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SHARIA, HUMAN RIGHTS, AND EVERYTHING GOOD

JAKOB SKOVGAARD-PETERSEN

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CONTENT

INTRODUCTION

In one vast revolutionary wave in 2011, citizens of several Arab countries managed to overthrow regimes that seemed powerful and stable. As the stated aim of these revolutions was to restore national institutions and politics from what they considered usurpers, it is not surprising that the political attention soon moved to the task of establishing new political orders. If 2011 was the year of the revolutions, 2012 promised to become the year of the constitutions. But the constitutional processes did not move along smoothly; there was a power vacuum to be filled, and oppositional forces who had united in the overthrow of the regimes soon discovered their ideological diversity. What is perhaps more surprising is the degree to which the new constitutions, when finally promulgated, ended up looking much like the old ones. In particular, one already highly controversial provision in the old constitutions, the reference to the Sharia, ended up being retained more of less word by word in the new ones. Why is that? This paper seeks to investigate what happened to the specifically Islamic clauses, and offer some reflections their role in the political process in these Arab countries.

CHAPTER 1

1 THE REFERENCE TO SHARIA IN ARAB CONSTITUTIONALISM

Middle Eastern constitutionalism begins with the Tunisian constitution of 1861, and much of the Arab World became constitutionalized with the Ottoman constitution of 1876. The state system as we know it is largely a product of the peace agreements between the great powers after the First World War, and a new generation of constitutions appeared in the 1920s. These were, by and large, nationalist and liberal, offering basic political rights to the citizens, but also limiting the popular exercise of power in a variety of ways. More ideological constitutions were introduced by the 1960s, in most of the new republics giving one political party full control of parliament and privileging its party ideology as the national educational program. In the nationalist constitutions of the 1920s, Islam was sometimes mentioned as the official religion, but this tended to be late in the text and had little practical significance. In the republican constitutions of the 1960s, it is marginal, if mentioned at all (Arjomand, 1994).

In the 1970s a number of Muslim states introduced the concept of Sharia in their Constitution. Four countries (Libya, Pakistan, Iran and Sudan) claimed to have implemented the Sharia, including the *hudud* punishments, but they did so in different ways and to different degrees (Peters, 1994). Other countries such as Egypt introduced the concept of the Sharia as “a” or “the” source of legislation, but more as an ambition, leaving its practical consequences to future legislators. And others again adopted a reference to the Sharia as a *repugnancy clause*, leaving it to courts to decide whether current legislation was in contradiction of the Sharia.

Whether the legislators themselves were religiously inspired, or they were merely trying to gain a new kind of popular legitimacy, is difficult to answer with any precision and largely beside the point. What matters is that the adoption of the Sharia was popular in politically significant circles of the populations. It is more unclear what these circles expected to come out of this commitment to the Sharia. To some jihadis and Salafists, God had ordered man to follow his rule, so this was simply a question of obedience and salvation in the afterlife. At the other end of the spectrum were those who did not think of the Sharia as God’s command, but as a national tradition; just like the French and Italians had built their modern legal system on Roman law, Muslim countries should naturally

build theirs on the well-established principles of Islamic law. Not rejecting any of these positions, but taking a more ideological approach, were the Islamists who were generally busy demonstrating that the tenets of the Sharia would lead to a socially harmonious, economically just and politically self-assured society. To them, Islam was comparable to other political ideologies, but superior to them, in that it constituted an “all-encompassing system” with a perfect harmony between material and spiritual components, a blueprint for a moral and healthy society.

CHAPTER 2

2 THE SOURCES, AND THE DILEMMAS

From the 1970s onwards, Islamists and to a certain extent non-Islamist *`ulama*, scholars of Islamic law, were preoccupied with discussions about how a feasible Islamic legislation could look like in the various fields of law. How could, for instance, an Islamic law of taxation be crafted? The general challenge was that the Islamic texts and principles pre-dated the modern, centralized and territorial state, and had never been formulated within such a framework. The Qur'an has a limited number of verses with some sort of legal content, and although the Hadith has got much more, these are disparate sentences, rarely concise or well defined, and omitting central issues of law and process. This is exactly why, over the centuries Muslim legal scholars, in an impressive endeavor called *fiqh*, had worked on these texts and transformed them into other, more systematic texts of a legally applicable nature.

