the feminist movement lies in the fact that men in general are Islamists or politicians racing to develop a mechanism for running

²⁸ Amneh Daoud, *Re-reading Qur'anic texts* (Madbouly Library, Cairo 2006) 31.

²⁹ As expressed by some publications posted on websites linked to the political Islam movement, as well as the large number of *fatāwā* [religious opinions] involving forbiddance and atonement on issues relating to women.

³⁰ Zainab Al-Ghazali, “A paper presented at a symposium on the status of women in Islam,” August 19–20, 1991.

³¹ Sheikh Mohammad Rashid Reda, *Women's rights in Islam* (The Arab Thought Foundation, Cairo 1984) 11.

the movement's activity, hence controlling it through guidance and setting its course of action. They are also keen to keep in their hands the reins of the movement, directly or indirectly, thereby denying women the opportunity to build up their capacity or utilize their skills except in the framework determined by the male society. In this connection, men take advantage of the culture of retrogression dominating women and the fact that they are distanced from the decision-making positions. Thus, their cause has been captured in its minutest details by the interpretations and arguments of the male mind, which has excluded them from making any advocacy or intellectual contribution to the nation-wide issues.

Unfortunately, there are rejectionist streams of thought that have remained centered on narrow-minded initiatives which do not match the role the Islamic jurisprudence should play. They have exercised hegemony through their obscurantist ideology over all aspects of Muslim life, declaring themselves as the guardian of Islam and Muslims. They have practiced the oppression inherent in destructive thinking against contemporary values by exploiting the climate of ignorance, social backwardness, and obsolete traditions as a hotbed for spreading their malignant viruses in the body of the Islamic peoples. They have become a source of danger against the purity of the Islamic Shari'ah provisions, which have set the grounds for the values of equality and promoted the principles of justice for all mankind.

It is known that the judgments of certain factions of the Islamic movement in Yemen³² have often been characterized with recklessness and arrogance toward the community. They have directed the social media platforms and networks and some newspapers to insult feminists and to accuse them of treason and working for the benefit of Western agendas, on the one hand, and to abuse their honor, on the other hand. The discourse of these factions has been focused on blaming women for the difficulties experienced by the community. According to their arguments, the call for equality would result in women acquiring rights exceeding their standard limits.

The maturing and rising moderate Islamic thought has rehabilitated the jurisprudence of rejuvenation which can be greatly relied on at the present time in which Islam is being exposed to harsh attacks targeting its universality, the dynamic nature of its provisions, and its adequate response to temporal requirements. Some advocates of Islamic thought bear responsibility for their failure to rejuvenate the essence of the Islamic religion and for neglecting the need to maintain a balance between textual particularities [of Qur'an and al-Sunnah] and the holistic purposes of the Islamic Shari'ah. They have rather exerted pressure on Muslims, narrowing their scope of life, and disregarded the message of jurisprudence by engaging in heated battles against the advocates of rejuvenation. In this connection, they claim that any discussion of the Shari'ah provisions is a distortion of the faith. Meanwhile, they continue to let off their venom of prejudice against women's rights, promoting their diminution. Their arguments and interpretations have regrettably overwhelmed the political establishment and, therefore, contributed to the formulation of the so-called male culture which has flourished in an environment of obsolete traditions and customs, without giving the slightest consideration to the principles of Islam which equates between men and women within the global domain of assignments and retributions.³³ They even do not heed the saying of Prophet Muhammad (PBUH) that "women are sisters of men". In their view, talking about equality between men and women is not of any value while Almighty God has differentiated between them in terms of inheritance, testimony, and guardianship.

³² The Salafists in Yemen, Al-Rashad Islamic Party.

³³ Gamal Al-Banna, *The veil* (The Islamic Thought Foundation, Cairo 2006) 96.

What is worrying in this aspect is the trend to attribute the interpretations of Qur'ān to the content of Qur'ān itself, rather than to its interpreters.³⁴ When these stress the concept of social justice embedded in Qur'ān, it does not mean to them that it encompasses women's equality with men. This is tantamount to a constitution stating that all men are created equal, but without ever intending to include equality between whites and blacks.

As the domain of jurisprudence is the most prominent aspect of the rejuvenation of religion, which is an open door until the Day of Resurrection with no one having the right to close it, the option of centrism is definitely required nowadays. This is because it is an active and interactive way of thought in dealing with evolution and inventiveness in various aspects of life, and it is based on the approach of moderation that is far from extremism and excessive tabooing.³⁵

Many Muslim scholars³⁶ assert that the current types of evidence indicate that the stream of centrism will be scoring progress in the future, as it has the capacity to address the people using the language of modern times and it has the ability to develop itself constantly through opening all channels of dialogue with others.

The bottom line is that the subject of women is one of the most controversial issues that sparked much debate among various factions of the Islamic movement. There are factions which advocate women's rights, while, in contrast, there are other factions which enhance women's inferiority and the diminution of their position through the call to deepen the culture of discrimination against them.

B. The Islamic Parties and Their Approach of Duplicity in Dealing with Women's Issues

Regardless of their frame of reference and their intellectual background, Islamic parties in Yemen have been represented in mechanisms characterized with violent defense of what they call the fundamentals of the Islamic Sharī'ah, artificially raising unfair controversy between the concept of faith and the arrogance inherent in the attachment to obsolete values. They still show extremism in their discourse, with increasing submission to the social and cultural dimensions of the traditional environment which is intrinsically hostile to women and their humanitarian role, and they keep mobilizing the elements that reject women's rights within these climates in an attempt to promote false beliefs when interpreting the political and social status of women. Although they raise the slogans of human rights, such as upholding the values of justice and freedom, yet they pay no attention to the reality of women entitlements, but rather strive to entrench their preferable negative model of Muslim women. Observers tracking the Islamic parties' programs and agendas in Yemen will vividly notice their tactical rise-and-fall approach, which they often follow on women's issues.³⁷

On the one hand, Islamic parties show hostility toward Western stereotype arguments on the elimination of the gender gap between men and women and attack international organizations with respect to their social theories and outreach programs under the pretext

³⁴ *Id.* 102.

³⁵ Amneh Daoud (n 28).

³⁶ Among them Dr. Yusuf Al-Qaradawi, *The future of Islamic fundamentalism*, a series of messages to rationalize the awakening movement (Wehbeh Library, Cairo 1997) 9.

³⁷ Najib Ghallab, *Yemeni women and the lost rights between parties and traditions* (Sa'ada Network Press 2012).

that they are prejudicial to the local specifics of the Muslim Arab communities and incite the rebellion of women under the slogan of freedom. On the other hand, they formulate *fatāwā* [religious opinions] legitimizing temporary [sexual] relationships with the intention of putting in place a male culture highlighting the Islamic Sharī'ah being appreciative of the circumstances of men and the satisfaction of their sensual needs.³⁸

Earlier, the Islamic movement groups also launched a heavy-handed campaign against governmental and nongovernmental organizations that are active in the field of gender and women's rights. This was done by inciting people against them through speeches and sermons in the mosques and disseminating hostile publications, as happened against the Women's Studies Centre at the University of Ṣana'ā'.³⁹ Accordingly, the Centre was the subject of hostile publications on the grounds that it had been immoral and providing a secure environment for prostitution in the community, which prompted the official establishment to form a parliamentary committee, then an academic committee, and, finally, a presidential committee, to discuss the "problematic" nature of the educational program delivered by the Centre.⁴⁰

This incident was only one of the battles over rights that have been waged by the coalition of Islamic parties against change, social transformation, and democratization of political life. They promote atonement as a penetrative and effective weapon in intimidating intellectuals, human rights advocates, political activists, and writers.⁴¹ Yemen's Scholars Association⁴² issued a lengthy statement in which they described the call for mainstreaming gender issues into the education curricula as a move toward legalizing sodomy, adultery, and homosexuality; promoting the moral decay and domestic rebellion; and inculcating the notion that a person has the right to change his or her sexual identity by converting from male to female and vice versa, which is conducive to gay marriage, hence the recognition of homosexuals and their reintegration into the society.

Going through the increasingly controversial concepts held in the Islamist parties' discourse will necessarily lead to raising the women's cause, their public social role, and their dialectic interaction with the complexities of assumptions and requirements of the de facto situation, which reflect the noticeable confusion in the problematic handling of the women's cause within the Islamic cultural system⁴³.

Salafists who are represented in al-Rashad Party in Yemen deny such thing as a women's cause, as proclaimed by the party's chairman, who spoke, on the occasion of the party's founding, of the injustice inflicted upon women in the West, where their rights

³⁸ In 2009, al-Zindānī, who is one of Yemen's most renowned scholar *shuyūkh* and a leading figure in the Yemeni Grouping Party for Iṣlāḥ [Reform], issued his famous *fatwā* legalizing what he called the "marriage of friends" [boy friend–girl friend] and the "Nikāḥ al-Misyār" [the traveler's marriage], which sparked a reprehensive uproar by media and human rights circles.

³⁹ This happened after the Centre had organized a conference September 12–14, 1999, entitled "Challenges facing Women's Studies in the 21st Century."

⁴⁰ The three committees concluded their work with a recommendation to close the Centre, which was implemented in October of that same year. The Director of the Centre [Rafū'ah Ḥassan] was prompted to leave Yemen for the Netherlands.

⁴¹ Najib Ghallab (n 37).

⁴² The statement was issued in March 2013 in response to the recommendations of the Regional Conference on Compulsory Education and Gender Mainstreaming, which was organized by the Women's Union of Yemen, in Sana'a, from March 4 to 6, 2013.

⁴³ Sheikh Mohammad Al-Ghazali, *Al-Sunnah of Prophet Mohammad between the People of jurisprudence and the People of Al-Sunnah* (Al-Shorouq Publishing House, Cairo 1990) 4.

have been violated and they have been sexually assaulted and treated as a commodity. On the other hand, he pointed out that women in Yemen are only entitled to exercise political activities within the controls and provisions set out in the Islamic Shari'ah, indicating at the same time that there are positions such as the highest executive position in the country which they are not naturally fit to hold due to their incompetency in terms of the Islamic Shari'ah. Thus, a committee of Islamic scholars has had to be formed in order to review the position to be taken on women's participation within the Shari'ah limitations. Meanwhile, the Islamic parties, including the Salafist al-Rashad Party, do not hesitate to mobilize women in long queues at polling centers to exploit their votes for achieving political gains.

Salafists in Yemen say that they stand for women as they stand for men, because women are sisters of men, both in rights and duties, except in what contradicts the nature of women and negates the Islamic Shari'ah. In line with this principle, they have opposed the women's quota system under the pretext that it is an act of discrimination against men, claiming that their position as such emanates from their commitment to the joint oath made by all members of the National Dialogue Conference to be indiscriminate.⁴⁴

The Arab Spring revolutions have changed the discourse of certain political Islam parties in Yemen. The Yemeni Iṣlāḥ [Reform] Party in Yemen had been adopting a shocking position against modernization and civilization in Yemen. Its tribal *shuyūkh* and scholars were known for launching a harsh war of words against the women's feminist movement in Yemen, accusing them of actively implementing Western agendas for disseminating an equality culture alien to the fundamentals of Islam and by deliberating the term "gender mainstreaming" as a basis for claiming women's equality with men. This was propagated by the leading figures of the Islamic Party, which issued rulings of atonement against a number of feminists known for their advocacy of women's rights.⁴⁵

It has been noticed nowadays, however, that the Yemeni Grouping for Iṣlāḥ [Reform] has been pushing its women cadres to take part in the National Dialogue Conference after having agreed to their representation.⁴⁶ The Yemeni Grouping for Iṣlāḥ [Reform] was founded in 1990, following the declaration of the Yemeni unity, in order to undermine the socialist tide coming from the South, by pushing it into ideological conflicts and rendering people, especially the general public, suspicious about the principles of faith of the socialist party.

Aa-Iṣlāḥ [Reform] Party views the feminist movement as a "poisoned dagger" in the heart of the nation and a destructive factor distorting the Islamic identity. Some analysts believe that Tawakkul Karmān, who won Nobel Peace Prize in 2011, and who is a model feminist leader inside this Islamic party, does not necessarily reflect a progressive thought, neither a real progress in al-Iṣlāḥ's party position on women.⁴⁷

⁴⁴ The Salafist al-Rashad Party has set a reservation to the outputs of the National Dialogue Conference, especially the constitutional guiding directive on guaranteeing a proportion of 30% as a women's quota for accessing decision-making positions.

⁴⁵ With funding from the government of the Netherlands, the known pioneer leader of the feminist movement in Yemen, Ra'ūfah Ḥassan, established the first Women's Studies Centre at the University of Ṣan'ā', in 1996, but as a result of the attack launched against the Centre by the Islamic Iṣlāḥ [Reform] Party, it has had to be closed down since then.

⁴⁶ During the revolution period, the former regime [of President 'Alī 'Abdullāh Ṣāliḥ] accused the feminist elements of the Yemeni Grouping for al-Iṣlāḥ [Reform] as adulterous because they left their homes and appeared in the sit-in squares and slept in tents.

⁴⁷ Certain *shuyūkh* of the al-Iṣlāḥ [Reform] Party have criticized the phenomenon of women's intermixing with men when some revolutionary women activists had to stay overnight in the sit-in camps with their colleagues.

In order to explore the merits of these divergent positions and address the problematic nature of women's issues, it is advisable to focus, nonexclusively, on the following sections, which occupy a large area in the contemporary cultural and social reality, since they are genuine and deep-rooted problems in the position of the Islamic discourse.

C. The Position on Women's Labor

Women's issues have occupied a large area on the agenda of the Islamic movement in Yemen whose discourse has been marked by a reactionary approach. It has been adopting worrying arguments, such as calling for the so-called awakening vis-à-vis women, especially after the spread of the phenomenon of return to the [legacy] of good ancestors. Consequently, the subject of women going out to work sparked alarm about their child-rearing and home-caring functions. The Islamic movement issued *fatāwā* [religious opinions] calling for women to return to their homes, highlighting the so-called illegitimacy [according to the Islamic Shari'ah] of women working with men because it is a way to sedition and to possible incidence of illegal relationships as a result of women intermixing and sitting for a long time with men who are strangers to them. The movement advocates developed formulations about the negative effects of the absence of women from their homes, the resultant loss of children, and the potential occurrence of family disintegration, eliciting a pretext to the effect that Islam has never ever encouraged women to abandon their "all the more important duties as mothers and wives towards their husbands and children".⁴⁸

The Islamic movement's discourse has been focused on narrowing the scope of women's labor opportunities. For example, this is done through holding them responsible for the difficulties experienced by the society as a result of women's competitiveness with men over jobs on the labor market and, in turn, the consequential diminution of men's chances in this respect, whereas man is the custodian of the family, which includes his wife and children who are basically dependent on him. The bottom line of such advocacy is rather a vision promoting the division of social work where women's role is to be limited to child-bearing and motherhood, and the most that can be expected in this sense is the acceptance of their independent social activity in the areas of community-based charity work. This sounds like an intimidating warning to women of the outcome of their work outside home, and an incitement to them to give up their ambitions.

Of course, there has been a difference between the Salafist position⁴⁹ and the position of the centrist Islamic school of thought of the Muslim Brotherhood,⁵⁰ which basically does not oppose women's working outside home. Instead, it introduces a set of risks which may arise from the respective working environment and its mechanisms. They call for giving adequate consideration to the social reality that women's work outside home should not violate their family duties or infringe on their role as faithful mothers and wives. In fact, such a call serves somehow as an intervention promoting the male culture than freeing women from the duplicated workloads of their tasks inside and outside home. This reflects adversely on building and developing their capacities and technical and innovative skills

⁴⁸ This has been done through informal *fatāwā* issued by religious parties in the form of leaflets emanating from unknown sources, but addressed under the names of some of their prominent advocates, or through leaking various types of stories and rumors.

⁴⁹ Represented by the Salafist al-Rashad Party.

⁵⁰ Represented by the Yemeni Grouping Party for Iṣlāḥ [Reform].

which enable them to develop excellent careers which qualify them for promotions on an equal footing with men.

D. The Position on Women's Political Participation

The hardline Islamic movement has been opposed to women's participation in political activity from the standpoint that Islam has not ever been supportive of women accessing power, as the Salafist al-Rashad Party in Yemen so indicates, invoking in this regard God's saying in Qur'ān "And stay in your houses . . ." ⁵¹ and the status of al-Salaf women—ancestral women of the past—who were not interfering in politics. The Islamic movement parties have established their position as such on the basis that women are not basically entitled to have jurisdiction, especially the public jurisdiction, because of the explicit statement in the Holy *Hadith*—the Prophetic Narration—that "no folks shall succeed if they have entrusted their jurisdiction to a woman". In their opinion, this is an explicit declaration of the inadmissibility of women's participation in political activity. They also consider women's pledge of allegiance in the era of Prophet Muḥammad (PBUH) as a pledge of allegiance to the faith, not as a political expression, unlike men's pledge of allegiance to the Holy Prophet, which had been characterized with different processes.

On the other hand, many centrist Islamic intellectuals ⁵² believe that, by the holy verse saying, "And as for the believing men and believing women, they are guardians of each other", ⁵³ God has established an absolute jurisdiction for believing women along with all believers, including women's jurisdiction over brothers, sincere affection and financial and social dealings, and the jurisdiction over military and political collaboration.

The moderate Islamic movement has recognized women's right to political participation and, furthermore, reflected its vision as such in its election programs. It has prompted their women elements to engage in the election of their regulatory bodies at various levels, as well as encouraged them to play their role in the parliamentary and local electoral processes. ⁵⁴

VI. CONCLUSION

The concepts of freedom and equality—as enshrined in the universality of human rights—are two closely related rights for any person, whether a man or a woman. These concepts remain incomplete and lose value when they are intended for the benefit of some humans than others, such as enhancing the standing of men at the expense of women or justifying women's inferiority in certain circumstances.

Correcting existing perspectives toward women is a high priority. First of all, political will is all the more needed to support social measures and promote cultural change with the aim of bringing up new generations with a more humane vision in dealing with the cause of women. This is definitely possible by way of reformulating the educational curricula in Yemen, which have been interpreting and continue to interpret Adam's exit from Paradise as an eternal damnation of women. According to this historical perspective, the passive cultural heritage has demonized women, portraying them as an eternally evil and

⁵¹ Āyah [Verse] 33 of al-Aḥzāb Sūrah [in the Qur'ān].

⁵² Sheikh Mohammad Rashid Reda, *Women's rights in Islam*, p. 11.

⁵³ Āyah [Verse] 71 of al-Tawbah Sūrah [in the Qur'ān].

⁵⁴ Such as the Islamic Yemeni Grouping Party for Iṣlāḥ [Reform].

a symbol of affliction. The outcome of all what has been stated above is summed in the following points:

- (1) The position of the official political establishment in Yemen on women is flopping between courting the international scheme on human rights, on the one hand, and going along with the pressures being exerted by the hard-line movements and tribally-oriented groups which are opposed to women's rights, on the other hand.
- (2) The discourse of the moderate Islamic movement on women has marked a change to some extent in the last decade of the twentieth century, and the arguments of certain factions of the movement have now constituted a reveille in the contemporary realities of the Arab life, including Yemen, albeit it has not risen to the level of ambition.
- (3) All factions of the Islamic movement have failed in presenting the women's issue in an independent Islamic way so that women's role can be highlighted evidently in light of the teachings of Islam, i.e., away from the obsolete traditional pressures and the dictates of the male cultural heritage.
- (4) The Islamic movement is responsible to some extent for the marginalization and exclusion of Muslim women from participating in the public social activity, and for even not granting them the trust which may enable them to contribute to the tasks entrusted to the movement itself.
- (5) The educational and social scheme which provides for humanitarian culture based on the promotion of the concept of gender mainstreaming and the complementarity of roles under societal partnership has been marked with weakness.

Religious Minorities under Pressure

The Situation in Egypt, Iraq, and Syria

OMAR FARAJ

I. INTRODUCTION

The study of the minority rights is currently of great importance due to the rapid changes in the Middle East region recently and the changes in many legal systems following the Arabic Spring. As a matter of fact, there is no unified definition as to what constitutes a minority; international law has never fully specified what exactly constitutes a minority. In order for any minority to be defined as such, it must display objective or subjective elements; sharing the same language, religious beliefs, or ethnicity are examples of objective elements. The subjective element is affirmed when the members of a given group identify themselves as minority members. One important question is how the international law regards or defines minorities. The definition presented in 1977 by Francesco Capotorti, the Special Reporter of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, offers a concise and sound definition of what constitutes a minority. It states that a minority is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹

The relevant human rights provisions oblige every state to guarantee and protect the rights of all individuals living within the state's territory and under its jurisdiction. The minority

¹ Minority Rights: International Standards and guidance for Implementation (United Nations Human Rights Office of the High Commissioner, United Nations, New York 2010) 2.

groups in the Arab world succeeded in keeping and maintaining their right of existence and have kept a recognized identity. The onset of the Arab Spring brought hopes for change to many people in the region, and scholars predicted a new sort of renaissance era with the spread of democracy and values of equality and freedom. This initial enthusiasm about the Arab Spring has since turned into pessimistic and uncertain expectations about the future of such developments. The level of aggression and violence that accompanied the uprisings in the Arab countries was horrifying. In the light of the political changes, new power blocs emerged and called for a hegemonic approach to the governing of various states. Matters such as respect for the principle of pluralism and maintaining human rights standards in governance thus became pertinent questions for many scholars and experts. Minority groups became vulnerable to the hegemony of the majority, with various Islamic groups' understanding of democracy establishing a tyranny of the majority.

The invocation of Shari'ah in most of modern Islamic countries has had both a political and a legal purpose and this has prevented any alterations in the practical application of Shari'ah doctrine, which might bring it into compliance with human rights standards. One of the critical questions which arises when applying Islamic law as a part of the constitutional legal order is that of whether the level of protection provided for religious minorities is sufficient.²

The main aim of this article is to shed some light on the situation of religious minorities in Egypt, Iraq, and Syria and examine the legal provisions that provide protection of and guarantee freedom of religious beliefs with an analysis of the provisions in the current constitutions of these countries that deal with religious minorities' rights. International mechanisms which provide protection for minorities will be examined together with the requirements stipulated under international human rights law. It is important to examine level to which the national laws in these countries are in compliance with the international conventions and agreements.

The revolution in Egypt started in 2011 and succeeded in overthrowing President Ḥusnī Mubārak. The aim of the revolution, reflected in the slogans proclaimed by protestors, was to achieve greater rights and freedoms for the Egyptian people. The Muslim Brotherhood, with the support of the Salafists, took control after the revolution and won in elections owing to the intensive involvement of their younger members during the demonstrations against the former regime. President Muḥammad Mursī was elected to form a new government controlled by a Muslim Brotherhood majority. Seeking an Islamic identity for Egypt, the Muslim Brotherhood began an organized process of altering laws and drafting a new constitution in 2012.³ The new draft constitution has been described by many as one which violates Egyptian religious minorities' rights and especially those of Egyptian Copts through the enforcement of Shari'ah. The rule of President Mursī and the Muslim Brotherhood was brought to an end by a military intervention to remove Mursī from power in July 2013.⁴

In Iraq, following the fall of the regime in Baghdad in 2003, a new constitution was drafted in 2005. Religious minorities like the Christians, who constitute conclude 3% of the population, have been victims of continuous attacks. The situation for the Yazidī, Sabian, and Shabak minorities was no better.⁵ In Syria, the uprising started in 2011 and has since

² Anver M. Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (Oxford University Press, Oxford 2012) 218.

³ Khalil Al-Anani, "The Role of Religion in the Public Domain in Egypt After the January 25 Revolution" (The Arab Center for Research and Policy Studies, Doha-Qatar, April 2012) 9–15.

⁴ See Ziad A. Akl, "Thus Spoke the Egyptians: Why Is It Not a Coup?," *Daily News Egypt Newspaper* (July 5, 2013).

⁵ Faleh A. Jabar, "The Constitution of Iraq: Religious and Ethnic Relations" (Minority Rights Group 2005) 3.

turned into what is now obviously a civil war and one of the worst humanitarian disasters the world has seen for decades. The situation for Christians and 'Alawīs, the two major religious minorities that supported the Assad regime, is a matter of critical concern and remains unclear.

II. RELIGIOUS MINORITIES AND NATIONAL LAWS

A. Egypt

In Art. 2 of the Egyptian Constitution of 2012 it is stated that "Islam is the religion of the state and Arabic its official language, Islamic jurisprudence is the principal source of legislation"⁶ This article clearly provides that the religion of the state is Islam, and it is given second position in the hierarchy of articles in a constitution that has 211 articles. Art 2. calls for recourse to Shari'ah in the law-making process, and it is directed at the legislator. Following Art. 2, one of the most controversial articles is Art. 4, which declares Al-Azhar⁷ to be an independent institution with the function of monitoring the implementation of Islamic law. It can be claimed that Art. 4 was written in order to reinforce the implementation of Art. 2 and to pave the way for greater influence from Islamic parties. The history of Al-Azhar shows that it has been a neutral institution which includes a range of religious scholars. Due to this institution's powerful influence on Sunni Muslims in Egypt, involving it in the constitutional process contradicts the principle of equality for all Egyptians.⁸

The last part of Art. 2, which declares the principles of Shari'ah to be the primary source of legislation and that no other principles may come into conflict with this, is very controversial. The word Shari'ah is a very broad term, which denotes the jurisprudence framework developed by Islamic scholars in its entirety, and also the legal rules set out by the Prophet Muḥammad through revelation. Art. 219 states: "The principles of Islamic Shari'ah include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community"⁹. Arts. 2 and 219 leave the door open for different interpretations of the principles of Islamic Shari'ah outlined above. Art. 219 opened the door for possible establishment of "social Islamic jurisprudence", there is/can be no universal reference point by which the principles of Shari'ah can be interpreted and implemented¹⁰

Despite the fact that equality is granted to all Egyptians under Art. 40 and the freedom of belief is granted under Art. 46, both of these articles contradict Art. 2 due to its invocation of Shari'ah as the main guiding principle for all other laws. However, many scholars

⁶ The Egyptian Constitution, Art. 2, <http://www.wipo.int/wipolex/en/details.jsp?id=13113>, accessed March 22, 2016.

⁷ Al-Azhar Mosque and University has long been regarded as the foremost institution in the Islamic world for the study of Sunni theology and Shari'ah, or Islamic law. The university, integrated within the mosque as part of a mosque school since its inception, was nationalized and officially designated an independent university in 1961, following the Egyptian Revolution of 1952, http://en.wikipedia.org/wiki/Al-Azhar_University, accessed March 22, 2016.

⁸ Holger Albrecht, *Egypt's 2012 Constitution: Devil in the Details, Not in Religion* (United States Institute of Peace, January 25, 2013) 2.

⁹ The Egyptian Constitution, Art. 219, <http://www.wipo.int/wipolex/en/details.jsp?id=13113>, accessed March 22, 2016.

¹⁰ Mohamed Abdelaal, "Religious Constitutionalism in Egypt: A Case Study" (2013) 37 *The Fletcher Forum of World Affairs* 38–39.

consider the aforementioned articles (40 and 46) to be in compliance with the Universal Declaration of Human Rights in Art. 18 of the declaration. The Copts in Egypt have shown great concern regarding the implementation of Art. 2; they have fears about the prospect of their relation to the state being governed by a *dhimmī* arrangement according to the classical understanding of Shari'ah; non-Muslims who followed a prophet who was nonetheless recognized in Islam (Christians and Jews) were called *dhimmīs*. They enjoyed a special level of autonomy upon fulfilling the requirement payoff paying a special fixed tax, called *jizyah*. Nevertheless, there were restrictions on their right to build houses of worship and according to al-Shaybānī, a leading classical Islamic jurist; the *dhimmīs* have a right to repair their existing houses of worship but not to build new ones.¹¹ In accordance with such an arrangement, Egyptian Christians and Jews would have to pay the state to keep their religion and exercise their religious practices as they are considered non-Muslims. This would establish a form of deep discrimination in Egyptian society.¹²

According to Art. 175 of the Egyptian Constitution of 2012, the role of the Supreme Constitutional Court of Egypt (SCC) is essential and significant in the interpretation of what is and is not in compliance with Shari'ah. In other words, it is the institution responsible for both examining the constitutionality of laws as well as interpreting Shari'ah. The approach adopted by the SCC can be seen from previous cases and decisions, which clearly demonstrate that the court adheres to the doctrine of *siyāssah shar'iyah* (wise governance). This approach holds that the system of governance should be in harmony with Shari'ah but be subject to limited reform.¹³ It is important to note here that the SCC has never paid heed to the argument that the *siyāssah shar'iyah* doctrine grants special jurisdiction to religious jurists and order institutions in interpreting Shari'ah. Instead the court restricted the use of *ijtihād* in reaching decisions only to cases where the need for *ijtihād* expertise actually arose. This means that the court essentially had only an advisory role.

In Shari'ah, if a Muslim converts from Islam to another faith, then he is considered an apostate and as a consequence will lose all his rights and possessions until he returns to Islam.¹⁴ Non-Muslims are not allowed to inherit from Muslims. This is a critical matter in cases where the father in a family has converted to Islam, because his sons are not entitled to receive any inheritance from their father unless they also convert to Islam. The *Ḥanafī fiqh* applied in Egypt allows a Muslim to inherit from an apostate but not the reverse.¹⁵ Apostasy is not a serious crime in Egyptian law, but it affects the civil rights of the apostate directly. Most cases relating to apostasy in Egypt appear in civil courts and are due to issues of child custody or inheritance claims. The Egyptian Court of Cassation's approach since 1975 has been to consider the prohibition of apostasy as an essential factor for public order. In a decision in 1996, the court upheld the legal consequences incurred for apostasy and based its decision on Art. 2 of the 1971 Constitution.¹⁶

The new Egyptian Constitution of 2014 does not differ very much from the previous one; the controversial Art. 2 retained the same wording, which states that Islam is the religion of state and the official language is Arabic and the principles of Islamic Shari'ah are the

¹¹ Ala Haider Hamoudi, "Religious Minorities and Shari'a in Iraqi Courts" (2013) 31 B.U. Int'l L.J. 387, 6.

¹² *Id.* 41–43.

¹³ Mohamed Abdelaal, "Religious Constitutionalism in Egypt: A Case Study" (2013) 37 The Fletcher Forum of World Affairs 40.

¹⁴ See the Egyptian Court of Cassation decision No. 37 in 31/04/1965, 16.

¹⁵ *Fiqh* (Islamic Jurisprudence), inheritance to a non-Muslim from a Muslim.

¹⁶ Moataz Ahmed El Fegieri, "Islamic Law and Freedom of Religion: The Case of Apostasy and Its Legal Implications in Egypt" (2013) 10 MWJHR 7.

primary source of legislation. The only change is that the interpretation of the principles of Shari'ah is to be decided by the Supreme Constitutional Court. Art. 3 was kept in the new constitution without change and gives the Egyptian Christians and Jews the right to use the principles of their own laws to regulate matters of personal status. It is obvious from the wording of this article is that the Egyptian legislator recognizes this right only for monotheists, i.e., only for religious groups that have a holy book and a prophet. Al-Azhar together with other Islamic parties opposed any change to the wording from "Christians and Jews" to "non-Muslims" at the time when this article was drafted.¹⁷ Therefore, according to this clause, the new constitution does not recognize religious groups like Buddhists, Bahā'ī, Aḥmadiyah, and many others.

One of the most important articles to deal with religious freedom is Art. 64. It is clear that the wording of this article has been taken from the Egyptian Constitution of 1923. The freedom of faith in the wording of the previous 2012 Constitution was "guaranteed" but in the new constitution it is "absolute". The freedom of worship provided for in Art. 64 is only for monotheistic religions, and the freedom of worship is not "absolute" according to the new constitution, but rather only the freedom of faith.¹⁸ In this article we once see again the influence of Art. 2 in regard to what are considered principles of Shari'ah: It represents the Islamic approach by recognizing the right to have another faith but not the right to worship and practice rituals under the rules of an Islamic state. One of the consequences of this approach is that it hinders Christian Copts in regard to building new places of worship or repairing existing ones. The procedures to approve applications for such works are very complicated. Egyptian law still follows the *Hamyūnī* Decree, which originates from the time of Ottoman rule in Egypt, and limits the rights of Christians to build or repair churches. This decree clearly violates Art. 27 of the International Covenant on Civil and Political Rights (ICCPR), which Egypt ratified in 1982, thus obliging it to incorporate the covenant's requirements into its national laws.

In fact, the most suppressed religious minority in Egypt are the Bahā'īs, who are not recognized by the Egyptian government. On the Egyptian national ID card, the religion or faith of the cardholder is stated; however, the Bahā'ī faith is excluded as an option. They therefore have great difficulties finding employment and in matters related to the law of personal status.¹⁹

B. Syria

Syria's new constitution drafted and approved in 2012, maintained the same level of protection for minorities stipulated in the constitutional provisions of the previous 1973 Constitution. Art. 3 stipulates that the president of the state must be a Muslim and Islamic jurisprudence is a major source of legislation. In Art. 35 (1) of the 1973 Constitution of Syria, the state is to respect all religions and guarantee freedom to perform rituals that do not prejudice public order and that the personal status of religious communities is to be protected.²⁰ Despite the right to religious freedom provided for in the constitution and

¹⁷ L. Lavi, "Egypt's Draft Constitution 2014: Focus on De-Islamization, Expansion of Military Power," *Right Side News* (January 12, 2014) 4.

¹⁸ *Id.* 5.

¹⁹ Michael Armanious, "Egypt's New Constitution: As Bad as Its Old One?" (Gatestone Institute, International Policy Council, December 23, 2013), <http://www.gatestoneinstitute.org/4105/egypt-constitution>, accessed March 22, 2016.

²⁰ The New Constitution of Syria 2012, Art. 3, <http://www.voltairenet.org/article173033.html>, accessed March 22, 2016.

other laws, the Syrian government nonetheless enforces some restrictions on the practicing of this right. The freedom to practice religious rituals has to be exercised in accordance with concerns for public order. The legislator has never defined exactly how rituals might constitute a violation of public order. This has left the interpretation open and allows for the restriction of practices at any time based on the claim that they violate public order. Religious minorities have been represented in official positions; however, Jews have been denied the right to hold any official position and have been continuously suppressed. The religious affiliation as required by the government in personal status matters must be with Islam, Christianity, or Judaism. In other words, these are the only three religions that the government recognizes in personal status matters.²¹

The Syrian Penal Code No. 148/1949 provides safe guards to the rights of all societies to live together and to protect peaceful cohabitation. In Art. 307 of the law it makes any act aiming to instigate racial bigotry or provoke conflict between the different groups of the Syrian society, punishable by a prison period (6 months to 2 years) or paying a fine (SL100–200). The same penalty stipulated in Art. 308 of the same law against any person who is found affiliated or a member of any association established for such goals, and a provision for resolving such associations. There is a hard punishment incorporated in Art. 319 of the penal code of up to one year of prison for anyone who attempts to prevent any Syrian citizen from practicing his or her constitutional right to religion. Also Art. 463 prevents the damaging, defacing, and destruction of any religious symbol or a place of worship and inflicts a penalty on any person who disrupts any “religious observances.”²²

Art. 33 (3) of the Syrian Constitution of 2012 stipulates:²³ “Citizens shall be equal in rights and duties without discrimination among them on grounds of sex, origin, language, religion or creed.”

This provision has been contradicted by the ban imposed by the Syrian government on Jehovah’s Witnesses. This group is obliged to practice their rituals in secret and without any appearance in public.²⁴ The ban is also not in compliance with Art. 3 of the same constitution according to which the state is obliged to respect all religions and ensure the freedom to perform all rituals that do not prejudice public order. There was no legal justification behind this ban, and this is also the case for other groups from the Islamic religion, like the Salafists and the Muslim Brotherhood.

Inheritance procedures in Syria follow Islamic law and are applied in the case of all citizens except Christians. Marriage and divorce matters for members of different religious groups are dealt with in accordance with their respective religious laws. A Christian woman is not entitled to inheritance if she was married to a Muslim. The government does not recognize any conversion from Islam to Christianity, which means that any converted person remains a Muslim in the eyes of the law and is therefore governed by Shari‘ah laws. This is not the case if a Christian converts to Islam, as such an individual is registered officially as a Muslim.²⁵ Apostasy is not a crime in Syria, and there is no legal provision to govern apostasy

²¹ International Religious Freedom Report (United States Department of State, Bureau of Democracy, Human Rights and Labor 2011) 3.

²² Joshua Castellino and Kathleen A. Cavanaugh, *Minority Rights in the Middle East* (Oxford University Press, United Kingdom 2013) 322–323.

²³ The New Constitution of Syria 2012, Art. 33, <http://www.voltairenet.org/article173033.html>, accessed March 22, 2016.

²⁴ International Religious Freedom Report (United States Department of State, Bureau of Democracy, Human Rights and Labor 2011) 2.

²⁵ International Religious Freedom Report, (United States Department of State, Bureau of Democracy, Human Rights and Labor 2011) 4–5.

from Islam, unlike the Egyptian law under which apostasy is considered as an act contrary to public order.

The Constitution of Syria is to be considered a bad example due to the fact it shows no respect for international norms or international organizations or to the international human rights law. Nevertheless Syria as a state is not a theocratic state. Surprisingly, the word “international” appears once in the context that the approval of any international treaties must be by the People’s Council of Syria.²⁶

C. Iraq

After the fall of the Iraqi regime in 2003, the country ever since is facing a continuous turmoil. Sectarian violence, socio-economic devastation, and population displacement, not mentioning the political dispersal, are the general characteristics of the new Iraq.

Iraq’s religious minorities enjoyed a type of religious freedom under the regime of Ṣaddām Ḥusayn. Iraq is a country with a variety of religious groups and faiths, and therefore the country is a very special case in regard to the rights and freedoms granted to religious groups.

The current Iraqi Constitution was adopted in October 2005 to replace the Transitional Administrative Law of Iraq (TAL). Despite the description of the document as “permanent”, the drafting process came during a very complicated political environment and as a compromise between the major political blocs Shi’ah, Sunnis, and Kurds that represents the population of Iraq. Questions over the legitimacy of such a written document under the American occupation of Iraq were critically raised. Issues of minorities’ rights and future and the legal mechanisms within the new Iraqi legal system were questioned. The future of non-Muslims in a majority Muslim faith-based population needed concrete, transparent clarity in the Iraqi Constitution of 2005.²⁷

The constitution analyzes the issues of cultural, ethnic, and religious minorities in a very unique way in the preamble. We can observe a clear indication to the diverse religious and secular legacy of Iraq. In the preamble, Iraq was described using the old name “Mesopotamia” as the land and origin of the prophets and messengers, holy Imams, and the creator of the headmost codified law, which is the Code of Hammurabi. The state is federal, republican, pluralistic, and democratic. In Art.1 the state is described as federal. It is worth mentioning that federalism in the Iraqi context is vague due to the lack of sound debate to adopt federalism. And no attempts were made to educate the people about the nature of a federalist society.²⁸

The first section of the constitution “fundamental principles” contains many articles of a great significance to minorities. Art. 2 indicates that Islam is the official religion of the Iraqi state and also the source of legislation, and no law may be enacted that contradicts the established provisions of Islam. The interpretation of this article is that no laws should contradict the Islamic religion. It is very hard to provide protection for religious minorities when a state like Iraq has announced a status of *fortiori* and incorporated Islamic law as the

²⁶ Brian O’Connell, “Constitutional Apostasy: The Ambiguities in Islamic Law After the Arab Spring” (2012) 11 Nw. J. Int’l Hum. Rts. 97.

²⁷ Joshua Castellino and Kathleen A. Cavanaugh, *Minority Rights in the Middle East* (Oxford University Press, United Kingdom 2013) 221–222.

²⁸ Will Kymlicka and Eva Pföstel, *Multiculturalism and Minority Rights in the Arab World* (Oxford University Press, Oxford 2014) 267.

main source of legislation. In the Iraqi Constitution there is no use of the word Shari'ah, and the constitution talks about the provisions of Islam instead.²⁹

In the same article we see that no law may be enacted that contradicts the principles of democracy and the basic freedoms as stipulated in the constitution. The question is, how this will be applicable? If Islam is the source of legislation and no laws contradict the provisions of Islam, then any law that is promoting or providing human rights protection can be contradicting Islamic provisions.

Art. 3 states: "Iraq is a country of multiple nationalities, religions, and sects". This article recognizes the diversity of Iraqi citizens. In Art. 4 we see the designation of two languages, Arabic and Kurdish as the official languages of the country, while it supports the right of Iraqi citizens to educate their children in their main language and, as listed, Turkoman, Syrian, and Armenian. The right is extended to public institutions, but the private educational institutions have certain guidelines to support this right. The important question here is, if Iraq is a multi, pluralistic country, then why are certain languages and communities specified? Due to political compromises between the three major ethno-religious identities of Iraq (Shi'ah, Sunnis, and Kurds), two national languages were adopted as the official languages of the country.³⁰

Art. 14 of the same constitution stipulates: "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status". The general context of the law is to consider all Iraqis equal in their rights and obligations before the law. We see similar wording in Art. 25 of the 1970 Interim Constitution of Iraq, which, in fact, demonstrated a broader viewpoint in its protection of religious freedom. Shari'ah was not enshrined in the 1970 Interim Constitution as a part of the legal framework governing the Iraqi state. For example, apostasy is considered a crime under Shari'ah law, but it is not a crime under Iraqi law. Arts. 41 and 43 of the 2005 Iraqi Constitution provide for the freedom of religious exercise and freedom of conscience. There is no mention of any restrictions on conversions from Islam.³¹

One of the most important articles in the 2005 Iraqi Constitution that deals with minority groups is Art. 125, which reads:

This Constitution shall guarantee the administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents, and this shall be regulated by law.³²

This is a very powerful approach in that it provides protection within the constitution and states clearly the type of rights to be preserved and protected. This modern approach follows the examples of many constitutions from developed countries, such as the Constitution of Spain. However, while the legislator mentioned some minorities, many religious groups were neglected. The wording would have been stronger if the phrase "all other constituents" had been replaced by wording which stated all religious or ethnic groups in Iraq, such as Yazidis, Sabians, Shabak, Bahā'is, and Jews.

²⁹ David Pimentel and Brian Anderson, "Judicial Independence in Post Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy" (2013) 46 *The Geo. Wash. Int'l L. Rev.* 34–35.

³⁰ Joshua Castellino and Kathleen A. Cavanaugh, *Minority Rights in the Middle East* (Oxford University Press, Oxford 2013) 227–228.

³¹ Ala Haider Hamoudi, "Religious Minorities and Shari'a in Iraqi Courts" (2013) 31 *B.U. Int'l L.J.* 387, 9.

³² Iraqi Constitution, Art. 125, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf, accessed March 22, 2016.

Iraq has signed many international treaties and conventions, such as the 1966 International Covenant on Civil and Political Rights, the International 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1958 ILO Convention 111 regarding Discrimination in Respect of Employment and Occupation, and the 1966 International Covenant on Social, Economic and Cultural Rights. All these agreements and conventions can be used as international mechanisms to enhance the protection of minorities in Iraq together with the national Iraqi law.

III. INTERNATIONAL LEGAL MECHANISMS AND THE PROTECTION OF MINORITIES

The concept of protection is based on the assumption that cultural, linguistic, and religious factors are all important elements of what it means to be a human being. Minority rights can be a key element in maintaining human identity, but such differences can also divide individuals into different communities and groups. There is a commitment in international human rights law to protect specific features of human identity from any exercise of sovereign force. Minority rights can be a unifying element if protected in accordance with international law, but at the same time the grievances of such groups can also be a dividing factor if their rights are neglected. This can create ethnic conflicts and hatred in a society, and it is for this reason that many countries today make minority rights a priority in the drafting of modern constitutions.³³

Minorities suffered lack of protection against assimilation attempts practiced by the majority group in the Arab countries. In many situations the political and civil rights of minorities interfere with the civil and the political rights of the majority. This is why minorities are vulnerable and can be subjected to discrimination and marginalization. Belonging to a minority is something not all individuals have in common, and the status of minorities is contingent on their history and various broader conditions. Under international human rights law there are different instruments that can effectively help minorities to challenge excessive exercises of power by a state. Along with the Universal Declaration of Human Rights, different domestic and international treaties and customary international law principles combine to form an instrument which can maintain balance as regards minority rights under the rule of a majority.³⁴

The benefit of providing protection to minorities, according to the United Nations, is to maintain peace and security while at the same time safeguarding human rights. The protection of indigenous peoples has become an international matter over the last 30 years. Initial legal research and analysis regarding the rights of indigenous peoples has come to the fore in light of discussions about the rights of minorities. Although the concerns of indigenous peoples and of minorities are similar in many respects, like the need for legal protection, they are nonetheless treated in different ways in international law. Indigenous people in some countries can be the majority, and therefore they are not treated as a minority group. However, it is clear that the legal instruments for protection of indigenous peoples under international law are better than those for the protection of minority rights.³⁵ The decision of the Inter-American Court of Human Rights in the Saramaka case showed without a doubt that the protection of indigenous land rights is completely equal to the prohibition of

³³ Patrick Macklem, "Minority Rights in International Law" (2008) 6 Int'l J. Constitutional L. 532.

³⁴ *Id.* 533–534.

³⁵ Dieter Kugelmann, "The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity" in A. Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Printed in the Netherlands 2007) 236.

discrimination. This case arose when the Republic of Surinam objected to indigenous land claims based on nondiscrimination grounds.³⁶ The Inter-American Court stated:

Furthermore, the State's argument that it would be discriminatory to pass legislation that recognizes communal forms of land ownership is also without merit. It is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognizes said differences is therefore not necessarily discriminatory. In the context of members of indigenous and tribal peoples, this Court has already stated that special measures are necessary in order to ensure their survival in accordance with their traditions and customs. Thus, the State's arguments regarding its inability to create legislation in this area due to the alleged complexity of the issue or the possible discriminatory nature of such legislation are without merit.³⁷

The Christian Copts in Egypt, along with the Caldo-Assyrians, Yazīdīs, and Sabians in Iraq and 'Alawīs in Syria, are all considered indigenous people who have inhabited the land for centuries. International law aims at establishing peace and security and protecting human rights worldwide and constitutes a solid foundation for achieving peace and security in many countries. Most countries today give some priority to minority rights in their domestic legislation in order to avoid any possible instability in their legal and constitutional systems. However, there are very few Muslim countries which have enshrined the rights of religious minority groups directly in their constitutions. Countries like Iraq, Iran, Pakistan, and Algeria have included direct provisions that clearly recognize religious minorities' rights. Other states are like Turkey, the former citadel of the Ottoman Empire, which recognized some rights for its main religious groups in the 1923 Treaty of Lausanne. However, the enforcement of such rights in domestic law does not always necessarily function properly, and some violations can occur. For this reason domestic law enforcement in providing minority protection will function more effectively if propped up by international mechanisms or held to international standards.³⁸

Art. 27 of the International Covenant on Civil and Political Rights (ICCPR) is one of the most important tools that provide protection for minorities on a global level. Despite the harsh criticism of this article, it nonetheless remains a strong tool for safeguarding minority rights. Art. 27 states the following:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.³⁹

Under this article, the right to protection of minorities is not only structured as a right for specific groups but it is also established as an individual right. The exercise of such

³⁶ Gaetano Pentassuglia, "Minority Groups and Judicial Discourse in International Law: A Comparative Perspective" (2009) in *International Studies in Human Rights* (Martinus Nijhoff Publishers, Netherlands 2009) 253.

³⁷ *Saramaka People v. Suriname*, Inter-American Court of Human Rights in 2007, 31.

³⁸ Anver M. Emon and Mark S. Ellis, *Islamic Law and International Human Rights Law*, (Oxford University Press 2012), 362.

³⁹ International Covenant on Civil and Political Rights (ICCPR) in 1966, Art. 27.

individual rights is shared with others in a society or a community. Art. 27 goes beyond the nondiscrimination provisions presented in Art. 26 of the ICCPR. The focus of Art. 27 is therefore on the exercise of individual rights rather than the collective rights of minorities.⁴⁰

Such special individual human rights, which exist in most international human rights instruments and mechanisms, can be of particular importance to minorities' protection. Freedom of media, freedom of religion, and freedom of association are all rights which are considered political and civil rights. Other relevant rights could in some cases include social or economic rights, like the right of the person to receive education in his native language. These are just some of the examples of minority rights which overlap with and complement individual human rights.

There are various international conventions and treaties with direct provisions on the protection of minorities. Such clauses and their stipulations constitute an international mechanism to enhance religious minorities' protection. The right to self-identification and the prohibition of forced assimilation are clearly evident in Paragraph 32 of the Copenhagen Document of the CSCE. Similar provisions are found in the Framework Convention for the Protection of National Minorities (FCNM) in Arts. 3 (1) and 5 (2). The obligation to protect and promote the distinct identity of national minorities, including the taking of positive measures to do so, is referred to in Paragraphs 32 and 33 of the Copenhagen Document. It is also provided for in Arts. 4 (2) and 5 (1) of the FCNM.⁴¹

The right of nondiscrimination and effective equality has been referred to and defined in most international conventions and the UN treaties. Examples of these numerous conventions include the ICCPR, the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereafter: UN Declaration on Minority Rights), and the CSCE Copenhagen Document. The right to receive education or training in one's native language is stated in Paragraph 32.2 of the Copenhagen Document and Art. 4.3 of the 1992 UN Declaration on Minority Rights, as well as in the FCNM convention in Arts. 12–14.

The freedom to practice religion is stated in Art. 8 of the FCNM and also in the 1992 UN Declaration on Minority Rights in Art. 2.1. The right to retain one's culture is referred to in many conventions and legal provisions like Art. 5 of the FCNM, Art. 27 of ICCPR, and Art. 1 of the 1992 UN Declaration on Minority Rights. The right to retain one's culture is referred to in many conventions and legal provisions such as Art. 5 of the FCNM, Art. 27 of the ICCPR, and Art. 1 of the 1992 UN Declaration on Minority Rights.⁴²

In relation to the implementation of international treaties and conventions, Art. 151 of the Egyptian Constitution stipulates the following:

The President of the Republic shall conclude treaties and communicate them to the People's Assembly, ratified with suitable clarifications. They shall have the force of law after their conclusion, ratification and publication according to the established procedure.⁴³

The application of this provision will, however, not be possible, because if any laws contradict the principles of Islamic Shari'ah, they are not applicable. The application of ICCPR,

⁴⁰ Kirsten Shoraka, *Human Rights and Minority Rights in the European Union* (Routledge Research in European Law, New York 2010) 102.

⁴¹ *Id.* 106.

⁴² *Id.* 110.

⁴³ The Egyptian Constitution, Art. 151, <http://www.wipo.int/wipolex/en/details.jsp?id=13113>, accessed March 22, 2016.

which Egypt ratified in 1982, is a good example of how such an approach works when it comes to adopting and enforcing international legal mechanisms to protect religious minorities. Egyptian constitutions have led to a restrictive legal approach in dealing with international conventions, and this affected the status of religious groups in Egypt. Despite the authorization granted to the Supreme Court to act as a monitoring body to prevent any misinterpretations of Shari'ah, Shari'ah principles are nonetheless the primary source for legislation, thus giving supremacy to Shari'ah over international conventions.

IV. CONCLUSION

Providing protection to religious minorities in the Middle East region and especially in Egypt, Iraq, and Syria is not just a legal matter. There are also historical and religious factors that cannot be neglected when providing protection for minorities. The status of religious minorities in the aforementioned countries has always been influenced by political circumstances and changes. It is obvious that the wording of Art. 2 of the Permanent Constitution of Egypt of 1971 was not substantially changed in the Constitution of 2012 or thereafter in the 2013 draft constitution following the military coup in Egypt. The influence of Islamist movements on the legal wording is clear as it describes Islam as the primary source for legislation. The change to note about the 2013 draft constitution is that it allocates the responsibility of the interpreting Shari'ah principles to the Supreme Court of Egypt. All the provisions that relate to apostasy, inheritance of non-Muslims, and custody of Muslim children remain the same.

In Syria the future of the religious minorities like 'Alawis and Christians still remains vague and unclear. Under the current secular regime of Bashār al-Assad these religious minorities enjoy strong protection. The newly approved Syrian Constitution of 2012, drafted amid continuous bloodshed in the country, did not deliver anything new regarding minorities rights. The respect for religious minorities' right to worship in Syria is contingent on its effect on public order. The use of Ba'th Party slogans and the praising of the Arab nation and people is a practice by the government which contradicts principles of equality and the freedom awarded to religious and ethnic groups in the constitution.

The 2005 Iraqi Constitution provided a direct provision stating clear rights for religious minorities, a modern approach followed by many modern constitutions. In Art. 125, political, cultural, and educational rights for minorities in Iraq are provided for and Chaldeans, Assyrians, and Turkmen are referred to as examples. This is nonetheless an inadequate approach as it refers to only some religious groups like Caldo-Assyrians while neglecting other religious minorities like Yazidis, Shabaks, and Sabians. It would have been more appropriate to strengthen Art. 125's legal impact concerning minorities' protection by mentioning all the country's religious minorities. This would have provided greater force to the clause and enhanced equality among the aforementioned religious groups.

International agreements like the 1966 International Covenant for Civil and Political Rights (ICCPR) failed to provide a sufficient framework in order to promote the protection of minority rights.⁴⁴ Egypt, Iraq, and Syria have ratified the ICCPR,⁴⁵ but there has been no real incorporation of the covenant's provisions into their national laws. Mechanisms for providing protection have been conditional on regional and international circumstances

⁴⁴ Anver M. Emon and Mark S. Ellis, *Islamic Law and International Human Rights Law* (Oxford University Press, Oxford 2012) 363.

⁴⁵ See the Status, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en, accessed March 22, 2016.

and changes, while religious minorities have been used as a political football in political conflicts, crises, and debates. For example, the regime in Syria has used minority protection as an argument in order to receive political and public support from the Christians and 'Alawis in its internal war against the majority Sunni since the uprising in 2011.

In order for the ongoing problems concerning minority rights to be solved, there must be a legal framework that doesn't define minorities and religious groups as separated and independent groups.⁴⁶ International norms can play an effective role and influence domestic laws, while strengthening the conception of citizenship can act an effective tool in providing equal rights for all religious groups within in a particular state. A comprehensive approach of providing better legal mechanisms for protecting religious minorities is observable in most Arab countries after the political changes which resulted from the Arab Spring. These efforts were hindered in many cases due to the tense security situation in some of these countries, or in many cases due to the reluctant approach stemming from a lack of political will to incorporate international agreements into domestic laws. The real numbers of religious groups left on the ground in Iraq and Syria is continuously diminishing. Despite the creation of laws which provide protection for religious minorities, their implementation is weak, and religious minorities have become vulnerable to unexpected attacks from various radical groups. International intervention to protect religious minorities groups could become a necessity in the light of the potential political changes in the Middle East region in the future.

⁴⁶ Anver M. Emon and Mark S. Ellis, *Islamic Law and International Human Rights Law* (Oxford University Press, Oxford 2012) 361.

Rights of Religious Minorities in Sudan

NOHA IBRAHIM ABDELGABAR*

I. INTRODUCTION

Since the secession of South Sudan in July 2011, there has been a marked call for the application of Shari'ah law in Sudan, as indicated in numerous pronouncements made by the government of Sudan, which call for Islamic constitutionalism. The resurgence of the call for the application of Shari'ah law, coupled with the dismantling of mechanisms that were put in place during the implementation of the Comprehensive Peace Agreement (CPA)—such as the Special Commission for the Protection of the Rights of Non-Muslims in Khartoum—has triggered fears within non-Muslim Sudanese communities.

In this respect, this chapter looks at the rights guaranteed to religious minorities and considers how Sudanese law treats religious minorities, particularly against the background of the secession of South Sudan. First, the chapter attempts to ascertain if and how minorities were indeed identified in the successive Sudanese constitutions and laws, with a focus on Sudan's Interim National Constitution of 2005 (INC). Second, the chapter considers the history of the treatment of religious minorities in Sudan and in doing so it presents a historical survey relating to the rights of religious minorities with a focus on the practice, legal framework, and policies since colonial times as well as the post-colonial period up to the Interim Constitution of 2005. Third, it presents an analysis of the protection of the rights of religious minorities under the INC and the relevant laws, as well as the protection of their rights in practice. Finally, the chapter looks at the recent development of calls for a new constitution of Sudan to be based on Shari'ah following the secession of South Sudan.

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II. BACKGROUND AND CONTEXT

Sudan is characterized by its multi-cultural, multi-ethnic and multi-lingual population,¹ consisting of many tribes that speak various dialects and practice a variety of religions and traditions. The two predominant religious communities in Sudan are Muslims and Christians.² An estimated 70% of the population is Muslim, and Islam predominates in North Sudan. Most Sudanese Muslims are adherents of the Sunni branch of Islam; however, there is significant religious diversity among the Sudanese Muslims, as many adhere to different *Sūfī* sects such as *Qādirīyah*, *Tijānīyah*, *Sammʿānīyah*, *Khatmīyah*, *Majdhubīyah*, *Idrīsīyah*, *Ismāʿīlīyah*, and *Mahdīyah*. These sects embrace different conceptions of Islam, and practice the religion in various ways.³ Shiʿah communities have recently emerged in Khartoum and other areas in Sudan.

Non-Muslim communities are territorially dispersed across Sudan. Followers of traditional indigenous beliefs (animism) are prevalent in rural areas throughout the country. Christians are the second largest religious group in Sudan, traditionally concentrated in South Sudan and the Nuba Mountains. The number of Christians living in North Sudan increased during the north-south conflict as a result of widespread displacement. Although many Christians have returned to South Sudan since its secession, Khartoum still has a considerable number of non-Muslims, including Southern Christians and animists, as well as Orthodox Christians (including Coptic Orthodox and Greek Orthodox). There are also Ethiopian and Eritrean Orthodox communities, largely made up of refugees and immigrants.

At the time of the arrival of Islam in the seventh and eighth century, Sudan was predominantly Christian.⁴ Copts, followers of the Egyptian Coptic Church, settled in North Sudan from the sixth century onwards⁵ and during the Turko-Egyptian rule of Sudan (1820–1881). When the British conquered Sudan in 1898, Coptic communities were allowed religious, educational, employment-related, and economic freedom.⁶ It was at this time that Coptic churches and schools were built.

Since its independence in 1956, Sudan has witnessed political instability as exemplified by fluctuation between systems of parliamentary democracy and military dictatorships. Under all successive governments, religion has played a central role in Sudanese history in that religious identity and political identity are interrelated in the country.⁷

¹ Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia 1990) 317.

² See generally M. P. Holt & W. M. Daly, *A History of the Sudan: From the Coming of Islam to the Present Day* (Pearson Education Ltd., Harlow 2000).

³ Barbara Degorge, "Millennial Islam in Africa, Sufi Politics in the Sudan" 5 (2000) 2 *The European Legacy* 195, 198–200.

⁴ Cf. Anders Breidlid (ed), *A Concise History of South Sudan* (Fountain Publishers, Kampala 2010) 29–32; see also http://en.wikipedia.org/wiki/Religion_in_Sudan, accessed May 21, 2015.

⁵ Minority Rights Group International, "World Directory of Minorities and Indigenous Peoples—Sudan: Copts" (Report 2008), <http://www.unhcr.org/refworld/country,MRGI,COUNTRYREP,SDN,49749ca6c,0.html>, accessed May 21, 2015.

⁶ *Id.*

⁷ Li Tonnessen & Anne Sofie Roald, "Discrimination in the Name of Religious Freedom: The Rights of Women and Non-Muslims after the Comprehensive Peace Agreement in Sudan" (Chr. Michelsen Institute Report, 2007) 5, <http://www.cmi.no/publications/file/2704-discrimination-in-the-name-of-religious-freedom.pdf>, accessed May 21, 2015.

At the time of independence the Arab Muslim elites defined the Sudanese identity as Islamic and Arab as manifested in the policies of political parties and as proclaimed by the two largest ones (the National *Ummah* Party backed by the *Anṣār* sect and the Unionist Democratic Party backed by the *Khatmiyah* sect) that came to dominate the political scene in the country.⁸

The policies that revolved around Islamization and Arabization of the state bred antagonism amongst the Sudanese communities, especially amongst those of South Sudan that identified themselves as Africans.⁹ In addition, urban and regional biased planning has, over the years since independence, contributed to sharp differences in poverty and socio-economic indicators such as health, education, etc., fueling Sudan's propensity for internal conflict that spread beyond South Sudan into other regions.

As a consequence, Sudan had been embroiled in a civil war since independence (the so-called north-south conflict) in which religious convictions, among other factors, have played a role. This has been increasingly the case during the current regime as conflict was portrayed as a *jihād* war against infidels in South Sudan. The cultural, racial, and religious diversity of Sudan renders it difficult to simplistically attribute the causes of the north-south conflict to religious differences; nonetheless, this conflict has long been perceived as a religious conflict between Christians, mostly in South Sudan, and Muslims, mostly in the rest of Sudan. The question as to whether Sudan should adopt an Islamic constitution has frequently been debated, and the post-independence constitutions of Sudan provide a mixed picture as concerns the relationship between religion and state, as will be illustrated below.¹⁰

The north-south conflict that has characterized the post-independence history of Sudan came to an end when the Comprehensive Peace Agreement of 2005 (CPA) was signed between North Sudan and South Sudan. The CPA provided for: the separation of the state from religion by exempting South Sudan from the application of Shari'ah law; the recognition of religious pluralism (introducing a dual legal system in which Shari'ah and secular law exist side by side);¹¹ the enactment of a comprehensive Bill of Rights;¹² and the reintroduction of a federal state that comprised 25 states and bears the features of asymmetrical federalism in which South Sudan was granted autonomous status with exclusive legislative, executive, and judicial powers in areas such as education, culture, language, etc.

The CPA also provided for the right to self-determination for South Sudan which was exercised by the people of South Sudan in January 2011 and resulted in the succession of South Sudan in July 2011. The drafters of the INC of 2005 made it clear that its provisions, subject to changes necessitated by the decision favoring the secession of South Sudan, shall stay in force until they are replaced by a new constitution.¹³ Based on this stipulation and following the secession of the South Sudan, the government of Sudan has recently launched a constitution making process in search of a new constitution.

⁸ *Id.*

⁹ *Id.* 3.

¹⁰ Akolda M. Tier, "Freedom of Religion Under the Sudan Constitution and Laws" (1982) Volume 26, *Journal of African Law* 133, 145, pp 133–151

¹¹ Chapter I "Machakos Protocol" Art. 3.2.2 et seq. of the Sudan Comprehensive Peace Agreement.

¹² Chapter II "Power-Sharing Protocol" Art. 1.6. of the Sudan Comprehensive Peace Agreement.

¹³ Art. 224 (10) of the INC states that "if the outcome of the referendum on self-determination favors secession, the parts, chapters, articles, sub-articles and schedules of this Constitution that provide for southern Sudan institutions, representation, rights and obligations shall be deemed to have been duly repealed."

III. THE TREATMENT OF RELIGIOUS MINORITIES IN SUDAN IN HISTORICAL PERSPECTIVE

The spread of Islamization and Arabization in North Sudan were advanced by Arab miners and traders¹⁴ emigrating from Egypt, resulting in the erosion of the already existing Christian kingdoms in Sudan that lasted until the 14th century.¹⁵ The *Funj Sultānate* (1504–1821) also played a role in the Arabization of indigenous people of Sudan through the application of Islamic law.¹⁶ Throughout the 19th century, the Turko-Egyptians governed Sudan and applied Islamic law, customary law and secular law. In 1884, al-Mahdī, who led a religious-nationalist movement, liberated Sudan, and literally applied the principles of Islamic law throughout Sudan.¹⁷ In 1898, Sudan was reconquered by an Anglo-Egyptian Condominium; the British Administration instituted legal codes that separated the state from religion. Back then, Sudan was administered under three systems of law: state law (English Common Law), customary law of the various tribal groups, and Islamic law.

After independence and up until 1983, the legal system in Sudan continued to adhere to the principles of English Common Law as adapted to suit the local circumstances through numerous revisions and re-enactments. Islamic law, on the other hand, has been confined to the areas of family law, divorce, and inheritance as administered by the Shari‘ah courts¹⁸ such as those regulated by “the Sudan Mohammedan Law Courts Organizations and Procedure Regulations of 1902”.¹⁹ In South Sudan on the other hand, the “Southern Policy of 1930” was introduced by the British Administration to segregate the South from the North.²⁰ As a consequence, Christian missionaries were limited to South Sudan and prohibited from preaching Christianity in North Sudan.²¹ Thereafter, a number of laws were passed by the British Administration that prevented free movement between North and South Sudan, including the 1922 “Passport and Permits Ordinance”, the 1920 “Closed District Ordinance”,²² and the “Permits to Trade Order” of 1925.

¹⁴ M. P. Holt & W. M. Daly (n 2) 22–37.

¹⁵ Ann Mosely Lesch, *The Sudan—Contested National Identities* (Indiana University Press, Bloomington 1999) 25.

¹⁶ Abdelsalam H. Abdelsalam & Amin M. Medani, “Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan” in: Lutz Oette (ed), *Criminal Law Reform and Transitional Justice—Human Rights Perspectives for Sudan* (Ashgate, Burlington 2011) 33, 38.

¹⁷ *Id.*

¹⁸ Abdullahi A. An-Na‘im, “The Islamic Law of Apostasy and Its Modern Applicability: A Case from the Sudan” (1986) 16 *Religion* 197.

¹⁹ The Sudan Mohammedan Law Courts Organizations and Procedure Regulations of 1902 regulated the personal status of Muslims, vested the Sudan Mohammedan Law Courts with the power to adjudicate between non-Muslims, if consented to the jurisdiction of the court, on the basis of Shar‘ah law. However, this provision has never been resorted to by the Sudan Mohammedan Law Court.

²⁰ Dunstan M. Wai, *The African-Arab Conflict in the Sudan* (African Publishing Co., London 1973) 35.

²¹ Markus Böckenförde, “The Sudanese Interim Constitution of 2005, a Model to Establish Coexistence between an Islamic and a Secular Legal Regime” in: Birgit Krawietz & Helmut Reifeld (eds), *Islam and the Rule of Law: Between Sharia and Secularization* (Konrad Adenauer Stiftung, Berlin 2008) 82.

²² “Closed District Ordinance,” which sealed off the southern region and greatly constrained its economic and other ties with the rest of the country, made the South closed to Northern Sudanese. Cf. Douglas H. Johnson, *The Root Causes of Sudan’s Civil Wars* (Indiana University Press, Bloomington 2003) 12, 17; Abel Alier, “The Southern Sudan Question” in: Dunstan M. Wai (ed), *The Southern Sudan: The Problem of National Integration* (Frank Cass, London 1973) 17.

Furthermore, the relationship between religion and the state was not defined in former constitutions and laws, including: the Self-Government Statute of 1953, the Transitional Constitution of 1956, and the Transitional Constitution of 1964 that established a secular state, provided for a democratic government, and guaranteed freedoms of thought, belief, and expression, etc. However, the post-independence political leaders continued to hold a vision of establishing an Islamic and Arabic state and the question of Islamization has always been a major issue in the Sudanese political and constitutional debates.²³ Political Islam has dominated Sudanese politics since its independence, with Muslim elites maintaining the view that the Muslim majority has the right to establish an “Islamic” state to be governed by religious laws, as manifested in a number of constitutional and legal provisions and policies adopted by the successive post-independence governments.²⁴

Despite constitutional provisions that protected the freedom of religion and respected the rights of religious minorities, in practice, freedom of religion has been a source of profound disagreement and conflict in Sudan. For instance, the first military regime of President ʿAbūd attributed the insurgency in South Sudan to the work of the foreign missionaries. As a result, Christian missionaries were expelled from South Sudan through the enactment of the 1962 Missionary Societies Act, while Christian missionaries in North Sudan were not expelled. The Southern Sudanese were deprived of their political and civil rights, and the parliament and political parties were dissolved by the military regime.²⁵ For instance, in 1960, a resolution of the government consolidated the working days in Sudan and made Sunday a working day in Southern Sudan as it was the case in the North. In response, a pamphlet was published to boycott work on Sundays in South Sudan. However, the dissemination of religious ideas led to prosecution and conviction by the state.²⁶ This was coupled with educational and administrative policies that gave preference to the Arabic language and Islam. To this end, a series of measures were put in place with a view to assimilating the South with the North by an overt policy of Islamization and replacement of the English language with Arabic in the educational establishments of South Sudan.²⁷

The second military regime (1969–1984) of President Numayrī rectified the policy of former President ʿAbūd by introducing a semi-federal constitution to accommodate for the religious and political rights of the Southern Sudanese in 1973. President Numayrī brought about various constitutional changes to nurture a culture of tolerance and respect for the rights of religious minorities during his first decade in power. However, the legal pluralism of Sudan was changed in the 1980s, when President Numayrī announced that Sudan would be an Islamic state. Numayrī issued a series of a Shariʿah-based laws, subsequently known as the “September Laws of 1983”, that were applied in a ruthless and widespread manner. The so-called “Prompt Justice Courts” were established and passed extremely severe punishments in the name of Shariʿah.

Subsequently, President Numayrī declared that “a version of Shariʿah law would be applied in the criminal, civil, and personal law systems and that September Laws would be a step toward transforming Sudan into an Islamic state.”²⁸ The so-called “Sources of Judicial

²³ Abdullahi A. An-Naʿim (n 18) 197, 200.

²⁴ Ahmed T. el-Gaili, “Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan” (2004) 45/2 *Harvard International Law Journal*.

²⁵ Interview with al-Ṣādiq al-Mahdī, October 2012, Khartoum, Sudan.

²⁶ Akolda M. Tier (n 10) 140.

²⁷ Emeric Rogier, *No More Hills Ahead? The Sudan's Tortuous Ascent to Heights of Peace* (Netherlands Institute of International Relations, Clingendael 2005) 10.

²⁸ Carolyn Ratner, “Islamic Laws as Violations of Human Rights in the Sudan” 18 (1998) 1 *BC Third World Law Journal* 137, 145.

Decisions Act of 1983” was enacted to enable the judges, in the absence of a legislative provision, to apply their own opinions on Islamic jurisprudence and make their decisions accordingly. This act was later amended to restrict its application within civil matters as opposed to criminal matters.²⁹ After the overthrow of Numayrī in 1985, the Transitional Government did not abrogate the September Laws but froze them despite campaigns that called for their abolishment, especially by the then Prime Minister al-Ṣādiq al-Mahdī. In fact, al-Mahdī froze their application, pending the drafting of a constitution for Sudan, but that plan did not materialize as the third military coup d’état under ‘Umar al-Bashīr took power in 1989.

The present regime (1989–present) promulgated an Islamic regime that embraced all programs of contemporary Islamic movements.³⁰ The al-Bashīr government pursued an aggressive war of *jihād* against South Sudan, and a vigorous campaign of Islamization was pursued, with religion utilized as a pretext to wage the *jihād* war. In the process, Islamic fundamentalism has been used as a means for political mobilization of people and as an instrument of political change.³¹ The state-run media was utilized for propaganda against Christianity that provoked the Southerners and fueled the north-south conflict.³²

In 1993, Dr. Ḥassan al-Turābī, a militant fundamentalist, invited all popular and active Islamic opposition movements to Sudan and sought to form an alternative to the Organization of the Islamic Conference (OIC): the Popular Arab and Islamic Congress, headquartered in Khartoum.³³

In addition, in order to attract Islamic fundamentalists from other countries to obtain the Sudanese nationality and to settle in Sudan, many Islamists and extremists were granted concessions to start businesses,³⁴ more lenient nationality laws were enacted that made the acquisition of the Sudanese nationality feasible within 5 years. This is in contrast to the post-independence era, which rendered nationality laws stringent, making it difficult for Copts to obtain the Sudanese nationality.³⁵

Attempts to Islamize and Arabize the country failed and only isolated Sudan from the international community. It was also rejected by the Sudanese populace.³⁶ Under international pressure, significant efforts were made during the CPA talks to incorporate provisions relating to the protection of religious minorities. The constitutional arrangements, as stipulated in the CPA, were embodied in the INC and regulated the relationship between the central level of government and the South Sudan level, thereby granting the South regional autonomy within the framework of a unitary state. The INC provided for extensive provisions and mechanisms for the protection of the rights of religious minorities, such as the inclusion of all human rights treaties that Sudan has ratified into the INC and the establishment of a Special Commission for the protection of non-Muslim, in Khartoum.

²⁹ Amin Medani, *Criminal Law and Justice in Sudan*, available at: http://www.pclrs.com/downloads/1206_criminal_law_and_justice_feb_2010.pdf, accessed May 21, 2015.

³⁰ El-Sadig El-Mahdi, *Religious Coexistence in Sudan* (a paper presented on a Workshop on Freedom of Religion and Belief) (Khartoum, December 2005), file available with the author.

³¹ Carolyn Ratner (n 28) 144.

³² In interview with al-Ṣādiq al-Mahdī, former Prime Minister, September 30, 2012, Khartoum, Sudan.

³³ “Divisions in Sudan’s Ruling Party and the Threat to the Country’s Future Stability,” no. 174 Crisis Group Africa Report (May 4, 2011) 10.

³⁴ In interview with Dr. Safwat Fanūs, University of Khartoum, October 4, 2012, Khartoum, Sudan; see (n 33) 10.

³⁵ In interview with Dr. Safwat Fanūs, University of Khartoum, October 4, 2012, Khartoum, Sudan.

³⁶ In interview with Āl-Ṣādiq Al-Mahdī, former Prime Minister, September 30, 2012, Khartoum, Sudan.

IV. PROTECTION OF RELIGIOUS MINORITIES IN THE SUDANESE LAW

A. Definition and Recognition of Minorities

1. *Definition of Minorities under International Law*

Most states have minority communities that are characterized by their own national, ethnic, linguistic, or religious identity, which differ from that of the majority.³⁷

At the international level, there is no agreed definition of the term “minority”. On the other hand, international human rights law contains numerous protections for minorities, including those in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), etc. For example, the UDHR demands equality and freedom for all and bars “discrimination of any kind on any grounds, such as language, religion, political or other opinion, etc.”³⁸ The 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities does not define minority, however, it declares that minorities possess rights to enjoy their own culture, to practice their own religion, to use their own language, and to participate in cultural, religious, social, economic, and public life.³⁹ It also emphasizes the obligations of the state toward minorities.⁴⁰ A more specific declaration on religious rights is stipulated in the 1981 UN General Assembly resolution “Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief”, which calls upon states to take effective measures to prevent and eliminate discrimination on the grounds of religion or belief.

On the other hand, Art. 27 of the ICCPR specifies that persons belonging to ethnic, religious, or linguistic minorities “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their language”. Although seemingly a group right, Art. 27 is quintessentially an individual entitlement offered to all persons that form part of a minority group. It is now well acknowledged that the determination as to whether a person belongs to a minority group is a matter of personal self-identification. Sudan is a party to a number of international human rights treaties, including the ICCPR, the African Charter on Human and People’s Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and others.⁴¹ In this respect, the Human Rights Committee has observed that states may be requested to adopt “positive measures of protection to protect rights from being violated”.⁴²

³⁷ UNCHR, “Minority Rights: International Standards and Guidance for Implementation” (New York 2010) UN Doc HR/PUB/10/3, http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf, accessed May 21, 2015.

³⁸ Arts. 2 and 7 UDHR.

³⁹ Patrick Macklem, “Minority Rights in International Law” 6 (2008) 3, 4 ICON 531, 535.

⁴⁰ Dieter Kugelmann, “The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity” (2007) 11 Max Planck UNYB 233, 243. Cf. UNGA, “Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities” UN Doc A/RES/47/135 (December 18, 1992).

⁴¹ See generally Markus Böckenförde, Simone Malz, & Verena Wiesner (eds), Max Planck Compilation of International Human Rights Treaties—Sudan (2nd ed, Heidelberg 2008).

⁴² Human Rights Committee, “General Comment No. 23/50 (art. 27 ICCPR)” UN Doc CCPR/C/21/Rev.1/Add.5 (April 26, 1994), [http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add5_\(GC23\)_En.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add5_(GC23)_En.pdf), accessed May 21, 2015.

2. Definition of Minorities under the Sudanese Constitution of 2005

Traditionally, the Sudanese constitutional and legal provisions have always provided protection against discrimination on religious grounds, and contained provisions to accommodate the cultural, religious, and ethnic diversity of Sudanese people. More specifically, the rights of religious minorities are to be found in the guarantee against discrimination on the grounds of religion or faith.⁴³

The INC does not contain a definition of minorities, but the Preamble to the INC recognizes the religious, cultural, and ethnic diversity of Sudan. Art. 1 of the INC defines the Sudanese state as “a multi-cultural, multi-lingual, multi-racial, multi-ethnic and multi-religious country”. Furthermore, the INC Guiding Principles highlight the importance of religious diversity within Sudan, a feature that is particularly apparent and emphasizes that “Sudan is a homeland where religions and cultures are sources of strength and harmony”.

The definition of minorities was problematic during the CPA negotiations and the question as to whether the state can define minorities raised heated discussions.⁴⁴ On the other hand, the drafting of the text of the INC was a compromise in order to resolve the north-south conflict, as the focus was to promote diversity of Sudan to achieve national unity. Reaching an agreeable position on the relationship between religion and the state was key during the CPA negotiations.⁴⁵ As a result, the INC contained explicit provisions to accommodate for the rights of the South Sudanese people.⁴⁶ Its focus, therefore, was on the protection of the rights of Christians.⁴⁷

The CPA provisions, which were later incorporated into the INC, allowed for a greater degree of autonomy on issues of religion and ethnicity, resulting in asymmetrical decentralization system of governance that distributed the powers unequally to different states across Sudan in that the South Sudan level was granted autonomous status. These structures were meant to provide for the people of South Sudan to self-rule within their part of the territory, as well as their representation at the national level.

B. Protection of the Rights of Religious Minorities under Sudanese Constitutions and Laws

1. Recognition and Protection of the Rights of Religious Minorities in the Old Sudanese Constitutions and the Interim National Constitution

A. RECOGNITION AND PROTECTION OF THE RIGHTS OF RELIGIOUS MINORITIES IN THE OLD SUDANESE CONSTITUTIONS 1953–1998

All Sudanese constitutions contain provisions related to the rights of freedom of religion. The Self-Government Statute, which was promulgated in 1953 shortly before the independence of Sudan, provided under Art. 7 (1) for freedom of conscience and religion,⁴⁸ but

⁴³ See Art. 5 of the INC. See generally Abdullahi A. An-Na'im, “Religious Minorities under Islamic Law and the Limits of Cultural Relativism” (1987) 9 Human Rights Quarterly 6.

⁴⁴ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

⁴⁵ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

⁴⁶ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

⁴⁷ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

⁴⁸ Art. 7 (1) of the Self-Government Statute of 1953 provided that “all persons shall enjoy freedom of conscience, and the right freely to profess their religion, subject only to such conditions relating to morality, public order, or health as may be imposed by law.”

it was silent on the issue of the official religion of the state and the sources of legislation as well as the first Sudan Transitional Constitution of 1956.⁴⁹

One year into Sudan's independence, a Constituent Assembly was formed to draft an Islamic constitution and proposed Shari'ah as the primary source of legislation.⁵⁰ However, South Sudan representatives walked out of the Constituent Assembly, as their demand for a federal state and protection of their religious and cultural rights was opposed. The project of an Islamic constitution was aborted when President 'Abūd came to power in 1958. In 1964, the transitional government adopted the Transitional Constitution of 1964, which was similar to that of 1956 in that it was silent on the issue of the official religion of the state.⁵¹ In 1967, a Constituent Assembly was elected to draft a permanent constitution that debated issues pertaining to federalism, secularism, and an Islamic state. In 1968, the draft constitution provided under Art. 2 that "Islam is the official state religion and Arabic the official language". The draft constitution was pending before the Constituent Assembly when President Numayrī came to power in 1969.

In contrast to this, the 1973 Constitution, as adopted by the Numayrī regime, departed significantly from the earlier constitutions in that it was a secular document, providing for some democratic rights and freedom, including religious rights. The constitution provided as a directive principle an active role by the state with regard to two religions: Islam and Christianity.⁵² The constitution contained a number of provisions on religion⁵³ that attempted to strike a balance between the religious rights of others and the interests of the state, and forbade the abuse of religions for political exploitation and any act intended to promote feelings of hatred among religious communities.⁵⁴

Numayrī made the resolution of the north-south conflict a priority. In 1972, the Addis Ababa Agreement was signed, which was later entrenched in the 1973 Constitution, establishing self-rule for South Sudan with exclusive power to regulate religion and cultural issues. With the introduction of the September Laws in 1983, which extended Shari'ah law to criminal offenses, the legal system had undergone substantial changes based primarily on Islamic law Shari'ah.⁵⁵ The September Laws were made applicable to all individuals within the state's

⁴⁹ The 1956 Transitional Constitution of Sudan proclaimed the right to freedom to conscience and religion in Art. 4 (2) and Art. 5.

⁵⁰ Mohamed Ibrahim Khalil, "Religion and State in the Sudanese Constitutions" in: Mahjoub M. Salih (ed), *Studies on Constitutions* (Friedrich Ebert Stiftung, Alayam Center for Cultural Studies and Development, Khartoum 2012) 37 (in Arabic).

⁵¹ Art. 4 (2) of the Transitional Constitution of 1964 provided that "no disability shall attach to any Sudanese by reason of birth, religion, race or sex in regard to public or private employment or in the admission to or in the exercise of any occupation, trade, business or profession." Art. 5 of the constitution also contained provisions on freedom of religion.

⁵² Art. 9 of the 1973 Constitution provided that "the Islamic Law and custom shall be the main sources of legislation. Personal matters of non-Muslims shall be governed by their personal laws."

⁵³ Cf. Part II "the Fundamental of the Sudanese Society," and Part III "Freedoms, Rights and Duties" of the 1973 Constitution.

⁵⁴ Art. 16 (d) of the 1973 Constitution provided that "the state shall treat followers of religious and noble spiritual beliefs without discrimination as to the rights and freedoms guaranteed to them as citizens by this constitution. The State shall not impose any restrictions on the citizens of communities on the grounds of religious faith"; Art. 16 (e) provided that "the abuse of religious and noble spiritual beliefs for political exploitation is forbidden. Any act which is intended or is likely to promote feelings of hatred, enmity or discord among religious communities shall be contrary to this constitution and punishable by law."

⁵⁵ Carey N. Gordon, "The Islamic Legal Revolution: The Case of Sudan" 19 (1985) 3 *The International Lawyer* 794.

jurisdiction in contravention to the 1973 Constitution. The imposition of Shari'ah criminal law infringed the rights of religious minorities and penalized them for acts not tolerated under Shari'ah law. In 1985, Numayri was overthrown and the Transitional Constitution of 1964 was reinstated to govern Sudan. Thereafter, the Transitional Council adopted a transitional constitution, which contained provisions on religion similar to the ones of the 1973 Constitution.⁵⁶ The September Laws, contravening the 1985 Constitution, were however never repealed.

In the 1990's, the establishment of state-mandated religion was manifested. The 1998 Constitution declared Islam to be the official faith in Sudan and one of the sources of legislation. Art. 24 of the constitution provided for the freedom of creed and worship, while Art. 25 contained a provision on freedom of conscience and expression, but limited such rights in the interest of "public order" or by subsequent legislation.⁵⁷ Art. 65 stated that "Islamic law and the consensus of the nation and custom are the sources of legislation." Art. 65 did not treat Shari'ah as the principal source of legislation, but instead placed it on equal footing with local customs, even though it also provided that no legislation should contravene Shari'ah law.

While the old Sudanese constitutions were silent on the relationship between religion and the state, the old constitutions necessarily guaranteed the protection of the rights of religious minorities by guaranteeing freedom of religion and equality of rights to everyone. On the other hand, the tendency in the 1980s toward the adoption of constitutions based on religion, which focused on interpreting Shari'ah law as one that narrows its application to Shari'ah penalties, has served as a means to gain political legitimacy and to form a national identity.⁵⁸ This is compounded by an understating that Shari'ah law is a set of specific laws that should be implemented and incorporated into the constitution as such. According to some Sudanese legal scholars, this is a very narrow interpretation of Shari'ah law that has led to a distraction from taking into consideration the purposes of Shari'ah law as a whole that are to be found in the Qur'an and *aḥādīth* (Arabic pl. of *ḥadīth*). Those serve as a source of legislation to support the establishment of Islamic countries that could be based on the rule of law and democracy.⁵⁹

B. RECOGNITION OF THE RIGHTS OF RELIGIOUS MINORITIES UNDER THE INTERIM NATIONAL CONSTITUTION 2005

The INC contains commitments to international human rights standards and enunciates specific rights addressing religious rights and prohibits discrimination on the basis of religion.⁶⁰ Art. 5 of the INC reflects the principle of toleration and nondiscrimination on the basis of religion in which the sources of legislation, including Shari'ah law, popular consensus, as well as the values and the customs of the people of Sudan, are varied.⁶¹ This provision

⁵⁶ Art. 4 of the 1985 Constitution stated that "Islamic law and custom are the key sources of legislation and the personal status of non-Muslims are governed by their own law" and Art. 18 contained provisions on freedom of religion.

⁵⁷ Art. 24 of the 1998 Constitution states: "Every human being shall have the right of freedom of conscience and religious creed and he shall have the right to declare his religion or creed, and manifest the same by way of worship, education, practice or performance of rites or ceremonies; and no one shall be coerced to adopt such faith, as he does not believe in [. . .]; and that is without prejudice to the right of choice of religion, injury to the feelings of others, or to public order, all as may be regulated by law."

⁵⁸ Abdelsalam H. Abdelsalam & Amin M. Medani (n 16) 36.

⁵⁹ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn, October 4, 2012, Khartoum, Sudan. Cf. Mohamed Ibrahim Khalil (n 50) 48 (In Arabic).

⁶⁰ Noha Ibrahim, "The Sudanese Bill of Rights" 12 (2008) 4 *The International Journal of Human Rights* 613–635.

⁶¹ Art. 5(3) of the INC states: "Where national legislation is currently in operation or is to be enacted and its source is religion or custom, then a state, and subject to Art. 26 (1) (a) herein in the case of Southern

is detailed further by allowing the legislature at state level, depending on the religion of the majority of the population, to opt out of religiously inspired legislation. That is to say, in such a case, a state where the majority of residents do not practice a given religion or custom may introduce differing legislation that allows practices or establishes institutions in that state that are consistent with its own religion or customs.

Alternatively, the state may refer the religiously-inspired law back to the Council of the States (the Second Chamber of the National Legislature). In the case that the law is referred back to the Council of States, the latter may either approve the law by a two-thirds majority of all representatives or initiate a national legislation which will provide for such necessary alternative institutions as may be appropriate.⁶² In practice, deferring religiously based legislation to the Council of the States has not been utilized.⁶³ The INC, unlike the 1998 Constitution, does not include a provision indicating that any law that applies to the entire nation must comply with Shari'ah law. Most religious matters are regulated exclusively at state level.⁶⁴ Moreover, the state is empowered to ensure that family and inheritance matters are adjudicated by the laws that apply in the relevant religious and/or cultural communities (i.e., personal law).⁶⁵

Furthermore, Art. 6 of the INC respects the religious rights to worship and to establish and maintain places of worship. The freedom of creed and worship is enshrined under Art. 38 of the INC, which contains the scope of prohibited conduct and protected manifestations of religion, while Art. 40 protects the right to freedom of assembly and association. The INC includes explicit provisions that prohibit discriminatory practices on the basis of religion as expressly stated in Arts. 31 and 44 that provide a guarantee against discrimination on the basis of religion in education and endorse equality before the law. However, the practical implementation of those articles remains unsatisfactory. For example, according to Sudanese law, Christians are to be given two hours to pray on Sundays. In practice, some employers do not comply. Public schools are in session on Sundays, and Christian students are not excused from classes. Instead, most Christians choose to worship on Friday, Saturday, or Sunday evening.⁶⁶

The INC, in Art. 27 (3), further strengthens the protection of religious rights through a comprehensive Bill of Rights that guarantees a number of fundamental rights and freedoms contained in the major human rights treaties and, additionally, incorporates all human rights treaties and covenants that Sudan has ratified. As such, the INC departs significantly from the previous constitutions of Sudan,⁶⁷ as Art. 27 (3) serves to enhance the protection of the rights of religious minorities beyond the protection offered within the provisions of the Bill of Rights of the INC.

Sudan, the majority of whose residents do not practice such religion or customs may:- (a) either introduce legislation so as to allow practices or establish institutions, in that state consistent with their religion or customs, or (b) refer the law to the Council of States to be approved by a two-thirds majority of all the representatives or initiate national legislation which will provide for such necessary alternative institutions as may be appropriate."

⁶² Art. 5 (3) of the INC.

⁶³ In interview with Dr. Ghāzī Salāh al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

⁶⁴ Par. 10, 18, 20 Schedule C 1 of the INC.

⁶⁵ Par. 10 Schedule C 1 of the INC: "all personal and family matters including marriage, divorce, inheritance, succession, and affiliation may be governed by the personal laws (including Shari'ah or other religious laws, customs, or tradition) of those concerned."

⁶⁶ In interview with Raja Nicola, The Sudanese Ministry of Justice, Khartoum Sudan, November 2012.

⁶⁷ Art. 27 (3) of the INC.

Furthermore, the INC recognizes the cultural and ethnic diversity of Sudan in that it contains general references prohibiting discrimination on the basis of ethnic differentiation.⁶⁸ For instance, Art. 47, entitled “Ethnic and Cultural Communities”, is aimed at allowing the members of ethnic and cultural communities to develop their particular cultures, to practice their beliefs, to use their languages, and to practice their religions. To accommodate for the recognition and protection of the rights of different communities, the INC provides for a bicameral system, proportional representation and decentralized system of governance that vests a number of exclusive competences at the state level, while creating other concurrent and residual competences between state level and the national level.⁶⁹

2. Recognition of Religious Rights under Sudanese Laws

A. RECOGNITION OF RIGHTS OF RELIGIOUS MINORITIES UNDER THE CRIMINAL LAW

In Sudan, there exist distinct legal instruments that protect the rights of minorities and their members. For example, the Criminal Act of 1991 contains explicit protection on the rights of religious minorities. Art. 64 of the Criminal Act criminalizes incitement of religious hatred, while Art. 125 prohibits the insulting of religious creeds. Furthermore, Art. 127 criminalizes defiling and disturbing places of worship, and Art. 128 prohibits trespassing in cemeteries.

Further protection under the Criminal Act includes the exclusion of non-Muslims from the imposition of Islamic punishments, i.e., *hudūd* and *qisās*, as stipulated under Arts. 78, 79, 85, 126, 139, 146, 157, and 171 of the Criminal Act that deal mainly with offences of alcohol consumption, dealing in alcohol, theft, apostasy, armed robbery, etc. While the Criminal Act under Art. 78 (1) explicitly excludes non-Muslims from the punishment in relation to consumption, possession, and manufacturing of alcohol, it, however, provides for a limitation to this exemption under Art. 78 (2) for situations where the consumption of alcohol in public places causes annoyance or nuisance. A further restriction is provided under Art. 78, which criminalizes anyone who intentionally stores, sells, purchases, transports, or possesses alcohol, thereby rendering superfluous Art. 78 (1) that prohibits discrimination on religious ground.

As such, Art. 78 of the Criminal Act restricts the rights of non-Muslims to practice their cultural activities, it being also in contravention of Art. 6 (c) of the INC that protects “the right of non-Muslims in the ownership and possession of immovable and movable objects and the manufacture, possession and use of tools and materials related to the rites or customs of a religion or belief”, which includes the right of Christians to use alcohol during religious festivals.⁷⁰

Furthermore, the Criminal Act under Art. 152 restricts fundamental freedoms and rights of Muslims and non-Muslims alike. It reads:

- (1) Whoever commits in a public place an act, or conducts himself in an indecent manner, or a manner contrary to public morality, or wears an indecent or immoral dress which causes annoyance to public feelings shall be punished with whipping not exceeding 40 lashes or with fine or both;
- (2) The act shall be deemed contrary to public morality if it is so considered in the religion observed by the perpetrator or the custom of the country where such act is perpetrated.

⁶⁸ Art. 38, 39, 40, 44, and 46 of the INC “The Bill of Rights.”

⁶⁹ Art. 24 of the INC.

⁷⁰ Nabil Adib, *Religious Diversity and Attractive Unit*, on file with the author.

The wording of Art. 152 (1) is not free of ambiguity, and what is more, subsection (2) thereof introduces two criteria for the determination of a public morality violation. These criteria include: (a) the offensive character of the act according to the standards of the religion observed by the perpetrator; and (b) its offensiveness in the traditions of the country where the act is perpetrated.

In practice, controversy has surrounded the interpretation of this provision by the judiciary, especially in the capital Khartoum. According to some judges, the prevailing understanding (within judicial circles) is that the dress and behavior are to be measured on the basis of Shari'ah Law.⁷¹ Another interpretation is that there are two criteria that need to be considered when applying this provision: first, conformity with the religion embraced by the person, taking account of the rights of non-Muslims to the degree that dress code laws, as provided in the Shari'ah, are not applicable to non-Muslims; and second, conformity with the customs of the country and respect for public places.⁷² Even so, it is difficult to accurately determine a single prevailing tradition in Khartoum that comprises different ethnic, cultural, and religious groups. Therefore Art. 152 of the Criminal Act is in contravention of the INC, which stipulates that Sudan is a country of religious and cultural pluralism.⁷³

As such, several parts of the Criminal Act, as discussed above, do not guarantee adequate protection for the rights of religious minorities. Even though the amendment to the Criminal Act in 1983 resulted in the incorporation of Shari'ah law into the Act itself, a closer look at the Act reveals that there are a limited provisions therein governed by Shari'ah.⁷⁴ The CPA mandated for law reform to bring the existing legislation in line with the INC and international human rights law. The Criminal Act was amended in 2009 to encompass war crimes, genocide, and crimes against humanity, as these are internationally defined. Thus, it extends the country's jurisdiction reach to said crimes. Other provisions of the Act, related to fundamental freedoms and rights, remained intact. Nonetheless, difficulties persist as concerns the application of relevant legislation and the implementation and observance of international norms. These difficulties consist of an insufficient level of legal culture and an awareness of human rights and international law on the part of governmental institutions, as well as a lack of experience in applying international law more generally.

Contrary to the observations outlined, Art. 24 of the Evidence Act of 1994 treats all religions equally. In this respect, the Supreme Court, in *Government of Sudan v. Badr al-Din 'Abbās*, concluded that a testimony is acceptable from any person regardless of his or her religion⁷⁵ and that, in accordance to the *Zakāt* Act of 1990, non-Muslim legal persons are not subject to *zakāt*.

Observers asserted that Sudan has always been a model state in religious tolerance, but this state of affairs changed in the 1990s through the introduction of the Public Order Act of 1996, which is in force in Khartoum State only and restricts the civil liberties and religious rights of Muslims and non-Muslims alike. The Act prohibits indecent dress and brings within this ambit other "offences of honor, reputation, and public morality." The Act does not define what "indecent dress" means, leaving such interpretation to the discretion of judges and the police. The Act contains other restrictions, for example, offences related to concerts (obtaining permission from the authorities to organize private and public

⁷¹ Khalid Abdelgadir, *Judiciary and the Rights of non-Muslims*, on file with the author.

⁷² Khalid Abdelgadir (Appeal Court Judge), *Judiciary and the Rights of non-Muslims*, on file with the author.

⁷³ Nabil Adib, *Public Order Act as Instrument of Violence Against Women* (2011), on file with the author.

⁷⁴ Abdeldalam H. Abdelsalm & Amin M. Medani (n 16) 34.

⁷⁵ *Government of Sudan vs. Badr al-Din 'Abbās Abū Shūrā* (1980) 64.

concerts), regulations about the use of public transport, offences related to hair dressing salons, etc.⁷⁶

The right to manifestation of religion is also problematic in Sudan, in particular with regard to some Muslim groups who adopt a liberal version of Islam. Some minority religious groups such as Shī'ah, Bahā'ī, and the Republic Brothers are restricted in their right to practice religion freely without discrimination or interference from the authorities despite the fact that the Sudanese Constitution guarantees some of their rights.⁷⁷

The present Public Order Courts, which apply the Public Order Act, were formed under orders issued by the Chief Justice in 1995. The Act has been subject to criticism in many ways as it infringes the freedom of religion and other fundamental freedoms and rights of Muslims and non-Muslims. Furthermore, the Public Order Act overlaps with the Criminal Act of 1991 on issues regulating public moral values. More important, the mechanisms for the implementation and execution of the Act have been characterized by the ruthlessness and violence displayed by the specialized police that are mandated to observe compliance with the Public Order Act.

The Public Order Court has meted out harsh, on-the-spot punishments against women (Muslims and non-Muslims) for violating the aforementioned dress code. Despite some declarations that Shari'ah law should be applicable to Muslims only, there were a number of documented cases where the opposite was in fact true, especially in cases where religious enforcers had administered on-the-spot punishments against individuals they believed were in violation of the Act. There have been repeated criticism and protests against their arbitrary and discriminatory enforcement, the practice of summary trials in violation of defense rights, and the imposition of corporal punishment. As noted by the Independent Expert on Sudan: "in Khartoum, on-going violations stemming from the uneven application of public order laws remain a major concern."⁷⁸ This renders freedom of religion, as provided for in the INC, an empty guarantee, due to arbitrary law enforcement, overly wide judicial discretion, and repressive application to impose a particular social order.

B. RECOGNITION OF THE RIGHTS OF RELIGIOUS MINORITIES UNDER THE CIVIL LAW

The Sudanese legal system authorizes people from different religions (non-Muslims) to organize their social life according to their own particular laws with distinct courts established to adjudicate on the personal matters of non-Muslims. There are many religious laws operating in Sudan—Muslim, Jewish, and Christian—that regulate the personal matters of non-Muslims (especially in the fields of marriage and inheritance), such as the Public Trustee Act of 1928,⁷⁹ the Guardianship and Administration of Estates Act of 1928,⁸⁰ and the Marriage of Non-Muslims Act of 1926. The latter Act is rare among Muslim countries in that the state recognizes the marriage of non-Muslims regardless of whether such

⁷⁶ Cf. Art 5, 6, 9, 13, 20, 24 of the Public Order Act of 1996.

⁷⁷ Mohamed Abdelsalam Babiker, "Why Constitutional Bills of Rights Fail to Protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and Arrested Reception of International Human Rights Law" in: *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives* (Conference Papers and Proceeding, January 2014) 14, 24, available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/140127FINAL%20Sudan%20UoK%20Report.pdf>, accessed May 21, 2015.

⁷⁸ UNHCR, "Report of the independent expert on the situation of human rights in the Sudan, Mohamed Chande Othman," UN Doc A/HRC/14/41 (May 26, 2010) para 29.

⁷⁹ This is based on English Common Law.

⁸⁰ This is based on religion and customs.

marriage is contracted in accordance with the requirements of other religions.⁸¹ More important, Art. 5 of the Marriage of Non-Muslims Act exempts several communities (sects), for their own benefit, from the application of the provisions of the Act and instead allows the application of the relevant rituals. In general, most, if not all, religious laws that regulate the personal status of non-Muslims are directed to accommodating Christians.

Non-Muslims have enjoyed legal autonomy in personal affairs governed by their religious laws—marriage, divorce, and inheritance—under Art. 5 of the Civil Procedure Act of 1983, which provides:

Where in any suit or other proceeding in a Civil Court any question arises regarding succession, inheritance, wills, legacies, gift, marriage, divorce, family relations, or the constitution of *waqf*, the rule of decisions shall be:

- (a) Islamic law, if the litigants in the case are Muslims or the marriage had been in accordance with the Islamic Shari'ah;
- (b) Any customs applicable to the parties concerned which are not contrary to justice, equity or good conscience, and have not been by this or any enactment altered or abolished and have not been declared void by the decision of a competent court [. . .]

Some controversy has surrounded the interpretation of the term “customs”. In other words, does a “custom” refer only to a long-established usage which has originated in Sudan, or may it also refer to rules of foreign origin?⁸²

The Civil Court (General Court for the Personal Matters for Non-Muslims) is a specialized court with original jurisdiction over the personal matters of non-Muslims as stipulated in Art. 18 (2) of the Civil Procedure Act of 1983. The General Court applies the 1938 Regulation of Personal Matters for non-Muslims, as adopted by the Coptic Church in Egypt for the Copts in Sudan. The Coptic Church in Sudan is the only Christian community which has written Christian family regulations. Moreover, it applies customs, excluding tribal customs that intentionally violate equity and justice.⁸³

However, in practice, the Court for Personal Matters of Non-Muslims decides cases on the basis of the customs that the litigants bring to the attention of the court and for its part the court leaves the burden of proof on the parties, according to their particular custom. However, as a general rule, the court requests the churches involved to furnish proof of the customs under consideration in a particular case. In principle, the courts do not intervene in the personal status of non-Muslims, but refer such matters to the individual churches and traditional leaders, including rural courts and chief courts.⁸⁴ In this respect, the court faces challenges as most of the customs are not codified.⁸⁵

This, however, leads to difficulties in the application of the customary law, and this is attributed to differences between the different tribes, thereby affecting the settlement of disputes, and the court faces difficulties in obtaining the custom that has a mandatory

⁸¹ In interview with Judge of Appeal Court, Khālid Abd al-Jadīr, October 4, 2012, Khartoum, Sudan.

⁸² Sayed Muhammad Abu Rannat, “The Relationship between Islamic and Customary Law in the Sudan” 4 (1960) 1 *Journal of African Law*, pp. 9–10.

⁸³ In interview with Appeal Court Judge, Court for Personal Status of Non-Muslims, October 7, 2012, Khartoum, Sudan.

⁸⁴ In interview with Sudan Constitutional Court Judges, October 8, 2012, Khartoum, Sudan.

⁸⁵ In interview with Appeal Court Judge, General Court for the Personal Matters of Non-Muslims, October 4, 2012, Khartoum, Sudan.

force.⁸⁶ It is worth noting that the court usually resorts to traditional leaders and native administrators to enlighten it about the customs and traditions of the different tribes.

However, there are instances where customs conflict with Shari'ah-based legislation. Of course, the Sudanese Constitution recognizes custom as a source of law that can supplement the rules of Shari'ah. What happens, however, in situations where the customs prevailing between the litigants conflict with Shari'ah law? Art. 62 of the Civil Procedure Act, 1983, reads: "In cases not provided for by any law, the courts shall act according to Shari'ah Law, Sudanese Judicial precedents, customs, justice and good conscience."

This means that the customs of non-Muslims are subject to the test of "Shari'ah law, Sudanese precedents, justice, and equity good conscience"⁸⁷ before they can be received by the Sudanese courts. It should be noted, however, that Art. 62 is to be interpreted on the basis of the Judgments (Basic rules) Act section (3):

Notwithstanding any provisions in any other law, and in the absence of a legislative provision governing an event:

- (a) A judge shall apply the existing Shari'ah rule as established by Qur'an and the Sunnah; [. . .]
- (b) If the judge does not find a text he shall exercise his own thinking and shall be guided in so doing by the following principles where he shall take them into consideration and shall decide their order of priority on the basis of the following:
 - (i) The consensus and the requirements of Shari'ah holistic and general and general principles and what is directions guide; and
 - (ii) The analogy which is based on Shari'ah provisions realizing its criteria and corresponding to its parallels.

Nonetheless, under Art. 12 of the Shari'ah Courts Act, Shari'ah courts are empowered to adjudicate over non-Muslim parties who have submitted to its jurisdiction and law. In practice, however, there is no documented evidence of jurisdiction by consent. Furthermore, the Personal Status for Muslims Act of 1991 does not treat all religions equally as it provides that the custody of the child is based on "the child following the best religion of one of the parents". That is to say, if one of the parents is Muslim, the custody of the child goes to the Muslim parent.

Although religious minorities enjoy freedom in the private sphere of their religion, in practice religious minorities are subjected to public laws. The substantive criminal law may impose restrictions on the human rights of religious minority members, particularly with respect to the rights of women and criminal punishment.

V. THE IMPLEMENTATION OF RELIGIOUS, CULTURAL, CIVIL, POLITICAL, AND SOCIO-ECONOMIC RIGHTS OF RELIGIOUS MINORITIES IN PRACTICE

A. The Special Commission for the Protection of the Rights of Non-Muslims in Khartoum

The INC established a special commission to ensure that the rights of non-Muslims are protected and not subjected to the application of Shari'ah law only in the national capital, Khartoum, to accommodate for religious, social, and cultural diversity and for the

⁸⁶ Judge Khālid Abdelgadir, Appeal Court Judge, *Judiciary and the Rights of non-Muslims*, on file with the author.

⁸⁷ Art. 62 of the Civil Procedure Act 1983.

participation of the Southern Sudanese in national institutions. The aim of the Commission was also to uphold respect for religions, norms, and beliefs and establish a spirit of tolerance and coexistence between different cultures in the national capital.⁸⁸ Furthermore, the INC mandates the establishment of mechanisms such as special courts and prosecutors to ensure all religions and beliefs are protected and enforced in Khartoum⁸⁹ by the law enforcement agencies, which shall be adequately trained and made sensitive to the cultural, religious, and social diversity in Khartoum.⁹⁰

The Special Commission for the Protection of the Rights of Non-Muslim in Khartoum was established in 2007 and lasted for 4 years. Its members were mostly religious scholars, both Muslims and Christians,⁹¹ community leaders, experts on customary law, and representatives from the Ministry of Justice, the Ministry of Interior, and the Sudanese Judiciary. The Commission for non-Muslims, during its lifespan, was able to collect and arrange customs and traditions and to codify customary law of different non-Muslim communities.

The Commission recommended the revision of the Criminal Act of 1991 and the Public Order Act of 1996 with the aim of exempting non-Muslims from the imposition of Shari'ah penalties. Some of the recommendations of the non-Muslim Commission included: reform of the curriculum of the police to include issues related to the rights of non-Muslims, raising awareness on the customs and traditions of non-Muslims, collaboration with the traditional leaders, and native administration for the implementation of customary law.⁹² Furthermore, the non-Muslim Commission provided a means to address issues involving non-Muslims arrested for violating Shari'ah law by advocating on behalf of non-Muslims with law enforcement agencies. It also issued regular reports and recommendations to the government. Also, the Commission intervened to halt decisions by the Supreme Court that carried Shari'ah law penalties against Christians that were later substituted by discretionary *ta'zir* penalties.⁹³

In practice, however, the provisions of the INC that related to the protection of the rights of non-Muslims in the capital remained without implementation throughout the interim period (2005–2011). There were shortcomings in the implementation of the recommendations of the Commission for non-Muslims, especially those related to law reform. This was because the decisions of the Commission were regarded as mostly recommendatory in nature.