The vast literature of *fiqh* was, however, not without problems itself. Evolving into different schools, themselves divided on many specific issues, the *fiqh* schools worked through the training and conscience of the individual judge and scholar of its jurisprudence, so transforming such an organic tradition into a standardized, codified law would betray its very essence. Moreover, like the Qur'an and the Hadith, the *fiqh* tradition was clearly a product of pre-modern, patriarchal societies, which made basic distinctions between the rights of believers and non-believers, men and women, and free men and slaves. This again was why Muslim modernists in the late 19th century called for a return to the pristine sources of Qur'an and Hadith, in order to rediscover a more progressive and dynamic legal spirit. Legislators in many Muslim countries had embraced this idea, as it enabled them to pass laws that were rational and useful, but still could be seen as stemming from the Islamic tradition. And it came close to the nationalist ambition of building a modern legal system on local traditions, in so far as they were relevant and applicable. This was the approach of the towering figure of Abd al-Razzaq al-Sanhouri (1895-1971), who in the 1940s and 50s, had devised civil codes for a number of Arab states. But the danger was that the Islamic element became flexible to the point of insignificance – which was what the Islamists had been protesting against in the first place.

The ambition of a specific Islamic legislation thus predictably ran into a number of problems. There were problems of sources, selection, reinterpretation, extension and consistency. And underneath was the basic question, never asked, whether a state law and Islamic law were reconcilable at all. This is something at least one leading scholar simply denies (Hallaq, 2009, p. 473ff).

But the idea of the Sharia as the basis for legislation was not fully put to the test. It became commonplace for Islamists to argue that no truly Islamic state was in existence; neither Iran (Shia clergy state), Saudi Arabia (monarchist dictatorship) nor Pakistan (military dictatorship) were models of the Islamic state – which was why they were known for torture, excesses, lack of freedom and scant civic participation. A true Sunni Islamic state would be civil, in the sense that neither the clergy nor the military, would be ruling. It would be ruled by a president, who was elected from and by the believers for a limited period, sworn in by making an oath to follow the Sharia and removed by the believers if he did not live up to that commitment. This is the gist of a number of books published by Sunni Islamist thinkers in the 1980s and 1990s: Muhammad Salim al-Awwa, Tareq al-Bishri, Muhammad Ammara and Fahmy Huweidi (Krämer,1999). These ideas were later adopted by the widely admired Islamist shaykh Yusuf al-Qaradawi in a book with the telling title Min fiqh al-dawla (“On the jurisprudence of the state”). The interest had moved from the application of specifics Islamic jurisprudence to the mechanism itself, the exertion of state power. From an early Islamist position merely proclaiming that “the Qur’an is our constitution”, the Islamists had become constitutionalists themselves. They had also clearly embraced democratic institutions and procedures. Even so, the question remained that both the Sharia and its role in state legislation were ill defined.

CHAPTER 3

3 THE NEW CONSTITUTIONAL TEXTS

As a result of the implosion of the regimes in Tunisia and Egypt in early 2011 and the violent toppling of the regimes in Yemen and Libya in 2011-12, numerous Arab states set out revising their constitutions or making new ones. Some of these changes were merely cosmetic: the rulers in Oman, Bahrain and Syria introduced amendments with slight reformatory changes, but ultimately no alteration in their autocracy. Algeria and Qatar set out on similar endeavours. The kings of Jordan and Morocco also modified their constitutions, limiting their own powers and upgrading the powers of parliament and prime minister, but still retaining control over the political process (Bernard-Maugiron, 2013, pp. 51-53).

The real novelty will be the constitution of Libya, which will undoubtedly be very different from the rule of Moammar Ghadhafi. However, Libya is nowhere near adopting a new constitution, and so far relies on an interim constitutional declaration announced in August 2011. A constitutional council was elected in April 2014 but was boycotted by some groups and will not be able to deliver a draft in the summer of 2014 as planned. In 2014, Yemen, too, has established a constitution drafting committee, which is equally contested.

This leaves the two original incubators of the Arab spring, Tunisia and Egypt, which have both adopted new constitutions, but after major setbacks and much wheeling and dealing. And in Egypt's case the constitution of 2012 has already been superseded by a new one adopted in January 2014, after the military takeover in 2013. The Tunisian and Egyptian cases are of particular interest because in both cases Islamists gained power in the first elections after the uprising. For the first time, Sunni Islamists had great influence on the writing of a new constitution. Now was the time when the new theories of Sharia republicanism could be put into practice.

CHAPTER 4

4 THE TUNISIAN CONSTITUTION

After the revolution of January 2011, a transitional National Constitutive Assembly (NCA) was established and after elections won by the Islamist Ennahda ("Renaissance") party (with 37 % of the votes), a coalition government was formed. Preparation for a new constitution took place in committees in the NCA, and after much wrangling (and assassinations of opposition politicians), the Constitution was put to the vote in the assembly and adopted in January 2014.

The Tunisian Constitution of 2014 begins with a *bismillah,* and in the preamble it expresses:

> "Our people's commitment to the teachings of Islam and its open and moderate objectives, to sublime human values and the principles of universal human rights, inspired by our civilisational heritage accumulated over successive epochs of our history, and from our enlightened reformist movements that are based on the foundations of our Islamic-Arab identity and to human civilisation's achievements, and adhering to the national gains achieved by our people" (Tunisia, 2014).

This is a far cry from a commitment to the application to specific tenets of the Sharia. Rather, affirming the Islamic identity of Tunisia, it stresses that the Tunisian version of Islam is reformist and modern and in conformity with the universal human rights.

The text itself begins with a reiteration of article 1 of the 1959 Constitution stating that: *"Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic, and its type of government is the Republic."* Likewise, article 74 upholds that the president's religion must be Islam.

Apart from very general statements on identity, article 6 states:

> "The State shall protect religion, guarantee freedom of belief and conscience and religious practices, and ensure the impartiality of mosques and places of worship away from partisan instrumentalisation. The State shall commit to spreading the values

> of moderation and tolerance, protecting sanctities and preventing attacks on them, just as it shall commit to preventing calls of *takfeer* [calling another Muslim an unbeliever] and incitement to hatred and violence and to confronting them." (Tunisia, 2014, pp. 5-6).

While the state commits to protecting religion and beliefs in general, it is also tasked with protecting Muslims from *takfiri* preaching and incitement - a clear reference to Salafi vigilante groups who had formed after the revolution.

Sharia is not mentioned in the Tunisian Constitution. It affirms the Islamic identity of the state and nation, and a certain primacy of Islam, but confirms the full freedom of belief and conscience of all citizens. As described by Shaqoura several drafts were on the table, each with a different emphasis on Islamic norms. None of them, however, operated with an idea of a specifically Islamic legislation. In one of them, article six included an item stating that the state was the protector of the Sacred, a clause that could perhaps have been the basis for some sort of censorship on religious grounds. In the final version, however, it was omitted.

Moreover, the text of the final Constitution is clearly committed to protecting Tunisian Islam from certain Muslim political tendencies, a remarkable position considering the high number of Ennahda members who took part in the drafting, and later promulgation, of the Constitution. It is clear that these members of Ennahda were reconciled with the idea that a general democratic constitutional framework of rights could work as a platform to pursue Islamist policies.