The Commission was dismantled in 2011 following the secession of South Sudan, against the desire of the Christian community that made requests to the authorities for its retention.⁹⁴ Some say that the dismantling of the Commission is not an indicator that non-Muslims will be discriminated after the secession of South Sudan and that the protection of their rights depends on the implementation of the constitutional provisions that guarantee the rights of non-Muslims.⁹⁵

⁸⁸ Art. 155, Art. 156 (c), and Arts 157, 158 of the INC.

⁸⁹ Art. 154 of the INC.

⁹⁰ Art. 155 of the INC.

⁹¹ Art. 157 of the INC.

⁹² Workshop "Requirements of Attractive Unity through Cooperation and Collaboration," Muḥammad Ja'far, a paper presented in a workshop for the Special Commission for the Rights of non-Muslims, on the file with the author.

⁹³ In interview with Raja Nicola, Ministry of Justice, September 9, 2012, Khartoum, Sudan. *Ta'zir* penalties are "discretionary sanctions that are applied by the judge when no penalties are specified in the Penal Code and are left for the discretion of the judge."

⁹⁴ In interview with Raja Nicola, Ministry of Justice, September 29, 2012, Khartoum, Sudan.

⁹⁵ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

B. Protection of the Rights of Religious Minorities in Practice

A variety of mechanisms and measures are envisaged under the INC for the protection of the rights of religious minorities. Furthermore, the INC provides for the establishment of a system of judicial circulars and specialized courts and specialized public attorneys to observe that non-Muslims are not subject to the penalties prescribed under Shari'ah law.⁹⁶

Despite the INC's great advances in human rights protection with provisions that outline in detail the rights of religious minorities and the duties of the state to uphold these rights, the value of these constitutional guarantees is greatly diminished by weak enforcement mechanisms and the slow implementation of constitutional provisions that guarantee these rights.⁹⁷ In practice, the law reform process is lagging in its effort to bring the Sudanese law into line with the provisions of the INC, as some legislation is still based on Shari'ah law, including the Criminal Act of 1991 and the Public Order Act of 1996.⁹⁸ The rule of law institutions face a challenging task to harmonize national laws with international and regional obligations, which require clear policies and administrative support. Limited awareness of rights and access to resources and other institutional capacities remain a challenge.

The practice negates the constitutional guarantees of religious freedom, including the dissemination of religious ideas, freedom of speech and association, teaching, practice and observance, freedom of worship, and the maintenance of places of worship, as provided for in the INC. In practice, public schools are required to provide religious instruction to non-Muslims, but some public schools excuse non-Muslims from Islamic education classes, and, at the same time, do not provide teachers for non-Muslims.⁹⁹ Such a practice contravenes the right to equality and freedom of religion and means that the state does not treat religions on an equal footing, as provided for in the constitution. These restrictions have been extended to the right to association and the right to freedom of expression of the Christian community in Sudan. For example, the organization of Christian religious festivals requires permission from the authorities (i.e., the police). Furthermore, in spite of existing legal instruments, the protection of the cultural rights of minorities is not completely satisfactory. This is illustrated by a pending case before the Sudanese Courts, involving a primary school that belongs to the Combani Christian Mission in Sudan and is situated in the locality of Mayo in the outskirts of Khartoum State that was merged by the authorities into an already existing Secondary school after the secession of South Sudan.¹⁰⁰

Moreover, the freedom of worship and keeping places of worship, in practice, is restricted. One of the main grievances in Khartoum has to do with permits to build new churches. Since 1970, building of churches has become difficult in terms of acquiring a permit. However, some improvements were made, and the government allocated plots for the construction of churches in Khartoum in early 1990¹⁰¹ through the Sudan Inter-Religious Council (which is composed of an equal number of Muslims and Christians with a view to converging Muslims and Christian communities, solving problems, and promoting religious coexistence and tolerance).¹⁰² Also, during the CPA, due to the efforts of the

⁹⁶ Art. 158 of the INC.

⁹⁷ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

⁹⁸ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

⁹⁹ In interview with Raja Nikola, Ministry of Justice, September 29, 2012, Khartoum, Sudan.

¹⁰⁰ In interview with Rifat Makāwī, Lawyer, October 3, 2012, Khartoum, Sudan.

¹⁰¹ In interview with Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

¹⁰² In interview with Dr. Sawfat Fanūs, University of Khartoum, October 4, 2012, Khartoum, Sudan.

Sudan Inter-Religious Council and the Guidance and Endowment Ministry,¹⁰³ permits for building new churches were provided.¹⁰⁴ While the constitutional and legal provisions protect the rights of religious minorities, what is problematic is that the regulations for their implementation usually violate the law and are compounded with erratic implementation. In effect, public opinion has been swayed to think that Christian missionaries are agents of external powers and as a result they are perceived with suspicion and hostility by the authorities.¹⁰⁵

As to the participation in decision-making institutions, the INC requires that government institutions respect diversity and ensure equality. Despite the clear stipulation of universal equality in all Sudanese constitutions, religious minorities are relatively more visible in the private and nongovernmental organization sectors, but overall their presence is lacking in public sectors. The lack of comprehensive statistics has made it difficult to ascertain this fact. In practice, ever since independence, policies were geared toward the development of the center thereby neglecting the periphery. For example, the south and the west were excluded from any development projects, education, and employment in the civil service.¹⁰⁶ However, the situation has been somewhat rectified in the INC through the establishment of a special commission for civil service. At the onset of the implementation of the CPA, 60 Southerners were appointed in the Ministry of Foreign Affairs.¹⁰⁷ This has resulted in criticisms by certain quarters who claim that this policy discriminated other minorities by favoring the Southerners in certain positions. Previously, application forms for Sudanese nationality, identity cards, and passports did not contain any reference to religion. Now, the new National Registration application mentions religion. This violates the INC provisions on non-discrimination.

Some argue that religious intolerance is related to ethnicity issues (north vis-à-vis south); for example, the Copts have not been subjected to racial or religious discrimination comparable to the Southern Sudanese.¹⁰⁸ By way of illustration, whereas Catholic Churches (associated with South Sudan) appeared to be vulnerable to attacks in Khartoum, Coptic churches were not. Despite the constitutional protection, in the 1990s religious intolerance manifested itself in attacks against churches and cemeteries of non-Muslims while criticism of other religions in the state-run media was a norm.¹⁰⁹ This practice, however, has now been reversed (although occasionally churches are attacked), and non-Muslim communities acknowledge the existence of greater religious tolerance, however, the treatment of all religions is not on an equal footing.¹¹⁰ In former times, religious leaders were not radical in their views as opposed to the current situation.¹¹¹ At present, what is considered

¹⁰³ *Department of Churches* within the Ministry of Guidance and Endowment summarizes difficulties facing non-Muslims to the commission for non-Muslims, which contains the following: reform of educational curriculum, permission to construct churches, civil service to allow non-Muslims time for worship on Sundays, and freedom of preaching.

¹⁰⁴ Cf. Li Tonnessen & Anne Sofie Roald (n 7) 15.

¹⁰⁵ In interview with Rifat Makāwī, Lawyer, October 3, 2012, Khartoum, Sudan.

¹⁰⁶ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

¹⁰⁷ In interview with Dr. Ghāzī Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

¹⁰⁸ In interview with Nabil Adib, Lawyer, September 30, 2012, Khartoum, Sudan.

¹⁰⁹ In interview with Dr. Sawfat Fanūs, University of Khartoum, October 4, 2012, Khartoum, Sudan. Cf. Miguel Ayuso Guixot, "Human Rights and Islamic Law in the Sudan" in: Ed Brady & Cirino Hiteng Ofuho (eds), *Building a Multi-Religious Society in the Context of Islamic Fundamentalism: Challenges and Appropriate Christian Responses* (Sudan Catholic Bishops Regional Conference 2001) 43.

¹¹⁰ In interview with Dr. Sawfar Fanūs, University of Khartoum, October 4, 2012, Khartoum, Sudan.

¹¹¹ In interview with Dr. Mansour Khālid, October 7, 2012, Khartoum, Sudan.

problematic is the recent resurgence of Islamic fundamentalists who view religion as an ideology. Sudanese governments which ruled the country on the basis of an Islamic reference advocated for religious tolerance, however, the concept of religious tolerance differs from the constitutional right of equality between religions.¹¹² On the other hand, at the community level, there are no attempts to distinguish between Muslims and Christians by the general people.¹¹³

The constitutional provisions that protect the religious rights of non-Muslims are broad, and there is a need for explicit and detailed provisions. While the provisions of the constitution on the right of religion may be read as an expansive guarantee, a lack of detail leaves questions of the extent and manner of enforcement to political will. As such, the provisions of the constitution on religious equality remained essentially dormant as regards the promulgation of new legislation. Observers asserted that in order to enhance the implementation of the constitutional and other statutory provisions that guarantee the rights of minorities, it is important to raise the public awareness.¹¹⁴ Some say that policies are needed in a range of areas to promote recognition of minorities' rights, including support for broadcasting in minority languages, school curriculum reform to raise awareness of diversity of religion in Sudan, and others.¹¹⁵

VI. NEW DEVELOPMENTS IN SUDAN: SECESSION OF SOUTH SUDAN

The main development influencing the situation of religious minorities in Sudan is the separation of South Sudan and the process of making a new constitution. The Independent Expert, in his recent visit to Sudan September 2013, "received complaints from different quarters about discrimination against non-Muslims—particularly in Khartoum—and incidents of arrests of individuals, raiding of churches and seizure of Christian literature by security agents due to allegations of Christian proselytization in the country".¹¹⁶ The President of Sudan declared: "If South Sudan secedes, we will change the constitution, and at that time there will be no time to speak of diversity of culture and ethnicity [. . .]. Shari'ah and Islam will be the main source for the constitution, Islam the official religion and Arabic the official language."¹¹⁷

Currently, in the process of creating a new permanent constitution, public debate over the new constitution is proceeding amid a polarization of views on diverse issues such as the role of religion in the new constitution, the decentralization of power, and wealth sharing between the different regions of the Sudan. Since its independence in 1956, a permanent democratic constitution has eluded Sudan. This period therefore provides an opportunity for the country to adopt a permanent democratic constitution that is inclusive and aimed at realizing a lasting democracy and political stability for the country.¹¹⁸

¹¹² In interview with Dr. Safwat Fanūs, University of Khartoum, October 4, 2012, Khartoum, Sudan.

¹¹³ In interview with Dr. Mansour Khālid, October 7, 2012, Khartoum, Sudan.

¹¹⁴ In interview with Dr. Ghāzi Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

¹¹⁵ In interview with Dr. Ghāzi Ṣalāḥ al-Dīn al-Tabānī, October 4, 2012, Khartoum, Sudan.

¹¹⁶ UNHRC, "Report of the Independent Expert on the situation of human rights in the Sudan," UN Doc A/HRC/24/31 (September 18, 2013) para 32.

¹¹⁷ "Fears grow for minorities in north Sudan if south votes to secede," *The Guardian* (January 8, 2011), <http://www.guardian.co.uk/global-development/poverty-matters/2011/jan/08/south-sudan-referendum-bashir-sharia-law>, accessed May 21, 2015.

¹¹⁸ UNHRC (n 116) para 12.

The Sudanese President and the leaders of the ruling National Congress Party (NCP) have stated repeatedly, since the secession of South Sudan, that the new Constitution of Sudan will be based on Shari'ah and will not include specific provisions recognizing Sudan's religious, ethnic, and linguistic diversity. This remark reveals a discriminatory view against certain groups which is contrary to the idea of the prohibition of discrimination.

Since 2011, a constitutional review has been underway in Sudan. This review has not been participatory or inclusive. Lively debates on the new constitution in general, and the Bill of Rights and human rights protection in particular, have nevertheless ensued.¹¹⁹ These debates have been driven by a keen awareness of the importance of constitutional rights. As concerns the process of making the new constitution, the President of Sudan will form a National Commission to draft the Sudanese Permanent Constitution. It is expected that the new constitution will be promulgated/passed by the National Assembly which has a 98% NCP "majority" and the remaining 2% mostly small parties that are in alliance or participating in the current NCP ruling party. Opponents say that the current Assembly lacks legitimacy and that there is a need to establish a Constituent Assembly to debate the constitution.¹²⁰

As to the content of the new constitution, opposition parties as well as some members of parliament are calling for a national constitution that caters for all Sudanese. Some say that there is no need to draft a new constitution and that the INC can be amended.¹²¹

On the other hand, a coalition known as the Coalition of Islamic Constitution is critical about the plans to appoint a commission to draft the new constitution as some members of the commission are not knowledgeable about the precepts of Islamic law and that, as 97% of the Sudanese are Muslims, the new constitution should be based merely on Islamic law.¹²² This statement does not account for the non-Muslims of Blue Nile and South Kordofan that practice a diverse culture and religion.

According to former Prime Minister al-Şadiq and other political parties, the new constitution should accommodate the diversity of the Sudanese people. In effect, according to opposition political parties, there must be agreements to ensure diversity in Sudan. For example, the new constitution should accommodate the cultural, racial, and religious diversity of Sudan, etc. Moreover, there should be a national constitutional conference, constitutional principles, and a constitutional committee to develop a constitution. In order to proceed with the constitution-making process in Sudan, it is important to ensure respect for fundamental rights and freedoms and achieve the cessation of hostilities in the Blue Nile and South Kordofan.

Radical religious groups call for an Islamic constitution. Dr. al-Turābī sees that the current political situation and instability across the country does not allow for people to deliberate on a new constitution for Sudan for a number of reasons. The ongoing conflict in the Blue Nile and South Kordofan and, intermittently, with the new state of South Sudan, the lack of legitimacy and independence of governmental and legislative institutions, and the lack of basic freedoms generally all indicate the need to dissolve the current government and form an interim government for the purposes of drafting the new constitution if it is to be an all-inclusive constitution embraced by all Sudanese. Therefore, there is a danger in excluding states where there is conflict. On the other hand, other political parties, for

¹¹⁹ UNDP, in collaboration with the Ministry of Justice, *The Republic of Sudan Constitution Making Forum* (at the national and the state level) 2011–2012.

¹²⁰ *Akhir Lahza Newspaper* Issue 2189 (September 27, 2012).

¹²¹ *Akhir Lahza Newspaper* Issue 2189 (September 27, 2012).

¹²² *Akhir Lahza Newspaper* Issue 2188 (September 26, 2012).

example, the *al-Khatmīyah* Party, encourage other political parties to accept the invitation of the NCP to participate in the ongoing consultations that are aimed at reaching an inclusive constitution.

Political parties that are based on Islam advocate for religious tolerance and religious equality. Religious tolerance means the exercise of religious freedom and resorting to religious law and practice of religious ceremonies. However, recently, after the secession of South Sudan, the Christmas holiday was not observed in Sudan.¹²³ In addition, observers asserted that with the rise of political Islam, including dogmatic Salafists who espouse a radical version of Islam, are growing as a proportion of the total Muslim population and that this growth was creating new sources of conflict with Christians and non-Salafist Muslims.

¹²³ In interview with Dr. Sawfat Fanūs, University of Khartoum, October 4, 2012, Khartoum, Sudan.

PART

6

CONSTITUTIONAL COURTS

New Guardians of the Constitutions?

Constitutional Review in Arab Countries

Dawn of a New Era?

RAINER GROTE

I. INTRODUCTION: CONSTITUTIONAL REVIEW PRIOR TO THE ARAB SPRING

Constitutional review is a relatively late arrival to the Arab world. Although some early experiments with constitutional review were undertaken in Arab states early in the 20th century,¹ it is only during the last three decades that the idea of constitutional review seems to have taken root more generally in the Arab world. A turning point came in 1979 with the establishment of Egypt's Supreme Constitutional Court, which blends central elements of both the US and European styles of constitutional review in a unique way.² Unlike most European constitutional courts, it is not competent for reviewing the constitutionality in abstracto, in the sense that neither the statutes of the court nor any constitutional or legal text entitles any person or entity to directly file an application for abstract review of a given legislative rule, whatever its origin may be. The only way to bring a claim before the Egyptian Supreme Constitutional Court is within the context of a pending court case, in which either the court before which the matter is pending or one of the parties to the proceedings raises the issue of the nonconstitutionality of a given statutory provision, indicating the grounds

¹ In 1948 Egypt's Conseil d'Etat ruled that nothing in Egyptian law prevented the Egyptian courts from addressing the constitutionality of legislation. This was a bold ruling which might have established a tradition of judicial review in Egypt early on had it not been impeded by the revolutionary events of 1952. For this and other early experiences of judicial review in Arab countries, see C. Mallat, *Introduction to Middle Eastern Law* (Oxford University Press, Oxford 2007) 182–185.

² On the establishment of the Egyptian court and the motives behind it, see T. Moustafa, *The Struggle for Constitutional Power—Law, Politics, and Economic Development in Egypt* (Cambridge University Press, Cambridge 2007) 57–89.

of the alleged violation.³ It should also be noted that the Egyptian system differs from the US model of constitutional review in that it confers the exclusive power to check the constitutionality of statutes to the Supreme Constitutional Court, whereas the ordinary courts are not entitled to disapply statutes they deem to be contrary to the constitution.⁴ In the first two decades following its establishment, the court made effective use of its powers and contributed significantly to the protection of basic civil and political rights and to the maintenance of the rule of law.⁵ However, toward the end of Mubārak's rule, the regime tried to reassert its grip on the judiciary by, among other measures, introducing constitutional amendments which removed the electoral process from judicial oversight and limited judicial supervision of measures taken to combat terrorism.⁶

Experiments with differing forms of constitutional review had also taken place prior to 2011 in the countries of the Maghreb, with the exception of Libya.⁷ The constitutional councils established in this region over time were largely modeled on the French Constitutional Council, with an emphasis on the abstract review of statutes and legislation before their promulgation. The effectiveness of this form of constitutional jurisdiction depends on the membership structure of the councils—as the term “council” implies, their membership was not limited to people with legal training or those with careers in the legal professions or at law faculties—and the rules regulating referrals of laws to the councils. In the Maghreb countries, prior to the Arab Spring, such power to refer laws was typically limited to the highest representatives of the states (king, president, presidents of the assemblies, prime ministers), with few, if any, possibilities for members of the political opposition or other minority groups to submit petitions to the region's councils. In Mauritania, one-third of the deputies in the National Assembly or one-third of the senators may request a constitutional review, whereas in Morocco the same power was conferred upon representatives making up one-quarter of the members of each house of parliament.⁸ These multiple restrictions imposed on the composition and the powers of the constitutional councils have meant that constitutional review in the Maghreb has been of very limited importance. Even in those Maghreb countries where the opposition does have access to the council, like Morocco, the Constitutional Council has seldom been called upon to exercise its facultative constitutional review powers⁹ and has therefore not been in a position to develop any substantial case law relating to fundamental rights and the rights of the parliamentary minority. The lack of trust in the Moroccan Constitutional Council displayed by the opposition

³ Art. 29 of Law No. 48/1979 on the Supreme Constitutional Court.

⁴ See Art. 25 no. 1 of Law No. 48/1979: The Supreme Constitutional Court *alone* is competent in matters concerning the review of the constitutionality of laws and regulations.

⁵ This period of judicial activism is often associated with the tenure of ‘Awaḍ al-Murr as Chief Justice of the Court from 1991 to 1997, see T. Moustafa (n 2) 118.

⁶ N. Bernard-Maugiron, “Consolidation of State Authoritarianism under Mubarak” in S. Arjomand and N. Brown (eds), *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran* (State University of New York Press, Albany 2013) 187.

⁷ All member countries of the Arab Maghreb Union other than Libya—Mauritania, Morocco, Algeria, and Tunisia – had established special bodies to ensure observance of their constitutions already prior to the Arab spring, see I. Gallala-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb,” in R. Grote and T. Roeder (eds), *Constitutionalism in Islamic Countries—Between Continuity and Upheaval* (Oxford University Press, New York 2012) 239–248.

⁸ See I. Gallala-Arndt (n 7) 251.

⁹ As in France, certain Acts of Parliament, the so-called organic acts (*lois organiques*), and the parliamentary rules of procedure are subject to compulsory review by the Council, see *id.* 250.

is understandable in view of the Council's evident bias in favor of the government. The Constitutional Council has been firm in the defense of government prerogatives. In its decisions concerning the constitutionality of the internal regulations of parliament, the Council has declared many provisions restraining the powers of the government to be inconsistent with the constitution.¹⁰

The French model of constitutional jurisdiction was also influential in Lebanon, where the main power of the Constitutional Council consists of the abstract review of legislation, to be requested within a period of fifteen days of the publication of the statute in the Official Journal. The rules on referring legislation to the court reflect the sectarian divisions which exist within the country: In addition to the president, the prime minister, the Speaker of parliament—each one representing one of the major confessional groups—at least ten deputies of the National Assembly and the heads of the religious communities may exercise this right, although in the latter case only on matters of religious law. While these powers should, in principle, allow the Council to play a substantial role in regulating the functioning of the other constitutional organs, the work of the Lebanese Constitutional Council has, in practice, been hampered considerably by the discontinuation in judicial appointments. For much of its existence, the Council has been paralyzed by judges staying on beyond their legally mandated terms and the incapacity of the political organs to replace them.¹¹

In contrast to this, the American style of decentralized judicial review is practiced in some of the countries in the Arab Peninsula, namely in the United Arab Emirates and Yemen.¹² In Yemen, cases concerning the alleged unconstitutionality of laws, bylaws, regulations, and resolutions are heard by the Constitutional Division of the Yemeni Supreme Court, consisting of the president of the Supreme Court, two deputy presidents, and four judges drawn from the court's other divisions.¹³ The Supreme Court of the United Arab Emirates (UAE) is the only one in the region which has been given the power, in Art. 99 of the Provisional Constitution, to settle disputes between the Emirates or between any one Emirate and the Union government. This is not surprising given that the country is the only one in the Arab world with a federal system. Indeed, controversies concerning the relationship between federal and local law have occasionally come before the UAE Supreme Court in the past and seem to have been settled in a manner which averted any open conflicts between the two levels of government.¹⁴

II. REFORMS OF CONSTITUTIONAL REVIEW IN THE WAKE OF THE ARAB SPRING

Constitutional review has played a major role in the constitutional debates in Arab countries following the "Arab Spring". This has widely been seen as an integral element of the

¹⁰ I. Gallala-Arndt (n 7) 255.

¹¹ See R. Grote, "Models of Institutional Control in Islamic Countries" in R. Grote and T. Röder (eds), *Constitutionalism in Islamic Countries—Between Continuity and Upheaval* (Oxford University Press, New York 2012) 227.

¹² See C. Mallat, "Three recent decisions from the Yemeni Supreme Court" (1995) 2 *Islamic Law and Society* 76.

¹³ See I. Glosemeyer, N. A. Shamiri, and A. Würth, "Yemen: A Burgeoning Democracy on the Arab Peninsula?" in R. Grote and T. Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, New York 2012) 417.

¹⁴ See C. Mallat (n 1) 195.

“civil state” (*dawlah madaniyah*), which revolutionaries wanted to put in place following the demise of the old authoritarian regimes. However, depending on the place which had been accorded to constitutional review in the previous regime, the discussion quickly veered off in different, if not opposite directions in different countries. In Egypt, the only country in which a functioning system of constitutional adjudication had existed prior to the revolutionary events in 2011, the Supreme Constitutional Court soon got caught up in the controversies between the remnants of the old regime (the military, the civil service, the courts) and the new Islamist majority, which viewed the court and its case law as an obstacle to their agenda of a stronger Islamization of the state and of society. These developments are analyzed in Section A, below. In Tunisia, on the other hand, there seems to have been a broad consensus that the independence and powers of the *Conseil Constitutionnel*, which had been dominated by the all-powerful executive during the Ben ‘Ali regime, would have to be strengthened in order to turn it into a genuine instrument for the protection of fundamental rights and the rule of law under the country’s new democratic constitution (described in Section B). Finally, the regimes which responded to the public protests triggered by events in Tunisia and Egypt, through implementing constitutional reform agendas from above, also used the creation of a new or the strengthening of an already existing institution of constitutional review as a tool to bolster their credentials in relation to issues of democratic government and rule of law (Section C).

A. An Embattled Institution: The Egypt Constitutional Court from 2011 to 2014

1. The Court’s Role in the Immediate Aftermath of the Fall of the Mubārak Regime

In Egypt, the Supreme Constitutional Court (SCC) played an important and highly visible role in the transition process following the demise of the Mubārak regime. Judges of the SCC served on the committee which drew up amendments to the constitution in order to pave the way for free parliamentary and presidential elections. The Constitutional Declaration was published on March 30, 2011, and served as an interim constitution until the promulgation of a new constitution which replaced the 1971 document. The Constitutional Declaration confirmed the position of the court as an “independent and autonomous judicial body exclusively responsible for the oversight of the constitutionality of laws and regulations”.¹⁵ The Declaration specifically provided that draft legislation on presidential elections had to be submitted to SCC for a review of its constitutionality. Such legislation could only become effective once its conformity with the Constitutional Declaration had been confirmed by the court; if the legislation was declared wholly or partially unconstitutional, it had to be rewritten in accordance with the ruling.

2. Growing Confrontation with the Islamists

The presidential elections finally took place in May and June 2012. Shortly before the second round of voting was held, the court intervened decisively in the electoral process. It declared unconstitutional a law adopted by the Egyptian parliament in April that barred persons who had served in senior positions under the previous regime from holding office for ten years on the grounds that the law deprived citizens of vital political rights without due process.¹⁶ The ruling allowed Aḥmad Shafīq, who had served as Mubārak’s last prime

¹⁵ Art. 49 of the Constitutional Declaration of March 30, 2011.

¹⁶ B. K. Rutherford, *Egypt after Mubarak—Liberalism, Islam and Democracy in the Arab World* (Princeton University Press, Princeton 2013) XXIII.

minister before he resigned in early March 2011, to compete in the second round of the presidential elections against the candidate of the Freedom and Justice Party, Muḥammad Mursī, after he had come second in the first round of voting on May 23 and 24, 2012, obtaining 23.7% of the votes cast in comparison to Mursī's 24.8% (in the runoff election on June 15–16, Mursī prevailed, although by a narrow margin—52% to 48%—and thus became the first freely elected president in the history of Egypt).

Even more important, the Supreme Constitutional Court declared unconstitutional the law on which the election of the People's Assembly in December 2011/January 2012 had been based.¹⁷ The court argued that the elections law had infringed Arts. 37 and 39 of the Constitutional Declaration of March 30, 2011, by allowing political parties to compete for the one-third of the seats reserved for independent candidates while not allowing independents to compete for the two-thirds of seats reserved for party-based candidates.¹⁸ This was a ruling with far-reaching implications because the Constitutional Declaration of March 30, 2011, not only conferred legislative powers on the People's Assembly but also assigned it, together with the *Shūrā* Council, the function of electing the members of the assembly responsible for drafting the new constitution. A first Constituent Assembly chosen by parliament was dissolved in April 2012 by a Supreme Administrative Court ruling on the grounds that it included members of parliament. In view of the Supreme Administrative Court, only individuals from outside parliament were eligible for membership in the Constituent Assembly in accordance with Art. 60 of the Constitutional Declaration.¹⁹ After difficult negotiations, the different political factions arrived at a tentative agreement on the composition of a new Constituent Assembly just a week prior to the second round of the presidential elections. However, when the members of the People's Assembly and the *Shūrā* Council met again on June 12 to vote for the members of the Constitutional Assembly, dozens of secular members of parliament walked out in protest at what they perceived as the attempt of the Islamist parties to pack the new Assembly with their supporters. Not surprisingly, the constitutionality of the new Constituent Assembly was again challenged in the courts, notwithstanding the fact that along with the election of the Assembly, parliament had adopted a law (Law No. 79/2012) which granted the Assembly immunity from dissolution.

The High Administrative Court repeatedly postponed its decision on the constitutionality of the second Constituent Assembly elected by parliament in June. At the same time it upheld the Supreme Constitutional Court's ruling on the unconstitutionality of the People's Assembly's election and its dissolution. On October 23, the High Administrative Court suspended the hearing of the lawsuits that sought the dissolution of the Constituent Assembly and referred the law which granted the assembly immunity from judicial dissolution to the SCC for a ruling on its constitutionality.

Faced with the threat of dissolution by the Supreme Constitutional Court and racing against time, the Constituent Assembly began voting on the draft constitution on Wednesday, November 28. The draft document was finally approved on November 29 and drew seething criticism from non-Islamist parties, human rights groups, and international experts. Two days later President Mursī announced that a popular referendum on the draft constitution would be held on December 15. Faced with massive protests by supporters of the Muslim Brotherhood, who prevented judges from meeting in Cairo, Egypt's

¹⁷ Egypt court orders dissolving of parliament, <http://www.aljazeera.com/news/middleeast/2012/06/2012614124538532758>, accessed September 14, 2015.

¹⁸ B. K. Rutherford (n 16) XXIII.

¹⁹ B. K. Rutherford (n 16) XXIII.

SCC postponed its much awaited rulings on the constitutionality of the election of the Constituent Assembly and the dissolution of the *Shūrā* Council, citing the psychological pressure from the protesters as the reason for its being forced to halt its work indefinitely. On the following day, the Supreme Council of the Judiciary announced that judges and supervisors would monitor the constitutional referendum, thus allowing the government to go ahead with the referendum. On December 15 the new constitution was duly approved by 69% of voters, albeit with a disappointingly low turnout of merely one-third of the electorate.

The Egyptian Constitution of 2012 reduced the membership of the SCC 19 to 11,²⁰ but left its functions largely unaffected. The court retained the “exclusive” competence of ruling on the constitutionality of laws and regulations.²¹ However, the Constituent Assembly, dominated by the Muslim Brotherhood and its allies, no longer wanted to leave oversight of the conformity of legislation enacted by Congress with Shari‘ah exclusively in the hands of the Supreme Constitutional Court, as had been the case under Art. 2 of the 1971 Constitution. In the eyes of the drafters of the new constitution, the court had proved itself to be rather too creative in finding ways to dismiss challenges to the consistency of statutes and regulations with Islamic law by distinguishing between undisputed universal principles of Shari‘ah and flexible applications of those principles.²² The drafters of the constitution thus included a definition of the principles of the Shari‘ah in the constitutional text so as to limit the scope of interpretation by judicial bodies when determining whether a provision complies with these principles. Using technical terms from Islamic legal tradition, Art. 219 defined what was actually meant by the reference to the principles of Islamic Shari‘ah in Art. 2. These principles were to be understood as entailing “general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.”

Perhaps even more important, the drafters of the 2012 Constitution attempted to involve the country’s most important Islamic institution, Al-Azhar, in the implementation of Art. 2 of the constitution. According to Art. 4 of the 2012 Constitution, Al-Azhar scholars were to be consulted in all matters pertaining to Islamic law. The provision did not specify whether the views on the requirements of Islamic law issued by Al-Azhar in the consultation process would bind the legislature when considering the adoption of a bill or the SCC if it was asked to rule on the conformity of the legislation with Art. 2 of the constitution.²³ There can be no doubt, however, that the main purpose of these reforms was to allow for a more effective implementation of Islamic law through the legislation and to curb the powers of the courts accordingly.

However, all attempts by the governing Islamists to diminish the position of the Supreme Constitutional Court proved to be futile. In another important ruling on June

²⁰ See Art. 176 of the 2012 Constitution. The 2014 Constitution leaves the determination of the number of Constitutional Court judges to the legislation for its implementation. It only requires that their number must be “sufficient,” see Art. 193.

²¹ Art. 175 of the 2012 Constitution.

²² On this jurisprudence, see A. O. Sherif, “The Relationship between the Constitution and the Shari‘ah in Egypt” in R. Grote and T. Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, New York 2012) 128–132; R. Hirschl, “Constitutional Courts as Bulwarks of Secularism” in D. Kapiszewski, G. Silverstein, and R. Kagan (eds), *Consequential Courts—Judicial Roles in Global Perspective* (Cambridge University Press, New York 2013) 316.

²³ See N. Brown and C. Lombardi, “Contesting Islamic Constitutionalism after the Arab Spring: Islam in Egypt’s Post-Mubarak Constitutions” (*in this volume*).

2, 2013, the Supreme Constitutional Court declared the legal basis on which the *Shūrā* Council had been elected to be unconstitutional. As in the case of the People's Assembly, the court argued that the law had infringed the Constitutional Declaration of March 30, 2011, by allowing political parties to compete for the third of seats which were meant to be reserved for independent candidates. The ruling also declared the Constituent Assembly to be unconstitutional as its members had been picked by the illegally elected People's Assembly and *Shūrā* Council. However, the court stopped short of dissolving the *Shūrā* Council, allowing it to continue its work until fresh parliamentary elections were held.²⁴ The governing Freedom and Justice Party responded to the ruling by stating that it had no effect on the new constitution's legal effectiveness as it had been adopted by popular referendum.²⁵

3. The Denouement: Restoration of the Court's Role after the Fall of the Brotherhood

Following mass demonstrations against the Islamist government in June, Mursī was removed from power by the leadership of the armed forces on July 3, 2013. The head of the army and defense minister, 'Abd al-Fatāḥ al-Sīsī, announced the appointment of 'Adli Maṣṣūr, a judge from the Supreme Constitutional Court who had been appointed president of that body by Mursī only weeks earlier as Interim President of Egypt. On July 8, Maṣṣūr issued a Constitutional Declaration which laid down the basic institutional framework for the transition period. A committee of experts was to be established by presidential decree within fifteen days, consisting of two members of the Supreme Constitutional Court, two judges from the State Council, two ordinary judges, and four professors of constitutional law from Cairo University. The proposals for the constitutional amendments would then be submitted to a fifty-member committee which would represent the various sectors of civil society and would have the task of drawing up the final text for amendments to the 2012 Constitution within a period of sixty days. Voting on alterations and the additions to the 2012 Constitution started on November 30. On December 3, 2013, the final version of the amended constitution was presented to Interim President 'Adli Maṣṣūr. It was put to a national referendum on January 15–16, 2014, and approved by 98% of voters on a turnout of 38.6% of Egypt's 52 million eligible voters.

Like its predecessors, the 2014 Constitution assigns the exclusive competence of assessing the constitutionality of laws and regulations to the Supreme Constitutional Court (Art. 192). The provisions of the 2012 Constitution, which were intended to clip the wings of the court, have been removed from the constitutional text. The requirement to consult Al-Azhar in all matters pertaining to Islamic law no longer figures in the new Art. 7, which defines Al-Azhar's role in Egyptian society as that of an "independent scientific Islamic institution" which is responsible for preaching Islam in Egypt and the world. Art. 219 was dropped altogether. Instead, the preamble of the 2014 Constitution affirms unambiguously that the relevant decisions of the SCC published in its collected rulings are to be the (only) reference for the interpretation of the Shari'ah clause in Art. 2.

The authority of the SCC has thus been fully restored. Following the overthrow of the Mubārak regime, the court needed some time to redefine its role in the changed environment. However, when it intervened with two important rulings in June 2012, its decisions

²⁴ J. Neriah, *Towards a Constitutional Crisis in Egypt?*, <http://jcpa.org/towards-a-constitutional-crisis-in-egypt/>, accessed September 14, 2015.

²⁵ "Egypt's constitution legitimate despite court rulings: FJP statement," *Ahram Online* (June 2, 2013), <http://english.ahram.org.eg/NewsContentPrint/1/0/72968/Egypt/0/Egypt's-constitution-legitimate-despite-court-rulin.aspx>, accessed September 14, 2015.

had a major impact on the course of events. By striking down the law banning leading officials from Mubārak's National Democratic Party from public office for a period of ten years, the court paved the way for Aḥmad Shafiq, Mubārak's last prime minister, to stand against Muḥammad Mursī in the runoff presidential election of June 2012. On the same day, it struck down the law which had governed the election of the People's Assembly, thus prompting the Supreme Council of the Armed Forces to dissolve the Assembly and throwing the Constituent Assembly, which was charged with the drafting of the new Egyptian Constitution, into disarray. Mursī's controversial constitutional declaration of November 22, 2012, in which he expressly granted the Constituent Assembly and the *Shūrā* Council immunity from judicial dissolution and precluded any appeal to the courts against his acts and declarations, was intended to forestall any negative effects of the court's expected rulings on the unconstitutionality of the election of the Constituent Assembly and the *Shūrā* Council on the work of these two bodies, and especially on the drafting of the new constitution. The court obliged with its ruling on the unconstitutionality of the *Shūrā* Council in June 2013, a further blow to the Islamist government which was already fighting for its survival, and to the legitimacy of the constitution it had promoted.

To critics arguing that its rulings on the unconstitutionality of the elections of the People's Assembly and the *Shūrā* Council impeded the implementation of the popular will expressed at the polls, the court could respond that it had simply applied its case law which dates back to the Mubārak era. At the end of the 1980s the court had repeatedly voided the law on parliamentary elections on the grounds that it failed to provide independent candidates with an adequate opportunity to run for office.²⁶ By drawing on its long established case law, the court was able to present itself as an impartial guardian against the abuse of electoral politics by the dominant political forces of the day, be they secular (as in the case of Mubārak's National Democratic Party [NDP]) or religious (as in the case of the Muslim Brotherhood's Freedom and Justice Party). The difference, of course, is that the NDP had been the vehicle of an authoritarian regime which had deliberately manipulated the electoral rules to undermine the performance of opposition groups at the polls, whereas the Muslim Brotherhood owed its dominant position in the People's Assembly and the *Shūrā* Council to its broad support among the population expressed in genuinely democratic elections. But even if, for the reasons just indicated, drawing a direct parallel between Mubārak's NDP in the 1980s and the Islamists who emerged victorious at the polls in 2011/2012 seems somewhat questionable, the position adopted by the Supreme Constitutional Court appeared credible in the eyes of large swathes of the public that had grown increasingly suspicious of the Brotherhood. This growing suspicion owed partly to the fact that following the demise of Mubārak, the Muslim Brotherhood had promised that they would compete for only half of the seats in the parliamentary elections, that they would not field a candidate in the presidential elections, and that they would work toward inclusion of all political and social groups in the democratic process, only to renege on each of these promises when the swift and full implementation of their political agenda seemed to be within reach.²⁷

B. Taking Constitutional Review Seriously: The Case of Tunisia

Whereas in Egypt the struggle has been for the maintenance of a functioning constitutional review process in the new political environment created by the overthrow of the Mubārak regime, the challenge in the other Arab countries has been to establish the constitutional

²⁶ SCC decisions of May 16, 1987, and of May 19, 1990.

²⁷ B. K. Rutherford (n 16) XVIII.

foundations for a truly autonomous and independent system of constitutional adjudication. In Tunisia, a Constitutional Council had been created in 1987 by a decree which assigned it the task of giving its opinion on the constitutionality of bills submitted to it by the President of the Republic as well as all issues affecting the organization and the functioning of the institutions referred to it by the head of state. The functions of the Council were gradually extended and in 1995 were incorporated into Chapter 9 of the Tunisian Constitution. According to the constitutional regulation introduced, the main function of the Council was the review, upon referral by the President of the Republic, of the consistency of legislation with the constitution prior to its promulgation. Neither the political opposition nor individual citizens had the right to petition the Council to protect their constitutional rights.²⁸

The Tunisian Constitution enacted in January 2014 replaces the Constitutional Council with a Constitutional Court that exercises broad review powers. Unlike other issues, namely the role of religion and the place of women in state and society,²⁹ the section on the Constitutional Court (Section 2 of Chapter 5) does not seem to have generated much controversy. The court is composed of twelve members, nine of whom have to be legal experts with at least twenty years of experience. The remaining three members may be drawn from other sectors of society, including from among retired members of the political class. The President of the Republic, the Assembly of the Representatives of the People, and the Supreme Council of the Judiciary are each to appoint four members of the court, the idea being that each of the three branches of government is thus responsible for the selection of one-third of the total membership of the court. The judges are appointed for a nonrenewable term of nine years (Art. 118).

The court has exclusive jurisdiction over all matters concerning the constitutionality of draft statutes, draft constitutional amendments, and draft treaties. Draft statutes may be referred to the court by the President of the Republic, the head of government, or thirty members of the Assembly of the Representatives of the People after they have been adopted by the Assembly in the final reading. By contrast, proposals for the amendment of the constitution, which may be introduced by the President of the Republic or one-third of the members on the Assembly, have to be forwarded to the Constitutional Court by the Speaker of the Assembly before they can be debated in parliament. The court is to examine whether the draft amendment would entail a change to a provision in the constitution that cannot be amended (Art. 144). This concerns mainly Art. 1 (recognition of Islam as the religion of Tunisia and of Arabic as its language) and Art. 2 (the principle of the “civil state”) and the rights and freedoms guaranteed in the constitution which may not be “undermined” (Art. 49). Draft amendments may also be referred to the court by the Speaker following their adoption in order to check whether the constitutional procedures for such amendments have been respected. International treaties may be referred to the Constitutional Court by the President of the Republic before he signs the law for their ratification. Finally, the rules of procedure of the Assembly are referred to the Constitutional Court by its Speaker (Art. 120).

Even more important, the new Tunisian Constitution allows for the review of constitutionality of laws which have already entered into force upon the initiative of one of the parties to a court case whose outcome depends on the contested provision. While it is the court or tribunal hearing the case which formally submits the matter to the Constitutional

²⁸ I. Gallala-Arndt (n 7) 250.

²⁹ On these issues, see Z. Al-Ali and D. Ben Romdhane, “Tunisia’s new constitution: progress and challenges to come,” available at: <http://www.opendemocracy.net/print/79368>, accessed September 14, 2015.

Court, it is the party challenging the constitutionality of legislation which initiates the procedure and determines its scope. In its ruling, which has to be issued within a period of three months, renewable only once, the Constitutional Court must limit itself to examining those issues which the party challenging the constitutionality of the contested legislation has raised in their application. If the Constitutional Court concludes that a statutory provision is unconstitutional, the provision ceases to be applicable, subject to the instructions given by the court (Art. 123). In theory at least, these powers seem to allow the new court to turn itself into an effective guardian of the rights guaranteed to individuals by the constitution.

C. Reforms from Above: Morocco and Jordan

Other Arab countries reacted to the wave of public protests running through most of the Arab world in early 2011 by implementing a constitutional reform agenda from above. This is true particularly in the case of the constitutional monarchies of Morocco and Jordan. Whereas Morocco already had some limited form of constitutional review prior to the “Arab Spring”, such an institution had to be created from scratch in Jordan.

1. Morocco

The constitutional changes approved by the Moroccan electorate in the referendum of July 2011 represent a major reorientation of the Moroccan constitutional system. The reforms strengthen the democratic and rule of law components of the constitutional system in several important respects. One such important new development is the express constitutional recognition of the special status of the parliamentary opposition. According to Art. 10 of the new constitution, this status enables the opposition to fulfill its special role in parliament and in the political life of the country. The parliamentary opposition has, among other things, the right to present its views in the official media, to have access to public funding, to participate in an effective manner in the law-making procedure and the oversight of the government, and to be represented adequately in the internal activities of parliament. It is particularly notable that the presidency of the important committee on legislation is to be reserved for a member of the parliamentary opposition.

In another potentially significant departure from previous constitutional practice, the 2011 Constitution contains a fully developed bill of rights. The 1996 Constitution had limited itself to a number of guarantees of fundamental rights which were included in Title 1 on the basic principles of the Moroccan Constitution. By contrast, the 2011 Constitution contains a separate and detailed chapter on freedoms and fundamental rights (Arts. 19 to 40). According to Art. 19, Moroccans shall enjoy, in addition to the rights and freedoms set forth in the new constitution, the human rights guaranteed in the international conventions and covenants to which the Kingdom of Morocco is a party. The enjoyment of these rights is qualified, however, by the reminder that they shall be exercised “in accordance with the provisions of the constitution, the lasting traditions and the laws of the Kingdom”.

The provisions in Title 2 guarantee the most important civil and political rights, including the right to life (Art. 20), security (Art. 21), physical and moral integrity (Art. 22), freedom from arbitrary detention or arrest (Art. 23), the right to protection of one’s private life (Art. 24), freedom of expression, information, and the press (Arts. 25, 27), freedom of assembly, peaceful manifestation, and assembly (Art. 29), the right to vote (Art. 30), and the right to property and freedom of enterprise (Art. 35). The latter right is balanced, however, by the obligation of the legislature to take measures to prevent conflicts of interest, insider trading, and all offences of a financial character, as well as practices which are contrary to the principles of free and fair competition (Art. 36).

In line with these changes, the new constitution has strengthened the role of constitutional review. The Constitutional Council (*Conseil constitutionnel*), established in 1992, has been elevated to the rank of Constitutional Court (*Cour constitutionnelle*). Like its forerunner, the new Constitutional Court is composed of twelve members appointed for a term of nine years, with a renewal of one-third of the membership taking place every three years. Six of its members are appointed by the King and the other six members are elected by parliament, one-half by the House of Representatives and one-half by the House of Counsellors. Of the six members to be appointed by the King, one shall be proposed by the Secretary General of the High Council of Religious Scholars. Unlike the 1996 Constitution, the new constitutional text leaves no doubt that the members of the new court have to be drawn from the legal establishment. They are to be chosen from among individuals who have a good legal education, have demonstrated their competence by practicing a profession in the judicial, academic, or administrative field for more than fifteen years, and who are known for their impartiality and integrity (Art. 130).

The court continues to carry out the functions which were previously performed by the Constitutional Council. In this regard, the court is responsible for monitoring the proper conduct of parliamentary elections and referendums and for reviewing the constitutionality of parliamentary legislation and the parliamentary rules of procedure. The power to review ordinary statutes and so-called Institutional Acts (i.e., statutes which are referred to in the constitution by this name; in substantive terms, these are statutes which spell out the details with regard to the organization, powers and functioning of the main state institutions established by the constitution) can only be exercised before the statute in question is promulgated. This power has been extended by the reform to laws relating to international agreements before their ratification. The review of Institutional Acts and new parliamentary rules of procedure is compulsory, i.e., a prior application to this end by a state body or an individual is not required. In contrast to this, ordinary statutes and laws relating to international agreements will only be reviewed if they are referred to the Constitutional Court by one of the applicants mentioned in the third paragraph of Art. 132 before their promulgation or ratification, i.e., by the King, the head of government, the president of either of the houses of parliament, one-fifth of the members of the House of Representatives, or one-quarter of the House of Counsellors.

In the past the Constitutional Council has made only very limited use of these review powers, especially with regard to the protection of fundamental rights and freedoms.³⁰ The Council was unable to develop any coherent case law relating to fundamental rights as, under the optional review procedure, the members of the political opposition in parliament rarely used their right to refer ordinary statutes to the Council. This is perhaps not surprising as the Council was originally created with the primary purpose of upholding the dominant position of the monarchy enshrined in the constitution. It was allowed to venture into other fields, and in particular into the field of fundamental rights, as long as this was not seen as incompatible with its primary role.³¹ This original narrow view of constitutional review was reflected in the early jurisprudence of the Council which firmly upheld the prerogatives of the government in its relationship with parliament. By contrast, a number of statutes which raised concerns about fundamental rights went largely unchecked.³²

³⁰ For an assessment of the jurisprudence of the Moroccan Constitutional Council, see I. Gallala-Arndt (n 7) 223.

³¹ O. Bendourou, "Conseils constitutionnels et État de Droit au Maghreb" in A. Mahiou (ed), *L'Etat de droit dans le monde arabe* (CNRS-Editions, Paris 1997) 240.

³² Decisions of January 3, 1995, *Bulletin officiel* (January 25, 1995) 196 and *Bulletin officiel* (July 4, 1995) 2144.

The constitutional reforms of July 2011 have, at least, given the legal instruments to the new Constitutional Court to act more vigorously in the defense of civil rights and liberties. Under the new Art. 133, the court will have jurisdiction to rule on the claim of unconstitutionality brought by one of the parties to a pending court case against a statute allegedly violating the rights and freedoms protected by the constitution, provided that the outcome of the court case depends on the constitutionality and applicability of the statute. While it will still not be possible to apply directly to the court in the case of human rights violations, the court will for the first time have the power to rule on the constitutionality of legislation which is already in force, and will be competent to do so outside a political context in the narrower sense, i.e., upon an application which is brought not by a political body, but rather by a court or by a private person or entity which is a party to judicial proceedings.

Much will depend on the implementation of this provision, and in particular on the question of whether the power to refer cases to the Constitutional Court for the review of a statute's constitutionality is restricted to the highest courts or whether it is extended to all courts, tribunals, and bodies of a judicial character before which the question of unconstitutionality of a statute may arise in the context of concrete litigation. Another vital question is whether the parties involved in such judicial proceedings are given specific rights with regard to the initiation of such a procedure, as is the case in Egypt.³³ A reform along Egyptian lines could open the way for a substantial role of the Constitutional Court in the defense of fundamental rights and the rule of law, assuming the Egyptian experience is a reliable indicator.

The profile of the Moroccan Constitutional Court has also been raised in other respects. The president of the Constitutional Court is now one of the individuals who have to be consulted by the King and the highest political authorities on the most important matters of state. These decisions include the declaration of a state of emergency by the King (Art. 59), the dissolution of parliament by the King (Art. 96) or of the House of Representatives by the prime minister (Art. 104), and the introduction of a bill amending the constitution by the King (Art. 174). The president of the Constitutional Court also heads the Regency Council, which exercises the powers and constitutional rights of the monarch before the heir to the throne reaches the required age (18) to assume his royal functions (Art. 44).

2. Jordan

Prior to the constitutional reform of September 2011, Jordan had neither a French-style Constitutional Council nor an Egyptian-style Constitutional Court. The only provision relating to the enforcement of the constitution was to be found in Art. 122 of the Jordanian Constitution of 1952. This provision assigned to the High Tribunal the right to interpret the provisions of the constitution. The High Tribunal was the body set up under Art. 57 for the trial of ministers for offences which they committed in the performance of their duties. It consisted of nine members, four of whom were drawn from the ranks of the Senate, while the other five members were selected from the ranks of the highest civil court. Its mixed political/judicial character raised doubts whether the Tribunal's constitutional interpretations under Art. 122 could be considered legally binding. But even if their binding character was admitted, the fact remained that the Tribunal could only exercise its powers at the request of the Council of Ministers or of one of the two houses of parliament. It did not

³³ See Art. 29 of Law No. 48/1979 on the Supreme Constitutional Court of Egypt. According to section 2 of this provision, if one of the parties to a case before a tribunal or an organ with judicial authority disputes the unconstitutionality of a law or a regulation and the tribunal or organ considers the challenge to be plausible, it is to postpone its decision and grant the party which has raised the challenge a maximum respite of three months in order to petition the Supreme Constitutional Court.

have the power to adjudicate concrete disputes. It is therefore not surprising that its relevance to the development of constitutional law in Jordan remained very limited in practice.

The reforms of September 2011 have brought fundamental change in this area by establishing, for the first time since the country was founded in 1922, a separate constitutional jurisdiction in Jordan. The new Constitutional Court is to be composed of nine members. Like the Moroccan Constitution, the amended Constitution of Jordan stresses the need for the Constitutional Court judges to be professionally competent. They must have served either as a judge in the Court of Cassation or the High Court of Justice; or as professor of law (with a full professorship) at a university, or as lawyer with no less than fifteen years of professional practice. However, unlike the Moroccan Constitution the revised Jordanian Constitution still leaves the door open to the membership of former politicians by stipulating that “specialists” who fulfill the conditions for membership in the Senate may also join the new review institution (Art. 61). According to Art. 64, the group of people eligible for membership in the Senate comprises present and past prime ministers and ministers, persons who previously held the office of ambassador, Speaker of the Chamber of Deputies, president and judges of the Court of Cassation and of the Civil and Shari’ah Courts of Appeal, retired military officers of the rank of Lt. General and above, former deputies who were elected at least twice, and “other similar personalities who enjoy the confidence and trust of the people in view of the services they have rendered to the nation and country”. It is not clear whether or not the term “expert” is to be understood as an additional qualification which would allow this rather large group of dignitaries to be whittled down to those who either come from the legal profession or at least hold a law degree when it comes to determining their eligibility for membership in the Constitutional Court. The judges are to be appointed by the King for a term of six years. Whereas draft versions of the new Art. 58 had provided that the term of membership would be subject to renewal, this clause, which constituted a potential threat to the independence of the judges, has disappeared from the final version of the article.

The Constitutional Court rules on the constitutionality of laws and regulations and interprets the constitution upon the request of the Council of Ministers or either of the houses of parliament (Art. 59). While citizens do not have the right to approach the court directly, the right to request the review of a statute or regulation for its constitutionality is limited to the highest bodies of the executive and the legislature, i.e., the Council of Ministers and both houses of parliament. However, the parties to a case pending before the ordinary courts have the right to plead the unconstitutionality of law and regulation. If the court of litigation is convinced that the challenged provision is applicable to the case at hand and that the claim of unconstitutionality is serious, it shall suspend the proceedings and refer the matter to the Court of Cassation, the highest civil court in Jordan, for a final decision on whether the petition will be submitted to the Constitutional Court. If the court of litigation refuses to refer the matter to the Court of Cassation, its decision can be appealed. By contrast, any decision by the Court of Cassation not to refer the matter to the Constitutional Court is not subject to appeal by the party whose petition has been rejected. It is therefore this court which determines whether the avenue to the Constitutional Court for private parties is a broad or a narrow one. Since the new Constitutional Court was established in 2012, it has already had the opportunity to decide on the conformity of laws with the constitutional bill of rights in this procedure in a number of cases. The court has already made use of this power to strike down laws for their inconsistency with the constitutional bill of rights on several occasions.³⁴

³⁴ For example, Judgment No. 2 of 2013 (Unconstitutionality of Art. 51 of the Arbitration Law No. 31 of 2001); No. 4 of 2013 (Unconstitutionality of Art. 5 of the Law on Landlords and Tenants with dissenting opinions by Justices Nşür, Ghazwî, Sa’îd, and Ĥamûd).

III. CONCLUSIONS

Four years after the beginning of the “Arab Spring” the future of constitutional adjudication remains uncertain. While the stronger emphasis on the rule of law after the demise of the authoritarian regimes which dominated the Arab world for the last half century should, in principle, favor the idea of independent and strong constitutional courts as an important safeguard against the abuse of power, a powerful constitutional court may also easily come to be seen considered as an obstacle to the full implementation of the program of the new political majority. As events elsewhere have shown, acceptance of constitutional courts as an integral part of a system of checks and balances presupposes a certain level of a political culture which views checks and balances on the exercise of political power as a desirable and necessary elements of a system based on democracy, rule of law, and fundamental rights. Such culture does not emerge overnight but needs time to develop and to take root.

The reforms implemented in Tunisia, Morocco, and Jordan look promising so far. The professionalization and thus the independence of these bodies have been strengthened through the requirement that only persons known for their legal and professional competence may serve in such bodies. Additionally, the courts have, for the first time, been given powers which will allow them to adjudicate on the constitutionality of statutes and other legal rules in the context of concrete litigation, thus creating a potential opening for individuals and civil society organizations to submit claims relating to their rights to these courts.

However, it remains to be seen whether the institutional and political environment in which the new courts will operate will allow them to thrive. At the time of writing, only the Jordanian Court has started to use its new powers. Certain ambiguities continue to exist in the new constitutional regulations which might hamper the effective exercise of the courts’ prerogatives. Where the right to submit questions of unconstitutionality in the context of concrete litigation to the Constitutional Court can only be exercised through the judicial hierarchy, as in Jordan, the superior courts may use their filtering function not only to shield the Constitutional Court from frivolous or ill-founded claims, but also to prevent these issues from reaching the court altogether. Much will therefore depend not only on the wording of the legislation implementing the new review procedures, but also on the spirit in which the judges make use of their new competencies.

Morocco's Constitutional Court after the 2011 Reforms

NADIA BERNOUSSI*

I. PREFACE

Constitutional revision is, evidently, not an isolated or neutral act, nor a technical matter, but is a response in legal form to major political concerns. It is often the result of consensus and of concessions made, sometimes a work of compromise between political powers that are pretty much opposed to one another—so much that sometimes, some basic laws¹ will opt to remain vague and reserved in order to win maximum support and avoid provoking hostility. The recent revision of the Moroccan Constitution is no exception to this rule, trying to reconcile hopes and demands that are at times entirely opposed to one another. Yet the revision is nonetheless the culmination of a long process of maturation of the democratic demand, accentuated by the imperatives of regionalization and of modernizing the structures of the state and intensified by the Arab Spring and the youth movement. Constitutional reform has thus hatched out within the debates on democratic transition, the rule of law and good governance, the foundations of moral reformism, and ethical awakening² redoubled by a tremendous clamor for participation that has suddenly thrown into frenzy the streets and the social networks.

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¹ The US Constitution, for example, does not provide for constitutional control, fearing that to declare such a competence would provoke a hostile reaction from the public. See Céline Wiener, *Le contrôle de constitutionnalité. I, Présentation générale, France, États-Unis*, Documents d'études No. 1-15 (La documentation française, Paris 1996) 25.

² See Hamma Hammami, *Le chemin de la dignité* (2007), quoted by Yadh Ben Achour, *La deuxième Fâtiha, L'islam et la pensée des droits de l'homme* (University Press of France, Paris 2011) 1.

The 2011 revision of the constitution did not come out nowhere in normative and institutional terms, but followed on from a gradual and incremental approach adopted during the 1990s. A previous constitutional revision as early as 1992 introduced significant amendments on human rights, rationalization of the powers of the monarchy, increased powers for the constituted bodies, and the establishment of new institutions, such as the region and the Constitutional Council.³ Shortly afterward, a 1996 revision, for its part, opened the way to bicameralism, which had a broadly positive impact on legislative procedure and the organization of the state authorities. That is to say that, although the fall of the Berlin Wall may not have found immediate or direct resonance in most Arab states, it did impact on national political institutions and ploughed its furrow on the margins of Moroccan political power. The prevailing political discourse of today fits into this continuum and this openness, and also takes account of “the deliberative imperative,”⁴ which has necessitated further concessions and in places created as many incipient cracks as false continuities. The royal speeches and the new constitution are in fact serving the purpose of restoring confidence, attempting to re-establish social adhesion, seeking common language with the people, recalling that the law is the same for all, promising an end to impunity and that the social justice being called for must be the foundation of a genuine democracy, and not a democratic *façade*.

The new constitution, promulgated on July 29, 2011,⁵ supersedes the previous one and provides carefully for transitional arrangements⁶ still in force at the time of writing. It is the second time⁷ that the constituent authority has acted so radically, in sweeping away the former legal system. Nourished by the conclusions of the Equity and Reconciliation Authority (*Instance Équité et Réconciliation*—IER) and by reports on the fiftieth anniversary (of the Moroccan parliament) and regionalization, the new draft would be conceived and written in the light of universally recognized democratic standards, hinting at a generous and ambitious constitutional promise.

The debate as to whether this constitution will be one that lasts or one of transition is still very much alive, with questions continuing to flourish on forums and round tables here and there; will Morocco still be in a phase of democratic transition? Are we perhaps, with this new version, reaching the consolidation phase? Several factors seem to point to a transition that is still in progress: Morocco has established a transitional justice, positive discrimination measures in favor of women as special temporary measures, interference by the head of state in the Family Code, or in the National Initiative for Human Development, emphasizing the important role of what in political science is called the “transitional leader,”⁸ the 2011 Constitution would be in the same vein, i.e., a constitution of transition, Basic Law in

³ See Abdeltif Menouni, “Lectures dans le projet de Constitution révisée” in Driss Basri, Michel Rousset, and Georges Vedel (eds), *Révision de la Constitution marocaine* (1992) (Imprimerie royale 1992) 55–82.

⁴ Loïc Blondiaux and Yves Sintomer, “L’impératif délibératif” (2002) 57 vol 15 *Politix* 17–35.

⁵ *Zahîr* No. 1-11-91 of July 29, 2011.

⁶ Arts. 176 to 180 of the Constitution promulgated by *Zahîr* of July 29, 2011.

⁷ Art. 103 of the 1972 Constitution provides that “the Constitution promulgated by *Zahîr* No. 1-70-177 of 27 *journada I* 1390 (July 31, 1970) shall be revoked.”

⁸ Thomas A. O’Brien, “The Role of the Transitional Leader: A Comparative Analysis of Adolfo Suárez and Boris Yeltsin” (2007) 4 vol 3 *Leadership* 419–432, quoted by Abderrahim El Maslouhi, “La voie marocaine de la démocratisation. Repères transitologiques” in Centre d’Études Internationales, *Une décennie de réformes au Maroc* (1999–2009) (Karthala, Paris 2009) 16.

which there are moments of constitutional “rupture” alongside spaces of “continuity” in a general framework in which it is fair to recall that little is arbitrary.

As regards the process of drafting the revision, we have to emphasize the novelty of the way in which this has been done. Thus, the process has evolved from a place where it was virtually conferred (in 1962, 1970, and 1972) to a more participatory approach, by means of memoranda (in 1992 and 1996), before arriving today at an integrationist and inclusive approach which achieves legitimacy in multiple ways: professional legitimacy (through the Advisory Committee for Revision of the Constitution⁹), partisan legitimacy (through the political follow-up and consultation mechanism¹⁰), and popular legitimacy (through recourse to a referendum).

Whether the agenda was scrupulously respected or in deliberate haste, the “preparatory” text is always revisited, reworked, and amended in the light of the discussions and the various judgments made after the “first draft.”¹¹ There is a moment of drift, when the text is no longer in the domain of expertise, but of something much more sensitive, namely, the strategic register. Like the sediment or the geological layers that encase a porous rocky boulder, the initial draft finds itself enshrouded here and there, where the silt is soft, the hard layers that will alter the image and the harmony of the whole, and cast light on the actual constitution, highlighting the unavoidable last-minute concessions.

Moreover, how is it possible for one individual to write about something conceived collectively? It is a delicate position, being “on the inside” and “on the outside”; there is the responsibility to exercise restraint and the imperative of bearing witness—how far does the responsibility to exercise restraint go exactly? Does it apply to the moment, to the “during,” the period of work, which might appear obvious, or does it go further and also apply to “afterward,” and if so until what point “afterward”? How is it possible to remain neutral and maintain distance from work that was undertaken in preparation, and collectively?

The theme of constitutional justice will hold a privileged place within the constitutional revision, revealing the degree of intimacy that exists with the paradigm of the state based on the rule of law. Indeed, constitutional justice is generally accepted as being a key element of a state based on the rule of law, particularly since the emergence and universality of the phenomenon around the 1980s, a period that coincided with the withdrawal of advocates of legicentrism.

It is important to acknowledge that this area curiously did not give rise to any particular polemic, dissent, or antagonism within the committee. It went without saying that constitutional justice needed to be reworked to make it effective and to turn it into an efficient instrument for protecting fundamental rights. Once it was accepted that constitutional justice was functioning poorly and lacked resources, reforming it became legitimate. Moreover, the lack of tension about the “remodeling” of constitutional justice may also have been because it was an institution far removed from the *imāmah*,¹² unlike the judicial

⁹ The Advisory Committee for Revision of the Constitution is chaired by Abdeltif Menouni.

¹⁰ The Political Mechanism for follow-up, consultation, and exchange of views on the draft revision of the constitution is chaired by Mohamed Moatassim.

¹¹ By way of indication, though this is by no means an exhaustive list, it is probable that the judgments came from the king, the *‘ulamā’*, the political parties, including the Party for Justice and Development, the trade unions, the Ministry of Harbors and Islamic Affairs, or from the general civil service.

¹² We talk in this regard of the “*wilāyat al-kubrā*,” a theory that says justice is a power coming from the *imāmah* that is merely “delegated” to the Ministry of Justice. This explains why the Department of Justice was for a long time considered as a ministry of sovereignty.

power over which the king continued to preside, and because it is a “civil” institution and its capacity for “interference” was not yet apparent, given its unobtrusive jurisprudential past. Moreover, the lack of a founding decision made the institution appear to be a benign structure, “without risk”, unlike the principles that said constitutional justice would overthrow the judicial systems of constitutionalism for neoconstitutionalism, constitutions preoccupied by the separation of powers for “key” constitutions, the reign of men for the reign of norms, sovereignty of faith for sovereignty of the law then, for the higher and greater sovereignty of the constitution.

Constitutional justice has a long yet straightforward history in Morocco. It became integrated into the Moroccan institutional landscape in a discreet and gradual way. The 1908 draft Moroccan Constitution already provided for political control of laws exercised by the Council of notables, while the 1962 Constitution, out of concern for “institutional economy”, instituted a constitutional chamber within the Supreme Court itself which controlled the constitutionality of organic laws and the internal regulations of chambers, overseeing the normative redistribution between the field of law and regulations, and handling electoral disputes. Control over ordinary law was the only thing it lacked in order to join the group of states that enjoy true constitutional justice—a step that would be achieved in the 1992 revision of the constitution,¹³ which established a Constitutional Council, an independent jurisdiction outside of the judicial authority, which retained its previous competencies, to which was added control over the constitutionality of ordinary law, a crucial characteristic of any constitutional justice system.¹⁴ Yet paradoxically, the judging of laws was little used.

The hard figures in this regard speak for themselves. Thus, in 2010, “[...] of 780 decisions handed down by the Constitutional Council, 621 concerned election disputes, two—the referendum, 50—the legal status of parliamentarians, 45—delegalizations, 22—organic laws, 12—internal regulations, and 10—ordinary laws”.¹⁵ Had it not been for the election disputes, the Constitutional Council would, to use Robert Badinter’s metaphor, have resembled sleeping beauty’s castle: 34 decisions for the direct acts of the constitution (internal regulations and organic laws), norms justiciable by automatic checks, 45 for delegations, a step that is a precursor to the reworking of old instruments, and 10 decisions on ordinary laws in the space of 15 years!¹⁶ How can such restraint be explained?

A closer look at the origin and number of applications in 2010 offers some clues (77 originating from the prime minister, 28 from the minister for the interior, 18 from the president of the Chamber of Representatives, 13 from the *walī*, 6 from elected members, and 5 from the minister of justice). The appellants found themselves in a logic of “[...] regulation of normative competences between public authorities [...],¹⁷ of updating of norms or of elected members’ concern for the legal situation, the objective of or concern for reparation of the law, redress of wrongs or the protection of fundamental rights took second place”.¹⁸ The weak application of constitutional justice is as much attributable to legal factors such as

¹³ Art. 76 onward of the Constitution of October 9, 1992.

¹⁴ Louis Favoreu, *Les Cours constitutionnelles, “Que sais-je?”* (University Press of France, Paris 1992) 24.

¹⁵ The Constitutional Council, Service de la documentation et de la Coopération, Rabat, 2010.

¹⁶ Nadia Bernoussi, “De quelques propos sur la jurisprudence constitutionnelle et la sécurité juridique au Maroc” in Placide M. Mabaka (ed), *Constitution et Risque (s)* (L’Harmattan, Paris 2010) 279.

¹⁷ Louis Favoreu, “Le Conseil constitutionnel, régulateur de l’activité normative des pouvoirs publics” (1967) 83 *La Revue du droit public* 5 et seq.

¹⁸ Nadia Bernoussi (n 16) 279.

the quorum necessitating alliances that were difficult to forge (at least a quarter of the members of one chamber or of the other), as to political reasons such as for example the principle of consensus, the “unbearable autonomy of politics”, the relative majorities, the fear of government, the urgency of deadlines and the lack of a founding decision.

How is constitutional justice regarded from a point of view of fundamental rights? In fact, although we accept without any doubt its mission of protecting fundamental rights, there is reason to wonder whether this is the only institution responsible for rights and freedoms.

Indeed, the king does remain protector “[. . .] of the rights and freedoms of citizens, male and female, and of groups [. . .]”.¹⁹ as in the previous constitutions, it is therefore always possible to question the degree of involvement of the head of state in areas close to religion, such as the family code or its successors for example. Moreover, despite attempts at the empowerment of justice, which went from being an “authority” to a “power”, the ordinary judge remains under the new constitution “[. . .] in charge of the protection of rights and freedoms [. . .]”.²⁰ rather than protector or guardian as for example in “the [French] judicial authority, guardian of individual freedom [. . .]”.²¹ “In charge” is not as strong and is less binding than “guarantor”²² or “protector”.

In summary, the new constitution has created a particular atmosphere, a new spirit, and has put in place a battery of mechanisms and procedures, an extensive piece of constitutional engineering—partly social or sociological, and partly “mecano-institutional”.

II. A SPIRIT

It is important to understand the spirit in which the new Constitutional Court will be able to operate, move, or make its presence felt. What sort of “climate” will the new Basic Law inhabit? Might it be said in this regard that a new social contract is being written? Are we witnessing a silent revolution?²³ Is a new social pact in the process of being born? In any event, there seem to be several fairies perched on the cradle of the constitution, alluding to the implicit references to Montesquieu, Kelsen, De Tocqueville, Habermas, and also to the supported and varying explicit references to Islam.

In fact, and throughout the reading of the constitution, an atmosphere is emerging and imposing itself that is somewhere between real conquests and unavoidable tensions, between significant victories²⁴ and intransigent deadlocks, between courageous concessions and cultural isolationism, a climate of a middle ground that is spontaneous or wisely developed, thought out, and codified.

¹⁹ Art. 42 of the Constitution promulgated by *Zahir* of July 29, 2011.

²⁰ Art. 117 of the Constitution promulgated by *Zahir* of July 29, 2011.

²¹ Art. 66 of the French Constitution of October 4, 1958.

²² It was not entirely by chance that General de Gaulle amended the text that was submitted to him by the Constitutional Council by replacing the phrase “il a la charge” [it is in charge] with “il est garant” [it is guarantor], cf. François Luchaire and Gerard Conac, *La Constitution de la République française, Analyses et commentaires* (Economica, Paris 1979) 133.

²³ Mohamed Cherkaoui, *Le Sahara, liens sociaux et enjeux géostratégiques* (The Bradwell Press, Oxford 2007).

²⁴ See in particular: the references to right to life, the supremacy of international conventions, the principle of the separation of powers, the principle of parity, of amazighity (i.e., Berber identity), the introduction of the separation of spiritual and earthly powers, checks and balances, or the exception of unconstitutionality.

A. The Distribution of Power

The idea of the separation of powers, vociferously demanded by the youth movement and a recurring leitmotif in the complaints of political parties and civil society, penetrates the new constitutional provision. The new powers (the establishment of the government as the executive power and the emergence of a judicial power in the place of and instead of the former judicial authority) provide greater autonomy and see their powers affirmed. Thus, in order that “power might check power”, control and evaluation mechanisms are established and made easier to access, notably by revising the quorums downward.²⁵ The opposition is given real status, an entire chapter is devoted to good governance and accountability, a plethora of guidance on regulation, good governance, and human rights, all giving body to the architecture of the new Basic Law.

In the same vein, the idea of separation mirrors the idea of delegation and of transfer of powers. Thus, fortresses once thought impenetrable, such as the Council of Ministers or the Supreme Council of the Judiciary are today no longer sacrosanct, the head of government being able to head the Council of Ministers as well as the new Supreme Security Council.²⁶ Moreover, although the king retains the presidency of the Supreme Council of the Judicial Power, he from now on delegates the vice presidency to the first president of the Court of Appeal.

Furthermore, although legislation becomes exclusively parliament’s domain, the judicial power gains autonomy, in particular by means of the eviction of the minister of justice from the vice presidency of the Supreme Council of the Judicial Power.

In addition, with the exception of organic laws and laws on sensitive matters such as those relating to amnesty or to the military domain, all other draft laws and decrees are a matter for the Council of Government exclusively, which, it must be emphasized, initiates the conducting of the general policy of the state.

Still further in the direction of the separation of powers and the desire to move closer to the canons of the parliamentary monarchy, the king withdraws from part of the legislative process; furthermore, the new constitution does away with the legislative referendum and restricts the right of replacement to cases of dissolution or of recourse to the state of exception.

From then on, the idea will emerge powerfully that the two foundation stones of royal legitimacy, namely, the generation of religious meaning and the power of appointment, will now be shared; this through new management of religious power with the institutionalization of the Superior Council of the *‘Ulamā’* and the new organization of power of appointment largely subject to countersignature.

To consolidate the choice of democratization, from the sharing of power and checks and balances, many new principles will be set down in its articles and paragraphs. The constitutional temple is in effect opening up to such classic and solid principles as the separation of powers, but also to new principles such as that of subsidiarity, administrative freedom, or parity. Without claiming the list to be exhaustive, we can cite consecration of the principles of modernity, openness, tolerance, participation, pluralism, transparency, dignity, nondiscrimination, the supremacy of international conventions, responsibility, accountability, the publishing of accounts, solidarity, or the moralization of public life. New words have also

²⁵ From a majority to one-third for commissions of enquiry, from a quarter to one-fifth or forty members to appeal to the Constitutional Court, from a quarter to one-fifth to file a motion of censure.

²⁶ Art. 54 of the Constitution promulgated by *Zahīr* of July 29, 2011.

entered the language of the constitution, such as the society and the people, which today replace the conventional references to nation, kingdom, or the state.

B. The Promotion of Positivism

One of the other great leaps forward of the new constitution is without doubt its anchoring of normativism and positivism. “The Constitution, the whole Constitution, and nothing but the Constitution” seems to have been an approach favored by the constituent, although, paradoxically or concordantly, it must be said that there was a overloading of religion and identity before the final draft.

The source of the law remains, under Art. 6 of the new constitution, “[. . .] the supreme expression of the will of the nation” and not the Shari‘ah, the *fiqh*, or Islam as was the case in many constitution of Arab states and as it has become in the Middle East and North Africa (MENA) region, subject to the conflicting turmoils of the Arab Spring and Islamic independence.

Among the allegiances of positivism, it is worth noting the devotion to the principle of the superiority of international conventions—although we will have to nuance the progress made in that regard below—the withdrawal of the sanctity of the king, which is replaced by respect and inviolability, gender equality in terms of civil rights (also to be nuanced below), justice handed down in the name of the king and in accordance with the law, the universality and indivisibility of human rights, the principle of nondiscrimination on grounds of religious belief, the submission of all public authorities to the law, the notion of the hierarchy of norms, the principles of constitutionality, the principle of the primacy of law, and justice handed down on the sole basis of the law.

C. Reconciliations

From the very preamble, and further on in the two first chapters, the 2011 Constitution attempts, by means of new references and new rights, to “make peace” with its past and its history by recognizing the various tributaries of its long repressed identity, such as the Amazigh, Hebrew, Hassani, or Dārijah, but it also decides to confer new rights on the various elements of its “self”, to all the “categories”, including young people, Moroccan residents abroad, women, mothers, disabled people, and foreigners.

Although at this level it is right to question the attitude of the normative actors or entrepreneurs because, indeed, the organic law relating to the Chamber of Representatives²⁷ has rather diluted the constitutional promises through its particular interpretation of the principle of parity,²⁸ so that the national list formerly reserved for women had to include men under 40 years of age, and the right to vote of Moroccans living abroad was transformed under the electoral debates into a vote by proxy.²⁹ This kind of “implementation” of the

²⁷ *Zahīr* No. 1-11-165 of October 14, 2011, promulgating Organic Law No. 27-11 relating to the Chamber of Representatives, Official Bulletin No. 5992 of November 3, 2011, 2346.

²⁸ Nadia Bernoussi, “Pourquoi tant de tergiversations autour de la place politique des femmes?” (2001) *L’Economiste*.

²⁹ *Zahīr* No. 1-11-165 of October 14, 2011, promulgating Organic Law No. 27-11 relating to the Chamber of Representatives, Official Bulletin No. 5992, November 3, 2011, 2346.

proclaimed rights creates cause for concern as to the fate that might befall the 19 organic laws provided for by the constitution.³⁰

D. The Deliberative Imperative

In accordance with the principles of the Frankfurt school,³¹ which say that states based on the rule of law rest on at least two pillars, namely, the virtue of deliberation and procedural democracy, the new constitution undertakes to open up spaces for deliberation and establish procedures for participation. This is for example the purpose of universal direct suffrage, the councils of the regions and of the communes being elected in that way; civil society, through nongovernmental organizations (NGOs), acquires a greater place in the constitution, a result of its involvement in the development of the constitution—the Advisory Committee for Revision of the Constitution devoted three-quarters of the hearing to NGOs; the role of political parties is consolidated; election monitoring is regulated; and participatory democracy strengthened by councils on regulation, good governance, and human rights. Moreover, procedural democracy is strengthened through the establishment of new mechanisms such as the right to petition at regional and national levels, initiation of legislation, and the exception of unconstitutionality.

Although the new constitution establishes a large number of councils on regulation, good governance, and human rights, it should not be forgotten in this regard that there was a strong need in this area. In fact, the majority of authorities that were heard wanted to have a place in the constitution, and it is therefore no wonder that there is such a plethora. Are we seeing an overdetermination of the law where *al-kalmah*³² would have sufficed, or are we seeing a crisis in or bankruptcy of the traditional authorities for aggregation of demands and the redistribution of norms and policies, i.e., the parliament and the government? Certainly freedoms benefit from being protected by several authorities and rights benefit from having several prosecutors. But shouldn't we also define the legal nature of such councils; will they be the consultative or decision-making bodies, appointed or elected bodies, and above all accountable to which authorities? Authorities' independent from whom?

E. References to Religion and Identity

Sixteen references to identity compared to four in 1996, including the defining principles or *thawābit* which have a key position in the new Basic Law. The material constitution floods the "legal" constitution, revealing the weight of the actual relationship between the political powers. We are within our rights to question this proliferation of religious references, especially given that the initial draft appeared to augur for a timid but gravid secular orientation.³³ That said, we note with interest the provisions that for the first time characterize

³⁰ Art. 86 of the new constitution provides that "the draft organic laws provided for under this Constitution must have been submitted for approval by Parliament within a timeframe not longer than the duration of the first legislature following the promulgation of said Constitution."

³¹ See Catherine Audard and Rainer Rochlitz (trs), Jürgen Habermas and John Rawls, *Débat sur la justice politique* (Les Éditions du Cerf, Paris 1997).

³² For Rahma Bourquia, the *al-ma'qūl*, *al-nīyah*, *al-kalmah* and *al-ḥaqq* still seem to be the basis for social relationships and negotiation. See Rahman Bourquia, "Les valeurs. Changements et perspectives" in *Rapport sur le développement humain au Maroc* (2006) 67.

³³ Division of the former Art. 19 of the constitution, or the separation of the "two worlds."

“Moroccan” Islam, as open, tolerant, and moderate. The religious emphasis is visible in the references to values, institutions, and norms.

On values, the religious references focus on, among other things, the federative defining principles, cultural values, the immutable national identity, education on the importance of Moroccan identity and the immutable national defining principles, and the identity attachment of Moroccans resident abroad.

In terms of the institutions, where the constituent power identified a religious sensitivity, it tended to hold responsible and involve the ‘*Ulamā*’, which is how the Regency Council, the Constitutional Court, and the Superior Council of the Judicial Power came to have a representative of the Superior Council of ‘*Ulamā*’ among their members.

As for the norms, it must be said that the *fatwā* is institutionalized and that as such the king can demand a religious consultation with the Superior Council of ‘*Ulamā*’. It is worth mentioning in this regard that although legally the claimant has the option of overriding the opinion thus requested, morally it is difficult not to take it into account. Consequently, although the source of the law legally remains the will of the nation, the nation may draw as its source on natural law and thus be inspired by a religious interpretation given by the *fatwā*. Consequently, the law does not always have in all domains a strictly civil and secular appearance and basis; it may be a civil law that is in essence and in inspiration, religious.

The constitutional jurisdiction, which shelters an ‘*ālim*’ within it, just like the Superior Council of the Judicial Power, will therefore have to take account of this immanent and transcendental fact, in particular in terms of the principles of the superiority of international conventions and gender equality in civil matters, given that the constitution only sets down such principles in the framework of the laws of the kingdom, the immutable defining principles of the nation, i.e., only if they are not contrary to Islam.³⁴

III. ENGINEERING THE MECHANO-INSTITUTIONAL SPACE

In this new atmosphere conducive to the consecration of the state based on the rule of law, constitutional justice will feature prominently. It is reasonable to bet on a fertile jurisprudence in so far as the constitutive elements of a jurisprudential block are present, namely a fertile framework, a “continental shelf” rich in rights and freedoms, a rewritten statute, some added competencies, and a procedure including the individual.

A. A Fertile Framework

First of all, it is worth emphasizing that one of the key innovations of the 2011 Constitution lies in the legal status conferred on the preamble. An indication of this kind would have the merit of closing definitively the Franco-French debates on the legal nature of the preamble. The preamble unambiguously forms part of the “block of constitutionality”, which is all the more relevant as it contains relevant provisions such as the principle of nondiscrimination and that of the superiority of international conventions, which is not insignificant, whether on the question of the equality of men and women or other kinds of discrimination.

Next, the new Basic Law consecrates supra-constitutionality³⁵ by setting material limits on the constituent power. Thus any constitutional revision relating to the monarchy, Islam, democracy, or the achievements accrued in terms of rights and freedoms, is prohibited. Henceforth, the material constitution is thus preserved, in conformity with the royal

³⁴ Yadh Ben Achour refers in this regard to the privilege of the executive.

³⁵ Art. 175 of the 2011 Constitution.

speech of March 9, 2011, which recalled the fundamental basis of the regime, or eternity clauses, namely, Islam and the freedom of worship, the commandship of the faithful, the monarchy, territorial integrity, the unity of the state, and, last, democracy. In this speech, such provisions were presented as stemming from the non-negotiable.

One might ask here whether democracy has been evoked as an immutable value on a par with Islam and the commandship of the faithful in order to recall that the two extremes of the arc are not incompatible, and can be reconciled. Has democracy thus become the new segment of the “historic compromise” that must be built?

After all, when a constitution reserves a privileged place for human rights, conferring them and guaranteeing them, one might say that it is joining the line of modern, contemporary constitutions that respect the principles of the state based on the rule of law. That is the case with this new constitution, which marks a significant step forward in terms of human rights, both quantitatively and qualitatively.

In terms of volume, one-third of the constitution addresses the individual, the constitution is “human rightist”, although one might also say that it is internationalist in the sense that the provisions relating to international law are significant compared to the previous constitution. Chapter II of the new constitution—specially dedicated to the fundamental rights and freedoms—thus encompasses 22 articles, to which must be added the content of the preamble, the rights of defendants set out in the chapter on justice, and the rights relating to governance.

In terms of the human rights content, this in accordance with the duality promoted by Georges Burdeau, concerns the human as citizen and the contextualized human being, civil rights (right to life, prohibition of torture, the right to own property, freedom of belief), political rights (the right to vote and stand for election), the economic, social, and cultural rights (linguistic pluralism, the right to education, to health), the rights of defendants (the presumption of innocence and the right to a fair trial), gender (the principle of nondiscrimination, equality in civil rights, the principle of parity, affirmative action measures in electoral matters, the authority for equality and nondiscrimination, proportional representation in the Superior Council of the Judicial Power), the categories (vulnerable populations, disabled people, Moroccans living abroad, young people, family), and rights relating to the ethicalization of public life (principles of equality, accountability, neutrality, and transparency).

In terms of the fundamental rights content, if it is permissible, to prioritize it would be tempting to assert or confirm that two of the major achievements seem to be the adoption of Amazigh as an official language and the recognition of women’s rights; however, we must still be cautious in terms of the content of the organic laws still to come and in terms of the multiple interpretations that risk neutralizing that initial promise. We must also recall the gravid influence of the recommendations of the IER, which is no longer considered as merely an important moment in history, but as a courageous transitional justice, out of date and isolated, but a sort of manifestation of dignity that as a result will have repercussions and resonance for the writing of the constitution.

The gender perspective, although not declared, and the new place given to women, is one of the strong points of the constitutional reform. It is a matter of shaping, in a new normative framework, the right eradication or prevention measures in the fight against violence against women—economic, political, psychological, or physical violence. It is good to recall that although the legal and political status of the Moroccan woman has certainly improved over the last two decades, equality of the sexes is still in the realms of “the unreachable star”.

It is helpful to recall that alongside the provisions specifically dedicated to women, the fundamental rights and the mechanisms for guaranteeing such rights, as a whole, address women too and constitute universal achievements. Indeed, the constitution addresses “l’Homme” with a capital “H”—i.e., mankind, rather than man—and the citizenship in its

indivisibility; the principles of universality and indivisibility of human rights being taken into account.

As for the protection of rights, this will fall within the competence of the king, the authorities for the promotion and protection of human rights, the ordinary and constitutional judges, and new mechanisms for the protection of human rights, notably the opening up to the individual of the right of referral when the law applicable to the litigation violates his or her fundamental rights as set down in the constitution.

That framework ought to be sufficient to stimulate constitutional justice; how well it performs will therefore depend on the activism of the individuals affected.

B. A New Statute

According to Hans Kelsen, "it is of the greatest importance in the composition of the constitutional jurisdiction to accord adequate place to professional legal experts".³⁶ That precaution was rigorously taken into account by the constituent authority. Kelsen implies in this regard that adequate space should be made for legal experts, but not for them exclusively. The Moroccan constituent understood his message perfectly, the future constitutional judges henceforth being required to have confirmed legal competency but being able to originate from three different areas, namely, the judiciary, academia, and the administration. As a result, although legal expertise is required, the necessary qualifications are more flexible except as concerns the liberal professions.

Faced with the unavoidable "political" criticism that no constitutional jurisdiction can escape, the legal minds sought to counterbalance this by banking on the requirement for technical skills, by "legalifying" the body through judicial appointments, balancing out the political representation by means of the requiring a qualified majority vote so that the judges were appointed by consensus, and by having the nominations of the various authorities be disclosed.

It is worth recalling that in 1962 and 1970, the constitutions and the organic laws relating to the Constitutional Chamber required legal qualifications. In fact the Constitutional Chamber had to include a professor of law and a member of the Administrative Chamber of the Supreme Court.³⁷ This requirement was abandoned in subsequent basic laws.

On the basis of what was asked for by the various political actors that were heard, the constituent power decided to make the body more ethical, to counter clientelism, to make the institution more legal in nature, and to strengthen its legitimacy by requiring legal qualifications and ethical and technical criteria widespread in comparative law. Election, qualification, and ethics have been the credo of the constituent authority.

First of all, the election of six members by the parliament by a two-thirds majority³⁸ replaces the appointment by the presidents of the chambers following consultation with groups. Then, legal qualifications are required in addition to 15 years experience. Lastly, ethical criteria, including impartiality and probity must be met.

Moreover, although the liberal professions are explicitly excluded,³⁹ the *‘ālim* makes its appearance in the Kelsenist structure no doubt so as to be present in the event that they

³⁶ Hans Kelsen, "The Jurisdictional guarantee of the Constitution" (1928) *La Revue du droit public* 227.

³⁷ First Art. of *Zāhir* No. 1-63-137 of May 16, 1963, containing organic law relating to the Constitutional Chamber of the Supreme Court. It is worth mentioning that the same requirements can be found in the "fugace" Constitution of 1970. See Art. 94 of the Constitution promulgated by *Zāhir* no. 1-70-177, of July 31, 1970.

³⁸ Art. 130 of the Constitution promulgated by *Zāhir* on July 29, 2011.

³⁹ Is this because of the problem of lawyers and constitutional judges? Do we owe this new condition to the memory of former members of the council who came from the liberal world? A rigorous concept of the

need to check the compatibility of a law with Islam. Official channels recall that the previous constitutional jurisdictions always included a member from the world of the *‘ulamā’*.

It is important to note that the legal and ethical conditions apply equally to all the judges of the Constitutional Court, regardless of the source of their appointment.⁴⁰ That means that today there is a general related competency.

C. New Competencies

The new constitution does not really innovate in this respect, with the Constitutional Court retaining its previous competencies while expanding out to new checks on the constitutionality of treaties. There are grounds to question whether this constitutes real progress or whether it is not simply a case of setting down in law a state of affairs that already exists.

In reality, checks on the constitutionality of treaties could be made by means of checking the law adopting the treaty, the check on constitutionality that is conducted on the law therefore “covering” the check on the treaty itself. If such a check provided for by the instruments has never functioned, this might easily be explained by the fact that the check on the simplest ordinary law was not implemented.

What is new, however, and if we believe the letter and the spirit of the constituent that from now on will require a significant number of treaties⁴¹ to pass compulsorily through parliament, is the examination of treaties that do not pass through parliament. This new provision makes it possible to monitor the constitutionality of the convention as a whole.

It is worth recalling that although this is a control effected a priori, open to the various authorities of application (the king, the head of government, the presidents of the chambers, one-fifth of the Chamber of Representatives, or 40 members of the Chamber of Advisors) and liable to generate a revision of the constitution in the event that the treaty and the Basic law are in conflict.

New grounds for deposition are constitutionalized in the section on the ethicalization of parliamentary life. In fact, elected members who switch political allegiances during their mandate will lose that mandate; it will be for the Constitutional Court to confirm the “violation” and declare the seat vacant, with the court playing a strictly “declaratory” role here, of recording a new situation.

The control on the redistribution of competencies between the center and the periphery, not provided for under the constitution, was curiously read out in the televised restitution of the revision of the constitution. It is legitimate to question the relevance of such a declaration when this competence was not included in the initial version. What happened in the meantime? This kind of check may have been legitimate and justified if the redistribution of competencies had been written into the constitution, but for the moment and despite the references to administrative freedom and the principle of subsidiarity, the promised regionalization remains closer to the French model than the Spanish, where the constitutional tribunal plays an important role.

We must also point out a new consultative capacity, namely, the advance consultation of the Constitutional Court in the application of the simplified constitutional reform, a procedural check. The jurisdiction is called upon in this regard in a procedural check that

incompatibility rule? All possible reasons for prompting the constituent to refocus the appointments in terms of the legal profile.

⁴⁰ In comparative law, it is common practice to exercise stricter control over nominations originating from the executive, with those originating from the legislature being less “monitored.”

⁴¹ Art. 55, second paragraph of the constitution.

could foretell a substantive control at the time of subsequent revisions. In this sense, the references to supra-constitutionality invite the Constitutional Court to oppose a rejection of any revision which would affect the untouchable, higher provisions. Morocco is thus moving away from the French position⁴² and, through this indication and prohibition, is joining those states that dare to check the constitutionality of basic laws.

D. A New Procedure

The level of the quorum to petition a constitutional jurisdiction remains a pertinent democratic indicator—raised when the objective is to complicate and neutralize its use, lowered if on the other hand the aim is to protect the rights of the opposition and minorities, somewhere in the middle if one wants to avoid its use as a delaying tactic. The Germans have opted for a rational one-third, which has the advantage of stabilizing the legislative process but has the significant inconvenience of excluding small groupings such as the greens or the communists. Lebanon allows applications from just 10 elected representatives, France—60, Spain—50; in 1992, Morocco had opted for one-quarter, which amounted to 82 elected representatives for the Chamber of Representatives and 68 for the Chamber of Advisors.

The new constitution lowered the quorum to 40 for the Chamber of Advisors and one-fifth for the Chamber of Representatives. At the time that the constitution was being drafted, and given the numbers in the outgoing Chamber of Representatives, namely 325, that represented 65 elected representatives. This figure corresponded to a good compromise between the 82 that had been needed previously and the 33 that had been called for by some political parties and NGOs. However, in the final weighing up, the numbers of the Chamber of Representatives was revised upward to 395, which to some extent neutralized that initial progress. One-fifth of the Chamber of Representatives today equates to 79 elected representatives needed to appeal, compared to 82 before. That is only 3 fewer elected representatives! What progress!

With this step back, there are grounds for wondering how these numbers were arrived at. In fact, why provide for a proportion for the Chamber of Representatives (one-fifth) but a fixed number for the Chamber of Advisors (40)? Perhaps because the number of advisors in the Chamber of Advisors had already been set (between 90 and 120)—but if that number had been fixed, why had they not also set a specific number for the Chamber of Representatives, which would have had the advantage of being “fair” in the perception of the composition of the two elected institutions and the great merit of obtaining a number that was fixed rather than adjustable.

In fact, for the Chamber of Representatives, we are only a few elected members from the status quo from 1996 and at 40 advisors in the other chamber. This situation should lend real vitality to its use by the upper chamber, a little like the French Senate.

Kelsen's aim was to protect the rights of the minority against a potentially oppressive majority, while at the same time avoiding unfounded or fantastical applications. It appeared to be necessary and fundamentally democratic to lower the quorum in order to invigorate

⁴² In France, since the decision of the Constitutional Council no. 92-312 DC of September 2, 1992, relating to the Treaty on the European Union, the question has been addressed in the sense that the idea of supra-constitutionality has become unacceptable and in this regard, “the existence of supraconstitutional norms would be contrary to the principle of sovereignty of the constituent power, with this being unlimited”. See Philippe Ardant and Bertrand Mathieu, *Droit constitutionnel et institutions politiques* (Librairie générale de droit et de jurisprudence, Paris 2009) 84.

applications, which up until now have required a coalition of several political parties in order to go ahead.⁴³

The option of the exception of unconstitutionality, i.e., the right of petition conferred on the individual remains the great achievement of the constituent power in terms of the part devoted to the Constitutional Court.

Recommendation of the IER, called for by the doctrine, by a dozen political parties and a sizeable section of civil society, forms part of the universally recognized democratic standards and protects not the minority or the opposition, but the individual, against any potential complicity between the majority and the opposition.

However, the constituent power did not opt for direct individual application to the Constitutional Court along the German model, but preferred for reasons of incrementalism, but also no doubt for purely practical reasons, to annul a law contrary to the fundamental rights enshrined in the constitution, on referral by the ordinary courts to the Court of Appeal, and then to the Constitutional Court, the law thus finding itself, “accidentally” damaged,⁴⁴ in an incidental manner, the Spanish and Italian models having been decisive in this respect.

Any individual, whether a national or a foreigner, a physical person or a legal entity, and in this sense, the organic law relating to the exception of unconstitutionality, “priority issue of [Moroccan] constitutionality”, must specify the modalities of the appeal, the delays provided for, the routes for referral to the Court of Appeal, the conditions for being able to “present” the case to the Constitutional Court as well as the effects of the annulment.

It is important to note the change in the designation of the new constitutional jurisdiction, which has become a court as a result of its new role as judge no longer of a purely abstract conflict of a law with the constitution, of judging not a law but the actual application of the law. We can expect two consequences of this change, said to create the “living law”, and of the individual’s right to appeal: on the one hand, the “democratization” of constitutional law, which will no longer address only the rights of the state but also matters as “ordinary” as a law on rent or on income tax; and on the other hand, a dialogue, or in the worst case scenario a war, between judges, if the Court of Appeal decides not to refer a matter to the Constitutional Court, judging it without foundation.

E. The Interpretations

Two interpretations are offered of the principle of equality, “torn” between universality and specificity.

Either, we opt for a positive attitude and define the major achievements: the principle of nondiscrimination, consecration of the principle of equality, the commitment of the state to take measures to render effective the principle of equality, the representation of women, affirmative action measures, the fixed nature of the human rights achievements, the evocation of a tolerant, open and moderate Islam, the authority of parity written into the article on the equality of the sexes, democratic choice or pluralism.

Or, we remain in a state of cautious expectation and adopt a wait-and-see attitude. In this regard, we must consider some provisions that appear to be liberal but that carry within them the seeds of their own potential destruction. The text moves forward, but at the same

⁴³ By limiting the risk of paralysis through the fact that the Constitutional Court cannot function except with the appointed members. See Art. 130 (2) of the 2011 Constitution.

⁴⁴ According to the magistral reference of Alexis de Tocqueville, Louis Favoreu (n 14) 6.

time takes precautions in case an appeal is made; the judge could always cling to “the privilege of Islam”.

Equality of the sexes in accordance with the defining principles of the nation, and in conformity with the constitution and the laws, the superiority of international conventions in conformity with the federative defining principles of the nation and the laws, the authority in charge of parity is embedded in all the forms of discrimination. But what are those defining principles exactly?

The first article of the new constitution lists “[. . .] moderate Islamic religion, national unity with multiple tributaries, the constitutional monarchy and democratic choice”.

How will judges interpret “moderate” Islamic religion? How will they read “democratic choice”? Will judges take a progressive approach or a culturalist one?

For example, regarding the Code of the Family and Inheritance, it is worth wondering about the position of judges in the event that the exception of unconstitutionality is raised by one of the parties to a trial, knowing that at the time when the constitution was drafted, the reservations to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴⁵ had been withdrawn. The judges’ attitude to this might vary—one interpretation might be that as the reservations had been withdrawn, one could therefore come into line with international law and human rights, but another interpretation might focus on the fact that Art. 19 explicitly and directly refers to the legislation in force and to the immutable defining principles of the nation. In short, in the light of ambiguous, even opposing provisions, when faced with a clash of rights, it will be down to the judge to undertake what Georges Vedel calls “a weighing up”, a balance, an interpretation of the texts, either in favor of universalism, as seems to be called for by the constitution and the reference to open and moderate Islam, or toward conservatism, as permitted by the laws still in force. However, is it worth recalling that the preamble plays a not insignificant “joker” in favor of the spirit of justice, and that received no attenuation in the arbitration, namely, the principle of nondiscrimination, a provision which thus remains absolute.

The same goes for the question of the superiority of international conventions. A claimant can thus contend that the law on inheritance is contrary to CEDAW, and to the International Pact on Civil and Political Rights. The judge may, by means of checking the conventionality of laws, break with the law on inheritance by basing his or her judgment on the superiority of international conventions and on the interpretation of an open and moderate Islam and the principle of nondiscrimination. Another judge may also break the international convention based on the constitution, which does not evoke the superiority except in the context of the defining principles of the nation and of laws.

Until now, faced with the silence of the instruments, the judge hesitated; now, judges from both camps can justify their argumentation and refine their justification. The ball is in society’s court, by the intermediary of the judges, and it is for judges to create jurisprudence, either by being “good” and listening to the cautious sentries, or by doing legal voluntary work and straining upward, conducting an *ijtihad* of enlightenment.

IV. CONCLUSION

Constitutional justice often holds a delicate position in states that are “legally” emerging—between reserve and weakness, “so as not to unnecessarily aggravate spaces under

⁴⁵ See partial withdrawal of the reservations formulated by the kingdom concerning the second paragraph of Arts. 9 and 16 of the Convention on the Elimination of all forms of Discrimination against Women, dated April 8, 2011. Cf. <http://treaties.un.org>.

democratic construction", or in the extreme, between exploitation and consolidation or legitimization of a process that is still authoritarian.

Some paths have been opened irrevocably, and it is for the various actors to step in with the necessary know-how. Attention must be paid to the disillusionment that could set in following the hopes engendered by the new constitution. That is why it is important to have counterbalances: the press, opposition political parties, and judges who will be able to remind the government of the promises made in the euphoria at the moment of foundation. Judges will have an essential role to play in this regard, in order that the new Family Code does not remain a dead letter, for example. On this question specifically, it is useful to rely on the combination of several efforts and precautions taken to create a harmony between the constitutional promises and their concrete and faithful implementation. A heavy responsibility will weigh on the shoulders of the judges, a challenge that will only be met if the groundwork is done in terms of their formation, their statute, their independence, and their propensity to *ijtihad*.

A constitution is like the rest in sheet music; it may be read in multiple ways, and the interpretation of the musician plays a fundamental role. That is why the action taken by the political actors, the elites, the political classes, citizens, and defendants will be so important. It must be remembered that the new constitution will be applied by the elites in place and with the culture of yesteryear. It remains to be seen by whom and how this new constitution will be inhabited. To read the first organic laws voted on after the constitutional revision, or to look on the recent decisions of the Constitutional Council,⁴⁶ we would be right to wonder about the degree of distance, and even attempts to pervert the initial clauses of the constitutional contract.

⁴⁶ Is the constitutional judge still the moralizer? Does the constitutional judge belong to a former jurisprudence addressing the same question and for which it has already be criticized? See Mohammed Amine Benabdallah, "Le Conseil constitutionnel, moralisateur?" (2007) 75 REMALD 133.

The Mauritanian Constitutional Court after the Military Coup of 2008

AHMED SALEM OULD BOUBOUTT*

I. INTRODUCTION

Military regimes have always been well known for establishing their own “law”,¹ substituting it—forcibly—for the legal system, democratic or otherwise, that had previously been in place. What is not so well known was for military regimes to allow two legal systems to coexist: a “chunk” of law arising from the previous legal system and a “chunk” arising from the new “legal” system, which in practice could result in a curious amalgam of an institutional framework established, in part, by democratic process and in part by a praetorian arrangement devoid of any democratic legitimacy.

It was this kind of “institutional Janus” that could be seen in Mauritania following the military coup of August 6, 2008, in which President Sidi Muḥammad Ūld Shaykh ‘Abdallāhi, who had been democratically elected to office on March 25, 2007, was deposed and replaced by a group of military leaders organized in the form of an executive body—the modestly named “High Council of State”—which was headed by General Muḥammad Ūld ‘Abd al-‘Azīz.² This High Council of State adopted the Constitutional Charter of August 13,

* An earlier version of this study was published in French in Jean-François Akandji-Kombé (ed), *L’Homme dans la Société Internationale: Mélanges en hommage au Professeur Paul Tavernier* (Bruylant/Larcier, Brussels 2013). The author thanks Professor Paul Tavernier, the Coordination Committee for the work, and les Editions Bruylant–Larcier for having allowed the publication of this extended version in English.

¹ On the question of coups and their relation with the rule of law, see among others: Christophe Boutin and Frédéric Rouvillois (eds), *Le coup d’État: recours à la force ou dernier mot du politique?* (Editions François-Xavier de Guibert, Paris 2007) 419.

² On this event, see among others: “Coup d’État en Mauritanie,” *Thompson Reuters* (Paris/Stuttgart August 6, 2008), http://www.lemonde.fr/afrique/article/2008/08/06/coup-d-etat-militaire-en-mauritanie_1080856_3212.html, accessed August 27, 2015. This was the sixth coup d’état in the country, which

2008, under the terms of which all the other institutions of the previous democratic regime that had been established by the Republican Constitution of July 20, 1991—notably the bicameral parliament, the Constitutional Council, the Judicial Authority, and, under new chairmanship, the Economic and Social Council³—were evidently permitted to continue to exist alongside this new body.

It can certainly be argued—and some political leaders opposed to the coup have not failed to make this point—that a coup d'état is by definition so contrary to the rule of law that it was completely incongruous to imagine that such things as the democratic and praetorian institutions were absolutely irreconcilable. It was also argued that under the 1991 Constitution, the office of the president was so critical that calling the presidency into question cast into doubt the entire judicial and institutional system that arose from that constitution. Although this reasoning is entirely logical, it might also be argued that even though an armed coup could suppress democratic institutions it could not strip them of their legitimacy. In truth, it has to be said that this hybrid system that unified the antitheses nonetheless functioned at least in terms of the interaction between two major institutional elements: the praetorian executive committee arising from the military power (High Council of State) and the parliament that had been established democratically under the previous political regime. The finishing touch to this surreal arrangement was, almost anachronistically, the retention of a constitutional review body which retained all its competencies.⁴

There is reason to consider this new institutional phenomenon in more detail, especially in view of the re-emergence of military regimes, particularly in Africa, onto the political stage—something that had been thought to be a thing of the past.⁵ Meanwhile, in the paragraphs to follow we will examine and evaluate the approach taken by the Mauritanian Constitutional Council during the time of the military regime, which lasted from August 6, 2008, to the presidential elections of July 18, 2009. This is worthwhile because paradoxically the Constitutional Council, which was established in 1992, was more active in those 11 months—making several important decisions—than it had been in the previous 16 years!⁶ Moreover, the Constitutional Council had a role to play in the process of overcoming the crisis and restoring constitutional order—a process that was conceived and

has been independent since 1960. On the turbulent political history of Mauritania, see our studies: A. S. Ould Bouboutt, "L'évolution des institutions de la République Islamique de Mauritanie" (1990) 54 *Revue d'études du Monde Musulman et Méditerranéen* 130; A. S. Ould Bouboutt, "La construction de l'Etat de droit en Mauritanie.-Enjeux, stratégies, parcours" (1995) *Annuaire de l'Afrique du Nord* 301; see also: *Recueil juridique des droits de l'homme en Afrique 1998–2000* (vol. 1, Bruylant, Brussels 2002), and *Recueil juridique des droits de l'homme en Afrique 2000–2004* (vol. 2, Bruylant, Brussels 2006).

³ The same phenomenon could be seen, in our opinion, in Honduras, following the coup d'état of June 28, 2008, led by General Roberto Michelletti, who seized executive power and retained the Supreme Court and Congress.

⁴ Although the Mauritanian Constitutional Council also remained in place after the coup d'état of August 3, 2005, it was only as a consultative body and arbitrator of elections, to the exclusion of all other responsibilities (verification of constitutionality; verification of national mandates; regulation of normative powers).

⁵ Since the coup of August 6, 2008, in Mauritania, the military has taken power in Guinea-Conakry (December 23, 2008) and Niger (February 18, 2010), and was involved in regime changes in Guinea-Bissau (March 2, 2009) and Madagascar (March 17, 2009).

⁶ On the activity of the Constitutional Council before August 6, 2008, see the previous work: A. S. Ould Bouboutt, "Le développement de la justice constitutionnelle en Mauritanie" (1993) 9 *Annuaire International de Justice Constitutionnelle*; see also: A. S. Ould Bouboutt, "Mauritanie, Chronique de jurisprudence constitutionnelle" (1996) 12 *Annuaire International de Justice Constitutionnelle*.

laboriously implemented by national political actors under the guidance of the international community. This role was apparent in some aspects and less apparent in others and it ought to be appraised accurately.

This chronicle of jurisprudence is unusual in that it records the activity of an institution emblematic of the rule of law, the constitutional judge, when confronted with the challenges of a nondemocratic context. Implicitly, the chronicle will allow us to review, in addition to the jurisprudence, the evolution of the legal and institutional structure of the country during the period in question, through examination of the decisions of the Constitutional Council that concern the regulation of relations between the political actors (Part II), the constitutional arrangements for the interim head of state (Part III), and the supervision of the presidential elections (Part IV).

II. REGULATION OF RELATIONS BETWEEN THE POLITICAL ACTORS

A. The Disagreement between Government and Parliament in 2008

Although there is no room to examine the circumstances that led up to the 2008 coup in detail, it should be noted that the background to the conflict between President Muḥammad Ūld Shaykh ‘Abdallāhi and the main military leaders of the country was an open political disagreement between the government of the Prime Minister Yaḥyā Ūld Aḥmad Waghf and the parliamentarians, particularly in the National Assembly. In that disagreement, the prime minister had the support of a group of parties, in particular the ‘*Ādil* Party (headed by the prime minister himself), the Progressive People’s Alliance (APP) (headed by the president of the National Assembly, Messa’ūd Ūld Būlkhayr), as well as other groups.⁷ Opposing this block was the Assembly of Democratic Forces (RFD), which was the party of the leading figure in the democratic opposition, Aḥmad Ūld Dādāh, along with several other parties⁸ and a number of parliamentarians of the former presidential majority who had broken rank with the ‘*Ādil* Party.

The parliamentary squabble that was the source of—and ignited—the conflict between the President of the Republic and the “generals” took the form of disagreements about the scheduling of extraordinary sessions of parliament, the criminal responsibility of the head of state, the motion of censure, and other key aspects of constitutional law.⁹ As is known, this culminated in the coup d’état of August 6, 2008, which took place after the President of the Republic had in desperation resorted to dismissing the main military leaders. The parliamentary squabble then continued in another form, between the parliamentary majority that supported the new military power¹⁰ and the camp that rejected the coup d’état,

⁷ In particular the Union of Forces of Progress (UFP) Party headed by Mr. Muḥammad Ūld Mawlūd and Tawaṣṣul, the “Islamist” party of the Parliamentarian Muḥammad Jamīl Ūld Mansūr.

⁸ In particular the Union for Democracy and Progress (UDP) of Ms. Nāhah Mint Muknās; the Democratic Republican Party for Revival (PRDR) headed by Mr. Sīdī Muḥammad Ūld Muḥammad Wall; the Hātem Party of Mr. Šālīḥ Ūld Ḥananā; and the Party of Revival (PR) of Mr. Muṣṭafā Ūld ‘Abayd al-Raḥmān. These four leaders were all members of the National Assembly.

⁹ For more on these disagreements, see: Stephan Bolle, “Rectification et Constitution en Mauritanie,” <http://la-constitution-en-afrique.org/article-22571222.html>, accessed August 28, 2015.

¹⁰ This (new) parliamentary majority comprised the National Assembly, the political forces (listed above) opposed to the previous civilian government from before August 6, 2008, and many parties not represented in parliament, notably the Alliance for Justice and Democracy (AJD). It was more pronounced in

the National Front for the Defence of Democracy (FNDD),¹¹ led by the president of the National Assembly.

The president of the National Assembly, Messa'ūd Ūld Būlkhayr, decided to cease presiding over sessions of the chamber and told parliamentarians under his influence to abstain from participation in the work of the extraordinary session of parliament that had been convened by the military power, thus opting for a strategy of "guerrilla politics", contesting the military power on all fronts, domestic and international, in a particularly dynamic manner. To counter this new form of opposition, the "parliamentary majority" came up with the idea of changing the rules of the National Assembly in order to facilitate the dismissal of its president, and this is where the Constitutional Council came in.

B. Amendments of the Rules of Procedures of the National Assembly

The new version of the rules of procedure was submitted to the Constitutional Council by the first vice president of the Assembly, who was a member of the "parliamentary majority". Among other measures, the new version modified the procedure for election of the Assembly's president and members of its Bureau and amended the procedure for determining vacancies in the Bureau of the Assembly. On the first point, the new regulations confirmed the principle of election by show of hands, the method that had been provided for in such matters up until then; on the second point, it introduced new grounds for posts being deemed vacant, notably "treason" and the "misappropriation of public funds", with the desired objective of making it legally possible to dismiss the president of the National Assembly before expiration of the term of his mandate, which was set under Art. 53 of the constitution at five years.

The Council made its ruling in an initial Decision, No. 029/DC/2008 of December 2 and 3, 2008. With regard to the form of voting, the Council censured the provisions of Art. 12 on the grounds that voting by show of hands should not be used for appointment decisions; with regard to the amendments to Art. 17, it judged that its provisions covered situations that could be taken into consideration only in the light of a judicial decision *res judicata*. The Constitutional Council gave precise guidance as to how the provisions thus censured should be amended in order to bring them into conformity with the constitution.

The "majority" in the National Assembly accepted the ruling and resubmitted the modified regulations to the Constitutional Council. Under this new version, Art. 17 listed the causes for vacancy (decease, resignation, loss of parliamentary seat) but now added "any other cause of a nature to compromise the exercise of responsibilities or duties". In its Decision No. 001/DC/2009 of January 7, 2009, the Constitutional Council judged that the Assembly had not taken into account its guidance, as the proposed new version "would, by its general nature, allow the Bureau to consider any behavior by the president or members of the Bureau as grounds for deeming a post to be vacant". Consequently, it censured those provisions.

the Senate, where it included, among others, the president of the Senate, Bâ Mamadou known as M'baré, who would be subsequently named interim head of state.

¹¹ This Front comprised the *Ādil* Party, APP, UFP, and *Tawaṣṣul*, who supported the previous civilian government from before August 6, 2008. It also comprised other allied groups not represented in parliament like the National Union for Democratic Change (UNAD), the Party for Liberty, Equality and Justice (PLEJ), and the movements Avant-garde of Forces of Change and for Mauritania.

C. Comments on the Rules of Procedure—Decisions of the Constitutional Council

The Rules of Procedure of the National Assembly decisions of the Constitutional Council 2008 and 2009 clarified several important points of constitutional law.

Firstly, on a technical jurisdictional level these decisions demonstrate the application of what was dubbed by Doyen Favoreu the “double check” theory particularly well. It allows the Constitutional Council to verify in the case of the regulations of assemblies and organic laws that the guidance it has given in its first decision have been faithfully taken into account in the second. This was certainly not the first time that the Mauritanian Constitutional Judge undertook this kind of (double) control, to which its previous decisions attest. In this case, however, the control eventually led to a declaration of unconstitutionality—and on this basis we can conclude that this was in fact the first decision of active censure taken by the Council since its establishment in 1992.¹²

These decisions are also important on their merits because they definitively affirm the use of a secret ballot for appointment decisions which, breaking with the jurisprudence in Constitutional Council Decision No. 002/DC June 17 and 22, 1992, Regulations of the National Assembly, was henceforth extended to the procedure for selecting the Assembly’s president and the members of its Bureau.¹³ These decisions also safeguarded the mandate of the parliamentarians, by protecting them from the whims and injustices of the political majority—which, it must be emphasized, is the key objective of having jurisdictional control over the regulations of parliamentary assemblies. Moreover, the Constitutional Council seems to have wanted to reaffirm—without doubt in response to the constitutional controversies that had led up to and accompanied the events of August 6, 2008—the principle that it had put forward in its Decision No. 001/DC of the June 15, 16 and 20, 1992, Regulations of the Senate, according to which the vote on a motion of censure as provided for in Art. 75 of the constitution must be conducted by secret ballot.

One might wonder, however, whether or not in this case the Constitutional Council had produced an “incorporeal” jurisprudence that neither alluded to nor took due account of the special context of the time, the coup d’état, or the particular reasons for the president of the Assembly’s behavior under the circumstances. Indeed, in ruling on the admissibility of the submission to the Council, the Council had accepted to receive a letter addressed to it by the vice president of the Assembly, supported by reference to Art. 8 of Ordinance No. 92-003 of February 18, 1992, which stipulates that “the vice-presidents shall stand in for the president in the event of absence”. However, in this case the approach taken by the president of the Assembly was not at all comparable to a straightforward “absence”. One can only conclude that the unusual circumstances did not feature at all in the considerations of the Constitutional Council in relation to this decision, because as we have seen, it did refer

¹² See, e.g.: Constitutional Council Decision, *Regulations of the Senate* 003/DC of July 4, 1992, and Constitutional Council Decision *Regulations of the National Assembly* 004/DC of July 4, 1992, both found in (1993) 9 *Annuaire International de Justice Constitutionnelle*; see also: (n 6): in these cases the Council had, following the first appraisal, pronounced certain provisions to be unconstitutional and issued guidance, before approving the (new) texts submitted after the second appraisal.

¹³ See, e.g.: Constitutional Council Decision *Regulations of the National Assembly* 004/DC of July 4, 1992 (1993) 9 *Annuaire International de Justice Constitutionnelle*; see also: (n 6). In this decision, the Constitutional Council considered that it was bound by the provisions of Ordinance No. 92-003 of February 18, 1992, in that regard, as it had the value of an organic law and the Council could not overturn existing laws.

to “any behavior by the president or member of the Bureau”. Nonetheless, in the final analysis this situation does offer a glimpse into the difficulty of applying constitutional texts of a democratic nature to the peculiar legal challenges arising from coups d’état. In any event, the Constitutional Council’s decision was felicitous because over and above its intrinsic legal value, it “saved” an institution of the Republic, in the context of a crisis in the rule of law.

These developments raise difficult questions concerning the different approach taken by the Constitutional Council toward the provisions of the 1992 Ordinance cited above: Indeed, it invoked Art. 8 of that ordinance—which is hierarchically superior to the regulations—in its interpretation of Art. 8 of these regulations which limit the extension of the vice presidents’ stand-in powers;¹⁴ but at the same time, it set aside Arts. 5 and 6 of the ordinance, which clearly state that the election of the president and Bureau members shall carried out be by show of hands—which it had found to be binding in its earlier decisions.¹⁵ Could this difference in approach be explained by saying that the organic law on the functioning of assemblies only applies to the regulations in so far as that organic law respects the constitution? Although the Constitutional Council clearly did not wish to depart from existing jurisprudence on this issue, to which it largely referred and which it was understood to be applying in this case, it must be acknowledged that this was the first instance of the Constitutional Council overturning the jurisprudence on the binding character of the ordinance.

III. THE CONSTITUTIONAL ARRANGEMENTS FOR THE INTERIM HEAD OF STATE

A. Plans for New Elections in 2009

In the face of active internal opposition to the coup and an intransigent “international community”, organized informally into an “International Contact Group on Mauritania”,¹⁶ which was calling for an immediate “return to constitutional order” in Mauritania, the military leaders in power decided—following the “General Assembly for Democracy”, a political forum unilaterally organized at their initiative in the January—to hold presidential elections on June 6, 2009. In the context of implementing this strategy for overcoming the crisis by means of elections—rejected by the opposition as a unilateral attempt at self-legitimization and by the international community as “inadequate” (declaration by the International Contact Group on Mauritania, Paris, February 20, 2009)—General Muḥammad Ūld ‘Abd al-‘Azīz decided to resign from his functions as head of state (in order to “bring the coup d’état to

¹⁴ This article of the regulations is drafted as follows: “The vice-presidents shall replace the president in the event of absence or in the event of impeachment in the order of the election. The functions of vice-president are limited to chairing sessions and representing the National Assembly in official ceremonies”, These restrictive provisions, applicable in this case, would not perhaps have admitted the regularity of a submission to the Constitutional Council by the vice president of the Assembly.

¹⁵ See the decision and references cited above (n 15).

¹⁶ This International Contact Group on Mauritania comprised the African Union, the European Union, the Organization of the United Nations, the International Organization of the Francophonie, the League of Arab States, and the Organization of the Islamic Conferences, well as some EU countries with embassies in Nouakchott (France, Spain, Germany) that were particularly active at the time, but also to a lesser degree the United States, China, Russia, Libya, and Senegal. With a few exceptions, these comprised the African members and the permanent members of the UN Security Council.

an end”) and from his military functions (in order for him to meet the requirements of the electoral code which declares “active military personnel” ineligible). In addition, the plan provided for the restructuring of the powers of the High Council of State, which would be transferred from the executive body to the body entrusted with defense and national security and, moreover, for the creation of a National Independent Electoral Commission (CENI) tasked with ensuring the transparency of the elections.

B. The Decision of the Constitutional Court on the Resignation of General Ūld ‘Abd al-‘Azīz

The resignation of General Ūld ‘Abd al-‘Azīz and the restructuring of the High Council of State took place on April 15, 2009; in a letter from the prime minister that same day the Constitutional Council was petitioned to “satisfy itself of the existence of the circumstances giving rise to a vacancy in the post of President of the Republic”.

In its decision, returned the very same day, the Constitutional Council referred to the prime minister’s request, to the constitution and—to the Constitutional Ordinance of August 13, 2008, that defined the powers of the High Council of State. It noted that under Art. 41 of the constitution “the Constitutional Council may be petitioned by the President of the Republic, the President of the National Assembly or the Prime Minister to confirm a vacancy in the post or impeachment of the President of the Republic”. It also recalled that Art. 40 of the constitution provided that “in the event of a vacancy or impeachment confirmed by the Constitutional Council, the President of the Senate shall act as interim President of the Republic in order to expedite current affairs.”

Reading these provisions in conjunction with those of the Constitutional Council’s Ordinance No. 001/2009 dated April 15, 2009, on restructuring of the High Council of State, the Council concluded that following the resignation of General Ūld ‘Abd al-‘Azīz, “it results from the facts that there is an effective vacancy in the highest post in the State, the post of President of the Republic”.

The Constitutional Council therefore considered that “the post of President of the Republic cannot tolerate a vacancy, even for an instant, given the serious repercussions that would ensue”, which, it emphasized, made the question a matter of urgency. Moreover it concluded “that the general conditions in the country since 6 August 2008 are of an exceptional nature which have to be approached with a great deal of wisdom and responsibility, in conformity with the well-known principle of Islamic Shari‘ah law, the sole source of law according to the preamble of the constitution, which provides for promoting benefits and avoiding harm, especially when it comes to promoting benefits and avoiding harm of a public nature”.¹⁷

C. Article 40 as an Alternative Solution?

On the political level this decision provoked a strong reaction, with President Ūld Shaykh ‘Abdallāhi contesting his impediment and also inspired the president of the National Assembly to write an emotive letter to the president of the Constitutional Council in which he implored it to reverse its decision.¹⁸ On the legal level, the decision became the subject of an exhaustive critique by Professor Muḥammad Maḥmūd Ūld Muḥammad Šāliḥ.¹⁹

¹⁷ Our emphasis.

¹⁸ Letter dated April 22, 2009. See the text of this letter in the newspaper *Biladi* (April 26, 2009).

¹⁹ Muḥammad Maḥmūd Ūld Muḥammad Šāliḥ, “Les deux Constitutions, A propos de la décision du Conseil constitutionnel du 15 avril 2009 sur la vacance du poste de Président de la République,” *Le Calame* (April

We will not therefore look in detail at this decision here, except to note that in this case the reference to Art. 40 of the constitution, which clearly did not take into account the highly complex situation created by the coup d'état, to which it alluded only by reference to its date (August 6, 2008), as well as to the praetorian ordinances that had established or restructured the powers of the High Council of State. Overall, the decision was unfortunate in that it created an amalgam which one might say resulted in a ludicrous situation. Moreover, it is worth noting on a normative level that by virtue of this decision the Constitutional Council gave full and absolute legal force to the preamble of the constitution; it is also worth emphasizing the unusual nature of the approach taken by the constitutional judge in resolving "positive" legal problems by appealing to the notions and principles of Islamic law, thus putting an end to the strict separation and autonomy of the two normative systems.²⁰ This raises questions about the identification of the principles of Islamic law at issue, their hierarchization, and the reconciliation of the two categories of norms. In this regard and on another level, one might fear that with the reference to a subtle theory of cost-benefit analysis, in its "Sharī'ah" version, the Mauritanian constitutional judge might have ventured onto the slippery ground of control of expediency.

Critics of the decision have noted that the Constitutional Council could have emphasized the unusual nature of the situation with regard to Art. 40 of the constitution and confirmed that the President of the Republic at the time, Sidī Muḥammad Ūld Shaykh 'Abdallāhi, was not capable of performing his duties for reasons that were known to all, thus sparing him an institutional blow. Under these circumstances and taking account of the "retirement" of General Ūld 'Abd al-'Azīz, who had been assuring the formal exercise—although not the essence—of the presidential powers, the Council could, by using similar reasoning to that used in relation to Art. 40 of the constitution, have confirmed the "provisional (and not definitive)" incapacity, in fact²¹ (and not in law), to carry out his duties of President Sidī Ūld Shaykh 'Abdallāhi and designated the president of the Senate as interim president under the circumstances, as he was next in line to the presidency.

This view reconciles the affirmation of the legitimacy of the elected president (and rejection of the coup d'état) with the need to ensure the continuity of the state. Although this view takes into account the reality of the situation, as the Constitutional Council did in its decision of April 15, 2009, it simultaneously prepares the ground for the restoration of the constitutional order. It could moreover have saved the Constitutional Council from having to take note of the resignation of President Ūld Shaykh 'Abdallāhi from a post which it had just declared to be "vacant", as it was subsequently obliged to do. As a result of the negotiations for a planned return to normal constitutional order in the context of the Dakar Agreement to overcome the crisis, President Ūld Shaykh 'Abdallāhi eventually consented to publicly announce his voluntary resignation from the presidency of the

21, 2009), available at <http://ufpweb.org/fr/spip.php?article2153>, accessed August 28, 2015. For the same approach, see the opinion of Professor Lo Gourmo Abdoul, www.cridem.org, accessed March 10, 2016.

²⁰ This "crossed" reference to two normative systems can be found again later in the Constitutional Council Decision *Law on the fight against terrorism* 001/2010/DC of March 3, 2010, in which the Constitutional Council handed down its first decision of censure of a submission from parliament.

²¹ It must be emphasized that the "impeachment in fact" is not an exact synonym of the expression "effective vacancy" used in this case by the Council.

Republic on June 26, 2009, and in the presence of the Constitutional Council in ceremonial formation. Taking note of this resignation in its Decision No. 06-2009 of June 27, 2009, the Constitutional Council had no other choice but to conclude—logically this time—that there was a vacancy “in the legal sense” in the post of President of the Republic and to appoint (once again) the president of the Senate as interim “with effect from the date of the resignation” [*sic*], on the basis of a new request by none other than the prime minister.²²

However, it must be said that, although the subsequent resignation of President Ūld Shaykh ‘Abdallāhi constitute a step toward the restoration of the constitutional order, the situation remained irregular in relation to the provisions of Art. 40 of the constitution, as the government in place had not been appointed by the resigning president.²³ In this regard, as the constitutional legal authority with responsibility for ensuring conformity to the constitution, the Council should have specified the legal consequences of its decision: Once the interim president was rightfully appointed, as was the case once the president had resigned,²⁴ the Constitution of July 20, 1991, would be restored as a text of democratic integrity. Therefore, and in application of the theory of a change of circumstances in law or in fact—a theory well known in international law but also in domestic law—instruments manifestly incompatible with the constitution ceased to be applicable for the future: in particular this applied to the two constitutional ordinances establishing and restructuring the powers of the High Council of State (in effect the interim president exercises all the powers of the President of the Republic, including those in the area of security and defense, with the exceptions provided for under Art. 41 of the constitution). This theory is also applicable to the instruments that appointed the government after August 6, 2008, as well as to the instruments that were adopted in the context of the election process, notably the texts naming the members of the CENI and the decree calling for an election on June 6, 2009. This would have allowed all other laws to remain in force, subject to, if applicable, modification by the competent authority as required by the stability of the legal order and the continuity of the state.²⁵

²² The awkward position the Constitutional Council found itself in can be seen in the references it included in the subsequent decision: Constitutional Council Decision, *Presidential elections* 004/2009/ of July 1, 2009. In this decision the council referred repeatedly to the decision of April 15, 2009 (no title specified) and Constitutional Council Decision *Relating to the vacancy in the post of the President of the Republic* of June 27, 2009. In the Constitutional Council Decision *Presidential elections* 005/2009/ of July 23, 2009, the Constitutional Council henceforth made reference only to this last decision.

²³ In fact, the government Ūld Aḥmad Wagħf II appointed by President Ūld Shaykh ‘Abdallāhi on July 16, 2008, was dissolved by the military in August 2008. On this point, this decision also notes, the difficulty of applying the constitutional norms required to manage a “normal” situation in situations born out of military regimes.

²⁴ It is worth noting that the result of this rather inventive regularization of the interim presidency was that a black Mauritanian—namely Mr. Ba Mamadū known as M’baré, president of the Senate—became Mauritanian head of state for the first time.

²⁵ On all these matters: Hamid Estur, “Peut-on bâtir une solution constitutionnelle et consensuelle sur le chantier d’une solution unilatérale? Réflexions sur les solutions de sortie de crise institutionnelle en Mauritanie au lendemain de l’intérim du Président Ba M’Baré” *Le Calame* (May 4, 2009). Almost all of the conclusions of this article were taken up, in one form or another (new government, new CENI, “reattachment of HCE to the Constitution,” new convocation of the electorate), by the Dakar Agreement on an exit to the crisis in Mauritania, which was signed subsequently.

IV. OVERSIGHT OF THE PRESIDENTIAL ELECTIONS TO OVERCOME THE CRISIS

A. The Dakar Framework Agreement

The presidential elections called for June 6, 2009, were overseen by the Constitutional Court. It received applications from candidates, announced the final list of candidates (namely, Muḥammad Ūld ‘Abd al-‘Aziz; Kān Ḥ. Bābā, vice president of the National Assembly; Ibrāhīmah M. Sarr, chairman of the Alliance for Justice and Democracy Party; and Sghayr Ūld M’bārek, former prime minister) and monitored the progress of the election campaign. In the meantime, in the face of a boycott of the election by the opposition candidates, the International Contact Group on Mauritania tasked President ‘Abdulay Wād of Senegal, following an unsuccessful first attempt by Colonel Mu‘ammar al-Qadhdhāfi, with the mission of mediating between the Mauritanian political factions in order to find a solution to the crisis by means of implementing a consensus process for restoring constitutional order.

Following difficult negotiations, on June 5, 2009, the three big political factions in Mauritania²⁶ signed the “Dakar Framework Agreement”, which provided among other measures for the appointment by President Sidi Muḥammad Ūld Shaykh ‘Abdallāhi of a national unity government mandated to organize presidential elections that would be open to all, the date for the first round of which was fixed, as July 18, 2009. The Dakar Agreement, alluding to the High Council of State, also provided for the “reattachment” of the institutions of defense and security to the constitution.²⁷ Moreover, the Agreement provided for President Sidi Muḥammad Ūld Shaykh ‘Abdallāhi, in a face-saving procedure, to “announce and formalize his voluntary decision concerning his mandate as President of the Republic” (i.e., his “voluntary” resignation), as well as “the taking into account of the effects of this decision in terms of the interim presidency of the Republic being assumed by the president of the Senate”.²⁸

As soon as the Dakar Agreement had been signed, the interim president issued a decree postponing the date of the election that had been scheduled for June 6, 2009, and announcing that electorate would vote later. Consequently, in a move that seemed to respond to the impatience of the camp supporting the military power with the delays already seen in the process of implementing this Agreement, the same authority adopted Decree No. 2009-083 of June 23, 2009, calling for an election of the President of the Republic on July 18, 2009. Such delays were linked to the complex protocollary adjustments necessitated by the resignation of President Sidi Ūld Shaykh ‘Abdallāhi which would not be completed before June 27. The decree ruled on the validity of applications that had been accepted for the elections originally scheduled for June 6, and addressed the question of the withdrawal of

²⁶ These three main factions are defined thus as follows in Article 4.1 of the Dakar Agreement: the “parliamentary majority” [at the time the Agreement was signed] supporting General Muḥammad Ūld ‘Abd al-‘Aziz—who had established the Party of Union for the Republic Party (UPR) following his resignation; the National Front for Defence of Democracy (FNDD); and the Assembly of Democratic Forces (RFD) of President Aḥmad Ūld Dādāh—which distinguished itself from this majority from January 2008 onward by rejecting the principle of the candidacy of military personnel in the planned presidential elections.

²⁷ Text of the Dakar Agreement in French, <http://www.cridem.org>, accessed March 10, 2016. This agreement was in fact agreed on June 2 in Dakar and signed June 5, 2009, in Nouakchott.

²⁸ As we have seen, this is in fact a question of an interim presidency being “renewed” (henceforth on a secure footing) for the president of the Senate, as he had been acting as interim since April 15: see our discussions on the matter, above.

candidates who had already been accepted; it provided that “the list of candidatures established by the Constitutional Council in its previous decision remain unchanged, with new candidates [coming] in addition to this list” and prohibited “claims against candidatures that have already been validated”.

B. The Decision of the Constitutional Court about Decree on Convocation of the Electorate

The Decree of June 23, 2009, which had not been submitted to the Council of Ministers of the Government of National Unity that had been established under the Dakar Agreement—for good reason²⁹—was referred to the Constitutional Council by the main leaders of the opposition.

In its Decision No. 005/2009 of June 24, 2009, the Constitutional Council declared the decree to be inapplicable, on grounds of unconstitutionality and violation of legal provisions, and ordered the communication of its decision to all the authorities concerned to ensure its strict application in conformity with the law. The Constitutional Court had arrived at this conclusion on the basis that the provisions of the Decree blatantly ignored the provisions of Ordinance No. 91-027 of October 7, 1991, implementing the organic law according to which “the Constitutional Council shall establish the definitive list of candidates and convey it to the Government”, noting that “legal statute established the supremacy of the law over regulations and thus of the provisions of the law over the decree”. According to the Council, these same provisions also ignored a general principle of law enshrined in modern constitutional law³⁰ and set down in the preamble of the 1991 Constitution, namely, the principle of equity and equality of opportunity between citizens. In effect, the Council explained, the principle of equality of citizens requires that candidates must compete on an equal basis, which presumes complete equality as regards the electoral list or any other aspect.

But the court did not stop there: It also emphasized that only the Constitutional Court is competent to determine who holds the right of appeal in so far as it concerns the presidential election, and to establish the definitive list of candidates, and that its competence is defined by the organic laws and cannot be defined by decree. It also pointed out that constitutional jurisprudence has established the obligation to consult the Constitutional Council on all decrees relating to the presidential election and to the referendum and particularly the decree relating to convocation of the electorate, which had not been taken into account before publication of Decree No. 2009-083.

The decision Decree on convocation of the electorate, which was delivered with extraordinary speed (barely 24 hours), prompts several observations. First of all, the Council had disregarded the respective petition by the applicants: Have we here a case of self-petition? This hypothesis is not provided for in the texts and seems to proceed from a particularly broad interpretation of the competencies of the Council by its members, who found themselves trapped by the texts governing the Council and by its own previous decisions in which the Constitutional Court had considered that it only had assigned jurisdiction.³¹ On

²⁹ This government was not appointed until June 26, 2009, by President Sidi Ūld Shaykh ‘Abdallāhi, prior to his resignation.

³⁰ In opposition to the law derived from Shari‘ah: this constitutes the re-emergence of a former classification of Mauritanian legal subsystems which today has fallen almost entirely out of use. See: A. S. Ould Bouboutt, “La nouvelle constitution mauritanienne” (1994) 104 *Recueil Penant* 129.

³¹ For comments of the author, see: Constitutional Council 001/DC of December 2, 1992, “Request for opinion” in A. S. Ould Bouboutt (n 6).

the other hand, although the Council, as electoral tribunal, could determine “any question or exception posed at the time of the application,”³² the texts did not accord it the possibility of ruling on these questions or exceptions, and notably on the decree convening the electorate, before the election. In this regard, we cannot help but feel reminded of the famous *Delmas* decision of June 11, 1981,³³ in which the French Constitutional Council had accepted to determine before the voting the regularity of a decree convening the electorate for the election of members of the National Assembly; that decision was justified by the Council with the argument that the contentious acts called into question the regularity of the electoral proceedings in their entirety and that it was thus necessary, in the interests of achieving the mission entrusted to it under Art. 59 of the constitution, that the Constitutional Council issued its rulings before the first round of voting. The French Constitutional Council subsequently clarified this jurisprudence in its decision of April 16 and 20, 1982, *Bernard et autres*, in terms that might well have been taken up and extended *mutatis mutandis* to the presidential election by the Mauritanian Council: “considering that, by virtue of its mandate to verify the regularity of the election of the members of parliament and senators entrusted to it under Art. 59 of the constitution, the Constitutional Council can exceptionally rule on the applications calling into doubt the regularity of the forthcoming elections, only to the extent that the inadmissibility that would be applied to these applications in accordance with the provisions of Arts. 32 to 45 of the aforementioned Ordinance of November 7, 1958 risked seriously compromising the efficacy of the Constitutional Council’s supervision of the election of parliamentarians or senators, would invalidate the general execution of election procedures and, thus, could jeopardize the normal functioning of public authorities.”³⁴

On merit, the decision Decree Convoking the Electorate offers a wealth of input to support the Council’s resolve in questing all sources of irregularity in the decree under consideration:³⁵ Besides recalling—and sanctioning—the fundamental rule of the hierarchy of norms, it applies forcefully the general principle of equality. Although this principle is in this instance based on the preamble of the constitution—reaffirming once again its binding character—the 2009 decision seems to foreshadow an activist approach by the Council, an impression that is confirmed by the audacious reference to “Constitutional jurisprudence that has henceforth established the obligation to consult the Constitutional Council on all decrees relating to the presidential election”. On the political level, and in consideration for calendar constraints, the decision in question afforded the protagonists no other alternative than to return to the route of a consensus solution under the Agreement of June 5, 2009, designed to facilitate an exit from the crisis.

C. The Elections of 2009

It took some time before the Government of National Unity provided for in the Dakar Agreement was finally established on June 26, 2009. Following a very long and seemingly eventful session, the communiqué approving the work of the first meeting of the Council of Ministers of this government, held the following day, reported the adoption of a decree convoking the electorate for July 18, 2009—a decree which in fact turned out to be a direct copy of the previous one. The opposition once again appealed to the Constitutional Council. On

³² Ordinance No. 92-04 of February 12, 1992—organic law on the Constitutional Council, Art. 44.

³³ Constitutional Council (France) decision *Delmas* of June 11, 1981, Rec. 97.

³⁴ Constitutional Council (France) decision *Bernard et autres* of April 16 and 20, 1982, Rec. 109.

³⁵ Indeed, just one of the irregularities highlighted would have been sufficient for rejection of the decree.

June 28, 2009, without responding to the applicants directly, the Council published a communiqué in which “it informed the public that it was opening a facility at its headquarters to receive candidatures for the presidential election of July 18, which would be open from June 28, 2009 until June 30, 2009”.³⁶ The message of the *communiqué*, which made no reference to the new decree,³⁷ was clear: The presidential elections would go ahead as planned on July 18, 2009. This brief communiqué and the decision it contained, was disconcerting: Not only should the judge only rule via deliberation in the due and proper form, but in this case—as though the Dakar Agreement in and of itself could clear the decree of any irregularity—it accepted to “make do” with the norms that it had a week earlier declared to be fundamentally unconstitutional, thus ignoring the authority of its own decisions, which it had previously insisted were binding on everybody, including itself. This position is all the more incomprehensible because this time the petitioners were not only contesting the legality but rather the very existence of the decree.

The “decision” of the Council was imposed in the end, notably through the active intercession of the International Contact Group and of certain embassies “on the front line”.³⁸ the intercession seemed particularly urgent following the publication of the communiqué approving the work of the Council of Ministers of the Government of National Unity. Six new candidates entered the fray: Aḥmad Ūld Dādāh, Muḥammad Jamīl Ūld Maṣṣūr, E’lī Ūld Muḥammad Wall, former head of state (2005–2007), Messa’ūd Ūld Būlkhayr, Ḥamādi Ūld Maymū, ambassador, and Šālīḥ Ūld Ḥananā. After rejecting on formal grounds a petition submitted by Kān Ḥ. Bābā contesting the eligibility of the candidate E’lī Ūld Muḥammad Wall³⁹ in view of his status as a serving officer (colonel) who had never resigned from the army, the Council validated all candidatures (Constitutional Council 07/2009 of July 1, 2009, Presidential elections). Since the rejection of that petition on formal grounds did not relieve the Council from verifying the eligibility of all candidates as a matter of public order, it must be concluded that in this case the Council found in favor of the candidate’s eligibility. As this decision rests on the balancing of the principle of strict interpretation of the ineligibility rules with the principle of freedom of candidatures, it is regrettable that on this occasion the Council did not give the reasons that motivated its decision. This would have shed light on an important aspect of Mauritanian electoral law, namely, the eligibility of members of the military—especially as this question had been raised at the time with regard to the provisions of the African Charter on Democracy, Elections and Governance adopted by the member states of the African Union on January 30, 2007, which had been ratified by Mauritania in 2008 but had not entered into force by the time of the election.

The first round of the election was held on July 18, 2009, and the provisional results, which gave 52.58 percent of the vote to the candidate Muḥammad Ūld ‘Abd al-‘Azīz, were announced the following day by the minister of the interior. The candidates Aḥmad Ūld Dādāh, Messa’ūd Ūld Būlkhayr, and E’lī Ūld Muḥammad Wall submitted applications

³⁶ Agence Mauritanienne d’Information June 28, 2009.

³⁷ This Decree is nonetheless referenced by the Constitutional Council in its later decisions, namely, Decree No.92-2009 of June 28, 2009, convoking the electorate for the presidential elections of July 18, 2009. See, for example: Constitutional Council Decision Definitive list of candidates to the presidential elections of July 18, 2009, 04/2009/ of July 1, 2009.

³⁸ See: (n 18).

³⁹ Constitutional Council Decision *Kane H. Baba* 007/2009/ of July 1, 2009. The decree validated by the Council did not allow E’lī Ūld Muḥammad Wall to repay the compliment, had he so wished, to Kān Ḥ. Bābā because the candidacy of the latter had already been validated for the elections scheduled for June 6, 2009, and could no longer be called into question.

denouncing, among other things, manipulations of the electoral roll, unfair voting conditions, and improper methods of producing the ballot papers. The Council sought the opinion of the National Independent Electoral Commission (CENI) and of the Ministry of the Interior on the issues raised in the applications. Basing itself on the response of the Ministry of the Interior, according to which “the application submitted contains no material proof” and on that of CENI asserting that “the procedures relating to the electoral roll and the ballot had occurred in normal and transparent conditions”, the Council concluded that “the candidate Muḥammad Ūld ‘Abd al-‘Azīz who won the first round of the presidential election with 412 608 votes, which was 52.58% of votes, equating to the absolute majority of votes cast as is constitutionally required, [is] elected President of the Republic” (Constitutional Council 005/2009 of July 23, 2009, Presidential elections). Although the minister of the interior had been designated by the opposition and CENI had been reorganized to become a consensus body in application of the Dakar Agreement, the Council nonetheless should have scheduled a hearing. The views of the CENI and Ministry of Interior were undoubtedly not binding on the Constitutional Council, which remained, in final analysis, the arbitrator of the election. In view of the unusual nature of the 2009 elections, which occurred in an agreed framework designed to facilitate a way out of the political crisis, and of the nature of the results announced, which accorded a victory in the first round of voting, as well as of the binding force of its own decisions, which are not subject to appeal, the Constitutional Council could have made fuller use of its powers and, recognizing the inquisitorial nature of constitutional election disputes eliminated any points of contention more effectively.⁴⁰

V. CONCLUSION

From this brief study it is clear that the Mauritanian Constitutional Council experienced a period of intense activity during the eleven months of military regime that the country experienced from 2008–2009; at least six decisions were recorded,⁴¹ concerning verification of constitutionality (decisions Regulation of the Assembly, I and II), the status of the President of the Republic in relation to Art. 41 of the constitution (decisions Vacancy in the post of President of the Republic, I and II), and electoral disputes (decisions Decree convoking the electorate and Presidential elections). Paradoxically, the period of sustained activity at this time put an end to the long period of hibernation that the Constitutional Council had lived through since its first decisions in 1992.⁴² Some of the decisions commented on in the previous sections are convincingly argued, some of them display limited (decision Regulation of the Assembly) or even substantial activism (decision Decree convoking the electorate), whilst others seem to reflect a forced pragmatism (decisions Vacancy in the post of President of the Republic) or to betray an attitude of deliberate self-limitation in the exercise of judicial prerogatives (decision Presidential elections). Did the Council collide or collude with those in power at the time? Although it is difficult to define precisely the exact nature of the changing relations between the constitutional judge and those in power at one time or another because these relations were conducted largely out of

⁴⁰ See in this regard: the drafting of Arts. 16 and 17 of Ordinance No. 91-027 of October 7, 1991, on the organic law relating to the election of the President of the Republic, amended.

⁴¹ To be thorough, we should emphasize that during the period under review, the Constitutional Council also returned an opinion (Constitutional Council 001/09/ January 14, 2009, “Request for opinion”) and other decisions, at least in terms of eligibility (decision *Kane H. Baba* (n 39)).

⁴² See on this point: A. S. Ould Bouboutt, “The Constitutional Judge faced with the challenges of democratization in Arab countries” in E. Canal Forgues (ed), *Les constitutions des pays arabes* (Bruylant, Brussels 1999).

public sight, the Mauritanian Constitutional Council managed to overcome the challenge of cohabitation by avoiding the sad fate of other African constitutional jurisdictions—forgotten for having been too flexible, like the Constitutional Council of Algeria in 1992, or swept away for having been too rigid like the Constitutional Court of Niger in 2009.⁴³ In this way it managed, intentionally or otherwise, to create the impression of continuity of the state based on the rule of law during a period of crisis of the rule of law. On this point, it is comforting to think that although the decisions of the Constitutional Council may not have definitively changed the course of events, it was able—some omissions, imperfections, or inaccuracies notwithstanding—to develop the techniques of judicial control and to foster and implement the principles and constitutional rights that might have helped to shape and prepare the way for its first decision censuring an application by parliament in the period that followed the military regime (Constitutional Council 001/2010/ DC of March 3, 2010 Law on the fight against terrorism). Isn't that what they say? That Supreme Court decisions are sometimes worth more in what they promise than in what they bestow.

⁴³ On constitutional jurisdictions in Africa, see: A. S. Ould Bouboutt, "Les juridictions constitutionnelles en Afrique—Evolutions et enjeux" (1997) 13 *Annuaire International de Justice Constitutionnelle*.

Constitutional Reform and the Rise of Constitutional Adjudication in Jordan

Background, Issues, and Controversies

MOHAMMAD HAMMOURI

The Arab Spring, which crossed Jordanian borders from Tunisia and Egypt, has compelled the authorities in Jordan to respond to the peoples' long-standing demands for reform. As a response, the king formed a Royal Commission¹ to propose amendments to the Constitution of 1952. After passing through government and parliament, the said amendments were issued and published in the Official Gazette of Jordan to come into force as of October 1, 2011. This article will touch on the considerations behind the Jordanian demands for reform, the views of the Constitutional Commission, the procedures through which the amendments were approved, and the most noteworthy constitutional changes. It will further concentrate on the essential elements of democracy that the Constitutional Commission did not take into account.

I. THE BACKGROUNDS OF THE REFORMS

The Jordanian Constitution of 1952 adopted the parliamentary system, which originated in England.² In 1831, Belgium inherited said system as a bicameral parliamentary system and

¹ In the following, referred to as the Constitutional Commission.

² More on the concept and history of the parliamentary system: Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford 2012) 556 et seq.

codified it to be its first constitution.³ Jordan took the rules of its 1952 Constitution from the consolidated version of the Belgian Constitution of 1921.⁴

The Constitution of Jordan, as any parliamentary constitution, regulates two subjects: the rights and freedoms of the people, and the authorities' obligation to serve and promote said rights and freedoms. The provisions of rights and freedoms in the Jordanian Constitution have never been amended. They were, and still are, similar to any provisions in a well-respected democratic state. However, during the period between 1954 and 1984, 28 amendments were made to the constitution, effectively increasing the power of the executive branch at the expense of other branches.

Relying on this added power, along with the provisions of martial law which were in application until 1991, the executive branch turned Jordan into a police state during this period. Under the pretense of national security and loyalty to the Monarch, the members of the General Intelligence Directorate in Jordan (GID) utilized their position and became the dominating power in the country. A report from a member of the GID against any citizen was sufficient to send him to jail and to deprive him of any future job opportunity.⁵ Few could hold any position, high or low, without a green light from the Intelligence Directorate. Prime ministers and ministers alike had to pay heed to the regulations and recommendations of the Directorate, or depart from their posts. The power of the government to pass provisional laws and material orders effectively evacuated the individual's rights and freedoms from their meaning or content. This atmosphere essentially changed the country into a state of powerful men rather than a state of law.

In their uprising of April 1989, the people of Jordan raised their voices against the practices described above and pressed the authorities for change and reform. The late King Ḥusayn responded by changing the government, holding elections for a new House of Representatives, abolishing martial law, and forming a commission to propose a National Charter. Distinguished lawyers and politicians participated in preparing and drafting the Charter, aiming to erect pillars of a democratic state. The Charter was promulgated in October 1991.⁶ Unfortunately, the Charter was neglected and forgotten. The Intelligence Directorate, which was and still is acting as the real yet hidden government,⁷ ensured that the Charter was nothing more than a way to placate the people. Jordan was declared to have entered the era of democracy; in reality, nothing had changed. Democracy was the cover under which the rule of men overshadowed the rule of law. This situation prevailed until the Arab Spring, which arrived in January 2011 and gave Jordanians an opportunity to rise again and call for real reform.

³ Belgian Senate, "Bicameralism in Belgium between 1831 and 1993," http://www.senate.be/english/federal_parliament_en.html#T.1, accessed June 3, 2015.

⁴ Belgium's Constitution was adopted on February 7, 1831. In 1920, the constitution was revised for the third time since then, *see* http://eur-lex.europa.eu/n-lex/info/info_be/index_en.htm, accessed June 3, 2015.

⁵ Art. 125 of the constitution provides: "The King may by a Royal Decree, based on a decision of the Council of Ministers, declare Martial Law in the whole country [...] and issue such orders as may be necessary for the defense of the Kingdom, notwithstanding of any law in force [...]." According to material law, the cognizance of deciding the accusation against a citizen, was given to the State Security Court (Martial Court) subject to the approval of the Martial Governor, whose decisions are not subject to any court appeal. Moreover, no one can be employed without the approval of the GID whose decision is final.

⁶ Text of the Charter: <http://www.kinghussein.gov.jo/charter-national.html>, accessed June 3, 2015.

⁷ *See also* Ambassador Fu'ad Batayneh, *The Jordanian Scene* (Dar Alafiris for Publication and Distribution, Amman 2005) 193–215.

II. THE DRIVING FORCES BEHIND THE REFORM PROCESS

In May 2011, the king, upon the advice of his close advisors, formed a Royal Commission of 10 dignitaries in order to introduce any needed constitutional amendments. There are a number of facts about this Constitutional Commission worth noting:

1. Neither the prime minister nor any member of his cabinet had anything to do with the formation of the Commission. They were neither represented nor is it known if they were consulted.
2. Four out of the ten members were former prime ministers while the other six members had formerly occupied ministerial positions.
3. Only three of the ten members were lawyers, but none of them was known to have written, published, or lectured in matters of constitutional law.
4. Up to the point when the Commission was formed, all the dignitaries who became members of this Commission were of the opinion that the constitution should not be amended in any reform effort and that no constitutional amendments should be permitted.

These facts may help to explain the quality of the constitutional reform eventually produced. Upon the request of the Chairman of the Commission, the author of this article provided the chairman with a number of his publications on the topic of constitutional reform. However, the outcome of the Commission ignored the essential suggestions and took few of the views presented in said publications into account. The Commission held secret meetings for more than three months at the end of which it submitted its recommendations to the king. The recommendations were to amend 68 paragraphs grouped in 37 articles of the constitution. Upon the recommendations and the advice of his inner circle, the king directed the government and the two houses of parliament to finalize the amendments within 30 days. The Council of Ministers, which was composed of 30 ministers, and afterward the House of Representatives, which has 120 members, took 27 days to finalize the constitutional amendments. When the amendments reached the Senate, whose members had many observations and suggestions, the remaining three days were not enough for its 60 members to consider the amendments. As a result, the Senate decided to approve the amendments without a single change.⁸

To understand the defect in this process, it might be helpful to compare it to the constitutional reforms that took place in Morocco at almost the same time. In Morocco, the king, upon the advice of his advisors, formed a Royal Commission of 19 distinguished law professors,⁹ who in turn wrote to their colleagues at universities, political parties, and civil society associations to provide them with the suggestions they may have in this respect. After studying the received suggestions and relevant publications, the Commission formulated a draft of the amendments in order to discuss them in meetings with representatives of civil societies that followed. Eventually, the outcome of said meetings was turned into provisions for the Moroccan Constitution.¹⁰

⁸ *Jordanian Official Gazette* no 5117 (October 1, 2011).

⁹ Cf. Madie Schutte, "Post-Election Reflection: Morocco's 2011 Constitutional Referendum" (August 16, 2011), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=822:post-election-reflection-moroccos-2011-constitutional-referendum-&catid=42:election-reflection&Itemid=270, accessed June 3, 2015.

¹⁰ *Moroccan Official Gazette* (July 19, 2011).

Today, many Jordanians view the constitutional amendments announced on October 1, 2011, as falling short of meeting the real and substantive needs of the country. Thus, the issues which Jordanians protested against remain as they were. Accordingly, demonstrations, which started in January 2011, have continued, and up to date (March 2016) Jordanians still claim that the constitutional amendments of October 2011 did not remedy the essential defects in the Jordanian political system.

III. THE SUBSTANCE OF THE REFORMS

Jordanians had patiently waited for a constitutional reform that would cure the defects in the system and overturn the practices which had made the country a state of powerful men. However, the outcome of the reform was and still is startling. The reform of 2011 amended some of the existing and added 68 new paragraphs to the constitution. Amongst the new provisions, 16 relate to rights and freedoms, and the other 52 paragraphs are related to the authorities. Although those paragraphs held some improvements, they did not remedy the essential defects in the structure of the system. The following sections are examples of the amendments.

A. Prohibition of Torture (Art. 8.2)

This article of the constitution prohibits the torture of any detained person. Its amendment added a progressive rule to the constitution, but did not provide for an entitlement to compensation for individuals against the state or against the individual who tortured him. The importance of compensation in this respect is not only to help remedy the injury of the harmed person but also to warn those who torture that they will be personally liable and consequently deter them from torturing others or from obeying orders to that effect.¹¹

B. Protection of the Essence of Rights and Freedoms (Art. 128)

The amendments added a new paragraph to Art. 128, which introduces an advanced rule to the constitution, for it provides:

All laws issued in accordance with this Constitution for the regulation of rights and freedoms may not influence the essence of such rights or affect their fundamentals.

For a long time, many legal scholars and lawyers demanded a provision in the constitution similar to the First Amendment of 1791 to the US Constitution. The first amendment to the US Constitution provides as follows:

Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for redress of grievances.¹²

Though the provision of Art. 128 can be regarded as a step of progress in Jordan, it is still vague and not mature. The terms “essence” and “affect” do not have a definite

¹¹ Cf. Manfred Nowak, *ICCPR Commentary* (N.P. Engel, Kehl 2005) Art. 7 para. 36.

¹² Cornell University Law School Legal Information Institute, http://www.law.cornell.edu/constitution/first_amendment, accessed June 3, 2015.

meaning and will cause many problems in application. When compared to the US provision, the Jordanian text appears to be flimsy. A clear and decisive provision was suggested to the Commission, but it seems that they preferred the less assertive text that was chosen. Freedom of opinion is provided for in Art. 15.1 of the constitution as follows:

The State shall guarantee freedom of opinion, and every Jordanian shall freely express his opinion by speech, writing, photography and the other means of expression, provided that he does not go beyond the limits of the law.

Nevertheless, the authorities have separated the freedom provided for in said articles from its content. This may be exemplified by the following most recent amendment: On June 1, 2014, the authorities added paragraph 6 to Art. 3 of the Law on the Prevention of Terrorism, No. 55 of 2006. This paragraph considers any published opinion which affects the friendly relationship of the Jordanian Kingdom with other countries as a terrorist crime.

Moreover, on November 29, 2014, relying on said paragraph, the authorities accused Zaki Banī Irshayd, the deputy leader of the Islamic Action Front, of committing a terrorist crime because he criticized the government of the United Arab Emirates on his Facebook page. He had been sentenced to eighteen months in prison by the State Security Court (i.e., Martial Court).

C. Establishment of a Constitutional Court (Arts. 58–61)

Arts. 58–61 of the constitution created a Constitutional Court in Jordan and provided for its cognizance. Although Jordanians have long demanded the establishment of such a court, any jurist who examines the relevant provisions will find that the said court is tailored to suit the government and not the people, and this is for the following reasons:

- a) The nine judges of the court are appointed by a decision taken by the government and approved by the king.
- b) The right to bring any direct action before the court to decide on the nonconstitutionality of a law or bylaw is given only to the government, the House of Representatives, and the Senate.
- c) Before the establishment of the Constitutional Court, the prevailing rule in Jordan was the same as the rule established by the American case *Marbury v. Madison* (1803) by Chief Justice Marshall,¹³ i.e., any of the 1,000 judges of Jordan had the jurisdiction to decide on the nonconstitutionality of a law or bylaw, relating to a case before him, whether or not such nonconstitutionality was pleaded by the parties of a case. The judges assumed such jurisdiction even though there is no legislation to this effect. However, the constitutional amendments were silent regarding the authority of the judge to question or challenge the constitutionality of the law without a plea presented by any party, and it was believed that the practice will continue as it was before. On the other hand, Art. 60 of the constitution gives the parties to any case a right to plea the nonconstitutionality of the law before the court and if a plea in this regard is raised, the judge will consider its merits. If the judge finds a ground for the plea, he/she should refer the file to a higher court for an audit of his decision. The provisions of the constitution do not designate the Higher Court, but such designation was to be provided for in a law that was to be issued. On June 7,

¹³ *Marbury v. Madison* (1803) 5 US. (1 Cranch) 137.

2012, the Law of the Constitutional Court, No. 15 of 2012¹⁴ was issued and Art. 11 of said law provided for the establishment of said Higher Court, composed of three judges of the Court of Cassation.

According to Art. 60 of the constitution, said Higher Court will judge whether or not the plea of unconstitutionality should be referred to the Constitutional Court. These long procedures for the case to come before the Constitutional Court will, in the view of the author, be a burden for the parties of the case and may defy justice.

- d) Apart from the government, the House of Representatives, and the Senate, the authorities who were tailoring and directing the reform rejected all suggestions concerning the establishment of a right of individuals to bring a direct action before the Constitutional Court. Not even political parties were vested with such a right.
- e) Up to now, neither the government nor the House of Representatives (Deputies) or the Senate have brought any action to the Constitutional Court to nullify a nonconstitutional law. Moreover, regarding the plea of nonconstitutionality before any ordinary court, the Constitutional Court has to date revealed a tendency of refraining from ruling on the nonconstitutionality of laws related to the rights and freedoms of the parties to the underlying case. Out of the 12 judgments which the Constitutional Court has issued so far, 8 cases were dismissed without any logical or persuasive reasoning.¹⁵
- f) When comparing the Jordanian Constitutional Court to the one established in Morocco through the constitutional amendments of July 2011, the defects of the Jordanian Court become clear. By virtue of Art. 130 of the Moroccan Constitution, there are 12 judges of

¹⁴ *Jordanian Official Gazette* no 5161 (June 7, 2012) 2519 et seqq.

¹⁵ Suffice it here to refer, as an example, to case no 5 of 2013, where a voter, by virtue of Art. 71 of the constitution, brought an action before the Court of Appeal in order to nullify the supplementary parliamentary elections for a seat in the second constituency in Amman, and based his claim on the nonconstitutionality of some provisions of the election law. The three judges of the Court of Appeal found serious grounds which support the nonconstitutionality and therefore adjourned its ruling, and referred the claim to the Court of Cassation, which, on the same grounds as the Court of Appeal, sent the file to the Constitutional Court.

In this respect, Art. 20 of the Election Law, no 25 of 2012, provides that bringing any case to nullify the elections is exempted from any court fees, and therefore, neither the Court of Appeal, nor the Court of Cassation requested any fees. In this respect, Art. 2 of the bylaw on Fees of the Constitutional Court provides that a claimant whose plea of nonconstitutionality is referred to the Constitutional Court should deposit 250 Jordanian Dinars to the depository of the Court of Appeal which referred the claim. Though the case is exempted by a clear provision in the Election Law and Art. 2 of the bylaw on Fees of the Constitutional Court does not apply to the case under discussion, the Constitutional Court relied on said Art. 2 in order to dismiss the case.

This ruling is shocking. For many decades it has been a settled practice that in cases where court fees were not paid for any reason, the courts at all levels respite the case until the party pays the required fees, but the Court of Cassation did not do so. Moreover, it was a settled practice that every judge holds a jurisdiction to challenge the unconstitutionality of a law, without any such plea raised before him, since neither the constitution nor the law regulating the establishment of the Constitutional Court prevent such practice. Therefore, and irrespective of whether any required fees have been paid or not, when the Constitutional Court is required to consider the unconstitutionality of a law, the court should examine the finding of the Court of Cassation, evaluate its merits, and judge accordingly. By dismissing the case without challenging the constitutionality of the concerned law, the Constitutional Court conveys the meaning that no judge in Jordan has the jurisdiction to challenge the unconstitutionality of a law or bylaw even when there are merits for said challenge. This means that any judge, who has sworn to respect the constitution, has to apply the law or bylaw, even if he or she is convinced of its nonconstitutionality.

the Constitutional Court. Six of those judges are elected in a secret ballot, three by the House of Representatives, and three by the Senate. One of the remaining six judges is named to the king by the secretary general of the High Scientific Council, and the other five judges are appointed by the king. It is obvious here that the executive authority can only influence the appointment of a minority of the judges. Moreover, Art. 133 of the Moroccan Constitution gives a right to any individual to plea the unconstitutionality of a law before any judge in Morocco who in turn has the jurisdiction to refer the case to the Constitutional Court based on merit supporting the plea.

D. Judicial Power (Art. 98)

Since 1952, the Jordanian Constitution provides that the judicial power shall be exercised by the courts of law, that judges are independent in the exercise of their judicial functions and that they are subject to no authority other than the law. Nevertheless, one of the main complaints of Jordanians, especially lawyers, was the continuous effort of the government to influence the courts.

Responding to the people's complaint, the Commission added two paragraphs to Art. 98, making the original text of the article the first paragraph of the new article. The second paragraph of the article in its new form reads as follows: "A Judicial Council shall be established by law to be in charge of all affairs relating to Civil Judges."

It is obvious that the term "all affairs" is used to give the council the authority of appointing and promoting the judges, as a way of preventing any interference or influence of the government in the field of judicial functions, while the term Civil Judges is used to exempt the Judges of the State Security Court (Martial Court).

Moreover, in order to substantiate the above meaning, the third paragraph of the new article provides: "The Judicial Council shall alone have the authority to appoint Civil Judges." Again, the word "alone" in the provision leaves no doubt about the conclusive authority of the council in appointing the judges. The paradox here appears when the three paragraphs are read together: Paragraph 1, in view of Art. 40 of the constitution, gives the government the authority to appoint and dismiss judges, whereas the other two paragraphs grant said authority to the Judicial Council. In addition, the Shari'ah judges who are mentioned in paragraph 1 have been forgotten in the other two paragraphs.

In the view of the author, no court independence can be realized, while paragraph (1) in Art. 98 of the constitution is still in existence. Moreover, said paragraph should be replaced by a provision that prevents the dismissal of judges, as will be discussed later.

E. Reform of the State Security Court (Art. 101)

For decades, Jordanians continuously complained about the State Security Court, the existence and jurisdiction of which stems from a special law issued for that purpose.¹⁶ The chief prosecutor of said court is required to be a general in the army who performs his duties under the leadership of the Chief of Staff of the Armed Forces. The other military judges of the court perform their judicial functions under the auspices of the general who directs the prosecution against the accused person before those judges. Such a type of court is not part of the judiciary system. Its practices have provoked many lawyers to say that a person sent to the State Security Court is effectively sent for being sentenced, not tried. However,

¹⁶ Jordanian Law of the State Security Court, no 529 of 1959 as amended.

instead of preventing the establishment of this court by adding a corresponding provision to the constitution,¹⁷ the Royal Commission proposed a provision for instituting a State Security Court with jurisdiction for considering three types of crimes. In its turn, the government approved the proposal and passed the draft to the House of Representatives. As the demonstrations and protests in the country increased, the House deleted the proposal, and instead rewrote paragraph 2 of Art. 101 as follows:

No civilian may be tried in a criminal case where all its judges are not civilian, the exception to that are crimes of treason, espionage, terrorism, the crime of drugs and currency forgery.

In the eyes of the people, things have become worse. Instead of narrowing down the jurisdiction of the State Security Court to three crimes, it was extended to five. Further, civil courts are now prohibited from considering these five crimes. By elimination, the only remaining court in the country to consider the said criminal cases is the State Security Court. The Senate approved the paragraph, and it has become a provision in the constitution. There is no provision in the constitution defining any of these five crimes. This effectively opens the door for enacting overreaching laws and accommodating definitions that could jeopardize the rule of law. Moreover, as Art. 101.2 requires a civilian to be tried in a criminal case before civilian judges, the authorities took the liberty for appointing Civil Judges in the State Security Court to carry out the trial, as if the constitution was only concerned with the uniform worn by the judges.

There is no persuasive reason for establishing a State Security Court in Jordan. In matters relating to civilians, Civil Judges are more qualified and trained to serve and protect justice than martial judges. Proponents of the State Security Court furthermore contend that its judges conduct faster trials than Civil Judges. The fact that this assertion is far from true is demonstrated by the example of the recent case of Ḥusnī Mubārak and his sons in Egypt, where the relevant crimes were referred to a civil court to be tried in consecutive sessions.

F. Provisional Laws (Art. 94)

In essence, the parliament, as the legislative authority, holds the constitutional power to issue laws. In the case of emergencies, circumstances do not leave time for the parliament to meet and pass a required law. In this case, constitutions allow governments to issue provisional laws for taking the needed measures quickly to remedy the situation.¹⁸ When the Jordanian Constitution was passed in 1952, Art. 94 provided that, in case the parliament was not in session, the Council of Ministers, with the approval of the king, had the competence to issue provisional laws covering situations such as general disasters, the state of war, and emergencies, and necessary expenditures which admit of no delay.

According to Art. 94, the provisional law, in order to have force of law, had to be placed before parliament at the beginning of its next session for approval, amendment, or rejection. On 5 May 1958, Art. 94 was amended and allowed provisional laws on “matters which require necessary measures that admit of no delay”. Furthermore, the amendment widened the scope of issuing provisional laws including cases where the House of Representatives had been dissolved. Relying on this amendment, governments used to dissolve the House and issue

¹⁷ As the reforms in Morocco did by adding Art. 127 to their constitution.

¹⁸ For more information on this topic, see Stephen Morton, *States of Emergency—Colonialism, Literature and Law* (Liverpool University Press, Liverpool 2013).

hundreds of provisional laws, disregarding the meaning of “necessity which admits no delay”. Moreover, the article, whether in its original text or after the amendments, did not specify any period of time for the parliament to consider these provisional laws. Therefore, many provisional laws have been before the parliament for years, some waiting for the last 30 years.

In January 1998, the General Assembly of the High Court of Justice held in five cases:¹⁹ “Necessity, which admits no delay means a state of war, public danger, fire, flood earthquake . . .” and accordingly declared the law in question under consideration to be unconstitutional. These rulings, however, did not have any impact on government practice. Over the last 15 years, Jordanian governments have issued many provisional laws even though they did not fall under a reasonable reading of the term of necessity. One government alone has issued 220 provisional laws within two years.²⁰

In view of the above, the pressure coming from demonstrators urged the House of Representatives to make real changes in this respect. The recent amendments to Art. 94 restrict the issuance of provisional laws by restoring the original language requiring “public catastrophes” or “state of war and emergency”, and by obliging the parliament to decide on the provisional laws within two consecutive ordinary sessions. Otherwise, they will be null and void. In this respect, Art. 94 provides:

1. When the House of Representatives is dissolved, the Council of Ministers—with the approval of the King—shall have the right to issue provisional laws to cover the following matters:
 - a) General disasters.
 - b) The state of war and emergencies.
 - c) The need for necessary and urgent expenditures which cannot be postponed.

The provisional laws—which should not violate the provisions of the Constitution—shall have the force of law, provided they are placed before the Parliament in the first sitting it holds. The Parliament shall take decisions in their regards during two consecutive ordinary sessions from the date of their referral. It may approve, amend or reject such laws. If it rejects them or the period provided for in this Paragraph elapses without decisions, the Council of Ministers should—with the approval of the King—declare their nullity immediately;

Though the latest amendment of Art. 94 might be considered a step of progress, for it authorizes the government to issue provisional laws only in the case that the House of Representatives is dissolved; in case the House is simply out of session, however, the government is not authorized to issue provisional laws. Still one might claim that this rather ironic amendment is not acceptable in a democratic system for two reasons:

- a) By virtue of Art. 73 of the constitution, the elections for a new House of Representatives should take place within four months following the dissolution of the House, and there is no democratic reason for absenting the dissolved House during said period. Accordingly, there should be a provision in the constitution that sets the day of the old House’s dissolution as the first day of the new House. The House is the people’s representative and accordingly, it should not be absent in any manner at any time.

¹⁹ Case no 226 (1997); case no 234 (1997); case no 341 (1997); case no 351 (1997); case no 352 (1997).

²⁰ The government which was in office June 19, 2000–October 25, 2003; see Mohammad Hammouri, “Provisional Laws between Constitutional Requirements and political whims” (2003) *Jordanian Bar Association Journal*—June paper.

- b) Regarding the other scenario, i.e., when the House is out of ordinary session—the ordinary session lasting for six months beginning with October according to Art. 78—the government should be authorized to issue provisional laws to remedy the extraordinary events mentioned above, but Art. 94 does not permit the government to do so.

G. Dissolution of House of Representatives (Art. 74)

In parliamentary systems like the one adopted in the Jordanian Constitution in 1952, the balance of power between the executive and legislative branches is essential.²¹ In Jordan, this balance is guaranteed by the following: The House of Representatives can revoke confidence in the government which entails its resignation. In turn, the government can dissolve the House.

On April 17, 1954, paragraph 2 was added to Art. 74 in order to complete this balance. The paragraph provided that:

If the House of Representatives is dissolved the government shall resign within a week from the date of dissolution and a transitional government shall administer the parliamentary elections.

In theory, the consideration behind the principle stated by the above provision is that the House of Representatives is usually dissolved when disputes arise between the government and the House. Therefore, it is expected that the cooperation between the government and the House will reach gridlock. In practice, this situation arises in democratic states when no party or organized group obtains a sufficient majority in the House of Representatives and a coalition government is formed. Again, in theory, the people should judge this dispute through elections. The people should elect a new House under the supervision of a nonbiased government. The elections would decide who will be the next prime minister and ministers. If the same members of the House or the majority of them are re-elected, this means that the House was right and accordingly the head of state will not appoint the same prime minister, because the same disputes will rise again. However, if the previous members of the House are not re-elected, that reveals that the House was wrong and the previous prime minister may form the new government. This principle, which governs democratic states, has never worked or been applied in Jordan.

However, on May 4, 1958, the added paragraph to Art. 74 was deleted and since then all consecutive Houses of Representatives have been dissolved before the end of their term and elections have been held by the governments who decided on the dissolution. Note here that during the last decade, many prime ministers and even a chairman of the intelligence agency confirmed the belief held by many Jordanian civil society groups that elections have often been rigged by the government.²²

²¹ Cf. Thomas Fleiner and Lidija R. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World* (Springer, Berlin 2009) 230 et seq. For a short but precise overview on the topic of the balance of powers and its alternatives: OECD, *Governance in the 21st Century* (OECD Publications Service, Paris 2001) 46 et seqq.

²² Ambassador Fu'ad Batayneh (n 7); see also Hossein Omar Toaqa (a Researcher of Strategies and National Security Studies, Former General, Late King Husayn Advisor and Ambassador), "General Intelligence Directorate in Jordan between forging the elections and imposing the appointments," *Today's Opinion Newspaper* (London, January 26, 2014); see also Alā'ah al-Fazzah, *Al-Sharq Newspaper* (Qatar, October 9,

In view of the above, the amendment of Art. 74 becomes extremely important for remedying a defect in the system. The suggestions of the Royal Commission restored part of the provision of 1954 which provides: "The government—in the tenure of which the House of Representatives is dissolved—shall resign within a week from the date of dissolution."

As the suggestion neglected the last part of the provision calling for a transitional government to oversee the elections, the prime minister, who signed the dissolution of the House, can accordingly form the transitional government and hold the elections. Effectively, this shows that the Royal Commission in its suggested amendment considers the dissolved House to always be wrong in its conflict with the government. The author of this article provided the government with a study, which proposed to include the part of Art. 74, which the commission had neglected. However, the government disregarded the suggestion and approved the amendment as prepared by the Commission.

The House of Representatives confirmed the first part of Art. 74 as received, but added the second part in a manner, which lacks suitability. The text of the article now reads as follows:

If the House of Representatives is dissolved the government shall resign within a week from the date of dissolution; and its head may not be designated to form the government that follows.

It is to be observed, in this respect, that the king alone is the one who appoints prime ministers,²³ without consulting political parties, for Jordan has never had a majority party, except the government of Sulaymān al-Nābulṣī which lasted five months and twelve days, i.e., from October 29, 1956, to April 10, 1957. As such, the added provision addresses the king and instructs him: "You are not permitted to appoint the Prime Minister of the dissolved Government to be the next Prime Minister." What the House of Representatives wanted to convey is that the prime minister who has dissolved the House would be biased if he were to form a new government to hold the elections and therefore he should not be allowed to do so. Although the article in its paraphrasing of 1954 constitutes a more polite and suitable text which serves the same purpose, the new, rather impolite text of the second part was adopted and the Senate approved it.

Another point of criticism to raise here is that paragraph 1 of Art. 74 provides: "If the House of Representatives is dissolved for any reason, the new House shall not be dissolved for the same reason".

It is obvious that in order not to dissolve the new House for the same reason, the reason of dissolving the former House must be stated in the decision of dissolution. As mentioned before, to date all consecutive Houses have been dissolved before the end of their term, but none of the decisions of dissolution mentioned a reason for any of the dissolutions. This 60-year-long practice should have drawn the attention of the Commission to the importance of amending the paragraph in a manner which directly requires mentioning a reason for dissolving the House, such as: "The reason of dissolving the House of Representatives should be stated in the decision of dissolution."

2012) 15, referring to what 'Abdullāh al-Nasūr said in this respect before being a prime minister; *Al-Ghad Newspaper* (February 21, 2012)—an interview with Prime Minister Awn Shawkat Al-Khasawneh, where he complained about forging parliamentary elections.

²³ Cf. Art. 35 of the constitution.

Nevertheless, neither the Royal Commission nor the government nor the House of Representatives have paid attention to the advice published by interested Jordanians who were keen to change the above practice through an obvious provision.

H. The Constitutional Amendment of August 2014

On August 14, 2014, Prime Minister ‘Abdullāh al-Nasūr surprised the Jordanians when he announced that Arts. 67 and 127 of the constitution would be amended. Four days later, the government presented the two amendments and on August 24, 2014, the House of Representatives approved said amendments. After the confirmation of the Senate, the amendments were signed by the king and published in the Official Gazette No. 5299 of September 1, 2014.

1. Art. 67

The amendments deleted paragraph 2 of Art. 67, which was introduced to the constitution in 2011, and replaced it with the following:

An independent commission shall be established by a law to administer parliamentary and municipal elections and any general elections pursuant to the provisions of law; the Council of Ministers may assign to the independent commission the administration of other elections or the supervision thereof at the request of the entity legally authorized to conduct those elections.

The essential change in this respect is that the amendment added municipal elections to the duties of the commission. The purpose of adding paragraph 2 to the constitution is to remedy the complaint of Jordanians regarding forging the elections by the Ministry of Interior, which used to administer and supervise the elections.

In the view of the author, the new paragraph will not remedy the defects complained of, for according to law No. 11 of 2012 and its amendments, the independent commission is composed of five high-ranking employees appointed by the government and has no staff for supervising the elections and thus will have to depend on the human resources of the Ministry of Interior. However, on December 8, 2012, King ‘Abdullāh the Second formed a Royal Committee for preparing a Charter for a National Integrity System. His Majesty said in his royal decree: “We decided to select the following eminent figures as members of the committee . . .” and stated 12 persons, amongst them the prime minister, the Speaker of the Senate, the president of the Judicial Counsel, and the author of this article. Due to the well-known fact that elections are often forged, the Committee, after long discussions, was persuaded and decided that the Law of the Independent Commission should be revised during the first six months of 2014, so that the Commission will be formed of highly qualified judges and will enjoy functional and administrative independence.²⁴ In this respect, the independent commission of judges will appoint a judge for supervising and tallying each ballot box in the country.

Unfortunately, even though the Charter was approved in a National Conference on November 30, 2013, under royal patronage, to date none of the suggested amendments have been enacted. Moreover, on April 14, 2014, a royal decree signed by the government

²⁴ “National Integrity Charter—Executive Plan to Enhance the National Integrity System,” English version (2012) 58, <http://inform.gov.jo/Portals/0/Report%20PDFs/7.%20Role%20&%20Performance%20of%20Government/iii.%20National%20Integrity%20Systems/2012%20National%20Integrity%20Charter%20and%20Action%20Plan.pdf>, accessed June 3, 2015.

was issued for the appointment of five government employees as the Board Members of Independent Commission.

2. Art. 127

The amendments also added the following paragraph 3 to Art. 127:

Notwithstanding of what is provided for in Art. 40 of the Constitution, the King shall appoint the Commander of the Army and the Director of Intelligence, dismiss them and accept their resignation.

According to Art. 40, the king shall exercise his powers by a royal decree signed by the prime minister and the ministers or minister concerned. When considering Arts. 40 and 127.3 together, the conclusion will be that the paragraph added to Art. 127 vests the king with absolute power with respect to the appointment of high-ranking executive officials. The question here is: Who will be responsible before the House of Representatives regarding any misconduct or corruption, if any, of the Commander of the Army and the Director of Intelligence? Although Art. 45 confers onto the government the power of administering all internal and external affairs of the state, and Art. 51 makes the Prime minister and the ministers jointly responsible before the House of Representatives for the public policy of the state, the government has nothing to do with the appointment of the Commander and the Director, and, accordingly, it can in no way be held liable. On the other hand, the king cannot be held liable either, for according to Art. 30 of the constitution, His Majesty is immune from every liability and responsibility.

In the view of the author, the advisors of the king and his inner circle who are accountable for the above-mentioned paragraph 3 added to Art. 127, turned our state from a constitutional monarchy into a presidential monarchy and harmed the king and the royal family. Moreover, on April 18th 2016, the Jordanian Government surprised its people by sending a number of provisions to the House of Representatives for amending the Constitution. At the time of writing these words, the amendments had been approved by the House of Representative but have not been voted upon by the Senate. According to the information available to the present writer, these amendments focus on granting the King more absolute power chiefly by making Him the exclusive and only authority to appoint every single member in the Senate (including its president), the Chairman of the Judicial Council, all the Judges of the Constitutional Court, and the Commander of the Police Special Forces. Similar to the mentioned amendments of 2014, the current amendments retained the King's immunity from liability and responsibility.

IV. IMPORTANT ISSUES IGNORED IN THE REFORM PROCESS

A. The Senate as a Government-controlling Body

Since 1952, the legislative body has been composed of the Senate and the House of Representatives. Contrary to Art. 24 of the constitution, which provides that the people are the source of all powers, the members of the Senate are still appointed and dismissed by a royal decree signed by the government and then by the king. These provisions are still in force despite the fact that the Senate is actually supposed to be a legislative body and in charge of supervising the government. Legislation coming to the Senate from the House of Representatives for approval can be delayed and its enactment may eventually be averted in the Senate. One of the core demands of the Jordanian people is to abolish such a Senate,

especially since its existence contradicts the principle which makes the people the source of all powers. If it is necessary that such a House remains, it should consist of representatives elected by the people. Nevertheless, public demands to this effect have been neglected and the structure of the Senate remains as it is.

In comparison, Arts. 60 and 63 of the Moroccan Constitution emphasize that in order to convey the will of the people, the Senate and the House of Representatives should both be elected.

B. Democratic Legitimization—The Elections

Since the establishment of political parties is an integral element of parliamentary systems, the king has no other choice but to appoint the leader of the majority party represented in the parliament to form the government. Otherwise, the House will not grant the government a vote of confidence. In its turn, the minority party will form the opposition. Naturally, the majority party will carry out the plan or program upon which it was elected.

In Jordan, Art. 16 of the constitution emphasizes that Jordanians have the right to form political parties. In addition, Art. 35 provides: "The King appoints the Prime Minister and may dismiss him or accept his resignation". In law and practice, over these 36 years during which Martial Law existed, Jordanians were deprived from establishing political parties, as according to Jordanian criminal law, forming a political party was a crime. This period lasted until 1992, when a law was issued allowing the formation of political parties. The conditions and various punishments provided for in the new law coupled with the fear embedded in the society due to past practice hindered the growth of parties. The only real example of a mature political party is the Muslim Front Party, which is the political front of the Muslim Brotherhood, a movement which has officially existed since 1945 as a religious society. The Muslim Front Party was formed in 1992 when the formation of political parties was legalized. The influence gained by the Muslim Front Party was not the result of a mature political party law but rather a result of the decades of social work by the Muslim Brotherhood. To illustrate this, we note that in the elections of 1989, before the party law existed, the Muslim Brotherhood gained 20 seats in addition to seven allied seats out of a total of 80 seats of the House of Representatives.²⁵ The members representing the Muslim Brotherhood became members of the Muslim Front Party immediately when it was formed in 1992, thus forming the largest coalition or *ipso facto* party in the House of Representatives.²⁶ Unfortunately, in 1993, the House was dissolved before the end of its term and the government issued a provisional law for elections.

Apart from the new elections of 2013, which took place according to the Election Law, No. 25 of 2012,²⁷ all elections during the last 20 years have been governed by provisional laws. In the eyes of Jordanians it has become common practice for the authorities, hidden or apparent, to rig the elections in order to guarantee the required parliamentary seats for the people they employ in the House of Representatives.²⁸

²⁵ Bakr Mohammad Albidoor, *The Parliamentary experience of Islamic Movement in Jordan 1989–2007* (Dar Almamoon-Publisher and Distributors, Amman 2011) 7.

²⁶ The Muslim Brotherhood's Islamic Action Front Party is described as the leading opposition force by Sean L. Yom, "Don't Forget about Jordan: A Regime Caught between Contagion and Consent," *Foreign Policy* (February 2, 2011), <http://foreignpolicy.com/2011/02/02/dont-forget-about-jordan-a-regime-caught-between-contagion-and-consent/>, accessed January 20, 2015.

²⁷ *Jordanian Official Gazette* (July 1, 2012) 2965 et seqq.

²⁸ The same observation is made by Danya Greenfield, "Optimism after Jordan's Election," *Foreign Policy* (January 25, 2013), http://mideast.foreignpolicy.com/posts/2013/01/25/optimism_after_jordans_election, accessed June 3, 2015.

The new election law has not remedied the defects in the electoral system, which have been subject to criticism for the last twenty years.²⁹ The essence of the complaint is that the successive election laws divided the country into constituencies, allocated a certain number of parliamentary seats to each constituency and gave the elector the right to vote for one candidate only. In this context, each candidate depended on his relatives to vote for him, thus reviving old tribal traditions. Accordingly, outcomes of the elections were determined by tribal factors and not by political programs or agendas.³⁰ With time, this electoral system fractured Jordanian society into social enclaves. Under the pressure of demonstrators for reform, the government formed a National Committee for the development of a better electoral system in 2011. After meetings had been held over a period of six months, the committee presented suggestions for a new system, but the government ignored the work of the committee when drafting the Election Law of 2012. As a response, the national political groups and parties boycotted the elections of January 2013.³¹

The said Election Law raised the number of representatives in the House of Representatives from 120 to 150. Each of the 150 members has/her his own agenda, and it is difficult to speak of any common political program or agenda among any group in the House. As a result, no political party became or was allowed to become a majority and the hidden government continued to direct the political process as well as the parliamentary scene. This prevailing practice precluded any progress in democracy and political life. On March 13, 2016, His Majesty the King signed a new election law³² for the House of Representative, which replaces the law of 2012, but in view of the author, the new law did not remedy any of the defects in the election system.

C. The Prime Ministers and Their Governments

The king may, by virtue of Art. 35, appoint anyone to be prime minister. It is natural in constitutional monarchies for the king to appoint the prime minister who forms the government.³³ In Jordanian practice, however, the king tends to appoint persons whom he personally considers fit instead of being advised on this question by a board of advisors. These prime ministers are appointed suddenly and are dismissed suddenly within months, they do not have any prepared plans or any program for the country and reasons neither for their appointment nor for their dismissal are made public. This is also the case for the ministers who are suddenly called upon to serve in a government that is formed within one or two nights. After a short period of time in office, and before they can even fully grasp the nature of the country's problems, which would be necessary to formulate the required remedies, the prime minister and his ministers find themselves out of work and a new cabinet replaces

²⁹ To the same conclusion comes Daoud Kuttab, "Jordan: Birth Pains of Democratic Politics," *The World Post* (April 25, 2013), http://www.huffingtonpost.com/daoud-kuttab/abdullah-ensour-jordan-elections_b_3151902.html?view=screen, accessed June 3, 2015.

³⁰ This evaluation is shared by Laurie A. Brand and Fayez Hammad, "Identity and the Jordanian Elections," *Foreign Policy* (January 17, 2013), http://mideast.foreignpolicy.com/posts/2013/01/17/identity_and_the_jordanian_elections, accessed June 3, 2015.

³¹ For more information, see Curtis R. Ryan, "Elections, Parliament, and a 'New' Prime Minister in Jordan," *Foreign Policy* (March 11, 2013), http://mideast.foreignpolicy.com/posts/2013/03/11/elections_parliament_and_a_new_prime_minister_in_jordan, accessed June 3, 2015.

³² Election Law for the House of Representatives, Law number 6 for the year 2016, Jordanian Official Gazette number 5386 (March 15, 2016).

³³ Cf. for example, Art. 62 lit. d of the Spanish Constitution, Part III Section 14 of the Danish Constitution, Chapter IX Section 171 of the Thai Constitution, Art. 54 para 5 of the Constitution of the United Arab Emirates.

them. During the period from January 1, 2011, until October 10, 2012, four governments were dismissed in this manner.³⁴ During the last 20 years, this method of appointing and dismissing cabinets has led to the formation of 22 governments.³⁵

Moreover, a prime minister who knows that he comes and goes at the king's will without any backing from a political party or parliamentary group will always aim to please the king in order to keep his post. For example, during the past decade it became a common practice for prime ministers and their ministers to announce that their decisions were made upon directions, orders, or recommendations of the king. This practice gives the impression that prime ministers and their ministers are mere employees of the king. This also means that the prime minister will try to please the high-ranking people who form the king's inner circle, such as the king's advisors, the Chairman of the Royal Court, or the Director of the General Intelligence Directorate. Though the prime minister and his cabinet have constitutional authority³⁶ and are subjected to constitutional liability,³⁷ the influence of the king's inner circle has lead cabinets, in practice, to surrender their constitutional authority to the will of the truly powerful.

In reality, the people of the said circle seem to think that the king and not the constitution is the source of the government's authority. Suffice it here to state what was written in the king's letter of acceptance of the resignation of Prime Minister Awn Al-Khasawneh on April 20, 2012. The king's letter included the following statement: "I granted you and your government all authorities, trust and freedom to enable you to perform your duties."

The question here is whether the king thinks that he is the source of the government's authority, or whether this is what the inner circle of the king believes. In my view, the letter directed to the prime minister and signed by the king has been written by the king's advisors.

It is clear here that the language of the letter reflects the understanding that the king's power, in the eyes of His Majesty's inner circle, is still the same as it was during the Middle Ages, and this is what the members of said circle want the people of Jordan to believe. Moreover, the members of the circle who participate in nominating prime ministers and ministers still dominate the political scene in the country and direct reform in a manner which suits their interests. The Jordanians know well that these people have become very wealthy without any apparent professional success or without inheriting from a deceased relative while, at the same time nobody dares to question their wealth. As a consequence, corruption has surged, and the performance of various governments has deteriorated to the lowest levels.

The Royal Commission, which suggested the constitutional amendments, did not pay any attention to the loud voices of academics and of the demonstrators recently populating Jordanian streets, all calling for a remedy to the issues described above. No attention was

³⁴ These are the government of Samir Rifā'ī, which resigned on February 1, 2011; that of Ma'rūf al-Bakhit, which resigned on October 17, 2001; that of Awn Al-Khasawneh which resigned on April 26, 2012; and that of Fāyaz Ṭarāwnah, which resigned on October 10, 2012.

³⁵ For 2011, the report on progress made on implementation of the EU-Jordan ENP Action Plan released on May 15, 2012, by the European Commission talks about three successive governments in nine months, http://ec.europa.eu/world/enp/docs/2012_enp_pack/progress_report_jordan_en.pdf, accessed January 20, 2015.

³⁶ Art. 45/1 of the constitution provides: "The Council of Ministers shall be entrusted with the responsibility of administering all affairs of the State, internal and external [. . .]."

³⁷ Art. 51 of the constitution provides: "The Prime Minister and Ministers shall be jointly responsible before the House of Representatives for the public policy of the State [. . .]."

paid to the importance of political parties and their role in any constitutional system aspiring to be a democracy. Any suggested constitutional amendments urging the king to consult parliamentary groups before appointing a prime minister were rejected. In Morocco, as a contrary example, the voices of the people were heard, and, accordingly, Art. 47 of the constitution emphasized that “the King appoints the Prime Minister from the party who gained greater number of seats in the House of Representatives.”

D. The National Integrity Charter and the Dismissal of Judges

As we have seen, paragraph 1 of Art. 98 read with Art. 40 of the constitution empowers the government to appoint and dismiss the judges. The Royal Committee of the National Charter discussed this matter several times while the author of this article provided the committee with several memorandums for remedying the defect in Art. 98.1 of the constitution. In the end, the Committee was convinced and arrived at the following provision:

Any future constitutional amendments should take into consideration that judges can not be dismissed from office after they are appointed except when the dismissal comes as a result of a criminal offence or behavioral misconduct.³⁸

Unfortunately, the constitution was amended on September 1, 2014, without any regard to what the Royal Committee had decided.

V. CONCLUSION

The authorities in Jordan consider the constitutional amendments of 2011 to be a proper response to the voices requesting reform.³⁹ In reality, it is becoming clear to the people that such amendments were merely meant to subdue the demonstrations and protests which were taking place in various towns and cities across the country. The adopted method of procedures coupled with the quality of the resulting amendments reveals the real intention of the dominating power to direct the reform scene. Even the language of the amendments can in no way be considered acceptable by a specialized lawyer.

It seems that high-ranking individuals, who feel that actual reforms and the establishment of democratic structures would deprive them of their privileges, advised the king to reform which does not meet the peoples' needs.

As a matter of principle, when the executive branch dominates the legislative and judiciary branches, one cannot speak of the adoption of any real reforms or the actual establishment of democracy. In this respect, two essential requirements for structural reform should be taken into consideration.

First, any state authority should be encountered by another independent authority to keep the balance between the authorities in the state. This is why modern democracy is based on three independent authorities.

Second, the opinion and policy according to which the state is governed should be encountered by another permitted opinion and policy to reveal any defect in the conduct

³⁸ “National Integrity Charter” (n 24) 57.

³⁹ Speech of King ‘Abdullāh II and the speech of the president of the Royal Committee on Constitutional Review Aḥmad al-Lawzī on the occasion of the publication of the constitutional amendments: <http://www.jordanoholic.com/blog/news/jordan-constitution-amendments-2011>, accessed January 20, 2015.

and behavior of those in power. This requires actual opposition parties as is the case in Western democratic States. In order for these two factors to become effective, peoples' enjoyment of actual freedoms are fundamental.

In the view of the author, Jordan should employ further reform in order for the country to become the actual constitutional monarchy and real democracy which the king has repeatedly called for. This new reform can in no way be properly accomplished under the watch of the politicians and king's advisors, whose position it has always been that any amendment of the constitution is a red line not to be crossed. These advisors forming part of the "old guard" or elite circles of Jordanian society and dominating the political scene are against any real reform. It is natural to expect the old guard to exert their utmost effort in order to protect their own interests in a reform tailored only to their benefit, just as has happened when the king was advised to accept the recent constitutional amendments. The old guard's drive to protect their own interests, under their claim that it is protecting the king, is in reality the main threat to the king's throne.

For the first nine months of the year 2011, the demonstrators and protestors in the streets of Jordan refused to speak a single negative word against the king. However, as soon as the outcome of the reform process began to crystallize, some people completely lost faith in the executive and legislative branches and directed their anger toward the king. As such, the demonstrations started using an increasing number of slogans and signs openly critical of the king. This has never happened before. What further attracts the observer's attention is that this direct criticism of the king started in the southern regions of Jordan, an area where people have always been seen as the backbone of the regime. Yet, said criticism has been increasing over years.

During the last five years, the author of this article has toured most of the cities and towns of the country, lecturing on constitutional reform and having discussions with thousands of Jordanians. The outcome of the discussions confirms that the removal of the king has never been a demand by the people of Jordan. In fact, the opposite has always been the case: The people of Jordan have historically shared a common belief that the Hashemite family, represented by the king, provides a much needed balance and equilibrium in a country like Jordan.⁴⁰ The fear is that without real reform, independent of and without interference by the old guard, this sentiment shared by most Jordanians might change.

⁴⁰ A controversy arises when taking into account that the opposite belief held by some Jordanians might be eliminated before being distributed across the country, such as in this case: "Jordanian Activists Detained for Criticizing King Abdullah II" (Press Release, March 15, 2012), <http://www.freedomhouse.org/article/jordanian-activists-detained-criticizing-king-abdullah-ii>, accessed June 3, 2015.

An International Constitutional Court

Bulwark against the Erosion of Constitutional Democracy

YADH BEN ACHOUR*

I. INTRODUCTION

Modern constitutional law is one of the many manifestations of the law of democracy. As for the law of democracy—for the time being let us just say that it is the law of peoples who have by means of a series of intellectual, political, and social revolutions finally come to realize that the legitimacy of the political establishment and the power that it embodies comes solely from the extent to which that political authority protects the freedom of the individual to participate fairly in the election of political representatives and the business of governing. In this respect, human rights are a fundamental basis for the law of democracy; but let it be said from the outset that human rights are not its only basis.

Constitutional law has been inevitably pulled along in the wake of the global spread of the law of democracy, which has occurred through a process of internationalization that is cultural, doctrinal, treaty-based, customary, and jurisdictional in nature. Indisputably, the field dubbed by the global community of legal experts as “constitutional law” is no longer the sole prerogative of domestic law. Given that this is the case, and in order to give it a stronger foothold in application, constitutional law ought to have at its disposal an autonomous institutional and procedural mechanism. The idea of an International Constitutional Court follows from this fact.

The first objection that is raised to this idea is that this need is already met by the existing international legal system and that adding a new mechanism would not only be

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unnecessary, but worse, would serve to further complicate a system that if anything would benefit from simplification. Those who make this argument primarily have in mind the universal or regional international conventions on human rights, some provisions of which are nothing less than rules of constitutional law. Global or regional international jurisdictions, in particular those that operate in the field of human rights protection, might also quite naturally come to mind. These conventions and jurisdictions do broadly meet this need. One might, at a pinch, accept the idea of a Universal Court of Human Rights,¹ but they see no need to go further than that.

This objection is obviously not entirely unfounded; however, we will show that it lacks relevancy. First of all, the undeniably close relationship between human rights and constitutional law is no justification for confusing the two. Allow me to clarify: Our hypothesis hereinafter is that it is precisely because of just such confusion of the fields of human rights and constitutional law that the various postulates and principles of democratic law are not respected. The human rights feast does not justify the famine in areas of the law of democracy that are not necessarily human rights-related and yet are so crucial to the democratic stability of states; that is why we need to go further. In August 2013, the president of the Tunisian National Constituent Assembly, to defuse a political crisis, suspended the work of the Assembly; the parties with the political majority contested the validity of this step. This issue, which impacts on the democratic stability of the state, has nothing to do with human rights. It would however be potentially justiciable before an International Constitutional Court. The international human rights protection under the existing international legal system is inadequate to protect the full range of states' constitutional obligations, for the benefit of the law of democracy.

However, before we can embark on any discussion about the International Constitutional Court itself, we must first tackle the unavoidable debate as to the philosophical assumptions which justify it, examine the legitimacy of the law of democracy, and the need for it. In particular, we must respond to the idea that the law of democracy is an expression of the philosophical, moral, religious, and cultural values of the European world—a civilization shaped by intellectual models from its own Greco-Roman pagan antiquity and by the spiritual and religious models of its Judeo-Christian origins. Should we fail to refute that view from the outset, any discussion about the law of democracy and its manifestations is reduced to a kind of truce signed to the advantage of that relativist approach.

II. THE LAW OF DEMOCRACY: ITS LEGITIMACY AND SUPERIORITY

How, except by begging the question, can we demonstrate the moral superiority of a democratic humanism that assumes humanity, human freedom, and human achievement to be the ultimate aims of the political project, regardless of any more ultimate aims? If we start from the assumption that our sole criterion in politics is humankind, then we can agree with Jürgen Habermas, who states that democratically formed law “has humanizing and civilizing virtues.”² In fact it is not difficult to prove the moral superiority of the law of democracy,

¹ On the draft Swiss universal court of human rights, see Département fédéral des affaires étrangères et Académie de droit internationale humanitaire, *Panel on human dignity. Protecting dignity: An agenda for human rights*, report 2011. See also the presentation by Manfred Nowak, “A world court of human rights” 41, and the consolidated draft with commentary by Julia Kozma, Manfred Nowak, and Martin Scheinin, 47 onward.

² C. Bouchindhomme (tr), J. Habermas, *La constitution de l'Europe* (Éditions Gallimard, 2012) 72.

which is just another way of saying “law established democratically”. How? That is what we will attempt to do now.

Authority may first be based on tradition, the voices of the ancestors, or the “mystical”. Moreover, there are civilizations that subscribe to the notion of a foundational religious authority, the authority of the prophets or of the saints. That approach leads evidently to the consecration of an institutional religious authority, such as for example a church or a body representing the foundational religious authority. Some religious parties still adhere to that view today; that’s the case, for example, with some Islamist parties who call for the establishment of a new caliphate to succeed the Prophet and a “Caliphatic constitution”.³ This theory of power also appears in another guise, which is the monarchic or imperialist system; under that kind of system, legitimacy of authority is sought in a kind of nucleus of history—a mythical history obviously, and one that transcends the facts of the past, the present, and the living.

The exercise of authority can as we know also be based on biological or physical determinism. It thus follows that the first authority, the familial authority, which is legitimized according to the logic of the begetter and the begotten and that grants the former the right to govern and to lead the latter. This kind of legitimacy can, for example, go a long way to justify government by whoever holds the most power or has the most violent wish to dominate others, or else to legitimize the superiority of one race to govern another or the superiority of the master to possess his slaves.

Democratic authority, on the other hand, flows from a philosophy based inherently on humankind, seen as an individual. It gravitates around a moral center based on reason and belief and around a practice based on exchange and dialogue. Under the theory of democracy, power has no any intrinsic legitimacy, but is continually called upon to justify itself, and thus to renew itself. The foundation of its legitimacy resides in humankind, and is specifically situated in the present and in life, in the here and now. The law of democracy comprises all of the legal rules and processes that are designed to put that democratic theory into practice. Its fundamental concepts revolve around sovereignty, citizenship, fundamental human rights, and freedoms of human and representation. The superiority of the law of democracy flows from two key factors, as outlined in Sections A and B.

A. The Theoretical Superiority of Democratic Law

At first glance, one might think it impossible for one philosophy or belief to be able to demonstrate and prove its superiority over the other available options. If, for example, we imagine a discussion between somebody who is convinced that the theocratic model is better than the democratic model and somebody else asserting the reverse, we might expect to conclude that it would be impossible for them to reach agreement, in that their different beliefs are based on epistemologically irreconcilable assumptions: One starts from the principle that humankind is both the starting point and the end point when thinking about politics, irrespective of everything beyond that; the other retorts that humans, such as they are, have neither sense nor essence without reference to their creation, their creator, and the objectives of that creator, and consideration for what will come after. Just as life is unimaginable except in relation to the passage of time, humankind has no sense without the “union” with God. How might a debate of that kind be brought to a conclusion? Each side would stick to their position, and the matter would therefore become a matter of personal choice and conviction, with no room for reasoning.

³ This is the case of the *Tahrir* Party, which has developed a constitution on the model of the caliphate.

However, although at one level this is true, the fact remains nonetheless that the theory of democracy remains the only theory that is “provable”, experimentally demonstrable, and this is what lends it its superiority. Other theories of power and of law become lost either in a cloud of mystery and grand hypotheses, assumptions certified as corresponding to the truth, facts of domination having the “force of legal truth”, interpretations having the “authority of *res judicata*”, testimonies prophesying the foundational word of God that have validity only within the circle of their worshippers, or in the cynicism of the still very many Machiavellian-type theories that claim “seize power, and you will have the right to it”, or in socio-historical explanations of power, such as the Khaldounian or Marxist type, which are relatively indifferent to the question of the moral legitimacy of power.

Democratic theory takes up the admission by Jean-Jacques Rousseau in *Discourse on the origin and foundations of inequality among men* (*Discours sur l'origine et les fondements de l'inégalité parmi les hommes*), in the beginning of which he writes: “Tis of man I am to speak; and the very question, in answer to which I am to speak of him, sufficiently informs me that I am going to speak to men; for to those alone, who are not afraid of honouring truth, it belongs to propose discussions of this kind. I shall therefore maintain with confidence the cause of mankind before the sages, who invite me to stand up in its defence; [. . .].”⁴ At the end of his *Discourse*, Rousseau makes another admission in the same vein: “I have endeavoured to exhibit the origin and progress of inequality, the institution and abuse of political societies, as far as these things are capable of being deduced from the nature of man by the mere light of reason, and independently of those sacred maxims which give to the sovereign authority the sanction of divine right.”⁵

It is therefore with humankind that the theory of democracy must also concern itself. For mankind is neither myth, nor hypothesis. Mankind is a truth, both subjective and objective, our only authentic truth. In fact, and above all, humanity is in each of us, observable and observer. This humanity, we know from evidence, is animated by the principle of nonsuffering and the quest for *joie de vivre*. This principle is a part of human cultures, with no exceptions; that makes it universal. This principle teaches us, through our own experiences and that of others, that human beings experience pain and suffering when a circumstance, impediment, fact, or accident of some kind assaults their dignity, as a member equal to all others in the same human race, or deprives them of the development and fulfillment of their being, both as physical bodies in space and as reasoning, thinking, reflecting, and talking moral beings. From this we deduce, for every human being, the absolute right to life and to physical integrity, which protect his or her physical body against suffering. We also deduce, in the name of the same principle of nonsuffering, all the rights and freedoms that derive from the natural attributes of reasoning, thinking, and talking beings, such as freedom of thought, conscience, and opinion, freedom of expression, and all that comes from them. Last, we deduce the rights of human beings, with their fellow humans and under the government of a single state, to participate in and to decide the business of government, as a citizen. Nobody, unless it is to deny or seek to destroy the humanity, can say “no” to these principles. That’s what makes democratic law superior. An attack on any one of these rights would create suffering and cause a scandal. Thus, from the principle of nonsuffering we can unravel the thread of the entirety of the law of democracy.

It is here that we are going to run into the objection by Hume according to which the facts of nature cannot be generators of norms—i.e., that one cannot infer from the statement

⁴ Jean-Jacques Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (Librairie de Bibliothèque Nationale, Paris 1894) 29, English version available at: <http://www.gutenberg.org/cache/epub/11136/pg11136-images.html>, accessed September 22, 2015.

⁵ *Id.* 135.

that a thing “is this”, that it “should be that”. A “must be” cannot be derived from the way that things “are”. This means that the facts of nature are not relevant on the normative, moral or judicial level: The law must be constructed without them, and sometimes contrary to them.

Without this principle, we founder in conformism, relativism, nihilism, or superstition. How can we accept then, the construction of a law of democracy on the basis of the natural and universal fact that is the experience of nonsuffering? How can righteous indignation and scandal be based on a natural and necessary fact?

To answer this question, we assert that we must differentiate between facts of nature. The law of democracy does in fact recognize the fact of nature and base itself on it when it participates in the ennoblement of humankind or protects humans from suffering or from humiliation, but it rejects the facts of nature when humans participate in the degradation or debasement of human beings. The facts of nature are not all of equal value under the law of democracy.

Indeed, we may find ourselves in a rare situation where the norm is in the thing itself. Such is the case of the first norm, the original norm, and the most fundamental—thou shall not inflict “harm” on your neighbor. What does that mean? Very specifically, it means that certain facts of nature, such as fleeing death, heartache, physical or moral suffering, situations that are humiliating, or unequal materially or in status, can be morally and consequently legally significant. They will necessarily and universally, through instinct and reason, engender the moral imperative of abstaining from causing suffering. It is this principle that tells us to reject all threats to life, to bodily integrity, to our faculty of thinking and expressing our thoughts, and last to our desire for equality, participation, and recognition, the source of our dignity. It is this principle that universally defines what is good and evil, authorized, recommended, or prohibited.

B. The Practical Superiority of the Law of Democracy

With its foundations in debate, consultation, and tolerance, the law of democracy obliges us to tolerate ideas that we abhor. Whilst it does not seek to teach us to love one another, because in that respect humans remain entirely free to choose for themselves, on the basis of freedom of thought, conscience, opinion, and religion, it does however oblige us to tolerate one another. The law of democracy permits the cohabitation of antipathies, regardless of their nature. A regime of quarrels and of open and endless polemics, democracy is the regime of pacifism. It has the power to accommodate the thoughts and utterances of its fiercest enemies, and yet it is this that is the main source of its fragility—this is where its enemies lie in wait. Dictatorship, theocracy, regimes of fixed ideology, celestial monarchies, or empires expunge their adversaries, their opponents, their political protesters. They cannot govern except by entrenched violence or hierarchical law unilaterally imposed on their subjects. In such systems there are no citizens, but only, in the best case scenario, a good shepherd and his flock. The law of democracy permits peaceful cohabitation, which is to say that it allows the fiercest enemies to live together without destroying one another. By liberating the word, it locks away the weapons of violence and anarchy, which are the best means of installing tyranny.

The law of democracy recognizes but one sole allegiance, which is that of citizenship. The allegiance of citizens to the state, through citizenship, liberates them from their condition or status as subjects. Regardless of whether this servitude is a voluntary servitude⁶, whether it is imposed by tradition, culture, or religion, it is nonetheless in every case a

⁶ As Boétie elegantly explains in *Discourse on Voluntary Servitude*: “there is no need of fighting to overcome this single tyrant, for he is automatically defeated if the country refuses consent to its own enslavement: it is not necessary to deprive him of anything, but simply to give him nothing; there is no need that the country

political alienation, contrary to the human freedom that is inherent in human nature. The discipline of the citizen is in the service of freedom: Citizens are happy because they are masters of their political destiny and remain masters of it. The passive discipline of the subject is in contrast an unhappy, alienated, or indifferent existence.

Last, let us emphasize that the basis for the law of democracy has nothing to do with culture—it transcends culture. The law of democracy does not belong to any civilization, nor to those individuals, whether great thinkers or men of action, who through particular effort or intellectual strength discovered it, lifted the deadweight of alienation that had imprisoned them for millennia, and disseminated, explained, theorized, revealed its implications. It was already there, before that, at the heart of our species constituted in our humanity, in our “essential essence”, while admitting nonetheless that the term “essence” is adapted to an evolutionary phenomenon. It is the shared fate, the genetic and spiritual heritage of all of humanity. The law of democracy does not belong under any one sky. It is neither Western, nor Eastern. Honoring humanity in its diversity, its colors, its histories, its particular cultures, and its identities, it is however contemptuous of enclosed geography, tyrannical culturalisms, “murderous identities” (Amin Maalouf), the God of slavery.

III. INTERNATIONAL CONSTITUTIONAL LAW

If we thus accept the superiority of the law of democracy, it remains for us to show that one of its fundamental instruments, namely democratic constitutional law, has in our times acquired an international importance that weighs on states at the legal as well as the cultural level.

The fundamental principles of democratic constitutional law are simple:

- Existence of a constitution known by all
- Foundation of power by the target people or group (tribal, minorities)
- Representation of the target group or people by bodies elected or appointed by other means, such as consensus
- Distinction between the legislative function and the execution of laws
- Independence and the high degree of professionalism of the judicial power
- Freedom of the individual and protection of individual and collective rights
- Respect for minority rights
- Control of powers and public authorities regardless of their rank by jurisdictional authorities and counterpowers
- Conformity with a set of legal rules determined by the bodies of the state and known in advance in the form of disseminated laws

It is true that these fundamental principles, which prior to the establishment of the League of Nations were the strictly domestic laws of some states, have since metamorphosed into the principles of international law, in the process undergoing some changes in meaning and a change of scale. This “international constitutionalization” represents,

make an effort to do anything for itself provided it does nothing against itself. It is therefore the inhabitants themselves who permit, or, rather, bring about, their own subjection, since by ceasing to submit they would put an end to their servitude. A people enslaves itself, cuts its own throat, when, having a choice between being vassals and being free men, it deserts its liberties and takes on the yoke”; see H. Kurz, *Antidictator, The Discours sur la servitude volontaire de l'Étienne de la Boétie* (Columbia University Press, New York 1942) 9.

as Renaud Dehousse writes, “the extension of the constitutionalism that we know at the national level”.⁷ Without getting into the arguments about monism and dualism, we must however acknowledge, including from the dualist perspective, that the autonomy of states’ domestic positive law has, in the area of constitutional law, been subjected to major restrictions imposed on it by the unprecedented development of general international law as well as of treaty law. Since the doctrines of Seward (1868) and Wilson (1913), then Tobar (1907) and Betancourt (1960), constitutional law is no longer exclusively the absolute monopoly of the state.⁸ International constitutional law has emerged by way of two complementary routes: the internationalization of constitutional law and the constitutionalization of international law.

A. The Internationalization of Constitutional Law

The term “internationalization” encompasses several phenomena, some legal, and others cultural.

In the first instance, it means that states acquiring the international status of a sovereign state recognized by the nations and the global organization adhere to an increasingly uniform constitutional model. Some writers even claim that the constitutive instruments of the international organizations are considered as their constitutions and even that they reveal a unified global constitution,⁹ less on the formal level than on the substantive level. It also means that there are legal provisions of a constitutional nature that are more or less imperative and restrictive on states, in several sources of international law, such as the universal or regional international conventions, the customs and the jurisprudence of all the international tribunals or other bodies of a political or quasi-jurisdictional nature. International law exerts a particular “constitutionalising” power.¹⁰ Moreover, it means the increasingly apparent institutionalization of the international framework and control, through the intermediary of international organizations, both universal and regional. In this vein we must not fail to mention the intervention of the Security Council, acting under Chapter VII UN Charter, in the constitutional life of states such as Liberia, Haïti, Sierra Leone, Côte d’Ivoire, Lebanon, Bosnia, Cambodia, Namibia, the Congo, or Kosovo. In some cases, we end up with “internationalized constitutions”, developed, arbitrated and monitored by the United Nations. Let us not forget to mention the Security Council’s exercising of this legislative function, which is contested precisely because it goes beyond “its” constitution, and by means of which it established the International Criminal Tribunals for the former Yugoslavia or for Rwanda (resolutions no. 827 and 955) or intervened in the field of terrorism (resolutions no. 1373 and 2001) or on the proliferation of weapons of mass destruction (resolutions no. 1540 and 204).¹¹ There are a multitude of international jurisdictions in the same vein—courts of human rights or international administrative tribunals—and then

⁷ R. Dehousse, “Naissance d’un constitutionnalisme transnationale” (2001) *Pouvoirs* 96, 21.

⁸ A. Mahiou, “Droit international et droit constitutionnel: de la non-intervention à la bonne gouvernance” (2003) vol. XVII *Droit constitutionnel et mutations de la société internationale*, Recueil des cours de l’Académie internationale de droit constitutionnel 186 et seqq.

⁹ J. Arato, “Constitutionality and constitutionalism beyond the state: two perspectives on the material constitution of the United Nations” (2012) 10 *Int’l J. Constitutional L.* 629.

¹⁰ R. Dehousse (n 8) 21.

¹¹ V. Gowlland-Debass, “The Security council and issues of responsibility under international law” (2011) vol. 353 *Recueil des cours de l’Académie de Droit International* 259.

there is the establishment of bodies for specific monitoring of particular international treaties¹² which have direct implications for constitutional law.

In addition to these legal aspects, internationalization reflects a uniformization of standards in the constitutional legal culture, thanks to the massification and acceleration of communication media and the intensification of contact between the elites that represent the constitutionalist culture. The activities of nongovernmental organizations and of international associations of lawyers, students, judges, and experts in constitutional law make a strong contribution and reinforce this trend toward the global expansion of the constitutionalist legal culture. This massification of the culture obviously affects the training of those holding political office, heads of state or of government. All of this is acting in concert, at the legal level and the cultural level.

To illustrate this hypothesis, let's look at some examples of the internationalization of constitutional law.¹³ International constitutional law emerged alongside the development of the global organization of nations. International organizations such as the League of Nations or the Organization of the United Nations provide a forum for the exchange of ideas and experiences. In coming together to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"¹⁴ and to guarantee peace and international security, the representatives of the nations that established these organizations evidently did so for the protection of humankind, human rights, and freedoms against violence and war, tyranny, injustice, and oppression. Such is their "common understanding" or their "common standard of achievement", to borrow the expressions used in the Universal Declaration of Human Rights. Yet that common standard implies a particular constitutional structure for the state; in order for this common standard to be realized, the constitutional structure must necessarily be democratic in nature. Consequently, dedication at the global level to the protection of human rights implies ipso facto dedication to the democratic constitutional model.

International law contains a great many constitutional provisions. They can be found in international instruments of great symbolic value, such as the Universal Declaration of Human Rights; in some resolutions of the United Nations General Assembly—notably those, of which there are many, that concern the promotion of regular and fair elections, or that support democratization or the state based on the rule of law at the national and international level; in international conventions, universal and regional; as well as in the jurisprudence of jurisdictional or quasi-jurisdictional international authorities. On this basis, one might even go so far as to say that the fundamental standards of democracy today form part of the international tradition.