CHAPTER 5

5 THE EGYPTIAN CONSTITUTIONS OF 2012 AND 2014

The Egyptian constitutional struggle is quite complicated. In March 2011, one month after the overthrow of President Mubarak, Egyptians voted for a limited constitutional amendment which would allow for a new and fairer electoral law. The committee preparing the amendment was headed by one of the above-mentioned representatives of the new Islamist constitutionalist trend, former judge Tarek al-Bishri. Subsequently, the ruling Supreme Council of the Armed Forces inserted more changes than people had actually voted on – a premonition of what was later to happen. Parliamentary elections in January 2012 resulted, like in Tunis, in the victory for a new Islamist party, as almost half of the votes were cast for the Freedom and Justice Party, established by the Muslim Brotherhood. More surprisingly, the more conservative Salafist Nur party gained almost one quarter of the vote.

According to the constitutional amendment, the elected parliament would appoint the 100 members of a constitutional assembly; the parliament proceeded to produce a committee heavily dominated by Islamists, half of them from the new parliament itself, eliciting strong protests from other political groups. In April 2012 it was declared unconstitutional by the State Council and the parliament was dissolved. A new assembly was elected in June, once again with an Islamist hue, and once again a number of cases were filed against it with the Constitutional Court. Just before the Court was to review these cases, the new Islamist president, Mohammad Morsi passed a decree in November 2012 prohibiting any court from examining them. The second assembly presented its draft constitution which was then adopted by the upper chamber of parliament in one long session, and duly adopted by two-thirds of the voters in a referendum on December 15, 2012. The turnout, however, was as low as 33%.

Morsi's decree was widely felt as an abuse of power and served to unify opposition against him. During the spring of 2013, his government seemed beleaguered and inefficient, and on June 30, the anniversary of his taking office, massive demonstrations against his presidency were held throughout the country. On July 3rd the army took over again and appointed an interim president. It also announced that a new constitution should be adopted before the election of a new president and parliament with the specific aim of amending

some of the religious clauses of the 2012 constitution. This time, a panel of legal professionals prepared the amendments, whereupon it was discussed, altered and approved by a panel of 50 representatives for different currents and stratas of Egyptian society. The new constitution was adopted by a popular referendum in January 2014, this time with an approval by 98% of the voters, according to official figures. The participation was, however, only a little larger with 38,6 % of the registered voters.

Both texts have been criticized on many points, not least the absence of any civil control over the military, and the inordinate power that the president still retains. Here we shall concentrate on the theme of Islam and the Sharia. The text of the 2012 Constitution is the most interesting, since it reflects the Islamist version. As mentioned, Islamists and Salafists dominated the Constitutional Assembly to the point that most non-Islamists withdrew from the assembly.

In the 2012 Constitution, Islamic references are numerous, but some are of little practical impact. The long preamble ends with stressing the state's responsibility to protect the Coptic church and the "Al-Azhar, with its history as a mainstay of national identity, the Arabic language and Islamic Sharia", and on the definition of the state in the first paragraph, it has been added that "the Egyptian people are part of the Arab and Islamic nations".

The most important religious article is number two which says that "Islam is the religion of the state, and Arabic is its official language. The principles of Sharia are the main source of legislation." This famous clause dates back to the Constitution of 1971 (as amended in 1980) and is thus a familiar, but controversial feature of the Egyptian constitution. At its latest amendment in 2007, human rights groups, the Coptic church and others tried to abolish the reference to the Sharia, or supplement it with other references, but they failed. Given the crushing victory of the Islamists in the elections of 2012, any attempt at abolishing it was doomed to failure. Instead, the Salafists pressured for a formulation that would leave less room for interpretation, specifying that it was not the "principles" but the "rulings" (*ahkam*) of the Sharia that must be the main source of legislation. This did not happen.

In the end, the article 2 was kept *verbatim* yet again, but at the end of the constitutional text a new article was inserted to define the correct interpretation of its most controversial tenet, "the principles of the Sharia". This article 219 states that "The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community." Many of these words are technical terms of the classical Islamic jurisprudence, and is probably not fully satisfactory

to either Salafist (who insist that the Qur'an and Hadith are sufficient) nor many Islamists (who often belong to a more modernist line that also privileges Qur'an and Hadith but are much more willing to reinterpret the texts in light of contemporary knowledge and needs). Rather, by stressing the need to move within the tradition of classical *fiqh*, article 219 underlines the authority of the *`ulama*, the classical Islamic legal scholars.

This is somewhat surprising, as especially Islamists traditionally have been quite skeptical about the *`ulama* (Skovgaard-Petersen, 2013, pp. 286-88). The reason must be - as Lombardi and Brown (2012) suggest - that this was a compromise between on the one hand Islamists and Salafists, and on the other hand non-Islamists who would have to accept that the article 2 would now be activated in a new sense, but feel more reassured that this would be within the traditional interpretations of the *`ulama* at al-Azhar, which has a reputation not only for orthodoxy but also for moderation. This preference can be seen in article 4 which makes it clear that al-Azhar must "be consulted in matters pertaining to Islamic law." Hence, the non-Islamists had to abandon the established arrangement whereby it was the Constitutional Court which decided whether specific legislation was in contradiction of the principles of the Sharia, and thus, in effect, became the ultimate authority on what the Sharia really says. This role was now conferred to al-Azhar, the real benefiter of the new constitutional arrangement. Moreover, article 21, 25 and 212 task the state with re-introducing an independent system of *awqaf* (endowments) in an attempt to strengthen institutions such as al-Azhar economically and make them more politically independent. In the previous constitutions al-Azhar had not even been mentioned. In this one, it is part of the Egyptian state's very *raison d'etre*.

Finally, article 76 lays down that "There shall be no crime or penalty except in accordance with the law of the Constitution." Since the Constitution includes article 2, this could conceivably be used to introduce a penal code including the punishments of the classical *fiqh*. (Hulsman et al., 2013, p. 61)

There are other clauses on religion. Equally for the first time, article 3 upholds that "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, of course, allows the Muslims to be in full control of their own personal status laws, and as elsewhere in the text it limits religious rights to Muslims, Christians and Jews. Other religions do not exist. Furthermore, probably inspired be the controversy of the Danish cartoons of Muhammad, article 44 maintains that "insult or abuse of all religious messengers and prophets shall be prohibited." But this religious limit to freedoms and rights is general: at the end of the chapter on freedoms, which states that "Such rights

and freedoms shall be practiced in a manner not conflicting with the principles pertaining to State and society included in Part I of this Constitution." That would include article 2. So the meaning is that these freedoms are absolute – as long as they are within the confines of the Sharia.

In the Constitution of 2014, much but not all of the religious clauses are omitted, or scaled down. The preamble omits the part about being part of the Islamic civilisation, but mentions Egypt's special role in Islamic history, as well as its role as a sanctuary for the Holy Family. Islam now enters as a central component of Egyptian culture that must be preserved - along with the Ancient Egyptian and Coptic components (art. 50). Religion still seems to be "heavenly" – that is, Muslim, Christian and Jewish, according to Muslim understanding, and Christian and Jews (of which there are less than fifty in the population) are entitled to their own personal status codes and religious rights.

Once again the article two is retained without any alterations: "Islam is the religion of the state, and Arabic is its official language. The principles of Sharia are the main source of legislation." But already in the preamble it is clearly stated that one of the aims of the constitution is to return this article to its traditional "dormant" condition:

> "We are drafting a Constitution that affirms that the principles of Islamic Sharia are the principal source of legislation, and that the reference for the interpretation of such principles lies in the body of the relevant Supreme Constitutional Court Rulings."

So back again from al-Azhar to the Supreme Constitutional Court. Al-Azhar (now moved to article 6) is now solely seen as an educational and scientific institution, and not an arbiter in the formulation of state law. Article 219 is abolished.