¹² E.g., Human Rights Committee, established by the 1966 Covenant on Civil and Political Rights; the Committee against Torture mandated to monitor the implementation of the Convention against Torture and other forms of cruel, inhumane or degrading treatment or punishment; the Committee on the Rights of the Child, established in 1991 under the Convention on the Rights of the Child; the Committee for the Elimination of Racial Discrimination mandated to monitor implementation of the International Convention on the elimination of all forms of racial discrimination; the Committee for the Elimination of Discrimination against Women which monitors implementation of the Convention on the elimination of discrimination against women.

¹³ On this question, see "Constitution et droit international" (2000) vol. VIII *Recueil des cours de l'Académie internationale de droit constitutionnel*; "Droit constitutionnel et mutations de la société internationale" (2003) vol. XI; "L'internationalisation du droit constitutionnel" (2007) vol. XVI *Recueil des cours de l'Académie internationale de droit constitutionnel*.

¹⁴ See Preamble of the UN Charter.

By way of example, let us take Art. 21 of the Universal Declaration of Human Rights,¹⁵ which relates to the basis of the authority of government, elections, universal suffrage, and secret vote, the right to take part in the government of one's country directly or through chosen representatives. The substance of that article was taken up again in Art. 25 of the 1966 Covenant,¹⁶ which is interpreted in General Comment 25 of the Human Rights Committee. In its General Comment, the Committee relates Art. 25 to the right of peoples to self-determination, the right to freely determine their political status, and to choose the form of their constitution or government. In its General Comment the Committee is careful to distinguish between human rights and civil rights. In paragraph 5 of its General Comment 25, the Committee notes that the conduct of public affairs is a broad concept that includes the exercise of legislative power. It clarifies that it is implicit in Art. 25 that the representatives of the people "do in fact exercise governmental power" and that they are, consequently, accountable to citizens through the electoral process for their exercise of that power. It also spells out that the representatives only have the powers that are conferred on them by the constitution, which means that the constitution must be interpreted in a restrictive manner when it establishes mandates. It adds that elections must be held on a periodic basis so that the authority of the government continues to rest on the freely expressed will of the people. How else can these considerations be characterized if not as the fundamental tenets of constitutional law or indeed the constitutional obligations of the state?

International courts of justice, and more specifically the regional international courts of human rights, have amplified the trend. The bodies of the United Nations and regional international organizations have played a significant role. Active in the field of peacekeeping as much as in development, human rights protection, and democracy, these organizations have established procedures and practices and elaborated international instruments with tremendous symbolic value in the field of constitutional law. Among hundreds of examples, there is the Millennium Declaration, adopted in the United Nations General Assembly resolution 55/2 on September 8, 2000; the numerous United Nations General Assembly resolutions on strengthening the effectiveness of the principles of regular and fair elections and of democratization; the Inter-American Democratic Charter of September 11, 2001, the Bamako Declaration adopted by the 13th Francophonie Summit; the Harare Principles adopted by the Commonwealth Heads of Government Meeting on October 20, 1991; the African Charter on Democracy, Elections and Governance of January 30, 2007.

The strictly constitutional field can be provided for in conventions elaborated specifically for its development and promotion. Such is the case of the African Charter on Democracy, Elections and Governance adopted by the eighth ordinary session of the Assembly of the African Union, held in Addis-Ababa on January 30, 2007. The key objectives of the Charter are to promote the "universal values and principles of democracy", enhance "adherence to

¹⁵ Article 21 of the Universal Declaration of Human Rights states: "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right of equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures."

¹⁶ Art. 25 states: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country."

the principle of the rule of law premised upon the respect for, and the supremacy of, the constitution and the constitutional order in the political arrangements of the State parties”, to promote “the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments”, to prohibit and condemn any “unconstitutional change of government”, “promote and protect the independence of the judiciary”, nurture “political pluralism and tolerance”, promote the prevention of and the “fight against corruption”. On the basis of these objectives, states undertake to respect the principle of “access to and exercise of state power in accordance with the constitution of the State party”, the “promotion of a system of government that is representative”, “the separation of powers”, “strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law”.

But the same subject is also covered by provisions in international conventions intended for human rights jurisdictional bodies: This is the case with Art. 3 of the Additional Protocol (Paris, March 1952) of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

The African Charter on Human and Peoples Rights, too, provides in its Art. 26: “The States parties to the present Charter shall have the duty to guarantee the independence of the courts [...]”. It is certainly true that this kind of provision could have direct implications in the field of human rights, but in substance it is a provision that stems from the principle of the separation of powers and the relations between institutions established by the constitution.

The international jurisprudence, the jurisprudence of the courts of human rights, and the jurisprudence of the committees provide us with a great many examples of “constitutional jurisprudence”. For example, in the case of *Paksas v. Lithuania*¹⁷ of January 6, 2011 (a case currently before the Human Rights Committee), the European Court of Human Rights, to judge whether certain aspects of the complaint was compatible *rationae materiae* with the provisions of the Convention, referred directly to impeachment proceedings against the president of Lithuania, followed by an act that prohibited him from standing as a candidate to the legislative, presidential, and local elections. In evidence that the impeachment proceedings did not have a penal nature the court declares:

However, in any event, in the context of impeachment proceedings against the President of Lithuania for a gross violation of the Constitution or a breach of the presidential oath, the measures of removal from office and (consequent) disqualification from standing for election involve the head of states constitutional liability, so that, by virtue of their purpose, they lie outside the “criminal” sphere.¹⁸

Consequently, the court concluded that Art. 6, paragraph 1, of the Convention was not applicable to the Constitutional Court proceedings in issue. Addressing the determination of disqualification of which the applicant claimed to be victim, the court took care to note that

in a recent democracy such as (according to the Government) Lithuania, it is not unreasonable that the state should consider it necessary to reinforce the scrutiny carried out

¹⁷ *Paksas v. Lithuania* (App no 34932/04) ECHR (January 6, 2011), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102617#{"itemid":\["001-102617"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102617#{), accessed February 23, 2015.

¹⁸ *Paksas v. Lithuania* (n 18) para. 66.

by the electorate through strict legal principles, such as the one in issue here, namely permanent and irreversible disqualification from standing in parliamentary elections. Nevertheless, the decision to bar a senior official who has proved unfit for office from ever being a member of parliament in future is above all a matter for voters, who have the opportunity to choose at the polls whether to renew their trust in the person concerned.¹⁹

Regarding the particular responsibilities of the president of Lithuania under the Lithuanian Constitution, the court says:

An “institution” in himself and the “personification” of the state, the President carries the burden of being expected to set an example, and his place in the Lithuanian institutional system is far from merely symbolic. In particular, he enjoys significant prerogatives in the legislative process since he has the right to initiate legislation (Art. 68 of the Constitution) and the possibility, when a law is submitted to him for signature and promulgation, of sending it back to the Seimas for reconsideration (Art. 71 of the Constitution). In the Court’s view, it is understandable that a state should consider a gross violation of the Constitution or a breach of the constitutional oath to be a particularly serious matter requiring firm action when committed by a person holding that office.²⁰

These appraisals of the disqualification proceedings, the status of the president and of presidential privileges, and the relationship of the president with the legislative assembly undeniably fall within the scope of an examination of pure constitutional law.

The same could be said about the *Ždanoka v. Latvia* case,²¹ considered by the European Court of Human Rights on March 16, 2006. In that case, the court ruled on facts in dispute, namely, the participation of the Latvian Communist Party in an attempted coup. Asserting that “the Court’s task is not to take the place of the competent national authorities but rather to review the decisions they delivered pursuant to their power of appreciation”,²² the court proceeded to consider a matter of qualification that was entirely constitutional in nature with the subject of a decision by parliament and a Supreme Court judgment in the context of a criminal case brought against two leaders of the Communist Party. The “European public order”²³ of which democracy is a fundamental element is evoked by the European Court in many of its judgments, notably the *Refah Partisi* Judgment and the *Vogt* Judgment (in which the court considered the requirement of political loyalty imposed on state officials with regard to the state), is in fact a constitutional order. That much became clear when the court, delivering its assessment of the criteria of “political neutrality”, deems that the “the criterion of “political neutrality” cannot be applied to members of parliament in the same way as it pertains to other state officials, given that the former cannot be “politically neutral” by definition. One might make the same observation when we see the court take a view on the actions of the leaders of a political party to know whether they are attributable to the party as such or whether they remain separable.

¹⁹ *Paksas v. Lithuania* (n 18) para. 104.

²⁰ *Paksas v. Lithuania* (n 18) para. 104.

²¹ *Ždanoka v. Latvia* (App no 58278/00) ECHR March 16, 2006, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72794#{%22itemid%22:%5B%22001-72794%22%5D%7D}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72794#{%22itemid%22:%5B%22001-72794%22%5D%7D), accessed March 23, 2015.

²² *Ždanoka v. Latvia* (n 22) para. 96.

²³ *Ždanoka v. Latvia* (n 22) para. 98.

This international control can go so far as to control the conventionality or internationality of the constitution itself. Let us take, for example, the case 246/02: *Ivorian Human Rights Movement v. Côte d'Ivoire*, handed down by the African Commission of Human Rights in July 2008.²⁴ The communication claimed that the Constitution of Côte d'Ivoire, adopted by constitutional referendum of July 23, 2000, contained discriminatory provisions (Arts. 35 and 65) by preventing some citizens from holding political positions. Accepting the admissibility of the communication, the Commission states: "These allegations, in the opinion of the Commission, raise a *prima facie* violation of human rights". Going on to consider that "the right to participate in public affairs or in the political process of one's country, including the right to vote and to stand for election, is a fundamental civil liberty and a human right and should be accorded to citizens without discrimination", the Commission judged the articles in question to be discriminatory and therefore not in conformity with the African Charter of Human and Peoples Rights. The Commission called for the discriminatory provisions in the constitution to be revised. This is a pure example of control of the internationality of the Ivorian Constitution, leading to the revision of the constitution.²⁵ Our view is that it would be more appropriate for an International Constitutional Court to intervene in litigation of this nature that questions the internationality of constitutions.

B. The Constitutionalization of International Law

The transfer between the two spheres of international law and constitutional law is occurring simultaneously in both directions, upward and downward.

States, even recalcitrant states who do not share the beliefs behind the universalization of democratic law, understand that in acceding to the legal system of the world they are required to respect its principles and rules, and will enter into an awkward dialogue with the law of democracy, or at least engage with the international constitutional norms in order to introduce them, to one degree or another, into their domestic legal system. The question therefore arises in two respects. First of all there is the moral and intellectual pressure exerted by the norms of international law during the process of drawing up constitutions. To what extent should the constitution include in its provisions the principles and rules of international constitutional law? Second, there is the influence exerted through the hierarchical legal relationship between international law, the constitution and the law. Is law that is contrary to international law unconstitutional? What about the constitution itself?

This question is an extremely interesting one to study during transitional periods when new constitutions are being written, in particular if the governments put in place during those periods are conservative or religious governments that do not share the fundamental philosophical presumptions or particular legal norms of international law of democracy.

When the Tunisian Constitution was being developed this question aroused great passions. We know that, since the elections of October 23, 2011, the majority party has been the al-Nahḍah Party, not one that abides unconditionally by democratic law. Despite its particular history in a relatively secularized country, which eventually led it to attempt to reconcile the precepts of the Islamic religion with those of democratic law, the party could

²⁴ See African Commission on Human Rights: July 29, 2008, 246.02/: *Mouvement ivoirien des droits humains (MIDH) / Cote d'Ivoire*, http://www.achpr.org/files/sessions/5th-eo/comunications/246.02/achpreo5_246_02_fra.pdf, accessed February 17, 2015.

²⁵ In the same vein: African Commission on Human Rights: May 7, 2001, 211/98: *Legal Resources Foundation/Zambia*, <http://caselaw.ihrrda.org/fr/doc/211.98/view/>, accessed February 17, 2015.

not accept the secular spirit of the law of democracy, nor some of the individual freedoms that are fundamental to democracy but contrary to the law developed by classical jurists on the basis of religious texts.

To be more specific, there were some fundamental issues that were at the core of a public debate about international constitutional norms in relation to the constitutional law of the state. This public debate in fact masks a fundamental opposition between supporters of the identity culture and supporters of modern culture. These questions concerned in particular the “civil” nature of the state, the universality of human rights and restrictions on them, freedom of conscience, attacks on sanctity, and the rights of women.

On all of these questions, the “democrats”, whilst accepting the first article of the draft constitution,²⁶ reclaimed the ground of the modern democratic law established by international standards, whereas the “theocrats” claimed the traditional precepts of Shari‘ah.

Thus, faced with the traditional predisposition that required that the “Shari‘ah as the fundamental source of the law” and “Islam as religion of the State” (Art. 141 of the draft constitution) be enshrined in the constitution, the modernist tendency responded not only that these retrograde provisions that were contrary to democratic law and to the principles of international law accepted by Tunisia as a member state of the international community must be rejected, but moreover that it was necessary to make an explicit provision as to the civil nature of the state. The majority party, seeking to prove the democratic faith that it professed, in March 2012, and before the flame of the democratic protest movements, renounced the Shari‘ah as a source of law and accepted, in the draft constitution passed on June 1, 2013, Art. 2: “Tunisia shall be a civil State, based on citizenship, the will of the people, and the supremacy of the law”. Eventually, in November 2013, within the Adhoc Commission on Conciliations (*Lajnat al-Tawāfuqāt*), it accepted the deletion of Art. 141.²⁷

There were similar standoffs about the equality of men and women and the criminalization of “attacks on sanctity” in the body of the draft constitutional text. Whereas the Islamist party preferred the formulation “the complementarity of men and women”, the democrats, led by the feminists, clung vehemently to the egalitarian rules of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which it demanded be enshrined in the text of the constitution. By unfortunate coincidence, the Convention had assumed an Arabized form derived from the English CEDAW, pronounced “see-dor”, that allowed the “complementaryists to refer to it unhelpfully as the “convention SIDA” [*the AIDS convention*”].

The criminalization of “attacks on sanctity” under the constitution was proposed as a means of responding to particular expressions of political or artistic opinions deemed blasphemous or which were excessively derisive of religion, which were not to the Islamists’ taste. In the face of the movements and fatigued by the relentless protests, the “complementaryists” gradually gave way to the egalitarianists, and our *guelphs* gave way before our *Ghibellines*.

²⁶ Article 1, which reproduces in its entirety the former Article 1 of the Constitution of June 1, 1959: “Tunisia shall be a free, independent and sovereign State, its religion shall be Islam, its language Arabic and its system of government shall be the republic.”

²⁷ This concession was made within the *Adhoc Conciliation Commission*, during the meeting of November 1, 2013. The draft of the constitution should normally have been adopted by a plenary session of the National Constituent Assembly by absolute majority, article by article, then by a majority of two-thirds for the text as a whole.

That's not all: The crime of "attack on sanctity" was deleted from the initial draft of the constitution, but the constituents went after it with a secular demand that consisted of introducing in the draft constitution alongside freedom of thought, expression, and religion, freedom of conscience, characterized as a "freedom absent in a theocratic State".²⁸ In doing so, they drew their arguments from Art. 18 of the Universal Declaration of Human Rights and from the 1966 Covenant, as well as from the jurisprudence of the Human Rights Committee and its General Comment No. 34, or indeed the jurisprudence of the European Court of Human Rights. The stakes were very high, in the sense that conventional Islamic law and the contemporary Islamic parties rejected the idea that a Muslim should have the right to leave his or her religion and recognized the death penalty for the crime of apostasy. On this point too, the democrats won out and freedom of conscience was allowed in to Art. 6 of the draft constitution.

Another even more significant example can be found not just in the debate around the universality of human rights but, more specifically, around the restrictions that a democratic state can impose on democratic rights and freedoms. Initially, the idea of enshrining the universality of human rights was rejected by the majority party, in the name of identity, religious feeling, and culture. Moreover, the initial drafts of the constitution borrowed the conventional formula, according to which freedoms were exercised "within the limits provided by the law". Tunisian jurists, in particular those who in 2011 constituted the "Committee of Experts" who had worked within the High Authority for Realisation of the Objectives of the Revolution (HIROR—*la Haute instance de réalisation des objectifs de la révolution*) joined forces for the dual causes of calling on the one hand for reference to be made to the universality of human rights in the preamble of the constitution, and on the other for an explicit provision taking up the Siracusa principles to appear in the body of the constitution. In the end, the draft retained on June 1, 2013, recognized the universality of human rights, but it was contested because its Art. 48 did not sufficiently regulate the restrictions that the legislator was able to impose over fundamental rights and freedoms. It was examined again by the Adhoc Conciliation Commission. The conventional restrictions inserted separately in each article were deleted and an amended Art. 48 was adopted as follows:

The exercise of and restrictions regarding the rights and freedoms set forth in this Constitution shall be provided for by the law, on condition that their substance is not undermined. Such restrictions shall only be adopted where necessary in the context of a civil and democratic State, with a view to protecting the rights of others or the needs of public security, national defence, public health or public morality, while respecting the principle of proportionality between the restrictions decided upon and the motivation for them. The courts shall ensure the protection of rights and freedoms against any infringement.

Anyone can recognize in this provision the influences of the European Convention on Human Rights; of the International Covenant on Civil and Political Rights, notably Arts. 18, 18, and 21; of the Siracusa principles adopted in May 1984; of the jurisprudence of the European Court of Human Rights and the statements of the Human Rights Committee, and its General Comments 25, 27, and 34.

Unless there is an unexpected about-face further down the line, the Tunisian example could come to be considered as a typical example of constitutionalization, in the strict meaning of the term, of international constitutional law.

²⁸ Title of an article by Yadh Ben Achour, which appeared in the Arabic language journal *Le Maghreb*.

C. International Constitutional Law and International Protection of Human Rights

While acknowledging the proximity, the interconnectedness even, of international constitutional law to human rights, we must be careful not to confuse genres and guard against a kind of human rights “imperialism”. The fact that some international conventions on human rights contain provisions that are purely constitutional or that international courts of human rights hand down decisions on strictly constitutional matters sometimes unrelated to human rights is not grounds for failing to consider the autonomy of international constitutional law. A too wide interpretation of human rights law would, in the end, lead us to integrate almost all disciplines into the field of human rights. Employment law, family law, fiscal law, administrative law, the law on obligations and contracts, criminal law, would all be swallowed up by human rights.

The proximity of the two fields constitutes no argument at all. In the *Zdanoka* judgment, the European Court of Human Rights differentiated, regarding Art. 3 of Protocol No.1, between the constitutional obligation that is incumbent on states to hold democratic elections and the related rights, including the right to vote and to stand for election, which could arise from the same article.

As we have said before, some human rights can be understood, in fact, as positive or negative constitutional obligations by the state. Others have direct repercussions on the constitutional organization of the state. We should not forget that Montesquieu had begun his reflection on what he never called “the separation of powers” with a reflection on political freedom, notably in the context of the “Constitution of England”.

However, international constitutional law and international human rights law are not of the same nature. Human rights, by virtue of their universality, are immutable. International constitutional law is malleable and changing. It is a means, and not an end. That is what led the International Court of Justice in its Advisory Opinion of October 16, 1975, on *Western Sahara* to state:

No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.²⁹

The constitutional autonomy of the state, based on its sovereignty, was highlighted in particular in the Judgment of June 27, 1986, *Military and Paramilitary Activities in and against Nicaragua*. The degree of variability in international constitutional normativism was shown consistently in the jurisprudence of the European Court of Human Rights, which was careful to note, in the judgments mentioned previously, that this subject depended on the particular context of each state, on its political evolution, its constitutional maturity, and its cultural traditions. Thus, regarding the concept of “democracy able to defend itself”, the court recognized “the need to take account of the political evolution”, in specifying that “what is unacceptable in the context of a system of one country may be justified in the context of another”. The court specified that “the political, historical, cultural and constitutional situation of Lithuania would thus justify the litigious measure, whereas it might seem excessive in a well-rooted democratic system”. Regarding electoral systems, the court emphasized, in the judgments *Hirst*, *Zdanoka*, and *Paksas*, that, in the very heart of Europe,

²⁹ *Western Sahara*, Advisory Opinions of the International Court of Justice, October 16, 1975, para. 94, <http://www.icj-cij.org/docket/files/61/6195.pdf>, accessed February 23, 2015.

there were notable differences, “in the historical evolution, the cultural diversity and political thinking, which made it incumbent on each state party to incorporate in its own vision of democracy”.

This relativist reasoning, which is entirely justified in the field of international constitutional law, is unacceptable in the area of human rights. Regardless of the fact that there are “inalienable” rights, it is difficult to maintain the idea that in areas such as the right to life, physical integrity, freedom of thought, conscience, and religion, freedom of expression, right to organize and protest, each state might have its own vision of the law. It is true that human rights can be subject to restrictions, which are accepted by international conventions. But that is a different matter: Such restrictions are valid for all states, regardless of their political, social, or cultural development. International constitutional law is an instrument of the right to democracy, a set of tools for achieving that right. But what is universal is the right to democracy, in its principles, and not international constitutional law in itself. International constitutional law may be exercised in different ways, depending on the circumstances of place and time. There is no universality in terms of election procedures, the structure of courts, the separation of powers, and the relations between them, federalism, decentralization, control over the constitutionality of laws and the legality of administrative decisions, etc. International constitutional law sticks to the daily lives of states, whereas international human rights law concerns humanity. To be valid, the constitutional law of a state must respect the objectives of the right to democracy, not adhere to a single predetermined constitutional model. This is a fundamental difference in perspective.

All of these reasons not only justify in themselves the creation of an International Constitutional Court, but moreover call on us not to confuse the idea of an International Constitutional Court with the idea of creating a Universal Court of Human Rights; one would consider humanity without conditions, the other is specific to state and citizenship.

IV. THE INTERNATIONAL CONSTITUTIONAL COURT

The idea of establishing an International Constitutional Court hopes to compensate for shortcomings in the law on the subject of the constitutional obligations of states, with or without relation to the protection of human rights. As was emphasized by Monique Chemillier Gendreau, recalling Art. 26 of the Vienna Convention on the Law of Treaties, it consists of “putting good faith back at the centre of politics and requiring the representatives of States to bring their actions in line with their promises”.³⁰

Although there is, as we have shown, an international constitutional law at the normative level, it remains for us to recognize its independence, and complete it, *de lege ferenda*, but above all to find it an institutional and procedural mechanism of implementation. That is the objective of the plan to create an International Constitutional Court.

A. Its Political Objective

Politically, the aim of the plan is to give the political actors, in particular those who are in opposition to the established government or the civil society organizations, a means of recourse able to recognize their rights, in the event of illegal behavior by the state as regards democracy. It is no coincidence that the idea of such a court germinated in the mind of a Tunisian opponent of the dictatorship, Doctor al-Munşif al-Marzūqī. In an article in the

³⁰ M. Chemillier-Gendreau, “Obliger les Etats à tenir parole,” *Le monde diplomatique* (September 2013) 12.

French newspaper *Libération* published in 1999, the man who 12 years later would become the first president of Tunisia after the revolution, lamented the capacity of international law to “mine the theoretical will of the international community to substitute law for force everywhere” and proposed the creation of an International Constitutional Court in these terms: “Although the concept of the world based on the rule of law must have a meaning, there must be a judicial structure, to which the national or international civil society can turn to demand justice when faced with an authority that is guilty of violating the texts that form the basis of the international legal system today. It would be the equivalent of a constitutional court in a democratic country, but at the global level . . . I have proposed to call such a structure the International Constitutional Court.”³¹

Following the election of the former opponent as head of state by the National Constituent Assembly on October 23, 2011, an international commission was put together to finalize the project.³² That commission has designed a basic legal architecture for the project.

B. Its Composition

So far as the composition of the court is concerned, the idea has been to integrate the Constitutional Court into the United Nations system, whilst conserving the role of member states, but without undermining the professionalism of the judges. It is foreseen that each of the member states of the United Nations would propose a candidate, and a college comprising judges of the International Court of Justice, Judges of the International Criminal Court, and members of the International Law Commission would then select 42 candidates from the list of candidates submitted by the states, according to the criteria of integrity, competence, and experience, whilst taking into consideration fair representation of the main legal systems of the world. The 21 members of the court would then be elected by the United Nations General Assembly from the list put forward by the college.

C. Its Role and Submissions

The functions of the court fall into two distinct categories.

The first category is those that stem from an expanded consultative function, both at the level of entities or individual who have access to the court, and in receiving requests for views, opinions, and mandates of the court in this field. With regard to submissions, the court can be petitioned by governments, plenary bodies of universal, regional, or sub-regional international organizations, nongovernmental organizations that have an official status, consultative or otherwise, with the aforementioned international organizations, political parties, national associations, and professional organizations. Just from looking at the spectrum of potential petitioners, we can see that the function of the court is not just to resolve the problems of victims of human rights violations.

The purpose of this expanded consultative role is first of all to reply to petitioners' questions on points of international constitutional law affecting a state in particular, then to

³¹ The article appears in M. Marzouki, *Le mal arabe: entre dictatures et intégrismes. La démocratie interdite* (L'Harmattan, Paris 2004).

³² This commission is made up of the following members: Yadh Ben Achour (Tunisia, President), Professor Monique Chemillier Gendreau (France), Monsieur Ghazi Gherairi (Tunisia), Professor Christian Tomuschat (Germany), Professor Maurice Kamto (Cameroon), Professor Ahmed Mahiou (Algeria), Professor Slim Laghmani (Tunisia), and Professeur Ferhat Horchani (Tunisia).

evaluate, from the point of view of the principles of democratic law and the rules of international constitutional law, the drafts of texts and texts that are submitted to it, regardless of their nature. It could be draft texts or texts of constitutions, of laws, decrees, or other acts of state that the court will examine, depending on demand, as a whole or in part (preambles, titles, chapters, articles, paragraphs).

The second element of the court's role is more contentious. In this context, it would be petitioned by individuals having the capacity to act, notably political officials and actors. In order to be able to access the court, these individuals would have to be supported by a collective petition, the rules for which would need to be specified. The court could also be petitioned by political parties, national associations, and professional organizations, by plenary bodies of universal, regional, or subregional international bodies, or by nongovernmental organizations accredited by the state, in the context of an election process. The court would rule on the illegal behaviors of states with regard to the principles of democracy and of international constitutional law, in particular as regards elections. Such behaviors might consist of either constitutional, legislative, or regulatory legal acts, or of material facts or operations, such as election procedures for appointing local, regional, or national representatives or referendum procedures.

D. Its Powers

The court's remit, in the framework of its consultative role, would consist of giving a reasoned opinion on the point of law raised by the petitioner, or issuing a declaration of conformity or nonconformity of the draft text submitted for its consideration. The court would also have the power, by way of advice, and in the event that it is asked to do so, to propose amendments to the text that would bring it into conformity with the universal principles of democratic law or the rules of international constitutional law. In contentious cases, the idea is that the court would hand down judgments that have the force of *res judicata*, so far as states are concerned.

E. The Proceedings

Proceedings before the court would therefore, in this area of competence, be proceedings of a legal nature what would set the conditions of the claim and its subject, the organization of hearings and pleadings, *amicus curiae* proceedings, questions of timeframe, etc. Its rules of procedure would obviously depend on the constitutive act of the court, but already it is foreseen that the court would not be able to rule until domestic means of recourse had been exhausted.

F. The Applicable Law

The court will have to refer to three main sources of applicable law: first, the normative provisions of its constitutive act. It is conceivable that this constitutive act, regardless of its nature, will be made up of two parts—one normative part devoted to the fundamental rules of international constitutional law and one organic and procedural part.

The second comprises the universal or regional international treaties establishing the principles of democratic law or the rules of international constitutional law that we have mentioned. In this light, it is clear that states will be committed "each one as it is concerned", according to its own block of constitutionality and its particular conventional obligations explicitly recognized.

The third relates to the general principles of democratic law and constitutional law accepted by the “democratic nations” that truly represent the civilized nations of the world today. Put another way, the concept of “democratic nations”, a universal and humanist concept based on the protection of human rights, must come to replace the concept of “civilized nations”, which is a discriminatory and racial concept of the former colonialist international law.

One could put things differently and say that if we wish to keep the expression “civilized nations”, we must understand it in the sense of “democratic nations”, i.e., in the sense given to it by Habermas, who, let’s not forget, stated that democratic law had humanizing and civilizing virtues which transcended, by their very definition, particular cultures, and identities. Democratic law is not Western law, although this formulation may make sense. The jurisprudence of human rights courts and committees who offer edifying precedents in this area could help the court to “locate” these international standards into the substance of international constitutional law.

V. CONCLUSION

The Tunisian Revolution of January 14, 2011, is one example of a recent major historical event that has put an end to the myth of “democracy as a Western import”. The culmination of mass social protests against tyranny, its message is clear and unambiguous. It is a direct result of democratic law—yet nobody, no leader nor governing party, no army, nor foreign state, came to teach the people of the revolution what they should shout to topple the dictatorship, the oppression and torture, the human degradation, the servitude and corruption. The cry of indignation let out by the young people of the revolution was a cry from the gut. At the heart of the message: freedom, dignity, justice, and in its body: a state based on the rule of law, the civil state (“secularism” was also seen and heard), pluralism, democracy, freedom of thought, freedom of belief, freedom of expression, the equality of men and women.

Let us therefore say again and say vehemently that in the light of events in Tunisia, and other similar experiences elsewhere in the world, it is becoming absurd to claim that the desire for democracy belongs to one particular culture. The law of democracy must not ever be associated with its individual Western “discoverers”, however great, or let us defy those who claim it, if they have the gift of illuminating the history of the world: Amīr ‘Abd al-Qādir, ‘Abd al-Rahmān al Kawākibī, King Muḥammad V, Mahatma Gandhi, ‘Umar al-Mukhtār, al-Munṣif Bey, Martin Luther King, and Nelson Mandela.

The law of democracy is the business of all of us. For democracy, we have no color, race, gender, history, language, denomination, or religion. Everyone can of course come to it by their own path—most likely according to a moratorium that will allow it to combat the forces of alienation and conformism that so permeate cultures and identities. But we must achieve it. The law of democracy is the sole guarantor of our humanity. An International Constitutional Court could make a key contribution to that.

PART

7

INTERNATIONAL
INFLUENCES AND
INTERACTIONS

The Relationship between International Law and National Law in New and Amended Arab Constitutions

ALI M. EL-HAJ

I. INTRODUCTION

Since the onset of the “Arab Spring,”¹ several countries in the Middle East and North Africa region have undergone constitutional reform. While in some of these countries new constitutions were introduced—Egypt (2014; 2012), Morocco (2011), Syria (2012), and Tunisia (2014)—in others, such as Bahrain (2012) and Jordan (2011),² existing constitutions were

¹ Given its common usage, the expression “Arab Spring” is used here only as a temporal point of reference. As for its intellectual accuracy, the author is cautious of using an expression, traditionally employed in relation to the “Prague Spring,” to capture ongoing and changing processes—some more successful than others—of several countries in the Middle East and North Africa region. For a more in-depth reflection of the expression “Arab Spring,” see: the contribution by Nouredine Jebnoun, “State and Religion in the Aftermath of the Arab Uprisings” (*in this volume*).

² In Jordan, the two houses of parliament endorsed amendments to two articles of the 1952 Constitution in August 2014. The changes do not affect the subject of this chapter. For current purposes, the latter constitution will continue to be referred to “as amended in 2011,” which is when the main raft of constitutional amendments took place. For more on the 2014 amendments, see: the contributions by Awn Shawkat Al-Khasawneh, “The Arab Spring and Constitutional Reforms in Jordan: A Historical and Legal Appraisal” and Mohammad Hammouri, “Constitutional Reform and the Rise of Constitutional Adjudication in Jordan” (*both in this volume*). See also: Areej Abuqudairi, “Jordan King Given Further Exclusive Powers—Al Jazeera English” (*Al Jazeera*, August 30, 2014), <http://www.aljazeera.com/news/middleeast/2014/08/jordan-king-given-further-exclusive-powers-2014826123814316219.html>, accessed September 18, 2015; “Inside Jordan’s Proposed Constitutional Amendment” (*Al-Monitor*), <http://www.al-monitor.com/pulse/politics/2014/08/jordan-constitution-amendment-king-government.html>, accessed September 18, 2015.

amended.³ Drafters of constitutional texts need to address a number of questions. One such question is the relationship between international law and the national law of these states.⁴ This chapter examines the relationship between treaties and the national legal orders of Bahrain, Egypt, Jordan, Morocco, Syria, and Tunisia.⁵ The inquiry is comparative on two levels. First, it examines constitutional provisions currently in force and compares these with the older constitutions to track what changes have occurred in each state. Second, the discussion compares these findings with those of the other Arab states. This inquiry is important because the reach of international law has expanded so that its remit extends to domains that were previously considered only within the sphere of the state.⁶ Studying the relationship allows one to better comprehend how, and why, international law impacts the domestic legal systems.⁷

Traditionally, academic scholarship has focused on the relationship between international law and national law through the lens of the “monism-dualism” debate.⁸ With this in mind, Part II lays the theoretical groundwork for the analysis of the Arab constitutions in the subsequent part. It begins by explaining, and evaluating, the “monist” and “dualist” schools of thought. Key terms used in this chapter will then be defined. This is followed by an overview of the relationship between international law and national law from the perspective of international law. National authorities play a role in the application and enforcement of international law in their domestic legal systems. While international law does elaborate on its relationship with national law, it does not stipulate how such an application or enforcement is to take place. This can be determined by the constitution of the relevant state. Part III seeks to better understand the relationship between treaties and the aforementioned Arab national legal orders. With a focus mainly on the constitutions, it examines: (A) whether, how, and when, do treaties become part of the national legal system; (B) the scope of the treaty-making power⁹ of the executive; (C) what the constitutionally recognized role of the legislature is in the treaty-making process; (D) what rank treaties have internally; and (E) if, and to what extent, the respective constitutional courts are authorized to monitor treaties. In some instances, where the constitutional provisions

³ The constitutions of Mauritania (1992) and Oman (1996) were amended in 2012 and 2011, respectively. Due to constraints in space, these constitutions will not be examined in this chapter.

⁴ Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins, “Commitment and Diffusion: How and Why National Constitutions Incorporate International Law” (2008) 2008 University of Illinois Law Review 201.

⁵ The Arab constitutions make no express reference to customary international law, hence the focus on treaties.

⁶ Ginsburg, Chernykh, and Elkins (n 4) 202. For example, Duncan B. Hollis writes: “From tobacco to chemical weapons, from the rights of children to desertification, from registration of trademarks to cybercrime, treaties have become *the* preferred vehicle by which states structure their rights and obligations under international law. [...] The study of treaties, therefore, is of increasing importance.” See: Duncan B. Hollis, “A Comparative Approach to Treaty Law and Practice” in Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff Publishers 2005) 2. See also: David Sloss, “Domestic Application of Treaties” in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, Oxford 2012) 367; André Nollkaemper and Ellen Hey, “Introduction Theme I: The Relationship between International Law and National Law” (2001) 3 International Law FORUM Du Droit International 9, 9.

⁷ In this chapter, the expressions “national-,” “domestic-,” and “municipal” legal system will be used interchangeably. The same applies to “national-,” “domestic-,” and “municipal” laws.

⁸ Sloss (n 6) 367.

⁹ In this chapter, “authority” and “power” will be used interchangeably.

are unclear or silent in relation to a specific question, treaty practice and case law is adduced to fill the gap and provide clarity. However, due to constraints of space, a full study on treaty practice and jurisprudence is not possible.¹⁰

The chapter concludes that: the approach of the Arab legal systems examined is generally “monist” in relation to treaties; ratified treaty provisions have domestic legal status and are, with the exception of some treaties in Bahrain, directly applicable in courts; the executive has a relatively wide scope of treaty-making power, which is, *de jure*, heavily concentrated in the head of state, but that parliaments play a role in approving some—in Egypt, almost all—categories of treaties prior to ratification. There is no clear, general trend in favor of increasing or decreasing the role of parliament in the area of approval of treaties; despite the lack of clarity or silence of many of the constitutions on the internal rank of treaties, jurisprudence and government statements indicate that the Arab legal systems generally cluster toward recognizing treaties as inferior to the constitution but superior to ordinary laws; and finally, in spite of the latter conclusion, the new and amended constitutions do not expressly authorize the respective constitutional courts to oversee the constitutionality of treaties—Morocco and Tunisia are the exceptions. Furthermore, no Arab constitution contains a provision empowering constitutional courts to monitor the conformity of ordinary laws to ratified treaties. The chapter concludes with some thoughts on how the power of oversight of treaties, by the respective constitutional courts, might be constructed by way of interpretation.

II. THEORETICAL UNDERPINNINGS

A. Monism

The terms “monism” and “dualism” have often been used to explain the relationship between the legal order of a state and international law. The monist tradition considers international law and national law as forming a single legal order. As a consequence, a key aspect of monist legal systems¹¹ is that “at least some treaties”¹² can automatically form part of municipal law once these have been concluded in a constitutionally conformant way and have entered into force for the relevant state.¹³ Treaty norms that apply directly in the national legal order do not require a further act of transformation¹⁴ and are treated as municipal or “statutelike” law.¹⁵ They are “statutelike” in the sense that national courts—as well as government bodies—will

¹⁰ For an excellent study of treaty law and practice of nineteen states, see generally: Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff Publishers 2005).

¹¹ In practice, states are not absolutely monist with regard to all treaties. For the purposes of this chapter, and in the interest of clarity in the discussion, the author subscribes to the approach of David Sloss, which classifies as “monist” those legal systems that give automatic domestic legal status to “at least some treaties”. This allows for a more straightforward categorization of states as either monist or dualist. This approach, however, does have limitations—most notably, it makes the categorization more dichotomous. See: Sloss (n 6) 369.

¹² *Id.* 373.

¹³ See: Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 183; Sloss (n 6) 369.

¹⁴ In this chapter, the terms “transformation” and “incorporation” will be used interchangeably.

¹⁵ John H. Jackson, “Status of Treaties in Domestic Legal Systems: A Policy Analysis” (1992) 86 *American Journal of International Law* 310, 310–311. Of course, as we shall see below, treaties can have a higher status than statutes. *Id.* 321.

refer to the treaty language as a source of law, in the same way that regard is had to various municipal laws, such as the constitution and statutes.¹⁶ Some scholars maintain the priority of treaties over inconsistent national laws¹⁷ as an aspect of “monism.”¹⁸ However, this is contested.¹⁹ The Netherlands is often cited as an example of a monist legal system. Accordingly, all treaties that bind the Netherlands on the international level automatically form part of the national legal order—there is no need for implementing legislation.²⁰ Provisions of self-executing treaties are superior to national laws,²¹ including the constitution.²²

B. Dualism

In the case of “dualism,” international law and national law are considered independent and distinct legal orders. Treaty provisions only form part of the national legal order when a statute incorporates or transforms these into the domestic legal order. When this is done, national courts may apply relevant provisions in domestic cases and individuals can rely on these.²³ There is no uniform definition of what constitutes an act of transformation: It could be a statute passed by parliament or “a regulation of an administrative body.”²⁴

In the case of conflict between the treaty provisions—as expressed in the act of transformation—and the national law, national courts apply the *lex posterior derogate legi priori* principle. The United Kingdom can generally be considered to have a dualist system: Treaties do not have automatic domestic legal status upon entry into force without legislation to that effect.²⁵ An act of transformation may also involve a statute which makes, in advance, provision for the incorporation of international legal norms.²⁶

C. Criticism—Legal Pluralism

The “monism” and “dualism” prisms for the study of the relationship between international law and national law have been criticized for, among others, being “not precise,” “too “dichotomous” in flavor”²⁷ and “intellectual zombies of another time and should

¹⁶ Jackson (n 15) 321; Konstantin Korkelia, “New Trends Regarding the Relationship between International and National Law (with a Special View towards the States of Eastern Europe)” (1997) 23 *Review of Central and East European Law* 227, 228.

¹⁷ Norms of the national legal order can encompass the constitution and prior or subsequent statutes as well as “regulatory acts, and laws of subordinate governmental units (states in a federal system).” See: Jackson (n 15) 318.

¹⁸ Ginsburg, Chernykh, and Elkins (n 4) 204.

¹⁹ Sloss (n 6) 368.

²⁰ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 100. However, André Nollkaemper notes that, in practice, “the Netherlands usually chooses to convert them [treaty provisions] into national legislation to harmonize Dutch law with the requirements of international law.” Source: André Nollkaemper, “The Netherlands” in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009) 335.

²¹ See: Art. 94 of the Constitution of the Kingdom of the Netherlands (2008).

²² Jackson (n 15) 320; Crawford (n 20) 101.

²³ Ginsburg, Chernykh, and Elkins (n 4) 204; Sloss (n 6) 370.

²⁴ Jackson (n 15) 315.

²⁵ *JH Rayner Ltd v. Department of Trade and Industry* [1990] 2 AC 418, at para 476.

²⁶ Jackson (n 15) 319.

²⁷ *Ibid.* 314. See also: Gerald Fitzmaurice, “The general principles of international law considered from the standpoint of the rule of law” (1957) 92 *Recueil des Cours* 1, 71.

be laid to rest.”²⁸ Furthermore, there is no single definition of the two concepts.²⁹ It can be argued that each constitution establishes a specific constellation of the relationship which cannot fit perfectly into the one or the other category.³⁰ For example, a state could take a monist approach with regard to treaties, but be dualist in relation to customary international law.³¹

While taking into consideration the above criticism, for present purposes, it suffices to use the “monism-dualism” lens as a starting point to describe, generally, types of national legal systems specifically with regard to their relation to treaties. Upon closer focus, one may then build on this and map out the diversity of these relations.³² Although beyond the remit of this chapter, it is interesting to note that perhaps some of the findings may serve as a further impetus to abandon the “monism-dualism” approach, in favor of one of “legal pluralism.”³³

D. Distinguishing Key Terms: Domestic Validity, Direct Applicability, Invocability, Direct Effect, and Self-Executory Treaties

For the sake of clarity, it is important to distinguish key expressions that are often used in the literature inconsistently, mainly within the context of monist legal systems. When a treaty has domestic legal status—once it is concluded in a constitutionally conformant way and enters into force internationally—it can be said to have domestic validity. It also usually has direct applicability. This means that courts and executive agencies can apply the treaty norms as domestic legal provisions *ex proprio vigore*, without the need for further national legislation.³⁴ A treaty is said to be invocable—often confused with direct applicability—when individuals can rely on its provisions in national courts or executive agencies. A treaty that has direct applicability can be deemed to be invocable when, for example, the provisions stipulated therein create rights for the individuals seeking to rely on, or invoke, the same. Adding to the confusion, in the context of European Union law, the expression direct effect has been used to refer to the direct applicability or invocability of a treaty. The expression “direct effect” will be abandoned in this chapter.³⁵

For a treaty to have direct applicability, it must be domestically valid. Invocability of a treaty, in turn, requires that it is directly applicable. Not all domestically valid treaties are

²⁸ Armin von Bogdandy, “Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law” (2008) 6 *International Journal of Constitutional Law* 397, 400.

²⁹ Sloss (n 6) 368.

³⁰ Visar Morina, Fisnik Korenica, and Dren Doli, “The Relationship between International Law and National Law in the Case of Kosovo: A Constitutional Perspective” (2011) 9 *International Journal of Constitutional Law* 274, 280.

³¹ Ginsburg, Chernykh, and Elkins (n 4) 204.

³² Sloss (n 6) 369; Jackson (n 15) 314.

³³ Instead of the concepts of monism and dualism, Armin von Bogdandy advocates an approach of “legal pluralism”: “[A] theory of legal pluralism can account, descriptively and normatively, for the diversity within the legal realm, in general, and the links between domestic constitutions and international legal phenomena, in particular.” Von Bogdandy (n 28) 398.

³⁴ Karen Kaiser, “Treaties, Direct Applicability” in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) 1108, 1108–1109.

³⁵ *Id.* For an overview of some of the considerations that may arise when international law is applied by national courts, see: Crawford (n 20) 57–59.

necessarily directly applicable and, in turn, invocable.³⁶ This is where domestically valid treaty provisions are deemed to be so ambiguous so as to be not enforceable without further legislation.³⁷ This further blurs the distinction between monist states that follow the direct applicability approach, and dualist states where treaties apply indirectly.³⁸ Unambiguous treaties—or treaty provisions—are said to be self-executory, whereas ambiguous ones are non-self-executory.³⁹ In several monist legal systems, the legislature sometimes introduces legislation to help courts and executive agencies in giving “practical effect” to treaties that are already domestically valid.⁴⁰ Not infrequently, constitutions—such as all the Arab constitutions being examined—refer to treaties, but do not distinguish between self-executing and non-self-executing treaties. This has been interpreted as meaning that all ratified treaty provisions can be invoked by individuals and applied by national courts.⁴¹

In dualist legal systems, the situation is relatively clearer. The distinction between self-executory and non-self-executory treaties does not need to be made because legislation already specifies what treaty provisions courts may apply and individuals can rely on.⁴² Treaty provisions only have domestic validity when an act of transformation incorporates these into the national legal order.⁴³ Thus, treaties are indirectly applicable.

E. International Legal Provisions on the Relationship between International Law and National Law

An outline of some provisions from the Vienna Convention on the Law of Treaties 1969⁴⁴ will shed light on the relationship between treaties and national law from the perspective of international law and, in turn, help inform the discussion in Part III.⁴⁵ Art. 2 of the Vienna Convention defines a “treaty” as an “international agreement concluded between States in written form”. Some states have a broader understanding of what constitutes a “treaty”, which encompasses, for example, “agreements with or between international organizations”.⁴⁶ For the purposes of this chapter, the term “treaties” encompasses the latter agreements as well.

In addition to “treaties”, the Arab constitutions also refer to international “conventions”, “agreements”, “covenants” and “charters”.⁴⁷ While the terms are not necessarily all

³⁶ Kaiser (n 34) 1108–1109; David Sloss, “Non-Self-Executing Treaties: Exposing a Constitutional Fallacy” (2002) 36 U.C. Davis Law Review 1, 10–11.

³⁷ Korkelia (n 16) 235.

³⁸ Hollis (n 6) 45–47.

³⁹ On the “twofold” distinction between self-executing and non-self-executing treaties, *see*: Daniel P. O’Connell, “Relationship between International Law and Municipal Law” (1960) 48 Georgetown Law Journal 431, 452. *See generally*: Jean-Marie Henckaerts, “Self-Executing Treaties and the Impact of International Law on National Legal Systems: Research Guide” (1998) 26 International Journal of Legal Information 56.

⁴⁰ Sloss (n 6) 375.

⁴¹ Gennady M. Danilenko, “The New Russian Constitution and International Law” (1994) 88 American Journal of International Law 451, 465.

⁴² O’Connell (n 39) 451.

⁴³ Hollis (n 6) 40.

⁴⁴ Vienna Convention on the Law of Treaties 1969 (United Nations, Treaty Series, vol 1155, p 331).

⁴⁵ For a more in-depth discussion of the approach of international law to national law, *see*: Crawford (n 20) 51–55.

⁴⁶ Hollis (n 6) 11.

⁴⁷ With reference to the new or amended constitutions of the following countries: Bahrain refers to “treaties” (Arts. 37, 121(a)) and “agreements” (Art. 121(a)); Egypt refers to “treaties” (Art. 151) and “international

identical,⁴⁸ and some are often used interchangeably, for reasons of clarity, this chapter focuses mainly on “treaties”.

Art. 7(2)(a) of the Vienna Convention recognizes the following office-holders as representing the state “for the purpose of performing all acts relating to the conclusion of a treaty”, namely, “Heads of State, Heads of Government and Ministers for Foreign Affairs”. Furthermore, according to Art. 46(1):

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

A treaty that is concluded and enters into force binds the parties thereto. As stipulated in Art. 26, a treaty must be performed in good faith (*pacta sunt servanda*). If a state party fails to perform, it may not invoke its internal law as a justification for nonperformance of the international legal obligation (Art. 27). The latter provision has been interpreted as appearing to show that treaties have direct applicability in national legal systems.⁴⁹

III. THE RELATIONSHIP BETWEEN TREATIES AND THE NATIONAL LEGAL ORDERS OF ARAB STATES WITH NEW OR AMENDED CONSTITUTIONS

Having (A) outlined the monist and (B) dualist traditions as an initial way of generally classifying legal systems in their approach to treaties—while (C) bearing in mind the limitations of using the “monism-dualism” binoculars—followed by (D) a breakdown of key terms that enable a more sophisticated analysis of the relationship between treaties and national legal orders, and, finally, (E) a presentation of international legal provisions that touch on that relationship, it is useful now to examine the relationship between treaties and the domestic legal systems of Bahrain, Egypt, Jordan, Morocco, Syria, and Tunisia. The study will be guided by the questions⁵⁰ below. These questions are descriptive per se—however, the ensuing discussion will be analytical and provoke

conventions, covenants and charters” (Art. 93); Jordan refers to “treaties” (Art. 33(1) and (2)), “agreements” (Art. 33(1) and (2)), and “international agreements” (Art. 21(2)); Morocco refers to “treaties” (Art. 55), “international treaties” (Art. 92), “international conventions” (Preamble, Arts. 19, 30, 92), “charters” (Preamble), and “international charters” (Art. 19); Syria refers to “international treaties” (Arts. 75(6); 107), “international conventions” (Arts. 75(6), 107), and “agreements” (Art. 128(7)); and Tunisia refers to “treaties” (Arts. 20, 62, 65, 67, 77, 82, 120) and “international conventions” (Art. 92).

A number of English translations of Arab constitutions available online do not translate some terms entirely accurately. For example, *ittifāqiyāt duwaliyah* is often translated as “international agreements,” although the term “international conventions” is more accurate. While this does not affect the discussion, in the interest of intellectual accuracy, it is important to raise this point. The translations of the aforementioned international instruments in this footnote is in line with United Nations terminology (available online).

⁴⁸ See: “Definition of Key Terms Used in the UN Treaty Collection” (*United Nations Treaty Collection*), https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml, accessed September 19, 2015.

⁴⁹ Hollis (n 6) 39.

⁵⁰ See also: *id.* 4. The approach used in questions (A) to (D) is in several ways informed by the approach discussed in Duncan B. Hollis’ chapter in Hollis, Blakeslee, and Ederington (n 10). See especially: Hollis (n 6) 4.

new questions. This may serve as a useful point for discussion for those involved in constitution-making processes and deciding on provisions governing the relationship between international law and the relevant national legal system. Thus, what is the scope of the treaty-making power of the executive? Do treaties become part of the national legal system? If so, when? What is the constitutionally recognized role of the legislature in the treaty-making process and in relation to which categories of treaties? What rank do treaties have internally? Does the constitution authorize constitutional courts to oversee treaties? If so, to what extent?

A. What Is the Scope of the Treaty-making Power of the Executive?

Since treaties are written rules, they “enter into more direct and precise competition with the main body of municipal law”, such as domestic laws and ordinances.⁵¹ In light of this contention and considering the influence of treaties on domestic laws, provisions on popular consent over treaties in the national legal system—in the form of parliamentary approval—become a relevant issue in constitutions. Given the volume and variety of treaties that states enter into, not all treaties require parliamentary approval after they have been concluded by the government. Some states, with a strong executive branch, may seek to maintain a high degree of influence by, for example, retaining the power to decide which treaties get concluded and ratified—free of parliamentary approval—and, in turn, form part of national law.⁵² The *de jure* remit of the power of the executive with regard to such treaties can be observed from the constitution. As will be seen below, apart from Egypt, for all the other Arab states the remit can be distilled by an *argumentum a contrario* from constitutional provisions that refer specifically to categories of treaties that require parliamentary approval.⁵³

The constitutions of the Arab states being studied display a large degree of similarity in an aspect of the treaty-making process: The executive has the power to negotiate, conclude, and ratify treaties.⁵⁴ Differences, in constitutions generally, emerge in the degree to what extent this power is centralized within the executive. Some constitutions—such as in Bahrain and Egypt—take a more centralized approach by empowering only the head of state to negotiate and conclude treaties. It is important to note that this conclusion is based on a formal reading of the constitutional provisions. Treaty practice, for example in Egypt, illustrates that other bodies within the executive—and not mentioned in the constitution—are involved in the treaty-making process. In Egypt, the Permanent Committee for Drafting the Revision of Treaties, an interagency committee, coordinates the exercise, by the executive, of its treaty-making power. It reviews, before the signature stage, all treaties that have been proposed.⁵⁵ In Jordan, it appears that treaty-making power is concentrated only in the king. However, another interpretation of the relevant constitutional provision—discussed below—reveals that a wider circle of office-holders within the executive is constitutionally recognized as being involved in the exercise of treaty-making power. Apart from the head of state, other office-holders or bodies within the executive—such as in Morocco, Syria, and Tunisia—may have express constitutional authorization to wield some treaty-making

⁵¹ Ignaz Seidl-Hohenveldern, “Transformation or Adoption of International Law into Municipal Law” (1963) 12 International and Comparative Law Quarterly 88, 101.

⁵² *Id.* 101–102.

⁵³ *Id.*

⁵⁴ Similarities exist also between other legal systems. See: Hollis (n 6) 19–20.

⁵⁵ *Id.* 20–23.

power.⁵⁶ Sometimes, treaty-making power may be allocated to office-holders not recognized by Art. 7 of the Vienna Convention on the Law of Treaties to negotiate and conclude treaties.⁵⁷

1. Bahrain

Art. 37 states that the king concludes treaties by decree.⁵⁸ Such treaties are, in turn, communicated to the Consultative Council and the Chamber of Deputies, which jointly make up the National Assembly (Art. 51).⁵⁹ Although Art. 37 illustrates that the treaty-making power is concentrated in the king, it is not the only position within the executive involved in the treaty-making process. For example, the Council of Ministers can approve the conclusion or accession to international treaties and conventions.⁶⁰ The 2010 Double Taxation Agreement between the United Kingdom and the Kingdom of Bahrain was signed by Minister of Finance Shaykh Ahmad Bin Muhammad al-Khalifah, rather than the king. Furthermore, the Legislation and Legal Opinion Commission (LLOC)—“an independent body” with an “independent budget”⁶¹—plays an important role in the treaty-making process. This is not evidenced in the constitution. The LLOC has been described as follows:

The LLOC is the legal advisor of the government, acts as Chief Legal Officer, and represents the government in front of civil and Constitutional courts; it also reviews all draft legislation [...] to the Legislature.⁶²

The LLOC consists of four departments, one of which is the “Department of International Treaties and Conventions and Contracts.”⁶³ In relation to treaties, some of its functions include the: (a) preparation and review of international treaties and conventions in light of what the Council of Ministers considers relevant to conclude, or accede to, at the request of the competent authorities; (b) legal study of international treaties and conventions which the Council of Ministers considers relevant to conclude or accede to, and the

⁵⁶ *Id.* 20–21.

⁵⁷ *Id.* 22–23. Art. 7 of the Vienna Convention on the Law of Treaties potentially introduces a tension with the way states allocate treaty-making power domestically. It appears that Art. 7 gives authority to the office-holders listed therein to bind the state internationally, regardless of the fact whether or not municipal law gives them that authority. Thus, if the minister of foreign affairs concludes a treaty without being authorized by domestic law to do so, then treaty obligations would nonetheless likely flow from this. A reliance on Art. 46 in such a case would not succeed. To what extent this tension exists can be gauged by looking at which office-holders have been given treaty-making authorization in domestic law. See: *id.* 19. See also: Ian Sinclair, *Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 32–33.

⁵⁸ See: Art. 37 of the 1973 Constitution.

⁵⁹ The Chamber of Deputies (or “Council of Representatives”) was established by the 2002 Constitution.

⁶⁰ See: point no. 5 under the section “Department of International Treaties and Conventions and Contracts”: “Tasks and Obligations” (*Legislation and Legal Opinion Commission*), <http://www.legalaffairs.gov.bh/53.aspx?cms=iQRpheuphYtJ6pyXUGiNqvIUuxhDKBaC>, accessed August 12, 2015 (in Arabic).

⁶¹ See: Art. 1: “The Law of the Commission—Law No. 60 (2006)” (*Legislation and Legal Opinion Commission*), <http://www.legalaffairs.gov.bh/55.aspx?cms=iQRpheuphYtJ6pyXUGiNqrNf8YcA6kci>, accessed August 12, 2015 (in Arabic). This is the author’s own translation.

⁶² OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Bahrain 2013: Phase 2: Implementation of the Standard in Practice* (OECD Publishing 2013) 56, <http://dx.doi.org/10.1787/9789264205468-en>, accessed August 12, 2015.

⁶³ See: Art. 7: “The Law of the Commission—Law No. 60 (2006)” (n 61). This is the author’s own translation.

provision of legal opinions on the extent to which these are compatible with the constitution; and (c) provision of opinion on the necessary legal procedures that need to be taken to conclude or accede to international treaties and conventions. Furthermore, the LLOC, if mandated to do so, can (d) represent the Kingdom of Bahrain or participate in representing it at international and local conferences or symposia to discuss international treaties and conventions.⁶⁴

2. Egypt

In Egypt, Art. 151 of the 2014 Constitution provides that the president concludes treaties, and ratifies the same after they have been approved by the House of Representatives, which is composed of no less than 450 members (Art. 102). Three limits, extracted from the constitution, on the exercise, by the executive, of its treaty-making power can be mentioned. First, the executive does not enjoy an uninhibited right to conclude and ratify treaties—in all cases, subject to exceptions, parliamentary approval is required before a treaty can be ratified. Previously, in the 1971 Constitution (as amended in 2007), the president would simply “communicate” treaties to the People’s Assembly after their conclusion (Art. 151). Second, according to Art. 151 of the 2014 Constitution, treaties of peace, alliance, and rights of sovereignty have to be put forward to a referendum. These can only be ratified after the announcement that they have been approved in the referendum. In the 2012 Constitution, these treaties required the approval of two-thirds of the members of the House of Representatives and the then-existing *Shūrā* Council (Art. 145). Third, the final sentence in Art. 151 of the 2014 Constitution states:

In all cases, no treaty may be concluded which is contrary to the provisions of the Constitution or which leads to concession [*sic*] of state territories.

This is relevant in terms of expressly delimiting the exercise of the treaty-making power of the executive. The reference to the conclusion of a treaty is noteworthy, because this is where the executive is involved. This express delimitation of the executive’s treaty-making power is not provided for in the 1971 Constitution (as amended in 2007). Furthermore, the cited provision highlights that the delimitation applies “[i]n all cases”. Art. 145 of the 2012 Constitution does not mention this, and does not refer, in the prohibition, to treaties leading to the cession of state territories. Thus, there is a stronger delimitation of the executive’s treaty-making power in the 2014 Constitution.

While the 2014, 2012, and 1971 Constitutions illustrate that, within the executive, the exercise of treaty-making power is concentrated in the president, this is not necessarily the case in practice. Nabil Elaraby et al., have pointed out that the cumulative effect of Arts. 138, 151, and 153 of the 1971 Constitution⁶⁵ “is that the President may delegate those [treaty-making] powers to different authorities within the executive branch”.⁶⁶ While the conclusion was written when the 1971 Constitution was still in force, it can still be applied to the current constitution, where the three aforementioned articles can still be found. Within

⁶⁴ See further: “Tasks and Obligations” (n 60) (in Arabic).

⁶⁵ “The Constitution of the Arab Republic of Egypt 1971 (as Amended up to 2007)” (*World Intellectual Property Organization*), http://www.wipo.int/wipolex/en/text.jsp?file_id=189854, accessed August 11, 2015.

⁶⁶ Nabil Elaraby, Mohammed Gomaa, and Lamia Mekhemar, “Egypt” in Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff Publishers 2005) 231.

this “cumulative effect” framework, Law No. 453 (1955) (as amended) provides that the Ministry of Foreign Affairs:

shall undertake the communications, consultations and negotiations for concluding all international agreements, and the supervision of their implementation, interpretation and denunciation in conjunction with other ministries and departments.⁶⁷

Another legal measure which illustrates that, notwithstanding the concentration, in the constitution, of treaty-making power in the president, it can be delegated to allow a wider circle of office-holders within the executive to exercise it, is the following:

[T]he Decree of the Cabinet of Ministers of September 21, 1955 on the organization of the Ministry of Foreign Affairs provides that the Legal and Treaties Department is entrusted with the preparation of the drafts of international agreements, all measures necessary for their conclusion, publication, and registration in the ministry or with other international organizations, and the procedures for their denunciation.⁶⁸

Various departments of the Ministry of Foreign Affairs are involved in the negotiation of agreements. The signing of agreements is a power that the president is authorized to exercise—however, it has been delegated to the prime minister and foreign affairs minister. It is also not uncommon for ambassadors of Egypt accredited abroad to sign treaties. As for ratification, while the constitutional provision authorizes the president to ratify treaties, this masks the fact that, in practice, the ratification process also involves other office-holders, ministries or departments within the executive.⁶⁹

3. Jordan

In Jordan, the power to conclude treaties and agreements lies with the king (Art. 33). On the one hand, it may be argued that the scope of the treaty-making power is concentrated only in the head of state. On the other hand, Art. 40 provides:

The King shall exercise his powers by a Royal Decree, and the Royal Decree shall be signed by the Prime Minister and the Minister or Ministers concerned. The King shall express his concurrence by placing his signature above the said signatures.

It may also be argued that the reference to “his powers” includes, by definition, the king’s treaty-making powers, stipulated in Art. 33. Thus, it would follow that the exercise of treaty-making power is, according to the constitution, not only concentrated in the head of state but also involves the prime minister and relevant minister or ministers. Based on the latter interpretation, and with the other Arab constitutions in mind, the 1952 Jordanian Constitution (as amended in 2011) recognizes a relatively wide class of office-holders within the executive that is involved in the exercise of treaty-making power.

4. Morocco

According to Art. 55 of the 2011 Moroccan Constitution, the king signs and ratifies treaties.⁷⁰ However, the exercise of the treaty-making power is not only concentrated there.

⁶⁷ *Id.* 232.

⁶⁸ *Id.*

⁶⁹ *Id.* 232, 235.

⁷⁰ *See:* Art. 31 of the 1996 Constitution.

Art. 92 stipulates that the Council of Government, acting under the presidency of the head of government, shall deliberate on international treaties and conventions before these are submitted to the Council of Ministers. The latter is presided over by the king and is composed of the head of government and ministers (Art. 48). This explicit constitutional recognition of the role of other bodies—namely, the head of government and Council of Government—within the executive that are involved in the deliberation of treaties is not present in the 1996 Constitution. In fact, the Council of Government only received constitutional recognition in the 2011 Constitution.⁷¹ Furthermore, in light of Art. 47 of the 2011 Constitution, the head of government is appointed by the king from the party that won most seats in elections to the House of Representatives.⁷² Thus, the cumulative effect of Art. 47 and Art. 92 of the new constitution is that the person occupying the position “head of government” can be of a party previously in opposition and, as head of government, can, in that capacity, be involved in the treaty-making process. It is submitted that, although this does not represent a widening of the scope of executive office-holders, it does potentially widen the scope of persons who exercise the position which allows them to be engaged in the treaty-making process.

5. Syria

Art. 107 of the 2012 Syrian Constitution⁷³ vests the power to conclude international treaties and conventions with the president, who has the power to revoke them “in accordance with provisions of the constitution and rules of international law.”⁷⁴ The power to conclude treaties is not only concentrated in the president. According to Art. 128, the Council of Ministers enjoys that power too.⁷⁵ However, it makes no reference to the revocation of the same.

6. Tunisia

Art. 77 of the 2014 Tunisian Constitution provides that the president shall ratify treaties and authorize their publication. The 1959 Constitution (as amended in 2008) does not expressly refer in this case to the publication of treaties.⁷⁶ Art. 67 of the new constitution further provides that “[t]reaties enter into force once they have been ratified”. Art. 32 of the 1959 Constitution (as amended in 2008) stipulated an additional provision for the entry into force of treaties, namely, that these be applied by the other party. Art. 62 of the new constitution stipulates that the head of the government—namely, the prime minister—may put forward (to the parliament) draft laws concerning the approval of treaties. These draft laws take priority. The prime minister is responsible for concluding international conventions of a “technical nature” (Art. 92). Both provisions are not present in the old constitution and represent a widening in the constitutionally recognized scope of members of the executive that may exercise treaty-making power.

⁷¹ Mohamed Madani, Driss Maghraoui, and Salwa Zerhouni, *The 2011 Moroccan Constitution: A Critical Analysis* (International IDEA 2013) 43, http://www.idea.int/publications/the_2011_moroccan_constitution/.

⁷² Morocco has a bicameral legislature, with the House of Councillors being the other chamber (Art. 60).

⁷³ See: Art. 104 of the 1973 Constitution (as amended in 2000).

⁷⁴ Such rules could, for example, concern provisions on the termination of or withdrawal from treaties, stipulated in the Vienna Convention on the Law of Treaties (1969).

⁷⁵ See: Art. 127 of the 1973 Constitution (as amended in 2000).

⁷⁶ See: Art. 32 of the 1959 Constitution (as amended in 2008).

7. Conclusion

The following conclusions can be drawn from the above points. First, the constitutional provisions illustrate how the treaty-making power is highly concentrated in the head of state, and, to a lesser extent, the prime minister and other ministers too. Second, this scope has remained generally the same if one compares the old and new constitutions. Morocco and Tunisia are more the exceptions. Third, treaty-making practice—for example, in Egypt—shows that despite the first and second observations, the exercise of treaty-making power can in reality be widely dispersed. This leads to two subpoints:

- (1) This third point fits with the conclusion of Duncan B. Hollis in a previous study on treaty law and practice, namely: The office-holders authorized by international law are not necessarily identical to the office-holders authorized by national law to conclude treaties.⁷⁷
- (2) The passage of new and amendment of old constitutions provided an opportunity for drafters to introduce or amend provisions on treaty-making that would more closely reflect practice. However, this was not always done. This makes a study on treaty-making practice all the more necessary. Yet, a constitutional provision that describes in detail the executive bodies through which a treaty needs to pass through can solidify a process that may require to be fluid and flexible enough to respond to various exigencies. Nevertheless, one may argue that those long-standing treaty-making practices that have crystallized into unwritten laws could have been codified to better reflect the allocation of treaty-making power within the executive and the treaty-making process.

B. Do Treaties Become Part of the National Legal System? If So, When?

Drafters of constitutions need to decide when international law becomes part of the domestic legal system. It is possible to distinguish between the direct applicability and indirect applicability approaches.⁷⁸ As monist legal systems, ratified treaties are, in principle, domestically valid and directly applicable in the Arab states being studied.⁷⁹ With regard to Bahrain, some categories of treaties, such as human rights treaties, are indirectly applicable.⁸⁰ The domestic validity and direct applicability of treaty provisions can be gauged from various government statements and jurisprudence cited later in this chapter. At this stage, it suffices to list some cases and government statements.

⁷⁷ Hollis (n 6) 29.

⁷⁸ *Id.* 40.

⁷⁹ Of course, in practice not all treaties ratified by a state will necessarily be applied by courts. Some treaties are horizontal and apply between states. According to David Sloss: “Domestic courts rarely apply treaties that regulate horizontal relationships among States.” This is because they “generally lack the institutional competence to adjudicate such disputes.” See: Sloss (n 6) 376–377. This is the case in monist and dualist legal systems. However, in relation to vertical treaties, such as those enshrining human rights for individuals, these are more likely to be applied by courts: “Domestic courts in both monist and dualist States apply vertical treaty provisions more frequently than they apply horizontal treaty provisions because, in most mature legal systems, domestic courts have an institutional responsibility to protect the rights of private parties, and vertical treaties (unlike horizontal treaties) create rights for private parties.” *Id.* 378.

⁸⁰ As illustrated below, this is based on the conclusion that Bahrain takes a dualist approach with regard to such treaties. See: Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (British Institute of International and Comparative Law 2008) 105.

1. *Domestic Validity*

In Bahrain, in relation to the status of treaties on the national level, once these have been ratified and published in the Official Gazette they have “the force of law” (Art. 37).⁸¹ In Egypt, treaties have the force of law once they are published (Art. 151). The Court of Cassation in Judgment No. 137 (March 8, 1956) ruled that treaties are part of domestic law.⁸² The Jordanian Constitution of 1952 (as amended in 2011) does not expressly stipulate whether treaty provisions are part of domestic law. However, the Jordanian government, in a report to the Committee on the Rights of the Child, stated that ratified treaties form an “integral part” of the domestic legislation.⁸³ In Syria, authority can be found in decision 1905/366 (December 21, 1980) of the Civil Chamber of the Court of Cassation, stating that treaties are part of municipal law.⁸⁴ This determination is not made explicit in the 2012 Constitution.

2. *Direct Applicability in Courts*

With regard to Morocco, the direct applicability of treaty provisions was evidenced in Decision No. 1413 of May 23, 2007, of the Shari’ah Chamber of the Court of Appeal of Casablanca. In the case of Syria, Decision 1905/366 (December 21, 1980) of the Civil Chamber of the Court of Cassation is insightful. In Egypt, following the ratification and publication of the Convention on the Rights of the Child, the government of Egypt noted in its periodic report to the Committee on the Rights of the Child: “Egyptian courts are obliged to implement the provisions of the Convention as domestic legislation.”⁸⁵ Such treaty provisions are also invocable. Accordingly, the government has also stated in a report to the Committee on the Elimination of Racial Discrimination that treaty provisions are invocable before state authorities, including courts.⁸⁶ That treaties can be applied by courts and are invocable was made apparent in various government statements of Bahrain.⁸⁷ As for Jordan, Decision No. 2353 (April 8, 2007) and Decision No. 945/2009 of the Court of Cassation illustrate the direct applicability of treaty provisions in courts. In

⁸¹ See: Art. 37 of the 1973 Constitution.

⁸² Elaraby, Goma, and Mekhemar (n 66) 238.

⁸³ “Initial Reports of States Parties Due in 2009—Jordan” (United Nations—Committee on the Rights of the Child 2013) CRC/C/OPSC/JOR/1 para 7.

⁸⁴ “Third Periodic Report—Syria” (United Nations—Human Rights Committee 2004) CCPR/C/SYR/2004/3 para 39.

⁸⁵ “Third and Fourth Periodic Reports of States Parties Due in 2007—Egypt” (United Nations—Committee on the Rights of the Child 2010) CRC/C/EGY/3-4 para 15.

⁸⁶ “Since all the provisions of international instruments, including the Convention forming the subject of this report, are regarded as part of the country’s legislation, they are enforceable and can be directly and immediately invoked before all the State authorities, which are bound by those provisions and the rules stipulated therein. Accordingly, anyone who suffers detriment as a result of their non-application has a direct right to resort, in accordance with the prescribed procedure, to the court competent to hear the type of offence involved in order to enforce his rights in this regard.” See: “Reports Submitted by States Parties under Article 19 of the Convention. Sixteenth Periodic Reports of States Parties Due in 1999. Addendum—Egypt” (United Nations—Committee on the Elimination of Racial Discrimination 2001) CERD/C/384/Add.3 para 23. See also: “Addendum—Egypt” (United Nations—Human Rights Committee 2002) CCPR/C/EGY/2001/3 paras 52, 55.

⁸⁷ For example, when the Convention of the Rights of the Child was published in Official Gazette No. 1971 of September 4, 1991, it became part of Bahraini law and its provisions could be invoked before national courts. See: “Initial Reports of States Parties Due in 1994—Bahrain” (United Nations—Committee on the Rights of the Child 2001) CRC/C/11/Add.24 para 37.

Tunisia, direct applicability and invocability of treaties was affirmed in government state-ments.⁸⁸ Furthermore, the direct applicability of treaties was evidenced in the following cases: Decision No. 7602 (May 18, 2000) of the Court of First Instance of Tunis; Decision No. 7286 (March 2, 2001) of the Court of Cassation; and Decision No. 53/16189 (2 December 2003) of the Court of First Instance of La Manouba. In the latter case, for exam-ple, the court stated that “filiation as defined in Art. 68 of the Personal Status Code must be interpreted broadly in accordance with Art. 2, paragraph 2, of the Convention on the Rights of the Child”.⁸⁹

3. *When Do Treaties Gain Domestic Legal Status?*

To avoid confusion, it is important to note the following two points. First, in states where treaties are directly applicable, it is often still the case that certain internal measures need to be executed before the treaty can have domestic legal status, such as pre-legislative approval and publication. Such additional measures do not mean that the treaty is indirectly applica-ble. As seen below, it is possible to split the direct applicability approach into two. Second, some states follow both the direct applicability and indirect applicability approaches in respect of different treaties dealing with different areas.⁹⁰

A. DIRECT DOMESTIC LEGAL FORCE ONCE THE TREATY IS RATIFIED AND ENTERS INTO FORCE

In some states, when the executive follows the procedures for joining a treaty—thereby binding it under international law—it automatically becomes part of domestic law with-out the need for additional measures, such as publication.⁹¹ It seems that Syria and Tunisia are the only states where a treaty is directly applicable without the need for publication. However, this is not entirely clear. With regard to Syria, this conclusion has been drawn based on two grounds: First, there is no express provision in the constitution nor, second, indication in any of the fifteen state party reports submitted to various United Nations human rights bodies—between 1977 and 2012—that ratified treaties gain direct appli-cability following publication. A 2004 report to the Human Rights Committee mentions that “Syrian laws are published in the Official Gazette”, but no reference is made to trea-ties.⁹² With regard to Tunisia, the government stated in a 1994 report that Art. 32 of the constitution then in force stipulated: “Treaties do not have force of law until they have

⁸⁸ “Core Document Forming Part of the Reports of States Parties: Tunisia” (United Nations—International Human Rights Instruments 1994) HRI/CORE/1/Add.46 paras 69–70.

⁸⁹ As cited in: “Replies of the Tunisian Government to the List of Issues (CCPR/C/TUN/Q/5) to Be Taken up in Connection with the Consideration of the Fifth Periodic Report of Tunisia (CCPR/C/TUN/5)” (United Nations—Human Rights Committee 2008) CCPR/C/TUN/Q/5/Add.1 3. For more on this and the other cases mentioned, see: *id.* 3–4.

⁹⁰ Hollis (n 6) 40. China follows this approach. See: Xue Hanqin, Hu Zhiqiang, and Fan Kun, “China” in Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff Publishers 2005).

⁹¹ Treaties that require pre-legislative approval fall under this category too. Hollis (n 6) 41–42.

⁹² “Third Periodic Report—Syria” (n 84) 44. A 2004 report to the Committee on the Rights of the Child does mention that the Convention on the Rights of the Child was “published in newspapers and maga-zines, particularly children’s magazines” and that some provisions “were also broadcast on radio and tel-evision in family and children’s programmes.” However, it seems that publication in this context was a measure “taken to make the Convention widely known to the public,” rather than give it the force of law. “Initial Reports of States Parties Due in 1995. Addendum—Syrian Arab Republic” (United Nations—Committee on the Rights of the Child 1996) CRC/C/28/Add.2 8.

been ratified.”⁹³ No mention of publication is made. The position seems to still be the case under the 2014 Constitution. While the latter introduces a provision that the president shall authorize the publication of treaties (Art. 77), the provision on the treaty coming into force specifically following ratification—as opposed to publication—still stands (Art. 67). Notwithstanding the above conclusions, in-depth examination of treaty practice is needed to shed more light on whether or not publication is needed to give ratified treaties direct domestic legal force.

B. DIRECT DOMESTIC LEGAL FORCE ONCE THE TREATY IS RATIFIED AND ENTERS INTO FORCE PLUS PUBLICATION

In addition to the steps needed to allow a state to join a treaty and bind itself on the international level when they enter into force, some states require further measures before the treaty provisions have domestic legal status. The “act of transformation” is to be distinguished from the requirement of publication: Even though a treaty may not require a further act of transformation, it will need to be “published” in order to be “received” or have domestic legal force.⁹⁴ In Bahrain, Egypt, Jordan, and Morocco treaties acquire the status of law when they are published. This is not made explicit in the Constitution of Jordan. However, state practice is highly indicative of this. Thus, “[a]s soon as” Jordan ratified the Convention against Torture and published it in the Official Gazette, “it became a part of Jordanian law and acquired the force of law.”⁹⁵

Two implications from the publication requirement can follow. First, it may be the case that a treaty that is not published will have international legal force, but not domestic legal force. Second, where the requirement to publish a treaty exists, a state may decide not to publish such a treaty, thereby rendering it as not having domestic legal force.⁹⁶ Treaties that do not have domestic legal status can generally not be enforced by courts. The executive’s decision therefore not to publish a treaty, and thereby deny it domestic legal status, has significant implications and highlights the power of the executive in that regard: It deprives the ability of the courts to apply it. Similar considerations apply to states that adhere to the “indirect application” approach: Courts are not able to enforce such ratified treaties without legislation enacted that incorporates the treaty provisions into the national legal order.⁹⁷ Yet even if a treaty has been signed but is not directly applicable, it may still have a number of internal legal effects: For example, it can influence the way statutes are interpreted by virtue of a statutory provision which refers to international law.⁹⁸

C. INDIRECT DOMESTIC LEGAL FORCE

Bahrain adopts this approach with regard to specific categories of treaties, such as human rights treaties. In this case, treaty provisions are part of domestic law when a law is promulgated by parliament to that effect.⁹⁹

⁹³ “Core Document Forming Part of the Reports of States Parties: Tunisia” (n 88) 68.

⁹⁴ Jackson (n 15) 311.

⁹⁵ “Second Periodic Report Due in 1996—Jordan” (United Nations—Committee against Torture 2009) CAT/C/JOR/2 para 15.

⁹⁶ Hollis (n 6) 43. “France, for example, only publishes treaties the implementation of which affect the rights or duties of individuals.” *See: id.*

⁹⁷ Hollis (n 6) 45.

⁹⁸ Jackson (n 15) 318–319.

⁹⁹ This point is dealt with in more detail in question (C) on the constitutionally recognized role of the legislature in the treaty-making process.

4. Policy Reasons for and against Direct Applicability of Treaties

On the one hand, there are a number of policy reasons that can explain why states take an approach of direct applicability of treaties. One argument in favor of the direct application is that by enabling treaties to apply directly in the national legal order, the effectiveness of international law is strengthened. Treaties—and also, if applied directly, customary international law—are given more weight and importance. Furthermore it limits—or avoids—the possibility of national institutions deciding to refuse to make provision for the incorporation of international legal norms into the national legal order. A second argument which favors the direct applicability of treaties is that it provides a better assurance to other states party that treaty obligations will be complied with. The third argument in favor of direct application is that where the treaty provides for rights to individuals, there is better assurance that such rights will be respected by the state party where these apply directly. Accordingly, individuals can rely on these rights directly from the treaty without there needing to be an act of transformation. Even if such an act were passed, this may tempt the institution passing one—for example, the government—to move away from the precise text of the treaty.¹⁰⁰

On the other hand, other policy reasons militate against an approach of direct applicability. The first argument is related to notions of national sovereignty. Accordingly, states, as sovereign entities, may decide for themselves how international legal norms apply in their national legal systems. John H. Jackson writes: “Indeed, it is sometimes argued that urging the direct application of treaties is tantamount to ‘interference in the internal affairs’ of a sovereign state.”¹⁰¹ A second argument opposing the direct applicability of treaties is that some constitutions—such as undemocratic constitutions—envisage a relatively limited role for institutions, such as parliament, in the treaty-making process. The treaty-making process and the conclusion of treaties are, to a large extent, dominated by an elite in the executive. There has been criticism advanced to the effect that “such elites are not in tune with the political will of the nation.”¹⁰² Given these circumstances, one may argue that giving parliament the constitutional role of requiring it to pass a law that incorporates treaty provisions into the national legal order imbues the treaty-making process with more democratic legitimacy and acts as a check on the treaty-making powers of the government. A third, practical argument against a system with direct applicability of treaties is that the national authority, such as parliament, that passes a law transforming the norm into the national legal system, may wish to tailor the wording of the treaty to fit the local context. For instance, this might be the case where the official language of the treaty is different to the official language of the country incorporating the treaty. Alternatively, even a country whose official language is the same as the treaty, the legislature may wish to tweak the wording of the treaty text to fit the ways these are used locally. Furthermore, the legislature may seek, through an act of transformation, to elaborate on the text of the treaty where these are deemed to be ambiguous. The act of transformation can also be used to specify a method of interpretation of the treaty provisions on the national level.¹⁰³

¹⁰⁰ Jackson (n 15) 321–322.

¹⁰¹ *Id.* 323. “There is, then, a binding obligation on the parties to a treaty to carry out their undertakings, but how a state does so is ordinarily not a concern of international law; the status of treaties in the domestic law of any country is a constitutional, not an international, question. All states have incorporated international law into their legal system to some extent in some ways, but states differ both as to extent and as to ways”. See: Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia University Press 1990) 62, as cited in: Jackson (n 15) 323.

¹⁰² Jackson (n 15) 323.

¹⁰³ *Id.* 323–325.

C. What Is the Constitutionally Recognized Role of the Legislature in the Treaty-making Process?

While treaty-making power may lie with the executive, this does not necessarily mean that it is always exercised without limitations. Constitutions often empower authorities outside of the executive—such as the legislature and courts—to limit when and how such power may be exercised. The limitations identified in the Arab constitutions come into play mainly at the stage before the treaty is ratified and binds the state internationally. Thus, there are cases where the executive cannot consent to a treaty without receiving legislative approval.¹⁰⁴ Apart from Egypt, in all the constitutions studied, the executive enjoys unfettered treaty-making power, but they set aside an express list of categories where the ratification of a treaty requires legislative pre-approval.¹⁰⁵ This approach of expressly stipulating the categories in which parliament may participate in the treaty-making process is also followed in Austria, France, Japan, and Russia. Outside such categories, the executive may conclude and ratify treaties without legislative approval. This approach can be contrasted with the 1996 Constitution of South Africa, where there is a presumption that the legislature approves all treaties, subject to exceptions.¹⁰⁶ This is closer to the approach of the 2014 Egyptian Constitution.

The requirement for parliamentary approval prior to the ratification of a treaty does not mean that a state has entered the dualist side of the spectrum. That national legislation needs to be passed after a treaty enters into force in order to become domestically valid and applicable is different to the requirement of legislative approval as a prerequisite for ratification. In most dualist systems, the executive can bind the state internationally without legislative approval before. This explains why in those systems implementing legislation is needed to incorporate treaty norms into the national legal system. In monist legal systems, the fact that some treaties have domestic legal status in the absence of implementing legislation can be explained by the fact that the legislature in some treaties furnishes its approval before ratification, in other words, before the state is bound internationally by the treaty. In dualist and monist states, it is rare for a legislature not to play any role in either the approval or incorporation of treaties.¹⁰⁷

1. Bahrain

As for the types of treaties listed in Art. 37 of the 2002 Constitution (as amended in 2012) below, these need to be promulgated by law by the Consultative Council and the Chamber of Deputies in order to be valid.

[P]eace treaties and treaties of alliance, treaties relating to State territory, natural resources, rights of sovereignty, the public and private rights of citizens, treaties pertaining to commerce, shipping and residence, and treaties which involve the State Exchequer in non-budget expenditure or which entail amendment of the laws of Bahrain, must be promulgated by law to be valid.¹⁰⁸

¹⁰⁴ Hollis (n 6) 23.

¹⁰⁵ Note, in the case of Bahrain, the parliament's role is not simply approving treaties, but promulgating laws to incorporate treaty provisions into the national legal system. Abiad (n 80) 105.

¹⁰⁶ Hollis (n 6) 24–26. For a more in-depth study of the national treaty law and practice of the countries listed in this paragraph, see: the relevant country-specific chapters in Hollis, Blakeslee, and Ederington (n 10).

¹⁰⁷ Sloss (n 6) 369–370.

¹⁰⁸ See: Art. 37 of the 1973 Constitution.

Thus, the Constitution of Bahrain differentiates between two types of treaties:

Bahrain's amended Constitution thus divides treaties and international conventions into 1) those that may be ratified by decree of the King, provided the Consultative Council and the Council of Representatives are so notified; and 2) those that must be ratified by the legislative branch (the Consultative Council and the Council of Representatives [or Chamber of Deputies]) and promulgated in a law in order to be valid under Art. 37 of the Constitution.¹⁰⁹

Treaties under the first category are directly applicable and invocable.¹¹⁰ In this sense, Bahrain is a monist legal system. However, with regard to the second category of treaties, Bahrain's approach has been described as dualist¹¹¹ since the promulgation of a law is required for the treaty provisions to have domestic validity and, in turn, applicability and invocability in courts. In this regard, Bahrain adopts an approach similar to the United Kingdom.

2. Egypt

In contrast to Bahrain, Jordan, Morocco, Syria, and Tunisia, the 2014 Egyptian Constitution does not list specific categories where parliamentary approval—or, in the case of some treaties in Bahrain, legislative implementation—of treaties is required. Instead, it is closer to the 1988 version of the Tunisian Constitution where, as a rule subject to exceptions, parliamentary approval is required for all treaties. The Egyptian Constitution grants the strongest role for parliament in the area of legislative approval of treaties than any of the other Arab constitutions in force. It was actually Art. 145 of the 2012 Constitution which first provided for parliamentary approval for all treaties, subject to exceptions. However, the provision required approval from the two houses of parliament: the House of Representatives and the *Shūrā* Council. The latter has been abolished by the 2014 Constitution, creating a unicameral legislature.

The 1971 Constitution (as amended in 2007) took an approach similar to the Arab constitutions currently in force, where set categories of treaties required approval by the House of Representatives (or “People’s Assembly”) before ratification:

[P]eace treaties, alliance pacts, commercial and maritime treaties and all other treaties involving modifications in the territory of the State or having connection with the rights of sovereignty, or which lay upon the treasury of the State certain charges not included in the budget, must acquire the approval of the People’s Assembly.¹¹²

The *Shūrā* Council had to be consulted in relation to treaties of peace and alliance as well as treaties affecting the territorial integrity of the state and concerning sovereignty rights (Art. 195 (4)).

¹⁰⁹ “Combined Initial and Second Periodic Reports of States Parties—Bahrain” (United Nations—Committee on the Elimination of Discrimination against Women 2007) CEDAW/C/BHR/2 para 41.

¹¹⁰ For example, when the Convention of the Rights of the Child was published in Official Gazette No. 1971 of September 4, 1991, it became part of Bahraini law and its provisions could be invoked before national courts. See: “Initial Reports of States Parties Due in 1994—Bahrain” (n 87) 37.

¹¹¹ Abiad (n 80) 105.

¹¹² “The Constitution of The Arab Republic of Egypt 1971 (as Amended up to 2007)” (n 65).

3. *Jordan*

The parliament in Jordan (“National Assembly”) consists of the House of Representatives and Senate (Art. 62). Art. 33 of the 1952 Constitution (as amended in 2011) specifies the types of treaties and agreements the National Assembly may approve:

Treaties and agreements which entail any expenditures to the Treasury of the State or affect the public or private rights of Jordanians shall not be valid unless approved by the Parliament.

The reference to “rights” encompasses human rights treaties. This explains why the Jordanian government presented the Convention on the Rights of the Child to the National Assembly in 2004.¹¹³ Following the approval of the parliament, the king ratifies the treaty.¹¹⁴ Of all the other constitutions, Jordan’s Constitution recognizes the fewest types of treaties requiring approval by parliament. It seems that for treaties which do not fall under the categories prescribed in Art. 33, the executive may conclude and ratify a treaty without parliamentary approval. The same applies to Bahrain, Morocco, Syria, and Tunisia.

4. *Morocco*

Art. 31 of the 1996 Constitution provided that, while the king signs and ratifies treaties, parliamentary approval is required in respect of “treaties committing State finances” before these may be ratified.¹¹⁵ Parliament’s role was confined to the approval of this category of treaties. Art. 55 of the 2011 Constitution introduces several other categories of treaties that require parliamentary approval before ratification. These concern the following types of treaties: treaties of peace or union, the drawing of the state’s frontiers, commercial treaties, treaties that involve state finances or require the introduction of national legislation for implementation, or relate to the individual and collective rights and freedoms of citizens. Parliamentary approval takes the form of passing a law. Art. 55 further provides that the king may, though need not, present any other treaty or convention to the parliament—which consists of the House of Representatives and the House of Councillors (Art. 60)—for approval before ratification. This leaves the door open for the king to expand the category of treaties that require parliamentary approval beyond the aforementioned cases. This possibility is not provided for in the 1996 Constitution. While in the new constitution the role of the parliament has been expanded, and the possibility of enlarging it exists, it is important to bear in mind that for all other treaties not listed in Art. 55, the king can ratify a treaty without parliamentary approval.

5. *Syria*

In Syria, legislative authority lies with the People’s Assembly (Art. 55). One of the functions of the Assembly is to approve international treaties and conventions in the following areas:

Approval of international treaties and conventions related to the safety of the state, including treaties of peace, alliance and all treaties related to the rights of sovereignty

¹¹³ “Third Periodic Report of States Parties Due in 2003—Jordan” (United Nations—Committee on the Rights of the Child 2006) CRC/C/JOR/3 para 19.

¹¹⁴ See: Samia Bourouba, “Jurisprudence in the Application of Human Rights Standards in Arab Courts” (Raoul Wallenberg Institute of Human Rights and Humanitarian Law) 31, <http://books.rwi.lu.se/index.php/publications/catalog/view/5/4/117-1>, accessed August 11, 2015.

¹¹⁵ Art. 31 further provides: “Treaties likely to affect the constitutional provisions shall be approved in accordance with the procedures prescribed for the modification of the Constitution.” See: “Constitution of Morocco, 1996” (*Al-Bab*), <http://www.al-bab.com/maroc/gov/con96.htm>, accessed September 13, 2015.

or conventions which grant privileges to foreign companies or institutions as well as treaties and conventions entailing additional expenses not included in its [the state treasury's] budget; or treaties and conventions related to loans' contract [sic] or that are contrary to the provisions of the laws in force and requires new legislation which should come into force (Art. 75(6)).

A slight widening of the scope of treaties requiring parliamentary approval is evident in the inclusion of loans contracts in the new constitution, which is not present in the 1973 Constitution (as amended in 2000).¹¹⁶ It is clear that even the old constitution recognized more areas where parliamentary approval is required than the previous, 1996 Constitution of Morocco.

Art. 67(4)(d) of the parliamentary Rules of Procedure 1974 (as amended in 2014) states that the parliamentary Committee on Arab and Foreign Affairs considers all international treaties and conventions which are presented to the People's Assembly.¹¹⁷ According to Art. 113(b), the statement on these treaties and conventions shall be read at the first parliamentary session and referred to the (competent) Committee. The Assembly, after receiving the report of the Committee thereon, shall accept or reject the treaties and conventions in question, or defer looking into them. It shall not amend the provisions thereof. In cases of rejection or deferment, the president shall be notified of the reasons for rejection or deferment. The role of the People's Assembly is circumscribed in that provisions of treaties and conventions are neither subject to debate nor voting article by article (Art. 116(c)).

6. Tunisia

Tunisia has a unicameral parliament, with legislative power being exercised by the Assembly of the Representatives of the People (Art. 50). In Tunisia, treaties dealing with the following subject matters need to be approved by parliament (Art. 67):

Commercial treaties and treaties related to international organizations, to borders of the state, to financial obligations of the state, to the status of individuals, or to dispositions of a legislative character.

Art. 65 of the 2014 Constitution states that laws which concern the approval of treaties are "organic laws". This means that such draft laws related to approval need to be approved by "an absolute majority of all members" of parliament (Art. 64). The former provision was not present in the 1959 Constitution nor the amended version of 1988. However, it can be found in Art. 32 of the 2002 amended version. In contrast to Morocco, the insertion of classes of treaties which require parliamentary intervention was not an increase in the role of parliament in the approval of treaties, but a decrease. Previously, parliamentary approval for treaties was the rule.¹¹⁸ Thus, Art. 33 of the 1988 version of the constitution stipulated: "The treaties are approved by law".¹¹⁹

¹¹⁶ See: Art. 71(5) of the 1973 Constitution (as amended in 2000).

¹¹⁷ "Rules of Procedure of Parliament" (*Syrian Arab Republic—The People's Assembly*, June 6, 1974), <http://parliament.gov.sy/arabic/index.php?node=5518&cat=409&>, accessed September 4, 2015.

¹¹⁸ Najla Abdeddayem, "The Evolution of the Legislative Authority in the Tunisian Constitution" (Faculté de droit de Sfax) 188–189, http://www.fdsf.rnu.tn/useruploads/files/com._najla_2.pdf, accessed August 11, 2015 (in Arabic).

¹¹⁹ "Tunisia—Constitution" (*International Constitutional Law (ICL)*), http://www.servat.unibe.ch/icl/ts00000_.html, accessed August 11, 2015.

7. Conclusion

The following conclusions can be drawn. First, although nearly all states recognize that the executive may join treaties unencumbered, in all these systems the legislature does play a role, in certain categories, in the approval or implementation of treaties. In Egypt, the parliament has been given the role of approving treaties in all cases, subject to exceptions. Second, although all constitutions recognize the role of parliament in approving and implementing treaties, there are differences in the scope of that role. Egypt's 2014 Constitution gives the parliament the widest role in approving treaties, whereas Jordan gives the narrowest. The other countries can be placed along a spectrum between these two countries. Third, it is interesting to note how the states studied, attach relatively similar importance to certain types of treaties that require either parliamentary approval or implementing legislation. Thus, treaties on state boundaries, peace, alliance, commercial treaties, treaties placing a financial obligation on the state, and treaties affecting the rights of citizens, often require legislative approval or implementation. It appears that those treaties that require parliamentary approval are significant in social, political, or economic terms.¹²⁰ The political significance of treaties related to peace and state boundaries is evident and requires legislative approval. Furthermore, the fact that such treaties require this additional procedure illustrates to other, negotiating states the significance attached to such a treaty by that state. Treaties that deal with commercial matters potentially have an economic impact on a state and its people—this can explain why the legislature is given a role in such cases. Treaties dealing with social matters, such as human rights, can be considered as of such importance as requiring oversight by the legislature.¹²¹ Syria is the only country which does not recognize treaties affecting the rights of citizens—which covers human rights treaties—as requiring parliamentary approval. Fourth, there is no clear trend in the constitutions in favor of increasing or decreasing the role of parliament in the area of approval of treaties. In Egypt, Morocco, and Syria, parliament's role has been increased—albeit to varying degrees—thereby limiting the scope of the executive's exercise of treaty-making power. However, in Tunisia it has decreased. In Bahrain and Jordan it has remained relatively the same. Fifth, it is not clear in the constitutions which authority decides whether a treaty falls within the remit of the categories for which legislative approval or implementation is required. Knowing which authority—or authorities—has this power is insightful in understanding the reach and limits of the executive's treaty-making power.

D. What Rank Do Treaties Have Internally?

Once a treaty has domestic legal status, it is important to ask what rank the treaty has in that legal order. This further illuminates the constellation of the relationship between international law and national law.¹²² Four ways in which domestically valid treaty provisions can be ranked in relation to the domestic hierarchy of norms may be cited:¹²³

- (1) Treaties can be superior to the constitution.
- (2) Treaties can be inferior to the constitution but superior to prior and/or subsequent ordinary laws.
- (3) Treaties and ordinary laws can have equal status.
- (4) Treaties can be inferior to the constitution and ordinary laws.

¹²⁰ Of course, as Duncan B. Hollis correctly notes, "all treaties are in some sense political." See: Hollis (n 6) 34.

¹²¹ *Id.* 32–38.

¹²² *Id.* 47.

¹²³ *Id.* 47–49.

In both states where treaties automatically form part of domestic law—once they enter into force—and where treaties indirectly form part of domestic law through implementing legislation, treaties or implementing legislation can have the same rank as ordinary laws.¹²⁴

By way of aside, the discussion above on the policy reasons for and against direct applicability of treaties can be used as a basis for discussing whether treaty provisions should be given a higher rank than national laws—including the constitution—or lower. The sting of many of the considerations identified above is heightened if, in addition to the direct applicability of treaties, the latter also have higher status to prior and subsequent laws.¹²⁵ Thus, the potentially undemocratic implication of nondirectly applicable systems might be compounded if treaties are incorporated by elites and, moreover, are given a higher status. John H. Jackson cautions against a system which recognizes direct applicability and higher status of treaties. Countries which adopt such a system may end up being “more locked into the norms than the other parties.”¹²⁶ As a consequence, states may be reluctant in signing up to international legal norms.¹²⁷ However, it is important to note that even where a system has adopted a system of direct applicability plus higher status of treaties, there are ways in which national authorities, such as courts, can try “to avoid the direct application of treaty norms that would take precedence not only over later legislation, but also over the Constitution itself”—the Netherlands has been cited as one such example.¹²⁸

In some of the Arab constitutions covered, it is not clear whether treaties take precedence over national laws, which can present a problem where the two conflict.¹²⁹ So far as possible, jurisprudence and state practice have been adduced to gauge what rank treaties have domestically. Notwithstanding, an express reference in the constitutions to the rank of treaties domestically would be welcomed for the sake of clarity. What does seem clear is that no state subscribes to the fourth approach.¹³⁰

1. Bahrain

Art. 37 does not specify what rank treaties have internally. In a report of the Organization for Economic Co-operation and Development (OECD), the provision that treaties have the force of law following ratification and publication has been interpreted as inferring “that treaties prevail over laws.”¹³¹ Whether such a conclusion can necessarily be drawn from this

¹²⁴ *Id.* 48.

¹²⁵ Jackson (n 15) 330.

¹²⁶ *Id.*

¹²⁷ *Id.* 331. “On the other hand, if government officials and citizens have a higher degree of trust in the international institutions and treaties than they do in their own governmental structure, they will probably prefer DAHS [directly applicable with higher status treaties] as a conscious or implicit check on their government. Thus, it is entirely understandable that some persons in recently autocratic countries might favor an international regime to protect human rights.” *Id.* 332.

¹²⁸ Jackson (n 15) 334.

¹²⁹ Vladlen S. Vereshchetin, “New Constitutions and the Old Problem of the Relationship between International Law and National Law” (1996) 7 *European Journal of International Law* 29, 35.

¹³⁰ The fourth approach is the case for self-executing treaties in South Africa. See: Hollis (n 6) 49; N. J. Botha, “South Africa” in Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff Publishers 2005).

¹³¹ OECD (n 62) 56.

provision is debatable. In any case, the Legislation and Legal Opinion Commission (LLOC) of Bahrain, has noted on May 8, 2011, that treaties are superior to domestic laws. Thus:

Bahrain's Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs), because they are, as treaties, instruments of international law, prevail over Bahrain's existing and future domestic law provisions i.e. unless future domestic laws expressly provide otherwise.¹³²

The abovementioned passage represents the official position of the government. Although the LLOC's opinions are not legally binding in court, they are "highly persuasive, especially where there are no contradictory previous judgements".¹³³ By 2013, no "LLOC legal opinion has ever been successfully challenged in Bahrain".¹³⁴

While the affirmation of the priority of treaties over "existing and future domestic law" is clear, it seems to be undermined by the addendum that future domestic laws prevail if these "expressly provide" for a contrary position.

2. Egypt

In Egypt, the constitution is superior to ratified treaties, which form part of national law (Art. 151 of the 2014 Constitution). However the 2014, 2012, and 1971 Constitutions do not expressly stipulate what rank treaties have vis-à-vis ordinary domestic laws. Art. 151 has been interpreted to mean that treaties and national laws have equal status.¹³⁵ According to Jasmine Moussa, "[d]omestic courts consistently treat international treaties as having an equal status to legislation".¹³⁶ In determining which norm has priority in case of inconsistency, Egyptian courts have applied the principle of *lex posterior derogat legi priori*.¹³⁷ There has been a discussion as to whether this principle would undermine Art. 27 of the Vienna Convention on the Law of Treaties if a national law were to take precedence over a treaty norm.¹³⁸ Thomas Buergenthal contends that "it would by no means follow that the ratification of the Vienna Convention would change this constitutional equation: a later statute could still overcome a prior treaty".¹³⁹

At the same time, however, the answer to the question on the rank of treaties is not entirely clear. There have been statements by the Egyptian government that the judiciary in Egypt "gives precedence to international treaties over Egyptian domestic legislation in the event of conflict between the two".¹⁴⁰ Furthermore, the Supreme Constitutional Court has "accorded treaty provisions a special status"¹⁴¹ by asserting that "the human rights clauses

¹³² As cited in: *id.* 56–57.

¹³³ *Id.* 57.

¹³⁴ *Id.*

¹³⁵ See: Bourouba (n 114) 43.

¹³⁶ Jasmine Moussa, *Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Shari'a-Derived Legislation* (Brill 2011) 151.

¹³⁷ Elaraby, Goma, and Mekhemar (n 66) 239; Hollis (n 6) 48; Moussa (n 136) 151.

¹³⁸ Korkelia (n 16) 230.

¹³⁹ Thomas Buergenthal, "International Tribunals and National Courts: The Internationalization of Domestic Adjudication" in Ulrich Beyerlin and others (eds), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Springer 1995) 699, as cited in: Korkelia (n 16) 230.

¹⁴⁰ See: "Initial Reports of States Parties Due in 2004—Egypt" (United Nations—Committee on the Rights of the Child 2010) CRC/C/OPSC/EGY/1 para 24. See also: "Initial Reports of States Parties Due in 2009—Egypt" (United Nations—Committee on the Rights of the Child 2010) CRC/C/OPAC/EGY/1 para 7.

¹⁴¹ Moussa (n 136) 151.

of Egypt's Constitution be interpreted in accordance with those human rights standards generally recognized and applied by democratic States, as reflected in international human rights instruments".¹⁴²

3. Jordan

With regard to the Jordanian Constitution, it is not clear from the constitutional provisions what rank treaties have on the national level. The government has stated previously that in the event of conflict between ratified treaty provisions and domestic legislation, the former takes precedence.¹⁴³ Insight can also be gained from the Jordanian Court of Cassation, in Decision No. 2353 (April 8, 2007), where the question was whether to apply the relevant provision of the United Nations Convention on the Carriage of Goods by Sea of 1978 or the conflicting one in the Jordanian Maritime Trade Law (Art. 215). In giving precedence to the former, the court affirmed the supremacy of treaties over conflicting national laws.¹⁴⁴ Another relevant case is Decision No. 945/2009 of the Court of Cassation, where the court held:

In case law and doctrine, there is a consensus that international treaties concluded by a State rank higher than the domestic laws of that State and that these treaties take precedence if their provisions conflict with the State's internal law. Furthermore, the application of international treaties and laws is the province of the judiciary and parties to proceedings have no discretion as to the treaty or law that they wish to invoke insofar as the matter is one of public order and hinges on completion of the constitutional procedures relating to agreements and treaties in the country where the dispute is being heard.¹⁴⁵

The statement recognizes that the ratified treaty provisions are domestically valid and directly applicable. As regard invocability, it appears that individuals may not freely invoke ratified treaties in national courts "insofar as the matter is one of public order". This limitation does appear to illustrate that, limitations aside, invocability of treaties is possible.

4. Morocco

The 1996 Constitution did not explicitly stipulate what rank treaties have in the hierarchy of norms.¹⁴⁶ This has changed under the 2011 Constitution: The supremacy of treaties over domestic laws is stipulated in the preamble. Accordingly:

[T]he Kingdom of Morocco, as a united, fully sovereign State belonging to the Greater Maghreb, reaffirms and vows to work for the following:

[. . .]—grant international conventions duly ratified by the Kingdom supremacy over domestic laws—within the framework of the provisions of the Constitution, the laws of the Kingdom, and respect for its immutable national identity, and as soon as these conventions are published—and bring the national legislative provisions concerned in line with the above conventions.¹⁴⁷

¹⁴² Ibrahim Badawy El-Sheikh, *The Enforcement of Egypt's International Human Rights Obligations in the Egyptian Legal System* (2003) 239–250, as cited in: Moussa (n 136) 151.

¹⁴³ "Initial Reports of States Parties Due in 2009—Jordan" (n 83) 7.

¹⁴⁴ Bourouba (n 114) 32–33.

¹⁴⁵ As cited in: "Initial Reports of States Parties Due in 2009—Jordan" (n 83) 8.

¹⁴⁶ Bourouba (n 114) 28.

¹⁴⁷ "Morocco—The Constitution" (CODICES Venice Commission), <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>, accessed August 11, 2015.

Treaties are superior to national laws. As can be seen from the above, the requirement of publication is provided for in the new constitution.¹⁴⁸ Although the supremacy of treaties has been recognized in the constitution only in 2011, there have been prior judicial proclamations in the case law that treaties are superior to national laws. The Shari'ah Chamber of the Court of Appeal of Casablanca stated in Decision No. 1413 of 23 May, 2007:

Whereas the international treaty is a special law having precedence over national law, being in this case Personal Status Law and Family Law, which are public laws, and that according to the principle of supremacy of these treaties over the national law confirmed by the Supreme Council in its Decision No. 754 dated 05/19/1999 in the commercial file no. 4356/1990 published in the Supreme Court Council Magazine Issue no. 56.¹⁴⁹

Furthermore, the Supreme Court of Morocco stated, in Decision No. 61 of February 13, 1992:

The Administrative Chamber considered international treaties legal sources that should be respected and therefore no administrative decisions can be rendered in violation of the provisions of an international treaty; this entails the necessity of their cancellation for being illegitimate.¹⁵⁰

5. Syria

In Syria, the 2012 and 1973 Constitutions do not contain express provisions on the ranking of treaties on the national level. However, in its periodic report to the United Nations Human Rights Committee in 2004, Syria noted: "in the event of conflict between any domestic legislation and the provisions of an international treaty to which Syria is a party, the provisions of the international treaty prevail".¹⁵¹ Judicial proclamations have also indicated the supremacy of treaties. The Court of Cassation stated in ruling No. 23 of 1931: "No domestic legislative enactment can lay down rules that conflict with the provisions, or even indirectly affect the enforceability, of a prior international treaty".¹⁵² This is further supported by decision 1905/366 (21 December, 1980) of the Civil Chamber of the Court of Cassation. Accordingly, where a treaty provision and domestic law conflict, a domestic court is to apply the treaty provision.¹⁵³ Art. 25 of the Syrian Civil Code also provides: "The provisions of articles that are superseded by, or conflict with, an international treaty in force in Syria shall cease to apply".¹⁵⁴

6. Tunisia

Treaties that have received the approval of the Assembly of the Representatives of the People, and have been ratified, have a superior status to that of national laws, but are inferior to the constitution (Art. 20).¹⁵⁵ It is not clear from this provision whether the same applies to treaties ratified by the president, but without having received parliamentary approval.

¹⁴⁸ See also: Bourouba (n 114) 28.

¹⁴⁹ As cited in: *id.* 29.

¹⁵⁰ As cited in: *id.* 30.

¹⁵¹ "Third Periodic Report—Syria" (n 84) 39.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ As cited in: *id.* On the history of the Syrian Civil Code, its durability and "post-revolution viability," see: Dan E. Stigall, "The Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring" (2014) 28 *Emory International Law Review* 283.

¹⁵⁵ See: Art. 32 of the 1959 Constitution (as amended in 2008).

In its opinion on the final draft constitution, the European Commission for Democracy through Law (Venice Commission) made the following observation in relation to the provision on the superiority of treaties (then Art. 19):

Before accepting a new commitment under an international treaty, Tunisia will have to ensure that it is compatible with its Constitution. If it is incompatible and Tunisia wishes to become a Party to the treaty, it will have first of all to amend its Constitution, so that there is no conflict with the international norm. The fact that treaties have a status superior to legislation will oblige the legislator to conform to the international treaties signed by Tunisia, in particular those relating to the protection of civil and political rights.¹⁵⁶

7. Conclusion

The following conclusions can be drawn from the above. First, the constitutions covered are generally unclear regarding the rank of ratified treaty provisions vis-à-vis domestic laws. The new Moroccan and Tunisian Constitutions are the exception. Express provisions in the other constitutions, clarifying the rank of treaties, would be welcomed. Second, notwithstanding the first point, jurisprudence and state practice do reveal that treaties have priority over domestic laws. The Egyptian and Tunisian Constitutions are the only texts which explicitly enunciate that the constitution is superior to treaties. Despite the lack of clarity in the constitutions, it seems that the Arab legal systems generally cluster toward the second, constellation identified above: Treaties are inferior to the constitution but superior to ordinary laws.

E. Are the Constitutional Courts Authorized to Monitor Treaties?

The question of whether constitutional courts are empowered to monitor treaties is an important aspect to the study of the relationship between international law—specifically, treaties—and the national law of the selected states. It also illustrates the complexity of this relationship.¹⁵⁷ The exercise of judicial oversight and judicial enforcement of treaties must be distinguished:

Judicial oversight goes to the question of whether a treaty was validly concluded under the state's constitutional framework (i.e., whether legislative approval was required, etc.). Judicial enforcement, in contrast, involves the interpretation and application of valid treaty obligations to specific parties in specific cases.¹⁵⁸

Issues related to judicial enforcement have been touched on when looking at the applicability and invocability of treaty provisions in courts and their rank in the domestic hierarchy of norms. The question of judicial oversight can be expanded and looked at in two contexts, namely, the oversight over the (a) constitutionality of treaties, where the

¹⁵⁶ “Opinion on the Final Draft Constitution of the Republic of Tunisia” (European Commission for Democracy through Law (Venice Commission) 2013) CDL-AD(2013)032 para 38, <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282013%29032-e>, accessed August 11, 2015.

¹⁵⁷ Hollis (n 6) 45.

¹⁵⁸ *Id.*

constitution is superior to treaties; and (b) conformity of ordinary laws to treaties, where treaties are superior to ordinary laws. Only the Moroccan and Tunisian Constitutions contain provisions related to category (a). Otherwise, the Arab constitutions do not contain provisions dealing with categories (a) or (b).

1. Oversight by the Constitutional Courts over the Constitutionality of Treaties

In countries where binding treaties are directly applicable, yet where the constitution is ranked higher than treaties in the hierarchy of norms, it follows that the treaty norm, from the domestic perspective, should conform to the constitution. It may be put forward that in such cases there ought to reasonably be a constitutional provision empowering courts to ensure the constitutionality of treaties.¹⁵⁹ This, however, is generally not the case in the Arab constitutions.¹⁶⁰ Such oversight could be preventive or repressive. In the case of preventive control, the constitutional oversight takes place before the treaty is ratified. This is the case in France and Spain. In the case of repressive control, the Constitutional Court—for example, in Italy—may review the domestic act that ratifies the treaty.¹⁶¹ In Morocco and Tunisia, judicial oversight is preventive. Where a constitution does not contain a provision on judicial oversight over the constitutionality of treaties, this does not mean that constitutional courts—or supreme courts—do not claim this power nonetheless. Jordan is one example—in that case, oversight has been repressive.

A. MOROCCO

In Morocco, the 2011 Constitution provides for the establishment of a Constitutional Court (Art. 129). The court is authorized to oversee that treaties conform to the constitution before they are ratified. The Constitution of 1962 did not recognize such a power to the constitutional chamber of the Supreme Court. The same is with the 1992 Constitution in relation to the then-newly established Constitutional Council. According to Art. 55 of the 2011 Constitution:

Should the Constitutional Court, [...] declare that an international commitment involves a provision which is inconsistent with the Constitution, the said text may not be ratified until the Constitution has been revised.¹⁶²

The court has jurisdiction over treaties where the matter has been requested to it by the king, head of government, head of the House of Representatives, head of the House of Councillors, or one-sixth of the members of the first house, or one-quarter of the members of the second house.

¹⁵⁹ Morina, Korenica, and Doli (n 30) 284–285.

¹⁶⁰ Nonetheless, other nonjudicial bodies may seek to ensure that treaties conform to the constitution. In Bahrain, the LLOC’s “Department of International Treaties and Conventions and Contracts” reviews treaties that have been concluded by the state and seeks to ensure that these do not violate the constitution. It also works to clarify to what extent these treaties conform with domestic laws. For more, see: “Departments: International Treaties and Conventions and Contracts” (*Legislation and Legal Opinion Commission*), <http://www.legalaffairs.gov.bh/83.aspx?cms=iQRpheuphYtJ6pyXUGiNqlRBGRBjMvSO>, accessed August 12, 2015 (in Arabic).

¹⁶¹ Morina, Korenica, and Doli (n 30) 285–286.

¹⁶² “Morocco—The Constitution” (n 147).

B. TUNISIA

The newly established Constitutional Court of Tunisia is the only institution that is empowered to supervise the constitutionality of treaties that have been presented to it—by the president—before the conclusion of the legal approval process (Art. 120). This process appears to refer to the parliamentary approval process. The provision is not expressly clear as to whether it also refers to those treaties which the president can ratify without parliamentary approval. A literal reading of Art. 120 suggests that constitutional mandate relates only to cases where the legislature is involved in the approval of treaties.

The court's mandate regarding the category of treaties is wider than that provided for in the 1959 Constitution (as amended in 2002). Art. 72 thereof empowered the Constitutional Council—now replaced by the Constitutional Court—to monitor the constitutionality of treaties provided for in Art. 2 of that constitution:

The Republic of Tunisia is a part of the Great Arab Maghreb, an entity which it endeavors to unify within the framework of mutual interests.

Treaties signed to this end which might cause any modification in this Constitution shall be submitted to referendum by the President of the Republic following their adoption by the Chamber of Deputies in the forms and conditions provided for by the Constitution.¹⁶³

C. JORDAN

The 2011 amendments established a new constitutional court (Art. 58). The Constitutional Court may review the constitutionality of “applicable laws and regulations” (Art. 60). There is no reference to the role that the Constitutional Court plays in overseeing treaties are compatible with the constitution.

Notwithstanding, in the abovementioned Decision No. 2353, the Court of Cassation exercised “quasi-constitutional control” over treaties—specifically the United Nations Convention—by enquiring whether the ratification process followed the correct constitutional procedure, and whether the approval of parliament was required for such a treaty.¹⁶⁴ This is a noteworthy development in the control of the court over treaties and, specifically, monitoring of whether a treaty falls within the categories that require parliamentary approval. In Decision Nos. 2174/2011 (January 12, 2012) and 755/2006 (July 17, 2006), the court refused to apply the Convention on Extradition between Jordan and the United States because it had not received the approval from the National Assembly. The court deemed the Convention to fall under the category of treaties that “affect the public or private rights of Jordanians”, which require parliamentary approval.¹⁶⁵

In Jordan and Morocco, it seems that judicial oversight applies to treaties that have been concluded by the executive and those that required legislative approval. In Tunisia it is less clear from the provisions that oversight relates to treaties that are not subject to legislative approval.

¹⁶³ “Constitution of the Republic of Tunisia,” <http://www.tunisie-constitution.org/sites/all/downloads/constitution-tunisienne-anglais.pdf>, accessed August 23, 2015.

¹⁶⁴ Bourouba (n 114) 33.

¹⁶⁵ See: *ibid.* 33–34.

2. *Constructing the Power of Oversight by Way of Interpretation?*

The power to review, preventively or repressively, the constitutionality of treaties [“review 1”] and conformity of ordinary laws to treaties [“review 2”], is generally not expressly provided for in the Arab constitutions. An in-depth examination of case law is important to shed light on whether and, if so, how, the highest courts have developed a practice where they engage in “review 1” and/or “review 2.” However, this would go beyond the remit of this chapter. Notwithstanding, it would be fitting to conclude this chapter with some thoughts on how such a power may, by interpretation, be extracted from the constitution, at least repressively.

A. REPRESSIVE OVERSIGHT OVER THE CONSTITUTIONALITY OF TREATIES THAT REQUIRE PARLIAMENTARY APPROVAL

One thought is that in those systems where parliament passes a law to approve or implement a treaty, the constitutional court may perhaps strike that down and effectively declare the treaty “unconstitutional.” A similar argument was made by (1) Gennady Danilenko with regard to the Russian Constitution of 1993, where the Constitutional Court did not have the express legal mandate to review the constitutionality of treaties following ratification;¹⁶⁶ and (2) by Visar Morina, et al., with respect to the Constitution of Kosovo of 2008.¹⁶⁷ In the Russian case, it was clear from the text of the constitution that the ratification of a treaty involved the passage of a law. In the case of Kosovo no such provision is present in the constitution. This is the case with the Constitutions of Egypt, Jordan, and Syria. However, regard may be had to previous practice in order to determine in which cases the legislature has, if at all, passed a law as a way of approving a treaty. In such cases, an argument may be constructed to the effect that the constitutional court can monitor the constitutionality of these laws. However, this approach should not be overstated: It sets more of an exception, rather than a constitutional standard. Moreover, in light of Art. 46 of the Vienna Convention on the Law of Treaties, the state concerned would continue to be bound by the treaty internationally.¹⁶⁸ A ruling of “unconstitutionality” in this context would not affect the validity of the treaty.¹⁶⁹ Rather, it would be a pronouncement to national organs to refrain from applying the conflicting treaty provisions, nationally and internationally. National authorities then have the option to amend the constitution to ensure harmony between the treaty and constitution. The Moroccan and Tunisian situation of preventive oversight is arguably more adequate because it can avoid a situation where the state is bound by a treaty internationally, but where the constitutional court—or supreme court—has later decided that national authorities may not apply the same. In both countries, a ruling of unconstitutionality would take place before ratification, thereby giving national authorities an ability to amend the constitution and ensure harmony with treaty provisions.¹⁷⁰

¹⁶⁶ “Despite the express language of the Constitution, in principle there may be another avenue for the Court to assess the constitutionality of treaties, even after they have entered into force. This possibility may arise from a general provision that authorizes the Court to review the constitutionality of ‘federal laws.’ Because the ratification of treaties requires the promulgation of ‘federal laws,’ the Court may consider the constitutionality of such laws and thus indirectly review the constitutionality of the relevant international treaties.” See: Danilenko (n 41) 456.

¹⁶⁷ Morina, Korenica, and Doli (n 30) 287.

¹⁶⁸ *Id.*

¹⁶⁹ The same applies to treaties with domestic legal status that have been ratified without prior parliamentary approval.

¹⁷⁰ The author is grateful for exchanges with Professor Rainer Grote on these points.

Returning to the case of repressive oversight: By way of example, in Syria, what form “approval” of treaties by the People’s Assembly takes place is not made explicit in the constitution. However, it appears that parliamentary approval takes the form of a law because Art. 113(a) of the parliamentary Rules of Procedure 1974 (as amended in 2014) states that the president refers to the People’s Assembly “draft bills” on the ratification of international treaties and conventions in the aforementioned areas specified in Art. 75 of the 2012 Constitution.¹⁷¹ If “approval” requires a law to be passed by the Assembly, then the Supreme Constitutional Court might be able to judge the constitutionality of the law that approved a treaty. A ruling of unconstitutionality has the consequence that “the items found to be unconstitutional shall be annulled” (Art. 147(1)(c)). Furthermore, Art. 147(2) provides that if a litigant challenges the constitutionality of a legal provision which was applied by a court “whose ruling is being challenged”, the case, if deemed serious, can be referred to the Supreme Constitutional Court, which is to make a ruling concerning the claim of unconstitutionality. This provision is not contained in the 1973 Constitution. In general, the constitutionally recognized mandate of the court in the 2012 Constitution is more explicit and wider than the old constitution. Thus, assuming that parliamentary approval of a treaty within the aforementioned categories requires the passage of a law, Art. 146 and Art. 147 of the constitution could perhaps be used to challenge that law and, by doing so, provide a means to monitoring treaties.

B. REPRESSIVE OVERSIGHT OVER THE CONFORMITY OF ORDINARY LAWS TO TREATIES

Another question is whether the constitutional court has the mandate to strike down ordinary laws that conflict with higher status treaties. While the treaties do generally have a higher status than municipal laws, there is lacking in the Arab constitutions an express review mechanism which guarantees the superiority of such treaties over inconsistent laws. Whether the power to review ordinary laws that do not conform to treaties can be implied from the power to review the constitutionality of laws vis-à-vis the constitution is debatable. The French Constitutional Council answered this question in the negative.¹⁷² Yet this may turn out to be different, for example, in the case of Tunisia. Art. 120 does authorize the court to oversee the constitutionality of:

Laws referred to it by courts as a result of a request filed by a court, in the case of the invocation of a claim of unconstitutionality by one of the parties in litigation, in accordance with the procedures established by law.¹⁷³

Although the “Constitutional Court does not have an express mandate to test national laws against international treaties”, Jörg Fedtke argues that this ought to be read into Art. 120.¹⁷⁴ A ruling of unconstitutionality leads to the suspension of the law as defined by the court (Art. 123).

¹⁷¹ “Rules of Procedure of Parliament” (n 117).

¹⁷² See: Morina, Korenica, and Doli (n 30) 288.

¹⁷³ “The Constitution of the Republic of Tunisia Promulgated on 27 January 2014” (Council of Europe—Venice Commission) CDL-REF(2014)010-e, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2014\)010-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)010-e), accessed August 11, 2015.

¹⁷⁴ Jörg Fedtke, “Comparative Analysis between the Constitutional Processes in Egypt and Tunisia—Lessons Learnt—Overview of the Constitutional Situation in Libya” (European Parliament—Directorate-General for External Policies 2014) 15, http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET_NT%282014%29433840_EN.pdf, accessed August 11, 2015.

IV. CONCLUSION

This chapter set out five questions in order to better understand the relationship between treaties and the national legal systems of Bahrain, Egypt, Jordan, Morocco, Syria, and Tunisia. The questions have been addressed with an eye mainly on constitutional provisions. It has shown that all legal systems are monist in relation to treaties, with Bahrain being dualist in relation to a specific category of treaties. Furthermore, ratified treaty provisions have domestic validity and direct applicability in all states. Further evidence—for example, from Bahrain, Egypt, and Tunisia—showed that treaty provisions are invocable too. Generally, in all the Arab legal systems investigated the executive has a relatively wide scope of treaty-making power, which is, *de jure*, heavily concentrated in the head of state. At the same time, parliaments play a role in approving some categories of treaties prior to ratification. There is no clear trend in the constitutions in favor of increasing or decreasing the role of parliament in the area of approval of treaties. Despite the lack of clarity in many of the constitutions on the internal rank of treaties, jurisprudence and government statements indicate that the Arab legal systems generally cluster toward recognizing treaties as being superior to ordinary laws. Finally, in spite of the latter conclusion, the new and amended constitutions do not expressly authorize the respective constitutional courts to oversee the constitutionality of treaties—Morocco and Tunisia are the exceptions. Furthermore, no Arab constitution contains a provision empowering constitutional courts to monitor the conformity of ordinary laws to treaties. Given the recent establishment of constitutional courts over the past few years, it is unfortunate that this opportunity was not used to clarify what powers these courts have in relation to treaties. The constitutions have been silent or unclear in answering a number of questions. The occasional reference to jurisprudence and state practice is helpful in, first, addressing these gaps and uncertainties and, second, showing to what extent constitutional provisions on, for example, treaty-making power, are reflected in practice. It also highlights the importance of studying the same in more depth.

Turkish Constitutionalism

A Model for Reforms in Arab Countries?

ASLI Ü. BÂLI

I. INTRODUCTION: A “TURKISH MODEL” FOR REFORM IN THE ARAB WORLD?

Set off in January 2011 by the nonviolent overthrow of authoritarianism in Tunisia, the last four years have witnessed long-ruling regimes across the Arab world facing profound domestic challenges. The convulsive changes set in motion by the Arab uprisings now range from ongoing demands for reform in Bahrain to civil wars raging in Syria, Libya, and Yemen, to fitful democratization in Tunisia to the throes of counter-revolution and renewed authoritarianism in Egypt. Beyond these countries, reverberations of the uprisings are being felt from Morocco to Saudi Arabia and beyond. The countries affected have in common geographical proximity, a shared language, similarities of culture and religious makeup, and variants of authoritarian political structures. Popular demands for reform across the region have, as a result, had much in common as well. Among the solutions to these shared structural problems often proposed by regional and international actors alike is constitutional and political reform. As a consequence, the recent period more than ever has witnessed a drive to expand the toolkit of available reform proposals and a search for suitable models that take into account the economic, political, social, and cultural specificities of the challenges laid bare in the Arab uprisings.

What role might there be for non-Arab regional powers in this period of upheavals and transitions? In many respects, Turkey, Iran, and Israel appear peripheral to the chain reaction of demands for reform, uprising, and suppression unfolding in the Arab world. Yet, the non-Arab states may have a more influential role in the course of events than is initially apparent. In the case of Iran, the experience of the 2009 Green Movement was undoubtedly both an inspiration and a source of cautionary lessons for the deployment of social media

to demand reforms and regime transitions in the Arab world.¹ Israel, in turn, has had some impact on events amongst its immediate neighbors, serving as a counter-revolutionary force in the Egyptian context while seeking to contain the impact of developments in Syria.² But perhaps the most surprising development has been the evolving role of Turkey.

As a consequence of Turkey's pre-2011 policy of renewed engagement with the Arab world and with Islamist politics in the region,³ the country has proven to be surprisingly influential as one potential model for the political transformations underway. At the outset of the uprisings, talk of a "Turkish model" was frequently invoked by both local and international actors, as a regionally appropriate example of a democratizing Muslim majority country.⁴ More recently, skepticism toward developments in Turkey's domestic politics, as well its policies toward the Arab world, has transformed the meaning of the "Turkish model."

Against the backdrop of Turkey's domestic political evolution as a result of well over a decade of rule by the *Adalet ve Kalkınma Partisi* (the Justice and Development Party)—best known by the acronym AKP—the country's principal relevance to the course of the Arab uprisings has been a consequence of its apparent ability to conduct democratic elections with the participation of a moderately Islamist political party. Viewing Turkey as an exemplar for the region would have been less plausible at a time when Turkey had limited or even hostile relations with most Arab countries. But its policies of engagement from 2003 to 2011—and the increasing popularity the country enjoyed among Arab publics immediately prior to the uprisings⁵—rendered the "Turkish model" more influential as demands

¹ For an argument that the Green Movement served as an inspiration for the Arab uprisings, see Hamid Dabashi, "What Happened to the Green Movement in Iran?" *Al Jazeera* (June 12, 2013), <http://www.aljazeera.com/indepth/opinion/2013/05/201351661225981675.html>, accessed August 30, 2015.

² For an analysis of Israel's counter-revolutionary role, see Leon Hadar, "The Israel-Egypt-Saudi Arabia Axis: Come the Counter-Revolution," *Huffington Post* (August 16, 2014), http://www.huffingtonpost.com/leon-t-hadar/the-israel-egypt-saudi-ar_b_5684834.html, accessed August 30, 2015.

³ Turkey emerged as a serious and engaged regional actor in the Middle East after reversing half a century of estrangement from the region through outreach to its neighbors. On Turkey's new approach to Iraq, Syria, and beyond beginning in 2009, see David Phillips, "Turkey and Iraqi Kurdistan Are Strategic Partners," *The Atlantic Council* (June 27, 2009), http://www.acus.org/new_atlanticist/turkey-and-iraqi-kurdistan-are-strategic-partners, accessed August 30, 2015; "Turkey agrees to plans for Arab 'free trade zone,'" *BBC* (June 10, 2010), <http://www.bbc.co.uk/news/10290025>, accessed August 30, 2015; Yigal Schleifer, "Turkey aims for clout as regional mediator," *Christian Science Monitor* (May 6, 2008), <http://www.csmonitor.com/World/Middle-East/2008/0506/p06s01-wome.html>, accessed August 30, 2015. Following the Israeli war in Gaza in 2008–2009 and the interception of a Turkish humanitarian mission to Gaza by Israeli commandos, relations between Israel and Turkey soured, which had the collateral effect of improving the country's profile in the rest of the Middle East. Alastair Crooke, "After the Israeli flotilla incident, Turkey is the new Palestinian champion," *Christian Science Monitor* (June 3, 2010), <http://www.csmonitor.com/Commentary/Global-Viewpoint/2010/0603/After-the-Israeli-flotilla-incident-Turkey-is-the-new-Palestinian-champion>, accessed August 30, 2015.

⁴ For example, see Saim Kayadibi and Mehmet Birekul, "Turkish Democracy: A Model for the Arab World" (2011) 3 *Journal of Islam in Asia* 255; Alper Y. Dede, "The Arab Uprisings: Debating the 'Turkish Model'" (2011) 23 *Insight Turkey*; Anna Secor, "Turkey's Democracy: A Model for the Troubled Middle East?" (2011) 52 *Eurasian Geography and Economics* 157; Ihsan Bal, "The Rise and Fall of the Turkish Model" (2013) *Eurasia Review*.

⁵ For instance, Turkey's prime minister was ranked among the most popular leaders in a public opinion poll of the Arab world conducted by Zogby International and the Brookings Institution. See "2010 Arab Public Opinion Poll," *Brookings Institution* (August 5, 2010), http://www.brookings.edu/reports/2010/0805_arab_opinion_poll_telhami.aspx, accessed August 30, 2015.

for political reform erupted in the Arab world. There are, however, good reasons to doubt the desirability and suitability of any “Turkish model” for the Arab world. Indeed, as Turkey has come to be perceived in the region as pursuing self-aggrandizing and aggressive “neo-Ottoman” policies, the invocation of Turkey as a model has declined.

A second reason to examine Turkey’s role in the Arab uprisings is not as a model, exerting influence by example, but rather as an intervener seeking directly to affect the course of events in pursuit of its own vested interests in the outcomes of the political struggles underway. Turkey has actively developed policies of engagement—ranging from facilitating dialog to open intervention in hostilities, sometimes at odds with its Western allies—over the course of the Arab uprisings. While Turkey has had to frequently recalibrate its position to keep pace with rapid changes, it has evidenced a commitment to remaining present in the Arab world despite the upheavals. Most recently, this commitment has taken a dark turn as Turkey has joined the military intervention in Syria, using the pretext of the fight against the Islamic State to launch a series of strikes against Kurdish forces in Iraq, Syria, and southeastern Turkey. Turkey’s effort to weaken Kurdish military actors by establishing a “safe zone” at the Turkey-Syria border that will undermine the emergence of a contiguous, autonomous Kurdish territory in Syria is unlikely to end well.⁶

While Turkey’s role as an intervener will dominate the headlines in the near term, the question of its relevance as a “model” for transitions in the longer run remains one worth considering. In this chapter, I will focus on the invocations of Turkey as a potential model for reforms and analyze the limitations of the Turkish constitutional and political order in this context. In the following section, I examine the ways in which the “Turkish model” has been invoked and the perceptions of Turkey undergirding such invocations. Next, I consider the political and constitutional order in Turkey in its current instantiation, highlighting the features that explain its potential appeal and analyzing recent reversals in Turkey’s own trajectory of democratization. These recent developments highlight some intrinsic shortcomings of the Turkish constitutionalism that I argue make the country’s political order an inapposite model for reform. I conclude that while Turkey will remain an important reference point in the region, its influence will be more as a partisan in the ongoing conflicts rather than as a model for their resolution.

II. PERCEPTIONS OF THE “TURKISH MODEL”

When the “Turkish model” was invoked by Arab publics demanding reform in their own countries at the start of the uprisings, the reference was generally linked to the pursuit of sociopolitical inclusiveness—that is, the inclusion of Islamist political parties—and economic dynamism. In terms of sociopolitical inclusiveness, the rise of the AKP and its successful electoral performance in national and local elections from 2002 until 2011 created an impression that Turkey’s republican history of assertive secularism had given way to a more pluralist vision of democratic inclusion capable of accommodating moderate Islamist political parties and allowing them to compete in free and fair elections.⁷ On the economic

⁶ On the Turkish decision to intervene militarily in Syria through airstrikes, see Anne Barnard, Michael R. Gordon, and Eric Schmitt, “Turkey and U.S. Plan to Create Syria ‘Safe Zone’ Free of ISIS,” *New York Times* (July 27, 2015), <http://www.nytimes.com/2015/07/28/world/middleeast/turkey-and-us-agree-on-plan-to-clear-isis-from-strip-of-northern-syria.html>, accessed August 30, 2015.

⁷ For example, see Ahmet Kuru, “Muslim Politics without an ‘Islamic’ State: Can Turkey’s Justice and Development Party be a model for Arab Islamists?” *Brookings Policy Briefing* (Brooking Doha Center, Qatar 2013).

front, the Turkish economy was growing at a remarkable rate even as the United States and Europe were reeling from the effects of the financial crisis of 2008–2009. Regularly mentioned alongside the “BRICS” countries as an emerging market poised to become a significant global economic force,⁸ Turkey’s “Islamic Calvinists” or “Anatolian tigers”⁹ appeared to serve as an engine for the kind of economic growth lacking in the stagnant or contracting economies of the Arab world.¹⁰ The popularity of the “Turkish model” as a result of a combination of these factors was evident from the referencing of Turkey and the AKP as influential models by Egypt’s Muslim Brotherhood,¹¹ Tunisia’s *al-Nahḍah* Party,¹² and even Morocco’s *Parti de la justice et du développement* (the name of which is a direct translation of the AKP’s name into French).¹³ An additional source of the popularity of the “Turkish model” was undoubtedly the AKP’s foreign policy efforts to rebrand Turkey in the Arab world as a partner rather than an indifferent successor to the failed Ottoman order.¹⁴

Yet from the earliest invocations of the “Turkish model” in the Arab world there was considerable ambivalence about what aspects of the Turkish example were worth emulating. Despite the widespread interest in constitutional reforms, for instance, none of the advocates of the “Turkish model” suggested that Turkey’s actual constitution—written under military tutelage in 1982, and amended over a dozen times since—be treated as exemplary, nor was there any interest evinced in directly borrowing from the text of the Turkish Constitution. Thus, the success of the country’s political model was being judged based on apparent outcomes rather than structural factors or constitutional design.

Second, when Turkey was invoked as a model, diverse sectors within each Arab country had different aspects of Turkey’s political order in mind. While grassroots popular perceptions of Turkey may have focused on the electoral successes of a moderately Islamist political party and economic growth, elites were more interested in other facets of the Turkey’s political trajectory. For example, in Egypt, the military leadership and

⁸ “BRICS” stands for Brazil, Russia, India, China, and South Africa. Simon Roughneen, “After BRIC comes MIST, the acronym Turkey would certainly welcome,” *The Guardian (UK)* (February 1, 2011), <http://www.theguardian.com/global-development/poverty-matters/2011/feb/01/emerging-economies-turkey-jim-oneill>, accessed August 30, 2015.

⁹ For a discussion of these terms, see “Islamic Calvinists: Change and Conservatism in Central Anatolia,” *European Stability Initiative* (September 19, 2005), http://www.esiweb.org/pdf/esi_document_id_69.pdf, accessed August 30, 2015.

¹⁰ Richard Javad Heydarian, “Arab Spring, Turkish Summer?” *Foreign Policy in Focus* (May 16, 2011), http://www.fpif.org/articles/arab_spring_turkish_summer, accessed August 30, 2015.

¹¹ Ties between Egypt’s Muslim Brotherhood and Turkey’s AKP were the subject of wide coverage both before and after the ouster of Egypt’s first democratically elected president, the Muslim Brotherhood’s Mohammed Morsi. Mohammad Abdel Kader, “Turkey’s relationship with the Muslim Brotherhood,” *Al Arabiya* (October 14, 2013), <http://english.alarabiya.net/en/perspective/alarabiya-studies/2013/10/14/Turkey-s-relationship-with-the-Muslim-Brotherhood.html>, accessed August 30, 2015; Marc Campion and Matt Bradley, “Islamists Criticize Turkish Premier’s ‘Secular’ Remarks,” *Wall Street Journal* (September 15, 2011), <http://www.wsj.com/articles/SB10001424053111904491704576570670264116178>, accessed August 30, 2015.

¹² “Tunisia’s Ennahda Movement Looks to AKP for Credibility,” *Turkish Weekly* (November 28, 2011), <http://www.turkishweekly.net/2011/11/28/news/tunisi-as-ennahda-movement-looks-to-akp-for-credibility/>, accessed August 30, 2015.

¹³ Feriha Perekli, “The Applicability of the ‘Turkish Model’ to Morocco: The Case of the Parti de la Justice et du Développement” (2012) 3 *Insight Turkey* 14, 85–108.

¹⁴ Omar al-Ghazzi and Marwan M. Kraidy, “Neo-Ottoman Cool 2: Turkish Nation Branding and Arabic-Language Transnational Broadcasting” (2013) 7 *International Journal of Communication* 2341–2360.

business elites were less taken by the post-2002 AKP model of Islamist politics than by the pre-2002 model of Turkish politics characterized by a strong and centralized executive in which a powerful military hierarchy governed through its role on the National Security Council and preserved its autonomy free from civilian oversight.¹⁵ Similarly, the moderate Islamist democratizing model of Turkey embraced by the *al-Nahḍah* Party was quite different than the earlier secular semi-authoritarian model of Turkish politics favored by some Tunisian elites.¹⁶ The “Turkish model”, in effect, became a floating signifier the content of which was as much a function of the political preferences of those invoking the model as of the actual political or constitutional trajectory of Turkey proper.

What about Western analysts proposing that the “Turkish model” be taken into consideration by political reformers in the Arab world? In 2011, following the overthrow in rapid succession of Ben ‘Ali and then Mubārak, the first preference of many such analysts—policies excluding the Muslim Brotherhood and other similar parties from political participation—did not seem viable. Under conditions in which political Islam could no longer be fully suppressed, such analysts sought a second-best alternative. In this context, their invocation of the “Turkish model” referred to the country’s ability to absorb moderate forms of political Islam in its political system, without veering too far off its course as a Western ally in the region. At a time when there was significant consternation about the AKP’s alleged reorientation of Turkish foreign policy, the best reading of Western advocacy for a “Turkish model” was not as an endorsement of the ruling party but rather as a second-best but regionally appropriate variant of favored Western policy prescriptions. While the pre-AKP “Turkish model” might have been preferred from this perspective, the belief that political Islamist parties would have to be included in post-authoritarian transitions after the Arab uprisings led to an embrace of the AKP’s variant of pro-business, market-oriented “moderate” Islamist politics.

The plasticity of the meaning of the “Turkish model” suggests that much of what rendered Turkey attractive in 2011 was in the eye of the beholder. For some, the electoral success of the AKP, seen as a moderate Islamist political force in a democratizing order was the crucial feature. For others, the apparent dynamism of Turkey’s economy was most worth emulating. For still others, the traditional role of the Turkish military as a “guardian” of the political order in the country held appeal. And for a different sector the seemingly durable secularism of the political order despite the presence of Islamist parties was critical. While none of these characterizations of aspects of the Turkish political and constitutional order were incorrect, they were highly partial. By taking one feature out of context, analysts risked adopting an ahistorical understanding of the post-2002 “Turkish model” distinct from the semi-authoritarian modernization process that characterized the country’s republican trajectory. As a result, those who invoked Turkey in a positive light may have failed to fully appreciate the limitations, weaknesses, and contradictions of the system that produced the outcome they favored and the risks attendant to transposing such a model.

¹⁵ On the appeal of Turkey’s “military model,” see Hesham Sallam, “Obsessed with Turkish models in Egypt,” *Jadaliyya* (June 30, 2013), <http://www.jadaliyya.com/pages/index/12517/obsessed-with-turkish-models-in-egypt>, accessed August 30, 2015; Robert D. Springborg, “Egypt’s future: yet another Turkish model?” (2014) 1 *The International Spectator* 49, 1–6.

¹⁶ Oğuzhan Göksel, “Perceptions of the Turkish model in post-revolutionary Tunisia” (2014) 3 *Turkish Studies* 15, 476–495.

III. CHARACTERISTICS OF THE TURKISH CONSTITUTIONAL ORDER

If references to the “Turkish model” were as plastic as suggested above, two further questions bear examination. First, what are the actual characteristics of the “Turkish model”, whether in terms of the functioning of the country’s political system or in terms of its constitutional order? Second, to what extent, if at all, are the actual political and constitutional institutions and practices in Turkey a suitable model for addressing the structural problems that led to popular uprisings in the Arab world? In this section I examine the constitutional order undergirding the “Turkish model”, and in the next section I consider the implications of developments in Turkish politics over the last four years for the viability of the model both within Turkey and as a potential influence beyond its borders.

Turkey has a long history of constitutionalism, dating back to the first Ottoman Constitution of 1876 through to the current constitution, written as part of a transition out of military rule in 1982.¹⁷ The constitutional order in Turkey has been described by a prominent Turkish constitutional law scholar as semi-democratic with a number of authoritarian and tutelary features.¹⁸ This description captures distinctive characteristics of the Turkish constitutional order that detract from its desirability as a model. First, it is a highly statist constitution, privileging the prerogatives of the state and “Turkish national interests” ahead of the protection of individual rights, as is evident in the constitution’s preamble.¹⁹ Second, the current constitution, drafted in 1982 as part of a transition away from military rule, created a set of tutelary institutions designed to check the powers of the elected branches of government. These institutions include the National Security Council (with a strong military presence and broad policy-making powers), the Higher Education Board (including representatives of the military in decisions concerning academic appointments and the regulation of higher education), and the judiciary with an appointments procedure that, for the higher echelon courts, is largely controlled by the executive (albeit less so following the constitutional amendments of 2010), among others.²⁰ In addition, the constitution secures significant institutional autonomy for the military and strikingly broad jurisdiction for the military courts.

¹⁷ Turkey has had four different constitutions in the post-Ottoman period: the national liberation constitution of 1921, the first republican constitution of 1924, the post-military coup constitution of 1961 (revised in 1971 and 1973), and the post-military coup constitution of 1982. None of the three republican era constitutions were written by a broadly representative constituent assembly. Rather, they were each imposed top-down by elite drafters and in the cases of the 1961 and 1982 Constitutions, the drafters were selected by the military. The 1982 Constitution has undergone over a dozen rounds of amendments since its adoption—the most recent amendment package having been passed in 2010—but it remains a text rooted in its semi-authoritarian origins.

¹⁸ Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave Macmillan, Basingstoke 2011) 151.

¹⁹ The preamble provides, *inter alia*, that “no protection shall be afforded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory” and “that all Turkish citizens are united in national honor and pride . . . in their rights and duties regarding national existence.” The English language text of the Turkish Constitution (as amended through 2011) is available at https://www.constituteproject.org/constitution/Turkey_2011?lang=en, accessed August 30, 2015. All subsequent citations in English to provisions of the constitution are based on this translation.

²⁰ The text of the Turkish Constitution’s provides for the NSC at Art. 118, the Council of Higher Education at Arts. 130 and 131 and the mechanism for judicial appointments and promotions through the High Council of Judges and Prosecutors is provided for by Art. 159.

Beyond these distinctive features, the constitution also provides relatively idiosyncratic versions of more common institutional features. Thus, Turkey is a democratic state with free and competitive elections based on universal suffrage, but has distinguished itself for the extraordinarily high rate of political party closures. These party closures occur through constitutional challenges to party platforms based on ethnicity, religion, or proscribed ideologies.²¹ Further, legislation specifies a 10 percent threshold to secure parliamentary representation, a uniquely high electoral threshold²² that has served, until 2015, to exclude Kurdish political parties (already under constant threat of party closure), forcing their representatives to run as independents.²³

The Turkish republic has been a formally secular state since 1928.²⁴ But Turkey's repressive definition of secularism, informed by the founding republican ideology of Kemalism, sets it apart from most other secular constitutional systems. Secularism in Turkey is not the constitutional principle of separation of state and religion (or even state neutrality on questions of religion) but rather state control and regulation of religion in the interest of maintaining the autonomy of the political realm.²⁵ Under this definition, secularism has been the basis for intrusive state policies governing many aspects of private religious expression and practice throughout much of the republic's history. This conception of secularism has also enabled the state to monopolize the domain of religious education, producing a state-sanctioned orthodoxy on Islam, excluding the beliefs and practices of heterodox Muslim communities, like the Alevis.

The Turkish Constitution also specifies nationalism as one of the characteristics of the republic.²⁶ Provisions related to nationalism serve to produce an ethnic (rather than civic) conception of citizenship in Turkey, marginalizing the country's large Kurdish minority. Ascribing a quasi-mythical status to the Turkish nation—despite the diverse makeup of the population in terms of ethnic, linguistic and religious communities—the constitutional

²¹ Art. 68 of the Turkish Constitution provides for the permissible programs of political parties, noting that they "shall not be contrary to the . . . indivisible integrity [of the State] with its territory and nation." This language has been the basis for banning Kurdish political parties, allegedly seeking territorial autonomy. Other provisions concerning the secular identity of the republic and the impermissibility of class-based mobilization have served to shut down Islamist or leftist political parties.

²² Sinan Alkin, "Underrepresentative Democracy: Why Turkey Should Abandon Europe's Highest Electoral Threshold" (2011) 2 Washington University Global Studies Law Review 10, 347–369.

²³ As a consequence of these factors as well as restrictions on individual rights and political interference in judicial proceedings, Turkey is regularly ranked as "partly free" by Freedom House despite regularly convening free and fair elections. For Turkey's 2015 Freedom House scores, see <https://freedomhouse.org/report/freedom-world/2015/turkey?gclid=CIX97cuDnscCFUNhfgod-z0KLQ#.VchXiPIVhBd>, accessed August 30, 2015.

²⁴ The Turkish republic's first constitution made reference to Islam as the religion of the state. That provision was removed by constitutional amendment in 1928 and in 1937 a further constitutional amendment enshrined the principle of secularism—or *laiklik*—as an unamendable feature of the republic. See Yaniv Riznai and Serkan Yolcu, "An unconstitutional constitutional amendment" (2012) 1 International Journal of Constitutional Law 10, 175–207.

²⁵ For a discussion of constitutional secularism in Turkey, see Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave Macmillan, Basingstoke 2011) 27, 32.

²⁶ The preambular language begins by "affirming the eternal existence of the Turkish Motherland and Nation and the indivisible unity of the Sublime Turkish State, this Constitution, in line with the concept of nationalism introduced by the founder of the republic . . . has been entrusted by the Turkish Nation to the democracy-loving Turkish sons' and daughters' love for the motherland and nation."

text can be read to conflate citizenship in the state with Turkish ethnic identity. Thus, the constitutional conceptions of secularism and nationalism have been tied to an enduring politics of exclusion for religious and ethnic minorities in the republic. While contestation of the best interpretation of the constitutional principle of secularism has enjoyed some success, demands for a civic rather than ethnic conception of citizenship have made less headway.²⁷

The constitution also specifies that Turkey is a “social state” signaling a commitment to welfare provision.²⁸ In practice, however, the constitutional emphasis has been on the economic stability of the state rather than the individual welfare of its citizens. The country has a market economy in which major state assets were largely privatized as part of a broad program of economic liberalization begun in the mid-1980s and accelerated over the last fifteen years.²⁹ This liberalization witnessed the emergence of a market-oriented religiously conservative social sector in Turkey, which has led to the expansion of the middle class and the rise of new small and medium-sized enterprises as engines for economic growth in the central parts of the country.³⁰ Economic liberalization accounts to some extent for the economic dynamism that won Turkey admirers in the Arab world, but recent corruption scandals have highlighted biased bidding processes for state contracts, partisan privatization of state assets, and the co-optation of religiously conservative capital, particularly in the construction and mining sectors, to serve the interests of the ruling AKP.³¹ The extent and nature of the corruption scandal, together with the widespread fear that growth has been fueled by a construction bubble, have cast a long shadow over the country’s economic performance.

This portrait of the Turkish constitutional order as characterized by military tutelage, assertive secularism, limited individual rights, discrimination against minorities, and corruption makes for a rather undesirable model. Indeed, some of these characteristics of Turkish constitutionalism would directly undermine the demands given voice in the Arab uprisings. Military tutelage has become the vehicle of counter-revolution in Egypt. The autonomy of the military from civilian oversight and the expansive jurisdiction of military courts have insulated Egypt’s post-coup leadership from accountability while allowing the persecution of their opponents in show trials.³² Limited individual rights and

²⁷ For a discussion of the civic versus ethnic conception of citizenship in the Turkish context, see Başak Ince, *Citizenship and Identity in Turkey: From Atatürk’s Republic to the Present Day* (IB Tauris, London 2012).

²⁸ Art. 2 provides: “The Republic of Turkey is a democratic, secular and social state.”

²⁹ For discussions of Turkey’s economic liberalization programs since the 1990s, see Ziya Öniş and Fikret Şenses (eds), *Turkey and the Global Economy: Neoliberal Restructuring and Integration in the Post-crisis Era* (Routledge, New York 2009); Ebru Kayaalp, *Remaking Politics, Markets and Citizens in Turkey: Governing Through Smoke* (Bloomsbury, London 2015).

³⁰ “Small and Medium Sized Enterprises in Turkey,” OECD (2004), <http://www.oecd.org/turkey/31932173.pdf>, accessed August 30, 2015; Ömer Demir, Mustafa Acar, and Metin Toprak, “Anatolian Tigers or Islamic Capital: Prospects and Challenges” (2004) 6 *Middle Eastern Studies* 40, 166–188.

³¹ Berivan Orucoglu, “Why Turkey’s Mother of All Corruption Scandals Refuses to Go Away,” *Foreign Policy* (January 6, 2015), <http://foreignpolicy.com/2015/01/06/why-turkeys-mother-of-all-corruption-scandals-refuses-to-go-away/>, accessed August 30, 2015.

³² Nathan J. Brown and Michele Dunne, “Egypt’s Draft Constitution Rewards the Military and Judiciary,” *Carnegie Endowment* (December 4, 2013), <http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary>, accessed August 30, 2015; Erin Cunningham and Abigail Hauslohner, “Egypt sentences 683 to death in latest mass trial of dissidents,” *Washington Post* (April 28, 2014).

discrimination on the basis of religious identity were the prime motivators of the uprising in Bahrain.³³ Corruption was one of the key grievances that catalyzed regime change in Tunisia.³⁴ In short, the “Turkish model” has little to recommend it for Arab publics that have repudiated similar features of their own constitutional orders. That being said, some aspects of these deficiencies have been attenuated to an extent in Turkey by constitutional amendment packages that have been adopted since the 1990s and particularly in the last fifteen years (though other problems—like corruption—may have been exacerbated in the same period). For example, the last decade has witnessed significant reforms to civil-military relations through constitutional amendments and a series of high-profile court cases curtailing the military’s authority to intervene in civilian politics.³⁵ In the wake of these reforms, the contemporary “Turkish model” is one in which the military is subject to a far greater degree of civilian oversight than was envisioned in 1982. Yet, analysts also agree that the constitution has not been fully civilianized, leaving extensive residual powers to the military through the National Security Council.³⁶ Moreover, there is reason to worry that the AKP’s new reliance on the military to advance its policies in Syria and the overturning of earlier court cases against alleged military coup plotters may witness the reversal of its earlier initiatives to civilianize the constitutional order.³⁷

There has also been an effort, under the AKP, to redefine the Turkish conception of state secularism toward what has been described as a more “passive” form of secularism maintaining the exclusion of formal religion from politics, while adopting a less intrusive set of state policies toward religious belief and practice outside of the political domain.³⁸ As an example, constitutional amendments and legislative changes have enabled women to enjoy legal protections in wearing headscarves on university campuses, in government offices, and in private sector employment to an extent that had been unimaginable a decade ago.³⁹ Those who view “passive secularism” favorably view Turkey as offering a model of a civil and tolerant Islamist politics that asserts the right to be included in contestatory politics but abides by a constitutional order premised on a “civil” (not religiously identified) state with a formal commitment to political secularism. By contrast, others argue that the

³³ Reza Aslan, “Bahrain’s Fake Sectarian War,” *Foreign Affairs* (June 30, 2013), <https://www.foreignaffairs.com/articles/bahrain/2013-06-30/bahraains-fake-sectarian-war>, accessed August 30, 2015.

³⁴ Carlotta Gall, “Widespread Graft Benefited Tunisian Leader’s Family, Study Says,” *New York Times* (June 25, 2015).

³⁵ E. P. Licursi, “The Ergenekon Case and Turkey’s Democratic Aspirations,” *Freedom House* (February 7, 2012), <https://freedomhouse.org/blog/ergenekon-case-and-turkey%E2%80%99s-democratic-aspirations#.VdGSyPIVhBc>, accessed August 30, 2015.

³⁶ A package of constitutional amendments in 2010 made some progress on civilianizing Turkey’s Constitution, but analysts agree that more is required to remove military tutelage from the constitutional order. Stephen Kinzer, “Breaking the grip of Turkey’s military,” *The Guardian (UK)* (September 7, 2010), <http://www.theguardian.com/commentisfree/2010/sep/07/breaking-grip-military-turkey>, accessed August 30, 2015.

³⁷ Tim Arango, “Turkish Leader Disowns Trials That Helped Him Tame Military,” *New York Times* (February 26, 2014); Jack Moore, “Turkish PM gives authority for military intervention in Syria,” *Newsweek* (July 3, 2015), <http://europe.newsweek.com/turkish-pm-gives-authority-military-intervention-syria-329748>, accessed August 30, 2015.

³⁸ On “passive secularism,” see Ahmet T. Kuru, “Passive and Assertive Secularism: Historical Conditions, Ideological Struggles and State Policies Toward Religion” (2007) 4 *World Politics* 4, 568–594.

³⁹ Sebnem Arsu and Dan Bilefsky, “Turkey Lifts Longtime Ban on Head Scarves in State Offices,” *New York Times* (October 9, 2013).

departure from assertive secularism in the Turkish context has enabled the AKP to launch a process of stealth Islamization of the country's political order, allowing personal religiosity to become a factor in everything from appointment to public office to the award of state contracts and more.⁴⁰ Religiously inflected policy statements from the prime minister or president's offices concerning lifestyle choices, ranging from alcohol consumption to the use of contraceptives,⁴¹ reinforce a sense that the government has not redefined but reversed long-standing presumptions of secularism.

In the area of individual rights, the Turkish Constitution formally protects freedom of speech, press freedoms, and freedom of association and prohibits discrimination based on religious or ethnic identity, and some civil liberties were strengthened by the 2010 amendments supported by the AKP.⁴² Despite these protections, however, the Turkish constitutional order remains fundamentally illiberal, with extensive restrictions on press freedoms, academic freedom, and access to the internet being introduced by recourse to an expansive conception of national security. Indeed, Turkey's failings with respect to free speech are legion. Whether in prosecuting literary figures for "insulting Turkishness," using regulatory and tax measures punitively to shut down media groups for publishing newspaper articles critical of the government, imprisoning publishers for producing Kurdish language materials, arresting journalists whose investigations cast an unflattering light on the government, prosecuting academics for signing peace petitions, or introducing far-reaching restrictions on access to the Internet, Turkey has distinguished itself among democracies for stifling free speech.⁴³

Another area of serious concern is the rampant discrimination against and even persecution of minorities, including the very large Kurdish and Alevi communities.⁴⁴ The AKP garnered praise in its first decade of rule for initiating a Kurdish "opening" or "peace process" and bringing to an end the senseless low-grade civil war that plagued the country's southeastern provinces from 1984 to the 2000s.⁴⁵ Yet, the promise of addressing long-standing Kurdish demands for greater cultural and political autonomy, including through

⁴⁰ Ahmet T. Kuru, "What happened to the Turkish model of passive secularism?" *Today's Zaman* (February 5, 2014), http://www.todayszaman.com/op-ed_what-happened-to-the-turkish-model-of-passive-secularism-by-ahmet-t-kuru_-338585.html, accessed August 30, 2015.

⁴¹ "CHP'den Başbakan'a 'iki ayyaş kim' sorusu," *Hürriyet* (May 28, 2013), <http://www.hurriyet.com.tr/gundem/23383581.asp>, accessed August 30, 2015; Kadri Gursel, "Erdogan's 'Three Children' Campaign Alienates Women," *Al Monitor* (June 25, 2013), <http://www.al-monitor.com/pulse/originals/2013/06/erdogan-three-children-campaign-women.html#>, accessed August 30, 2015; and Marc Champion and Joe Parkinson, "Alcohol Hits Nerve in Turkey," *Wall Street Journal* (January 15, 2011).

⁴² For a discussion of the 2010 constitutional amendment package, see Aslı Bâli, "Unpacking Turkey's 'Court-Packing' Referendum," *MERIP* (November 5, 2010), <http://www.merip.org/mero/mero110510>, accessed August 30, 2015.

⁴³ For one report documenting various aspects of Turkish repression of free speech, see "Statement on freedom of expression in Turkey, December 2014," *Article 19* (December 3, 2014), <https://www.article19.org/resources.php/resource/37833/en/statement-on-freedom-of-expression-in-turkey-upr-pre-session-december-2014>, accessed August 30, 2015. On Internet restrictions, see "Turkey: Internet Freedom, Rights in Sharp Decline," *Human Rights Watch* (September 2, 2014), <https://www.hrw.org/news/2014/09/02/turkey-internet-freedom-rights-sharp-decline>, accessed August 30, 2015.

⁴⁴ Meltem Naz Kaşo, "Minority groups face increasing discrimination in Turkey," *Today's Zaman* (March 20, 2014), http://www.todayszaman.com/national_minority-groups-face-increasing-discrimination-in-turkey_342607.html, accessed August 30, 2015.

⁴⁵ Yılmaz Ensaroğlu, "Turkey's Kurdish Question and the Peace Process" (2013) 2 *Insight Turkey* 15–17.

constitutional reform and devolution of power to the Kurdish provinces, was never realized and after a two-year-long ceasefire with the PKK (Kurdistan Workers Party), the government has recently reversed course.⁴⁶

Following disappointing results in the 2015 general elections in which the AKP lost its majority in parliament for the first time since 2002, while the relatively new, pro-Kurdish HDP (Peoples' Democratic Party) scored an electoral success by passing the 10 percent threshold, President Recep Tayyip Erdoğan undertook a radical shift in policy. Ostensibly joining the United States in undertaking airstrikes against Islamic State targets in Syria, the Turkish government has in fact launched a massive series of strikes against Kurdish forces in Syria, Iraq, and southeastern Turkey, effectively ending the Kurdish peace process.⁴⁷ Many analysts believed that Erdoğan was gambling that launching airstrikes against Kurdish targets within and beyond Turkey's borders would garner far-right votes that would help it regain its parliamentary majority in the new elections held on November 1, 2015, a gamble that appeared to pay off.⁴⁸ Steps to remove the parliamentary immunity of HDP deputies and to seek the constitutional closure of the party,⁴⁹ thereby barring it from political participation, have all reinforced suspicions that the AKP has turned against the Kurdish community as part of a domestic electoral calculation. Whether the attacks on Kurdish forces are motivated by electoral concerns or not, the abandonment of the peace process signals backsliding on the prospect of reconciliation with the Kurds. The Turkish inability to achieve social integration or constitutional protections for its minority communities is hardly an attractive model for heterogeneous Arab countries dealing with their own sectarian and ethnic cleavages.

Nor is reconciliation with the Kurds the only example of such a reversal of course whereby the AKP has begun to undo some of its own democratizing and liberalizing reforms. In another instance of backsliding, the same government that proposed amendments in 2010 that strengthened the independence of the judiciary has since led the charge in an assault on judicial autonomy—firing, replacing, and relocating hundreds of judges and prosecutors to disrupt a corruption investigation involving the ruling AKP.⁵⁰ Even where progress has been made in amending the constitution to ameliorate its tutelary and statist character, piecemeal reforms have proven easy to reverse. As a result of these serious deficiencies in the protection of individual rights, minority rights, and the rule of law, the Turkish government has been the subject of extensive criticism of its record on human rights by international nongovernmental organizations (NGOs), the European Union and Turkish civil society organizations.⁵¹ In the constitutional arena, these critics advocate

⁴⁶ Nigar Göksel, "A New Cycle Begins in Turkey-PKK Conflict," *International Crisis Group* (August 11, 2015), <http://blog.crisisgroup.org/europe-central-asia/2015/08/11/a-new-cycle-begins-in-turkey-pkk-conflict/>, accessed August 30, 2015.

⁴⁷ Tim Arango and Ceylan Yeginsu, "Turkey's Push into War Is Seen as Erdogan's Political Strategy," *New York Times* (August 6, 2015).

⁴⁸ Tim Arango and Ceylan Yeginsu, "Erdogan's Party in Turkey Regains Parliamentary Majority," *New York Times* (November 1, 2015).

⁴⁹ That the AKP, long threatened by its political opponents with party closure, would pursue the closure of the HDP for tactical reasons is especially ironic. "Top court begins investigation into HDP after AK Party files complaint," *Today's Zaman*, July 28, 2015.

⁵⁰ Oya Yegen, "Turkey Rolling Back the 2010 Reforms?" *I-CONnect* (October 24, 2014), <http://www.iconnectblog.com/2014/10/turkey-rolling-back-the-2010-reforms/>, accessed August 30, 2015.

⁵¹ "European Parliament's Turkey report sharpens criticism of rights violations," *Today's Zaman* (May 12, 2015); "Turkey: Authoritarian Drift Undermines Rights," *Human Rights Watch* (January 29, 2015),

replacing the current constitution with one drafted under civilian control by a broadly representative and inclusive body, with the hope that the resulting constitutional text would be more liberal, less statist, and consistent with the European human rights standards to which Turkey is subject as a member of the Council of Europe.⁵²

This last point—Turkey’s obligations under the European Convention on Human Rights—highlights a characteristic of the Turkish political order worth underscoring when appraising the suitability of the “Turkish model” for transposition to the Arab world. Turkey’s geopolitical location and significance have enmeshed the country for over half a century in a dense web of treaty obligations, military alliances, and strategic partnerships with the West to an extent unmatched by any other country in the region. An associate member of the European Union since 1963, Turkey first applied for accession in 1987. The country has been a member of the Council of Europe since 1949 and was among the first countries to join the NATO alliance (in 1952). Each of these points of contact and interaction also serves as a leverage point that has enabled Europe and the United States to exert effective liberalizing pressure politically and economically on Turkey. The presence of significant incentives to comply with European and American demands because of the substantial benefits of NATO and possible EU membership set Turkey apart from other democratizing countries that are not subject to the same web of agreements and compliance obligations.

IV. CHALLENGES TO THE “TURKISH MODEL” SINCE THE ARAB UPRISINGS

The brief survey above suggests that despite its apparent record of economic growth and successful inclusion of a moderate Islamist actor in democratic politics, the unresolved challenges of Turkey’s constitutional order make it a poor choice of model. Moreover, Turkey’s appeal to Arab publics has diminished significantly since 2011. At the start of the uprisings, reasonable observers could argue that despite a flawed constitution, under AKP rule Turkey had improved its democratic standards, economic performance, and regional influence. Such claims became more difficult to sustain as a series of developments since 2012 have produced, instead, the view that the AKP is increasingly authoritarian, corrupt, and playing a dangerous, often sectarian, game as it meddles in the region. As a result, many commentators have noted that Turkey’s much vaunted earlier foreign policy of “zero problems in the region” has been transformed into a record of “zero friends.”⁵³

Setting aside the question of Turkey as a “model” for the Arab world, the Turkish political and constitutional order is failing to satisfy basic criteria of legitimacy for a significant proportion of the Turkish public. The suppression of the 2013 Gezi protests in Turkey, the ruling party’s increasing clampdown on individual rights of speech and assembly and press freedoms, corruption scandals and the AKP’s abrogation of the separation of powers to block investigations, and Turkey’s aggressive stance in Syria have all resulted in a loss not

<https://www.hrw.org/news/2015/01/29/turkey-authoritarian-drift-undermines-rights>, accessed August 30, 2015.

⁵² Ali Ünal, “Venice Commission ready to assist Turkey on new constitution,” *Daily Sabah* (August 9, 2014), <http://www.dailysabah.com/politics/2014/08/09/venice-commission-ready-to-assist-turkey-on-new-constitution>, accessed August 30, 2015.

⁵³ For example, see Piotr Zalewski, “How Turkey Went from ‘Zero Problems’ to Zero Friends,” *Foreign Policy* (August 22, 2013), <http://foreignpolicy.com/2013/08/22/how-turkey-went-from-zero-problems-to-zero-friends/>, accessed August 30, 2015.

only of regional influence but also of domestic confidence in the sustainability of Turkey's current political order. In the words of one prominent analyst, the new model offered by Turkey appears to be one of "authoritarianism in domestic politics, cronyism and corruption in the economy and deadlock in foreign policy."⁵⁴ Another commentator has argued that the AKP is now backsliding on the promise of democratic Islamism.⁵⁵

More fundamentally, many have noted that what is being illustrated in Turkey is not a conflict between democracy and political Islam but between the majoritarianism espoused by the AKP and liberalism. That is, the AKP remains committed to democratic politics so long as an electoral majority (or, after the 2015 elections, an electoral plurality) gives the party the right to govern as it wishes between elections. Such an approach has been described as "the credo of an expanding group of elected but autocratic rulers," of which Erdoğan is a leading exemplar.⁵⁶ Without rules and institutions that constrain the elected government's policies—through robust protections of individual rights including the right to peaceful protest, a commitment to judicial autonomy, and a free press—unchecked majoritarianism produces government that serves exclusively the interests of its own electoral constituency.

The AKP's record of attacking protesters with police brutality, silencing critics through control of the ownership of broadcast and print media, and compromising judicial autonomy by manipulating appointments and promotions has badly tarnished its democratic credentials through an abandonment of basic checks and balances in favor of crude majoritarian politics. In the previous section, I considered the intrinsic limitations of the Turkish constitutional order as of 2011. In the following section, I examine the additional limitations to Turkey's political model that have been revealed in the four years since the Arab uprisings began.

A. Revelations of the Gezi Protests and Their Aftermath

When the movement that came to be known as the "Gezi protests" began on May 31, 2013, it may have come as some surprise to those touting Turkey as a "model" of stable democracy in a Muslim majority country. The protests were ostensibly about plans to demolish an urban park in Istanbul as part of the broader, state-driven urban renewal program. Such urban renewal projects have fueled a construction boom in Turkey, contributing to a record of economic growth backstopped by short-term foreign investment but also leading to the displacement of local populations and the diminution of green spaces in the city. When the small group of environmental protesters were confronted with excessive police brutality—gripping photographs of which circulated instantly through social media—public indignation quickly led thousands to stream into the Taksim square area in solidarity. Within days, the protests had spread across the country and expanded in scope, moving from a critique of environmental politics and urban planning to a more general public expression of dissatisfaction with the semi-authoritarian and divisive style of then-prime minister Erdoğan's rule.

By the end of the summer, the protests encompassed public anger over corruption and crony capitalism (with allegations that massive public construction projects—like the one

⁵⁴ Ömer Taşpınar, "The End of the Turkish Model" (2014) 2 *Survival* 56, 50.

⁵⁵ Robert D. Springborg, "Egypt's Future: Yet Another Turkish Model?" (2014) 1 *The International Spectator* 49, 2.

⁵⁶ "Zombie democracy," *The Economist* (June 22, 2013), <http://www.economist.com/news/leaders/21579850-note-turkeys-prime-minister-among-others-winning-elections-not-enough-zombie-democracy>, accessed August 30, 2015.

in Gezi Park—were being awarded through rigged bidding processes), rampant privatization, nepotism in civil service appointments and promotions, police brutality, perceived manipulation of the judiciary and punitive mass trials, centralization of state power in the hands of an ever strengthening executive,⁵⁷ and the invasive policy statements by Erdoğan and some of his ministers concerning lifestyle choices among the Turkish public including the consumption and sale of alcohol. The rapid spread of the protests, the escalating resort to the use of tear gas and water cannon by police to disperse crowds across all the major cities of the country, and the widespread international media attention garnered by the Turkish protesters undermined the country's claim to serve as a model for the region. Indeed, the evolution of the protests revealed grievances rooted in the weak constitutional protections of rights and liberties that must have been strikingly familiar to Arab publics.

Comparisons between Turkey's summer of discontent in 2013 and the Arab "spring" uprisings of 2011 would be misplaced because of the difference in the magnitude of the grievances given voice in the two contexts. The divisiveness of Erdoğan's governance style and the increasingly intolerant rule of the AKP remain a far cry from the full-blown authoritarianism of Egypt's Mubārak or Syria's al-Assad. Yet, in thinking about the limitations of "Turkey's model" as a potential reference point for reform, it is worth considering the similarities in the core grievances among Turkish and Arab publics, while bearing in mind important differences of degree. The core areas of overlapping grievance were: centralization of political power in the executive, excessive police brutality, press censorship, and economic cronyism.⁵⁸

The Gezi protests made clear widespread popular opposition to the greater centralization of power, yet Erdoğan went on to garner the necessary votes to be elected president in 2014.⁵⁹ He has used his time in that office to accrete further powers to a centralized executive while trampling on the formal constitutional requirement of neutrality designed to ensure that the presidency remain above partisan politics.⁶⁰ Notwithstanding (and possibly to some extent because of) his open (and constitutionally impermissible) electioneering in advance of the June 2015 parliamentary elections, however, the AKP lost some of its vote share and with it the parliamentary majority it would have required to pass constitutional amendments to institutionalize Erdoğan's vision of presidentialism. The June 2015 elections no less than the Gezi protests were a public rebuke of the AKP's desire to centralize power in a strong executive, but as of the writing of this chapter, Erdoğan appears

⁵⁷ Suzy Hansen, "Whose Turkey Is It?" *New York Times Magazine* (February 5, 2014). Some noted that even as Erdoğan set his sights on the presidency while still occupying the prime minister's office, he was also behaving as though he were the mayor of Istanbul, micromanaging public construction projects to be developed as part of the city's urban renewal. Centralization and personalization of power meant that both separation of powers at the national level and any devolution of power to local and regional governments were anathema to Erdoğan's style of governing.

⁵⁸ Additional grievances that were front and center at Gezi—such as the government's moralistic intrusions on private lifestyle choices in areas like alcohol consumption and reproductive rights—have less in common with the Arab uprisings and will not be considered in detail here.

⁵⁹ "Recep Tayyip Erdogan wins Turkish presidential election," *BBC* (August 10, 2014), <http://www.bbc.com/news/world-europe-28729234>, accessed August 30, 2015.

⁶⁰ "In Turkish Parliamentary Campaign, Erdogan Is Everywhere," *New York Times* (June 3, 2015), <http://www.nytimes.com/aponline/2015/06/03/world/europe/ap-eu-turkey-erdogan-campaign.html>, accessed August 30, 2015; Barçın Oran, "AKP's presidential system will lead to one-man rule," *Hürriyet Daily News* (March 2, 2015), <http://www.hurriyetdailynews.com/akps-presidential-system-will-lead-to-one-man-rule.aspx?pageID=238&nID=79041&NewsCatID=341>, accessed August 30, 2015.

undeterred. After the election results, he was widely perceived as blocking the formation of a coalition government in an apparent bid to force early elections that might enable the AKP to win back a majority and unilaterally pursue constitutional amendment.⁶¹ This gambit succeeded, returning the AKP to power as the ruling party following new elections in November 2015. While the party did not secure enough seats to adopt constitutional amendments on its own, it needs only the support of thirteen additional parliamentarians to adopt a new constitution and its policies suggest that it is pursuing the support of MHP representatives. The party has doubled down on its strategy of repression to consolidate the support of its electoral base and draw ultra-nationalist supporters, with an escalating military campaign in the Kurdish provinces of the country's southeast and the prosecution of academic critics and other dissidents under an ever-broadening definition of support for terrorism.⁶²

The excessive police brutality that met the Gezi protests made international headlines. Adding insult to injury for the protesters was the near-total blackout of coverage of the Gezi protests by the Turkish media in early June. While CNN international was offering near round-the-clock coverage of the protests, the Turkish CNN affiliate, CNN-Türk, famously broadcast a documentary about penguins to fill airtime while its idled correspondents were kept away from the protests. As urban street battles raged in the city squares of Istanbul and Ankara, Turks would have to turn to social media and the world press to get updates on events unfolding outside their windows.⁶³ This unprecedented degree of self-censorship in Turkey's mainstream media revealed the consequences of a decade during which the consolidation of media ownership in the hands of pro-government oligarchs resulted in the creeping transformation of the erstwhile relatively free Turkish press. Since that time, the government has also acted overtly to shut down critical or independent media through asset seizures or selective prosecution on national security or terrorism charges.⁶⁴ Further, Turkey has come to be known as the country that has imprisoned the largest number of journalists in the world and is routinely singled out by international NGOs for its rampant censorship and crackdowns on press freedoms.⁶⁵

Last, while Gezi began as an environmental protest against the disappearance of green spaces in Istanbul, the main thrust of the objection to the razing of the park was the cumulative distress of city dwellers over gentrification and the crony capitalism by which construction contracts were awarded to AKP-loyalist firms. Many worried that the massive

⁶¹ Murat Yetkin, "Will Erdoğan's intervention ruin AKP-CHP coalition chances?" *Hurriyet Daily News* (August 13, 2015).

⁶² Matthew Weaver, "Turkey rounds up academics who signed petition denouncing attacks on Kurds," *The Guardian (UK)* (January 15, 2016); and Ceylan Yeginsu, "Turkey's Campaign Against Kurdish Militants Takes Toll on Civilians," *New York Times* (December 30, 2015).

⁶³ Kerem Öktem, "Why Turkey's mainstream media chose to show penguins rather than protests," *The Guardian (UK)* (June 9, 2013), <http://www.theguardian.com/commentisfree/2013/jun/09/turkey-mainstream-media-penguins-protests>, accessed August 30, 2015.

⁶⁴ Safak Timur and Tim Arango, "Turkey Seizes Newspaper, Zaman, as Press Crackdown Continues," *New York Times* (March 4, 2016); and Ceylan Yeginsu, "Thousands Protest Arrest of 2 Turkish Journalists on Spying Charges," *New York Times* (November 27, 2015).

⁶⁵ Hannah C. Murphy, "Turkey Jailing the Most Journalists," *New York Times* (December 18, 2013). In 2014, after releasing eight journalists, Turkey slightly improved its record, falling to the number two position. "Turkish courts release eight journalists in two days," *Committee to Protect Journalists* (March 27, 2014), <https://cpj.org/2014/03/turkish-courts-release-eight-journalists-in-two-da.php>, accessed August 30, 2015.

construction projects undertaken without the input of local urban planners were disfiguring Istanbul and other major cities. The objection to what was widely described as the “neoliberal” urban renewal schemes of the AKP—transforming Istanbul’s neighborhoods and transit infrastructure in pursuit of an unrecognizable megalopolis—was captured in the wildly popular documentary film, *Ecumenopolis*, released one year prior to the Gezi protests.⁶⁶ The conspicuous (and relatively recent) wealth of the Erdoğan family and much of their entourage along with their ties to construction industry moguls cemented the sense that urban renewal was a manifestation of corrupt cronyism benefiting the AKP’s constituencies and officials at the expense of the city and the nation. After the Gezi protests, a slow-down in economic growth,⁶⁷ a corruption scandal engulfing Erdoğan together with the construction firms that were the object of some of the Gezi protests,⁶⁸ and a mining tragedy in which deregulation and privatization led to the unsafe conditions that cost over three hundred miners their lives,⁶⁹ raised further questions about Turkish crony capitalism and the rule of law.⁷⁰

B. Failed Constitutional Transition: 2007–2015

While many grievances and demands were given voice in the Gezi protests, one issue around which there was clear convergence was a rejection of the majoritarian, ballot-box conception of democracy advanced by then-prime minister Erdoğan. Indeed, the protests might be understood, among other things, as an “epic encounter between two models of democracy—the majoritarian entitlement claims of Erdoğan (but not necessarily all elements in the AKP) versus the participatory and populist ethos of the younger generation.”⁷¹ In this sense, the Gezi protests were part of the larger constitutional crisis in which Turkey has been mired since at least 2007. The only way to achieve the pluralist civil democracy and expansion of liberal rights protections envisioned by the protesters would be through constitutional reform. Yet, efforts to undertake constitutional transition have met with repeated failure over the last eight years for reasons that reveal the degree of polarization in the Turkish political landscape and the country’s inability to resolve profound social cleavages around religion and ethnicity that date back to its founding.

⁶⁶ “‘Ecumenopolis’ displays dark side of Istanbul’s growth,” *Today’s Zaman* (December 11, 2011).

⁶⁷ Daniel Dombey, “Turkey growth slows to 2.4% in 2014,” *Financial Times (UK)* (March 31, 2015).

⁶⁸ Andrew Finkel, “Corruption scandal taints Turkish construction,” *Financial Times (UK)* (May 6, 2014).

⁶⁹ Emrah Yildiz, “On Erdogan’s ‘Ordinary Things’: The Soma Massacre, the Spine Tower and the Corporate State’s Fitrat in Turkey,” *Jadaliyya* (May 18, 2014), <http://www.jadaliyya.com/pages/index/17742/on-erdogan%E2%80%99s-%E2%80%98ordinary-things%E2%80%99-the-soma-massacre-t>, accessed August 30, 2015; and “Public outcry in Turkey puts managers in court over Soma mining disaster,” *Deutsche Welle* (April 12, 2015), <http://www.dw.com/en/public-outcry-in-turkey-puts-managers-in-court-over-soma-mining-disaster/a-18374109>, accessed August 30, 2015.

⁷⁰ Turkey experienced the sharpest downgrading amongst 175 countries ranked in the corruption index maintained by Transparency International as a result of the corruption scandal and the handling (read: quashing) of the investigation by the AKP government. Berivan Orucoglu, “Why Turkey’s Mother of All Corruption Scandals Refuses to Go Away,” *Foreign Policy* (January 6, 2015), <http://foreignpolicy.com/2015/01/06/why-turkeys-mother-of-all-corruption-scandals-refuses-to-go-away/>, accessed August 30, 2015.

⁷¹ Richard Falk, “Gezi Park: Revolutionary ethos and the hope of history being a bad teacher,” *Al Jazeera* (June 28, 2013), <http://www.aljazeera.com/indepth/opinion/2013/06/201362884215605712.html>, accessed August 30, 2015.

While the 1982 Constitution has been revised by seventeen amendment packages, repealing many of its most draconian original provisions, it is “commonly agreed that these amendments have not been able to completely eradicate the authoritarian-tutelary legacy of the 1980–83 military regime.”⁷² The AKP’s election platform in three consecutive national elections promised to address the widespread demand to replace the 1982 Constitution through a broadly representative constitution-drafting process producing a more liberal, rights-protecting, and civilian-authored text. Yet electoral victories have not translated into successful constitutional revision. The key stumbling blocks to constitutional reform are deep divisions over three facets of Turkey’s constitutional order: state-religion relations, a civic versus ethnic conception of citizenship, and the statism that prioritizes a strong and centralized executive over the protection of individual rights. Under the AKP’s rule these obstacles have resulted in a stalemate over constitutional secularism, Kurdish rights, and the AKP-favored proposal for a presidential system. The resulting constitutional paralysis has prevented both democratic consolidation and political liberalization, while the AKP has used channels of ordinary politics to put in place, piecemeal, some of its own favored reforms over the constitutional objections of opposition parties.

The first attempt by the AKP to replace the 1982 Constitution occurred after contentious parliamentary elections in 2007 from which they emerged with a plurality of the vote and a majority of seats in parliament.⁷³ The party sought to translate its parliamentary majority into an initiative to repeal and replace the constitution. A constitution-drafting committee comprised of prominent constitutional law scholars was convened by the AKP to prepare an initial draft that would serve as a starting point for legislative debate.⁷⁴ This approach proved to be a nonstarter.

The eventual constitutional text produced by the committee was the most liberal draft for a constitution that had ever been proposed in Turkey. That draft, which was leaked to the media, jettisoned the ideological baggage of the previous three constitutions, cleaving instead to European human rights standards and guidelines for the rule of law. Yet, because the committee had been selected by the AKP rather than through an all-party consensus and precisely because the draft represented a radical departure from its Kemalist forebears, it was met with instant suspicion. An attempt by the AKP to sever the controversial question of rules concerning the wearing of headscarves from the broader constitutional debate by introducing separate amendments that would address that question before turning to the more general constitutional project proved fatal. The headscarf amendments were ruled unconstitutional by the Turkish Constitutional Court, and advocacy for the amendments became the basis for an attempt to subject the AKP to party closure on the grounds that it had become a focal point for anti-secular activities. In the end, the secularist and modernizing Kemalist opposition rejected a liberal draft constitution out of anxieties that a more pluralist and liberal order might diminish the assertive secularism to which they cleaved.

Following the failed 2007 constitutional initiative, the AKP passed a package of constitutional amendments in 2010 that served to civilianize the constitution—reducing the autonomy and jurisdiction of the military over civilian affairs—while introducing a small set of new

⁷² Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave Macmillan 2011) 151.

⁷³ For a discussion of the 2007 constitution-drafting project, see Aslı Bâli, “The Perils of Judicial Independence: Constitutional Transition and the Turkish Example” (2012) 52 *Virginia Journal of International Law* 235–320.

⁷⁴ Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey* (Budapest: CEU Press 2009) 103–105.

individual rights protections and reducing the tutelary role of the judiciary.⁷⁵ These amendments made important changes that ameliorated the Turkish Constitution, but did not accomplish the thoroughgoing change supported by much of the Turkish electorate. The next general election in 2011 witnessed a third consecutive victory for the AKP, which won the election with a larger vote share but a reduced majority of seats because of the number of parties that passed the 10 percent threshold and the presence of successful independent candidates. Even as the vote tally was coming in, the AKP signaled that it would use its renewed electoral mandate to “build the new constitution through consensus and negotiation” with the other parties.⁷⁶

In the months after the election, the AKP led the Turkish Grand National Assembly in the formation of a Constitutional Reconciliation Committee (CRC) including all four of the parties seated in parliament. The secular Republican People’s Party (CHP), the far-right Nationalist Movement Party (MHP), and the pro-Kurdish Peace and Democracy Party (BDP) together with the AKP were each afforded equal representation on the CRC, which was to deliberate by consensus on revisions to each of the 175 articles of the constitution. Any articles adopted by the committee were subject to a unanimity rule (and the committee’s recommendations would then be forwarded for the approval of all four parties in the plenary stages of the process). The CRC certainly corrected for the complaints that the 2007 process had excluded opposition parties from input on the initial draft of the constitution. However, in light of the polarization of the parties on the CRC—with the pro-secular CHP opposing the moderate Islamist AKP and the pro-Kurdish BDP facing the deep hostility of the ultra-nationalist MHP—the consensus rule all but guaranteed stalemate over the most contentious articles at issue in constitution-drafting.

The CRC began meeting in October 2011, and for the first seven months it held meetings with civil society representatives to solicit public input on constitutional reform. Drafting work began in May 2012 and continued for over seventeen months.⁷⁷ One year into the deliberations of the CRC, the Gezi protests highlighted the urgent need for a new constitution that would redress the balance between statist prerogatives and individual rights protections, and produce a more participatory, inclusive, and liberal constitution. At the same time, the protests signaled to the AKP that they could not secure a consensus around a presidential model with an even stronger and more centralized executive. The CRC voting rules were never conducive to compromise on contentious issues—by virtue of the veto power held by each party—but as the polarization of the electorate deepened during the Gezi protests, the likelihood of compromise and consensus declined. By November 2013, the CRC had been able to forge consensus on only 60 out of 175 articles under discussion and was unable to make progress on the remaining issues.⁷⁸ The inability

⁷⁵ For a discussion of the amendments, see Aslı Bâli, “Perils of Judicial Independence: Constitutional Transition and the Turkish Example” (2012) 52 *Virginia Journal of International Law*, 295–309. After the amendments were enacted, the composition of the judiciary changed significantly, but in ways that proved displeasing to the AKP, yielding heavy-handed executive intervention in judicial affairs beginning in 2013. “EU report criticizes Turkey over judicial independence, press freedom,” *Today’s Zaman* (October 8, 2014); Oya Yegen (n 49).

⁷⁶ “Turkey ruling party wins election with reduced majority,” *BBC* (June 12, 2011), <http://www.bbc.com/news/world-europe-13740147>, accessed August 30, 2015.

⁷⁷ For a detailed discussion of the CRC’s work, see Taylan Barın, *Türkiye’nin Yeni Anayasa Arayışı: 2011–2013 TBMM Anayasa Uzlaşma Komisyonu Tecrübesi* (Levha Publishing, İstanbul 2014).

⁷⁸ “AK Parti’nin ‘60 Maddeyi Geçirelim’ Taklifine CHP’den Ret” [CHP rejects AKP proposal to pass 60 consensus articles], *Milliyet* (November 7, 2013), <http://www.milliyet.com.tr/ak-parti-nin-60-maddeyi-siyaset/detay/1788622/default.htm>, accessed August 30, 2015.

to come to any consensus over state-religion relations, Kurdish rights, or the AKP's proposal for a presidential system meant that after over two years of work, the CRC process ended with a whimper as the committee was dissolved in late November 2013.⁷⁹ Within a few weeks of the CRC's dissolution, a massive corruption scandal erupted pushing the failed constitutional transition out of the headlines and off the national agenda. More recently, the AKP has once again made constitutional revision a high priority, this time seeking to push through far-reaching changes almost unilaterally in order to put in place a presidential system that runs the risk of entrenching majoritarian electoral authoritarianism.⁸⁰ Should the party succeed such a change would likely reverse the incremental reforms accomplished over the last three decades, undermining the fragile democratic and rights-protecting elements of Turkey's current constitutional order.

The repeated failure of efforts to repeal the military-authored 1982 Constitution and replace it with a more liberal, civilian-authored draft illustrates the limitations of democratic consolidation in Turkey. While the country has held consistently free and fair elections under the present constitutional order, it has secured only the barest version of ballot box democracy. Without a strong constitutional commitment to individual rights protections, the trampling of the freedom of the press and the brutal suppression of protests were only the most visible facets of a political order in which competitive elections coexist with elements of authoritarian governance. Further, the deep social cleavages in Turkey over ethnic and religious identity have hindered the development of a widely shared consensus concerning the constitutional identity of the state. Competing conceptions of constitutional secularism, rival notions of civic versus ethnic citizenship, and fundamental disagreement about the allocation of power between the branches of government suggest that Turkey's constitutional model remains too contested and unstable to meet the evolving needs of the country itself, let alone to serve as a model for its neighbors.

V. CONCLUSION: THE LIMITED APPLICABILITY OF THE "TURKISH MODEL"

In the foregoing sections, I have considered the deficiencies in Turkey's constitutional order and argued that transposing these features to countries undergoing post-authoritarian political transitions would be ill-advised. In this concluding section, I turn to a more specific consideration of the reasons that the "Turkish model" is of limited applicability in the Arab context. In addition to its internal problems, Turkey's political and constitutional order evolved to address fundamentally different structural issues than those raised by the Arab uprisings.

One reason that Turkey was referenced in 2011 as a "potential model" is that there are superficial similarities between the challenges faced by Tunisia and Egypt and those addressed by Turkey's recent political history under the AKP. First, all of these countries were seeking to undertake a constitutional transition after 2011. Second, both the Muslim Brotherhood in Egypt and the *al-Nahḍah* Party in Tunisia have specifically claimed to be influenced by the AKP. The fact that there are transregional connections between the AKP

⁷⁹ "Anayasa Uzlaşma Komisyonu feshedildi: TBMM Anayasa Uzlaşma Komisyonu Resmen dağıldı" [The Constitutional Reconciliation Commission has been dissolved: the TGNA CRC is officially disbanded], *Milliyet* (November 19, 2013), <http://www.milliyet.com.tr/anayasa-uzlasma-komisyonu-siyaset/detay/1812914/default.htm>, accessed August 30, 2015.

⁸⁰ Ayla Jean Yackley and Nick Tattersall, "Turkish prime minister says no bargaining on new constitution," *Washington Post* (March 6, 2016).

and the various Muslim Brotherhood movements in the Arab world suggests that the ruling party that has presided over nearly a decade and a half of political and constitutional change in Turkey might have some influence in the Arab transitions. The leader of the Tunisian *al-Nahḍah* Party has even stated that “Turkey is a model country for us in terms of democracy.”⁸¹

Beyond these superficial similarities and the limited influence one aspect of the “Turkish model” may have exerted, however, lie the vast differences in context, structural problems and sequencing of reforms that separate Turkey from the Arab world. The contemporary Turkish political balance is the outcome of a long process of staggered progress toward democratization. This process entailed decades of constitutional crises yielding military coups, and the brutal introduction of neoliberal economic policies in the midst of a financial crisis that impoverished large swathes of the Turkish public. Although these tribulations gave way to economic growth, yawning social inequality has accompanied the recovery. While military coups may now be less likely in Turkey, constitutional crises continue, and the current political order depends on a fragile balance. The outcome of the November 2015 general elections has once again called into question the stability of the country’s political system as the AKP prolonged its single-party rule at the cost of destabilizing the country’s security situation and deepening political polarization.

The structural problems plaguing the Arab world include high unemployment—and especially youth unemployment despite high levels of advanced education—mass poverty, corruption, police brutality, torture and long-standing political stalemates around social cleavages barely suppressed by sclerotic authoritarian regimes. These problems, in turn, are tied to constitutional structures and political institutions that are reflections of the very authoritarianism that has given rise to revolt. While some aspects of these problems bear a resemblance to problems that Turkey currently faces—particularly with corruption, police brutality, and social cleavages—the degree of the challenges and the institutional endowments in the respective contexts are vastly different.

Egypt’s Muslim Brotherhood (MB) and Tunisia’s *al-Nahḍah* may point to the AKP as a model worth emulating, but the circumstances that enabled the rise of that party in Turkey are difficult to replicate. The AKP came to power through an electoral victory that was the outcome of a long fought history of contestation and party closures dating back to the founding of the republic and, more recently, the successes and failures of the AKP’s predecessors in the 1990s, the *Refah* and *Fazilet* parties. Legacies of the democratic practices of its predecessors (and of the Turkish political system as a whole) equipped the AKP to build an electoral constituency and reach out to center-right constituencies, drawing non-Islamists into coalition politics that grew the party’s base.

In Egypt and Tunisia, by contrast, the rise to power of the MB and *al-Nahḍah* was the consequence of popular uprising that produced a rupture with the earlier order. The prior regime in both cases had not tolerated more than a peripheral margin of contestatory politics in their systems of electoral authoritarianism. As a result, neither party had a robust experience of political competition in free and fair elections. Perhaps relatedly neither the MB nor *al-Nahḍah* were able to develop a coalition drawing non-Islamists into strategic alliances the way the AKP was able to dominate the center-right of the Turkish political spectrum through coalition politics. Had the MB or *al-Nahḍah* sought greater inclusiveness or incorporated smaller interest groups through coalition-building within their party

⁸¹ Oğuzhan Göksel, “Perceptions of the Turkish model in post-revolutionary Tunisia” (2014) 3 Turkish Studies 15, 477.

platforms, perhaps they might have avoided the brutal suppression experienced by the MB in Egypt⁸² or the electoral loss suffered by *al-Nahḍah* in Tunisia.⁸³ The AKP also benefited, ironically, from the history of assertive secularism in Turkey that had long removed religion from the political domain. As a result of that history, the AKP presented itself as a liberalizing political party seeking to reinterpret secularism rather than impose Islamic order. The legacy of earlier thoroughgoing secularization of the political field may have made the prospect of AKP rule—within the bounds of constitutional secularism—less threatening in Turkey than the destabilizing effect of the rise of the MB or even *al-Nahḍah* (despite Bourguiba's (Būrqība's) relatively secularizing influence) proved to be to non-Islamists.

Perhaps the most critical differences between Turkey, Tunisia, and Egypt lie outside of the political domain. Some argue that the key catalyst of the uprisings was economic stagnation and mass poverty. If that is the case, then the absence in Tunisia and Egypt of the economic fundamentals that enabled the AKP to build a constituency amongst a rising Turkish middle class may represent the greatest obstacle to borrowing lessons from a "Turkish model". The current Turkish political and economic order grew out of a military coup, suggesting a superficial similarity with the Egyptian context after the military coup that ousted the Muslim Brotherhood. Like General Kenan Evren, the Turkish coup leader, General 'Abd al-Fattāḥ al-Sīsī has taken the position of president following his ouster of the elected MB government in 2013. Yet the similarities end there. Evren was committed to liberalizing the Turkish economy and bringing in an independent technocratic civilian government to oversee that liberalization. There is no Turgut Özal on the horizon in Egypt, and the brutal repression of the MB's constituency stands in contrast to the gradual inclusion in Turkey of a socially conservative but market-oriented Muslim civil society sector. Further, Turkey's efforts at structural adjustment and economic liberalization beginning in the 1980s were heavily buttressed by the support and external pressure of the European Union. By contrast, the principal foreign influence on Egypt's current trajectory comes from massive infusions of cash from the Gulf, and notably Saudi Arabia. The contrast in the priorities of the European Union and Saudi Arabia as external influences on prospects for economic and political liberalization could hardly be more pronounced. While Saudi Arabia provided billions of dollars worth of aid to Egypt, the assistance swelled the military's coffers and enabled the continued inflation of public sector employment while requiring little by way of liberalizing reforms.⁸⁴ As a result, there seems no reason to expect Egypt to veer away from its tradition of command-and-control statist economic management.⁸⁵

⁸² Elizabeth Nugent, "How repressing the Brotherhood could have unintended consequences in Egypt," *Washington Post* (January 23, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/23/how-repressing-the-brotherhood-could-have-unintended-consequences-in-egypt/>, accessed August 30, 2015.

⁸³ "Ennahda shut out of new Tunisian government," *Al Jazeera* (January 23, 2015), <http://www.aljazeera.com/news/middleeast/2015/01/ennahda-shut-tunisian-government-150123140936298.html>, accessed August 30, 2015.

⁸⁴ Nigel Wilson, "Saudi Arabia and UAE Ready Massive \$20bn Aid Package to Boost Egypt's Shattered Economy," *International Business Times* (June 2, 2014), <http://www.ibtimes.co.uk/saudi-arabia-uae-ready-massive-20bn-aid-package-boost-egypts-shattered-economy-1450818>, accessed August 30, 2015.

⁸⁵ An early example of the continuation of this tradition is embodied by the "new Suez canal" inaugurated by Sisi in August 2015. David K. Kirkpatrick, "Suez Canal Upgrade May Not Ease Egypt's Economic Journey" *New York Times* (August 6, 2015), <http://www.nytimes.com/2015/08/07/world/middleeast/suez-canal-channel-egypt.html>, accessed August 30, 2015.

At base, the Turkish political and economic trajectory emerged out of different conditions than those that obtain in the countries affected by the Arab uprisings. These differences are at least as important as the fact of geographical proximity. Before considering Turkey as a regionally appropriate model for transitioning Arab countries the different origin points of each country's trajectory and their divergent experiences should be kept in focus.

In the final analysis, the difficulty of applying a "Turkish model" in the Arab world arises from the inherent limitations of any model outside of its own original context. Attempts to transpose institutional accommodations, which were the organic outcome of one national trajectory under different circumstances elsewhere, produce inevitably unpredictable outcomes. Without its relative political freedoms, Turkey's economic policies may have backfired; without its particular struggles with military-civilian relations, secularism in Turkey may have taken a different course; without its geostrategic location and ties to Europe, Turkish democratization may have yielded an alternative paradigm. The conditions that gave rise to the Arab uprisings are varied, with different characteristics in one country than the next. The specificities of each country's context must be considered against the backdrop of a transregional repertoire of demands for democracy and economic reforms that have much in common. Ultimately, those specificities, rather than a toolkit of best practices drawn from other transitions, will determine the results of the Arab uprisings in each country. Though comparative lessons may be drawn from neighboring or even more distant examples, these should be assessed critically and understood as instructive rather than transposable.

The Arab Spring and the Development of Islamic Constitutionalism in Iran

ABOLHASSAN BANISADR AND HASSAN REZAEI

I. INTRODUCTION

Just as a revolutionary wave swept across the Middle East and North Africa in the early winter of 2011, and as several authoritarian Arab states began to collapse, Iranian society was marking the 30th anniversary of the 1979 Revolution—known as the “Islamic Revolution”. It presently seems to be a matter of common sense that the Iranian-and-Islamic Revolution of 1979 has dramatically contributed to change traditional Islamic discourses on the relationships between Islam and state both inside Iran and beyond. While Iranian society is still struggling with the dilemma of how to reach an “agreement” (*tawāfoq*) on the matter of state-and-Islam, this contribution argues that the current changes sweeping the Arab world can be essentially associated with role of the 1979 Iranian Revolution in giving a new rise to political Islam in the Middle East. Further, both the Iranian Revolution and the “Arab Spring” can adequately be explained in the context of the rise of Islamic revivalism begun by the Sunni Muslim Brotherhoods in the 1960s.

We, however, will situate the struggle between democratic and fundamentalist forms of Islam within the revolutionary settings of contemporary Arab societies in the context of the 1979 Iranian Revolution and consider how the re-emergence of authoritarianism might be reinforced or prevented by reference to the discourse of Islamic constitutionalism. The leading question is whether a revolution as classic as the Iranian Revolution of 1979 or the twenty-first-century models in “Arab Spring societies” leads to a stable constitutional democracy.

By exploring the main legal and political aspects of the Constitution of the Islamic Republic of Iran, this article will examine how the thesis of “the Islamic state” has been materialized in the Iranian revolutionary context. From this point of departure, we will discuss the changes in the conception of “Islamic constitutionalism” in the aftermath of the revolutions of the Arab Spring and their relatedness to the Iranian experiences. Finally, we

will explore the paradigm shifts among the young populations forming part of the Iranian Revolution and Arab Spring uprisings, and offer a comparative perspective on the reinterpretation of Islam for the sake of state building in harmony with the principles of international human rights.

II. CONDITIONS FOR MUSLIM REVOLUTIONS

Despite a number of political, social, and cultural distinctions, the Iranian Revolution of 1979 and the Arab Spring uprisings in 2010–2011 had four things in common. The first was the development of transformative readings of Islam within the dominant ideological systems in these countries. These drew on Persian and Arab nationalism, militarism, communism, traditionalism, tribalism, and even some types of liberalism. In both the Arab and Iranian contexts, since 1979, we can find trends away from traditionalist and passive interpretations of Islam toward new revolutionary forms, as well as toward jihadism and militant Islam. The second common factor was an exhaustion of the ideological and political basis or *raison d'état* of the states in this region. When the reasons for their emergence lost legitimacy, the authoritarian regimes increasingly relied on repression to survive, and administrative and financial corruption accompanied this trend. A third common factor was the existence of a young population that was socially connected and strongly politicized. The fourth factor was the influence of global waves of democratization, and the increasing international presence of pro-democracy and human rights movements that could support one another.

These factors resulted in the creation of political systems that were deprived of their religious, cultural, social, and even economic founding pillars. After the first wave of protests, these states failed to stabilize because of accumulated undemocratic dynamics in their policy making. Revolutionary moments emerged when extremely externalized and dependent states with discredited ideologies, which commanded increasingly corrupt rentier structures and shrinking social bases, and which were depleted of any goals other than their own preservation, confronted populations that had developed goals of its own. Such confrontations are irreconcilable for states which are fearful of flexibility, and so this state preference inflexibility is in turn transformed into further motivation for popular resistance. The inflexibility of these regimes did not only create conditions for the rise of revolution but also for its victory. In both the Iranian society in 1979 and in the societies of the “Arab Spring”, revolts initially occurred when a politicized and active young population realized that a ruling regime had departed from the goals which had justified its legitimacy. When a majority of people realize this, they come to the conclusion that they have no future within the system.

If we were asked to categorize these four conditions in the Muslim-majority societies of the Middle East and North Africa today, the main condition for revolutionary change, in our view, can be found in the emergence of new forms of thought which are themselves based on, and which in turn generate, discourses and practices of human dignity (*karāmah*), independence, freedom, rule of law, and nondiscrimination. Building on existing cultural resources, and particularly using familiar Islamic symbolism, is crucial in this transformative period. By comparing the social and cultural contexts of the Iranian Revolution and the Arab Spring, we find that revolutionary action was enabled when a significant part of the young population could imagine transformation in their lives and world through the animation of compelling and affirmative narratives about revolution.

When observing Middle Eastern affairs up to this date, it becomes obvious that both Iranian and Arab revolutionaries, except the new Tunisian experience, have failed to effect a transition to a human rights-oriented constitutionalism. This failure, in our view, can be profoundly related to the guiding set of beliefs which should inspire the Muslim individual,

society, and the state. In the contexts of the Iranian Revolution and of the Arab Spring, this is called Islam (in the broadest sense). While Islam has many individual and social dimensions, herein we will focus on the relationship between this set of beliefs and the establishment of the constitutional state under the rule of law.

III. REVOLUTION FOR ISLAMIC THEOCRACY OR CONSTITUTIONAL DEMOCRACY

The Iranian revolutionaries of 1979 formed a wide spectrum, from Marxists to socialists; from Muslim traditionalists, modernists, and thinkers outside and inside of the country to fundamentalist Shīʿite clerics. However, they shared a common goal: the overthrow of the authoritarian secular regime of the *Shāh*. The broad use of the term “Islamic Revolution” was meaningful for most revolutionaries, although it has contained two contrasting ideals from the beginning. For activists who advocated an Iranian-Islamic discourse on freedom and independence—liberal and social democrats, including both practicing Muslims and secularists—the Islamic Revolution was, above all, a revolutionary transformation of orthodox and passive Islam into one supporting freedom, national liberation, independence, development, and social justice. But for those at the other end of the spectrum—fundamentalist clerics and the mass of their followers and militant groups—it was equivalent to the establishment of an Islamic state under the rule of Shariʿah. To this latter group, despite aspirations for an Islamic liberation, the revolution was made for the sake of an exclusive clergy-centered government (*selseleh rūhanyyat*) that imposed Shariʿah as interpreted by a Shīʿite school of Islamic law, be it democratic or undemocratic.

Interestingly, during these revolutionary moments in which crowds in Tehran and other major Iranian cities filled the streets with Islamic-inspired slogans, many in the secular West thought that the Iranians would replace the authoritarianism of the *Shāh* with a democratic republic that could also open a spiritual sphere around the secular politics of the modern world.¹ Yet it did not take long for the democratic and almost nonviolent revolution to become transformed into a repressive regime based on the rule of the authoritarian clerical elite. This unusual political system has since succeeded in ruling the country and has, thus far, managed to not only repress secular and liberal forces but to repress or incorporate Muslim reformers as well.

In his analysis of the societies after the Arab Spring, Michael Walzer argues that the Iranian Revolution offers an interesting example within Muslim societies of the coexistence of a democratic revolution with religious revival.² The links between the legal and political developments of post-revolutionary Iran and the developments of the Arab Spring can be understood as part of the former’s century-long struggles for constitutionalism in Iran.³ In

¹ Michel Foucault, for example, enthusiastically wrote about the Iranian Revolution as “the introduction of a spiritual dimension into political life” or “l’esprit d’un monde sans esprit.” See Michel Foucault (ed), J. Afary and K. Anderson (trs), *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism* (Chicago University Press 2005) 203–209.

² Michael Walzer, “After the Arab Spring” (2014) 40 *Philosophy and Social Criticism* 2014, 424–425.

³ In this chapter, we define the term “constitutionalism” as *mashrūʿiyat*, which was intersubjectively evolved, accepted, and shared by religious and secular Iranian scholars from the era of the Constitutional Revolution (1905–1907) to date. The meaning implies clear opposition on both religious and nonreligious grounds to the arbitrary rule of any ruler or of the state by, and establishes the rule of law through democratic means. Departing from this understanding, the underlying premise of this chapter is that an Islamic state can be established and developed around a modern constitutional text. However, with regard to contemporary

both contexts, there are two major forces: an undemocratic front advocating the rule of Shari‘ah, and a democratic front within civil society and the reform movement which advocate the rule of law. Both are diverse in their understandings and in the conception of their ideals (i.e., the establishment of an Islamic state and the creation of a constitutional state). In Arab societies, on the one hand, we witness an increasing fear of a lack of democracy as appeared in Iran after 1979, and of the fate of a society in the aftermath of the establishment of an “Islamic” state.⁴ On the Iranian side, on the other hand, there is enthusiasm amongst both Shari‘ah-oriented and constitutionally oriented forces to understand the Arab Spring developments. For the former, these are all signs of an “Islamic Awakening” similar to the one generated by Ayatollah Khomeini’s ideals, while for the latter these uprisings are primarily signs of the development of progressive constitutional democracies in the Muslim world, especially with reference to the Tunisian Constitution of 2014. As an illustration of the connection between the post-revolutionary struggle of Iranians for constitutional democracy and the Arab uprisings, perhaps no event is more demonstrative than the arrest of the leaders of the current Iranian reform movement, known as the Green Movement, on the anniversary of the revolution (February 11, 2011). On that day, Iranian reformists had called for mass demonstrations to show support for Arab Spring protests against despotic regimes. This call was violently repressed, and its leaders have since been living under house arrest without trial or any recourse to justice.

IV. THE INTER-ISLAMIC EVOLUTION OF MODERN CONCEPTS OF THE STATE

Islamic constitutionalism is a major manifestation of religious identity and political resurrection in Muslim societies, and its conceptual aspects have been elaborated in many political, jurisprudential, and theological works over the past century. As there are many crossroads between the two main Islamic denominations, i.e., Shi‘ite and Sunni, constitutionalism is an inter-Islamic concept which encompasses a diverse range of phenomena. The key argument for this project is the conviction that Islam is a universal and all-embracing way of life and that it therefore requires a concept of the state that provides a status for believers but also for nonbelievers to live within the Islamic state as non-Muslim citizens.

Shi‘ite jurisprudence was exposed to modern constitutionalism later than Sunni Islam. During the nineteenth century, in most parts of the Sunni world there were colonial, theological, and legal confrontations with the West and with secular politics. Through this process, the followers of Shi‘ite Islam experienced foundational, structural, and epistemic rifts in which traditional Shari‘ah colleges did not only lose their important role in politics and in the legal profession, but instead these colleges lost everything they meant and implied in

Islamist movements, the word “constitutionalism” has a range of meanings at different levels; i.e., regarding the Qur‘ān as a constitution; Islamic law-based constitutionalism; national constitutionalism; and even inter-faith, regional, or international constitutionalism. See Rüdiger Wolfrum, “Constitutionalism in Islamic Countries: A Survey from the Perspective of International Law” in R. Grote and T. Röder (eds), *Constitutionalism in Islamic Countries, Between Upheaval and Continuity* (Oxford University Press, New York 2012) 77–88.

⁴ Many Arab activists have rejected the claim that the Arab Spring echoed Iran’s Islamic Revolution. On February 5, 2011, during a mass demonstration in Cairo’s Tahrir Square, a speaker rebuked ‘Alī Khāmene‘ī, to great applause: “Egypt will not be another Iran. We will not be governed by a religious dictatorship, as in Iran.” The crowd then chanted anti-Iranian slogans. A statement by Egyptian activists also denounced Khāmene‘ī for trying to “drive a wedge in the nation’s fabric by talking about an Islamic revolution.”

terms of theory and practice. Their influence on the construction of legal and judicial systems gradually disappeared. In the history of modern Iran, on the contrary, the Shīʿite legal tradition and its educational centers maintained a good measure of continuity until the second *Pahlawī Shāh* (1941–1979).

Prior to the Iranian Revolution of 1979, catalyzing most Muslim discourses around the modern inter-Islamic conception of the state, the idea of making a modern Islamic state developed in Pakistan and Egypt, perhaps due to heavy influences from, and direct reactions to, colonialist narratives and forms of knowledge.⁵ The idea of establishing an Islamic Republic with reference to Islamic texts clearly emerged with the writing of the Constitution of Pakistan of 1956 under the influence of Indian Muslim theologian Abu ʿl-Aʿlā Mawdūdī (d. 1979) and his Islamist Party, as well as the ideas of Ḥassan al-Bannā (d. 1949), the founder of Muslim Brotherhood in Egypt.⁶ In fact, the Muslim Brotherhood was founded shortly after the dissolution of the Islamic Ottoman Caliphate in 1924. According to both Mawdūdī and al-Bannā, the Muslim state is to be a “theo-democracy,” in which the whole community is called upon to interpret the Shariʿah with their time and space exigencies, i.e., to interpret the Shariʿah contextually; the state is the power that supervises the implementation of Shariʿah and politics is regarded as an “intangible and inseparable component of Islamic faith and the Islamic state is a result of Muslims’ political action and the answer to all their problems.”⁷ Mawdūdī and al-Bannā, in their turn, became sources of inspiration for many Islamist revivalist forces throughout the Islamic world, particularly in Iran and Egypt.⁸

After this, Sayyid Quṭb (d. 1966), a modernist Egyptian thinker of Islamism who is regarded as a principal figure in modern Sunni Islamic revivalism, influenced modern Muslim reformers, including theologians and religious-revolutionary leaders of Iran, during the 1960–70s. His books were translated and widely read among Shīʿah seminaries. More than a decade before the full enshrining of an Islamist hierarchical ideology and political structure in the Shariʿah-based Constitution of Iran under the rule of Ayatollah Khomeinī, the essential revolutionary writings of al-Bannā and Sayyid Quṭb became popular reading materials within Islamist organizations and communities.⁹ Ayatollah Khāmeneʿī, the current leader of the Islamic Republic since 1989 and (according to his official biography) holder of the grand office of *Walī Amru ʿl-Muslimīn* (The Guardian of Muslim Affairs), is proud of being a translator of Sayyid Quṭb’s three key books.¹⁰

By the early 1940s, the first Shīʿite fundamentalist and militant movement of Iran encountered these ideas and launched not only a religious campaign to push Shīʿah leaders toward Quṭb’s models, but engaged in a series of political assassinations to enable its direct implementation. Strongly influenced by *Fadāʾiyyān-e Islām* (the “self-sacrificers of Islam”) and its leader M. Nawwab Ṣafawī, many Iranian revolutionaries, especially those loyal to Ayatollah Khomeinī, began to agitate for the establishment of an Islamic state. When Nawwab Ṣafawī and some of his supporters went to Mashhad and settled at the Suleiman Khān Madrasah in 1952, Ayatollah Khāmeneʿī—then a young student of the

⁵ Peter C. Hansen, “Developments of Islamic Legal Doctrines: Interview with Wael B. Hallaq,” The Legal History Project, <http://www.legalhistory.com/LargeFrame.php?Choice=Interviews&N=Hallaq1105>, accessed May 11, 2015.

⁶ Mumtaz, 1994, 457–530.

⁷ Gilles Kepel, *Jihad: Expansion et déclin de l’islamisme* (Gallimard, Paris 2000) 32–33.

⁸ Vali Nasr, *Mawdudi and the Making of Islamic Revivalism* (Oxford University Press, Oxford 1996) 80–106.

⁹ V. Martin, *Creating an Islamic State: Khomeini and the Making of a New Iran* (I. B. Tauris, London 2003).

¹⁰ See <http://www.leader.ir/langs/en/index.php?p=biography>, accessed May 11, 2015.

Madrasah—attended a fiery speech of Ṣafawī on the rule of Shari‘ah and the necessity of the Islamic state. As an active member of the Fadā’iyyān movement during that time, he recalls in his biography: “It was at that very moment, because of Nawwab Ṣafawī, that the consciousness of Islamic revolutionary activism sparked inside me. I have no doubt that it is Nawwab Ṣafawī who first kindled the fire [of revolutionary Islam] in my heart.”¹¹

Unlike Mawdūdī, Al-Bannā and Quṭb avoided being specific about the concrete form of their ideal Islamic state, as well as about the modalities of applying Shari‘ah as a system of public law and the qualifications of the ruler (based on their views, for example, even a layman can be elected as the Muslim ruler).¹² By the beginning of the 1970s, Ayatollah Khomeinī and his supporters, with the intellectual support of some Muslim modernists, had begun developing details for their ideal. It is important to note that despite the Fadā’iyyān movement, until the mid-1960s Ayatollah Khomeinī and most other Shi‘ite leaders, under the guidance of Ayatollahs Hā’erī (d. 1937) and Brūjerdī, did not seriously engage in political struggle and remained relatively passive. There was no discussion about *welāyat-e faqīh* (“rule of the jurist”) at this time. In this period, Marxism was the mainstream political ideology and influenced cultural activities. It was after the death of Ayatollah Brūjerdī on March 31, 1961, that the *Shāh*’s six-point program of reform called the “White Revolution” led the clergy toward political activism. In early 1970, Ayatollah Khomeinī started teaching “Islamic government” in Najaf. This became his main area of scholarly and political focus until 1978, when he went to Paris.¹³ It is important to stress that Khomeinī was skilled in changing his views, *fatāwā*, and approaches toward emerging issues of Islamic government over time. He once said, “since we want to apply Islam, [the fact that] I have said something does not mean that I should be bound by my word.”¹⁴ However, his ability to improvise and accommodate himself with the exigencies of power has enabled him to outlive political crises. He has changed his ideas with regard to the question of Islam and the modern state at least five times. *Islamic Government*, which was later published as a book outside Iran, addressed only some generalities of the project of the Islamic state and its ruler from a Shi‘ite perspective. Based on this manifesto, which was influenced by Leninist organizational ideas about revolution, Shi‘ah mysticism (*‘irfān*), Greek political theories (i.e., Plato’s metaphysics and philosophies of power and in particular Aristotle’s conception of the absolute ruler¹⁵), the Iranian clerical-revolutionary leaders redefined this country as an ideal Muslim territory for applying Shari‘ah in its most authoritarian reading. The Iranian Constitution of 1979 introduced a new textual design of the Islamic state by utilizing all traditional and modern legal and political symbols and tools of power in the modern world.