CHAPTER 6

6 CONCLUSION

The two 2014 constitutions of Tunisia and Egypt have a lot in common when it comes to their treatment of Islam. Both affirm the Islamic identity of the nation and the state, all the while stressing the freedom of religion of the individual citizen (although in the Egyptian constitution, religion seems to be confined to Christianity, Judaism and Islam). And both seem be concerned about the protection of what they consider “moderate” Islam. The “enemies of Islam” do not seem to be non-Muslims, but rather extremist Muslims, especially in the Tunisian constitution. Both uphold a national Islam that has served the population well and has prepared them to take a constructive role in the international community.

Sharia is invoked in article 2 of the Egyptian constitution of 2014, but not in the Tunisian constitution. But although article two has been retained all along, it was given very different interpretations among Egyptian political forces, and the 2012 constitution was an attempt by Islamists to activate it in several ways. Firstly, by making it a demand for political action: legislators should actively work to develop new legislation based on the principles of the Sharia, as understood by the al-Azhar Corps of High *`Ulama*. This is political constitutionalism. But the Constitution also entails legal constitutionalism, in that it empowers an independent court to determine whether laws are in conformity with the Sharia (Lombardi, 2013, p. 621). This is the Supreme Constitutional Court. Moreover, when no contemporary legal text covered an issue, a judge could proceed in the manner of classical *fiqh* by consulting the Islamic basic texts, and make the appropriate decision.

The issue of the Islamic identity of the state and the people has been a divisive one in both Tunisia and Egypt. In both cases, the great majority of the population is Sunni Muslim - but there are other religious groups – and a significant opposition towards the authoritarian regime came from religious quarters and was expressed in an Islamic idiom. In Tunisia, the Ennahda movement was banned, and the leadership abroad called for democratic reforms in order to reinstate itself in the country and pursue Islamizing policies in a parliamentary system. In Egypt, the Muslim Brotherhood was tolerated but banned from forming a party, and it, too, opted for democratic reforms in order to pursue its

policies. In this process it revised earlier points of view and began to adopt certain liberal positions, accepting that it was merely a party among others, albeit with an "Islamic reference", just like the state itself. This liberal tendency culminated with the party platform of the Freedom and Justice Party after the 2011 revolution, but in power, neither the party nor president Morsi managed to fully live up to these liberal principles (Rohe & Skovgaard-Petersen, forthcoming).

The 2012 Constitution was the big prize for President Morsi and the Brotherhood, and they exerted so much effort that they began to lose their popular support. Overall, it was less autocratic than the late Mubarak constitution of 2007, but while the ambition of Islamizing is clear, it does seem that the Islamists and Salafists were far from decided on numerous points, and may have been quite relieved to leave the matter of Islamization to future legislators and courts, as long as they had established certain parameters. The surprising recourse to al-Azhar and traditional *fiqh* is probably an indication that these movements have been used to take a stand on specific issues, but really did not have much of a "system" in place. In power, of course, Morsi also realized the significance of flexibility and pragmatism in the application of specific Islamic injunctions. It was the wider issue of securing economic growth and development that took priority. At least, Islamist leaders began to talk about a very gradual implementation of Islamic law – just the thing they had always criticised Mubarak's National Democratic Party for doing. And the only ambitious attempt of Islamizing – introducing *sukuk*, or interest-free bonds, to raise capital from Muslim investors – failed, ironically precisely due to al-Azhar insisting on its new right to vet the laws for Sharia compliancy.

The reason, then, for retaining the formulations on Islam in Tunisia's article 1 and Egypt's article 2, is that given the deep divisions over the role of Islam in these two countries, no other formulation could win wide support, but everybody had learned to live with these statements. To Islamists, at least they confirmed that Islamic nature of the state. They could also hope that, if they succeeded in governing, the Secularists would have to accept that the population would support Islamizing policies along the way. To non-Islamists, this was clearly the most they could hope for. But many non-Islamists are probably also happy with formulations that confirm the Islamic nature and commitment of the state, as long as it is not a commitment to implementing an Islamic "system" (whatever it might be), or granting Islamic actors or language a privileged position of power.

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