Within the social context of Iran in 1979, the intervention of Muslim jurists in state building was inevitable. Like in Iran since 1979, it will be extremely difficult to create

¹¹ *Id.*

¹² V. Martin, *Creating an Islamic State: Khomeini and the Making of a New Iran* (I. B. Tauris, London 2003) 138.

¹³ M. Kadivar, “Political Thoughts in Islam Series” (2001) 5th edition, *The Theories of State in the Shiite Fiqh*, Ney Publishing House, 21–26, 31–32, 80–96, and 107–109, http://mkadivar.wpengine.com/wp-content/uploads/1998/02/Kadivar-Nazariyeaye_Dolat.pdf, accessed May 11, 2015.

¹⁴ In a meeting with the members of the Guardian Council on December 11, 1983, available online at <http://www.imam-khomeini.ir/fa/books/BooksahifeBody.aspx?id=3326>, accessed May 11, 2015.

¹⁵ Based on Aristotle in the *Politics*, which is influenced by Plato’s *Statesman*, absolute rule, i.e., a rule unrestricted by law, can be legitimate when the man or men have transcendent virtues like as most knowledgeable and most pious. Aristotle combines his discussion about absolute ruler with kingship, which leads to legitimization of the absolute King ultimately. See R. G. Mulgan, “A Note on Aristotle’s Absolute Ruler” (1974) 19 *Phronesis* 66.

constitutional democracy in the current societies forming part of the Arab Spring, where political Islamic discourses are on the rise, without support for democratic processes and institutions, including fair electoral processes which are free from moral and religious leaders of society. The constitution, as a contract for the legitimacy of a monopoly of power, needs something more than mere legal validity in a positivist sense. Legitimacy is what makes a political system worthy of respect, so that people living in these legal systems have reasons to accept the rule.¹⁶ In religious societies like Iran, however, building a sustainable political system needs the support of moral foundations. Islamic discourses presented themselves as the key sources for legitimacy in these societies.

Looking at both the popular and intellectual debates in 1978 and 1979 in-depth, it is possible to argue that the Iranian Revolution was not motivated by the theory of *welāyat-e faqīh*. Rather, the prevailing thought during that revolutionary period was that Islam was a discourse for freedom, independence, and social justice. This is what made it possible for many secular, Marxist, and modernist Iranians to take part in the revolution.¹⁷ Yet there was no transition to a constitutional state, and classical, power-oriented Shiʿite discourses became more influential in the design of the state. The hegemonic clergy and its authoritarian conception of the state defeated Iranian constitutionalism mainly due to ignorance about the principles of the rule of law, particularly the proper mechanism of constitutional review. The Iranian Revolution of 1979 revealed that a functioning constitutional democracy requires a firm safeguarding mechanism, i.e., a modern human rights-oriented contract which establishes independent, impartial, and effective constitutional justice and which is bound by international human rights standards. This may offer the greatest possibility for creating a state that reflects and upholds the rule of law.

To understand this situation, it is helpful to look at the connection between the citizen and the state. It is only by considering members as citizens—not believers—that a Muslim state can be a modern and well-functioning one.¹⁸ Constitutional democracy, as John Rawls describes, is based on the equality of citizens as a collective body.¹⁹ Notions of citizenship's rights and equal access to freedoms including religious freedoms in modern societies, which have developed since the eighteenth century, are largely unknown to the classical scholars of the Islamic law tradition. While most contemporary Muslim thinkers focusing on the relationship of Islam and modernity are engaged with this question, the clerical architects of the Iranian Constitution of 1979, including Ayatollah Khomeini himself, have been less conscious of the enormous political, legal, and social aspects of this relationship in the setting of revolutionary Iran. Islamic law has robust foundational principles and is hard for Islamic jurists to deconstruct. Islamic law was largely run without a "state," especially in the Shiʿite tradition. In capitalist modernity, there can be no truly moral principles, or principles that can render capitalism subservient or subsidiary to them. This was Sayyid Quṭb's point of departure. The predicament of modern Muslim reformers today is thus how to evolve Islamic law for a modern state building while maintaining in this law a structural mechanism which will keep the moral and religious principles of Shariʿah intact. The dilemma is that while Muslim societies believe in the sacred religious texts of Shariʿah,

¹⁶ See Frank Michelman, "Is the Constitution a Contract for Legitimacy?" (2003) 8 *Review of Constitutional Studies* 125–128.

¹⁷ See the anthropological study by Paul Vieille and Farhad Khosrokhavar, "Le Discours populaire de la révolution iranienne" (1990) 2 *Contemporaneité* 360.

¹⁸ For a thoughtful interfaith discussion on this relationship, see Abdullahi A. An-Na'im, *Islam and the Secular State* (Harvard University Press, Cambridge MA 2009) 84–140.

¹⁹ J. Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, Cambridge MA 2001) 182.

which make claims to eternity and universalism, they must also accommodate themselves to the secular manifestations of modernity and the rapid social, cultural, economic, and political changes which have embraced these societies during the era of globalization.

Repeated failures in lawmaking and impasses in the legal and political systems led Ayatollah Khomeinī, to suggest, in last year of his life, a fundamental change from classical theories of Islamic law to utilitarian ones.²⁰ Despite using Shari‘ah-based language to justify this new approach, his focus was the changing needs of the post-revolutionary power structure in the administration of public life. Preparing for the second decade of the Islamic Republic, Khomeinī spoke pragmatically about the flexibilities of Shari‘ah, as he understood them, to receive and include the societies of the modern age. Before his death in June 1989, he established an Expediency Council (EC) and decreed the Assembly of Experts to amend the 1979 Constitution.²¹ In Khomeinī’s new approach, protecting the interests of *nizām-i islāmī* (the Islamic system) required a dynamic *fiqh*.²² He even intended to assert the absolute authority of the supreme leader (*wali-e muṭlaq-i faqih*) to suspend the classical ruling of Shari‘ah. According to Khomeinī, in order to protect the Islamic state system, even Islamic rituals like prayer, fasting, and *hajj* can be suspended. The constitutional revision of 1989 changed “the rule of the supreme Shi‘ite jurispudent” from being conditioned by rulings of Shari‘ah into “the absolute rule of the supreme Shi‘ite jurispudent” with the power to go beyond the rules of traditional Shari‘ah.

Using Khomeinī’s last decree and moving toward establishing a maximum authoritarian state with fewer republican features, the Constitution Revision Committee made several amendments to the constitution. The amended constitution expanded the realm of *welāyat-e faqih* at the expense of the remaining elements of constitutionalism and democratic values, established the Expediency Discernment Council (EC) (Arts. 110, 11, and 112), abolished the high council of judiciary, and expanded the rule of the supreme leader as well as presidential powers. The EC was tasked to resolve conflicts between the *Majlis* and the Council of Guardians regarding the compatibility of legislation with Islamic criteria. However, in 1988, the EC passed new legislation such as the harsh Anti-Narcotics Law and Governmental Ta‘zīrāt Law. The establishment of the EC meant that the Guardian Council of the Constitution (GC) made extensive use of its power to veto parliamentary legislation on the basis of alleged incompatibility with the constitution or Islamic law. This represented an institutional impasse in the legislative process. The EC currently comprises more than thirty five appointed members, the heads of three branches and the six clerical jurists of the GC and the head of the national security council. The EC introduced a religious pragmatist approach (*aḥkām-e maṣlahatī*) into Shi‘ite jurisprudence, which has been perceived as irreconcilable with Shi‘ism by most traditional Shi‘ite jurists. Referring to the aims of Shari‘ah and to public interest as sources of law was not a Shi‘ite methodology. The EC drafts general policies for the country and for the leader, particularly on how to handle the impasse when the *Majlis* fails to accommodate the GC’s objections.

Briefly, in post-revolutionary Iranian constitutionalism the state is viewed not only as a political organization of a society based on Shi‘ite jurisprudential rules, but (borrowing from the ideas of Plato and Lenin) defined as a totalitarian institution that has to fit together into one unified system of power, morality, and faith.²³ In the Iranian Constitution, the

²⁰ For more discussion on these developments as occurred inside the Iranian criminal justice system, see H. Rezaei, *Naqsh-e Moqataziyāt-e Zamān wa Makān dar Neẓām-e Keifari-e Islāmī* (Orooj Publication, Tehran 2003).

²¹ *Id.* 197–255; also *Sahīfeh-e Imām*, 20 (Nashre Asare Imam, Tehran 1999) 451–452.

²² *Sahīfeh-e Imām*, 21 (Nashre Asare Imam, Tehran 1999) 289.

²³ For an analytical discussion on totalitarianism in the context of post-revolutionary Iran, see A. Banisadr, *Totalitarianism: Ketāb-e Awwal* (Enghelab Islami Verlag, Paris 2013).

theory of the relations between the state and the citizens is a *fiqhī* one, a divine duty (*taklīf*). This refers to a delegated divine authority imposed by a powerful man, the Muslim jurist, over the members of society without any choice between it and other alternatives through free and fair elections. The Constitution of Iran, as the general structure of public authority, is centered on the concept of this Muslim jurist and laws are defined as duty (*taklīf*) in this theory. Here, the political and the religious aspects of the state are not very clearly delineated. The state is primarily responsible to protect the interests of believers in this specific form of the Islamic state. The concept of *rayʿiyat*, followers in mass, is a key element. In this system, in order to protect the Islamic face of the state, all major domestic and international relations must be mediated through the Shīʿite *mujtahid*. The supreme leader, the head of the judiciary, the minister of intelligence, the president, and key members of the GC are selected from within the clergy. The last clause of the Islamic Republic Constitution, Article 177, states that “the contents of the Articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the *wilāyat al-amr* the *Imāmāt of Ummah*; and the administration of the affairs of the country based on national referenda, official religion of Iran [Islam] and the school [Twelver *Jaʿfari*] are unalterable”.

Originally, in mainstream Shīʿite jurisprudence, this concept of the state was regarded as a narrow *fiqhī* interpretation of the rule of Shariʿah jurist, which is rooted in a marginalized legal theory about the civil custodians of orphans and minorities. Ayatollah Khomeini developed this idea into a theory of absolute rule. In this way, the role of the state in modern Iran devolved into the rule of a small traditional social group composed of Shīʿite clericals following the exceptional jurisprudential view of Ayatollah Khomeini. This discourse is common in the language and concepts used across the Iranian legal and political system, including the Islamic parliament, Islamic foreign policy, Islamic ministry, Islamic penal code, Islamic courts, Islamic sport, Islamic park, Islamic broadcasting service, Islamic dress, etc.

V. FROM THE REVOLUTION FOR CONSTITUTIONALISM TO THE ABSOLUTE RULE OF THE SHĪʿITE JURIST

The slogans in the streets of Tunis, Tripoli, Cairo, Ṣanaʿā, Damascus, Manama, and Amman for *dawlat al-qanūn*, the rule of law, are similar to the ambitions expressed by Iranians since the first constitutional movement of the region, known as the Constitutional Revolution of 1905–1911. During the course of the Constitutional Revolution, a discursive struggle between monarchical institutions, clerical establishments, and secular reformers about the principle of the rule of law defined the limits of modern state building in Iran. A review of the historical development of constitutionalism alongside the secular, arbitrary rule of monarchism and Islamism highlights some roots of the ongoing conflict.²⁴

The outstanding work of Mirzā Yūsef Mostashār al-Dawleh, published as “One Word”, *Yek Kalemeh*, in 1871, was widely regarded as enlightening and as one of the most influential works on the basic principles of modern rule of law written in Persian during that period. The book argued for a legal codification based on full compatibility with the French Civil Code and Shariʿah rulings. It undoubtedly had a strong influence on the constitutionalist

²⁴ For an account of this period, see H. Rezaei, “Iran” in *Oxford Encyclopedia of Law and Islam* (Oxford University Press, 2014), http://www.oxfordislamicstudies.com/browse?_hi=0&_startPrefix=iran&jumpPage.x=14&jumpPage.y=6, accessed June 15, 2015.

movement. Another leading thinker and activist in this movement was Mirzā Malkom Khān, publisher of the *Qānūn* (Law) newspaper in London. Other senior Shī'ite leaders gradually joined this movement and played a significant role in the transition from the arbitrary rule of Qajars to constitutionalism. The arbitrary and degrading rule of the Qajars, combined with economic stagnation, raised public calls initially for the establishment of *edālatkhāneh* (a house of justice). The revolution resulted in the Proclamation of August 5, 1906, made by Muẓaffār al-Dīn Shāh (r. 1896–1907), which granted the right to a constitution and establishment of the first *Majlis* (parliament).²⁵

The *Majlis* was immediately established, and the first Iranian Constitution was influenced by the 1831 Constitution of Belgium (its principal model), the 1791 French Constitution, the 1876 Ottoman Constitution, and the 1879 Bulgarian Constitution. It was drafted on December 30, 1906. It was completed with a Supplement to the Constitution on October 7, 1907 (again modeled after the Belgian and French Codes). This text is regarded as the starting point of a modern history of law and justice in Iran. This constitution remained in effect as the Iranian Constitution until 1979, altered only due to minor revisions. Changes in the old, ineffective, and decentralized justice structures of premodern Iran, and the process of the modernization of the legal and judicial institutions came almost exclusively after the Constitutional Revolution; it is a post-1906 phenomenon.

The Constitutional Revolution launched a passionate struggle for a democratic constitutional order between modernists and conservatives. Amongst the radical intelligentsia, this struggle formed between those criticizing the arbitrary rule of the *Shāh* and those attacking the premodern thought of the clerics. Through radical debates in flowering liberal newspapers and secret associations, the intelligentsia highlighted citizen rights and notions of modern justice which affected the justice discourse of many urban Iranians. Even the wording of *huqūq* (law as a scientific discipline) was born in this era. Prior to this, law was understood only as *aḥkām* (customary or religious rulings).

The finalized 1906 Constitution was actually the result of a compromise between secular constitutionalists and clerics who were divided into camps favoring or opposing the constitution. From this point onward, the dichotomy between the rule of Shari'ah, as divinely revealed law, and positive modern law as man-made law became more public. Advocates of Shari'ah rule regarded any new legislation as a *bid'ah* (rejected innovation in Islam). Ultimately, a two-tier legal system with an ambiguous civil rights structure was constituted: The first and second articles ensured the Shī'ite identity of the nation and state and established preliminary foundations for secular lawmaking and a modern justice system. Article 27, although building the architecture for a modern judiciary for Iran, officially legalized the division of courts into religious and secular courts (a legacy of the Ṣafawīds). In this way, Shari'ah courts obtained modern legal recognition from the constitution. Yet most clerics were not in favor of substantive judicial reforms. A conflictual dual judiciary emerged (Art. 71) and clerical control over legislation was designed in the form of a council of high ranking Shī'ite clerics (*hey'at-i mujtahedīn*) vested with a veto power. This council of five outstanding *mujtahidūn*, as members of the *Majlis*, was established to ensure that legislation would conform to *mawāzin-i share'* (Islamic standards). However, this mechanism of Islamizing did not function, and was applied only for a short period from 1909 to 1911.

Notably, the Constitutional Revolution created a new conflict zone within the Shī'ite school of jurisprudence, a multifaceted conflict between *mashrū'eh-khāhān* (those demanding only Shari'ah rule represented by Shaykh Faḍlullah Nūri) and *mashrūteh-khāhān*—those defending constitutionality and the necessity of parliament as represented

²⁵ E. Abrahamian, *A History of Modern Iran* (Cambridge University Press, New York 2008) 8–33.

by Akhund Khorāsānī (1839–1911) and his consultant Mirzazā-i Nāʾeynī 1860–1936), the author of the most authoritative treatise on constitutionalism. When advocates of Shariʿah rule found that they could not avoid parliament and its activity, they tried to draw tight limitations on any future legislation. They held the majority of seats in the newly established parliament and did not only introduce Article 2 to the constitution but also established many other safeguards such as articles 8, 9, 14, 15, 18, 20, 21, 27, 58, 71, and 83, and curtailed the authority of parliament to legislate anything against Shariʿah criteria. Nūri was sentenced to death by a cleric and hanged for several counts including his opposition to the constitution in 1909, collaborating with the *Shāh*, issuing a *fatwā* which justified violence, and permitting war against revolutionaries.

Inside the *Majlis*, the conflict between the clerics and seculars intensified. As intellectual contact with the West increased, the secular parliamentarians willingly and sometimes forcefully accepted Western codes and legal norms and proposed them to the *Majlis*. Reconciliation between the interests of the progressive intelligentsia and the clergy became difficult. To persuade the conservative clergy, secular parliamentarians invented different tricks. Sometimes they would include general articles at the beginning or end of new laws, on other occasions they would explicitly declare new legislation as provisional. Secularists were socially forced to show their respect to holy texts and the *fatāwā* of the clerical establishment. For instance, while the new secular penal codes of 1906, 1917, and 1927 directly aimed at transforming the foundations of existing Shariʿah-based criminal laws in the country, the first articles of the 1906 and 1926 Codes and the last article of the 1917 Codes were all designed to satisfy clerics.

It was during this debate that old words like *ʿadālah* (justice), whose perception was to a great extent based on the teachings of Greek philosophers, acquired new meanings. The traditional understanding of *ʿadālah* was, for instance, that the *Shāh* or any other figure of power was meant to mete out to different groups and classes in order to maintain existing social hierarchies. This term was gradually redefined to describe a request for freedom and equal justice for all, irrespective of gender, ethnicity, social class, and religion. Voices rose to declare that laws should be free of discrimination and uniformly applied in different cities and towns, and that Iran should resolutely adhere to international anti-slavery conventions. However, family law—including the rights of women in marriage and divorce, inheritance, and child custody—continued to be controlled and defined primarily by clerical advocates of older concepts of justice.

Forces of arbitrariness stood against the constitutional order, and in June 1908 the *Majlis*—the major achievement of the constitutionalist movement—was bombed and closed after a coup by the *Shāh*, which had been assisted by the Russian Cossack Brigade. The *Shāh* was soon deposed by revolutionaries from Tabriz and Bakhtiari, and the constitutionalists continued their rule. But with the assassination of a leading clerical figure of constitutionalism, ʿAbdallāh Bihbahānī, even those *mujtahidūn* who had been leading figures in constitutionalism and arguing for republicanism highlighted the secularist elements and begun to disassociate themselves from this modernist movement. An emerging antagonism between revolutionary forces situated within an unchanged political structure, and foreign interferences damaged the outcomes of the constitutional movement and contributed to chaos and hardship from 1910 to 1920. In 1920, the Qajar dynasty formally ended and was replaced by the secular, autocratic, and military rule of the *Pahlawī* dynasty (1926–1979). From 1921 to 1979, Reza Shāh (1878–1944) and his son Muḥammad Reza Shāh (1919–1980), nostalgic for the pre-Islamic Iranian empire, launched a wave of secular, Westernized legal and judicial reform in Iran. Reza Shāh's reforms led to an unusual process of the exhaustion of statehood, economy, armed forces, education, and even cultural

spheres like art in which the traditional society of Iran was forced to surrender itself to the Western dominating powers. The discovery of oil and its flow into the machinery was the primary pivot of this phenomenon.²⁶ Facing the concentrated power of religious authorities, Reżā Shāh initially assured the Shī'ite establishment of his support for the rule of Shari'ah, but later tried to bring the religious establishment under state control. Pressed by *Pahlawī* rulers and somewhat disillusioned by bitter constitutional events, the Shī'ite clergy generally stuck to its pre-Şafawīd approach of distancing itself from political discourse for over thirty years (1920–1950), especially under the rule of grand Ayatollahs Hā'eri and Brūjerdī.

From 1949 to 1953, a nationalist movement led by Prime Minister Moşşadeq (1880–1967) began to transform the monarchical, elitist, and undemocratic rule of the justice sector into an open and democratic one. The coup of 28th Mordād (August 19, 1953), which was engineered jointly by US and UK intelligence services, re-established *Pahlawī* authoritarianism and destroyed both the Iranian experience of constitutionalism and the move toward a liberal and republican rule-of-law system. Arguably, this coup paved the way for the emergence of Islamic fundamentalism in 1979.

The *Shāh* was able to continue the undemocratic process of secularizing the legal system because the mainstream clerical establishment was busy with its own traditional scholarship. However, popular social critics like Jalāl Āl Aḥmad (1923–1969) and 'Alī Shari'ātī (1933–1977) argued that the *Shāh's* social and legal reforms were mechanisms of “Westoxication” (poisoned by the West, meaning extreme forms of Westernization). Shari'ātī in particular contributed to a revolutionary reading of the Shī'ite doctrines. This revolutionary approach to Shī'ism was later added to the jurisprudential-theological approaches of Ayatollah Khomeīni and his bazaari-clerical network against the *Shāh* in the late 1970s. The *Pahlawī* secularization, in the language of Ayatollah Khomeīni, was principally designed to “undermine Islamic values.”

When in 1978–1979, Iranian society went through a new revolution, the main program of the religious leadership of the revolution aimed at a total Islamization of Iran based on the model of Ayatollah Khomeīni's Shī'ism. In Khomeīni's view, Iran had to entirely serve Islam. The most pressing goal of the revolution was to establish the rule of Islamic law (*Islām-i faqahatī*). Islam was not to be confined to the arenas of individual rituals and moralities, but expanded to be a theory of government and integral to the conduct of social, economic, legal, and political relationships, with the sacred legislation of Islam being the sole legislative power. The logic was that Islam has precepts for everything which concerns man and society, and that because Islam is political the Islamic ruler must Islamize the entire social system based on exigencies of time.²⁷ The focus of Khomeīni's language was immediate power, and the conception of Islam was associated with the changing needs of the state rather than with the more traditional ruling of Shari'ah.

The revolution resulted in the modern institutionalization of clergy rule in Iran. Historically, both Shī'ite and Sunni Muslim jurists had claim over the administration of justice. The new leaders, however, called for the implementation of Islamic law in all areas of private and social life. To revolutionary Islamists, the monarchical justice system of the *Pahlawīs* was pagan, inefficient, corrupt, unfair, and Westernized. The alternative, in their view, was a holy, swift, fair, and simple Islamic justice system that had been historically ignored by *Shāhs*. The goal was “to establish Islamic justice and create divine government”;

²⁶ A. Banisadr, *Naft wa Sulṭeh* (Tehran 1977) 331–34.

²⁷ Hamid Algar (tr), *Islam and Revolutions; Writings and Declarations of Imam Khomeini* (Bizan Press, Berkeley 1981) 55.

according to Ayatollah Khomeīnī. Notwithstanding such statements, the first wave of changes to the legal and judicial system under the Islamization agenda was a shock for many Iranian lawyers and legal professionals.

The post-revolutionary constitution, drafted by a clergy-dominated council called the Assembly of Experts, was ratified in a referendum on December 2, 1979. The constitution provided for maximum Islamization: “all civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria”, and Article 4 set the foundations for a total engagement between the legal system and Islam. Article 12 of the constitution established the *Shī‘ite Ja‘fari* as the official school of Islamic Law (*madhhab*) of the Iranian state, while Article 167 of the new constitution even permitted courts to make decisions based on credible Islamic sources or *fatāwā* in the case of the silence or lack of positive law. In practice, this article allowed Islamist criminal judges to refer to Shī‘ite jurisprudence and even decrees of the leader in order to convict culprits and impose arbitrary sanctions. To invent new offences, the revolutionary courts in particular have used this instrument excessively.²⁸

The final draft of the constitution diverged significantly from the first draft prepared by liberal lawyers,²⁹ which had been based on conceptions of rule of law and republicanism (although the document was not yet entirely led by the principle of equality due to contents like Art. 106). The final draft, however, offered a hitherto unknown hybrid of authoritarian, theocratic, and republican elements based on the rule of the Shī‘ite jurist (*welāyat-e faqīh*). Under the 1979 Constitution, which was amended only once in 1989 and which remains the Iranian Constitution to date, the judiciary was designed to be headed by a *mujtahid* appointed by the leader for five years. The role of the former ministry of justice, while remaining in the cabinet, was limited to coordinating the administrative and financial relationships between the judiciary and the legislative–executive branches

²⁸ For a more detailed discussion of the Islamization project, see H. Rezaei, “The Iranian Criminal Justice under the Islamization Project” (2002) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 10, 54–69.

²⁹ The initial work on the first draft of the constitution was a product of a technical process during the Iranian Revolution between which autumn 1978 and June 1979. Its starting point was a very preliminary draft which in fact constituted a translation of the French Constitution prepared by Hassan Ḥabībī. This draft was soon put aside by a committee organized by the deputy prime minister, Saḥābī, made up of an expert group of six modern Iranian lawyers with solid knowledge of Islamic law who also consulted some progressive clerics. This committee prepared a new draft which was approved by the Council of the Revolution and published on June 28 and 29, 1979. With a few minor amendments, Khomeīnī endorsed it on June 18, 1979, and asked for quick approval. This draft did not mention *welāyat-e faqīh*, and no special authority was reserved for clerical staff, except in the composition of the Guardian Council (GC), where they were a minority. Under this first draft, the GC did not have an automatic authority to control or veto legislation. Legislative control could be granted only upon the request of the established *Marāji‘* (designated sources of imitation), the president, the chief justice, or the general prosecutor and only provided that it was within one month of the enforcement of legislation (Art. 143). Under Art. 141, the GC consisted of 17 members: five *mujtahidūn*, six civilian jurists, three senior judges, and three law professors. Its judgments could only become valid if passed by a two-thirds majority in the parliament. This first draft is available online at http://enghelabe-eslami.com/ketab/Ghanun_Asasi/Ghanun_Asasi.pdf, accessed June 15, 2015. For more discussion of the GC’s functions, see S. A. Arjomand, “The Kingdom of Jurists: Constitutionalism and Legal Order in Iran” in R. Grote and T. Röder (eds), *Constitutionalism in Islamic Countries, Between Upheaval and Continuity* (Oxford University Press 2012) 157–162; also John O’Kane (tr), A. Schirazi, *The Constitution of Iran: Politics and the State in the Islamic Republic* (I. B. Tauris and Co., London 1997) 293.

without any authority in judicial affairs or the court system. To safeguard this clerical hierarchy in a deliberative legal structure, the first Council of Guardians (GC) was opened in May 1980. Restoring the ignored Article 2 of the 1906 Constitution, this Council, inspired by the French *Conseil Constitutionnel*, was placed above the *Majlis* (according to Article 4, which stipulates that all laws and regulations including the constitution have to be based on Islamic law). In addition, Article 72 prohibited the *Majlis* from passing any legislation which deviated from the official school of Islamic law (*madhhab*) of the country. The GC is comprised of twelve members, including six Shari'ah jurists (*fuqahā'*) appointed by the leader and six lawyers appointed by the parliament from a list proposed by the chief of the judiciary, who is in turn appointed by the leader. The control of the Islamicity of legislation was exclusively delegated to the *fuqahā'* of the GC. In addition to having the authority to review the compliance of legislation with Islamic law and the constitution, the GC was authorized to supervise elections and referenda. It also had the authority to give official interpretations of the provisions of the constitution by a vote of three-quarters of its members. Comparing Article 2 of the first constitution of 1906 with Article 4 of the 1979 Constitution, the difference is clear: The former mechanism was founded on the basis of a secular state, while Article 4 of the 1979 Constitution is based on an authoritarian concept of an Islamic state ruled by clergy, as formulated by Ayatollah Khomeinī in the mid-1970s.

VI. REVOLUTIONARY CONSTITUTION-MAKING AND ITS RISKS

In general, the Arab Spring uprisings of 2011 induced a new wave of constitution-making processes in different countries with new political actors. While considering the emergence of powerful Islamists in the context of the Arab Spring, there is a notion that the Arab uprisings present a deep unsolved challenge for a democratic transition to a political system based on the rule of law as well as on human rights. The post-revolutionary democratic state of Egypt under the rule of the Muslim Brotherhood, for instance, could have been paving the way for a similar story as what has been constantly taking place in Iran since the beginning of the twentieth century. Once again, the dramatic changes, especially in Egypt, since 2011 showed that prospects for a democratic system based on the rule of law would be weak in the absence of an Islam which embraces democratic principles and human rights.

However, mobilizing people for a constitution-drafting process is a risky idea. Comparative studies show that constitution-drafting and ratification are significant in determining whether a constitution will serve as an ideological tool for the new elites or as a basis for the rule of law in a country. Constitutional theorists suggest that the constitution-making process is critical in the construction of robust constitutional orders.³⁰ The experiences of Iran in 1979, Russia in 1993, Kazakhstan 1995, Belarus 1996, and Egypt in 2012 show that wherever mechanisms of popular constitution-making have been introduced, the constitutional orders have been far less successful in building a rule of law and a stable constitutional democracy. Instead, the fashion of constitution-making brought these countries to the brink of civil wars and resulted in the re-emergence of authoritarianism. These examples indicate how popular constitution-making taking place in the context of unchanged political and cultural structures, and where foreign elements are active, can permit charismatic individuals who claim the mantle of popular legitimacy to reproduce old patterns of authoritarian constitutions and arbitrary states. Therefore, a crucial requirement

³⁰ William Partlett, "The Dangers of Popular Constitution-Making" (2012) 38 Brooklyn Journal of International Law 40–46.

for the constitution-making process is the availability of external rules or institutions, such as well-established constitutional courts, to ensure thorough and democratic deliberation needed for the establishment of a successful constitutional order.³¹

As the Arab Spring steadily releases many silent forces of Islamism, examining the context of post-revolutionary Iran shows that a sustained revolutionary mood can facilitate the emergence of unthoughtful understandings about Islam and of democracy, particularly during the sensitive phase of the constitution-making process. Such new understandings developed in Iran with the sudden introduction of *welāyat-e faqīh* into society. In a revolutionary discourse led by Ayatollah Khomeīnī, the masses were called upon to ensure an Islamic way of life in the upcoming legal order. The constitution-drafting process was perceived as the ideal tool for engineering these rules in the revolutionized Islamic society. Under these circumstances, the political structure, including legislative, executive, and judicial authorities and offices, was constituted by classical Shari'ah rules as formulated by "the line of the *imām*" (the *maṣlaḥah* doctrine was added later in the 1990s). Through a hasty constitutional-drafting process, fundamentalist religious forces were able to contain the enthusiasm of Iran's revolutionized society for constitutionalism. The outcome of this undebated process was a contradictory constitutional document for which the Iranian society continues to pay a high price in both domestic and international affairs. Even after more than thirty-four years, it is not difficult to see that this process has not only crippled formerly existing constitutional guarantees of the rule of law and of human rights in Iran, but has also had direct and indirect effects on the rise of violence on regional and global levels.

In 1979 and 1980, there were two subsequent quick constitutional referendums in Iran. On April 1, 1979, just two months after the fall of the *Shāh's* regime, Iranians were called to vote "Yes" or "No" on establishing a *Jomhūrī Islāmī* (Islamic Republic) in an abstract and general sense. Ninety-seven percent of voters (persons over sixteen years of age) approved the establishment of the "Islamic Republic of Iran". Five days later, the Ministry of the Interior announced that elections for a Constituent Assembly would be held in two months. Implicitly, this meant that a draft constitution must be ready before the first meeting of the Assembly. The interesting point is that this referendum was only concerned with the title of the system, and information about the nature of this assembly or about the contents of the constitution was not available. The leader of the Islamic Republic simply promised that it would be a republic like all the other republics in the world. But the hasty popular constitution-making put an end to political dialogue and to the efforts to find a consensus regarding the essentials of post-revolutionary constitutionalism. The Iranian draft, despite gaining popular support, was vague and could only be enforced by the power of Ayatollah Khomeīnī. Within Iran, this mindset manifested itself in a growing popularity for "nativism," a doctrine best defined as a call for the resurgence of native or authentic culture, of going back to one's roots—including political Islam, inasmuch as it was considered to be part of this authentic culture.³²

Notably, some months before the collapse of the *Shāh's* regime in the autumn of 1978, a draft of the constitution, in great parts a translation of the French Constitution, had been prepared by Ḥassan Ḥabībī (1937–2013) who later became the first vice president of Iran during 1989–2001. He submitted it to Ayatollah Khomeīnī on January 22, 1979, before his return to Tehran. This draft was later put aside and replaced by a new draft prepared by a special committee in the office of the deputy Prime Minister Saḥābī. This text was then

³¹ *Id.* 45 et seq.

³² Negin Nabavi, "The 'Arab Spring' as Seen through the Prism of the 1979 Iranian Revolution" (2012) 44 *International Journal of Middle East Studies* 153, 155.

reviewed and approved article by article by the Council of Revolution. Ayatollah Khomeinī also reviewed it and commented on it; these comments then went to the Council of Revolution for revision. An “unofficial” version of this draft was published in a newspaper on April 28, 1979. This draft, which was overwhelmingly a democratic text, was put aside by the constitution-drafting assembly (CDA or, literally, the “Assembly of Experts” as it is called in Iran), which was dominated by authoritarian clerics. This had become possible because clerical and religious forces, which were organized within the Islamic Republic Party (IRP) under the direct guidance of Ayatollah Khomeinī, mobilized radicalized supporters from among countryside Islamists, the urban lower class, religious students, the state bureaucracy, mass media, and its paramilitary forces (the Islamic Committees and Revolutionary Guards). Despite some protests from dissident clerics and political organizations,³³ this populist action secured the domination of the clerical staff over state organs and enabled the IRP to introduce and ratify the theory of *welāyat-e faqīh* in the CDA. Under the rule of the clerics, the mandate and procedural rules of the CDA were essentially changed. The proposition of *welāyat-e faqīh*, however, became a matter of controversy and speculation among different groups of revolutionaries. Ultimately, with the populist activities of the clergy directed by the heads of the CDA—Ayatollah Montazerī (successor to Ayatollah Khomeinī until April 1989) and Ayatollah Beheshti, who was the leader of IRP—Islamic authoritarianism in the name of *welāyat-e faqīh* was firmly established in the constitution. In defense of Article 5, which provides the ideological foundation for *welāyat-e faqīh*, Mr. Beheshti said, “In the present system, the leadership and legislation cannot be left to the majority at any given moment. This would contradict the ideological character of the Islamic Republic.”³⁴ When Bāzargan’s government criticized the IRP’s attempt to change the mandate of CDA, it was Ayatollah Khomeinī who publicly came to the defense of the IRP, stating, “The first draft [of the constitution] is nothing, you have to give your vote and present your view.”³⁵ Ayatollah Tāleghānī, a prominent revolutionary leader and Imam of Tehran, after voting against Article 5, stated, “My fear is that the level of this constitution will be lower than seventy years ago [when the first constitution was ratified].”³⁶ Furthermore, as his popularity rivalled that of Khomeinī, he used the Friday prayer of Tehran as an opportunity to attack the idea of the rule of the Muslim jurist: “Leave people alone, let people take responsibility, [and] throw away despotism, which is under the cover of religion.”³⁷

However, both the Council of Revolution and the interim government, each from their specific standpoints on the “goals” of revolution, announced that they were committed to a popular process of constitution-making. Without a thorough national dialogue over the nature of the future state, the text of the constitution became a conflict zone for both

³³ For instance, Ayatollah Qomī called the election an “unimaginable betrayal” (Kayhan, August 7, 1979); Grand Ayatollah Shari’atmadarī boycotted it and asked for annulment (Khalq-e-Mosalman, October 21, 1979). Also, five radical Islamic organizations (Mujāhedīn-e-Khalq, OMMAT [the Militant Muslim Movement], SASH [Islamic Organization of Councils], and JAMA [Revolutionary Organization of Muslim People of Iran] wrote an open letter to Khomeinī and protested the electoral frauds. Mahmoud Delkhasteh, *Islamic Discourses of Power and Freedom in the Iranian Revolution, 1979–81* (Ph.D. Dissertation, London School of Economics and Political Science, London 2007) 160, <http://etheses.lse.ac.uk/2143/1/U613375.pdf>, accessed July 10, 2015.

³⁴ Ibid.

³⁵ Ruḥollah Khomeinī, *Saḥīfah-ye nūr* (Markaz-e Madarek-e Entersharat-e Eslami, Tehran 1999) 213.

³⁶ Ayatollah Tāleghānī, *Az Azādi tā Shāhādāt* (Resa Publishing Company, Tehran 1980) 488.

³⁷ *Keyhan Daily*, November 17, 1979.

popular clerical establishment and republicans. Therefore, social pressure for reframing the first draft into Khomeinī's concept of an Islamic government, *welāyat-e faqīh* (the mandate or rule of the Shi'ite jurist), increased. By resorting to two referendums within less than one year, the struggle between the two readings of Islam-in-constitution dominated the political and socio-economical scene of Iran in 1979–1980.

In other words, as shortly described, in Iran from 1979 to 1980, constitution-making by “We the Majority” led to a unilateral demonstration of majoritarian will with dangerous consequences for Iranian constitutionalism. Egypt's constitution-making processes since 2012 have a similar character. In the beginning of December 2012, then-President Muḥammad Mursī called for an “almost immediate referendum” on December 15, in which a majority of the people were likely to approve the document. Both Ayatollah Khomeinī in 1979 and Mursī in 2012, and their supporters, drew on an intellectual tradition of “popular constitution-making”, which dates back from the French revolution and which sees the majority of the people as unlimited in their ability to draft a new constitution. In this version of constitution-making by “We the Majority”, the judiciary or legal professionals inside the government have no legitimate role in a revolutionary constitution-making process.

Comparative research suggests that popular constitution-making is often favored by those interested in a unilateral takeover of power.³⁸ Populist leaders use their command of electoral majorities to exclude the other-thinkers, opposition, and minorities. Overall, these unilateral claims to the constitution-making power have ultimately hindered the development of constitutionalism in most cases. Other contexts, like in Germany 1949, Spain 1978, Bulgaria 1991, Poland 1997, and South Africa 1997, show that the tradition of deliberative technical and legal constitution-making is a better method for two reasons. First, it can ensure that this crucial national process is not only supported by a majority of the people but also that its decisions emerge from consensual and deliberative processes. Second, it involves the participation of citizens in the existing legal institutions. According to Hannah Arendt, this kind of deliberative constitution-making transcends the monolithic popular will of the majority through “the organized multitude whose power [is] exerted in accordance with law and limited by them.”³⁹ Those who have followed the legal and more deliberative path have been far more successful in building stable constitutional democracies. As mentioned above, Spain, South Africa, Bulgaria, and Poland have recently adopted this legal and professional model of constitution-making, making wide use of deliberative roundtables, preexisting law, and judicial oversight to ensure an inclusive approach to constitution-making.

VII. BETWEEN ISLAMISM AND REPUBLICANISM: AN UNRESOLVED DICHOTOMY

At present, under the domination of Ayatollah Khomeinī's Islamic jurisprudence, constitutionalism in Iran clearly fails to offer a modern realization of the ideals of the 1979 Revolution; i.e., Islamism and republicanism, which are based on the principle of equality. For instance, while Article 4 of the constitution validates Islamic norms as the source of the rule of law, it also states that these norms are to be interpreted and determined by Islamic

³⁸ See William Partlett, “The Dangers of Popular Constitution-Making” (2012) 38 Brooklyn Journal of International Law, <http://ssrn.com/abstract=1924958> or <http://dx.doi.org/10.2139/ssrn.1924958>, accessed June 19, 2015.

³⁹ Hannah Arendt, *On Revolution* (The Viking Press, New York 1963) 166.

jurists, who completely control the *Majlis*.⁴⁰ Article 110 states that these jurists are to be appointed by the leader. While according to the principle of the rule of law, there should be mutual checks and balances and limitations on the will of rulers, the rule of Shari'ah in Iran primarily relies on the "religious-moral" qualifications of the leader and certain clerical officials charged with Islamic governance. While there are some weak traces of modern rule of law, like the formal separation of powers and adoption of the principle of *nulla poena sine lege* in theory and practice, the *wali-e faqih* nevertheless stands above the law and can limit the provisions of the constitution through a range of formal and informal mechanisms (e.g., issuing *fatāwā* and *hokm-e hokūmati*).⁴¹ In addition, varying interpretations of the "sacred texts" (*nuṣūṣ*) mean that even speaking about the rule of law in its modern concept is confusing in Iran. For instance, Article 159 of the constitution interprets the rule of law in the administration of justice: "The courts of justice are the official bodies to which all grievances and complaints are to be referred. The formation of courts and their jurisdiction is to be determined by law." This provision is relativized by Article 61 stipulating that "the functions of the judiciary are to be performed by courts of justice, which are to be formed in accordance with the criteria of Islam, and are vested with the authority to examine and settle lawsuits, protect the rights of the public, dispense and enact justice, and implement the Divine limits [*al-hudūd al-Ilāhiyah*]." Moreover, Article 167 states that "the judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of such a law, he has to deliver his judgment on the basis of authentic Islamic sources or authoritative *fatāwā*."

In practice, this structural dualism within the Iranian judicial system, which originates from the constitution, has resulted in an unusual system of justice, in particular when it reaches the realm of criminal procedure.⁴² For example, most of the fundamental human rights protected under international law in the Iranian Constitution are qualified by reference to ill-defined "Islamic criteria". This specificity of the Iranian system is rooted in the special powers entrusted to the unelected Council of Guardians, which has exercised considerable authority since the revolution and has encroached on the parliament's democratic legislative functions. This has created a serious crisis for all the republican principles of the constitution.

Reviewing these contradictions for some Arab critical thinkers the Iranian Constitution of 1979 and its later practical developments seem to have greatly demystified the project of constitutionalism under the baton of authoritarian readings of Islamic rules.⁴³ Since its establishment, constitutionalism in Iran has been steadily regenerating a deep dichotomy between Islamism and Republicanism. This dichotomy has tarnished the utopian vision of a liberating revolution, and since then both society and state have been divided around this gap. Although one finds that there is still a significant Islamic-reformist discussion about the extent of a possible consistency between a republican rule of law and Islamism, this discussion could neither result in a structural reform regarding the theory of governance

⁴⁰ For discussion on this Article, see A. E. Mayer, *Islam and Human Rights* (3rd ed, Colorado/USA 1999) 18–38.

⁴¹ Ramin Moschtaghi, "Rule of Law in Iran," <http://wikis.fu-berlin.de/download/attachments/22347860/Moschtaghi+Iran.pdf>, accessed June 19, 2015.

⁴² It is notable that in comparative law the criminal procedure is regarded as the seismograph of the constitution. For discussion on the relationship between the constitution and criminal procedure, see C. Roxin, *Strafverfahrensrecht* (25th ed, München 1998) 9–12.

⁴³ For instance, see Zubaida Sami, "Is Iran an Islamic State?" in Joel Beinin and Joe Stork (eds), *Political Islam: Essays from the Middle East Report* (University of California Press, Berkeley 1997).

nor in a change of actual politics yet. The developments during the Arab Spring in 2011 demonstrated that there are still unresolved tensions between republicanism and Islamism, and between democratic values and Islamic principles and rules in both the Shi'ite and the Sunni world—and that there are different approaches to their resolution.

As a result of this widespread confusion, as well as contradictions, the establishment of the rule of law has been stalled by various Islamization projects. These projects are concerned with questions about the Islamic identity of state and society and the application of Shari'ah rules and religious ethics, in particular when it comes to women's and minorities' rights, rather than with constitutional questions of establishing representative institutions, organizing free elections while abolishing autocratic policy making, and removing flagrant socio-political inequities, corruption, and violations of human rights.

Since the Arab uprisings in the winter of 2011, there has been a continuous if uncertain flow of intellectual encounter between advocates of *welāyat-e faqih* and republicans in Iran, and an increasing number of overlapping concepts between Islamic reformists and liberal secularists. Wandering the streets of Cairo, Tripoli, and Tunis, it is possible to find Islamic and Koranic concepts being used by revolutionaries as weapons to express their vision of the transitional period. *Taghūts* (pagans), for instance, is a bold expression in the world of political Islam, which is widely used to militate for an Islamic state. The preamble of Iran's Constitution refers to this expression with four different formulations. Islamists use it as a derogatory term not only to describe the state institutions which remain of former regimes, in particular the intelligence services but also to preclude any man-made lawmaking. This term was frequently used by Ayatollah Khomeinī to reject other aspects of former regimes (e.g., “the laws of pagan *Shāh* System” and “institutions which violate the divine laws”). Yet the meaning of the term is contested. In one of his last writings, for example, Ayatollah Montazeri said that the very concept of *welāyat muṭlaqeh faqih* is itself an instance of paganism (*shirk*).

As with the defeat of constitutionalism in Iran in the aftermath of the 1979 Revolution, the failure of Islamist parties to offer a pluralistic political process in the “Arab Spring” countries, especially in Egypt during the constitution-making process, was a new historical blow to efforts to “Islamicize” the constitutional order in the Muslim world. However, the Arab Spring did refuel a spread of enlightening discussions about Islam and democracy, which many parts of Iranian society support. Such debate may contribute to a new intellectual and reformist movement in Iran, which Asef Bayat calls “a post-Islamist constitutionalism”. According to Bayat's formulation, “post-Islamism” represents both a condition and a project. In the first place, it refers to political and social conditions where, following a phase of experimentation, the appeal, energy, and sources of legitimacy of Islamism are exhausted, even among its once ardent supporters. Post-Islamism is neither anti-Islamic nor un-Islamic nor secular.⁴⁴ Rather, it represents an endeavor to fuse religiosity and rights, faith and freedom, Islam and liberty. It is an attempt to turn the underlying principles of Islamism on their head by emphasizing rights instead of duties, plurality in place of the singular authoritative voice, historicity rather than fixed scripture, and the future instead of the past. In short, whereas Islamism is defined by the fusion of religion and responsibility, post-Islamism emphasizes religiosity, in the meaning of spirituality, and rights.⁴⁵

⁴⁴ A. Bayat, *Making Islam Democratic, Social Movements and the Post-Islamist Turn* (Stanford University Press, Stanford 2007) 11.

⁴⁵ A. Bayat “What is post-Islamism?” available at http://openaccess.leidenuniv.nl/bitstream/handle/1887/17030/ISIM-16-What_is-post?sequence=1, accessed in June 15, 2015.

The Islamic Republic is still in search of valid Islamic criteria for its special type of republicanism. The most strategic document in Iran today, called “General Policies of the Islamic Republic”, addresses strategic policies regarding the legal and judicial systems as follows: “Determining appropriate Islamic criteria for all judicial affairs including judgeship, legal representation, professional legal entities, law enforcement and continuous oversight for good performance by the Judiciary.”⁴⁶

Surprisingly, Iranian legislators still have not reached a coherent theory of Islamization, particularly in the realm of public law. In practice, two models of Islamization have been pursued without a promising perspective: a traditional *fiqhī* model and a pragmatist (*maṣlaḥah*-based) model. The first approach, which prevailed in Iran in the first decade of the revolution, is based on a formal and literal understanding of Shari‘ah. The second is a modern Shi‘ite version of the theory of *al-maqāṣid al-shar‘īyah*, based on the conception of the supremacy of interests of the Islamic state over any other rule. For conservative clerics sitting in the GC, full compatibility with the classical rules of Shi‘ite jurisprudence is the key aspect of Islamism and must be respected anywhere. But for those sitting in the Expediency Council, including the same members of the GC, the ultimate principle of Islamicity is the protection of the Islamic state from domestic and international risks. There is a range of unresolved issues relating to Iran’s unmet international obligations under the human rights documents they have signed, as well as to Islamic banking and political crimes. One can add many other issues such as harsh and cruel corporal punishments, including stoning and amputation, gender justice, discriminatory laws based on religion, gender, and political affiliation, and above all the principle of rule of law contrasted with the rule of the supreme leader.

It is clear that Iran, perceived as a plural religious society, cannot sustain itself with this chronic dichotomy. The key question is whether the country is able to develop a modern, progressive legal system, based on the recognizance of human dignity, while at the same time being in harmony with Shari‘ah. Through this, a sort of peaceful resolution between Islamism and republicanism might be achieved. Since 1979, the Islamic Republic has exposed Shari‘ah to every possible challenge of modernity. Alongside this exposure, critical Islamic studies, in particular comparative public law scholarship, from within Iranian academia and seminars is on the rise. In fact, the excessive involvement of clerics in the formation of the post-revolutionary legal and judicial system means that Iran now has a large number of clerics who have been educated in both Islamic and modern law faculties and who research, teach, and practice law in everyday life. However, the revealed texts of Islam have the potential to speak in multiple voices depending on the context. Presently, even within the Shi‘ite seminaries, which are independent from academic and secular institutions, one finds increasing sympathy with ideas about the undesirability of integrating religion and state. The challenge is that for most Shi‘ite religious leaders, the current system, despite its greater or lesser injustices, represents a historical opportunity to realize an ideal system of Islamic justice in Iran. Is this movement, which is increasingly digitalized, capable of completing the unfinished project of a human rights-based constitutional democracy in Iran and of establishing a democratic rule of law? What is clear is that the Islamized legal and judicial system is unfinished.

If we acknowledge the rule of law as a constitutional principle for modern state building, we could argue that the unfinished project of the 1979 Iranian Revolution is to establish a rule of law system in which the law affords adequate protection of fundamental human rights. This objective may also be found in the very text of the constitution itself.⁴⁷

⁴⁶ Sections 1–9 and part 13 of this document are available at <http://parliran.ir/index.aspx?fkeyid=&siteid=1&pageid=3367>, accessed June 15, 2015.

⁴⁷ According to T. Bingham, *The Rule of Law* (Penguin Books, New York 2011) 8.

Its core value is “that all persons and authorities within the state, whether public or private, religious or secular, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁴⁸ This is a basic development which goes beyond the existing *maṣlaḥah* principle in the constitution based on the simultaneous exercise of law and arbitrary discretion. In post-Islamist constitutionalism, however, questions of legal right and liability should ordinarily be resolved by the application of law and not the exercise of discretion. This does not mean that judges or public administrators are automatons lacking the ability to take decisions in individual cases. Rather, it means that any discretion granted by law must not be exercised in an arbitrary fashion. Public officers at all levels must exercise the powers conferred on them with regard to this principle in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not in an unreasonable way. The rule of law also requires the state to comply with its obligations under international as well as under national law.

VIII. THE VIOLENCE OF REVOLUTION AND THE RULE OF LAW

Revolutions are large-scale human experiments for changing the collective destiny, which need to be persistently continued as struggles to realize objectives of social transformation. Beyond initial aspirations for national liberation, social justice, and freedoms, popular revolution in the time of Islamic revivalism is strewn with numerous problems and hurdles which can move some groups of people, those seeking domination, to resort to violence at every turn. The Iranian Revolution of 1979 was largely tainted due to post-revolutionary violence.⁴⁹ Just like in the aftermath of the French Revolution of 1789 and the Bolshevik Revolutions of 1917 (if we consider the final capture of the Russian state by the Bolsheviks a revolution rather than a coup), in Iran we saw the reconstitution of dictatorship and the spread of violence. In the view of the authors, these are not natural results of revolution as such, but predictable consequences of the resilience of underlying structures, of cultures of arbitrary rule, and of closed forms of thought and social action.⁵⁰ The establishment of violent structures was made possible because the resort to violence could be justified as a reaction to various internal and external threats and trends for the new revolutionary system. The major developments were the spread of political assassinations, summary executions of former regime officials, the occupation of the US embassy, economic sanctions, and the Iraqi invasion, implemented through new “revolutionary” institutions (such as the Revolutionary Guards and newly armed Stalinist organizations), and dominated by discourses of power (such as *welāyat-e faqīh* or the “dictatorship of the proletariat”) over new discourses of freedom.⁵¹

Epistemologically, the hostility of Islamist rulers toward a democratic system based on human rights and the rule of law has two key foundations. The first is the certainty that there is a singular truth possessed by the Islamist rulers. This claim makes it difficult to compromise, share power with, or yield power to people who reject this truth. The underlying assumption of the Islamization agenda was that the truth of Islam, as exclusively perceived

⁴⁸ Ibid.

⁴⁹ A. Banisadr, “What Makes a Revolution” (2011) *Harvard International Review*, available at <http://hir.harvard.edu/what-makes-a-revolution>, accessed June 15, 2015.

⁵⁰ *Id.*

⁵¹ *Id.*

by the Shi'ite jurists, provides for a legal and judicial system more complete than any worldly system. The advocates of maximum Islamization argued that without the guidance of religious texts, human reason is defective and untrustworthy. The second foundation is the belief that the singular truth is known to a defined group of learned men (so far, only men) and that it mandates a hierarchical organization of society which makes it difficult to accept the ideas of freedom and democracy.⁵² These two beliefs have resulted in a full range of contradictions throughout the entire constitutional order in Iran, and these produce crises in all aspects of national and international life.

In transitional periods, struggles against violence require a policy of de-violentization. Efforts should therefore be made so that political organizations become freed from Leninist-style politics in which the goal of political struggle is to achieve power, stay in power, and use power. Instead, political plans should become compatible with human rights, collective rights, and the rights of nature. A policy of de-violentization would aim at strengthening the rule of law and at protecting human rights and dignity. This is a crucial task that should begin with respecting the rights of the members of an old regime who are accused of crime and corruption. If their rights are respected, then the rights of others will be as well. The show trials and speedy executions of members of the former regime which occurred during the Iranian Revolution do not constitute good examples for the societies forming part of the Arab Spring and undergoing a transitional justice process. At the time, some Iranian human rights advocates found that when the transitional justice process fails, those seeking power will not stop violating the rights of those who have committed various crimes and will ultimately also violate the rights of the innocent. The experience from Iran suggests that in order to effect a transition to democracy and diminish the likeliness that new authoritarians come into power, certain conditions have to be fulfilled. First, the new political leaders have to distance themselves from the patterns of the old regime and its elites. Lack of experience on the part of ordinary people, for example, should not lead to a reliance on the expertise of the elites of the security sector from the former regime. Looking at the developments after 1979 one may observe that in any department and ministry there are many patriotic experts who are not tarnished by their association with the former regime and who are willing to play a constructive role in rebuilding the country. The people in the streets should not think that their work is done, and that they can leave the rest to political organizations. Through organizing civil society and forming local councils, they must make their presence felt in every corner of the country and at every layer of government. In democracies, public space belongs to the people. When people abandon this political space, it will inevitably be filled with power-oriented political organizations that reimpose repressive practices. The unfortunate lesson of the Iranian Revolution was that most political organizations did not commit themselves to democracy.⁵³

In our view, the major roots of revolutionary violence are to be found in discriminatory structures in society and politics. The constitutional order in Iran under *welāyat-e faqīh* is an example of a regime of discrimination. It is based on a deep theoretical division between the learned and the ignorant, as discussed in the traditional theories of Islamic law. This ruling is prevalent throughout the structure of the constitution and institutionalizes hierarchies of rulers and the ruled, clerical superiors, and ordinary believers. This division is the source of hostility of the Islamic state human rights-based democracy, particularly with

⁵² Michael Walzer, "After the Arab Spring" (2014) 40 *Philosophy and Social Criticism* 426–428.

⁵³ For an insider's analysis of the reconstruction of violence in post-revolutionary Iran, see A. Banisadr, *l'Espérance trahie* (Editions Papyrus, Paris 1982).

respect to the implementation of religious freedoms and women's rights. The authors agree with Walzer's analysis⁵⁴ that this reading of Islam in opposition to freedoms and human rights is not a traditionalist religion but a modern, militant, and fiercely ideological project of an Islamic state based on Shari'ah in opposition to democratic politics.

IX. CONCLUSION AND PROSPECTS

This article has offered a historical and thematic overview of the cultural processes of constitutional and Islamic jurisprudential thought in Iran, with a view to shedding light on current issues in the countries of the "Arab Spring". We argued that the history of constitutionalism in Iran can be read as the history of a campaign for *qānūn* (the rule of law) as opposed to *estebdād* (arbitrary rule). Central to both Iranian history and the contemporary Iranian legal system is an unresolved conflict within the post-revolutionary constitutional order between Shari'ah and a human rights-based legal system. Two revolutions in the twentieth century demonstrated the complexities of this question: while the Revolution of 1905–1907 aimed to constitutionalize the arbitrary rule of the *Shāh*, it generated a complicated question about how to constitutionalize the rule of the clerics which has been debated throughout the twenty-first century.

The debate between followers of Islamism and those pertaining to secularism, however, has never been defined and explained in political or legal terms in Iranian constitutionalism since its origins in 1905. While the revolution in Iran enabled the Islamic aspect of the state to dominate the secular, in countries like Algeria, Syria, and Egypt, it is a secular military which now dominates the Islamic characteristics. The comparison between Iran and Egypt is particularly relevant because it shows how the separation of Islam and democracy in the countries of the Islamic Middle East with a majorly Muslim population can lead to either secular or religious authoritarianism. The post-revolutionary constitutional system in Iran is in a process of constant change, which will be further affected by political changes in the greater Islamic world during the period following the Arab Spring. Ongoing domestic discussions about the complexities of creating fundamental political change while resorting to the rule of law (i.e., the idea of mainstreaming the current constitution with all its shortcomings) are intensive. The fact that this attempt to redesign the relationships between law and Islam dates back to the sixth century, and the rise of Shi'ite Iran makes it even more complicated.

By situating the uprisings during the Arab Spring in the context of the history of the Iranian Revolution, it is possible to argue that liberation from a failed or hated old regime is much easier than the free, fair, and democratic construction of a new political system. Constitution-making is vital to this process. The project of a progressive Muslim constitutionalism based on power-oriented readings of Islamic texts proved to be a historical failure in Iran due to both internal and external factors. Apart from undemocratic foreign interference, deep flaws and pathologies paved the way for the dominance of totalitarian and fundamentalist Islamic theories. The speedy and popular post-revolutionary constitution-making process failed to engage an extensive public deliberation for a free and democratic society with republican institutions and based on the rule of law, or to reconfigure freedom and Islamic discourses in the public sphere. Instead, it freed totalitarian forces inside Islamic centers to impose their theocratic new order.

One controversial outcome of these uprisings was the empowerment of those advocating for an Islamic state, including Salafists, who had been waiting for decades for an

⁵⁴ Michael Walzer, "After the Arab Spring" (2014) 40 *Philosophy and Social Criticism* 426–427.

opportunity to present their views of a classical Islamic state. Despite their concerns about Shi'ite influence, the Islamic character of the Iranian Revolution was particularly attractive to Sunni Islamist parties in Afghanistan, Pakistan, Iraq, Lebanon, Syria, and the Arab states in the Persian Gulf, Egypt, Sudan, and the Maghreb countries; in the words of one member of the Egyptian Islamic Jihād, who was imprisoned in 1981 for his group's involvement in the assassination of Anwar Sādāt and who spent twenty-six years in and out of Egyptian prisons: "In the early 1980s, we were all inspired by the Iranian Revolution and admired Khomeīnī, and we still admire much about the Islamic government of Iran. But we are different and we don't want them to rule over us."⁵⁵

Islamic jurisprudence and its related discourses still play a major role in the public spheres of Muslim societies. When the movements in Iran of the last three decades are viewed in the context of developments in the Arab Spring, one can argue that until a democratic Islam is widely accepted and practiced by a majority of people in Muslim societies under the direct rule of Islamic law, there is little opportunity to build stable constitutional democracies in these countries. The dichotomy of state and religion in Islamic societies has a devastating effect on the democratization process.

Obviously, the dominant paradigm of Islamic constitutionalism in countries like Iran is not human rights-based. This paradigm defines justice as an exclusive concept resembling a monologue, which is perceived as a consequence of *fiqhī* norms, not as a criterion for their rightness. In this paradigm, tradition (Sunnah) is understood as a meta-historical and dogmatic practice in which the ends justify the means. In a human rights-oriented legal system, on the contrary, the ends should be expressed in the means, while general common values and moral principles would be considered at all stages of legislation and during the application of laws. Similarly, in the dominant paradigm of Islamic constitutionalism, freedoms are defined as domination in power relationships and are limited to the rights established by traditional reading of Shari'ah and may be exercised only so far as possible within a hegemonic relationship between a ruler and citizens. The core elements of the Islamic paradigm are principles of duty and absolute forbiddingness (maximal criminalization). They permit a regime of discriminatory laws and regulations. To transform this type of legal doctrine, there is need to redefine Islamic law toward a discourse of nondomination which provides an open horizon of understanding and common sense in society.⁵⁶

One consequence of the 1979 Iranian Revolution was to engage *fiqh* with the modern world and with the modern constitutional systems based on the rule of law. More recently, the Arab Spring movements reinforced the view that the dialogue between *fiqh* and democracy is vital for the political development of the Muslim world. At the center of this dialogue should be the right to life because as long as Islamic jurisprudence prioritizes the protection of religion over the right to life, its efforts to achieve the transition to constitutional democracy will be difficult. Establishing the rule of law without conversation with *fiqh* is risky because when democracy faces the *fiqh* still prevailing since the premodern world, it will be endangered. The Arab Spring contributed to the historical engagement of *fiqh* and constitutional democracy from Arab and Sunni perspectives. Inter-Islamic dialogue about this tension, between different parts of the greater Middle East, can provide intellectual and institutional resources to effect a paradigm shift of Muslim conceptualizations about a human rights-centered constitutional order.

⁵⁵ Shibley Telhami, "Arab Perspectives on Iran's Role in a Changing Middle East," available at http://www.wilsoncenter.org/sites/default/files/arab_perspectives_irans_role_changing_middle_east.pdf, accessed July 3, 2015.

⁵⁶ A. Banisadr, *Uṣūl-e Rahnemā-e Islām* (Enghelab Islami Press, Paris 1993).

There are precedents for such a paradigm shift in Islamic law. As discussed in our work on the Qurʾān and freedom,⁵⁷ legal and judicial systems that issue criminal sanctions on apostasy cases, and particularly the execution of “apostates”, contradict the main source of Islam; in the Qurʾān there is no crime of relinquishing one’s belief which would entail worldly sanctions. According to the Qurʾān, there is to be no compulsion of religious beliefs (chapter 2, verse 256). Instead, when reading passages in the Qurʾān stating that freedom is the essence of all living beings and that the ultimate purpose of law is to protect both human life and the environment from all forms of despotism and violence, we can argue for universal human rights. The basis for this argument is the model of *laïcité* rooting in a reformed modern Islamic theology in which the state takes a neutral position toward all systems of belief in order to protect universal human rights rather than privileging particular groups, religious faiths, or systems of belief.

Throughout the last century, the Shīʿite jurist has been a key player in the construction of Iran’s constitutional order. The substantial role of Shīʿite jurists has reached its apex under the doctrine of *welāyat-e faqīh*. While the Shīʿite jurists contributed to the construction of a relatively modern system based on the rule of law in the first and second phases of Iranian constitutionalism (i.e., between 1905 and 1907, when they substantially supported the first Constitutional Revolution and the subsequent Supplement to the Fundamental Law from 1906, and in 1939 with the drafting of Iran’s first modern Civil Code), beginning with the Islamic Revolution of 1979 they undertook a serious deconstruction of constitutionalism and rule of law in Iran. One of the paradoxes of the process of Islamic constitutionalism in Iran is that unlike under today’s rule of *walī-e faqīh*, the role of the Shīʿite jurisprudents of the first and second phases of modern Iranian legal history is widely recognized as being substantially constructive even though they made no official pronouncement of an Islamic Republic, no claim to revive Islam, and no mention of any specific theory of the Islamic state. This becomes apparent in the constitutions themselves. Comparing Article 2 of the first constitution of 1906 with Article 4 of the 1979 Constitution, one can observe that the very formulation of Article 2 in the first constitution was founded on the basis of a secular state, while Article 4 of the 1979 Constitution loudly speaks for an authoritarian concept of an Islamic state ruled by the clergy, as formulated by Ayatollah Khomeīnī in the mid-1970s.

The increasingly arbitrary rule of *welāyat-e faqīh* and its powerful instruments in the past decade, particularly in the aftermath of the 2009 Green Movement has made the question of constitutionalism in Iran even more complex than it was in 1907. After Khātami’s reformist government failed to strengthen a formal conception of the rule of law and constitutionalism, a more arbitrary and militant rule of *welāyat-e faqīh* evolved. Khātami’s approach was to strengthen the formal conception of the rule of law rather than filling it with substantive content as he maintained respect for law itself. The use of governmental decrees (*aḥkām ḥokūmati*) to bypass normal lawmaking process increased and prevailed in the system while failing to fulfill constitutional requirements. The official interpretation of the Council of Guardians was that Article 110 of the constitution placed the leader above positive law and endowed him with supra-legal authority.⁵⁸ Political radicalization in 2009 was accompanied by a conservative-dominated judiciary that insisted on the revival of radical legal and judicial policies in opposition to human rights. To the new head of the judiciary, human rights are a Western product, and since the element of the “Republic” in the Islamic Republic is

⁵⁷ A. Banisadr and H. Rezaei, *Qurʾān: Ketāb-e Bayān-e Esteghlāl wa Azādī*, (Frankfurt 2012).

⁵⁸ In particular, see the interpretations of articles 57, 110, 111, and 112 in I. Mūsazādeh, *Dadrāsī-e Asāsī dar Jomhūrī-e Eslāmī-e Irān, Moʾawenāt-e Tadwīn, Tanqīh wa Enteshār-e Qawānīn wa Moqarrarāt*, Tehran 1390/2011, 209–251 and 594–678.

fully subordinated to the divine rule of *faqīh* at both national and international levels, the Iranian government is not even committed to those international human rights obligations it has ratified.⁵⁹

Many reformers have now concluded that it is impossible to remain both a devout follower of Islamism in the form of *welāyat-e faqīh*, as it is articulated in the 1979 Constitution, and to enjoy a developed, democratic, and humane justice. In this moment, the Iranians are interested in learning from the successful models of constitution-making in other parts of the Muslim world, such as the post-revolutionary model of the Tunisian Constitution of 2014 and the Egyptian Constitution of 2014 (as stated on the paper). Looking at the imbalances in the new constitutions which emerged following the Arab Spring, including the authority given to the armed forces in Egypt, the key question for the Iranian population is how to establish a republic based on the rule of law after three major revolutionary movements during one century.

There are signs that Islamic jurisprudence and related discourses still play a major role in the public spheres of most Muslim societies like Iran and the societies of the Arab Spring. Experiences show that the unsolved dichotomy of a modern state committed to the rule of law, human rights as well as to religion in Islamic-shaped societies has a devastating effect on the democratization process. This dichotomy is extremely harmful to both religion and the state, particularly because various kinds of discrimination (against minorities, women, children, and believers and thinkers who do not follow Islamic views) will be reinforced by it. In other words, the most efficient safeguard for democracy is a development toward human rights and dignity (the human as an end in itself) in religious discourses.

Rethinking and renewing the underlying assumptions of Islamic jurisprudence suggests a cohesive solution to this problematic. This aspiration in itself, however, reveals an unfinished project of Iran since 1979: an “Islamic Revolution” in the sense of a paradigm shift (*enqelāb-e fekrī*) that is equivalent to a revolution in our underlying assumption and pre-understandings of Islam. Rethinking and renewing the assumptions of the current paradigm should be grounded in the ontology of Muslims and expanded to individual Muslim behaviors purposing constant self-criticism (i.e., the Great *Jihād*).⁶⁰ Emerging Muslim politicians who espouse a democratic interpretation of Shari‘ah should have a solid foundation to stand on. In our assessment, based on the Iranian experience, Islamic jurisprudence which constitutes a discourse of freedom can promote a human rights-based legal system but supporters of this view will need to work hard for its broader acceptance in traditional Muslim societies. To reach these audiences there would be the need to encourage a more

⁵⁹ Available at http://www.bbc.co.uk/persian/iran/2011/12/111222_103_unga_larijani_response.shtml, accessed June 15, 2015.

⁶⁰ There is an interesting etymological and conceptual connection between *Jihād* and *Ijtihād* originally. The idea of “working hard” for accomplishing an ethical and moral life lies at the center of both concepts in their two variants. Exerting yourself for the sake of God or for promoting the higher goals of a pious community was an act that was characterized by the use of *jahādah/ijtihadah* during the first two centuries of Islam, where the conceptual connection between the two terms was still made. As Wael Hallaq rightly explores this special semantic within the Islamic legal tradition, the former term was the realm of the “private” individual who will have to “struggle” or “do his or her best” to live by a moral conduct prescribed by the law. *Ijtihad*, on the other hand, is the realm of the “professional” or elite (not elitist) jurist who will have to do his best to reach, by highly competent reasoning, that positive ruling for the benefit of the “private” individual, the consumer of the law. See Peter C. Hansen, “Developments of Islamic Legal Doctrines: Interview with Wael B. Hallaq, The Legal History Project,” available at <http://www.legalhistory.com/LargeFrame.php?Choice=Interviews&N=Hallaq1105>, accessed June 15, 2015.

sophisticated use of *ijtihād*, or of independent interpretation of Islamic legal sources, primarily of the Qur'ān. At the same time, in order to explore viable models for establishing the rule of law in emerging Muslim democracies, research should be conducted to understand the relationship between Islamic law and religious and political power, and how certain forms of it led to despotism. The experiences of some non-Arab Muslim states such as Turkey, Indonesia, and Malaysia are now experimenting with balancing democracy and Shari'ah, and can present living examples to countries in the greater Middle East. The Arab Spring context provides renewed hope that the project of establishing an Islamic and at the same time democratic state based on human rights and the rule of law can flourish provided it is continuously viewed with critical thought.

Lessons from the Iraqi Constitution-making Process

SHAIKH HUMAM HAMOUDI

I. INTRODUCTION

The process of writing a constitution in a country that has experienced an invasion goes along with enormous difficulties in various fields, such as the role of the occupying force, the participation of former regime members, and the question of legitimacy as such. Who should write the constitution: the occupying force, foreign experts, or local politicians and lawyers? Can such a constitution at all be accepted by a large majority of the population, particularly if the occupying force has imposed conditions in regard of authorship, process, and contents?

The regime of Ṣaddām Ḥusayn and the Ba‘th Party collapsed following the invasion of Iraq by a US-led multinational force in April 2003. Subsequently, the Law of Administration for the State of Iraq for the Transitional Period (TAL) was decreed,¹ which regulated the formation of an elected government. The second step in Iraq’s Constitution-making process was the establishment of the 275-seat Transitional National Assembly (TNA) as provided in Art. 30 TAL. It was elected in January 2005 and tasked with the drafting of a permanent constitution,² which should replace the TAL.³ After the drafting process in the Assembly had officially come to an end, a group of politicians called the “Leadership Council” continued to work the constitutional draft until two days before the referendum in October 2005.

¹ The TAL is printed in Chibli Mallat, *Iraq: Guide to Law and Policy* (Aspen/Wolters Kluwer, New York 2009) 132 et seq.

² Charles Tripp, *A History of Iraq* (Cambridge University Press, Cambridge 2010) 286.

³ Art. 62: “This law shall remain in effect until the permanent constitution is issued and the new Iraqi government is formed in accordance with it.”

Many political and religious leaders desired to contribute to this important document, which would constitute the basis for the emerging, new Iraqi state. The involvement of the *marjaʿiyah*—an influential Council of Grand Ayatollahs with Ayatollah ʿAli al-Sistānī considered to be first among equals, which constitutes the religious leadership the Shīʿites—is particularly noteworthy.⁴ The prospect of constitutional and legislative guarantees of their rights and interests also made the Kurds and other factions interested in the constitution-making project.⁵ Even the dissenting currents positively influenced the atmosphere of discussions, as their objections and demands invigorated and stimulated the public debate that took place between June 15 and October 15, 2005. The story of “Writing the Iraqi Constitution” as a legitimate basis for state and society will not be forgotten by the Iraqi people. As the first constitutional project in an Arab country in the 21st century, it has influenced the developments in other regional countries after the “Arab Spring.”

However, various shortcomings pervaded the process of writing the constitution. First and foremost, some considered the presence of foreign military forces a challenge to, and even a breach of, its legitimacy. The US administration was at odds with itself: It seemed intent on setting up a fully functioning democracy, with a democratic constitution, while it was, in fact, contradicting to this declared goal through its actions. Most of all the United States never answered the crucial question of how Iraq, a divided, occupied country with a dictatorial past and rapidly disintegrating institutions, could be turned into a democracy.⁶

Second, multiple political parties including the Association of Muslim Scholars headed by Ḥārith al-Ḍārī, the General Council for the People of Iraq headed by ʿAdnān al-Dulaymī, and the Iraqi Front for National Dialogue chaired by Ṣāliḥ al-Muṭlaq undertook strenuous efforts to prevent the writing of a constitution and foster doubt in the Commission’s legitimacy, often organized along religious-ethnic lines.⁷ One of their accusations was that the Transitional National Assembly did not properly represent all spectrums of the Iraqi society, as Sunni Arabs were underrepresented. They also criticized that the Sunni Arabs, who were later added to the Commission that drafted the permanent constitution by the US-led Coalition Provisional Authority (CPA) were not elected and therefore lacked legitimacy. Some parties sought to delay the drafting of the constitution until after the planned elections, the attainment of national unity, and the removal of the TAL, which was written by the occupying powers. Most of them voiced unrealistic demands and stood at the same time against the demands of others, such as rejecting denominational pluralism and federalism. They also reproached the Commission for its foreign tutelage and suggested that the text of the constitution was merely translated, not genuinely written by Iraqis.⁸

⁴ The Ayatollahs who formed the *marjaʿiyah* in 2005 stemmed not only from Iraq but also from Iran and Afghanistan. They were also teaching at Najaf’s religious study center, the *al-ḥawzah al-ʿilmiyah*. See: Haider Ala Hamoudi, *Negotiating in Civil Conflict. Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, Chicago 2013) 136 et seq. See also: Assem Hefny, “Religious Authorities and Constitutional Reform: The Case of Al-Azhar in Egypt” (*in this volume*), who analyzes the role of religious authorities in the constitution-making process in Egypt.

⁵ See: Bawar Bammarny, “The Legal Status of the Kurds in Iraq and Syria” (*in this volume*).

⁶ Charles Tripp (n 2) 277.

⁷ Andrew Arato, *Constitution Making Under Occupation* (University Press, New York 2009) 50.

⁸ See: Nathan J. Brown, “Iraq’s Constitutional Process Plunges Ahead” in *Carnegie Endowment for International Peace* (July 4, 2005), <http://carnegieendowment.org/2005/07/18/iraq-s-constitutional-process-plunges-ahead/>, accessed September 19, 2015.

Third, remnants of the former regime were determined to undermine the legitimacy and stability of the new system, and attempted to prevent the drafting of a democratic constitution with threats and violence. An escalating insurgency, terrorist attacks, and threats of genocide handicapped the long-needed dialogue between the Iraqi parties.⁹ For instance, the drafting period witnessed sectarian provocations in the city of Madā'in, near Baghdad, and in the town of Tal 'Afar. It also witnessed a crisis between the government represented by the Ministry of Interior, and a large part of the Iraqi Sunni community following the Operation Lightning. These events influenced the constitutional debate and, directly or indirectly, the draft constitution itself, which was supposed to be a document of reassurance, but was written under contrary circumstances.

Fourth, the lack of a generally accepted philosophical basis for the future state also hindered and lengthened the debates of the Constitutional Commission. For these reasons, it was not certain if this process would eventually lead to a system of government as demanded by Art. 4 of the TAL:

The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations. The federal system shall be based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession.

The outcome of this multi-interest project is thus a result of bitter, complicated struggles.¹⁰

II. THE MAIN STEPS TOWARD AN IRAQI CONSTITUTION

The drafting of the Iraqi Constitution took place in a two-step process. First, the US-led Coalition Provisional Authority (CPA) enacted the Law of Administration for the State of Iraq for the Transitional Period (TAL) as an interim constitution on June 28, 2004, legally framing the drafting process of the final constitution. On this basis, the Transitional National Assembly was elected on January 30, 2005, as an interim parliament with the mandate to draft of a permanent constitution.

The TAL was drafted by an Iraqi committee, with advice from US and UN experts. Some of the committee members were selected from the Iraqi Governing Council (IGC), which was appointed by the CPA after the war and occupation of Iraq by the coalition forces to administer the country; other members did not belong to the IGC.¹¹ This transition period

⁹ *Id.* 288.

¹⁰ The present author will describe the constitutional process and the related challenges not only on the basis of publicly accessible information but also his personal experience as a chairman of the Constitutional Commission, member of the "Leadership Council," and later Head of the Constitutional Review Committee of the elected Council of Representatives.

¹¹ See: Faisal A. R. al-Istrabadi, "Islam and the State in Iraq. The Post-2003 Constitutions" in Rainer Grote and Tilmann J. Roeder, *Constitutionalism in Islamic Countries* (Oxford University Press, New York 2012). Al-Istrabadi was one of the authors of the TAL. See also: Zaid Al-Ali and Philipp Dann, "The Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor" (2006) 10 Max Planck UNYB 423, 436.

began on June 30, 2004, and was meant to end in late December 2005.¹² During this time, the TAL was seen as the supreme law of the land.¹³

The TAL stated that the Transitional National Assembly was to be composed of elected politicians who represented the different social currents in such a way as to avoid bias.¹⁴ Although some 58% of the national electorate turned out during the election for the Assembly, it is noteworthy that Shi'ite and Kurdish politicians commanded over three-quarters of the seats. The United Iraqi Alliance (UIA), a coalition dominated by the Shi'ite-based Islamist parties Supreme Council for the Islamic Revolution in Iraq (SCIRI) and the Islamic *Da'wa* Party, held 140 of the Assembly's seats; the overall number of seats was 275. The next largest bloc was the Democratic Patriotic Alliance of Kurdistan with 75 seats. The Sunni Arabs, representing some 20% of the Iraqi population, were almost unrepresented.¹⁵ This was not only due to their own boycott of the Transitional National Assembly elections but also because a number of their candidates were excluded as Ba'athists, neo-Ba'athists, or Arab Nationalists.

In an endeavor to keep members of the dissolved Ba'ath Party out of the constitution-making process, the TAL provided specific requirements for the nominees of the National Assembly.¹⁶ However, practice has shown that the de-Ba'athification was not accomplished and that many influential members of the Ba'ath Party remained in powerful positions. Others were dismissed although they had only weak ties to the Ba'ath Party, or none at all. In these cases the de-Ba'athification process was used to settle old scores. In an attempt to foil the constitutional project, the remnants of the former regime threatened the chairman of the Constitutional Commission and are suspected of assassinating one of the Sunni participants.¹⁷

Expectations from the Transitional National Assembly were high: It was supposed to respect the technical state-of-the-art and develop a logic to organize the content of the constitution. The constitutional form should to meet modern requirements, the contents reflect the political and social situation and evolution, and the resulting document should be able to gain the greatest possible national and international acceptance and support. In their efforts to fulfill these tasks, the members were supported by foreign experts, whose work was useful, though sometimes rather constraining.

Art. 60 of the TAL outlined the way in which the drafting process should take place. The provision stipulated that the Transitional National Assembly was to draft a permanent constitution and encourage public discussions about it across Iraq through public meetings and the media. This process of communication was notably spurred by the Assembly's Public

¹² Art. 2 TAL reads: "(A) The term 'transitional period' shall refer to the period beginning on 30 June 2004 and lasting until the formation of an elected Iraqi government pursuant to a permanent constitution as set forth in this Law, which in any case shall be no later than 31 December 2005, unless the provisions of Art. 61 are applied."

¹³ Art. 3.

¹⁴ Art. 30 TAL reads: "[. . .] (C) The National Assembly shall be elected in accordance with an electoral law and a political parties' law. The electoral law shall aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly and of having fair representation for all communities in Iraq, including the Turcomans, Chaldo-Assyrians, and others."

¹⁵ Charles Tripp (n 2) 296.

¹⁶ Art. 31 (b) TAL.

¹⁷ The killed representative was Mijbil Shaykh al-ʿIssa. See: "Iraq: Annan condemns murder of Sunni constitutional committee member," *UN News Centre* (July 19, 2005), <http://www.un.org/apps/news/story.asp?Cr=iraq&Cr1=&NewsID=15072>, accessed September 19, 2015.

Dialogue Committee, which established contact with a variety of organizations and institutions all over the country in order to open the drafting process to society and enhance its legitimacy. The report of this committee, outlining the scope and depth of its work over a period of time, encouraged many civil society organizations and institutes to carry out educational campaigns to inform the public and explore trends in the community about sensitive issues in the constitution. The Iraqi media also played a significant role in the definition and discussion of the constitutional articles.

Almost all societal groups, including women and members of the many different religions and sects, became engaged in heated debates. Their multiple perspectives brought the attention to all articles of the constitution.

The United Nations Assistance Mission to Iraq (UNAMI), with the support of the European Union, also spent millions of dollars on media campaigns to raise awareness of the constitution and the planned referendum, using newspapers, radio, and satellite TV channels. Another actor in the final mobilization of the public was the *marja'iyah*, which encouraged people to vote in favor of the constitution.

The draft of the constitution was to enter into force after a referendum on October 15, 2005, provided that “a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it.”¹⁸ Sixty-three percent of the electorate turned out, 79% of whom voted in favor of the constitution. The turnout differed in the various regions: While the Kurdish and Shī'ite governorates voted overwhelmingly in favor of the constitution, it was rejected in three mainly Sunni Arab governorates. However, only in two governorates more than two-thirds of the voters voted against the constitution. The constitution was thus approved.¹⁹ The general elections on December 15, 2005, with a participation of 80% may be regarded as an even stronger backlash to the former regime's foundations, policies, and procedures.²⁰

III. WHO WROTE THE CONSTITUTION? SUNNI PARTICIPATION, THE CONSTITUTIONAL COMMISSION, AND THE LEADERSHIP COUNCIL

When the TAL was written, its authors and the CPA did certainly not expect that one significant societal group would boycott the envisaged political and constitutional process. As described, the Transitional National Assembly established a 55-seat Constitutional Commission, which would be answerable to the whole interim parliament, in May 2005.²¹ Due to the boycott of the Assembly elections on January 30, 2005, the Sunni part of the population was underrepresented in both the Assembly and the Constitutional Commission.²² In addition to the two Sunni members already sitting in the Commission, the US-dominated Coalition Provisional Authority (CPA) wanted therefore 15 Sunni Arabs to join the Commission as members and an additional 10 Sunni Arabs in an advisory capacity.²³ These 25 individuals joined the Commission on July 5, 2005. The issue of Sunni

¹⁸ Art. 61 TAL.

¹⁹ Charles Tripp (n 2) 301.

²⁰ Charles Tripp (n 2) 302: “The high turnout was also a result of the conclusion of the Sunni Islamist parties that their previous boycott had done them little good.”

²¹ Nathan J. Brown (n 8) 4.

²² “Shia majority for Iraq parliament,” *BBC News* (December 11, 2012), http://news.bbc.co.uk/2/hi/middle_east/4273931.stm, accessed on September 19, 2015.

²³ Zaid Al-Ali and Philipp Dann (n 11) 439.

participation was given special attention because of the growing insurgency in Iraq, which was mainly fueled by the disaffection amongst the Sunni community.²⁴

However, the Sunni participation to the Commission lasted for less than a month.²⁵ No offers, concessions, or privileges changed the position of the Sunni representatives. Their actions and policies in the Commission, as well as their later decision to vote against the constitution on the one hand, and their participation in the elections to the Council of Representatives on the other, were primarily driven by their keenness to protect their interests.

The Constitutional Commission's chairmanship soon decided to delegate the work on the constitution to subcommittees, in order to tackle the problem of time, to deal with the problem of the largeness of the Commission, and to direct the discussions and analyses toward reaching concrete, reasonable results. The six subcommittees formed by the Constitutional Commission dealt with the topics of basic principles, system of government, federalism and local government, constitutional guarantees, rights and duties, and transitional and amendment provisions.²⁶ Besides the various subcommittees, the National Dialogue Committee played a crucial role in the public debate as established by item 60 (C) of the TAL, holding regular meetings as well as press conferences.

However, the downside of the formation of subcommittees became visible when the result of their work had to be put together. Even though the Constitutional Commission had also formed an additional subcommittee to coordinate among the subcommittees, there was a significant lack of unity and cooperation between the different subcommittees in the writing and preparation of the draft constitution during the drafting process.²⁷ It took frequent efforts to revise the drafted sections and the draft as a whole, in order to arrange the sections and articles properly, erase overlapping and repetitive parts, and ensure the use of proper and coherent terminology.

While the Constitutional Commission and its subcommittees could handle a great number of details, more fundamental questions turned into serious problems when the deadline for the six-month extension (Art. 61 f of the TAL) approached.²⁸ The Constitutional Commission thus decided to refer the disputed issues to meetings of the most important leaders of the country (or, in some cases, their representatives). The around 15–18 members of the so-called “Leadership Council” or “Kitchen” began meeting in August 2005. The group included Jalāl Ṭalabānī of the Patriotic Union of Kurdistan (PUK) and Mas‘ūd Barzānī of the Kurdistan Democratic Party (KDP), ‘Abd al-Ḥakīm of the Shī‘ite Supreme Council for the Islamic Revolution in Iraq (SCIRI) and Ibrāhīm al-Ja‘fari of the Islamic *Da‘wā* Party, for the Sunnis Ṣāliḥ al-Muṭlaq (Iraqi Front for National Dialogue), ‘Adnān al-Dulaymī (General Council for the People of Iraq), and Iraqi Islamic Party (IIP) leaders including Ṭariq al-Hāshimī, joined by the American diplomat and advisor to the Kurdish leaders Peter W. Galbraith and the US Ambassador Zalmay Khalilzad.²⁹ Some observers criticize that the “Leadership Council” excluded the Sunni side in order to facilitate agreement between the other negotiators.³⁰ Indeed, the Sunni representatives were not present

²⁴ *Id.*; Andrew Arato (n 7) 212.

²⁵ Zaid Al-Ali and Philipp Dann (n 11) 439.

²⁶ Nathan J. Brown (n 8) 4.

²⁷ *Id.*

²⁸ *Id.* 7 et seqq.

²⁹ Ali Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace* (Yale University Press, Yale 2009) 413.

³⁰ Zaid Al-Ali and Philipp Dann (n 11) 440.

in all meetings; but this was rather due to the shortage of time and the targeted empowerment of the Shi'ite and Kurdish faction in making reliable decisions concerning constitutional powers.³¹ In this sense, Galbraith reminds us of the Sunni's objection to almost all proposals, which frustrated the Shi'ites and the Kurds to such an extent that they finally stopped negotiating with the Sunni side.³²

Nonetheless, the American diplomats and experts, who exercised significant influence on the drafting process of the "Leadership Council", supported the Sunni cause. It seemed that they expected that the presence of some Sunni politicians could solve the divergences, but the insistence of the present Sunni representatives to be joined by the president and the vice president of the Transitional National Assembly and other officials made the issue even more difficult.

A key point of criticism throughout the constitution-making process was the involvement of political leaders in drafting the constitution. The establishment of the Leadership Council encouraged some members of the Constitutional Commission, who belonged to political blocs, to refer many issues, including the formation of regions, wealth distribution, Iraq's identity, civil status, and others, to the Leadership Council so as not to carry any responsibility for the delays or burdens of not finding solutions once the Constitutional Commission's time was up. Other, more critical voices in the Constitutional Commission regarded the work done by the Leadership Council and that of legal experts who were assigned to support the subcommittees in formulating articles in accordance with constitutional standards as a violation of their mandate. On the other hand, some of the legal experts protested against the Constitutional Commission. These problems threatened the constitutional process as a whole.

The changes and amendments outside the framework and without the participation of the Constitutional Commission led to the marginalization of the elected Commission entrusted with drafting the constitution. The members of the Leadership Council did not respect even their own representatives in the Commission, adding items that were never on the table for discussion, and rejecting articles accepted by most Commission members and all factions, as being inaccurate or inappropriate. This created reservations among many members of the Commission who opposed the approval of their political leaders in acknowledging these items.

According to Charles Tripp, the impression that Kurdish and Shi'ite leaders bypassed the Constitutional Commission was reinforced by the Sunni Arab members' boycott of the presentation of the outcome document at the Transitional National Assembly.³³ Because of the sensitivity and delicacy of the issue, it was not easy for the Constitutional Commission and its subcommittees to carry out all of the amendments they deemed necessary. Therefore, there is a discrepancy between the formulations of the constitution and the ideas they were based on. The Commission had to give legitimacy to decisions it did not contribute to, even decisions it may have opposed. This situation represented a setback to former times when leaders of parties and blocs controlled the decisions of the members of elected committees. It also weakened the legitimacy of the National Assembly, aggravated by the fact that some, including the president of the National Assembly, considered the consent of political leaders to be equal to "legitimacy", as it is referred to by Art. 60 of the TAL. In addition, time constraints rendered the chances of public education and participation, an inherent task of

³¹ International Crisis Group, "Unmaking Iraq: A Constitutional Process Gone Awry" (2005) 3 Middle East Briefing 19.

³² Peter Galbraith, *The End of Iraq* (Simon and Schuster, New York 2006) 193–194.

³³ Charles Tripp (n 2) 301.

the Transitional National Assembly, almost impossible.³⁴ Hence, whenever the bloc leaders decided it meant that the Commission had decided and that the Assembly had agreed, without enabling a debate and vote directly in the Assembly. Many of the changes that the political leaders pushed through without further consultation of, or endorsement by, the elected bodies were not thought through and crafted in incomprehensible ways.³⁵ This weakened the prestige of the constitution, bringing the whole process into question and undermining its credibility.

It should be mentioned that the transitional government also formed a committee consisting of a group of ministers to support the constitutional process. However, this was more of an act of propaganda than a helping hand. The group of ministers did not contribute to the proposal of constitutional articles.

IV. UTILIZING FOREIGN EXPERTS: USEFUL OR CONSTRAINING?

The idea of benefiting from the experiences of others, identifying potential problems, and finding appropriate solutions through the experience of international experts, is a sound, important, and useful one. The experience of writing a permanent constitution in Iraq proved that international experts can be helpful, provided that they possess understanding, experience, and knowledge. They have to have the ability to find practical solutions and not only theoretical ones. The draft of the Iraqi Constitution was prepared by elected politicians and then improved and formulated by the constitutional experts.

During the constitution-making phase, within the Constitutional Commission, foreign and international experts were officially forbidden from participating in the drafting process.³⁶ However, already before the process of legal drafting, the Commission consulted with outside experts about the content.³⁷ Arab countries, the United Nations, different institutes, international organizations, and nongovernmental organizations as well as the occupying forces, particularly the United States, provided commentaries to a number of the drafts that were produced.³⁸ In addition, the TAL—which was influenced by international experts—served as the basis for the permanent constitution.³⁹ Iraqi or other Arab experts, provided that they were politically and ideologically neutral, had a very beneficial effect on the drafting of the constitution in its final form. The Office of Constitutional Support in the United Nations Assistance Mission for Iraq (UNAMI), headed by Nicholas Haysom, also provided the Constitutional Commission with important assistance.⁴⁰ On the other hand, the presence of foreign ambassadors, especially the presence of the ambassador of the United States, cast a shadow over the independence of the Iraqi decisions, prominently in the constitutional discussions by the opponents of politicians. The influence of US officials became even more substantial with the establishment of the Leadership Council.⁴¹

³⁴ Andrew Arato (n 7) 220.

³⁵ *See: id.* (n 31) 3.

³⁶ Zaid Al-Ali and Philipp Dann (n 11) 440.

³⁷ Nathan J. Brown (n 8) 4.

³⁸ *Id.* 4.

³⁹ *Id.*

⁴⁰ The UNAMI was established following the Security Council Resolution 1546 (2004) and expanded under resolutions 1770 (2007), 1830 (2008), 1883 (2009), and 1936 (2010).

⁴¹ Zaid Al-Ali and Philipp Dann (n 11) 439: “[A]t least one of the Leadership Council’s plenary sessions was actually held at the U.S. Ambassador’s residence.”

Specific problems that had to be dealt with by the Commission were the federal structure as such and the exclusive powers given to the federal government as opposed to the governorates in particular, taxation relationships among the provincial and the local government, the problem of water and natural resources, as well as the question of a Constitutional Court. Further debates concerned the political system, the role of the army and the armed forces, and the fundamental rights and freedoms. Experts were utilized to help mediate difficult dialogues between different groups. They were also asked to hold meetings with a particular faction or committee that had a crisis or tension in their internal dialogue.

However, despite having access to this contingent of experts, the Iraqi Constitution seems to have benefited surprisingly little from international experience. How can this be explained?

First of all, some of the experts did not impart new information to the Commission members, many of whom had been intensely discussed about the future of Iraq while they had to endure prolonged opposition. Sometimes the Commission and the experts, who mostly stayed for a week or ten days, did not have sufficient time to meet or deal with important issues unattached to the actual constitutional drafting. The experts were further limited by the security requirements. Moreover, the problem of translation constrained communication with the foreign experts. Many ideas were lost due to poor translation, its inaccuracy or length. In addition, some foreign experts' suggestions were not valuable, as they had little to no knowledge of the Iraqi reality and its problems.

The chairman of the Commission took a set of decisions to avoid these problems. Among others, he decided to use records instead of lectures by asking the experts to formulate their ideas and suggestions in written documents, which were then translated and distributed to the members and the relevant subcommittees. Instead of holding lectures, the experts answered a set of direct questions on the issues and problems about which the Commission needed international expert advice. The United Nations provided useful studies and perspectives on these questions. It was also helpful that the experts introduced role models, such as the Spanish, Indian, South African, and Malaysian models. In general, the Commission preferred to take countries similar in their social conditions as examples, such as the states of Asia, as well as taking benefits of the experts who are Arabs or close to the Arabs.

In addition, the chairman of the Commission tried to stay connected to the experts via the Internet. This expanded the use of experts expanded beyond holding seminars.

V. THE SECTARIAN CRISIS

Unfortunately, the sectarianism and nationalism influenced many questions and issues that were supposed to be solved through a dialogue based on an objective and scientific basis. The thorny issues of ethnic-based federalism, including the question of the formation and powers of regions, as well as the matters of the oil revenue distribution and the role of religion, were the key points of dispute during the process of bargaining Iraq's Constitution.⁴² The dialogue on these subjects was unconstructive, as the rejection or support of many members of the Transitional National Assembly was predetermined. The discussion therefore altered from dialogue into accusations. In particular, the fear that former Ba'ath Party members or supporters would try to reinstall the dictatorship enforced suspicions against those who lobbied for a centralized state system. The majority currents, notably the Kurds, the Shi'ites represented through the United Iraqi Alliance (UIA), and the Sunnis, therefore

⁴² See: Andrew Arato (n 7) 223, 233 et seqq.

tried to influence the drafting process according to their own interests, prioritizing them over the all-Iraqi cause.

The Kurds entered into constitutional negotiations as agents of a *de facto* independent Kurdistan, a result of the first Gulf War.⁴³ They were thus in a powerful bargaining position. Additionally, they held exclusive bilateral negotiations with the United States, which indicated their “special relationship” with the occupying powers.⁴⁴ Before entering official negotiations, the Kurds sent a delegation of their own parliament to visit each group that was expected to participate in the constitutional process and distributed the text of a constitution proposed by the parliament of Kurdistan. Their leader Mas‘ūd Barzānī clearly demanded a fully federal state.⁴⁵ Later, the Kurds wrote a protest note accusing the chairmanship of the Constitutional Commission of being biased. The political goal was to have all the decisions made by the Commission renounced, as these didn’t meet the minimum level of what could be accepted by Kurdish leaders. This embarrassed the elected members of the Kurdistan Alliance in the Constitutional Commission, who apologized for signing the protest note as a political position, and expressed their respect and appreciation for the Commission’s chairmanship.

The Shī‘ah representatives, on the other hand, had a special interest in the role of religion; that is, whether the Sharī‘ah would be the only source of legislation or among other sources, the protection and management of the holy sites and shrines in the cities of Najaf and Karbalā’ (*atabāt*), and the role of the *marja’iyah* in directing and guiding the government as well as its independent historic stature, for it protects all the sons of the country indiscriminately, for the Iraqi memory carries on the heinous violations by the previous governments against the freedom of religion and religious rituals and holidays such as the months of Muḥarram and Šafar.⁴⁶ This created disputes between the factions in the Transitional National Assembly. Some Shī‘ah Islamists argued that Islam should be “the basic” or “the fundamental” source of legislation, while other Shī‘ah religious participants supported the modifier “the principal” or the phrasing “amongst other sources of law”. The Kurdish faction wanted it to be only one of several sources as proposed by Art. 7 (A) of the TAL.⁴⁷ The final formulation of Islam as “a fundamental source” (Art. 2 para. 1 of the constitution⁴⁸) is therefore a compromise between the two factions. However, this dispute was less legal in nature than it was about Shī‘ite identity, which had been repressed for years.

The Sunni parties’ fundamental points of disagreement were the federal system, the establishment of regions other than the Kurdistan Region, and the borders of Kurdistan of 1991, to which they had agreed reluctantly, while refusing to compromise on other, partly Kurdish inhabited governorates. They insisted on a central government or a limited decentralized one. In addition, they rejected the constitution’s preamble, feeling offended by the lack of reference to Sunni history in comparison to Shī‘ah history and by them being

⁴³ *Id.* 51.

⁴⁴ *Id.* preface.

⁴⁵ Charles Tripp (n 2) 286.

⁴⁶ The mourning of Muḥarram marks the anniversary of the Battle of Karbalā’ when *Imām Ḥusayn* ibn ‘Alī, the grandson of Muḥammad, and a Shī‘ah *Imām*, was killed by the forces of the second Umayyad caliph Yazīd I at Karbalā’. It continues for 2 months and 8 days until the 8th of Rabī‘ al-Awwal.

⁴⁷ Peter G. Danchin, “International Law, Human Rights and the Transformative Occupation of Iraq” in Brett Bowden et al. (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge University Press, Cambridge 2009) 64, 85.

⁴⁸ This article relies on the English translation in Chibli Mallat and Hiram Chodosh (eds), *Law in Iraq. A Document Companion* (Oxford University Press, New York 2012) 1 et seqq.

describe as “people in the Western area,” though this phrasing was later retracted.⁴⁹ The extent of the Sunni Arab members’ discontent became evident once again when they boycotted the presentation of the constitution in the Transitional National Assembly. To contain the Sunnis, a controversial path was chosen: The door to amend the constitution in return for voting in favor of the constitution was opened widely.

So negotiations reached an impasse between the Sunni side on the one hand and the Kurdish and Shi’ite side on the other. Only divergences between the Kurds and the Shi’ites could be solved, mainly because their historical relationship during the opposition period contributed to the convergence of their views and demands.⁵⁰

Another independent group was formed by secular Iraqis and strongly supported by the George W. Bush administration.⁵¹ This current introduced further points of contention into the debate, whether it was because they were in favor of a constitution based on the Turkish model, rejecting a public role of Islam,⁵² or other demands that were not associated with any sectarian direction, such as issues relating to liberties and women. This rejectionist stance extended the drafting process even more.

All the described tensions affected the drafting of the constitution and made it difficult to find an atmosphere of dialogue and discussion to reach an understanding. Some disputes were on superficial and idiomatic issues, not of value except for the opposition that used any argument to demand that the constitution be dropped and rewritten in a different way. In order to overcome the crisis, the chairmanship of the Commission sought to request foreign experts, especially UNAMI’s Office of Constitutional Support, to help create an atmosphere of dialogue and discussion. The Commission assumed that a subject like federalism would seem more acceptable and could be dealt with more objectively when proposed by a neutral expert. The Director of the Office of Constitutional Support, Nicholas Haysom, presented many studies that were robust and held valuable information based on comparisons with more than 25 constitutional systems. However, even this input was not sufficient to overcome the political crisis, which some sought to frame in a sectarian and unresolvable way.

VI. THIRD-PARTY INFLUENCE: BETWEEN MEDITATION AND OCCUPATION

In crises where a negotiation arrives at an insoluble point, or a debate doesn’t reach a compromise, mediating parties usually step in to assist in the return to constructive negotiations. But who in the Iraqi constitutional negotiations crisis was eligible to step in and help? The TAL gave little indication other than the time limit, leaving the Transitional National Assembly free to draft the constitution without any strict conditions implemented by third parties.⁵³ The most influential non-Iraqi actors were the United Nations and the United States in its role as the main occupying force.

The United Nations enhanced their support to the constitutional process at the request of the Transitional National Assembly and the Iraqi transitional government through

⁴⁹ “Controversy over the Constitution,” *Islamopedia Online*, <http://islamopediaonline.org/country-profile/iraq/islam-and-nation-state-building/controversy-over-constitution>, accessed July 25, 2015.

⁵⁰ Andrew Arato (n 7) 215, speaks of a “modus vivendi” reached by the Shi’ites and the Kurds.

⁵¹ Peter G. Danchin (n 47) 84.

⁵² *Id.* See also: Aslı Ü. Bâli, “Turkish Constitutionalism: A Model for Reforms in Arab Countries?” (*in this volume*).

⁵³ See: Nathan J. Brown (n 8) 3 et seqq.

the Ministry of Foreign Affairs. At an official meeting the Special Representative of the Secretary-General, Ambassador Ashraf Qāḍī, the president of the Assembly, and the chairman of the Constitutional Commission discussed the possibilities of support. The United Nations could not only dispose over the Office of Constitutional Support that belonged to UNAMI, but also over UNDP. The latter suborganization assumed the task to follow-up and monitor the discussions and plans and to gain an overview of the constitutional and political positions of all parties. It then reported back to the Secretary-General. Moreover, both UNAMI and UNDP alerted the parties to sensitive issues that had caused problems in other countries of the world. They also provided advice, studies, and proposed solutions to problems based on the expertise and experience from other countries. They further sought to bring parties closer together by delivering positive messages amongst them.⁵⁴ This was carried out directly by Ambassador Ashraf Qāḍī.

The UN representatives did not exercise pressure because they did not have the ability to do so. They thus used their means to draw attention to positive developments that encouraged the overall morale. They also withdrew from mediations in the final stage of negotiations, especially when the constitutional dialogue transformed from within the Constitutional Commission into a dialogue among the party leaders in “the Kitchen”. The United Nations did not interfere in the drafting of the constitutional articles, but they provided recommendations on international standards for the formulation of these materials and on the presence of certain contents in the Part of Rights and Freedoms.

The Constitutional Commission welcomed the UN support, but it remained, as the Iraqis in general, and the opposition in particular, skeptical about the integrity and impartiality of some of the UN representatives. Unlike the Special Representative of the Secretary-General, who seemed close to the situation in Iraq and impartial with the parties, Lakhdar Brahimi—who had taken the lead in negotiating the formation of an interim government—was considered biased by most Iraqis and accused of having his own agenda.⁵⁵

The suspicions also resulted from a proposal presented by the UN team that raised the ire of the elected Constitutional Commission, as it suggested the formation of a different commission to write the constitution, made up of members of the Constitutional Commission and others, mainly from the Sunni spectrum. This new commission's decisions should have overruled the resolutions and decisions of the elected Transitional National Assembly. The proposal increased uncertainty about the position of the United Nations and was understood as a continuation of the politics of Lakhdar Brahimi, and made the Commission hesitant to react to any forwarded input. Moreover, the Kurdistan Alliance was discontent with the observations and expert discussions of the United Nations, particularly the debate over federalism and exclusive powers of the federal government. As a result, UNAMI's Office of Constitutional Support was asked to limit its focus to technical aspects and not to interfere in domestic political matters that did not belong to the United Nations' areas of specialization.

Only the Sunni faction continued to frequently meet with the Representative of the Secretary-General, as they felt the United Nations was most understanding of their situation and heeded its advice and comments. In other words, the Sunnis perceived the United Nations as a kind of “shelter”.

⁵⁴ For further information about the UNAMI's role in the political and constitutional process in Iraq, see: <http://unami.unmissions.org>, accessed September 18, 2015.

⁵⁵ James Dobbins et al., *The UN's Role in Nation-Building—From the Congo to Iraq* (RAND Corporation 2005) 193, available at: <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA431334>, accessed September 18, 2015.

The United States, on the other hand, was represented by the ambassador and the head of the political section of the embassy. Naturally, all parties sought to win the US support for their cause.⁵⁶ At first the Sunnis were closest to the Americans, as they adopted all their demands and were able to persuade important Shi'ite parties to change some of their positions. The preferred figure for the Americans was the leader of the Iraqi Front for National Dialogue, Ṣāliḥ al-Muṭṭāq, who arrived at meetings in the car of the US ambassador. In addition, the Sunni party gained the trust of the UK ambassador. However, in the later episodes of negotiation, the US embassy changed its view about al-Muṭṭāq and shifted its support to the Iraqi Islamic Party, which was deemed more sensible. Nevertheless, the United States continued to influence the drafting process in favor of the Sunnis, by confirming the Arab identity of Iraq and its Arab role, alleviating the de-Ba'ṭhification process, and giving less attention to the issue of federalism. The arrival of the new US ambassador, Zalmay Khalilzad, in May 2005, marked a shift of US policy, which became more supportive of the involvement of Sunni Arabs in the relevant institutions during the drafting process in order not to exclude an entire group of the society. This policy finally led to the inclusion of 15 Sunni Arabs in the Constitutional Commission as members or advisors.⁵⁷ Then, as mentioned above, the United States extended its influence to all unsolved, disputed matters that had been referred to the Leadership Council.

The embassy also had a specific interest in the demands of the Kurds, which it considered its allies. The Kurds benefited from the US support to the constitutional recognition of the Kurdistan Region, where US forces were kept to a minimum,⁵⁸ as well as their language rights.⁵⁹ On the other hand, the United States started to pressure the Kurds into lowering their demands on the issues of Kirkūk, the borders of Kurdistan, and the subject of Islam. In response, the Kurds attacked the US ambassador in sharply worded articles in widely read newspapers, accusing him even of being supportive of Islamists. The US ambassador seemed to have learned his lesson; he put pressure on interim Prime Minister Ayād Ḥallāwī and the president of the Iraqi Transitional National Assembly, Ḥājim al-Ḥassanī, who decided to dissolve the Assembly because of the lack of consensus on the constitution. This meant leaving the constitutional draft incomplete.

The Shi'ites and their representatives feared US pressure, which could be mobilized by the Sunnis. The Shi'ite position was that certain vital points could not be left out of the constitutional text, such as the role of religion in the state, personal status, federalism, tribes, and the *marja'iyah*. Many of these points were now removed by the United States. The Shi'ites used all their power, including the weight of *marja'iyah*, and succeeded in changing the US positions on the role of religion, the text of the preamble, and the holy shrines. However, by omitting the *marja'iyah's* role, modifying the item of personal status, and postponing federalism, the US demands went against Shi'ite interests. The Shi'ites and the United States also had different conceptions about Part II of the constitution, which dealt with civil and political rights as well as economic, social, and cultural liberties.

As soon as the drafting process was finished, the US embassy followed the development of the constitution in detail and with utmost care through lawyers and politicians. Once

⁵⁶ The US representatives also changed their political course several times and are strongly criticized by Nathan J. Brown, who scrutinizes the repeated course-changes as a waste of considerable time and resources, see: Nathan J. Brown (n 8) 17.

⁵⁷ Ali Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace* (Yale University Press, Yale 2009) 399, 397–398.

⁵⁸ Charles Tripp (n 2) 278.

⁵⁹ Next to Arabic, the Kurdish language became a second official language of the state of Iraq.

more, they were very interested about Part II and the subject of women's rights.⁶⁰ They pressured the Constitutional Commission by involving some women's organizations to modify many of the texts to meet international human rights standards. They were also interested in the subject of regions, and—while postponing this matter—keen to investigate it in view of the adoption of the Sunni demands in this area.⁶¹ Additionally, the subjects of religion and minority rights were given attention, as well as the modification of texts that could endanger the future position of the United States in Iraq.

VII. FROM DRAFT TO REALITY: IRAQ'S CONSTITUTIONAL DEVELOPMENT SINCE 2005

Various experts argue that a key problem within the federal framework established by the Iraqi Constitution is its ambiguity.⁶² Over 50 of the 144 articles postpone difficult issues, some using the phrase "to be regulated by a law", which reflects the profound disagreements experienced during the drafting process.⁶³

Other problematic provisions include Art. 119, which grants the right to any governorate to form a region but does not determine the size, and the regions' right to organize self-defense and regulate internal security (Art. 120, 5th clause), which can be criticized insofar as it undermines the monopoly on the use of force as a power of the federal government.

Already the TAL had established the Iraqi Federal Supreme Court in its Art. 44. This court is still in place (Art. 92 of the constitution) and plays an important role in Iraq, considering that many regulations of the Iraqi Constitution are vague and require authoritative interpretation. However, the power of the Federal Supreme Court to solve questions of dispute concerning the federal system has been contested by some, thereby leaving another question unsolved in the struggle for a vertical separation of powers.⁶⁴

Whereas the issue of natural resources was originally provided as an exclusive power of the federal government in Art. 25 (E) TAL, it is now also unclear to whom they are allocated (Arts. 111–112 of the constitution).⁶⁵ These and other thorny issues have thus not yet been resolved completely, leaving the door open to different interpretations. In considering the struggle of the various factions during the constitution-making process and the final compromise that was found in an extraordinarily short period of time, it is true that "the ambiguities might better be thought of as placeholders until such time as Arabs and Kurds, Sunni and Shi'ah, can reach consensus on these issues."⁶⁶

In line with this, a Constitutional Review Committee (CRC) was created by the 2005 Constitution and tasked to complete the unfinished aspects of the 2005 text. The CRC

⁶⁰ See: Zaid Al-Ali and Philipp Dann (n 11) 441.

⁶¹ According to Peter G. Danchin, "[to] the extent that Islam was to have a larger role, the US lobbied negotiators involved in the drafting process to ensure that this would not impinge upon religious freedom, women's rights, or an independent Iraqi judiciary," see: Peter G. Danchin (n 47) 84.

⁶² Vicarious for others: Jason Gluck, "Ambiguities in Iraq's Constitution," <http://www.comparativeconstitutions.org/2010/09/i.html>, accessed September 18, 2015.

⁶³ Chibli Mallat, "Reconciliation in Iraq: Taking the Constitution seriously," *Daily Star* (July 16, 2009).

⁶⁴ See: Andrew Arato (n 7) 235.

⁶⁵ Art. 111 of the current version states, on the one hand, that "oil and gas are the property of all the Iraqi people," but, on the other hand, it continues "in all the regions and the governorates." It remains unclear if the national or the regional and provincial governments are competent for these matters.

⁶⁶ Jason Gluck, "Ambiguities in Iraq's Constitution," <http://www.comparativeconstitutions.org/2010/09/i.html>, accessed September 18, 2015.

operated under Art. 142, which defined a simplified way to amend the constitution, whereas the normal procedure of Art. 126 makes its adoption far more difficult.⁶⁷ The Constitutional Review Committee comprised 27 politicians in rough proportions to the Council of Representatives of Iraq that was elected in the Iraqi legislative election of December 2005. The list of its members demonstrates that it was more than a mere technical drafting committee; it may be considered an instrument of national reconciliation. The United Iraqi Alliance (Shī'ite) was represented by the present author as chairman of the committee, 'Abbās al-Bayātī, 'Alī al-'Allāq, and others; the Kurdish Alliance by Fu'ād Ma'sūm, Sa'ad al-Barzanjī, Faryād Rawāndazī, and others; the Iraqi Accord Front (Sunni Arab) by Iyād al-Samarā'ī, Salām al-Jabūrī, and others; and many seats were reserved for smaller factions and minorities. The committee presented the results of its debates shortly before the 2010 elections. However, the amendments were never brought before the electorate for a referendum. Haider Ala Hamoudi explained this silent end of the constitutional amendment process as follows:

The whole premise of Article 142, that it was necessary to make amendments that would render the Iraqi constitution acceptable to the Sunni population, which had once opposed it, had disappeared.⁶⁸

Indeed, the constitution is today not viewed as a document imposed by foreign powers upon the Iraqi people, but is widely accepted as a basis for state and society.

VIII. LESSONS FROM THE IRAQI CONSTITUTIONAL PROCESS

At the beginning of the US-led intervention, US politicians hoped Iraq would be a model for democracy in the Arab world.⁶⁹

Afterward, notions about the Iraqi Constitution drafting process diverged. Some analysts consider the process of constitution-making in Iraq altogether a failure.⁷⁰ Arato, for example, criticizes the lack of an actual state (re-)building, which he considers fundamental to every constitution,⁷¹ as well as the acceptance of the constitution in a relatively short time period of seven months, considering the enormous sectarian retrenchments of the Iraqi parties.⁷²

Differently, Peter Galbraith considers the constitution to be a successful improvement over the interim constitution.⁷³ More than one expert from the United Nations referred to the Iraqi Constitution being in line with international standards and being an advanced constitutional model in the region. It should not be forgotten that it was drafted years before the so-called Arab Spring, in a time when other countries were still under the firm control of authoritarian rulers. The acceptance of 80% of voters in 2005 also indicates that they regarded the constitution to meet the needs of Iraq and its society.

⁶⁷ Haider Hamoudi and Chibli Mallat, "Iraq at crossroads: Constitutional Review Committee fills in crucial gaps," *The Daily Star* (November 19, 2009).

⁶⁸ Haider Ala Hamoudi, *Negotiating in Civil Conflict. Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, Chicago 2013) 4.

⁶⁹ E.g., the statement of US Senator Lincoln D. Chafee, during the joint hearing in the US Congress, June 25, 2003, about constitutionalism, human rights, and the rule of law in Iraq.

⁷⁰ Andrew Arato (n 7) 205.

⁷¹ *Id.* 53 et seqq.; 205–206.

⁷² *Id.* 215.

⁷³ Peter Galbraith, *The End of Iraq* (Simon and Schuster, New York 2006) 170, 203–204.

The lesson that should be learned is that a prolonged period would not have been useful or effective, but would have created a crisis of polarized dialogue. The influential factors are not limited to knowledge and discussion but also include the ability of those mandated to draft a constitution to hold the attention of society and evoke its emotions. The discussions in the Iraqi society on this issue continue, and they will contribute greatly to the promotion of constitutional values such as justice, democracy, and participation. It is in fact a long-term goal for the process of dialogue and mass communication.

But is the Iraqi experience, its progress, as well as its setbacks applicable to other countries in the region? One issue where the Iraqi Constitution could serve as role model to other Arab countries is the treatment of Shari'ah in the text, which declares Shari'ah to be the highest source of the law in the land, while at the same time subscribing to the ideals of democracy.⁷⁴ However, every comparison with the Iraqi situation has to pay regard to the special circumstances of the Iraqi process of constitution-drafting after a military invasion, the difficulties of a transition from one political system to another, the influence of non-Muslim foreign powers, and the contradictory political, socio-ethnic, and sectarian currents inside the country.⁷⁵

The political and social axioms in Iraq reassembled themselves in a period of rebirth and uncontrolled circumstances. Each faction tried to impose their ideas on the Transitional National Assembly and to promote their interests in the future constitution. Nevertheless, discussions took place between the diverse groups, which led them to agree on generally accepted issues and create a framework and a basis with which to form the state and its constitution. The cooperation between opposing forces before the fall of the regime strengthened this consensus.

Therefore, this constitution can be regarded as representing a revolutionary as well as a daring and courageous process of change. It goes, in fact, against the general tendencies evident in the region by endorsing and stipulating important aspects of Iraq's path to democracy, such as the recognition and respect of religious pluralism, the decentralization of administration, a clear separation of powers, mechanisms of control, and the adoption of a parliamentary system. A process of rethinking the role of the state took place, in which the state is now a sponsor institution, serving the people's ambitions for a better life, but not being in control of it. All of these concepts sparked debates that, under the former regime, were prohibited and punishable by death.

⁷⁴ Michael Bohlander and Mohammad M. Hedayati-Kakhki, "Criminal Justice under Shari'ah in the 21st Century—An Inter-Cultural View" (2009) 23 *Arab Law Quarterly* 417, 418.

⁷⁵ *Id.*

Impulses from the Arab Spring on the Palestinian State-Building Process

ASEM KHALIL

I. INTRODUCTION

In 2012, Palestine, while keeping its status as an observer, won the status of non-member state in the United Nations via a majority vote at the UN General Assembly (UNGA).¹ For the Palestinians, the move was considered a diplomatic victory, especially considering Israel's and the United States' isolation during the UNGA voting session. President of the Palestinian Authority (PA) Maḥmūd 'Abbās, who considered the resolution as a "birth certificate" of the state of Palestine,² returned triumphant to Ramallah, despite having in fact only obtained recognition for what can be considered a nominal state. Some weeks earlier, a ceasefire deal was reached between Ḥamās and Israel. The ceasefire put an end to the escalating violence that had resulted in the deaths of dozens of Palestinians by Israeli bombs, and the launch of hundreds of rockets toward Israeli cities, even reaching Tel Aviv, as well as the assassination of Aḥmad Al-Ja'barī, a high-ranking official of al-Qassām Brigades, the Ḥamās Military Wing.³

¹ UNGA Res. 67/19 (November 29, 2012) UN Doc A/RES/67/19. There were 138 states in favor, out of 193 member states of the United Nations, 9 against, and 41 abstentions.

² As appears in Mr. 'Abbās's speech upon his return from New York, to a packed rally in Ramallah on December 2, 2012. See: <http://edition.cnn.com/2012/12/02/world/meast/israel-settlements/>, accessed May 9, 2015.

³ The Israeli attack on Gaza started officially on November 14, 2012, with the assassination of Aḥmad Ja'barī. A ceasefire was announced on November 21, 2012. According to OCHA office in the occupied Palestinian territory, Palestinian casualties were 103 dead and 1,399 injured; 6 Israelis were killed and 224 injured; 450 housing units were destroyed in Gaza while 8,000 sustained minor damage. Approximately 12,000 individuals in Gaza City and Northern Gaza governorate fled their homes and sought refuge in emergency shelters set up in 14 UNRWA and 2 government schools. UNOCHA, Gaza Initial Rapid Assessment, Final

Ḥamās and Fatāḥ appeared to be united—or at least less divided. Fatāḥ supported Ḥamās in resisting Israeli attacks on Gaza, while Ḥamās officially supported the PA's move at the United Nations. The Arab countries apparently also united in support of the PA going to the United Nations. Egypt under Muḥammad Mursī appeared more supportive of Palestinians of Gaza (when compared to Egypt under Mubārak during the 2008/2009 attacks⁴). As usual, Egypt had played a crucial role in reaching the ceasefire.⁵ The Arab world seems different as a result of the so-called “Arab Spring.”⁶ Palestinians appear to have changed, too. This chapter aims at assessing the Arab Spring's impact on the Palestinians, in particular in their quest for statehood and their state-building efforts, with particular emphasis on relevant constitutional law and institutions.

While it may be impossible to measure the impact of an incomplete process of change in the Arab world on an incomplete statehood, it is possible to identify certain impacts the Arab Spring is having on Palestine. To do so, two different approaches are possible. One can observe the Palestinians' (leadership, parties, civil society, and population) behavior and reaction to the many internal challenges they see occurring in the Arab world. In this approach one would engage in a very useful intellectual process of observation and induction. However, such efforts aim at reaching a conclusion (i.e., that an impact on Palestine can be observed), which, in this chapter, will be assumed as a sound basis for further analysis. Also such observation goes beyond the limited scope of this chapter, aiming at analyzing formal processes of state-building. It is also possible—as the author will do in this chapter—to analyze certain steps and actions undertaken by the PA and by the Ḥamās-led government in the Gaza Strip in light of (or at least since) the beginning of the Tunisian and Egyptian revolutions in late 2010 and early 2011, respectively.⁷

In a previous study, in a volume similar in content to the current one, the present author connected the process of constitution-making to that of state-building in Palestine, and concluded that the two processes contribute to and urge for the redefinition of the Palestinian nation and those who represent it.⁸ The case studies in this chapter are intended as a contribution to such a redefinition.

Report, November 24–26, 2012, http://www.ochaopt.org/documents/gaza_initial_rapid_assessment_report_nov_2012_eng.pdf, accessed January 11, 2015.

⁴ For a discussion of the attack on Gaza in winter 2008/2009, its context, objectives, and consequences, see: Camille Mansour, “Reflections on the War on Gaza” (2009) 38 (4) *Journal of Palestine Studies* 91–95.

⁵ In an article published by the *New York Times*, Egypt's President Muḥammad Mursī was praised for his demonstrated pragmatism, as he balanced public support for Ḥamās with a determination to preserve the peace with Israel. See: David Kirkpatrick and Jodi Rudoren, “Israel and Hamas Agree to a Cease-Fire, After a U.S.-Egypt Push,” *The New York Times* (November 21, 2012), available at: http://www.nytimes.com/2012/11/22/world/middleeast/israel-gaza-conflict.html?pagewanted=all&_r=0, accessed January 11, 2015.

⁶ For an excellent discussion of the connotations of the terms used to describe the changes taking place in the Arab world, see: Rami Khouri, “Drop the Orientalist term ‘Arab Spring,’” *The Daily Star* (August 17, 2011) 7, <http://www.dailystar.com.lb/Opinion/Columnist/2011/Aug-17/Drop-the-Orientalist-term-Arab-Spring.ashx#axzz2HbiHXdjn>, accessed January 11, 2015.

⁷ The reference to the “Tunisian Revolution” refers to those events taking place on December 18, 2010, that led to the ousting of the President Zīn al-ʿĀbidīn Ben ʿAlī on January 14, 2011. While the Egyptian revolution started on January 25, 2011. It resulted in the overthrow of President Ḥusnī Mubārak on February 11, 2011.

⁸ Asem Khalil, “Constitution-Making and State-Building: Redefining the Palestinian Nation” in Rainer Grote and Tilmann J. Roeder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, Oxford 2012) 596.

II. CONSTITUTIONAL DEADLOCK

In 2006, Ḥamās won PA legislative elections, one year after Maḥmūd ‘Abbās, a Fataḥ-affiliated leader, was elected president of the PA, succeeding Yāsir ‘Arafāt. Ḥamās formed a new government (led by Ismā‘īl Haniyāh) and obtained majority vote in the Palestinian Legislative Council (PLC). Immediately after the election, Israel started to administratively detain Ḥamās PLC members. The PLC was blocked from functioning as a regular legislative assembly.

The cohabitation between a PA president and a Ḥamās-led government was (or became) impossible and the international community and Israel contributed to the deadlock by imposing economic sanctions on the Palestinian government. PA institutions were also paralyzed as a result of strikes over the lack of salaries for public servants, and many institutions and powers were transferred by presidential decrees to the president’s office and his advisors. Ḥamās, under internal, regional, and international pressure accepted the formation of a unity government, composed of Fataḥ and Ḥamās officials. However, the international community and Israel could choose the ministers within the cabinet they wished to deal with. This unity government, which resulted from the so-called Mecca Accord of 2007, was ultimately unsuccessful in uniting the Fataḥ and Ḥamās factions.⁹

The PA under Ḥamās government between February 2006 and June 2007 was rife with contradiction. After all, how is a government supposed to govern without control over security forces, public money, or civil servants? Ḥamās’ reaction was as problematic as Fataḥ and PA attitudes toward Ḥamās’ victory. The Ḥamās-led government started to change existing procedures so as to allow its members admission to public and security offices. They established, through the minister of interior, a new armed group, called the Executive Force, completely under his control, without any connection to the many existing groups of security forces. As a result of international (mostly Western) sanctions and lack of support, they further tried to obtain funds from other sources (including Iran).

The Palestine Liberation Organization (PLO)—previously ignored by Fataḥ leadership and PA officials—began to play a more important role, in order for President ‘Abbās (who is also the chairperson of the PLO Executive Committee) to justify his increased prerogatives. Ḥamās was asked to accept all agreements signed by the PLO, and to submit the government program to the PLO Executive Committee for approval. Ḥamās is not part of the PLO since it didn’t exist at the time of its establishment in 1964, nor was it admitted at a later stage (Islamic Jihād is also not part of the PLO). However, this reality is not only a result of historical timing. It also reflects the PLO’s anxiety in dealing with Islamic groups, and uneasiness on Ḥamās and Islamic Jihād’s side to form a coherent position concerning their possible admittance to the PLO.

The Basic Law of 2003 and its amendment in 2005, as a constitutional text, didn’t contain necessary rules and institutions to maintain a functioning system of government in such cohabitation. Also, it didn’t (and wasn’t supposed to) envisage Israeli reaction to the elections, nor that of the international community. It was also impossible to find norms in the Basic Law that can help the authority to function in light of a long strike of public servants that paralyzed most PA institutions. The Basic Law further contained contradictory provisions, giving the PA president and the government completely different signals for what their authorities and limitations were. The PLC was unable to function regularly, and

⁹ For more about the Mecca Accord, see: Talāl Okal, “Ettfāk makkā: kerāa fel mukaddemāt wal natāej” (2006) 18 (69) *Majallat al-dirāsāt al-filastīniyah* 142–148.

the government was not provided with necessary executive tools (public servants, public funds, and security forces) to govern effectively.¹⁰

The judiciary was also unable to clarify what conflict-resolution mechanisms the constitution or the law provides for. In a famous case of the High Court acting as a High Constitutional Court, the court had to look into a decision of a Ḥamās PLC speaker canceling all decisions undertaken by previous PLC members in an extraordinary session called for in between the declaration of the electoral results and the new PLC members taking office. The court was divided but eventually reached the conclusion that a PLC speaker alone couldn't cancel all previous PLC enactments.¹¹ However, the court did not and was not supposed to speak out about the legitimacy of the actions undertaken by previous PLC members (the majority from Fatāḥ) who effectuated changes after they knew the electoral results. Interestingly, Ḥamās didn't use the court to confirm or re-establish its prerogatives—possibly and presumably due to lack of trust in the court's judges and the judicial system in general.

In June 2007, Ḥamās committed a bloody coup in Gaza, taking command of Fatāḥ-controlled PA offices, and has since controlled Gaza by force. Ḥamās immediately began to make changes to the legal system in place, starting by issuing an Official Gazette from Gaza (different from the one the PA issued from the West Bank). They also reformed the security forces and nominated new public servants, while the ministries pretended to function as usual. The Ḥamās PLC members in Gaza, under Aḥmad Bahār (a deputy to the PLC Speaker), started to convene pretending to have procuration from their imprisoned colleagues. They even started to issue laws, changing the existing legal system in Gaza in a drastic way. Constituting one of the latest legislative interventions in Gaza, the controversial Civil Law Code replaced the Ottoman Majallah (which remained in force outside of the Gaza Strip). Ḥamās even effectuated changes in the judicial system, nominating new judges (although this is a prerogative of the PA president), formed a new judicial council for the Gaza Strip, and nominated a new Prosecutor General.¹² They further issued death penalty decisions and executed the condemned, without the endorsement of the PA president as required by the Basic Law.¹³

President 'Abbās ruled the West Bank by decrees and decree-laws in the absence of a functioning PLC. During the one-month emergency period in June 2007, he nominated Salām Fayād as prime minister. Salām Fayād's government was the longest serving Palestinian government ever formed since Oslo and started a new plan for building institutions (in the West Bank) in preparation for statehood. International money returned in support of the PA, and negotiations with Israel began again. However, President 'Abbās' legislative interventions were not limited to necessary legislative interventions. There were also many problematic interventions (amendments) such as those related to Income Tax Law, Company Law, and the Election Law.

¹⁰ For more about the crisis of government after Ḥamās arrival to power, see: Asem Khalil, "Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law" (2013) 11 (1) International Journal of Constitutional Law.

¹¹ The High Court acting as High Constitutional Court in the case 1/2006 of December 19, 2006. The decision is available in English on Al-Muqtafi, Birzeit University, <http://muqtafi.birzeit.edu/en/courtjudgments/ShowDoc.aspx?ID=52112>, accessed January 11, 2015.

¹² For more information, see: Ṣalāḥ 'Abd al-Mu'ti, "Wāqi' al-qadā' al-filasṭīnī fī qīṭā' ghazah" (2008) 20 *majallat tasāmuḥ* 131–134.

¹³ Such decisions were subject of expression of concerns of the Palestinian Independent Commission for Human Rights. See, for example, the statements issued by the Commission in 2012 at: <http://www.ichr.ps/ar/1/4?d=2012#>, accessed January 11, 2015.

President ‘Abbās’s and the PLC’s four-year terms ended in 2010, but in the absence of presidential and parliamentary elections, both remained in power. Some scholars connect Ḥamās and Fatāḥ’s reaching an accord with the agreement to parliamentary and presidential elections. Such connection made reconciliation even harder as it was impossible to agree on elections without reconciliation between Fatāḥ and Ḥamās, while reconciliation became with time a condition for the elections themselves. It is clear that over time, the gap between the West Bank and the Gaza Strip, and between the PA Fatāḥ and Ḥamās has deepened, and the political and legal division is more entrenched.

III. BUILDING STATE INSTITUTIONS DURING OCCUPATION

Salām Fayāḍ’s new idea to build an infrastructure of the state, despite the occupation is a controversial one. The plan was praised by some as a “brilliant idea.”¹⁴ Fayāḍ’s plan was aimed at creating a de facto state, and was not a unilateral declaration of statehood. This plan was developed in 2009 and thus preceded any changes in the Arab world (Tunisia’s first popular movement only began in December 2010). Interestingly, Fayāḍ’s plan aimed at achieving similar goals as the Arab uprisings would two years later: full citizens’ rights, enfranchisement, and a government for the people.¹⁵

The document containing Fayāḍ’s program, the PA Thirteen Government program, was titled “Palestine: Ending the Occupation, Establishing the State.”¹⁶ The national goals included the end of occupation, promoting national unity, protecting Jerusalem as the eternal capital of the Palestinian state, protecting refugees, and following up on attainment of their rights, securing the release of prisoners, ensuring human development, achieving economic independence and national prosperity, bringing equality and social justice to all citizens, consolidating good governance, bringing safety and security across the homeland, and building positive regional and international relations. The document also contained a full plan of action in terms of institutional development. This included the unification and modernization of the legal framework, the rationalization of government organization, structures, and processes, encouraging the use of information and communication technology, and the management of financial and human resources. The document finally identified sector priorities, policies and programs, and implementing bodies. The sectors the document referred to are governance, social, economy, and infrastructure.

In a staff report presented in April 2011, the International Monetary Fund (IMF) states “that the PA is now able to conduct the sound economic policies expected of a future well-functioning Palestinian state, given its solid track record in reforms and institution-building in the public finance and financial areas.”¹⁷ Similar positive reports, issued by other respectable

¹⁴ Daoud Kuttab, “Fayyad’s Brilliant Two-Year Plan for Palestinian Statehood,” *Huffington Post* (August 27, 2009), http://www.huffingtonpost.com/daoud-kuttab/fayyads-brilliant-two-yea_b_270253.html, accessed January 11, 2015.

¹⁵ Juliane von Mittelstaedt, “An Independent Palestine Will Be Inevitable,” *Spiegel Online International* (September 19, 2011), <http://www.spiegel.de/international/world/spiegel-interview-with-palestinian-prime-minister-an-independent-palestine-will-be-inevitable-a-787165.html>, accessed January 11, 2015.

¹⁶ The Plan is made available in English at Wafa, Palestinian News & Info Agency, at: <http://english.wafa.ps/?action=detail&id=12943>, accessed January 11, 2015.

¹⁷ Oussama Kanaan, Javier Gomez, Udo Kock, and Mariusz Sumlinski, *Staff Report for the Meeting of the Ad Hoc Liaison Committee* (IMF, Brussels 2011), http://unispal.un.org/pdfs/IMF_AHLCrep130411.pdf, accessed January 11, 2015.

international organizations, including the World Bank and the United Nations, show that Salām Fayāḍ's plan was considered a "birth certificate" for the state of Palestine.¹⁸ However, as outlined by Patrick Clawson and Michael Singh, the conclusion of the IMF staff report required three important caveats: "First, it depends on Israel-Palestinian cooperation; second, it is contingent on Gaza's return to Palestinian Authority control; and third, it does not take into account the PA's broader political readiness for statehood, which continues to lag."¹⁹

The plan's success depends on the occupying powers' cooperation, while the plan itself aims at putting an end to occupation. One example of this paradox is the development of Area C, which is still under full Israeli control. In an interview with the Institute of Palestine Studies regarding his plan, Salām Fayāḍ didn't sufficiently answer the tricky question put forward by Prof. Camille Mansour: "[H]ow can you build a state under occupation, especially in 'off limits' zones like Area C where approval by the occupying power is required?" Instead, he elaborated on the need for international support in the formation of a Palestinian state.²⁰ In other words, Fayāḍ's plan assumes that a changed international atmosphere would pressure Israel into cooperating and contributing to de facto Palestinian state-building. The Arab Spring in a sense contributed (together with other factors, such as the Eurozone crisis and the US electoral cycle) to the marginalization of the Palestinian cause, as outlined by Salām Fayāḍ himself in 2012.²¹ The Arab Spring hence presents an obstacle to Palestinian (or Fayāḍ's) state-building efforts.

Demonstrations erupted in 2012 against Salām Fayāḍ's plans to increase prices, in particular fuel. Some believed the demonstrations were orchestrated by Fataḥ supporters, and tolerated by security forces.²² Maḥmūd 'Abbās himself referred to the demonstrations using the term "Palestinian Spring" and expressed solidarity with the protesters and their demands.²³ Clearly the demonstrations were not—as some may have hoped—a sign of the beginning of a Palestinian spring, nor can a Palestinian spring—as some may have wanted—be the result of orchestrated efforts, or supported by the leadership it wishes to displace.

The two-year limit ended in 2011, and the de facto Palestinian state Fayāḍ was aiming for wasn't in place. The Palestinian economy was still dependent on Israeli markets and on international aid, and the Palestinians were still unable to control their own natural resources. They continue to lack control over their borders and cannot profit from the human, natural, and financial capital they possess. Development under occupation seemed to be out of Fayāḍ's reach. In September 2011, Fayāḍ responded to a question put to him by German newspaper *Der Spiegel* that he was not sure the Palestinian state would be consolidated during his term in office, though he has no doubt it will happen eventually.²⁴

¹⁸ Juliane von Mittelstaedt (n 15).

¹⁹ Patrick Clawson and Michael Singh, "Is the Palestinian Authority really ready for statehood?," *The Jerusalem Post* (April 24, 2011), <http://www.jpost.com/MiddleEast/Article.aspx?id=217691>, accessed January 11, 2015.

²⁰ "A Palestinian State in Two Years: Interview with Salam Fayyad, Palestinian Prime Minister" (2009) 39 (1) *Journal of Palestine Studies* 58–74.

²¹ Donald Macintyre, "Salam Fayyad: 'We have never been more marginalized,'" *The Independent* (London July 26, 2012), <http://www.independent.co.uk/news/people/profiles/salam-fayyad-we-have-never-been-more-marginalised-7976731.html>, accessed January 11, 2015.

²² Khaled Abu Toameh, "A 'Palestinian Spring': A Renewed Fataḥ Bid to Remove Fayyad," *GATESTONE Institute* (September 14, 2012), <http://www.gatestoneinstitute.org/3346/palestinian-spring-fayyad>, accessed January 11, 2015.

²³ *Id.*

²⁴ Juliane von Mittelstaedt (n 15).

IV. THE NON-MEMBER STATE STATUS AT THE UNGA

In September 2011, the PA president, also the chairperson of the PLO Executive Committee, presented a request to the UN Security Council, through the UN Secretary General, requesting full UN membership for Palestine. Full UN membership requires positive recommendation from the Security Council by a majority of 9 out of 15 members (including the five permanent members), and a two-thirds majority vote in the UNGA. The request wasn't successful as the Palestine didn't secure the necessary votes in the Security Council.

One year after the request, Maḥmūd 'Abbās sought recognition of Palestine in the UNGA as a non-member state, keeping Palestine's previous observer status. The resolution needed a majority vote to pass through, and Palestine secured 138 countries in its favor.²⁵ Both requests referred to pre-1967 borders, not the partition plan, at its basis, as was the case in the Palestinian Declaration of Independence in 1988.²⁶

Resolution A/RES/67/19 described Fayāḍ's 2009 plan—referred to as the Palestinian National Authority's 2009 plan—as “constructing the institutions of an independent Palestinian State within a two-year period,” and welcomed “the positive assessments in this regard about readiness for statehood by the World Bank, the United Nations and the International Monetary Fund.”²⁷ Such a reference gives the impression that applying for the “non-member state” status at the United Nations is part of an overall strategy. The impression is however misleading, as the same resolution expresses the urgent need for the resumption and acceleration of negotiations. Also the resolution gives different impressions by referring to various PLO positions and declarations, including the Declaration of Independence in 1988 and the UNGA partition plan of 1947. The impression given here is, again, misleading.

What was depicted by Palestinian leadership and media as a Palestinian diplomatic victory has more of a symbolic value. The vote at the UNGA doesn't mean Palestine became a state. Recognition of a state is not a constitutive element for statehood, nor is a vote at the UNGA. Legally, Palestine wasn't a state before the 2012 Resolution and neither is it after that vote.

Some may argue that obtaining the status of a non-member state may facilitate access to other UN Specialized Agencies and international organizations, including access to the International Criminal Court. In fact it did. On April 1, 2014, Mr. Maḥmūd 'Abbās ratified the Four Geneva Conventions and its First Protocol, together with 13 other international treaties.²⁸ While denying the PLO the privilege to access the Geneva Conventions in the

²⁵ UN Doc A/RES/67/19 (n 1).

²⁶ The Palestinian National Council convening in Algiers, declared independence of the state of Palestine on November 15, 1988. An unofficial translation to English is published by Arab Thought Forum, <http://www.multaqa.org/pdfs/PNC%20INDEPENDANCE%20DECLARATION.pdf>, accessed January 11, 2015.

²⁷ UN Doc A/RES/67/19 (n 1) 3.

²⁸ The other treaties ratified by President 'Abbās were: The International Convention on the Suppression and Punishment of the Crime of Apartheid. The International Covenant on Civil and Political Rights. The International Covenant on Economic, Social and Cultural Rights. The Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child (on the involvement of children in armed conflict). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention on the Prevention and Punishment of the Crime of Genocide. The UN Convention against Corruption. The Vienna Convention on Diplomatic Relations. The Vienna

past,²⁹ Switzerland, the depositary power of these conventions, now accepted the request of the state of Palestine to join the conventions.³⁰ On January 1, 2015, Mr. Maḥmūd ‘Abbās ratified 18 treaties and conventions, including the Rome Charter, which enabled Palestine to access the International Criminal Court as a full member state.³¹ The latter step again had not been possible a few years earlier, when Palestine’s request before the UNGA to join the International Criminal Court (ICC) wasn’t accepted.³²

While the status of a non-member state at the United Nations has had a facilitative role, access to other international organizations is not an automatic or guaranteed step. Access to other international organizations will depend on accession procedures which reflect the political choices of member states. It is important to note that Palestine was admitted

Convention on Consular Services. The Convention on the Elimination of All Forms of Discrimination against Women. The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. The Convention on the Rights of Persons with Disabilities. The Vienna Convention on the Law of Treaties. The International Convention on the Elimination of All Forms of Racial Discrimination. See: Dalia Hatuqa, “‘Paradigm shift’: Palestinians join treaties,” <http://www.aljazeera.com/news/middleeast/2014/04/shift-palestinians-join-treaties-2014418111950813313.html>, accessed May 9, 2015.

²⁹ The request first presented on June 21, 1989, was rejected because Switzerland, as explained by its Foreign Ministry at the time, could not decide on the outcome of the application as the existence or nonexistence of a state of Palestine was still contested.

³⁰ See “Palestinians join Geneva Conventions” at: http://www.swissinfo.ch/eng/rules-of-war_palestinians-join-geneva-conventions/38371102, accessed May 9, 2015.

³¹ The treaties ratified by President ‘Abbās were: Convention on the Political Rights of Women. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Convention on Biological Diversity and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III). Convention on the Law of the Non-Navigational Uses of International Watercourses. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. United Nations Convention against Transnational Organized Crime. Convention on the Safety of United Nations and Associated Personnel and the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel. United Nations Convention on the Law of the Sea. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Agreement on the Privileges and Immunities of the International Criminal Court. Rome Statute of the International Criminal Court. Declaration in accordance with the Rome Statute of the International Criminal Court. The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. The Treaty on the Non-Proliferation of Nuclear Weapons. Convention on Cluster Munitions. See: “Abbas moves for Palestine to join 18 international treaties,” *Maan News Agency* (January 1, 2015), <http://www.maannews.com/Content.aspx?id=751160>, accessed April 24, 2015; see also: *Majallat Al-Dirasat Al-Falastaneyya* (2015) 26 (102).

³² See: the document issued by the office of the Prosecutor General of the ICC, issued on April 3, 2012, explaining the reasons why the request of the government of Palestine to accept the jurisdiction of the International Criminal Court wasn’t accepted, because of its status as observer, and not non-member state in the UN, at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>, accessed May 9, 2015. The ICC prosecutor office almost suggested to the Palestinian leadership ways forward so as to render a future application to join the ICC successful. This makes it possible to understand the Palestinian shift of strategy in the following years, which related to becoming a non-member state by a UNGA resolution.

as a full member of UNESCO even before obtaining the status of non-member state at the United Nations. This example consolidates the argument advanced in this paper: The admission of Palestine to international organizations is a political process independent of the status obtained in the United Nations as non-member state.

Besides serving its purposes to facilitate its objective to ratify international treaties and join international organizations, including the ICC, such move also helps the Palestinian leadership in its internal politics. This would mean that such steps are actually directed at domestic politics, more than they are intended to serve the Palestinians internationally. Palestine is faced with a population that is increasingly dissatisfied with its leadership's lack of vision, the lack of reconciliation, and the lack of advancement in negotiations with Israel. In the following, two examples are put forward to support this claim.

The Palestinian diplomatic move was accompanied domestically by a revival of the discussion of the draft constitution of the state of Palestine, whose latest version was made public in 2003.³³ Salīm Za'nūn, the chairperson of the PLO Palestinian National Council, headed three meetings with experts and politicians (the group was informally called "The Committee for the Preparation of the Constitution") to discuss the latest version of the draft constitution.³⁴ Once the admission request had been presented to the Secretary General in 2011, the Committee was never convened again until recently. In May 2015, and in an unexpected way, the chairperson of the Palestinian National Council reconvened the Committee. The Committee met President Maḥmūd 'Abbās who urged the committee to finalize the constitution of the state of Palestine³⁵—a step criticized by Ḥamās for not being the result of "national consensus."³⁶

Since 2012, after Palestine was admitted as a non-member state to the United Nations, there has been increasing reference made to the necessity of having the constitution adopted.³⁷ So the logic may be formulated as follows: "As we are now a state, we need to act like one. We need to have a constitution like states do, use symbols of the state, and establish a new government for the state, etc."³⁸

³³ For an English unofficial translation of the third draft constitution, with an excellent commentary, see: Nathan Brown, "The Third Draft Constitution for the Palestinian State: Translation and Commentary" (2003) *Palestinian Center for Policy and Survey Research*.

³⁴ See the Palestinian National Council coverage of the event: http://www.palestinepnc.org/index.php?option=com_content&view=article&id=620%3A2011-10-30-15-52-15&catid=93%3A2010-05-25-10-32-12&Itemid=356&lang=ar, accessed January 11, 2015.

The author of this chapter has personally participated in these meetings as part of the new "constitutional committee" that was never formally composed by the president of the PA. When reconvened four years later, in 2015, the author declined to participate in the meetings of the committee, for many reasons, including the lack of a clear mandate for the work of the committee—which to date (May 2015) has not been officially established.

³⁵ See the news in local newspapers about the meeting of the committee with President Maḥmūd 'Abbās: <http://www.wattan.tv/ar/news/132053.html>, accessed May 9, 2015.

³⁶ See, for example: <http://www.ramallah.city/archives/21214>, accessed May 9, 2015.

³⁷ PA president Maḥmūd 'Abbās commented: "It is not logical we stay without a Constitution. There is a draft constitution we are working on, and we hope to receive comments from everyone, and once it is done, we will make it public." (Translated by the author). News item is available at: <http://www.qudsnet.com/arabic/news.php?maa=View&id=232662>, accessed January 11, 2015.

³⁸ Aḥmad Quray said: "We need to form a government of the State of Palestine, instead of that of the Palestinian Authority." (Translated by the author). News item is available at: <http://m.aawsat.com/content/1356218563839444400/aaa%20News%20and%20Politics>, accessed January 11, 2015.

Another example is the consideration of issues that usually follow the establishment of a state; i.e., the possibility of entering into a confederation with neighboring states. Despite official denials, reports mentioned that Maḥmūd ‘Abbās asked leaders in Fataḥ to start thinking of this scenario,³⁹ and King ‘Abdullāh of Jordan seems to be discussing this option with Israeli Prime Minister Benjamin Netanyahu, too.⁴⁰ Notably, the Palestinian position was always that a confederation with Jordan would be discussed only after the state of Palestine is established. Again, the logic seems to be along the lines of: “Now that we have been admitted as non-member state to the UN, we can start talking about the post-state scenarios even before the state is established.”

To clarify this point, it is useful to reiterate the following two contradictory positions of the Palestinian leadership vis-à-vis the accession to international treaties on the one side and regarding the internal legal system on the other side. In fact, Palestine is one of the few Arab countries which ratified international treaties without any reservation whatsoever. At the same time, there is nothing in the Palestinian legal system that suggests that such treaties will be applied domestically as binding law. This means that the discrepancy between international obligations created by the treaty and internal Palestinian laws will stay as is and that Palestinian courts will continue to apply the same domestic law as before, without any change whatsoever as a result of the ratification of those treaties. It is possible then to conclude that such ratification processes were simply diplomatic shows, aiming at creating new venues and paths in the absence of a negotiated peace process and offer an alternative to the internal stagnation in the Palestinian Authority itself. In such a context, the Palestinian leadership so far did not show the extent to which this ratification serves advancing Palestinian rights. For example, accession to international treaties alone does not protect Palestinian refugees, who continue to suffer in many Arab countries, in particular in Syria, or as a result of the events in Syria. The state of Palestine is unable to provide them with the protection they need in the place they are staying in (such in Yarmūk Camp, under attack by the Syrian regimes, its opponents, and the “Islamic State in Iraq and Syria” [known as ISIS] itself), or in the places they are displaced to (such as in Jordan, where they often have to stay in camps separate from those for other Syrians, subordinated to separate sets of rules than other displaced Syrians, etc.) while not being able of course to ensure their return to Palestinian territory. Similarly, the reconstruction of Gaza, largely unachieved as a result of Israeli siege, continued to be an objective impossible to obtain even after the UNGA bid had been achieved and international treaties had been ratified.

V. THE RECONCILIATION EFFORTS

The Fataḥ-Ḥamās divide has been going on since 2007 and the origins of this divide have already been referred to. This section of the chapter will discuss the impact of this division on state-building efforts, in particular in light of the Arab Spring. The remarkable thing about the division between the two Palestinian factions is that for a long time the inter-Palestinian division was associated with the factions’ regional connection and dimension. In wake of the Arab Spring, the regional actors changed drastically, and the kind of support Palestinian factions could expect changed, too. Surprisingly, the result remained the

³⁹ See news report at: <http://www.alwatanvoice.com/arabic/news/2012/12/13/342629.html>, accessed January 11, 2015.

⁴⁰ See news report at: <http://www.echoroukonline.com/ara/articles/152364.html>, accessed January 11, 2015.

same: complete stagnation. Reconciliation and unity between Fatāḥ-PA and Ḥamās seems more and more difficult to realize.

It is important to emphasize that the divide between the West Bank and the Gaza Strip is older and deeper than the Ḥamās-Fatāḥ, or even the Ḥamās-PA/PLO divide. In fact, from 1948, the Gaza Strip was under Egyptian administration, while the West Bank was made part of the Kingdom of Jordan. This division was also reflected in the legal and political cultures of both entities, which was entrenched and kept after the Israeli occupation in 1967. The Gaza Strip was under a different military government and civil administration than the West Bank. Israel granted different identification numbers to residents of both areas (and separated East Jerusalem from both). Under the Oslo agreements, Gaza and the West Bank were officially referred to as one entity. However, in reality, the separation by military orders, and by a system of permits and restrictive regulations on residency status, made it possible to keep the two populations separated. For the PA, the West Bank–Gaza Strip dichotomy was important in all decisions related to elections, nominations to public offices, judiciary, ministries, security forces, etc. Israel unilaterally withdrew from most parts of the Gaza Strip in 2005, the occupation regime intensified in Areas A, B, and C in the West Bank and East Jerusalem, and the annexation of land in the West Bank increased with the construction of a wall in the area.

In an earlier section of this chapter, it was argued that the Ḥamās takeover of the Gaza Strip may be a Ḥamās reaction to the lack of empowerment they experienced while in government on matter such as public money, public servants, and security forces. In other words, it is a conflict over power. But this is not the only reason for the divide; it is also about representation. Contrary to expectation, Ḥamās is more represented by PA institutions than PLO institutions, as it is in their interests that the PA become stronger, not the PLO. This is partially because Ḥamās is not part of the PLO. Part of the disagreement between Maḥmūd ‘Abbās and the nominated prime minister in 2006, Ismā‘il Haniyāh, was about the insistence of the PA president that the government present its plan to the PLO Executive Committee for approval, and the nominated prime minister’s refusal to do so. Haniyāh insisted on the Basic Law that regulates this matter and gives only the PLC the power to give confidence, not any other institution, including the PLO. This is why any negotiation between Fatāḥ and Ḥamās ends up discussing the role of the PLO, and the need for reform of the PLO.

But the divide is increasingly becoming a legal one, too. Since 2007, both the Haniyāh government and the PLC members of the Gaza Strip amended the law in force in the Gaza Strip. Other examples have already been referred to earlier in this chapter, such as the replacement of the Ottoman Majallah with the controversial Civil Law Code. Decrees to effectuate change were also used in the West Bank. President ‘Abbās exercised his powers to issue decree-laws, ensuring the Fayāḍ government has remained in office and acted as regular government without the PLC’s vote of confidence since the issuing of the decrees. The interesting thing is that both parties refer to the Basic Law as the source of their authority and use it to delegitimize the other party.⁴¹ Over time, reconciliation has become even harder to realize, considering the kind of legal changes that are taking place.

But what does the Arab Spring have to do with Fatāḥ–Ḥamās reconciliation efforts? In February 2012, a deal was reached between Maḥmūd ‘Abbās and Khālīd Mash‘al to form a unity government, headed by Maḥmūd ‘Abbās himself. Many saw this change in Ḥamās and Fatāḥ as a result of change in the Arab world. Of course, the removal of Mubārak in Egypt, and later on Muḥammad Mursī, and the current revolution in Syria have had clearly

⁴¹ Khalil (n 10).

an impact on Ḥamās in Gaza, and on Fatāḥ and the PA in the West Bank, seen the regional alliances those two groups developed with government authorities and opposition groups. The impact is, however, yet to be discovered, as outcome of the current fight in Syria is not settled in one direction or another at the time of the writing, nor the clearly harsh policies of the post-Mursī government toward Gaza-Ḥamās after the withdrawal of Islamic Brotherhood from government.⁴² The deal between ʿAbbās and Mashʿal has been forgotten, as many other deals before it, including the agreement reached in the post-Mubārak Cairo in May 4, 2011.⁴³

Following the Israeli attacks on Gaza in 2012, a ceasefire was reached with Egypt as mediator. A more positive atmosphere between Fatāḥ and Ḥamās leaders seems to be apparent, as they appear more willing to discuss agreements. A real and substantive reconciliation and unification of Palestinian factions, nevertheless, seems unlikely within the foreseeable future, although over time an agreement on a “unity government” has been reached between Fatāḥ and Ḥamās under Rāmī Ḥamdallah as prime minister.

VI. ḤAMĀS RULE OF GAZA

Ḥarakat al-Muqāwamah al-Islāmiyah (Ḥamās), literally the Islamic Resistance Movement, first appeared on a leaflet at the beginning of the first *Intifāḍah* in 1987, although their connection to the Islamic Brotherhood's social welfare programs can be traced to earlier stages.⁴⁴ However, this was a different Ḥamās from the one currently governing Gaza, or at least it is not the Ḥamās I'm referring to here in this section. Rather, the reference here is to the organized Ḥamās that forcibly took control of the Gaza Strip in 2007 and has governed it since. In a sense, this new Ḥamās is the real challenge to efforts of Palestinian state-building and constitutionalism, not the old social activist Ḥamās.

In an earlier section, this chapter already discussed the *de facto* and *de jure* separation between the West Bank and the Gaza Strip since 1948. It also covered how Israel maintained the separation, and how the PA dealt with it. It further addressed the challenge Ḥamās poses to the representation of Palestine and the Palestinians, particularly considering the lack of Ḥamās representation in the PLO. This section of the chapter shall discuss the events of 2005, when Maḥmūd ʿAbbās was elected as successor of Yāsir ʿArafāt as both the PLO Executive Committee chairperson and PA president, and when Ariel Sharon, the then Israeli prime minister, unilaterally withdrew from most of the Gaza Strip.

The withdrawal from the Gaza Strip didn't change the legal status of that territory as an occupied territory. The legal qualification as an occupied territory is important for the application of international humanitarian law, and Israel's obligations as the occupying power, toward civilians of the Gaza Strip.⁴⁵ For the PA, the Gaza Strip was part of the occupied Palestinian territory before 2005 and remained so afterward. Erez is the main crossing

⁴² Nathan Brown, “The Hamas-Fatah Deal,” *Journal of Turkish Weekly* (February 20, 2012), <http://carnegieendowment.org/2012/02/20/hamas-fatah-deal/9ssv>, accessed January 11, 2015.

⁴³ For more about the reconciliation efforts, see: Youssef Munatter, “Prospects for Palestinian Unity After the Arab Spring” (2011) 13 (3) *Insight Turkey* 21–31; Khalil Shāhīn, “Al-muṣālaḥah al-filasṭīniyah bayn naʿyī ʿamaliyat al-salām wa-tajāḥul al-rabīʿ al-ʿarabī” (2011) 22 (87) *Majallat al-dirāsāt al-filasṭīniyah* 131–148.

⁴⁴ See: Shaul Mishal and Avraham Sela, *The Palestinian Hamas: Vision, Violence, and Coexistence* (Columbia University Press, New York 2000) 16.

⁴⁵ Lena Abu-Mukh, *Movement to and from the Palestinian Territories under Israeli Occupation after Oslo* (1993–2006) (Research Report, CARIM-RR, 2006/02) 16, http://cadmus.eui.eu/bitstream/handle/1814/6275/CARIM-RR_2006_02.pdf?sequence=1, accessed January 11, 2015.

for passage through Israel to the West Bank, and Kārnī the main crossing for food and supplies; both are strictly and exclusively controlled by Israel and often closed on the basis of Israeli political/security considerations. This means that any PA policies on the Gaza Strip (rebuilding Gaza after the 2007–2008 and 2012 attacks, for example, which is part of Salām Fayād's two-year plan for building the institutions of the state) will depend on Israeli permission (and Ḥamās permission, as no PA plans can be implemented in the Gaza Strip without the approval of Ḥamās).

As for the borders with Egypt, Rafah is the only official crossing point. In November 2005, a deal was reached between the concerned parties (the Agreement on Movement and Access and the Agreed Principles for the Rafah Crossings⁴⁶) giving full control of the crossing to the Palestinians on the Palestinian side of the borders, though monitored by an EU mission (EU BAM Rafah), while Israel monitors the borders via closed-circuit television.⁴⁷ However, the agreement gives Israel the power to veto who can enter and exit the Gaza Strip.⁴⁸ Following the second legislative elections in 2006 and Ḥamās's victory, Israel threatened to close the Rafah crossing if Ḥamās administered it. As a result, President 'Abbās adopted a presidential decree⁴⁹ placing the Directorate of Crossings and Borders autonomy (originally part of the Ministry of the Interior) under his direct control. After Ḥamās's takeover of the Gaza Strip on June 14, 2007, the Rafah crossing was often closed, and hundreds were caught in between the Egyptian and the Palestinian side. In July 2008, a ceasefire was reached between Ḥamās and Israel with the mediation of Egypt, resulting in some alleviation of the restrictions on the entry of supplies and food, and, in coordination with the Egyptian side, the gradual opening of Rafah crossing in urgent humanitarian cases.

Since the change of regime in Egypt, crossing Rafah borders has become easier, though there is no information showing there is bilateral agreement or coordination between Ḥamās and Egypt on the administration of entry and exit through the crossing, as Rafah remains an Egyptian-controlled crossing. However, the tunnel economy and business between Egypt and Gaza continues as usual.⁵⁰ During the 2012 attacks on Gaza, Egypt under Mursī appeared different. Egyptian Prime Minister Hishām Qandīl visited the Gaza Strip on November 16, 2012, and expressed Egyptian solidarity with the Palestinians of Gaza. However, Egypt continues to play the same role as mediator as it did under Mubārak in 2008.

The interesting thing about Ḥamās ruling Gaza is that, despite its clear de facto defiance of the Basic Law and the constitutional system of the PA, the appearance of legality is maintained. Ismā'īl Haniyāh, dismissed by presidential decree following the Ḥamās coup in the

⁴⁶ The agreement between Israel and the Palestinian Authority, available at: [http://domino.un.org/UNISPAL.NSF/796f8bc05ec4f30885256cef0073cf3a/c9a5aa5245d910bb852570bb0051711c/\\$FILE/Rafah%20agreement.pdf](http://domino.un.org/UNISPAL.NSF/796f8bc05ec4f30885256cef0073cf3a/c9a5aa5245d910bb852570bb0051711c/$FILE/Rafah%20agreement.pdf), accessed January 11, 2015.

⁴⁷ Lena Abu-Mukh (n 45) 21.

⁴⁸ In other words, those who do not hold an ID card (issued by the PA, with Israeli approval) couldn't enter Gaza through Rafah, with some exceptions, such as diplomats and workers in international organizations. For more information, see: Maslak, *Man yaḥmal mafāṭih ma'bar Rafah?* (Gisha—Legal Center for Freedom of Movement and Physicians for Human Rights 2009), http://www.gisha.org/userfiles/File/publications/Rafah_Report_Arabic.pdf, accessed January 11, 2015.

⁴⁹ Presidential decree No. 16 of 2006, available at: <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2006&MID=15262>, accessed January 11, 2015.

⁵⁰ Yezid Sayigh, " Hamas Looks to the Future: With Gains Come Dilemmas," *Al-Hayat* (March 8, 2012), available at: <http://carnegie-mec.org/2012/03/08/hamas-looks-to-future-with-gains-come-dilemmas>, accessed January 11, 2015.

Gaza Strip in 2007, is officially the head of a caretaker government. His government believes itself to be the legitimate Palestinian government (the other one being that of Salām Fayād, established by a presidential decree and without a vote of confidence by the PLC). Also, Ḥamās is maintaining the appearance of legality by making legal changes official through legislative amendments, and by adopting decrees that are published in an Official Gazette (issued separately for the Gaza Strip, and different from the one issued by the PA in the West Bank).

Another challenge is related to the financial and economic transactions in the Gaza Strip. As a result of the blockade, a new kind of economy has developed in the Gaza Strip: the tunnel economy. Although what the tunnels offer is nothing else but smuggling, in the Gaza Strip began as a unique way to satisfy the Gaza population's needs. Over time and despite the ease of movement of goods between the Gaza Strip and Egypt in particular, the tunnel economy became a major source of imported products (and for that reason, of economic transactions). The Ḥamās government, through the Ministry of Public Works and Housing, used to facilitate the access to public services for the users and workers of the tunnels, for instance, by providing them with water and electricity. Reports also indicate that the Ḥamās government used to collect taxes from the owners of the tunnels and their users. Gaza's tunnel economy was booming, and could even be considered a semi-public sector due to the Ḥamās authority's intervention, as described above. However, it remained informal, as it was outside the regular application of the law that applied to economic activities, and the import of goods. It was certainly also outside of any kind of public accountability and control.⁵¹ On different occasions, the Egyptian authorities flooded the tunnels.

Another challenge to state-building efforts is the form of financial transactions in the Gaza Strip. Because of the international sanctions on the PA since 2006 (and the boycott of Ḥamās ministers in 2007), and as a result of the siege and the development of an unofficial tunnel economy, i.e., the trade and transfer of goods and capital through the tunnels. As all transactions of Palestinian banks necessarily pass by Israeli ones, financial transactions involving Ḥamās money only passed through the informal sector. A new bank was established for this purpose, though it was not recognized by the Palestinian Monetary Fund: the Islamic National Bank. This bank remains an autonomous financial entity in Gaza tasked with the implementation of the financial decisions made by the Gaza government, including transferring salaries for public employees.⁵² Ḥamās has so far managed to pay their staff salaries, while the PA continues to pay salaries for the PA staff in the Gaza Strip, although many of them no longer work—another financial burden on the PA.⁵³ Also, the fuel required from Israel by electricity companies in Gaza is paid for from the tax revenues Israel collects for the PA.⁵⁴ Ḥamās, on the other hand, collects the money for electricity from the Palestinian citizens and keeps the money for themselves.⁵⁵

⁵¹ For an excellent discussion of the tunnel economy in Gaza, see: Nicolas Pelham, "Gaza's Tunnel Phenomenon: The Unintended Dynamics of Israel's Siege" (2012) 41 (4) *Journal of Palestine Studies* 6–31. Also available at: <http://www.palestine-studies.org/jps/fulltext/42605>, accessed March 17, 2016.

⁵² Are Hovdenak (ed), *The Public Service under Hamas in Gaza: Islamic Revolution or a Crisis Management?* (PRIO Report 03/2010) 27. The same author argued that "[t]he establishment of the bank apparently represented a formalization of the tunnel economy."

⁵³ Apparently, those who accepted to work with under the Ḥamās government feared threats of having their salaries and pensions terminated. *Id.* 30.

⁵⁴ World Bank, *Stagnation or Revival? Palestinian Economic Prospects: Economic Monitoring Report to the Ad Hoc Liaison Committee* (March 21, 2012), <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WorldBankAHLCreportMarch2012.pdf>, accessed January 11, 2015.

⁵⁵ Referring to Hisham Omari, CEO of the Jerusalem District Electricity Company, it was claimed that "[i]n Gaza, the Hamas government collects fees from residents and businesses for electricity use, but

VII. PA RULE OF THE WEST BANK

This section of the chapter will examine the PA's form of government and the challenges that such kind of government poses to state-building efforts in Palestine. In particular, the present author will discuss the way laws are effectively put in place, particularly addressing the way laws were created and enforced after 2007.

The PA, as a lawgiver, faces two different risks that are intrinsically related. On the one hand, there is a clear tendency to legislate law, as fast as possible, and in as many areas as possible. Hundreds of laws, decree-laws, and bylaws have been adopted since the establishment of the Palestinian Authority, even before the election of the Palestinian Legislative Council. The risk here is the legislature's tendency to expand its power, by thinking that legislation allows the creation of any law, covering any domain of individuals' lives, without any restrictions whatsoever. Most important, the elected legislative body may be willing to expand its powers on the expense of the executive or even the judiciary. This falls outside the principle of the separation of power, which is theoretically included as a basis of the Palestinian Authority's legal and political system. The nonsovereign character of the PA "exacerbates the perceived need and tendency to silence critics and repress political opponents,"⁵⁶ while at the same time rendering accountability under international human rights treaties is *de iure* impossible⁵⁷—until the recent ratification of international human rights treaties.

On the other hand, the PA did not exclude the rule by decree, thus granting or maintaining a primordial role of the executive, especially the president of the PA. This role is even entrenched in a written constitution-like legislated text, the Basic Law of 2003. Following the Ḥamās coup in Gaza in 2007, and the declaration of the state of emergency by President 'Abbās, a technocratic government under Salām Fayāḍ was formed, and a new era of "rule by decree" was set in motion in the West Bank. Surprisingly, this took place with the support of the international community, which saw this situation as an opportunity to realize reforms in many domains, including security governance and public finance.

These two risky tendencies may appear at first glance to be contradictory, however, they are in fact completely coherent as the result of the legacies that the PA had inherited. The first tendency is a result of decades of Israeli occupation that did not come to an end with Oslo, while the second emerges from the legacy of the PLO, a liberation movement. Military orders are in fact adopted by Israeli military "governors"⁵⁸ (whether personally or by authorized personnel), in their capacity of a lawgivers, executors, and judges, at the same time. Accordingly, all authorities are concentrated in the same person. The PLO

never transfers them to the Palestinian Energy Authority in Ramallah, using the money for its own purposes." Sharon Udasin, "Israel pays PA electricity debts with withheld taxes," *The Jerusalem Post* (Jerusalem December 12, 2012). Available at: <http://www.jpost.com/Sci-Tech/Article.aspx?id=295690>, accessed January 11, 2015.

⁵⁶ Lisa Hajjar, "Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority" (2001) 56 *University of Miami Law Review* 59–76. For a discussion of the impact of the character of the Palestinian Authority on protection of human rights, see: Nasser Aruri and John J. Carroll, "A New Palestinian Charter 2 (1994) 23 (4) *Journal of Palestine Studies* 9–12.

⁵⁷ See generally: Justus Weiner, "Human Rights in Limbo during the Interim Period of the Israel-Palestinian Peace Process: Review, Analysis, and Implications" (1995) 27 *New York University Journal of International Law and Politics* 795–803.

⁵⁸ Term used in plural because there were two Israeli governors, one for Gaza and another for the West Bank, referred to in military orders, as Judea and Samaria.

itself, although theoretically adopting three branches of government (the Palestinian National Council acting as a parliament-like body; the Executive Committee, chosen from within the Palestinian National Council, which serves as a cabinet; and the military courts) had a similar concentration of powers in the form of the chairman of the Executive Committee.

In his evaluation of Salām Fayāḍ's plan to build the institutions of the state, Nathan Brown harshly notes that "Fayāḍ has managed to [...] maintain many of the institutions built earlier and make a few of them more efficient. But he has done so in an authoritarian context that robs the results of domestic legitimacy. In the long term, neither Fayāḍ nor his international backers are well served by ignoring the hollow nature of the current strategy."⁵⁹ One may disagree with Brown on the evaluation on the institutions Salām Fayāḍ helped to establish, ameliorate, or consolidate. However, it is possible to support the main claim, i.e., that the reform and change promised and delivered by Salām Fayāḍ, was in fact executed in an authoritarian context—it was a government by decree, rather than a government by legitimately adopted or pre-established legal rules.

The authoritarian character of the lawmaking and of the government work of the PA persisted after the resignation of Salām Fayāḍ as prime minister, and the nomination of Rāmī Ḥamdallah as a successor in June 2013.⁶⁰ The stagnation in Palestinian internal politics became even more entrenched than before. The establishment of the so-called "unity government" in 2014, under the same prime minister, Rāmī Ḥamdallah, did neither lead to unity nor has it so far made it possible to achieve reconciliation between Ḥamās and Fatāḥ.

VIII. CONCLUSION

The title of this chapter may appear biased to one narrative of the events taking place in the Arab world and the impact on Palestinians—a positive and optimistic narrative. The Arab world appears as one body politic, young again and full of life. Impulses are only the sign of a living body, thanks to the circulating blood necessary for the survival of all its organs (including the Palestinians, and their state-building efforts). If one applies this analogy to the Arab Spring, and its impact on Palestinian state-building, then it means accepting several assumptions (including the unity of the body politic, and the steady and regular impulses of that body, and the organs' need for blood to survive). All such assumptions appear necessary to give a positive and optimistic narrative of events, but that does not render them inherently sound.

Such an image is misleading, and the impression it gives is wrong. This is not because one should exclude such a positive and optimistic narrative, but because it is not the only possible one. The cases this chapter considered in the Palestinian context show how Palestinian leadership uses the new dynamics taking place regionally and locally, to support (or undermine) the state-building process. Also, the changes taking place in the Arab world are shaping the way the state-building process is taking place in Palestine, and the kind of constitutional system that is put in place. Indeed, contrary to populist allegations of Palestinian leaders and the superficial popular expectations, change in the Arab

⁵⁹ Nathan Brown, "Are Palestinians Building a State?" (Carnegie Commentary, June 2010), available at: http://www.carnegieendowment.org/files/palestinian_state1.pdf, accessed January 11, 2015.

⁶⁰ Ali Sawafta, "Palestinian PM Hamdallah sworn in, faces Hamas, economic issues," *Reuters* (Ramallah June 6, 2013), <http://www.reuters.com/article/2013/06/06/us-palestinians-government-idUSBRE95510Z20130606>, accessed May 12, 2015.

world did not result in a more accountable, transparent, and popularly legitimate process of state-building in Palestine, that enhances the pillars of a constitutional system, while mindful and respectful of human rights and freedoms, the rule of law, and the separation of powers.

Instead, Palestine as a claimed political entity is now officially reduced to the 1967 borders (West Bank, including East Jerusalem, and the Gaza Strip), this time by Palestinian request and insistence at the United Nations. In reality, the geography of (this new) Palestine is shrinking as a result of Israeli settlements. Palestine as a body politic is also divided between the West Bank and the Gaza Strip, Fatāḥ and Ḥamās, etc.

Formally speaking, the Basic Law remained in force in both the West Bank and the Gaza Strip, despite clear transgression of its provisions and its spirit by both the PA and Ḥamās governments. In this chapter, reference has been made to some examples. Nevertheless, the Basic Law was rarely attacked as the Supreme Law and highest reference for powers and authorities, by both the PA and Ḥamās-led governments. In both cases, however, new terms are introduced to help maintain the text, but overcome its provisions whenever deemed necessary; such terms include national or public unity, interest, or security. Words change, as much as those who use them, but they all turn around “national”, “interest” and “security”. They are all vague terms used by every competing and conflicting party to justify contradictory positions.

As for efforts of reconciliation between Ḥamās and Fatāḥ, one cannot but notice that they take place outside any constitutional framework. In other words, Palestinian factions dealt with the issue of Fatāḥ-Ḥamās division as something outside the framework of regular application of the law, including the regular application of institutions and rules that were made available by the Basic Law. All the undertakings of both parties as a result of the division are not challenged in court. Rather, the courts are accommodating the new authorities in place. Courts, including the Supreme Court acting as a High Constitutional Court, didn't play a role in finding a solution for the division. They are in a sense part of the division as they are dealing with the system they are part of; they don't question the system itself. Rather, they help consolidate the fragmentation and the division.

Another layer of the separation still exists between Palestinians of the Diaspora, Palestinians in the occupied Palestinian territory, and Palestinians inside Israel. The separation here is important for the issue of representation (the PLO, marginalized sometimes, and at the center of Palestinian politics, the PA). Issues become even more complicated in terms of representation with the possibility of creation of a Palestinian state.

Salām Fayāḍ plan to build institutions of the state while still under occupation (but also to put an end to it) fell short. Not only weren't the plan's objectives realized, it consolidated a kind of political process of state-building where technocrats are presented as alternative to politicians, governance as alternative to government, and management as alternative to rule. Also, the fact that the plan is presented by a government that is ruling only the West Bank, and in the absence of a functioning PLC and the lack of unity between the two factions, Ḥamās and Fatāḥ, meant that the plan consolidated the rule by decree that took place in the West Bank after the Ḥamās takeover of Gaza in 2007.

On the other hand, the UNGA vote enabled the Palestinians to establish a nominal state. The occupied Palestinian territory (the West Bank, including East Jerusalem, and the Gaza Strip) is now referred to as Palestine or occupied Palestine. For the supporters of this move, the new status necessitates some domestic changes, including the adoption of a constitution, and thinking about possible scenarios following statehood, even before its full realization, such as a confederation with Jordan. For these supporters, the Gaza Strip may remain separated for now—with no impact at all on the adopted measures regarding

the constitution and the confederation. Thus, it is possible that a similar confederation or another kind of partnership agreement is reached with Egypt over the Gaza Strip. For Israel, this is an ideal solution, as solid agreements are already in place with both Egypt and Jordan, and accordingly the Egypt-Gaza and Jordan–West Bank option would be just fine. Accordingly, the UNGA's nominal state of Palestine was a gift for Israel that Palestinian leadership offered for free, undermining the Palestinian national cause and putting at risk its main (unique?) achievements: the unity of Palestinians as a people, and the recognition for their right to self-determination and to independence.

The European Union and the Constitution-making Processes in the Arab World

Observer or Actor?

TIMO TOHIDIPUR

I. INTRODUCTION: POSTCOLONIAL DRIFT

The Mediterranean Sea, which connects Europe to the North African and West Asian states, has long been the stage of a narrative of a lasting dialogue between Europe and the Arab-Islamic world,¹ a dialogue on economy, culture, and political issues but a narrative of a militant and colonial history whose traces are in certain contexts still clearly visible. Debates on Eurocentric worldviews and a specific approach of Western thinking on North African and West Asian countries and cultures, often compressed in the term of “Orientalism”,² have accompanied the establishment of a Neighbourhood Policy of the European Union (EU) and a development policy based on the concepts of effectiveness and sustainability.

¹ Julia Clancy-Smith, *Mediterraneans: North Africa and Europe in an Age of Migration* (University of California Press, Berkeley/L.A./London 2012); Philip Mansel, *Levant: Splendour and Catastrophe on the Mediterranean* (Yale University Press, New Heaven 2011); and Michele Penner Angrist, “The Making of Middle East Politics” in Michele Penner Angrist (ed), *Politics & Society in the Contemporary Middle East* (2nd edn Lynne Rienner Publishers, Boulder/London 2013) 17.

² Edward Wadie Said, *Orientalism* (Vintage Books, New York 1979); Todd Kontje, *German Orientalisms* (University of Michigan Press, Ann Arbor 2004); Hamid Dabashi, *Post-Orientalism* (Transaction Publishers, New Brunswick/London 2009); Ian Buruma and Avishai Margalit, *Occidentalism: The West in the Eyes of Its Enemies* (Penguin Press, New York 2004).

The Green Movement in Iran in 2009 in context of the Iranian revolutionary tradition³ and the uprising in the North African countries 2010-2011 may be seen as variations on the same theme: the “defiance of both European colonialism and its extended shadow and postcolonial aftermath”.⁴ At the same time the numerous small uprisings in Algeria against the military regime since the early 1990s and their further impact on recent revolutionary developments in the region remain in question.⁵ Nonetheless, the uprising of the people in North African states, which is conceptually framed as the “Arab Spring”, seemed to hit the EU unexpectedly, although many observers had repeatedly pointed to the potential for upheaval due to social, political, and economic injustice in the region.⁶ And only some months later everything has changed again—recently elected governments with an Islamist background⁷ have resigned (Tunisia) or were removed from office forcibly (Egypt), while Libya struggles with an unmanageable multiplicity of armed groups threatening state unity, and Syria suffers from a brutal civil war with multiple actors from in- and outside the country. All this has happened right next door to the EU, on its nearest southern doorstep, and therefore it inevitably raises the question of the EU’s actual and expected role within these (and further constitutional) processes, and, moreover, brings the external character of the Union’s policies regarding the Arab world in general into the spotlight. In 2011 the High Representative of the EU for Foreign Affairs and Security Policy with the Commission stated that “the EU must not be a passive spectator”.⁸ But does the EU really influence actors and events beyond its own territory in a relevant way? While the idea of a common EU foreign policy is difficult to handle within a complex system of sovereign nation states, the Lisbon Treaty has set up a new legal and institutional framework on foreign, security, and defense policies. However, there seem to be only isolated uni- or bilateral responses to the uprisings and their aftermath. Especially in view of the so-called refugee crisis 2015/2016 with growing numbers of refugees arriving at the EU borders the absence of solidarity between the EU member states got distinctly and visibly. Some Mediterranean

³ Timo Tohidipur, “Iran und die Narrative west-östlicher Begegnung” (2012) 2 *Kritische Justiz* 185; Roger Hardy, *The Muslim Revolt* (Hurst & Company, London 2010) 4; Emmanuel Todd, *Frei! Der arabische Frühling und was er für die Welt bedeutet* (Piper, München/Zürich 2011) 18.

⁴ Hamid Dabashi, *The Arab Spring. The End of Postcolonialism* (Zed Books, London/New York 2012) 2.

⁵ See Arthur Goldschmidt Jr., “The Historical Context” in Jillian Schwedler (ed), *Understanding the Contemporary Middle East* (Lynne Rienner Publishers, Boulder/London 2013) 86; Mohammed Salih, “Blurring Geopolitics” in Muna Abdalla (ed), *Interregional Challenges of Islamic Extremist Movements in North Africa* (Institute for Security Studies (ISS) Pretoria 2011) 38.

⁶ UN Development Program, “Arab Human Development Report 2002” (UN Publications, New York 2002) 117 et seq.; Bettina Huber, “Governance, Civil Society and Security in the Euro-Mediterranean Partnership: Lessons for a More Effective Partnership” (2004) EuroMeSCo Paper No 39/2004, <http://www.euromesco.net>, accessed March 21, 2016, 5 et seq.; Youssef Courbage and Emmanuel Todd, *Le rendez-vous des civilisations* (Éditions du Seuil et La République des Idées, Paris 2007); Jolyon Howorth, *Security and Defence Policy in the European Union* (The European Union Series, 1st edn Palgrave, Basingstoke 2007) 250.

⁷ The term “Islamist” is used here without any positive or negative connotation, but simply to describe political movements or parties that clearly refer to Islam due to their understanding of religious rules. See further Larbi Sadiki, “Political Islam: Theoretical Underpinnings” in Muna Abdalla (ed), *Interregional Challenges of Islamic Extremist Movements in North Africa* (Institute for Security Studies (ISS) Pretoria 2011) 1.

⁸ European Commission, “A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean” COM 200 final, March 8, 2011, 2; see further European Commission, “Review of the Neighbourhood Policy” Joint Communication JOIN(2015) 50 final, November 18, 2015, 3.

partner states get only into focus of EU politics as allies when the EU tries to reduce refugee influx in cooperation with regimes beyond EU external borders. The temporary neglected vision of the Union for the Mediterranean, which is rooted in a process that began with the Barcelona Declaration in 1995, offers a fragile institutional framework which is still not assertive enough to be seen as relevant. Despite this delineated long-term relation between the EU and the Arab world, the role of the EU seems to be stuck in a situation of ambivalence between normative principles like the rule of law, democracy, and the respect for human rights on one side and the basic political interests of stability and security without any enduring normative contextualization on the other.

II. THE EU'S EXTERNAL ACTION AND THE ACCESS TO THE ARAB REGION

“Speaking with one voice” seems to be the key vision of the external dimension of EU politics, underlined by the general provisions on the Union's external action and specific provisions on the Common Foreign and Security Policy (CFSP) in Title V of the Treaty on European Union (TEU). The strong statement of Art. 47 TEU manifests the international legal personality of the EU, which allows the EU an external, independent presence that generally places it on a par with states.⁹ But the center of authority on foreign policy issues remains at the level of its member states, even if there are a lot of informal processes of multilateral bargaining.¹⁰ Therefore, the search for a common legal approach for the EU regarding the constitution-making processes in the Arab world leads to a relatively open basis for relations.

A. Common Policies, Principles, Actions, and Cooperation

From the beginning the European project had an international dimension in terms of integration of the common market into the world trading system and its approach to economic relations with former European colonies.¹¹ With the evolution of the integration process, the political and legal focus on external actions has become more visible. In terms of its exclusive competences such as customs union, monetary policy, or common commercial policy, the Union has, according to Art. 3 para. 2 Treaty on the Functioning of the European Union (TFEU), exclusive competence for the conclusion of international agreements which should become secondary law or directly affect the exercise of internal competences or common rules and their scope. In contrast to this, Art. 4 para. 4 lists development cooperation and humanitarian aid among shared competences, which means that competences of the EU and of its member states are of complementary character.¹² According to the most general provision of Title V (Union's External Action)—Art. 21 para. 2 TEU—the Union defines and pursues common policies and actions while working for a high degree

⁹ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn Cambridge University Press, Cambridge 2010) 632.

¹⁰ Patrick Müller, *EU Foreign Policymaking and the Middle East Conflict* (Routledge, London/New York 2012) 3; Sebastian Mayer and Timo Tohidipur, “Recht und Politik der internationalisierten Sicherheit” in Andreas Fischer-Lescano and Peter Mayer (eds), *Recht und Politik globaler Sicherheit* (Campus, Frankfurt 2013) 98.

¹¹ Daniel Thym, “Foreign Affairs” in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn Hart/Beck, Oxford 2010) 316.

¹² Piet Eeckhout, *EU External Relations Law* (2nd edn Oxford University Press, Oxford 2011) 139.

of cooperation in all fields of international relations. This includes, inter alia, conflict prevention at its external borders, fostering sustainable development in developing countries, integration of all countries into the world economy, and the promotion of an international system based on stronger multilateral cooperation and good global governance. It was also intended to be a project of counterbalancing the dominance of US foreign policy focusing on an autonomous capability for crisis intervention.¹³ As Art. 21 para. 1 TEU outlines, the Union's action should always be guided by the principles which are fundamental to its own existence, namely democracy, rule of law, human rights, and respect for human dignity, the principles of equality and solidarity and the principles of the United Nations and international law in general. The reference to the values of the European Union as stated in Art. 2 TEU is obvious.

The Union's competence covers nearly all areas of foreign policy and tends to ensure coherence between the different areas of its external action and also the foreign policy of the member states (Art. 24 TEU). At the same time, the Union's external powers are guided by the principle of conferral as Art. 5 TEU clearly indicates, which is why the Union can only act within the limits set by the TEU and the TFEU.¹⁴ The EU pursues two main types of policies in relation to the external affairs:¹⁵ economic policies comprising trade agreements as well as development and humanitarian aid, on the one hand, and security and defense policies, including the so-called "fight against terror", on the other. Therefore, the EU recognizes itself as a key player in the international arena, not least based on its sheer size and its impact on economic and financial terms, covering issues from global warming to conflict prevention in Iraq, Afghanistan, and the Middle East.¹⁶ The EU is currently engaged in 15 ongoing civilian and military operations, while 12 other operations have already been completed, ranging from engagement in Bosnia-Herzegovina and Kosovo to Africa and Asia.¹⁷ Acting within a complex system of horizontal and vertical competencies is to be institutionally ensured by cooperation between the Council, the Commission, and the High Representative of the Union for Foreign Affairs and Security Policy, as stated in Art. 21 para. 3 TEU. The office of High Representative was established under the Lisbon Treaty, and it is the head of the European External Action Service (EEAS), established by the Council Decision 2010/427/EU regarding the future organization of EU external relations.¹⁸

According to Art. 22 TEU, the European Council decides on the strategic interests and objectives of the EU by unanimous decision on the recommendation of the Council while the adoption of legislative acts is in general excluded. The Commission and the High Representative can only submit joint proposals to the Council, but they ensure the implementation of the decisions adopted by the European Council and the Council. Recent

¹³ For further argument, see Dirk Peters, *Constrained Balancing: The EU's Security Policy* (Palgrave MacMillan, Basingstoke 2010) 208 et seqq.

¹⁴ Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law* (2nd edn Cambridge University Press, Cambridge 2010) 637.

¹⁵ Simon Hix and Bjørn Høyland, *The Political System of the European Union* (The European Union Series, 3rd edn Palgrave MacMillan, Basington 2011) 302.

¹⁶ European Commission, *The EU in the World. The Foreign Policy of the European Union* (Office for Official Publications of the European Communities, Luxembourg 2007) 3; Michael E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge University Press, Cambridge 2004) 200.

¹⁷ For an official overview, see http://eeas.europa.eu/csdp/missions-and-operations/index_en.htm, accessed March 21, 2016.

¹⁸ The Council of the European Union, "Council Decision of 26 July 2010 establishing the organization and functioning of the European External Action Service (2010/427/EU)."

research highlights the influence of the Union's institutions on the formulation and implementation of EU crisis management.¹⁹ The specific role of the European Parliament (EP) remains, however, less central according to Art. 36 TEU. Thus the High Representative shall regularly consult the EP on "main aspects" and "basic choices" of the CFSP, and the EP may "address questions or make recommendations" to the Council or the High Representative, but there is no ordinary legislative procedure and therefore no regular involvement of the EP within the CFSP (see Arts. 24 and 31 TEU). The Lisbon Treaty assisted the dynamics of parliamentarization in general²⁰ but could not generate strong treaty powers for the EP in the domain of foreign policy. Therefore, there is currently a tendency to reinforce the informal mechanisms of parliamentary consultation and scrutiny in the area of CFSP.²¹

Although the EU has established a common foreign policy over the years and is enhancing cooperation within common institutional structures, the overall process is still "unfinished business" because one single policy or one voice representing the EU's global ambitions does not exist.²² Maybe this will never happen because it contravenes the integrational structure of EU's foreign policy, which focuses on cooperation between autonomous partners in a supranational setting. Most of the member states are reluctant to relinquish control of their foreign policy as it seems in many ways connected with their national influence, sovereignty, history, and identity. The security and defense policy remains an even more sensitive issue, as it represents the essence of national sovereignty.²³

In principle, the Council, as an EU institution, should act where the international situation requires operational action by the Union but—as Art. 28 TEU indicates—every member state can take its own national action and, e.g., in cases of "imperative need" the member state has only to inform the Council of such action afterward. Indeed, there exists a general obligation for each member state to consult with the others in order to determine a common approach; however, every state has the right to act self-determinately and autonomously, as Art. 32 TEU emphasizes.

The fast intervention of France in Libya in 2011, which was not coordinated by the EU, and the announcement by France and Britain in 2013 that—after calling for a common EU stand—they might decide to directly supply Syrian rebels with arms while a strict EU arms embargo is still in place²⁴ reveal the ambivalences of a common EU approach to foreign policy. The French treaty-call for help according to the mutual assistance clause in Art. 42

¹⁹ Nadia Klein, *European Agents Out of Control?: Delegation and Agency in the Civil-Military Crisis Management of the European Union 1999–2008* (Nomos, Baden-Baden 2010) 166.

²⁰ For a differentiated view, see Jürgen Bast, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 *Common Market Law Review* 885–927.

²¹ For further argument, see Anna Herranz-Surrallés, *The Contested "Parliamentarisation of EU Foreign and Security Policy: The Role of the European Parliament Following the Introduction of the Treaty of Lisbon* (PRIF Report No. 104, Frankfurt am Main 2011) 26 et seq.; Elisabeth Wisniewski, "The Influence of the European Parliament on the European External Action Service" (2013) 18 *European Foreign Affairs Review* 81.

²² Michael E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge University Press, Cambridge 2004) 209 et seq.; Paul Craig and Gráinne de Burca, *EU Law* (6th edn Oxford University Press, Oxford 2015) 317, highlight the "soft power" of the EU on the global stage.

²³ Neill Nugent, *The Government and Politics of the European Union* (The European Union Series, 7th edn Palgrave MacMillan, Basington 2010) 381.

²⁴ Adrian Croft and Conor Humphries, "France, Britain fail to win easing of Syria arms ban," *Reuters Press Statement* (March 22, 2013), <http://www.reuters.com/article/2013/03/22/us-syria-crisis-eu-idUSBRE92L19C20130322>, accessed March 21, 2016.

(7) TEU following the Paris terror attacks and the fact that all 28 EU member states have unanimously backed this call for “aid and assistance” does not challenge the analysis of an ambivalent EU foreign policy because the condemnation of terror was always common to all EU member states and institutions and the French government is subsequently dealing bilaterally with the other EU governments regarding concrete support. Furthermore it remains unclear why France declared war on the terror organization which is called “Islamic State” (ISIL/Da’esh) by activating the mutual defense clause for the first time instead of invoking the solidarity clause regarding terror attacks from a non-state actor in Art. 222 TFEU.²⁵ Despite the general idea of a coherent and coordinated foreign policy for the EU, the center of authority on foreign policy issues remains at the member state level.²⁶ The integration of member states into a somewhat cosmopolitan Union with overlapping interests is contrasted by the continued particularities of foreign affairs and international relations of the EU and the lack of a coherent security discourse.²⁷

The diverging foreign policy approaches also affect the EU’s engagement in the Euro-Arab Dialogue and especially the Palestinian-Israeli Peace Process. The EU tried to move toward a common policy on the Mediterranean at a very early stage and managed to establish a Mediterranean Working Group in the 1970s, but talks and projects did not get very far.²⁸ What followed was a long-term struggle to find a common approach to the Middle East. While the EU developed its policy tools within the CFSP in the form of economic aid and sanctions, its initiatives were successful insofar as the EU became the largest aid donor to the region.²⁹ This demonstrates the core feature of the relationship between the EU and its Mediterranean partners in the south—a relationship of cooperation via development politics³⁰ instead of a dialogue between equal partners. This unpleasant type of relationship was to be reconfigured by the establishment of the so-called Barcelona Process in 1995, which became the basis for the Union of the Mediterranean as an important part of the Neighbourhood Policy of the EU. The Neighbourhood Policy itself can be considered a focal point of the EU’s foreign policy.³¹

²⁵ Sara Myrdal and Mark Rhinard, “The European Union’s Solidarity Clause: Empty Letter or Effective Tool?” UI Occasional Papers No.2/2010, 19. <http://www.ui.se/upl/files/44241.pdf>, accessed March 21, 2016; Carmen-cristina Cirigliu, “The EU’s mutual assistance clause: The first ever activation of article 42(7) TEU, EU Parliament Briefing, November 27, 2015, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2015\)572799](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)572799), accessed March 21, 2016.

²⁶ Patrick Müller, *EU Foreign Policymaking and the Middle East Conflict* (Routledge London/New York 2012) 3; Ronja Kempin and Nicolai von Ondarza, “CSDP on the Brink: The Importance of Bringing France and the United Kingdom back” (2011) 13 SWP Comments, http://www.swp-berlin.org/fileadmin/contents/products/comments/2011C13_kmp_orz_ks.pdf, accessed March 21, 2016.

²⁷ Jolyon Howorth, *Security and Defence Policy in the European Union* (The European Union Series, Palgrave MacMillan, Basingstoke 2007) 197; Constanza Musu, *European Union Policy towards the Arab-Israeli Peace Process: The Quicksands of Politics* (Palgrave MacMillan, Basingstoke 2010) 103; Daniel Thym, “Foreign Affairs” in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn Hart/Beck, Oxford 2010) 310.

²⁸ See Michael E. Smith, *Europe’s Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge University Press, Cambridge 2004) 84 et seq. for further developments.

²⁹ Michael E. Smith, *Europe’s Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge University Press, Cambridge 2004) 236.

³⁰ Michelle Pace, *The Politics of Regional Identity: Meddling with the Mediterranean* (Routledge, London/New York 2010) 58 et seq.

³¹ Edmund Ratka and Olga A. Spaizer, “Introduction: Understanding European Neighbourhood Policies” in Edmund Ratka and Olga A. Spaizer (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 15.

B. Neighbourhood Policy, Union for the Mediterranean, and Partnership for Democracy and Shared Prosperity

The European Neighbourhood Policy (ENP) is considered to be the “key geo-strategic project” of the EU today.³² According to Art. 8 TEU, the Union is to develop a special relationship with neighboring countries, “aiming to establish an area of prosperity and good neighborliness”. Art. 8 para. 2 TEU concretizes this by giving the EU the right to conclude specific agreements, which may contain “reciprocal rights and obligations as well as the possibility of undertaking activities jointly”. The origin of this approach in terms of the Mediterranean was the Barcelona Process, which was later reanimated by the Union for the Mediterranean.

1. Views on the Barcelona Process

To understand the political and legal setting of the Neighbourhood Policy and its implications on the actual situation in Arab states, one has to look back to the early 1990s. The end of the Cold War changed the international political context of the EU and shifted the focus from the former US-USSR dimension to regional issues and conflicts including a broader view of the North-South relation.³³ Cooperation with Southern Mediterranean states within the Barcelona Process and its outcomes are of primary interest in this context. The Barcelona Declaration was launched at the Euro-Mediterranean Conference in 1995³⁴ between all (then 15) EU member states and 14 Mediterranean partners but essentially became a multilateral forum for dialogue and cooperation between the EU and its Mediterranean partners in the south. This multilateral framework did not preclude but only complemented bilateral cooperation between separate EU states and North African states. The Declaration was intended to establish a multifaceted partnership, which was organized into three main dimensions: the “political and security partnership” establishing a common area of peace and stability, an “economic and financial partnership” creating an area of shared prosperity, and a “partnership in social, cultural and human affairs” developing human resources, promoting understanding between cultures, and exchanges between civil societies. The work program that was also included outlined more clearly what the specific areas of further cooperation should be, such as, inter alia, the establishment of a Euro-Mediterranean free trade area, intensified cooperation in agriculture, energy, and telecommunications, as well as the interoperability of transport networks. The work program of the Barcelona Declaration places a clear emphasis on the economic side of cooperation while the idea of political and security partnership was reduced to periodical meetings of senior officials aiming at establishing a network for intensified cooperation in the future. The envisaged cooperation regarding migration was not categorized under “security” but under the “partnership in social, cultural and human affairs”, while the idea outlined in the work program was to intensify and improve cooperation among police, judicial, and other (administrative) authorities through periodical meetings and therefore sounded more like security politics.

³² Bernd Weber, “The Evaluation of the EU’s Neighbourhood Policies: How to Measure the Effectiveness of External Europeanisation” in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 69; see also European Commission, “Review of the Neighbourhood Policy” Joint Communication JOIN(2015) 50 final, November 18, 2015, 2.

³³ Neill Nugent, *The Government and Politics of the European Union* (The European Union Series, 5th edn Palgrave Macmillan, Basingstoke 2003) 415.

³⁴ Barcelona declaration, adopted at the Euro-Mediterranean Conference, 27/28/1995, http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf, accessed March 21, 2016.

The Barcelona Declaration also promoted an ongoing dialogue between cultures, which was to lead to a better mutual understanding among the partners by creating a multilateral “framework of relations based on a spirit of partnership, with due regard for the characteristics, values and distinguishing features peculiar to each of the participants”. This dialogue was to be brought forward institutionally by a Euro-Mediterranean Committee for the Barcelona Process. However, the whole process was only marginally successful. In a communiqué concerning the tenth anniversary of the EUROMED partnership, the Commission underlined its success in creating long-term political links between the partners—not at least through Association agreements with Morocco, Tunisia, Jordan, Israel, the Palestinian Authority,³⁵ Lebanon, and Algeria—but at the same time admitted that the partnership had failed to establish a EUROMED regional market or bring about intensified cooperation regarding justice and security.³⁶ This may be a result of the open character of the Barcelona Process, which did not establish self-confident institutions and did not define specific competencies or particular objectives. The Commission concluded that some partners seemed not wholly committed to the process, while the search for consensus in general appeared to decelerate the achievement of common goals. Furthermore, the relationship of the EU to the Southern Mediterranean states was always influenced by the stagnation of the Middle East peace process although it was meant to develop separately from it.³⁷

The policy objectives of the EU in relation to the Middle East peace process include a two-state solution with Israel and a “democratic, viable, peaceful and sovereign Palestinian State” in accordance with the UN Security Council Resolution, including solutions for Jerusalem and the Israeli-Syrian and Israeli-Lebanese conflicts.³⁸ Assistance to the Palestinians comprises the two ongoing EU operations in the Arab region. In November 2005 the Council established the EU Police Mission in the Palestinian Territories (EUPOL COPPS),³⁹ and since 2005 the EU has been attempting to monitor an agreement between Israel and the Palestinian Authority regarding the Rafah crossing point in Gaza with its EUBAM Rafah Mission,⁴⁰ which has steadily been extended and amended on paper⁴¹ but

³⁵ Suspended following the election of Hamas in January 2006. See Constanza Musu, *European Union Policy towards the Arab-Israeli Peace Process: The Quicksands of Politics* (Palgrave Macmillan, Basingstoke 2010) 131 for more.

³⁶ Communication from the Commission to the Council and the European Parliament, “Tenth anniversary of the Euro-Mediterranean partnership: A work programme to meet the challenges of the next five years” (2005) Euromed Report no. 89 2 seqq.

³⁷ *Id.* 15; see also Constanza Musu (n 34) 129.

³⁸ Art. 2 of the Council Joint Action 2008/133/CFSP of February 18, 2008 amending and extending the mandate of the European Union Special Representative for the Middle East peace process, (2008) OJL 43/34.

³⁹ Council Decision 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories extended by Council Decision 2009/955/CFSP of 2 December 2010 and again by Council Decision 2012/784/CFSP of June 25 2012 [2012] OJL 165/48 June 2012.

⁴⁰ Council Joint Action 2005/889/CFSP of December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) [2005] OJL 327/28.

⁴¹ Latest Council Decision 2012/332/CFSP of 25 June 2012 amending and extending Council Joint Action 2005/889/CFSP of 12 December 2012 on establishing a European Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) [2012] OJL 165/71.

has nonetheless remained on hold since 2007 due to local political conditions.⁴² The urgent need to resume negotiations is due to the challenges in the Arab world which have put the peace process back on the agenda of EU's foreign ambitions⁴³ but without tangible outcome so far. Since May 2013, the EU supports Libyan authorities in the reconstruction of its external borders (EUBAM Libya), which should be extended with a new Libyan unity government.⁴⁴ This civilian crisis management mission under the Common Security and Defence Policy (CSDP) is working in coordination with the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex),⁴⁵ which clearly indicates its relevance for the sea borders between EU and Libya. Besides these civilian operations, the EU is one of the largest donors of nonmilitary financial and technical aid to the Palestinian Authority, which can be seen, for example, through the European Instrument for Democracy and Human Rights (EIDHR), the EU Partnership for Peace,⁴⁶ the continued direct financial support for the payment of salaries and pensions of Palestinian civil servants,⁴⁷ and the first bi-annual Single Support Framework to support the Palestinian Authority for the period of 2014–2020, which had for the years 2014/2015 a total value of 508–621 million Euros.⁴⁸ At the same time the EU remains one of the most important trading partners of Israel but has nonetheless failed to advance or even influence the peace process in a sustainable manner.⁴⁹ Although an in-depth knowledge of the region exists in the different European countries and the EU treaties offer a variety of declaratory, operational, economic, and strategic instruments,⁵⁰ the EU has not been able to generate a coherent approach and therefore lacks diplomatic power. Owing to its military and political power, the United States remains so far the most credible Western mediator.⁵¹ The Gulf monarchies—especially Saudi Arabia and Qatar—steadily increased their financial support for poorer Arab states and therefore became central pillars of state policies in many North African and Middle Eastern states,⁵² thereby challenging the EU's level of influence.

⁴² EUBAM Rafah Temporary suspension of operations, June 15, 2007 (see <http://www.consilium.europa.eu/uedocs/cmsUpload/temporarysuspension.pdf>, accessed March 21, 2016) and “Council Conclusions on Middle East Peace Process” (May 23, 2011) 3091st Foreign Affairs Council meeting, Press Release.

⁴³ High Representative of the EU for Foreign Affairs and Security Policy, Joint Communication to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions, “European Neighbourhood Policy: Working towards a Stronger Partnership” (2013) JOIN 4 final, 18 et seq.

⁴⁴ Council of the EU, Green light for civilian mission to support border security in Libya, Press 9478/13, Brussels May 22, 2013, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137189.pdf, accessed March 21, 2016; European Council, Conclusions 18 and 19 February 2016, EUCO 1/16, February 19, 2016, 7.

⁴⁵ EU External Action Service/CFSP, EU Integrated Border Assistance Mission in Libya (EUBAM Libya) Fact Sheet, January 2015, http://eeas.europa.eu/csdp/missions-and-operations/eubam-libya/pdf/fact-sheet_eubam_libya_en.pdf, accessed March 21, 2016.

⁴⁶ See for documents and financial structure: http://eeas.europa.eu/delegations/westbank/projects/overview/index_en.htm, accessed March 21, 2016.

⁴⁷ EU Press release (17 March 2013) PR/08/2013 with reference to the Mécanisme Palestino-Européen de Gestion de l'Aide Socio-Economique (PEGASE).

⁴⁸ European External Action Service, “Single Support Framework 2014–2015: The EU and Palestine sign new multi-annual programming document” (October 15, 2014) Press Release PR/14/2014.

⁴⁹ Constanza Musu (n 35) 131 and 134.

⁵⁰ Constanza Musu (n 35) 138.

⁵¹ Constanza Musu (n 35) 137.

⁵² Christopher M. Davidson, *After the Sheikhs: The Coming Collapse of the Gulf Monarchies* (Hurst & Company, London 2013) 81.

2. *European Neighbourhood Policy and Union for the Mediterranean*

In the last substantial round of enlargement in 2004, ten new member states joined the EU, and consequently, the eastern neighborhood of the Union was completely rearranged. This created the demand for a new framework for relations with Eastern Europe that also took account the Southern Mediterranean states.⁵³ Consequently, the EU developed a new European Neighbourhood Policy with the objective of strengthening the stability, prosperity, and security of all neighboring states. One reason for the ENP was to prevent the emergence of new lines of division between the enlarged EU and its neighbors,⁵⁴ but at the same time it could be seen as a tool to exert influence on all concerned.

The central Art. 8 TEU establishes only “specific agreements” as tools to fulfill the tasks of the Neighbourhood Policy.⁵⁵ The EU is not creating a coherent institutional setting for the Neighbourhood Policy but is leaving the implementation of the agreements to periodic consultations. However, the central elements of the ENP are bilateral Action Plans agreed between the EU and each partner, which have not yet been fully concluded.⁵⁶ A new financial (aid) instrument has been launched, the European Neighbourhood Instrument (ENI), for the period 2014–2020⁵⁷ which replaced the former ENPI and MEDA programs as the relevant financial instruments of the Barcelona Process and beyond.⁵⁸ The ENI continues the approach of the former ENPI which was initiated in order to make the EU’s external assistance more effective by providing more flexible financial support for single- or multi-country (cross-border) programs and singular projects with partner countries,⁵⁹ while the MEDA procedures had become too bureaucratic and confusing for external interlocutors.⁶⁰

In 2008 the EU—under the auspices of the French presidency—established the “Union for the Mediterranean” as a new approach to the European (-Mediterranean) policy within the ENP.⁶¹ Although this project is called “Union” for the Mediterranean and has a General

⁵³ See the Communication from the Commission to the Council and the European Parliament, *Wider Europe—Neighbourhood: A New Framework for Relations with Our Eastern and Southern Neighbours* (2003) COM 104 final, March 11, 2003, and the European Neighbourhood Policy: Strategy Paper, (2004) COM 373 final, May 12, 2004.

⁵⁴ Kristi Raik, “The EU as a Regional Power: Extended Governance and Historical Responsibility” in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave Macmillan, Basingstoke 2006) 77; Constanza Musu (n 35) 130.

⁵⁵ See Art. 8 (2) TEU.

⁵⁶ Filipa Bismarck Coelho, “From Accession Policy to Neighbourhood Policy: A Legal Perspective on EU Democracy Promotion” in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 312.

⁵⁷ Initiated by Regulation 232/2014 of the EP and of the Council of 11 March 2014 laying down general provisions establishing a European Neighbourhood Instrument, OJ L 77/27.

⁵⁸ For further reading on the former structure of financial aid, see Michelle Pace, *The Politics of Regional Identity: Meddling with the Mediterranean* (Routledge, London and New York 2006) 58 f; also Juliane Brach, *Technology, Political Economy, and Economic Development in the Middle East and North Africa* (2010) vol 5 no 3 Review of Middle East Economics and Finance, 14 et seq.; for the achievements of the previous ENPI, see European Commission, *European Neighbourhood and Partnership Instrument 2007–2013. Overview of Activities and Results* (EU ENP Info Center, Brussels 2014), 7.

⁵⁹ Which according to the Annex I to the ENI-Regulation are: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Republic of Moldavia, Morocco, occupied Palestinian territory (oPt) Syria, Tunisia, and Ukraine. In contrast to the former ENPI-Regulation, the Russian Federation has now a more separate status, see Art. 1 (3) of the ENI-Regulation.

⁶⁰ Constanza Musu (n 35) 130.

⁶¹ See Joint Declaration of the Paris Summit for the Mediterranean, Paris, July 13, 2008, http://ufmsecretariat.org/wp-content/uploads/2012/09/ufm_paris_declaration1.pdf, accessed March 21, 2016.

Secretariat in Barcelona, it is not an international organization and has no legal personality. This project achieved even less than the relaunch of the Barcelona Process, offering only slightly more balanced governance and increased visibility.⁶² Even EU officials have recognized that the establishment of the Union for the Mediterranean has not delivered the expected results.⁶³ One fundamental reason for this unfruitful outcome was the asymmetrical and unbalanced relationship between the EU and its neighbors, which is rooted in the “conditionality principle” of the ENP, whereby the neighboring countries will only benefit from the Union’s political and financial assistance if they adopt and respect its values and in part the *acquis* rules.⁶⁴ The more they follow this path, the more they can achieve. Nevertheless, it remained a relevant platform for communication, and the participant countries expressed their confidence that this renewed agreement could finally establish a common area of peace, stability, and security in the Mediterranean region. The Union for the Mediterranean established at least a sort of a privileged relationship between the EU and its neighbors, although some member states traditionally have their own special relations with particular states and regions of the world regardless of this.

3. Partnership for Democracy and Shared Prosperity

The EU described the revolutionary events in North Africa—also called the “Arab Spring”—in its programmatic paper establishing “A partnership for democracy and shared prosperity with the Southern Mediterranean” as being of “of historic proportions” and stated that “now is the time for a qualitative step forward in the relations between the EU and its Southern neighbours”.⁶⁵ In the same paper the EU declared that the Union for the Mediterranean “did not deliver the results we expected”,⁶⁶ deeming it therefore an unsuccessful project. This paper on a newly proposed partnership is and reads like a reaction from a foreign observer that has no actor status within the described events. Furthermore, the timeline is interesting: The main events in North Africa took place between December 2010 and February 2011,⁶⁷ while the EU published the paper on the renewed partnership approach one month after these events. Concerning the role of EUROMED cooperation in general, the EU suffered from divergences between the member states on questions of the

⁶² Constanza Musu (n 35) 130; Werner Ruf, “Mittelmeerunion: Barcelona revisited” in Sabine Ruß-Sattar, Peter Bender, and Georg Walter (eds), *Europa und der Arabische Frühling* (Nomos, Baden-Baden 2013) 95; the instruments are described here: European Commission, “Euro-Mediterranean Partnership: Regional Co-operation. An overview of programmes and projects” (2008), https://ec.europa.eu/europeaid/sites/devco/files/publication-regional-cooperation-mediterranean-partnership-projects-2010_en.pdf, accessed March 21, 2016.

⁶³ European Commission: High Representative of the Union for Foreign Affairs and Security Policy, “A Partnership for Democracy and shared prosperity with the Southern Mediterranean” (2011) COM 200 final 11.

⁶⁴ Filipa Bismarck Coelho, “From Accession Policy to Neighbourhood Policy: A Legal Perspective on EU Democracy Promotion” in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 313; *acquis communautaires* represents the body of common rights and obligations which bind all member states together within the EU, see Paul Craig and Gráinne de Búrca, *EU Law* (5th edn Oxford University Press, Oxford 2011) 14.

⁶⁵ European Commission, “A Partnership for Democracy and shared prosperity with the Southern Mediterranean” COM 200 final March 8, 2011, 2.

⁶⁶ *Id.* 11.

⁶⁷ For a short but concise overview, see Tariq Ramadan, *The Arab Awakening: Islam and the New Middle East* (Allen Lane, London 2012) 1; also Adeed Dawisha, *The Second Arab Awakening* (W.W. Norton & Company, New York and London 2013) 17.

institutional setup and the funding of this policy area⁶⁸—there was a continuous lack of a coherent vision, to say the least. While in early 2011 six southern EU Members suggested shifting of resources away from EU's eastern neighborhood toward its southern partners, to offer them a more flexible and differentiated approach, some northern EU member states opposed the idea of a redistribution of resources and wanted to open and therefore restructure the agricultural market of the EU.⁶⁹ This implies differing models for the future role of the EUROMED dialogue and its institutional setting.

Finally, the EU has declared its will to support the Mediterranean partners under the condition that “the commitment to democracy, human rights, social justice, good governance and the rule of law must be shared”. While a differentiated approach should respect the specific circumstances of each of the partners, it constitutes a clear promotion of the values laid down in Art. 2 TEU. This promotion of values continues by the definition of the three main elements of the partnership: “(1) democratic transformation and institution-building, with a particular focus on fundamental freedoms, constitutional reforms, reform of the judiciary and the fight against corruption, (2) a stronger partnership with the people, with specific emphasis on support to civil society and on enhanced opportunities for exchanges and people-to-people contacts with a particular focus on the young and (3) sustainable and inclusive growth and economic development especially support to Small and Medium Enterprises (SMEs), vocational and educational training, improving health and education systems and development of the poorer regions.”⁷⁰ This was executed by the SPRING Programme (ENPI budgetary source of €350 million, duration 2011–2012),⁷¹ which was adopted at first in 2011 and later continued by SPRING 2013.⁷²

The EU outlined an immediate response to the revolutionary situation in its southern neighborhood covering not only humanitarian aid, facilitation of consular cooperation, and coordination of immediate support for measures of democratic transition but also Frontex joint operations backed by support of the External Borders Fund as an important short-term response.⁷³ This includes a strict EU focus on security, perceived as an effective border control apparatus which was and remains present. And while the detections of irregular border-crossing along the external EU borders again sharply increased in 2013 and 2014 (nearly like during the Arab Spring 2010–2011)⁷⁴ and ended 2015/2016 in a massive migration movement towards Europe especially due to the internal conflicts in many Arab states, the EU answers with renewed security measures to optimize and externalize border controls by establishing amongst others the new Schengen Information System (SIS II) to ensure an optimized data flow, the Smart Border Package, and the new European Border Surveillance System (EUROSUR) to install inter alia the technical and operational

⁶⁸ Timo Behr, “The European Union’s Mediterranean Policies after the Arab Spring: Can the Leopard Change Its Spots?” (2012) 4 ALF 80.

⁶⁹ Timo Behr (n 68) 80.

⁷⁰ European Commission: “A Partnership for Democracy and shared prosperity with the Southern Mediterranean” COM 200 final, March 8, 2011, 3.

⁷¹ European Commission, EU response to the Arab Spring: the Spring Programme (September 27, 2011) MEMO/11/636.

⁷² European Commission, “European Union committed to strengthening democracy in Morocco” (May 19, 2014) IP/14/574.

⁷³ The European Commission, “A Partnership for Democracy and shared prosperity with the Southern Mediterranean” COM 200 final, March 8, 2011, 3.

⁷⁴ See Frontex Risk Analysis 2014, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf, accessed March 21, 2016.

basis for more effective border controls and a cooperation that ensures a faster reaction to irregular migration and cross-border crime—and especially by hastily signing agreements with southern partner states (just like Tunisia, Egypt, or Turkey and maybe soon a shaken Libya) to commit them to help reduce migration flows into EU territories regardless of the partner countries internal legal and political problems.⁷⁵

In the long run the Neighbourhood Policy should be reviewed and adjusted to restructure the support mechanisms for democratic and constitutional reform processes, politics of mobility including legal migration and unconditional support for refugees, as well as the promotion of inclusive economic development and trade relations. However, the ideas of promoting human rights, democracy, and fair trade are already on the EU agenda, but this has never resulted in a prominent role of the EU in the support of nongovernmental actors or the civil society in the southern neighborhood.

III. OBSERVATION, DIALOGUE, AND INFLUENCE

In evaluating the relevant impact of the EU on the outside world and especially on the North African and West Asian states (or Middle Eastern and North African states, known as MENA), we must deal with not only the question of normative principles and rules or coordinating and leading of efforts but also the question of political, economic, and social constellations and the ambivalences of a transnational dialogue setting. Even before foreign policy was an essential part of the normative setting of the EU, non-EU states took note of EU's attitude toward various global issues, especially regarding the policy areas of economy and development but also in terms of institutionalized dialogue such as in the case of the Middle East.⁷⁶ The EU always rooted its approach to the south on the basis of common values, which were not common at all. To build up a dialogue and to influence constitutional processes presupposes common vocabulary based on mutual understanding and a (common) vision.

A. The Quest for (Common) Values and for a Vision

The EU's approach to its Southern Mediterranean neighbors reveals a fundamental ambivalence. The idea of privileged relationship includes—according to the Barcelona Declaration, the Union for the Mediterranean, and the actual partnership for democracy and shared prosperity—consideration for the perceptions and values of each of the partners⁷⁷ and the right of each partner to choose their own path, while the EU resists imposing its own solutions⁷⁸ and emphasizes the joint ownership of all partners of the EUROMED cooperation.⁷⁹

⁷⁵ European Council Conclusions, 17–18 March 2016, PR143/16, 1; Frontex FRAN Q4 (Oct–Dec 2015) 2016, 5, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Fran_Q4_2015.pdf; Frontex Risk Analysis 2015, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf, accessed March 21, 2016 at 2 et seqq.

⁷⁶ Michael E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge University Press, Cambridge 2004) 247.

⁷⁷ See No 3 of the preliminary remarks of the Barcelona Declaration.

⁷⁸ European Commission, "A Partnership for Democracy and shared prosperity with the Southern Mediterranean" COM 200 final, March 8, 2011, 13.

⁷⁹ Second preliminary paragraph of the Draft Joint Declaration of the Paris Summit for the Mediterranean, Paris, July 13, 2008, http://ufmsecretariat.org/wp-content/uploads/2012/09/ufm_paris_declaration1.

At the same time—and partly within the same texts—the EU stresses that its approach is “rooted unambiguously” on values which “must be shared”⁸⁰ and that it wants to reward those partners that show a “clear commitment to common values”.⁸¹ This implies that the privileged relationship between the EU and its neighbors is to be built on commitments to values like democracy, the rule of law, good governance, respect for human rights, and the principles of a market economy and sustainable and inclusive development.⁸² The EU always asserts that these are “common values”, but this remains a problematic statement.

The politics of enlargement and the ENP are in many respects similar, although the goal of accession is absent and the financial resources allocated for the ENP countries are modest in comparison with EU support to candidate countries.⁸³ However, the main common feature is the spreading of EU values and norms to neighbors through conditionality: “we do not impose anything, but if you want closer cooperation, do as we say”.⁸⁴ This is, in other words, the so-called “more for more” principle, further outlined in the Joint Communication of the Commission and High Representative on “A new response to a changing Neighbourhood”.⁸⁵ This principle seems to allow a differentiated approach and gives each partner country scope to develop its relations with the Union according to its own aspirations, needs, and capacities. This may reflect some amount of political discretion, but the dynamics of the uprisings seem nonetheless to be somehow neglected. The Neighbourhood Policy is a tool for establishing a reference framework for the Europeanization of neighboring countries⁸⁶ or—more directly—to “extend and replicate” the Union’s liberal-democratic discourse.⁸⁷ The EU, therefore, exercises power over its neighbors, applying a concept of “Extended Governance”,⁸⁸ which carries the risk of the North African states being reduced to a “subordinate secondary power”⁸⁹ and their abstaining from further cooperation. At the same time

pdf, accessed March 21, 2016; European Commission, “10th anniversary of the Euro-Mediterranean Partnership” COM 139 final, April 12, 2005, 2.

⁸⁰ European Commission, “A Partnership for Democracy and shared prosperity with the Southern Mediterranean” COM 200 final, March 8, 2011, 2.

⁸¹ European Commission, “10th anniversary of the Euro-Mediterranean Partnership” (2005) COM 139 final, April 12, 2005, 6.

⁸² See recital 3 of the ENI Regulation 232/2014.

⁸³ Filipa Bismarck Coelho, “From Accession Policy to Neighbourhood Policy: A Legal Perspective on EU Democracy Promotion” in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 312; Kristi Raik, “The EU as a Regional Power: Extended Governance and Historical Responsibility” in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave Macmillan, Basingstoke 2006) 88.

⁸⁴ Kristi Raik (n 82) 87.

⁸⁵ Joint Communication to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions, “A New Response to a Changing Neighbourhood: A Review of European Neighbourhood Policy” COM 303, May 25, 2011.

⁸⁶ Bernd Weber, “The Evaluation of the EU’s Neighbourhood Policies: How to Measure the Effectiveness of External Europeanisation” in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 69.

⁸⁷ Timo Behr, “EU Foreign Policy and Political Islam: Towards a New Entente in the Post-Arab Spring Era?” (2013) 48 *The International Spectator: Italian Journal of International Affairs* 20 et seq.

⁸⁸ Kristi Raik, “The EU as a Regional Power: Extended Governance and Historical Responsibility” in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave Macmillan, Basingstoke 2006) 77.

⁸⁹ Hani Habeeb, *The Euro-Mediterranean Partnership. Pros and Cons. An Arab View* (Universal Publishers, Boca Raton 2002) 195; Silvia Colombo and Daniela Huber, “The EU and Conflict Resolution in the

the partner countries have the freedom to choose how far they want to deepen their political and economic ties with the EU.⁹⁰ And it remains the freedom of the EU to decide which states should be partners for further political and economic cooperation. Nevertheless, this does not ease the responsibility of the EU and its member states toward former colonies and their historical areas of influence in the MENA region. The EU ties its scope of responsibility to the recognition of common values, but what is its ultimate responsibility toward those who do not share those defined values and live or want to live under different political conditions?⁹¹ From the beginning of its engagement efforts in the EUROMED region, any real dialogue with Islamic/Islamist parties was excluded⁹² until the United States developed contacts with moderate Islamist movements and the EU followed suit by establishing its own communication channels.⁹³ The claimed central role of shared values implies that the EU should offer a conceptual dialogue to all countries in the neighborhood in order to avoid neglect or isolation and with the goal of opening up a forum of mutual recognition and discussion of visions, values, and ideas. The content of European values is, to say the least, a subject to dispute even within the Union itself. The very same values imply a responsibility to keep the political dialogue open and to be responsible toward “others” who do not belong to the Union.⁹⁴ Only this can lead to a real “common” understanding of values as a basis for enhanced economic or political cooperation—or influence on constitutional processes. Beyond the formerly existing constitutional settings, the revolutionary events were not necessarily characterized by the ideas and values mentioned in Art. 2 TEU. The emblematic slogans which were chanted during the uprisings were: “Freedom, (Social) Justice, Dignity.”⁹⁵ The emphasis on dignity, honor, and self-respect,⁹⁶ the idea of freedom from authoritarian state structures, which also includes the refusal of postcolonial influence and the cry for a just social order including an economic perspective,⁹⁷ should be seen as part of a debate on political and social rights as human rights in the respective countries, but this does not necessarily correspond to the EU’s concepts of democracy or rule of law. The support of the authoritarian regimes by the EU—which exceeded dialogue by far—and the unemphatic EU response at the beginning of the recent protest movements have shaken the foundations of its own value system. There are detectible convergences but also differences, at least in the rating of values, their vocabulary, and normative relevance. The strengthening of a new dynamic debate incorporating many different (partly conflicting) approaches in the Arab countries cannot be reduced to a dichotomy of secular/modern versus Islamic/traditional.⁹⁸ Bearing in mind that the majority of the protesters are Muslims who have not been acting against their religion but quite often in its name, they must now be allowed to

Mediterranean Neighbourhood: Tackling New Realities through Old Means?,” European Institute of the Mediterranean, EuroMeSCo Paper 27, March 2016, 17, <http://www.euromesco.net/images/papers/euromesco27b.pdf>, accessed March 21, 2016.

⁹⁰ European Commission, *2012 Annual Report of the EU’s development and external assistance policies and their implementation in 2011* (Publications Office of the European Union, Luxembourg 2012) 51; Kristi Raik (n 87) 88.

⁹¹ Kristi Raik (n 88) 91.

⁹² Timo Behr (n 87) 25.

⁹³ *Id.* 27.

⁹⁴ Kristi Raik (n 88) 79.

⁹⁵ Hamid Dabashi, *The Arab Spring. The End of Postcolonialism* (Zed Books, London/New York 2012) xix.

⁹⁶ Johnny West, *Karama! Journeys through the Arab Spring* (Heron, London 2011) 16.

⁹⁷ Christian D. Falkowski, “Der Arabische Frühling und die Europäische Union” (2013) 4 ZFAS 393, 411.

⁹⁸ Tariq Ramadan, *The Arab Awakening: Islam and the New Middle East* (Allen Lane, London 2012) xi.

find the way forward respecting their respective traditions while also taking into account the challenges of the “modern era” of pluralistic states and societies. Self-determination of neighbors and their civil society movements is a necessary step toward a dialogue on equal terms regarding a common understanding of values in a—thus far—unequal and asymmetric relation between the North and the South.⁹⁹ Maybe this could become the common vision of a Union which lacks a coherent strategy regarding its role on the global stage and therefore vis-à-vis the Mediterranean¹⁰⁰—perhaps this is because there is no coherent “other”.

B. Supporting State Transition: Framework of Constitutional Processes

1. Democracy, Rule of Law, and Institution Building: Impact of the EU?

The revolutionary wave of protests and demonstrations in the Southern Mediterranean should be conceived as an opportunity for popular sovereignty and political pluralism.¹⁰¹ The EU has expressed its will to support the democratic and constitutional reform processes, which means the transfer of money and ideas at the least. According to Art. 3 para. 5 TEU, the EU “shall uphold and promote its values and interests” in its relations with the wider world. Apart from granting humanitarian aid, which provides aid in the form of medical resources and food, etc., the EU undertook to support democratic transitions in 2011.¹⁰² This took place in the form of “support packages”, which focused on allocating money for the elaboration of legal frameworks needed for the holding of elections as well as Election Observation missions of EU officials in southern partner countries. The EU’s Endowment for Democracy is a newly created tool to assist “pro-democratic civil society organizations, movements and individual activists acting in favor of a pluralistic multi-party system”.¹⁰³ According to this plan, there should be an initial focus on the ENP partner countries, while democracy and freedom should not become an export good, but the EU explicitly wants to support “sustainable democratization process” without questioning the ownership of the respected partner countries.¹⁰⁴ Several “Task Forces” for Tunisia, Jordan, and Egypt were established to serve as “catalysts” for political and economic reform by bringing together representatives of EU institutions and governments and those

⁹⁹ See for critical views, José-Manuel Barreto, *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge University Press, Cambridge 2013); Ratna Kapur, *Makeshift Migrants and Law: Gender, Belonging, and Postcolonial Anxieties* (Routledge, New Delhi 2010); William Twining, *Human Rights, Southern Voices* (Cambridge University Press, Cambridge 2009); Balakrishnan Rajagopal, *International Law from Below* (Cambridge University Press, Cambridge 2003).

¹⁰⁰ Annegret Bendiek, “Overcoming Europe’s Political Deficit toward North Africa and beyond” (2011) 5 IP Global Edition 1.

¹⁰¹ Florent Parmentier, “The Clash of Neighbourhoods? The Impact of the Arab Spring on the EU’s Neighbourhood Policy” in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 355; Marwan Muasher, *The Second Arab Awakening and the Battle for Pluralism* (Yale University Press, New Haven/London 2014) 160.

¹⁰² European Commission: High Representative of the EU for Foreign Affairs and Security Policy, “A Partnership for Democracy and shared prosperity with the Southern Mediterranean” (2011) COM 200 final 3.

¹⁰³ Council European Union, “Declaration on the Establishment of a European Endowment for Democracy” (December 20, 2011) Doc 18764/11.

¹⁰⁴ European Council, Conclusions (February 8, 2013) EUCO 3/13 5.

of the southern partner states and also international donors, civil society, and the private (economic) sector.¹⁰⁵ The step-by-step establishment of a (common) market could act as a strong incentive as it would bridge part of the existing economic gap and diverging economic interests in favor of more participative economic cooperation, an equal partnership in terms of trade, and, furthermore, cooperation in the energy market. One first, but indeed very important, step in partner countries like Tunisia, Libya, Morocco, and Egypt was the organization of elections, which required financial aid and organizational support—all of which was an essential part of the “Neighbourhood Policy Package”, outlined by the European Commissioner for Enlargement and Neighbourhood Policy.¹⁰⁶ As a key element in an electoral process, political parties have to be professionalized and the media has to be trained to fulfill its task.¹⁰⁷ The UNDP-EU partnership provided, for example, important support for the carrying out of elections in Tunisia.¹⁰⁸ In 2013, elections which were described as fair and competitive by international and EU observers have been held in Tunisia, Libya, and Egypt at least.¹⁰⁹ The results of the poll, however, did not fulfill the expectations of the EU because in all three countries, so-called “Islamist parties” became an important part of the government,¹¹⁰ while the struggle for a civilian government on grounds of an adopted constitution continues. The EU is also committed to strengthening democratic transition in Morocco via its SPRING 2013 Initiative.¹¹¹ The predominant growth of parties with clear Islamic backgrounds revealed that the outcome of democratic processes is not necessarily compatible with a European understanding of the establishment of a political and legal community. However, the installation of (democratic) structures and institutions to safeguard the path of self-determination can only be assisted by building up an appropriate framework that allows the supported state to

¹⁰⁵ European Commission: High Representative of the EU for Foreign Affairs and Security Policy, Joint Communication to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions, “European Neighbourhood Policy: Working towards a Stronger Partnership” (2013) JOIN 4 final 5 and 16.

¹⁰⁶ Stefan Füle, *Presentation of the European Neighbourhood Enlargement Policy Package*, Speech/13/246, March 20, 2013; European Commission, *2012 Annual Report of the EU’s development and external assistance policies and their implementation in 2011* (Publications Office of the European Union, Luxembourg 2012) 51.

¹⁰⁷ Edmund Ratka, Mathieu Rousselin, Reinhardt Rummel, and Thando Silio, “Strengthening democracy in Tunisia: Recommendations for a transparent, inclusive and accountable political system” C.A.P. Aktuell 2/2012, 2 et seqq.

¹⁰⁸ Jamel Haouas, *Supporting Democratic Elections in the New Tunisia*, <http://www.undp.org/content/brussels/en/home/ourwork/democratic-governance-and-peacebuilding/successstories/supporting-democratic-elections-tunisia.html> /, accessed March 11, 2016.

¹⁰⁹ Seth G. Jones, “The Mirage of the Arab Spring” (2013) Foreign Affairs 2013 55; Dirk Vanderwalle, “After Qaddafi” (2012) Foreign Affairs 9, and High Representative of the EU for Foreign Affairs and Security Policy, Joint Communication to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions, “European Neighbourhood Policy: Working towards a Stronger Partnership” (2013) JOIN 4 final, 4 and 6.

¹¹⁰ Alison Pargeter, *The Muslim Brotherhood: From Opposition to Power* (2nd edn Saqi Books, London 2013) 7; Jillian Schwedler, “Religion and Politics” in Jillian Schwedler (ed), *Understanding the Contemporary Middle East* (Lynne Rienner Publisher, Boulder/London 2013) 398.

¹¹¹ European Commission, “European Union committed to strengthening democracy in Morocco” (May 19, 2014) IP/14/574. See further Ashraf Nabih El Sherif, “Institutional and Ideological Re-construction of the Justice and Development Party (PJD): The Question of Democratic Islamism in Morocco” (2012) 66 Middle East Journal 660.

establish own rules and institutions. In addition to this, the Human Development Report (HMDR) 2013 calls for far better representation of the south in global governance systems and underlines the necessity of (regional) institutions and partnerships to support developments in this direction.¹¹² Representation constitutes an important part of democratic self-determination. Support for democracy, rule of law, and human rights in Arab countries requires a continued dialogue,¹¹³ and the Neighbourhood Policy with its rudimentary but nonetheless existing institutional setting could be an important forum for regional partnership that could also promote the inclusion of Arab states in international discourse—in the same sense as called for in the HMDR 2013. In April 2012 the Danish presidency organized a seminar in Madrid that brought together experts and representatives from Tunisia, Libya, Egypt, Morocco, Bahrain, Jordan, and the EU to discuss constitutional processes, how an inclusive process could be secured, and which institutional framework ought to be created by those new constitutions.¹¹⁴ Alongside these official (policy-driven) meetings, a great amount of scientific cooperation and expertise exists, but there is no strategic EU action as a supra-national political entity. The idea to organize and—on the grounds of the ENP alone—institutionalize a mutual dialogue which involves a serious attempt to outline and define common vocabulary is necessary in order to prevent cooperation from being centered on words without any substance.

But this (new) narrative of democracy and human rights as a special guiding line for EU politics via its southern neighbors can be called into question. According to EU policies toward the Mediterranean over the years, it has always been intended that this area be turned into an area of peace, democracy, and prosperity.¹¹⁵ If they had been taking these policies seriously, the EU and the member states would have always acted in favor of democratic transition, the establishment of the rule of law, and the implementation of human rights in Arab countries. Unfortunately, the experiences of the past reveals a picture of EU engagement that seems to be more interested in the stability of the southern regimes and to be even opposed to civil society movements in some cases.

The talks between the EU and Egyptian officials in April 2014 on the “preparation of structural reforms”, “inclusive sustainable growth”, and “good governance”¹¹⁶ did neither contain any official reference to the oppression of civil society movements or oppositional groups and parties which also represent the origin of the “Arab Spring” movement. Nor did the EU officials comment on mass death sentences against protesters and members of the Muslim Brotherhood in a process that “lacked basic fair trial guarantees.”¹¹⁷ These incidents illustrate the overtly pragmatic, diffuse, or even cynical approach of the EU. It appears to be symptomatic that the EU in its “ENP Country Progress Report” on Egypt declared too cautiously that “there was little room left to the opposition” regarding

¹¹² UN Development Program, “Human Development Report 2013. The Rise of the South: Human Progress in a Diverse World” (UN, New York 2013) 121.

¹¹³ Michelle Pace, *The Politics of Regional Identity: Meddling with the Mediterranean* (Routledge, London and New York 2006) 178, highlights the relevance of language and communication for necessary common understandings.

¹¹⁴ Danish EU Presidency, “Support for Democracy in Arab countries,” Press statement April 12, 2012, <http://eu2012.dk/de/Meetings/Other-Meetings/Apr/Support-for-Democracy-in-Arab-countries>, accessed March 11 2016.

¹¹⁵ See, for example, Draft Joint Declaration of the Paris Summit for the Mediterranean (n 79).

¹¹⁶ European Commission, “EU-Egypt: reviewing on-going cooperation and priorities for the future” (April 2, 2014) Statement/14/1051.

¹¹⁷ See “Egyptian court sentences 683 people to death,” *Al Jazeera* (April 29, 2014), with reference to Amnesty International, <http://www.aljazeera.com/news/middleeast/2014/04/>

the constitutional referendum in January,¹¹⁸ because many opposition leaders and followers had simply remained in jail for months. The same critique hits the later EU Election Observation Mission (EU EOM) to Egypt which observed the presidential elections in May 2014 and proclaimed in its press release that that the election was “administered in line with the law, in an environment falling short of constitutional principles”¹¹⁹—almost close to the initial findings of the observer mission of the Arab League, which identified basically only some technical irregularities¹²⁰—while the observation mission of the US-based Democracy International (DI) stated that “Egypt’s repressive political environment made a genuine democratic presidential election impossible”.¹²¹ One may designate the EU EOM mission as a wrong statement of the EU because it legitimizes a repressive policy¹²² while simultaneously delegitimizing the approach of supporting civil society in the region.

2. Security, Stability, Military: Ambivalence Test

Before the revolts the EU approached the Southern Mediterranean in a manner much less focused on democracy but more so on stability and security.¹²³ The institutionalization of the Neighbourhood Policy, with its objective of creating a prosperous but particularly stable and secure Union, aims at forming a so-called “ring of friends” to the eastern and southern borders¹²⁴—a security buffer. One could identify two main areas of interest and intervention of the EU and its member states regarding its southern neighborhood: The establishment of a security cooperation program which is to support political stability (this includes the “instrument” of the arms trade), on one hand, and a strict regulatory regime for migration control at EU borders on the other. The former authoritarian regimes

egyptian-court-sentences-683-people-death-201442875510336199.html, accessed March 21, 2016, and the Amnesty International Report 2015/2016. *State of the World’s Human Rights* (Amnesty International Ltd, London 2016) 147.

¹¹⁸ European Commission, “ENP Country Progress Report 2013—Egypt” (March 27, 2014) MEMO/14/223.

¹¹⁹ EU EOM Arab Republic of Egypt, “Presidential Election 26/27 May 2014, Press Release Cairo May 29, 2014,” http://www.eueom.eu/files/pressreleases/english/290514-pressrelease-ps_en.pdf, accessed March 21, 2016.

¹²⁰ Joel Gulhane, “International observer missions condemn electoral climate,” *Daily News Egypt* (May 29, 2014), <http://www.dailynewsegypt.com/2014/05/29/international-observer-missions-condemn-electoral-climate-2/>, accessed March 21, 2016.

¹²¹ Democracy International, “Disregard for Egyptians’ Rights and Freedoms Prevents Genuine, Democratic Presidential Election Findings of DI Findings Observation Mission to Presidential Election in Egypt,” press release and preliminary statement (May 29, 2014), <http://democracyinternational.com/news/press-release-and-preliminary-statement-disregard-egyptians-rights-and-freedoms-prevents-genuine>, accessed March 21, 2016.

¹²² Lars Brozus and Stephan Roll, “Egypt: The EU Election Observation Mission was a mistake,” *Stiftung Wissenschaft und Politik (SWP)* (Berlin June 4, 2014), <http://www.swp-berlin.org/en/publications/point-of-view/egypt-the-eu-election-observation-mission-was-a-mistake.html>, accessed March 21, 2016.

¹²³ Florent Parmentier, “The Clash of Neighbourhoods? The Impact of the ‘Arab Spring’ on the EU’s Neighbourhood Policy” in Edmund Ratka and Olga A. Spaizer (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 358; Timo Behr (n 87) 22.

¹²⁴ Filipa Bismarck Coelho, “From Accession Policy to Neighbourhood Policy: A Legal Perspective on EU Democracy Promotion” in Edmund Ratka and Olga A. Spaizer (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 311.

of Ben 'Alī, al-Qadhdhāfī, Mubārak & Co. were reliable partners regarding this understanding of stability.¹²⁵

Bilateral action plans were signed with autocratic regimes in the Arab states in the era before the people's uprising. These regimes were never democratic, nor did they apply principles like the rule of law, good governance, or even human rights. This practice of "upgrading authoritarianism", which allowed some partner countries in the south to disguise their authoritarianism under a variety of quasi-democratic facades and market-economy reforms,¹²⁶ is to a certain degree to be attributed to the EU. The uprisings were partly an economic revolt but at the same time also a revolt against Western-backed regimes.¹²⁷ The EU and some member states also supported these regimes against the first waves of civil society movements. EU member states like France and Italy, among others, used to be very committed regarding their cooperation with—what from the perspective of the EU would be called autocratic—regimes in Tunisia, Libya, or Egypt due to their desire for a stable Southern Mediterranean neighborhood.¹²⁸ Uprisings therefore only pose a danger to the stable southern periphery of the Union. The essentialist depiction of a monolithic and hostile Islamist challenge illustrates the fear of a pro-Islamic aftermath.¹²⁹ Just after the beginning of the uprisings in Tunisia, the French government offered Tunisia's former president Ben 'Alī help to restore him to power—against the wishes of those revolting.¹³⁰ Germany was also involved through its Federal Office of Criminal Investigation (Bundeskriminalamt/BKA), which instructed, among others, the Egyptian State Security Agency, Tunisian Police Judiciary, Jordanian General Intelligence Directorate, and Moroccan and Algerian authorities on the issue of internet surveillance and in some cases also was also equipping them with software up until the uprisings.¹³¹ This may have had an impact as many Internet activists (bloggers, etc.) in Egypt and Tunisia were arrested and in some cases tortured both shortly before and during the revolts in both countries. Moreover, security concerns also determine engagement in terms of military actions and—even more important—the arms trade. EU countries have a long tradition of trading arms with Arab countries, especially

¹²⁵ Thomas Demmelhuber, "Dilemma von Demokratisierung und Stabilitätspolitik im Mittelmeerraum: Herausforderungen für die EU und Ägypten nach dem Rücktritt Hosni Mubarak" in Sabine Ruß-Sattar, Peter Bender, and Georg Walter (eds), *Europa und der Arabische Frühling* (Nomos, Baden-Baden 2013) 55.

¹²⁶ Tobias Schumacher, "The EU and the Arab Spring: Between Spectatorship and Actorness" (2011) Insight Turkey 107, 109; Stephen Heydemann, "Upgrading Authoritarianism in the Arab World" (2007) Analysis Paper No. 13 The Saban Center for Middle East Policy at the Brookings Institution, <http://www.brookings.edu/~media/research/files/papers/2007/10/arabworld/10arabworld>, accessed March 21, 2016.

¹²⁷ Noam Chomsky, *Power Systems* (Metropolitan Books, New York 2013) 45.

¹²⁸ Zaki Laïdi, "Europeans without Europe: The Paradox of the 'Arab Spring'" in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 110.

¹²⁹ Timo Behr (n 87) 24. See further Arun Kundnani, *The Muslims Are Coming! Islamophobia, Extremism, and the Domestic War on Terror* (Verso, London/New York 2014) 265.

¹³⁰ Zaki Laïdi, "Europeans without Europe: The Paradox of the 'Arab Spring'" in Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 110; Muriel Asseburg, "Kein großer Wurf: Eine vorläufige Bilanz europäischer Politik in Nordafrika seit Beginn der Transformationsprozesse" (2013) FG6-Arbeitspapier (AP) Nr. 1/2013, http://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Arbeitspapier_Asseburg_Kein_grosser_Wurf.pdf, accessed March 21, 2016.

¹³¹ German Ministry of the Interior (Bundesministerium des Innern), "Ausbildung in Ländern des Arabischen Frühlings zu 'neuen Ermittlungstechniken,' zur Internetüberwachung und zum Abhören von Telekommunikation," Answer to a Parliamentary Question of the Left Party, April 18, 2013, BT-Drucksache/Official Journal of the German Parliament 17/12981.

with Saudi Arabia, Iraq, Kuwait, and Qatar.¹³² Military cooperation and trade with Saudi Arabia and Qatar is not consistent with the idea of supporting the values of the EU or the ENP, especially when the weapons are used against civilian uprisings in Bahrain or even in the Syrian conflict. This is also inconsistent with the simultaneous condemnation of the political situations in Bahrain and Syria.¹³³ Germany has again violated its own proclaimed values regarding the export of weapons by selling tanks to the (thus far) unstable Egypt, tanks which have been used to run down demonstrators.¹³⁴

Furthermore, the revolutionary events in North Africa have gained the EU's attention not only as an historic moment for popular sovereignty but also as a perceived threat in relation to the flow of migrants from the Southern Mediterranean.¹³⁵ While the member states are still responsible for deciding on criteria for entry into their territories, the EU, according to Art. 77 TFEU, has the competence of developing a common (coordinative) policy on visas and other short-stay residence permits and is to adopt measures concerning the checks to which persons crossing external borders are subject. Apart from a multitude of secondary law based on this article, the EU has also established the European border security agency Frontex as the "anchor stone of the European Concept of Integrated Border Management".¹³⁶ According to the new partnership for democracy and shared prosperity, Frontex joint operations (like "Hermes extended" in 2011) initialized to support EU Members like Italy or Spain "in case of massive influx of migrants from North Africa" are regarded as an important immediate response to the Arab revolts.¹³⁷ Migration politics in the North-South dimension has been "securitized"¹³⁸ and has to a certain degree lost its link to human rights concerns. Moreover, migration has become associated with global terrorism and transnational crime. Therefore, migrants have come to be associated with threats to European public order, cultural identity, and the EU's domestic labor markets.¹³⁹ This

¹³² Andrew Feinstein, *The Shadow World: Inside the Global Arms Trade* (Penguin, London 2011) 35 et seqq.

¹³³ See European Commission, *2012 Annual Report of the EU's development and external assistance policies and their implementation in 2011* (Publications Office of the European Union, Luxembourg 2012) 51.

¹³⁴ Gerald Traufetter, "Made in Germany: Berlin under Fire for Tank Deal with Cairo," <http://www.spiegel.de/international/world/berlin-made-dubious-tank-deal-with-cairo-a-902143.html>, accessed March 21, 2016.

¹³⁵ European Commission, "The European Commission's response to the migratory flows from North Africa" (April 8, 2011) MEMO/11/226. See also Florent Parmentier, "The Clash of Neighbourhoods? The Impact of the 'Arab Spring' on the EU's Neighbourhood Policy" in Edmund Ratka and Olga A. Spaiser (eds), *Understanding European Neighbourhood Policies* (Nomos, Baden-Baden 2012) 355.

¹³⁶ Council Regulation 2007/2004/EC of October 26, 2004 OJ L 349 and Regulation 863/2007/EC of July 11, 2007 OJ L 199/30, last amended by Regulation 1168/2011/EU of 25 October 2011 OJL 304/1. See also Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur, "Border Controls at Sea: Requirements under International Human Rights and Refugee Law" (2009) *International Journal for Refugee Law* 256, 292 et seqq.

¹³⁷ European Commission, "A Partnership for Democracy and shared prosperity with the Southern Mediterranean" COM 200 final, March 8, 2011, 3. See also Council of the European Union, "Strengthening the European external borders agency Frontex—Political agreement between Council and Parliament" Brussels 11916/11 Presse 192, June 23, 2011.

¹³⁸ Communication from the Commission to the Council and the European Parliament, "Tenth anniversary of the Euro-Mediterranean partnership: A work programme to meet the challenges of the next five years" (2005) Euromed Report no. 89, and Columba Peoples and Nick Vaughan-Williams, *Critical Security Studies* (Routledge, London/New York 2010) 75 et seqq.

¹³⁹ Columba Peoples and Nick Vaughan-Williams, *Critical Security Studies* (Routledge, London/New York 2010) 134.

becomes even more apparent in light of the cruel terrorist attacks in Paris 2015 in times, when the EU tries to regulate massive migration flows in EU territories by outsourcing border controls and care of refugees. The European Migration Network (EMN) established in 2008 should—according to the Council Decision that founded it—pay particular attention to ensure a “good degree of cooperation” with countries covered by the ENP amongst others.¹⁴⁰ This cooperation has been deepened not only through bilateral agreements between the EU and/or its member states and partners like Libya, Tunisia, and Egypt but also by working arrangements signed by Frontex and authorities in partner countries with operational responsibility for border control.¹⁴¹ This has been possible because Frontex has its own legal personality and is therefore able to establish “a reliable and effective network of partnerships”—Frontex’s own special form of external relations.¹⁴² Frontex classifies these relationships as valuable tools for effectively tackling irregular migration and cross-border crime. The EU and its member states are trying for their part to regulate border crossing by installing a series of legal sieves or filters, which at the end supports the selectivity of borders.¹⁴³ Those third-country nationals who are not on a EU’s white (visa) list are collectively seen as a potential security risk of some kind (illegal immigration, criminality, political violence).¹⁴⁴ The very interesting and humane idea of a “Euro-Mediterranean Citizenship”, which would include people living in the territories of the partner states of the Union for the Mediterranean, remains a future-oriented concept of an intercultural human rights dialogue, far from being a realistic political or legal project.¹⁴⁵

All this leads to the practice of security through stability rather than security through freedom and an active and efficient civil society and certainly the sustainable implementation of the rule of law. According to Art. 21 para. 2 TEU, the EU “shall define and pursue common policies and actions” in order to “safeguard its values, fundamental interests” and “security”. While it is therefore a legitimate aim of the EU and its member states to prioritize security as a guideline for relations with the south, it is counterproductive in terms of credibility of the EU’s human rights policy and the policy of supporting democracy according to Art. 21 TEU.¹⁴⁶ Furthermore, the EU is accused of equating stagnation with stability by

¹⁴⁰ Council Decision 2008/38/EC of 14 May 2008 establishing a European Migration Network, 8.

¹⁴¹ Frontex has concluded working arrangements with the authorities of 17 countries, such as Cape Verde, Nigeria, Armenia, Azerbaijan, and Turkey and is still negotiating agreements with states like Libya, Morocco, Senegal, Mauritania, Egypt, and Tunisia, among others. For recent developments, see Frontex, “Risk Analysis 2015” 61.

¹⁴² See Frontex homepage, <http://www.frontex.europa.eu/partners/third-countries>, accessed March 21, 2016; Frontex, Single Programming Document 2016-2019. Programme of Work 2016, 17, http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Work_programme/2016/Programme_of_work_2016.pdf, accessed March 21, 2016.

¹⁴³ See for the more global debate, Leanne Weber and Sharon Pickering, *Globalization and Borders* (Palgrave MacMillan, Basingstoke 2011) 25 et seq.

¹⁴⁴ Elspeth Guild, *Security and Migration in the 21st Century* (Polity Press, Cambridge 2009) 189; Leanne Weber and Sharon Pickering, *Globalization and Borders* (Palgrave MacMillan, Basingstoke 2011) 26, underline that, e.g., borders are virtually nonexistent for capital and global elites.

¹⁴⁵ Pietro de Perini, “Intercultural Dialogue and Human Rights: Prospects for a Euromediterranean Citizenship” (2010) 2 *International Journal of Euromediterranean Studies* 163.

¹⁴⁶ Annegret Bendiek, “Overcoming Europe’s Political Deficit toward North Africa and beyond” (2011) 5 *IP Global Edition* 1; Hossam Shaker, “Europe and the Arab Spring: Five years later,” *Middle East Eye*, December 28, 2015, <http://www.middleeasteye.net/columns/europe-and-arab-spring-five-years-later-850907420>, accessed March 21, 2016.

cooperating intensively with autocratic regimes.¹⁴⁷ The entire legal and political situation tends to be a very unpleasant starting point for EU's input on the constitutional processes of the Arab states. Regardless of how the EU or member states try to engage themselves, they will always risk the inherent allegation of a (post)colonial intervention or exercise of influence. Therefore, there should and can be no direct input to the constitutional processes.

C. Relevance of Law and/or Politics in EU-Arab Relations

EU-Arab relations are not built on a structured EU policy with a coherent catalogue of primary and secondary law provisions. The constitutional provision of Art. 8 TEU is only a very general basis for the ENP flanked by multi- and bilateral agreements. Within this fragmented normative setting the Commission and the High Representative elaborate the agenda of further cooperation. However, these EU decision-making processes thus display more intergovernmental characteristics.¹⁴⁸ The whole structure of the ENP is very close to a (public) international law regime, because the member states still maintain complete control via the Council and, moreover, have the ability to act autonomously in terms of their foreign interests. Through the involvement of several institutions and global actors, the EU tries very hard to create policy coherence¹⁴⁹ but does so without a coherent normative approach or coherent outcome. In fact the EU is torn between activism and passivism, which is displayed in its rather anachronistic foreign policy behavior toward the MENA region.¹⁵⁰ Given the lack of a uniform strategy, some member states like France and Britain were able to start air raids in Libya while others criticized any (military) action against a sovereign southern neighbor, and all this was based on a total different understanding of the Security Council Decision on Libya and within the same legal context of EU law.¹⁵¹ In 2013, France and Britain precluded the weapon embargo to Syria by simply refusing to decide explicitly.¹⁵² EU action requires unanimous approval by all members. But even those action plans which constitute the core features of EUROMED Cooperation are

¹⁴⁷ Rym Ayadi and Carlo Sessa, "What scenarios for the Euro-Mediterranean in 2030 in the wake of the Arab spring?" (2011) MEDPRO Policy Paper No. 2, <http://www.medpro-foresight.eu/system/files/MEDPRO%20PP%20No%202%20WP9%20Rym%20Ayadi%20and%20Carlo%20Sessa.pdf>, accessed March 21, 2016; Sven Biscop and Stefan Borg, "A New Concept for a New Neighbourhood," in Senén Florensa (ed) *The Arab Spring in Comparative Perspective*, SSN-Euromesco Joint Policy Study 1, European Institute of the Mediterranean 2015, 82, http://www.euromesco.net/images/papers/joint%20policy%20study_1.pdf, accessed March 21, 2016.

¹⁴⁸ See for further elaboration, Neill Nugent, *The Government and Politics of the European Union* (European Union Series, 7th edn Palgrave Macmillan, Basingstoke 2010) 429.

¹⁴⁹ High Representative of the EU for Foreign Affairs and Security Policy, Joint Communication to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions. European Neighbourhood Policy: Working towards a Stronger Partnership, (2013) JOIN 4 final 19 et seq.

¹⁵⁰ Tobias Schumacher, "The EU and the Arab Spring: Between Spectatorship and Actorness" (2011) *Insight Turkey* 107, 109 et seqq. identifies five dichotomies, all of which contribute to the standing of the EU.

¹⁵¹ Ronja Kempin and Nicolai von Ondarza, "CSDP on the Brink: The Importance of Bringing France and the United Kingdom Back" (2011) 13 SWP Comments, http://www.swp-berlin.org/fileadmin/contents/products/comments/2011C13_kmp_orz_ks.pdf, accessed March 21, 2016; Annegret Bendiek, "Overcoming Europe's Political Deficit: Prospects of European Foreign Policy" (2011) 5 IP Global Edition 4.

¹⁵² James Kanter, "European Nations End Weapons Embargo, Creating Path to Arming Syrian Rebels," *New York Times* (New York May 27, 2013), http://www.nytimes.com/2013/05/28/world/middleeast/syria.html?pagewanted=all&_r=0, accessed March 21, 2016.

not legally binding. It is therefore comprehensible that the ENP is marginalized in most textbooks on European law while political scientists show much greater interest in the EUROMED regime.¹⁵³ The same political scientists tell us much about a generally misguided Neighbourhood Policy toward the south, which was not even able to maintain its institutional integrity.¹⁵⁴

But what are the effects on the constitution-building processes and what is the reaction of the law regarding constitutional processes in the Arab countries? All these agreements between the EU and/or its member states with the Arab states cannot ensure direct influence on their constitutional processes. However, political cooperation with its southern partners could create an atmosphere where the positive and negative experiences of the EU in creating national and supranational legal entities via constitutionalization could become relevant. Within an established framework of partners and signatories, each side could be admonished to do its duty, for example, the implementation of provisions of cooperative agreements. However, this does not lead to simple transfer of norms in the sense of give (EU) and take (Arab states). Neither the EU nor a conception of an “international constitution” can create a universal constitution as a single role model for all constitutions. While globalization tends—on the one hand—to globalize certain constitutional ideas it brings about, on the other hand, the fragmentation of and diversity in constitutional constructions.¹⁵⁵ The recognition of commonly used constitutional vocabulary is a testament to how the international community always has a bearing to such processes. However, the transfer of constitutional ideas and legal provisions is for the most part far more complex than a bi- or multilateral transaction of goods, as it is predicated on the conviction that an understanding of them precedes their transfer. Observing the socio-political and legal context of the partners and developing an understanding of the fundamental institutional needs and the desired constitutional rationale of the (political) community or state in the respective neighborhood is of existential relevance for the EU because it eases communication and trade and therefore ensures peaceful coexistence and promotes cooperation.¹⁵⁶ The intensity of cooperation with southern partners remains primarily the decision of the member states and not the EU, which explains the heterogeneous outcome. Local social and economic conditions remain the most relevant factors. The EU or even the United States as “outside powers” are supposed to have only marginal direct impact on the scope of political reforms or constitutional texts.¹⁵⁷

¹⁵³ See, e.g., Beate Neuss and Antje Nötzold (eds), *The Southern Mediterranean. Challenges to the European Foreign and Security Policy* (Nomos, Baden-Baden 2015); Edmund Ratka and Olga A. Spaier (eds), *Understanding European Neighbourhood Policies: Concepts, Actors and Perceptions* (Nomos, Baden-Baden 2012); Richard G. Whitman and Stefan Wolff (eds), *The European Neighbourhood Policy in Perspective* (Palgrave, Basingstoke 2010); Johannes Varwick and Kai Olaf Lang (eds), *European Neighbourhood Policy: Challenges for the EU Policy towards the New Neighbours* (Barbara Budrich Publishers, Leverkusen 2007), and Sabine Ruß-Sattar, Peter Bender, and Georg Walter (eds), *Europa und der Arabische Frühling* (Nomos, Baden-Baden 2013).

¹⁵⁴ Claus Leggewie, *Zukunft im Süden* (Edition Körber-Stiftung, Hamburg 2012) 152; Annette Jünemann, “Vorerst gescheitert: Perspektiven einer glaubwürdigen EU-Mittelmeerpolitik nach dem Arabischen Frühling” in Sabine Ruß-Sattar, Peter Bender, and Georg Walter (eds), *Europa und der Arabische Frühling* (Nomos, Baden-Baden 2013) 26.

¹⁵⁵ Timo Tohidipur, “Comparative Constitutional Studies and the Discourse on Legal Transfer” in Günter Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar, Cheltenham 2013) 31.

¹⁵⁶ Timo Tohidipur (n 155) 30.

¹⁵⁷ Seth G. Jones, “The Mirage of the Arab Spring” (2013) *Foreign Affairs* 55, 56.

While the EU along with its member states are large aid donors, responsible for over 50% of the world's official development assistance, which should give the EU a powerful position in international development policy,¹⁵⁸ the outcome regarding direct input to the constitutional processes but also diplomatic pressure of the EU seems to be less impressive. Nonetheless, a seriously restructured approach may offer the chance for the EU to become a long-term partner that gains influence through ENP as a single framework for relations with a number of diverse partners. The EU seems to need a more flexible conceptual framework regarding the ENP partners which could (re)adjust aims and methods of cooperation and therefore accommodate the national interests of both the member states and also of the partner states.¹⁵⁹ The EU is not the only partner for political and economic cooperation and not the only potential role model for ENP partner countries in a globalized world. Therefore, this will "require the EU to reflect on how to have a more multilateral policy approach",¹⁶⁰ which involves all relevant actors like the Arab League and other Arab states which are not part of the ENP more systematically. However, this approach does not fit well with the general EU legal concept of binding rules for everybody. While the "Union of Law" thus takes a back seat, a disharmonic "Union of Politics" and political interests determine relationships with the southern partners.

IV. CONCLUSION AND PROSPECTS: THE EU'S AMBIVALENT OBSERVER-ACTOR STATUS

The EU is still in need for a common approach to its Southern Mediterranean partners and the Arab world in general. The High Representative of the EU for Foreign Affairs, the Commission and the Council of the EU, as the institutionally responsible actors, do not lead the member states but rather coordinate parts of the EU's external policy without defining a common vision in relation to the Arab world. Certainly, the EU issues papers on (common) general goals, like the partnership for democracy and shared prosperity, and in general supports elections (financially) or a peace process or tries to establish a dialogue between conflict parties, however, when it comes to more concrete measures or relevant (economic or social) projects the approaches of the member states and/or the institutions differ, which results in a more fragmented and ambivalent foreign policy approach. Additionally, the EU is struggling to regain its reputation after years of supporting autocratic regimes, a story which has not ended yet. According to recent descriptions, the EU's approach varies "between true civilianism and soft imperialism".¹⁶¹ This tends to outline a very pragmatic approach which seems to disregard not only parts of the values stated in Art. 2 TEU but also some of the aspirations of the southern states. A relaunch of EU-Arab relations after the "Arab Spring" must include support for processes of postcolonial emancipation, allowing partner states to assert the autonomy of their countries. The potential of the ENP could be realized by supporting flexible regional or sectoral cooperation schemes

¹⁵⁸ Simon Hix and Bjørn Høyland, *The Political System of the European Union* (The European Union Series, 3rd edn Palgrave Macmillan, Basingstoke 2011) 310.

¹⁵⁹ Timo Behr(n 87) 22.

¹⁶⁰ European Commission: High Representative of the EU for Foreign Affairs and Security Policy, Joint Communication to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions, "European Neighbourhood Policy: Working towards a Stronger Partnership" (2013) JOIN 4 final 22.

¹⁶¹ Timo Behr(n 87) 22.

without allowing a lapse back to mere national orientations.¹⁶² The EU practice of security through stability without consideration of the authoritarian character of some of its partners must be reconsidered. The culture of political participation of the civil society which is evolving in the aftermath of the revolutionary or quasi-revolutionary events in Tunisia, Egypt, and other southern partners should be supported without direct influence on political and constitutional processes because such influence could be seen as a means of revitalizing colonial hierarchies and could be used as an argument against pluralistic developments by conservative political movements in these, thus far (politically) fragile societies. While partner countries like Tunisia carefully tend to establish stable political and normative settings via an inclusive dialogue,¹⁶³ the revitalized suppressive tendencies against former protagonists of the civil society movements and other political parties in a partner state like Egypt¹⁶⁴ and the highly unstable and volatile situation during the drafting process for a new constitution in Libya¹⁶⁵ display the complexity of processes of transformation in the region. At any rate, the EU's separation from refugee/migration issues by calling for more and more effective external border control mechanisms and even enhanced armament and military cooperation¹⁶⁶ heavily contrasts with the value-oriented approach of the EU itself. The EU should be more focused on local social and economic conditions and an inclusive policy. Even if it remains difficult to define common values with the Arab world, some observers claim that EU's future in relation to its development—especially regarding energy policy cooperation and commodity trade—and aspirations for peace, prosperity, and stability lies in the south.¹⁶⁷ However, the EU has to be aware of other international projects in terms of both political and constitutional developments, such as the Arab League or the Organization of Islamic Countries, which enjoys the support of the financially strong countries of Saudi Arabia or Qatar. And Saudi Arabia especially is well described as leader of the counter-revolution, which tends to preserve or reconstruct authoritarian but stable regimes, inter alia in opposition to Iranian ambitions in the region.¹⁶⁸ But the EU must be careful to not simply follow the same path which totally ignores what has happened around the uprisings of 2010-2011—and what

¹⁶² For different scenarios, see Rym Ayadi and Carlo Sessa (n 147), 3.

¹⁶³ European Commission, "Neighbourhood at the crossroads—taking stock of a year of challenges" (2014) Press Release IP/14/315 2.

¹⁶⁴ Marwan Muasher, *The Second Arab Awakening: And the Battle for Pluralism* (2nd edn Yale University Press, New Haven and London 2014) xii; Amnesty International *Report 2015/2016. State of the World's Human Rights* (Amnesty International Ltd, London 2016) 145.

¹⁶⁵ European Commission, "ENP Package-Libya" (March 27, 2014) MEMO/14/228.

¹⁶⁶ In context of EUROSUR the EU promotes the inclusion of automated surveillance systems and drone programmes like OPARUS (Open Architecture for UAV-based Surveillance System), <http://cordis.europa.eu/projects/242491>, accessed March 21, 2016, and AEROCEPTOR, which is an armed drone able to stop "non-cooperative" vehicles, <http://www.aeroceptor.eu/>, accessed March 21, 2016; furthermore, cooperation between Frontex and NATO is established, Press Statement March 6, 2016, <http://frontex.europa.eu/pressroom/news/frontex-and-nato-to-cooperate-in-the-aegean-sea-IbLcu0>, accessed March 21, 2016.

¹⁶⁷ Claus Leggewie, *Zukunft im Süden: Wie die Mittelmeerunion Europa wiederbeleben kann* (Körber-Stiftung, Hamburg 2012).

¹⁶⁸ Guido Steinberg, *Anführer der Gegenrevolution; Saudi-Arabien und der arabische Frühling* (Stiftung Wissenschaft und Politik, Berlin 2014) 27; Henner Fürtig, "Iran and the Arab Spring: Between Expectations and Disillusion" (2013) GIGA Working Paper No. 241, http://www.giga-hamburg.de/de/system/files/publications/wp241_fuertig.pdf, accessed March 21, 2016.

may happen again. The EU has to redefine a role for itself regarding the new constitution-making processes in this area without marginalizing the outcome of the civil society movements, because ties to the Southern Mediterranean guarantee an intimate connection to the Arab-Islamic world, a connection which remains vitally important for Europe. The processes of long-lasting renegotiations of governing and the range of a participative society, which may lead to different forms of civil emancipation within the Arab countries (Islamic and secular) have just begun.

Epilogue

The Constitutional Legacy of the Arab Spring

RAINER GROTE AND TILMANN J. RÖDER

I. INTRODUCTION

In the early stages of the Arab Spring, when the overthrow of the old regime suddenly created a hitherto unprecedented space for open political debate, much of the discussions on a new democratic political order centered around the concept of a civil state, or *dawlah madaniyah*.¹ It is probably fair to say that the term owed its huge success in no small part to its ambiguity. It was the kind of concept around which moderate Islamist groups as well as liberal, nationalist, and socialist political parties could rally. For the Islamists in particular, it marked a shift away from the concept of the “Islamic state” which they had previously been advocating. By invoking the concept of citizenship, as opposed to the sovereignty of God as the foundation of legitimate constitutional authority, they were able to placate the fears of the non-Islamist sectors of society and thus increase their chances of playing a central role in the post-authoritarian constitutional order. At least for some among them, however, this semantic shift also reflected the disillusion with the theocratic model of government established in Iran, which was increasingly contested within the country itself and had failed to fulfill the hopes of Islamists outside the country. The shift from “Islamic state” to “civil state” allowed the political leaders of the Islamist movements in the Arab Spring to join the political mainstream on constitutional issues in the countries of the Arab Spring without having to use the term “secular”, which was objected to not only by Islamists, but by Arabs in general, because of its association with colonialism and Westernization.²

¹ For an overview, see: Peter Hill, “‘The Civil’ and ‘the Secular’ in Contemporary Arab Politics,” <http://muftah.org/the-civil-and-the-secular-in-contemporary-arab-politics/>, accessed September 25, 2015.

² Fawaz A. Gerges, “The New Islamists: Pluralism and Minorities?,” <http://blogs.lse.ac.uk/ideas/2012/05/the-new-islamists-pluralism-and-minorities/>, accessed September 25, 2015.

Following the election of the Egyptian Muslim Brotherhood's candidate as new president of Egypt in June 2012, which marked a high point in the political fortunes of moderate Islamists in the country and beyond, the president-elect Muḥammad Mursī declared: "Egypt is now a real civil state. It is not theocratic, it is not military. It is democratic, free, constitutional, lawful, and modern"³ In the way it was used by Mursī, the reference to the "civil state" expressed the basic consensus of the political forces united in their desire to replace the old authoritarian political regime by a new constitutional order based on democracy, and as such was deliberately vague. At its most basic level, it signaled that the state to be established by the post-revolutionary settlement should be run neither by the military nor by the clerics. It would instead be based on democracy, rule of law, and the respect of fundamental rights. However vaguely, the concept thus marked the common ground where the adversaries of the old regime, Islamists and non-Islamists alike, hoped they might be able to meet in order to consolidate the democratic gains of the popular uprisings and create a democratic constitutional framework which would be strong enough to prevent a return to authoritarian rule.⁴

As it turned out, however, such hopes were largely illusory. While there was a large consensus that military rule should be a thing of the past and the new political order be based on democratic principles and the equality of all citizens before the law, the role of religion in politics remained highly contested. While a bigger role for Islam in matters of governance was a cherished hope for some, it instilled fear in others.

II. EGYPT—THE FAILURE OF ISLAMIZATION AND THE RETURN OF THE MILITARY

In Egypt, the decision by the Muslim Brotherhood and its allies in Egypt to reject any political compromise with the non-Islamist political forces in the Constituent Assembly in favor of imposing their version of an Islamic state backfired and paved the way for the military to take back the reins of power. This was a high price to pay, especially since the "Islamist" Constitution of 2012 fell short on both accounts: It did not implement a clear and coherent concept of the Islamic state nor did it achieve a breakthrough in establishing the unquestionable primacy of the elected civilian leadership of the country over its military.

With regard to the position of the armed forces, the 2012 Constitution made a considerable effort to woo the military leadership by entrenching its status as an autonomous institution which escapes civilian control in the constitutional text. While Art. 194 declared in very general terms that the armed forces "belong to the people" (Art. 194), the command over the armed forces was not entrusted to the highest representative of the people, i.e., the elected President of the Republic, but to the minister of defense, who was to be appointed from among the officers of the armed forces (Art. 195). The military judiciary was going to have exclusive jurisdiction in all crimes related to the armed forces, its officers, and personnel; this included jurisdiction over civilians in all those cases in which they stood accused of crimes that "harmed" the armed forces (Art. 198). The budget of the armed forces was not decided by parliament, but by the National Defense Council, in which the voting members representing the armed forces—the minister of defense, the chief of the general

³ Muḥammad Mursī, as quoted in Ashraf Ramelah, "Egypt's Challenge: Writing a New Constitution," available at: <http://www.gatestoneinstitute.org/4034/egypt-constitution>, accessed September 25, 2015.

⁴ Bruce K. Rutherford, *Egypt after Mubarak* (Princeton University Press, Princeton 2012) xiv–xxi, who concludes that as a result of the events unfolding after January 25, 2011, the boundary between liberal thought and Islamic constitutionalism has largely disappeared.

intelligence service, the chief of staff of the armed forces, the commanders of the army, the air forces, and air defense, the chief of operations of the armed forces, and the head of military intelligence—outnumbered the civilian members (the President of the Republic, the Speakers of the houses of parliament, the prime minister, the minister of foreign affairs, the minister of finance, and the interior minister). The Defense Council had to be “consulted” with regard to all draft laws related to the armed forces, giving it in effect a veto on those laws if it did not like them (Art. 197).

By contrast, the gains in incorporating a more Islamist version of the state in the new Constitutional Document remained limited. They resided mainly in the addition of a new provision—Art. 219—which defined what was meant by the reference to the “principles of Islamic Shari‘ah” in Art. 2, and in raising the profile of Al-Azhar by giving it an official role in matters concerning Islamic governance.⁵ After intense discussions, the Constituent Assembly decided to frame Art. 2 of the new constitution, which dealt with the role of Shari‘ah in the Egyptian legal system in precisely the same terms as in the old constitution, i.e., by referring to the principles of Islamic Shari‘ah as “the primary source of legislation.” Nor did it change the basic mechanism for the interpretation and enforcement of this provision by way of constitutional review: While the number of judges of the Supreme Constitutional Court (SCC) was reduced from 19 to 11, thereby eliminating the only female judge from the Court,⁶ the exclusive jurisdiction of the Supreme Constitutional Court in all cases concerning the review of the constitutionality of laws and regulations, including their compliance with Art. 2, was maintained. The Constituent Assembly did attempt, however, to curtail the discretion of the Court in interpreting the concept of “principles of Islamic Shari‘ah” in Art. 2. In the eyes of the Islamist majority in the Constituent Assembly, the Court had proved too creative in the past in finding ways to dismiss challenges to the consistency of statutes and regulations with Islamic law by distinguishing between undisputed, universal principles of Shari‘ah and flexible applications of those principles.⁷ They therefore included a definition of the term “principles of Islamic Shari‘ah” in the text, which used terms drawn from the classical tradition. Art. 219 suggested that while the terms of Art. 2 had remained unchanged, they now would have to be interpreted differently, giving more weight to traditional interpretations of Islam and thus putting an end to the modernist, utilitarian interpretation the Constitutional Court had preferred in its earlier jurisprudence.

The other new provision, Art. 4, dealt with the question of who could be trusted to interpret the texts referred to in Art. 219. While Islamic constitutionalists close to the Muslim Brotherhood in the past had been critical of the *‘ulamā*,⁸ due to their closeness to those in power and their willingness to legitimate autocratic rulers,⁸ Salafis in particular

⁵ See in detail: Nathan Brown and Clark Lombardi, “Contesting Islamic Constitutionalism after the Arab Spring: Islam in Egypt’s Post-Mubarak Constitutions” (*in this volume*).

⁶ The justice concerned, Tahānī al-Jibālī, had been the first woman in Egypt to be appointed to a position in the judiciary. She had made no secret of her views broadly favorable to the opposition to the Islamists. The 2012 Constitution reduced the total number of positions on the Supreme Constitutional Court to eleven, to be filled by the president and the ten most senior sitting SCC justices. Not accidentally, al-Jibālī was the eleventh most senior judge, see: Nathan Brown, “Egypt: A Constitutional Court in an Unconstitutional Setting,” Paper for the Constitutional Transition and Global and Comparative Law Colloquium, New York University, School of Law, October 23, 2013, available at: <http://www.constitutionnet.org/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting.pdf>, accessed June 19, 2015.

⁷ On this jurisprudence, see: Ran Hirschl, “Constitutional Courts as Bulwarks of Secularism” in Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (eds), *Consequential Courts—Judicial Roles in Global Perspective* (Cambridge University Press, Cambridge 2013) 311.

⁸ Bruce K. Rutherford (n 4) 108.

pushed for a greater role of the learned *shuyūkh* of Al-Azhar in the interpretation of this central provision, assuming that they could be better trusted to interpret the texts in light of the medieval tradition than the utilitarian modernists on the Supreme Constitutional Court. Art. 4 thus provided that Al-Azhar's body of senior scholars was to be "consulted" in matters pertaining to Islamic law. This left the procedure in which the advice of Al-Azhar was to be provided to the competent public bodies very much in doubt. It was fairly obvious that the consultation requirement was meant to have an impact on the adoption of new legislation. Thus, Al-Azhar could certainly address its opinions to the legislative bodies. But was the expert opinion of the religious scholars binding on the legislature, although the text of Art. 4 spoke merely of consultation? And what was the role of the scholars in constitutional review proceedings before the Supreme Constitutional Court in cases in which the issue of consistency of laws and regulations with Art. 219 arose? Did the Constitutional Court have the duty to follow an opinion by the scholars on the requirements of Islamic law given during the legislative procedure, or had it to request such an opinion if none had been issued yet? These matters remained largely unresolved during the short-lived existence of the 2012 Constitution.

In any case, the changes introduced by the Islamists with regard to the position of Islamic law were rather incremental than revolutionary. They presented a novel feature only insofar as they tried to carve out a role for the senior scholars of Al-Azhar in the implementation of Islamic governance. Unlike the theories of Islamic government prevailing in Iran, which are built on the acknowledgment of the comprehensive responsibility of the *mujtahids* for the well-being of the nation, including the political, economic, and social sphere,⁹ the role of the '*ulamā*' in the implementation of the principles of Islamic governance has rather been downplayed or viewed with outright suspicion by the recent generation of Islamic constitutionalists in Egypt and other Arab countries.¹⁰

But even those limited changes provoked strong opposition outside the Islamist camp and were quickly removed after the downfall of the Mursi government. The requirement to consult Al-Azhar in all matters pertaining to Islamic law no longer figures in the new Art. 7 of the 2014 Constitution, which defines Al-Azhar's role in Egyptian society as that of an "independent scientific Islamic institution" which is responsible for preaching Islam in Egypt and the world over. Art. 219 was dropped altogether. Instead, the preamble of the 2014 Constitution states in unambiguous terms that the relevant decisions of the Supreme Constitutional Court published in its collected rulings shall be the (only) sources of reference for the interpretation of the Shari'ah clause in Art. 2. And finally, the clause specifically prohibiting the dissemination of information and opinions which could be interpreted as insulting religious prophets (Art. 44 of the 2012 Constitution) has also gone.

While the new articles on the role of Islam in the development of the country's legal system were shelved, the 2014 Constitution has preserved the provisions on the autonomous institutional role of the military. The supreme command of the armed forces is entrusted to the minister of defense appointed from the ranks of their officers (Art. 201), the military budget is not discussed in parliament, and all draft laws relating to the armed forces must be vetted by the National Defense Council (Art. 203). The principle of civilian government enshrined in the preamble and the prohibition to form political parties possessing a military or quasi-military character should thus not be read as implying that the constitution is based on the primacy of the civilian leadership of the country over the military. On the contrary, the wording of the preamble, according to which the army delivered victory to

⁹ Chibli Mallat, *The Renewal of Islamic Law* (Cambridge University Press, Cambridge 2003) 59 ss.

¹⁰ *Id.* (n 8).

the sweeping popular will in the January 25–June 30 revolutions, implies a concept which places the military above politics as the interpreter and executor of the popular will and thus as the ultimate institutional arbiter of Egyptian politics.

III. TUNISIA—A BREAKTHROUGH FOR THE CIVIL STATE?

In contrast to the Muslim Brotherhood in Egypt, al-Nahḍah and its allies in Tunisia were able to leave their mark on the text of the constitution, which finally emerged from the transition period triggered by the downfall of Ben ‘Alī. But they had also been more willing to compromise on certain key demands in order to avoid a replay of the Egyptian drama which had overshadowed the final stages of the constitution-drafting process. The fact that it took the Constituent Assembly considerably longer than originally envisaged to adopt the new constitution with the required two-thirds majority in order to avoid a popular referendum shows that the compromise which was finally reached was the fruit of difficult and protracted negotiations. At times, distrust between Islamists and their opponents threatened to derail the whole process. It was mainly due to the intervention of the country’s civil society organizations that the drafting process could be put back on track and finally be brought to a successful conclusion.

Unlike the Egyptian Constitution of 2014, which only obliquely refers to the concept of “civil state”,¹¹ Art. 2 of the Tunisian Constitution expressly defines Tunisia as “a civil state based on citizenship, the will of the people, and the supremacy of the law”. It also spells out the consequences of this principle with regard to the supremacy of the civilian leadership. Unlike Egypt’s military, the Tunisian armed forces have traditionally adopted a low public profile. After independence, Būrqiba sought to confine the military to a supportive role which did not question the supremacy of the civilian leadership of the country.¹² By and large, the Tunisian armed forces have kept their distance from political infighting. They managed to preserve their reputation during the country’s difficult constitutional transition following the ouster of President Ben ‘Alī, although it is widely presumed that the refusal of the military to fire on civilians during the 2011 protests played a crucial role in his exit.¹³ Art. 18 of the new constitution now provides that the national army be a republican army. Its responsibility is to defend the nation, its independence, and the territorial integrity of Tunisia. It has a constitutional duty to stay completely neutral with regard to domestic politics. The army must support the civilian leadership in the fulfillment of their functions in the manner set out in law. The elected president is its commander in chief (Art. 77).

The role of the security forces, whose role in the mass protests leading to the overthrow of Ben ‘Alī was more ambiguous, is defined in similar terms in Art. 19. They are responsible for maintaining security and public order, safeguarding individuals, institutions, and property, and enforcing the law, but must pursue these objectives by means and methods which stay within the limits established by the constitutionally protected fundamental rights and in complete neutrality.

¹¹ Art. 1 of the constitution states among other things that Egypt is a “democratic republic based on citizenship and the rule of law.”

¹² Harold D. Nelson, *Tunisia: A Country Study* (Foreign Area Studies, American University, Washington D.C. 1986) 288.

¹³ E. Parker, “Tunisia’s Military: Striving to Sidestep Politics as the Challenges Mount,” *tunisiaalive* (June 25, 2013), <http://www.tunisia-live.net/2013/06/25/tunisiass-military-striving-to-sidestep-politics-as-challenges-mount/>, accessed September 25, 2015.

Art. 110 of the constitution maintains the jurisdiction of the military courts. However, their role is much more limited than in Egypt. They are only competent to deal with military crimes. Civilians are not subject to the jurisdiction of military courts. Military personnel can be tried before the military courts, but only for offenses fixed in the military penal code, not for criminal offenses under ordinary law.

By contrast, the role of Islam in the new constitution leaves room for interpretation. The preamble refers to the spirit of “openness and tolerance” of the teachings of Islam, to which the Tunisian people remain committed. This wording is reminiscent of the preamble of the 2011 Moroccan Constitution, which similarly links the recognition of Islam’s role in the nation’s life to its commitment to the values of openness, moderation, and tolerance. By contrast, the reference to the binding character of human rights is less than straightforward. The preamble does not express a commitment to universal human rights as such, but only to the “highest principles” of these rights. This leaves considerable room for the modification of these rights as required by local customs and traditions.

Although the new constitution—like its predecessor—does not recognize the Shari‘ah as a source of legislation, it recognizes the prominent role of Islam as one of most important sources of the nation’s identity. According to Art. 1, “Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its political system republican”. The wording of Art. 2 leaves room for different interpretations of the place of religion in the Tunisian legal system. It may be understood as merely acknowledging that Tunisia is a country where the vast majority—more than 90 percent—of the people are Sunni Muslims. In this interpretation, Art. 1 is the description of a sociological fact rather than a normative prescription. However, it is at least equally plausible to interpret “its religion” as referring to the religion not (only) of Tunisia, the country, but also of the Tunisian state, which is defined in the first half of the sentence as “free, independent, and sovereign”. If this interpretation is correct, Art. 1 effectively enshrines Islam as the state religion of Tunisia.

Art. 6 would seem to support this interpretation. Far from declaring the state neutral in religious matters, the provision recognizes the role of the state “as guardian of religion”. In this function, the state guarantees freedom of conscience and belief and the free exercise of religious practices. At the same time, it is charged with the mission to protect the neutrality of mosques and places of worship from all forms of partisan instrumentalization. This is perfectly in line with the traditional functions of the ruler in the Islamic community which comprises the duty to uphold the unity and cohesion of the *ummah* and to protect it against internal strife, or *fitnah*. It is also interesting to note that while Art. 6 obliges the state to guarantee both freedom of conscience and freedom of belief, with freedom of conscience covering the freedom of nonbelievers to hold nonreligious convictions, the same provision explicitly limits the freedom to exercise religious practices, thus withholding constitutional protection from nonreligious customs and practices. Finally, the state has a duty to disseminate not only the values of moderation and tolerance but also to protect the sacred, and to prohibit violations thereof. The latter may conceivably include the prohibition of insult or abuse of religious messengers or prophets, which has vanished from the articles dealing with freedom of expression (and its limits). Perhaps nowhere is the compromise character of the new Tunisian Constitution more evident than in this provision, which obliges the state to uphold and defend religious and secular values at the same time.

Similar ambiguities appear at closer inspection with regard to the much vaunted protection of women’s rights in the Tunisian Constitution. They were the object of passionate and highly controversial debates in the Constituent Assembly, with Islamists arguing for a more traditional understanding of the respective roles of men and women, which was at odds with the country’s progressive record on women’s rights. The early drafts referred to the “complementarity” of the respective roles of men and women, thus rekindling the

suspensions of women's rights' advocates that Islamist delegates were seeking to undermine the principle of equal rights and duties for both sexes in favor of traditional conceptions denying women full equality with men. But these draft provisions did not make it into the final text of the constitution. Instead, Art. 21 provides that all citizens, male and female, have equal rights and duties and are equal before the law without any discrimination. The supporters of full equality between men and women thus seem to have carried the day.

However, the scope of application of Art. 21 is more ambiguous than it appears at first sight. The provision does not speak of men and women as such, but of "Citizens, male and female". This suggests that the provision does not pretend to deal with equality between men and women in general, but only in relation to citizenship rights, i.e., the rights of women in the public sphere. By contrast, it does not say anything about the rights of women in the private sphere, and especially in the family. This view is supported by Art. 46, which, in its second paragraph, guarantees "the equality of opportunities between men and women to have access to all levels of responsibility in all domains" (emphasis added by the author). In contradistinction to Art. 21, Art. 46 expressly speaks of the relationship between men and women "in all domains". While it is superseded by Art. 21 as the more special rule with regard to all matters pertaining to the status and rights of women as citizens, it applies to all other areas, and namely to the role of women in the family. But here, according to the clear wording of Art. 46 (2), the relevant principle is not equality of rights, but "equality of opportunities". These matters are thus exempted from the application of the principles of full equality and strict nondiscrimination between men and women and leave room for the unequal treatment of both sexes in line with traditional concepts of Islamic law, e.g., in the law of successions.

IV. MOROCCO—THE CAUTIOUS MODERNIZATION OF A TRADITIONAL ISLAMIC MONARCHY

If Tunisia is an example—the only example—of largely peaceful democratic change coming about as a result of the Arab Spring, the revision of the Moroccan Constitution in July 2011 is testimony to the self-assertion of a traditional Islamic monarchy in changing circumstances. The reform process was initiated from the top, by a speech of King Muḥammad VI on March 9, 2011, in which he announced the establishment of a consultative commission to study changes to the constitution. The proposals of the Commission were submitted to a discussion of the political parties and the social organizations of the country before they were finally approved in a national referendum by a crushing majority of 98 percent of voters, on a turnout of 73 percent of the electorate.¹⁴ It had thus taken less than four months to complete the constitutional revision process.

The basic objective of the reform was the modernization of the monarchy in line with some of the popular demands raised in the early stages of the Arab Spring so as to strengthen, not to weaken, its grip on political power. This purpose is reflected in Art. 1 of the revised constitution, which enumerates the bases of Moroccan statehood ("the permanent federating factors"): These are moderate Islam, national unity "with multiple components", constitutional monarchy, and democratic choice. Art. 3, which defines the place to be accorded to Islam, is imported word for word from the previous constitution, emphasizing the continuity which has prevailed in this point since the first independence

¹⁴ Charles Saint-Prot, "Continuité nationale et évolution constitutionnelle" in Ahmed Bouachik, Michel Degoffe, and Charles Saint-Prot (eds), *La constitution marocaine de 2011—Lectures croisées* (Remald, Rabat 2012) 17.

Constitution of 1962: "Islam is the religion of the state which guarantees to all freedom of worship." The wording indicates that Morocco's espousal of Islam coexists with an official policy of religious tolerance. Morocco has non-Muslim citizens who are mostly Jewish and who have been traditionally allowed to practice their own faith.¹⁵

The new constitution elaborates much more on the concept of religious tolerance than its predecessors. As was mentioned above, while the 2011 Constitution recognizes Islam as one of the foundations of statehood in Art. 1, it does so by expressly referring to a specific version of Islam, namely "moderate Islam". The preamble sets out the characteristics of this brand of moderate Islam in detail: "The preeminence assigned to the Muslim religion within the national reference framework goes hand-in-hand with the commitment of the Moroccan people to the values of openness, moderation, tolerance, and dialogue for the mutual comprehension among all cultures and civilizations of the world."

A peaceful coexistence and dialogue with other cultures and religions are thus the hallmarks of Islam as it is practiced in Morocco. Any form of Islamic or religious militancy is thus not protected by the constitution. Conversely, the constitution prohibits any form of Islamic or other religious militancy. This also extends to political life. While Art. 7 of the 2011 Constitution guarantees the free establishment and activity of political parties, their activities are subject to a number of qualifications. Parties may not be established on a religious, linguistic, ethnic, or regional basis or recruit their membership on any other criteria which are discriminatory or contrary to human rights. In addition, they may not pursue political goals which subvert the bases of the Moroccan state. Thus, parties may not pursue the objective to disturb the Muslim religion, the monarchical regime, the democratic foundations, national unity, or territorial integrity. This provision skillfully takes up one of the core concerns of Muslims, the risk of *fitnah*, or disunity, in the Muslim community as a result of unchecked partisanship and fierce party competition, and transforms it into a constitutional mandate to constrain, if the need arises, political pluralism and multiparty competition in order to protect religious tranquility.

The supreme authority in religious matters, also charged with overseeing the implementation and observation of the ideal of tolerant Islam, is the king. The new constitution confirms King Muḥammad VI in his role as "Commander of the Faithful" (*Amīr al-Mu'minīn*), head of state and supreme representative of the nation (Arts. 41, 42). The title "Commander of the Faithful" is an ancient sobriquet which was already used in the 7th century by the caliphs who claimed to descend from the Qurayshī tribe of the prophet and were recognized as his lawful successors. It serves as a reminder that King Muḥammad's dynasty, the 'Alawīs, claims to descend from the Prophet's family and to have inherited the combined role of religious and political leadership.¹⁶

While in the previous constitution both roles, the religious and the political, had been defined in one and the same provision, the new constitution deals with the central missions of the monarch in two different provisions, one of which refers to his religious functions as head of the Muslim community and guarantor of the free practice of religious cults (Art. 41), while the other summarizes his main secular functions as symbol and guarantor of the unity of the nation and the continuity of the state and the supreme arbiter of its institutions (Art. 42). In one respect, this arrangement is in line with a more modern concept of political power, which calls for a clear separation between the political and the religious functions of the ruler. On the other hand, it expressly confirms the traditional religious function

¹⁵ Ann Elizabeth Mayer, "Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition" (2002) 1 UCLA Journal of Islamic and Near Eastern Law 183.

¹⁶ *Id.* 212.

of the ruler by calling him by the ancient sobriquet of “Commander of the Faithful” and setting out the prerogatives which go with it in considerable detail. It has been pointed out that the theory of one ruler commanding the loyalty of all Muslims was suited for the circumstances of the early caliphate when there was one Islamic community. However, it is hardly suited to the modern world where the allegiances of the faithful are divided by their citizenship to various nation-states and where no Muslim ruler is universally acknowledged as the rightful heir to the Prophet.¹⁷ If the new Art. 41 nevertheless sticks with the historic title of *Amīr al-Muʾminīn* and even gives it greater prominence by dedicating a whole article to the religious functions of the king, which is placed at the top of the chapter dealing with the monarch, the message is clear: The new Art. 41 intends to highlight the king’s importance to the Islamic identity of Moroccans by reminding them that in Morocco the monarchy is an institution which is deeply rooted in, and closely tied to, the Islamic history of the country, and that consequently the institution of monarchy cannot be abolished or reduced to the kind of merely symbolical institution known from European constitutional monarchies without gravely affecting or even destroying the Islamic character of Moroccan society as a whole.

In his capacity as Commander of the Faithful, the king ensures the observance of Islam, guarantees the free practice of religious cults, and chairs the High Council of Islamic scholars (*ʿulamāʾ*). The Council is the only body which is competent to issue opinions on matters of Islamic law (*fatāwā*). However, it cannot exercise this function on its own initiative or upon the request of individuals or groups. It is the king who decides which issues are submitted to the Council and firmly controls its agenda. The Council is thus not an independent body enjoying a degree of functional autonomy but a subsidiary organ whose main role consists in assisting the king in the discharge of his religious functions. In other words, the *ʿulamāʾ* remains firmly under the control of the government. This is a familiar feature from post-independence constitutions of Arab countries, whether they are organized as republics or monarchies.

King Muḥammad VI has not hesitated to make use of these powers to assert his control over the religious teachings in the country’s mosques. In May 2014, he issued a royal decree (*ḍahīr*), in which he reminded the imams and other religious leaders—who in Morocco are government employees—that they are prohibited to exercise any activity or to adopt any position of a political character which may compromise the tranquility of religious worship or religious places in any way. If they do not observe these obligations, they will be dismissed from their posts.¹⁸

In his capacity as head of state and supreme representative of the nation, the king symbolizes national unity, guarantees the continuity of the state, protects the constitution, and ensures the smooth functioning of the constitutional institutions (Art. 42). He is Supreme Commander of the Armed Forces (Art. 53) and chairs the Council of Ministers (Art. 48). His powers with regard to the government have been somewhat reduced, though. Whereas previously he appointed the head of government at his discretion, he is now constitutionally obliged to appoint the prime minister from among the members of the political party that has won the election to the House of Representatives. The other members of the government are appointed upon the proposal of the prime minister (Art. 47). Since the electoral system applied in Morocco virtually guarantees that no political party will win a majority

¹⁷ *Id.*

¹⁸ Naceureddine Elafrite, “Réaffirmation spectaculaire du monopole du religieux par le Roi” (July 4, 2014), available at: <http://www.medias24.com/NATION/POLITIQUE/12892-Réaffirmation-spectaculaire-du-monopole-du-religieux-par-le-Roi.html>, accessed September 25, 2015.

of its own in the House of Representatives, the monarch retains some room for maneuver under the new system. He also has important powers which allow him to intervene in the government's activities. The government is accountable to him as well as to parliament (Art. 91). He has to be informed about the conclusions of the cabinet meetings by the head of government (Art. 92). He chairs the meetings of the Council of Ministers where the most important matters have to be discussed before the government adopts its final position (Art. 49). And the king may terminate the functions of one or several members of the government on his own initiative, following consultation with the head of government (Art. 47). Finally, he exercises the power to dissolve one or both houses of parliament. The head of government, as well as the presidents of the houses of parliament, have merely to be informed of the decision; they must not even be consulted.

The Moroccan Constitution builds upon a long tradition which has been called the political theory of Sunni realism.¹⁹ This theory is based on the recognition of a duality of religious law and institutions on the one hand and government and military establishments on the other. Obedience is due to a Muslim ruler who protects the Muslim domains, fights heresy and error, and fosters the conditions for Muslims to worship and apply the holy law in peace. Even if such a ruler is impious in his personal conduct and oppressive in his rule, he must be obeyed, as long as he does not order his subjects to disobey God's commands. In this perspective, the duty of Muslims to obey the ruler must apply even more strongly if the latter, like the Moroccan king, is descended from the Prophet's family and thus can claim leadership in the religious sphere as well. It has rightly been pointed out that this theory, which ostracizes any form of behavior that could lead to division, or *fitnah*, in the community of believers, puts a premium on political quietism and acquiescence.²⁰ The 2011 Constitution of Morocco, which bans any kind of (party) political activity which is likely to create divisions in the community along religious fault lines or to disturb the Muslim religion and which gives the ruler the necessary powers to enforce the vision of a peaceful and tolerant Islam espoused by it, is rooted firmly in this tradition.

V. CONCLUSION

In those countries of the Arab Spring which were able to avoid outright civil war, continuity has thus prevailed over change. This is true for Egypt, the biggest Arab country, where after the overthrow of the Mursi government both the central role of the military and the Islamic character of the country's legal system have been recognized in terms which are almost identical to those contained in the 1971 Constitution. It also applies to Morocco, where the constitutional revision in 2011 essentially consisted of the limited modernization of the Islamic monarchy which has held sway in that country since the 17th century. Even in Tunisia, where the uprising of January 2011 finally gave rise to a genuinely democratic constitutional framework, many provisions, especially those on the role of Islam in politics, mark a continuity with a well-established "modernist" orientation whose origins reach as far back as the 19th century.

Those forces which advocate a political Islam have not been able to translate their vision of an Islamist state into coherent and workable institutional arrangements. Even less has a genuine reconciliation of the Islamists' and the non-Islamists' competing versions of a post-authoritarian "civil state" taken place in any of the countries affected by the Arab Spring. Again with the exception of Tunisia, the constitution-drafting processes seem to

¹⁹ Sami Zubaida, *Law and Power in the Islamic World* (I.B. Tauris, London 2005) 89 et seqq.

²⁰ *Id.* 92.

have fostered a growing antagonism and polarization between Islamist and non-Islamist groups. The most Islamists were able to secure was the right to compete on equal terms with non-Islamists for a chance to implement their vision of the ideal Islamic order through the democratic process in Tunisia. But Tunisia is also the country which has supplied the largest contingent of fighters, in proportion to its population size, to the self-proclaimed Islamic state in Iraq and Syria.²¹ This suggests that the limited success of Islamic identity policies that was achieved through the constitutional drafting process in that country may not be enough to satisfy those forces which long for a purer version of Islam. It may also herald trouble for those who had hoped for an Islamic constitutionalism to emerge from the popular revolts of the Arab Spring which would be able to combine the main achievements of Western-style constitutionalism—democracy, rule of law, and respect for basic rights—with the central tenets of the Islamic tradition.

²¹ See: Louisa Loveluck, Sam Dodge, and Tom Shiel, "Islamic State, One Year On: Where Do Its Fighters Come From?," *Daily Telegraph* (June 8, 2015), <http://www.telegraph.co.uk/news/worldnews/islamic-state/11660487/Islamic-state-one-year-on-Where-do-its-fighters-come-from.html>, accessed September 25, 2015.

List of Contributors

Huda Ali Alawi

Huda Ali Alawi holds a doctorate in criminal law from Ain Shams University in Cairo, Egypt. She teaches at the Faculty of Law of Aden University, Yemen, and is the Director of the Women's Research and Training Center. Dr. Alawi has also been active in advising the legislature on various laws so as to enhance public participation of women and to better ensure equality between men and women. She has conducted extensive research on women's political rights in light of Yemeni legislation. Dr. Alawi has authored many articles, notably on the question of the abolition of the death penalty (2010) and on the freedom and restrictions on the press in Yemeni jurisprudence (2008).

Badria Abdullah Al-Awadhi

Badria Abdullah Al-Awadhi obtained a Ph.D. in public international law from London University, University College of Law, in 1975. In 2012 she chaired the Committee of Legal Expert in the Arab League, which prepared a draft proposal for the establishment of an Arab Human Rights Court. At present, she is Professor on Human Rights Law at Kuwait International Law School, Director of the Arab Regional Center for Environmental Law. She also served as Dean of the Faculty of Law and Shari'a at Kuwait University. Additionally, she currently holds the position of Deputy Chairman of the Arab Thought Forum. In 2011, she was a member of the Bahrain Independent Commission of Inquiry.

Khalid M. Al-Azri

Khalid M. Al-Azri is the Secretary General for Oman's Education Council. He obtained his Ph.D. at the University of Melbourne in 2008, after which he was appointed as a Research Fellow at the University of Oxford. His research focuses on social, economic, and political structures of the Arab Gulf countries with specific focus on Oman. His book on social and gender inequality in Oman published in 2012 looks at the formation of the Omani state's identity and the contextualization of the political, legal, and social structures of Oman since 1970.

Mohamed Driss Horma Babana

Mohamed Driss Horma Babana has been Professor at the Nouakchott University, Mauritania, since 1988, where he first received his maîtrise in international relations. He holds a state doctorate in public law from Tunis El Manar University, Tunisia, and also received an attestation

from the International Academy of Constitutional Law. Since 1996, Dr. Babana has served the Mauritanian *Cour des Comptes*—the highest public finance controlling institution—as a magistrate and first counselor. He also works as a counselor for the Prime Minister and has been nominated Director of Legislation, Translation, and Edition of the *Journal Officiel* at the General Secretariat of Government and Legal Advisor of Government.

Asli Ü. Bâli

Asli Bali is Assistant Professor of Law at the UCLA School of Law, where she teaches public international law, laws of war, and international human rights. Her current research focuses also on comparative law of the Middle East. Recent publications include *Pax Arabica? Provisional Sovereignty and Intervention in the Arab Uprisings* (2012). Prior to obtaining her position at UCLA Law, she was a postdoctoral fellow at the Yale Law School. Before joining academia, Professor Bali practiced international law in a variety of contexts, including the United Nations Office of the High Commissioner for Human Rights and in the Middle East and North Africa Division of the World Bank.

Kilian Bälz

Kilian Bälz is a partner at Amereller Legal Consultants, an international law firm focusing on the MENA region. Based in Berlin and Cairo, he specializes in projects, finance, and energy, as well as related arbitration matters. In addition, he advises international organizations and government bodies on constitutional and law reform. Dr. Bälz studied Law and Middle East Studies at the universities of Freiburg, Berlin (FU), Damascus, Cairo (diploma in Middle East studies, AUC), and London (LL.M., School of Oriental and African Studies). He has published widely on Middle Eastern constitutional and business law.

Bawar Bammarny

Bawar Bammarny is a lawyer and lecturer for Arabic public law, private law, and Arabic legal terminology at the University of Heidelberg. He studied law in Iraq, and obtained his LL.M. and doctor's degree at the Faculty of Law of the University of Heidelberg. Dr. Bammarny worked in the Iraq project of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, above all organizing rule of law training programs for judges, prosecutors, lawyers, and other law professionals. His research areas include Arabic and Islamic law, comparative law, oil and gas law, constitutional law, and human rights, especially with regard to the rights of religious and ethnic minorities.

Abolhassan Banisadr

Abolhassan Banisadr is an Iranian economist and human rights activist. He took part in the drafting of the Iranian Constitution of 1979 and served as the first President of the Islamic Republic of Iran from January 1980 until June 1981, when he was overthrown by the ruling clergy. Prior to his presidency, he served as Minister of Foreign Affairs and Minister of Finance of the interim government. Dr. Banisadr studied religion and economics at the University of Teheran and continued his studies at the University of Paris I (Panthéon-Sorbonne), where he obtained a doctorate and taught. In addition to theorizing about the 1979 Iranian Revolution, he has published a wide range of books and articles in the fields of philosophy, theology, sociology, and economy.

M. Cherif Bassiouni

Mahmoud Cherif Bassiouni is Emeritus Professor of Law at DePaul University, Chicago, and Emeritus President of the International Human Rights Law Institute. He currently holds the position of President of the International Institute of Higher Studies in Criminal Sciences, located in Siracusa, Italy, and has served as the Secretary General and President

of the International Association of Penal Law. He has been appointed to numerous United Nations positions, such as Chair of the Commissions of Inquiry for Yugoslavia and Libya. The many distinctions he has received include the Defender of Democracy Award (1998), a Nomination for the Nobel Peace Prize (1999), and the Hague Prize for International Law (2007). He is the author of numerous books and articles in several languages.

Yadh Ben Achour

Yadh Ben Achour is a Tunisian lawyer, Professor of Constitutional Law, and expert of Islamic political theory. In January 2011 Mohamed Gannouchi, the Prime Minister of Tunisia, appointed him to be the president of Tunisia's Higher Political Reform Commission, which was charged with overseeing constitutional reform in post-Ben Ali Tunisia. In 2014, Ben Achour was elected as a member of the United Nations Human Rights Committee. President Moncef Marzouki and Dr. Ben Achour developed the concept of an International Constitutional Court, which has been presented to the United Nations and in many other forums in recent years.

Madjid Benchikh

Madjid Benchikh is Professor Emeritus of the University of Cergy-Pontoise, France. He has been a member of the university's scientific council and has led the Doctoral School for Law and Human Sciences. Dr. Benchikh also used to act as arbiter in many arbitration courts for international trade and was the first president of Amnesty International in Algeria. Moreover, he participated in many international negotiations, for example, at the third United Nations Conference on the Law of the Sea. Finally, Dr. Benchikh has authored several books, articles, and studies, notably among them *Droit international du sous-développement* (1983) and *Algérie: un système politique militarisé* (2003).

Nadia Bernoussi

Nadia Bernoussi is Professor of Constitutional Law at the École Nationale d'Administration and the Institut Supérieur de l'Administration in Rabat, Morocco. She also teaches at the Royal Institute of Territorial Administration, the Governance and Economy School, and at the Moroccan Academy for International Studies. Dr. Bernoussi was a Member of the Consultative Committee on Constitutional Reform, which drafted the Moroccan Constitution of 2011. She is a founding member of the Moroccan Associations of Constitutional Law and Political Sciences and Vice President of the International Association of Constitutional Law and the International Academy of Constitutional Law.

Francesco Biagi

Francesco Biagi is a Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law, and Researcher at the Center for Constitutional Studies and Democratic Development (CCSDD). He is the author of many publications, focusing mainly on transitions to democracy, constitution-building and constitutional justice. His latest works include *Political and Constitutional Transitions in North Africa: Actors and Factors* (Routledge 2015), edited with Justin O. Frosini, and *Corti costituzionali e transizioni democratiche. Tre generazioni a confronto* (il Mulino 2016).

Ahmed Salem Ould Bouboutt

Ahmed Salem Ould Bouboutt is Professor of Public Law at the University of Nouakchott, Mauritania. He also teaches at French universities as a guest lecturer. Dr. Bouboutt is a former Member of the Mauritanian Constitutional Council and served as a legal advisor to the Prime Minister as well as to the Ministry of Justice. He was also President of the National Commission for Higher Education. In addition to being the author of *L'apport du Conseil Constitutionnel au droit administratif* (1987), Dr. Bouboutt has published numerous articles

and studies in the area of public international law as well as the constitutional and administrative law of Mauritania, France, Senegal, and several Arab states.

Nathan J. Brown

Nathan J. Brown, Professor of Political Science and International Affairs at George Washington University and nonresident associate at the Carnegie Endowment for International Peace, is an expert of law and politics in Arab countries. His current work focuses, among others, on constitutional developments and on the role of Islamist movements in politics in the Arab world. In addition to his academic work, Professor Brown has served on advisory committees for Human Rights Watch and the committees drafting the Palestinian and Iraqi constitutions. His publications include *Constitutions in a Non-Constitutional World: Arab Basic Laws and Prospects for Accountable Government* (2001) and *The Rule of Law in the Arab World: Courts in Egypt and the Arab States of the Gulf* (1997).

Jean d'Aspremont

Jean d'Aspremont is Professor of Public International Law at the University of Manchester as well as Professor of International Legal Theory at the University of Amsterdam. He is a current member of the Scientific Advisory Board of the European Journal of International Law. Professor d'Aspremont acted as counsel in proceedings before the International Court of Justice. He is series editor of the Melland Schill Studies in International Law and of the Elgar International Law Series. His areas of research include questions pertaining to the law of international organizations, statehood, sources of international law, state responsibility, international dispute settlement, international humanitarian law, and international legal theory, on which he has published extensively.

Salwa El-Daghili

Salwa Fawzi El-Daghili is Professor at the Faculty of Law of the University of Benghazi and was a lecturer at the Academy of Graduate Studies in Benghazi, Libya, until the start of the Libyan civil war. She holds a doctor's degree in constitutional law from the University of Paris I (Panthéon-Sorbonne), where she wrote a dissertation on *L'originalité du modèle libyen de la juridiction constitutionnelle par rapport au modèle français* (2009) under the supervision of Professor Jean Gicquel. Dr. El-Daghili served as Member of the Libyan National Transitional Council, where she was in charge of Legal Affairs and Human Rights, until the dissolution of the Council. She also served as Special Representative of Women's Affairs at the Transitional Council.

Kaouthar Debbeche

Kaouthar Debbeche is Associate Professor of Public Law at the Faculty of Legal, Political and Social Sciences of the University of Tunis II. She holds an LL.M. and a doctorate in law and has specialized in public law, specifically, constitutional law, as well as international law, with a focus on the law of the sea. Dr. Debbeche is a member of the research team on "International Law, International Jurisdictions and Comparative Constitutional Law" at the University of Tunis II. She is also a founding member and General Secretary of the Tunisian Centre of Constitutional Law for Democracy, where she is involved in the identification and resolution of legal problems arising during the transitional period in Tunisia.

Philippe Droz-Vincent

Philippe Droz-Vincent is Professor of Political Science and International Relations at the University of Grenoble, France. He is an expert of politics and civil-military relations in the MENA region. Dr. Droz-Vincent published numerous books and articles, including "Prospects for Democratic Control of the Armed Forces? Comparative Insights and

Lessons for the Arab World in Transition” (in *Armed Forces and Society*, 2013) and “The Military amidst Uprisings and Transitions in the Arab World” (in *The New Middle East, Protest and Revolution in the Arab World*, ed. Fawaz Gerges, 2014). His main research interests are the Arab uprisings in 2011, the different paths of transition and state building, and the role of the security forces in Middle Eastern countries.

Baudouin Dupret

Baudouin Dupret is Director of Research at the Centre National de la Recherche Scientifique, Paris, and Director of the Centre Jacques-Berque for the Human and Social Sciences in Rabat, Morocco. He is also guest lecturer in Islamic law and socio-legal sciences at the University of Louvain and at the École des Hautes Études en Sciences Sociales, Paris. After having graduated from the American University in Cairo in Middle Eastern studies in 1993, he conducted research projects at various institutions, for example, at the Centre d'Études et de Recherches sur le Monde Arabe Contemporain of the University of Louvain. Dr. Dupret recently edited *La Charia aujourd'hui. Usages de la référence au droit islamique* (2012).

Omar Faraj

Omar Faraj is a Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law, where he has been working on projects on Iraq and Afghanistan since January 2013, after ten years of service as a legal expert. He obtained his law degree from the University of Baghdad, Iraq. He continued his academic career at the universities of Malmö and Lund, Sweden, where he received a master's degree in human rights and an LL.M. in international maritime law. Mr. Faraj has also published in the area of maritime law. He is active in a variety of organizations, including the Swedish Committee for Afghanistan and the Malmö Association for Foreign Affairs. Moreover, he is a member of the Iraqi Bar Association.

Imen Gallala-Arndt

Imen Gallala-Arndt is Senior Research Fellow at the Department for the Law of Islamic Countries at the Max Planck Institute for Foreign Private Law and Private International Law in Hamburg. She holds an LL.M. and a doctorate from the University of Heidelberg. She studied law at the Faculty of Law Tunis II, from which she holds a *Maitrise en sciences juridiques* and a *Diplôme des études approfondies en droit public et financier*. Dr. Gallala-Arndt also taught at this faculty as an assistant lecturer in public international law. Her main fields of research are national and international family and succession laws of Islamic countries.

Rainer Grote

Rainer Grote, Dr. iur., LL.M. (Edinburgh), Adjunct Professor of Public Law at the University of Göttingen, is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. He studied law at the universities of Bielefeld, Geneva, Göttingen, and Edinburgh and holds a PhD in law from the University of Göttingen. Dr. Grote teaches and writes in the fields of constitutional law, comparative law, and international law. Recent publications include *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (2012, with Tilmann Röder) and *EMRK/GG Konkordanzkommentar* (2013, with Oliver Dörr and Thilo Marauhn).

Ali M. El-Haj

Ali M. El-Haj is lecturer and researcher in English law at the Centre for British Studies of Humboldt University of Berlin. He teaches, among other subjects, “Constitutional Law and Political System”, “Human Rights” and “Law and Culture.” Mr. El-Haj was previously a Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, and later at the Max Planck Foundation for International Peace and the

Rule of Law, where he worked on various projects on constitutional reform in Arab countries, with a particular focus on Egypt, Libya, and Tunisia. He received his LL.M. degree in public international law from the University of Cambridge and LL.B. (Hons) law degree from University College London. His research interests are in public international law and constitutional law.

Mohammad Hammouri

Mohammad Hammouri is Professor and Founding Dean of the Faculty of Law at the University of Jordan. He is also the founding partner and chairman of the law firm Hammouri and Partners. Dr. Hammouri served as Minister of Culture and National Heritage and Minister of Higher Education. He also served as Member of the Royal Committee for preparing the National Integrity Charter in Jordan, Member of the Ministers' Legal Cabinet Committee, Member of the Cairo-based Regional Center for International Commercial Arbitration, and Member of the Board of Trustees of the Arab Anti-Corruption Organization. Dr. Hammouri obtained his Ph.D. from Cambridge University. He has published numerous articles and books in comparative and constitutional law.

Shaikh Humam Hamoudi

Shaikh Humam Hamoudi is Member of the Iraqi Council of Representatives, where he belongs to the United Iraqi Alliance faction and is a prominent leader of the Islamic Supreme Council of Iraq. He was chairman of the committee that drafted the Iraqi Constitution in 2005. Currently, he is First Deputy Speaker of the Council of Representatives and chairs the parliamentary Constitution Review and Foreign Relations Committees. Additionally, he is the Supervisor of the Iraqi Institute for Thought Dialogue, which issues the quarterly magazine *Thought Dialogue* (in Arabic). Dr. Hamoudi is also a lecturer and university professor in social, human, and political sciences.

Assem Hefny

Assem Hefny studied German, Arabic, and Islamic Studies at Al-Azhar University in Cairo, Egypt. Between 1996 and 2004, he worked as a research assistant at the Department of German Studies and Islamic Studies of Al-Azhar University. He obtained his doctorate at the University of Leipzig in 2010 with a thesis on religious-political terminology and Muslim understanding of power in the light of Egyptian authors. He is engaged in research projects on Islamic banking in Germany and an active member of the Society for Arab and Islamic Law Association (GAIR). Since 2012, Dr. Hefny has taught at the Center for Near and Middle Eastern Studies of University Marburg. His publications include *Herrschaft und Islam* (2014) and *Islamisches Zivilrecht der hanfitischen Lehre* (2013).

Ferhat Horchani

Ferhat Horchani is Professor at the Faculty of Law and Political Sciences at the University of Tunis II, where he heads the research center Droit des Relations Internationales des Marchés et des Négociations. His fields of interest cover international law, economic law, international investment law, constitutional law, and human rights. Moreover, he is the Head of the Tunisian Association of Constitutional Law. Following the uprising in Tunisia, Ferhat Horchani was appointed as expert to the Higher Committee for the Realization of the Goals of the Revolution and presided over the subcommittee tasked with drafting the Law on the Election of the Constituent Assembly.

Noha Ibrahim Abdelgabar

Noha Ibrahim Abdelgabar is a Programme Specialist with the Access to Justice and Rule of Law for United Nations Development Programme Sudan. Dr. Abdelgabar also served as a

Human Rights Specialist for the Omani National Human Right Commission, Muscat, and Legal Consultant for the Redress Trust Organization, London, the International Rescue Committee, Khartoum, and as a Research Fellow for the Sudan Peace Project at Max Planck Institute, Germany. She received her doctor's degree with a thesis on "Constitutional Reform as a Means of Democratic Transformation in Sudan" at Hamburg University. Dr. Abdelgabar has published in the areas of comparative constitutional law, law reform, and human rights.

Noureddine Jebnoun

Noureddine Jebnoun teaches at Georgetown University's Center for Contemporary Arab Studies. Prior to this assignment, he served as Assistant Professor at the War College, the Command and General Staff College, and the National Defense Institute in Tunisia. Dr. Jebnoun is co-editor of *Modern Middle East Authoritarianism: Roots, Ramifications, and Crisis* (2013/2015) and author of *L'espace méditerranéen: les enjeux de la coopération et de la sécurité entre les rives nord et sud à l'aube du XXIème siècle* (2003). His research interests include governance issues and security challenges in the Arab Middle East and North Africa and the Sahel region. He holds a doctorate in political science from Sorbonne University (1996) and a diploma of the NATO Defense College (2001).

Ali Karimi

Ali Karimi is Professor at the Faculty of Law at the University Hassan II and leads the Research Unit on Human Rights and Public Liberties at the Law School in Casablanca. He also teaches at the Higher Institute of Communication and Information in Rabat, is the Head of the Moroccan Association of Political Sciences, and leads the Moroccan Center of Research and Studies on Communication and Human Rights. Dr. Karimi further assists the Justice and Reconciliation Commission of Morocco and many international organizations, including UNESCO and ICISCO, as legal expert. Among others, he wrote the chapter on Morocco in the volume *Droits culturels au Maghreb et en Égypte* (2010) and a book on the law of communication and media in the Maghreb countries (2011).

Asem Khalil

Asem Khalil is Associate Professor of Law and Dean of the Faculty of Law and Public Administration of Birzeit University, Palestine. He has also been teaching at Bethlehem University. Dr. Khalil is a member of the Academic and Teaching Committee at the Palestinian Judicial Institute at Ramallah and of the network of experts in the Euro-Mediterranean Consortium for Applied Research on International Migration at the European University Institute (Florence, Italy). Dr. Khalil holds a doctor's degree in public law from Fribourg University, Switzerland, and a master in public administration from the École Nationale d'Administration in Paris, France.

Siraj Khan

Siraj Khan (LL.M., MSc.) is Country Manager and Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law, Heidelberg, Germany. His areas of expertise include constitutional law and international law particularly in the Middle East and North Africa. He trained as a Barrister at the Inns of Court School of Law, London, and was called to the Bar of England and Wales in 2010. Mr. Khan holds postgraduate degrees in International Law (UWE Bristol) and Islamic Studies (Edinburgh) and is currently reading for a Ph.D. on the Shari'a clause in state constitutions and international legal obligations. He is also traditionally trained in Islamic Theology, Qur'anic Exegesis, Islamic Law, and Jurisprudence (Cairo).

Awn Shawkat Al-Khasawneh

Awn Shawkat Al-Khasawneh is a Jordanian statesman, jurist, and diplomat. From 2000 until 2011, he served as Judge at the International Court of Justice, where he held the office of the Vice President from 2006 until 2009. In October 2011, he was appointed as Prime Minister of Jordan, an office he held until April 2012, when he resigned. Dr. Al-Khasawneh was also President of the Royal Hashemite Court of Jordan (1996–1998), a Member of the UN International Law Commission (1986–2000), and a Member of the Human Rights Sub Commission on the Prevention of Discrimination and the Protection of Minorities (1982–1993). He has lectured widely and continues to lecture and contribute to many learned journals.

Clark B. Lombardi

Clark B. Lombardi is Associate Professor of Law and Adjunct Associate Professor of International Studies at the University of Washington, where he specializes in Islamic law, constitutional law, and law and development. He completed his Ph.D. in 2001 from Columbia's Department of Religion with a dissertation on the incorporation of the Shari'a into Egyptian constitutional law. Professor Lombardi is the author of *State Law as Islamic Law in Modern Egypt* (2006) and numerous articles. He is a senior editor of the forthcoming *Oxford Encyclopedia of Islam and Law* and co-editor of the Oxford University Press book series *Oxford Islamic Legal Studies*. He has worked on numerous legal reform projects in the Muslim world.

Said Mahmoudi

Said Mahmoudi is Professor of International Law and former Dean of the Faculty of Law of Stockholm University, Sweden. His main fields of interest include the law of the sea, international environment law, the use of force, and international organizations. In recent years, he has started to focus on the relation of international law to common values and principles. Dr. Mahmoudi's present research focuses on the relation between Islam and international law. He is a member of the editorial board of *Atoms for Peace: An International Journal* and of the editorial board of *Scandinavian Studies in Law*. Prior to his academic career, he served as diplomat in the Iranian foreign service.

Antoine Messarra

Antoine Nasri Messarra, a lawyer and sociologist, is a member of the Constitutional Council of Lebanon, and Professor at Lebanese University and Saint-Joseph University in Lebanon. He is the founder of the Lebanese Foundation for Permanent Civil Peace and a member of the commissions on civic education and history of the Centre de recherche et de développement pédagogique. Dr. Messarra's publications include *La citoyenneté dans une société multicommunautaire: Le Liban en perspective comparée* (2007) and *Théorie juridique des régimes parlementaires mixtes: Constitution libanaise et Pacte national en perspective comparée* (2013).

Mohammed Amin Al-Midani

Mohammed Amin Al-Midani obtained the degree of doctor of international law from Strasbourg University, France. He is the President of the Arab Center for International Humanitarian Law and Human Rights Education in Strasbourg and Deputy Director of the Research Group in Islamic Religion at Strasbourg University. Additionally, Professor Al-Midani is Lecture Fellow at Strasbourg University, Professor at Jinan University in Tripoli, Lebanon, Editor-in-Chief of the *Jinan Human Rights Journal*, and Independent Researcher at the Yemen Center for Studies and Researches. He has published numerous texts and books, including *Les droits de l'homme et l'Islam. Textes des Organisations arabes et islamiques* (2nd edn, 2010).

Hatem M'rad

Hatem M'rad is Professor of Political Science at the Faculty of Legal, Political and Social Sciences of Tunis. He was Director of the Department of Public Law and Political Sciences from 2005 to 2011. Moreover, he co-founded and chairs the Tunisian Association of Political Studies and is a member of the Executive Committee of the International Political Science Association. He has been a visiting professor to various institutions in France, including the University of Lyon III and the University of Paris-Sud XI. Among other works, Dr. M'rad has published *Liberalism and Liberty in the Arab-Muslim World. From Authoritarianism to Revolution* (2011), *The Democratic Deficit under Bourguiba and Ben Ali* (2014), and *Tunisia: From the Revolution to the Constitution* (2014).

Abdullahi Ahmed An-Na'im

Abdullahi Ahmed An-Na'im is Charles Howard Candler Professor of Law and Associated Professor in Emory College of Arts and Sciences, as well as Senior Fellow of the Center for the Study of Law and Religion of Emory University, Atlanta, Georgia. Dr. An-Na'im is the author and editor of numerous books, notably *What Is an American Muslim* (2014), *Muslims and Global Justice* (2011), *Islam and the Secular State* (2008), and *Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (1992). His previous research projects include women's access to, and control over, land in seven African countries, a global study of Islamic family law, and a fellowship program in Islam and human rights. Dr. An-Na'im was formerly the Executive Director of the African bureau of Human Rights Watch.

Gianluca P. Parolin

Gianluca P. Parolin is Assistant Professor of Law at the Aga Khan University in London. Prior to this assignment, he taught comparative law and Islamic law reform at the American University in Cairo, Egypt. Dr. Parolin obtained his LL.M. and later his doctorate from the University of Torino, Italy. Following the First World Congress on Middle Eastern Studies, he was invited to observe the 2002 general elections in Bahrain. Asked to be the rapporteur on constitutional provisions on Shari'a to the Second Conference of the International Consortium on Law and Religion Studies, he started developing a comparative overview of such provisions within the legal systems in Muslim-majority countries.

Xavier Philippe

Xavier Philippe is Professor of Public Law at Aix-Marseille University and Extraordinary Professor at the University of the Western Cape (South Africa). He is the director of the Louis Favoreu Institute–Research Group on Comparative Constitutional Litigation (GERJC) that focuses on comparative constitutional litigation and legal matters relating to state building in post-conflict scenarios. His recent works include *Question prioritaire de constitutionnalité: premiers bilans* (2011) and “Les processus constituants après les révolutions du printemps arabe—l'exemple de la Tunisie: rupture ou continuité?” (in *Mélanges offerts à Jean Du Bois de Gaudusson*, 2013).

Hassan Rezaei

Hassan Rezaei is an expert of comparative law, focusing on Islamization of legal and judicial systems within Muslim Middle Eastern societies. Currently, he is working as the Judicial Affairs Officer at the United Nations Support Mission in Libya. Prior to this position, he served as Justice Reform Coordinator for the United Nations in Afghanistan. Dr. Rezaei has been a Research Fellow at the Max Planck Institute for Comparative and Foreign Criminal Law in Freiburg, the Max Planck Institute for Comparative Public Law and International

Law in Heidelberg, and the Kluge Center of the Library of Congress in Washington, D.C. Additionally, he worked as a legal advisor to the Research Center of the Shari'a and the Constitution Council of Iran.

Tilmann J. Röder

Tilmann J. Röder is a Managing Director of the Max Planck Foundation for International Peace and the Rule of Law in Heidelberg, Germany. From 2006 until 2012, he was a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. Dr. Röder mainly writes on constitutional and international law, legal pluralism, and legal history. His recent publications include *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (2012, with Rainer Grote) and "Civil-Military Cooperation in Building the Rule of Law" (in *Rule of Law Dynamics*, 2012). He is a Member of the Advisory Panel on Civilian Crisis Prevention of the German Federal Government.

Anja Schoeller-Schletter

Anja Schoeller-Schletter is a legal expert at Amereller Legal Consultants in Cairo. She also works as an independent consultant, particularly on constitutional matters, for international organizations and institutions. From 2000 until 2004, she was project coordinator at the Zentrum für Entwicklungsforschung in Bonn, Germany, and Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Afterward, she represented the International Association of French Lawyers of International Expertise. Dr. Schoeller-Schletter wrote her dissertation on the Constitution of Paraguay. Since then, she has published numerous articles on law and development themes, including on the recent constitutional development in Egypt.

Timo Tohidipur

Timo Tohidipur is a Postdoctoral Research Fellow and Lecturer at the Institute for Public Law of Goethe University, Frankfurt am Main. He teaches comparative and German constitutional law, European law, legal theory, and migration and refugee law. Dr. Tohidipur taught as visiting professor in Beijing, China, Santiago de Chile, and Vilnius, Lithuania. He wrote his doctoral thesis about the judicial system of the European Union. Recent publications include "Comparative Constitutional Studies and the Discourse on Legal Transfer" (in *Order from Transfer*, 2013) and "Iran und die Narrative west-östlicher Begegnung" (in *Kritische Justiz*, 2012).

Rüdiger Wolfrum

Rüdiger Wolfrum is a Judge at the International Tribunal for the Law of the Sea and a Managing Director of the Max Planck Foundation for International Peace and the Rule of Law in Heidelberg, Germany. From 1993 until 2012, he served as a Director of the Max Planck Institute for Comparative Public Law and International Law and taught as Professor of National Public and International Public Law at the University of Heidelberg. Before these assignments, he was Director of the Institute of International Law of the University of Kiel and Vice-Rector of the University of Kiel (1990–1993). Dr. Wolfrum is the editor of the *Max Planck Encyclopedia of Public International Law* (Oxford University Press) and, amongst others, of *United Nations, Law Policies and Practice* (1995).

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