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Constitutionalism in Muslim Countries

The struggle between Islam and Individual Liberties, with special regard to Egypt and Tunisia

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"The smallest minority on earth is the individual. Those who deny individual rights, cannot claim to be defenders of minorities."

Ayn Rand

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ABSTRACT

The present work aims to assess the compatibility between provisions referring to Islamic law and ethics, and those guaranteeing individual liberties in the constitutional orders of Egypt and Tunisia.

In terms of content, I focus on a set of problematic issues where the tension between Islam and human rights is more accentuated. Such analysis is conducted on Islamic charters of rights and on the Egyptian and Tunisian Constitutions. I then select two specific case studies, i.e. blasphemy and homosexuality, those being rarely considered in an Islamic environment as even part of the human rights discourse.

My methodological approach is a qualitative one, based on scholarship, legal texts, case-law and interviews conducted in the field in Egypt and Tunisia. The perspective I adopt is not a theological one but a legal one; consequently, my study is not intended to verify the theoretical compatibility of Islamic law with human rights, but the concrete application of Islamic-derived norms in the legal systems of contemporary states.

This thesis shows that the Islamic constitutional approach is based on the pre-eminence of shari'a law. However, such a religious *Grundnorm* proves to be incompatible with modern constitutionalism and fundamental rights.

INTRODUCTION

Research question and methodology

The present dissertation aims to assess the compatibility between provisions referring to Islamic law and ethics, and those guaranteeing individual liberties in the constitutional orders of Egypt and Tunisia.

I shall therefore attempt to answer the following research question: how does the reference to Islam, its laws and principles, in constitutional documents affect individual liberties?

As a preliminary remark, my analysis will not be based on a deductive approach intended to verify the theoretical compatibility of Islamic law with human rights, but on an inductive one attempting to answer the research question via a legally-based assessment of the concrete application of Islamic-driven norms in contemporary states.

Therefore, I shall not trace that scholarship attempting to define in generic terms the abstract compatibility between "Islam" and "human rights". For instance, Jan Michiel Otto argues that, "unlike many assume, violations in Muslim countries often have little to do with sharia. Abiad even concludes on the basis of another comparative research of Muslim countries, that 'it is not Sharia which is preventing the implementation of human rights', but a 'lack of political will' of the governments. In

contrast, Abiad argues, 'the very nature of Sharia demonstrates the potential of reform in the interest of human rights'".[1] Mashood Baderin quotes the conclusions of a seminar on human rights held in Kuwait to show how violations of human rights in the Muslim world often do not occur due to shari'a, but to its distortion: "It is unfair to judge Islamic law (Shari'a) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources".[2] He consequently adopts an approach which "theoretically engages international human rights practice in dialogue with Islamic jurisprudence",[3] meaning with the latter the classical interpretation of Islamic sources. *Contra*, An-Na'im argues: "[T]he inherent problems with the Shari'a state as the ideal to be pursued by Muslims today are more serious than the problems of realizing that 'ideal'. Even if that ideal were realized in practice today, it would still fall short of the standards of modern constitutionalism".[4]

In opposition with these methods, I believe that the inner polysemy of "shari'a law" impedes a final judgment on its abstract compatibility

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[1] Jan Michiel Otto, "Introduction: Investigating the Role of Sharia in National Law," in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto, Law, Governance, and Development (Leiden: Leiden University Press, 2010), 618.

[2] Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford Monographs in International Law (Oxford, New York: Oxford University Press, 2003), 12.

[3] *Ibid.*, 5.

[4] Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, 1996), 86.

with individual liberties. As well illustrated by Jean Michiel Otto, we may discern four different meaning of shari'a: a divine, abstract as the will of Allah; classical shari'a as interpreted by classical scholars; historically transferred shari'a, as the whole body of interpretations over it developed from the beginning of Islam up to the present day; and a contemporary shari'a, as used in contemporary legislation and case-law.[5] None of them is, in its turn, univocal. Therefore, the best way to look at the issue of Islamic constitutionalism and human rights consists in my view in overcoming an abstract-deductive approach focused on the theoretical rapport between the latter and Islamic principles,[6] and to adopt a concrete-inductive one[7] examining constitutions and laws in Muslim-majority countries.

In fact, abstract analyses may be useful to draw parallelisms between a Western foundation of constitutionalism and an Islamic one, which at an empirical level might contribute to the social acceptance of human rights as an endogenous, rather than exogenous and imperialistically imposed, phenomenon. However, this often becomes a sterile exercise in that it employs only certain rules and interpretations of shari'a law,

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[5] Otto, "Introduction," 26.

[6] *Ibid.*, Baderin, *International Human Rights and Islamic Law.*, An-Na'im, *Toward an Islamic Reformation.*

[7] Moamen Gouda, "Islamic Constitutionalism and Rule of Law: A Constitutional Economics Perspective," *Constitutional Political Economy* 24, no. 1 (March 2013): 57–85., Sami A. Aldeeb Abu-Sahlieh, *Les musulmans face aux droits de l'homme: étude et documents*, 2 edition (CreateSpace Independent Publishing Platform, 2013)., Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 5 edition (Boulder, Colo: Westview Press, 2012).

which are not necessarily: 1) the sole applicable to the concerned cases; 2) interpreted in the same way by all Muslim actors. A typical example is that of freedom of religion: if this right is undeniably laid down in the Quran,[8] why then is apostasy almost universally considered a crime, punishable by death under shari'a law? This is a typical case showing that, due to the multiplicity of sources and interpretations of Islamic law, an adamantly liberal outcome is entirely compatible with the cruelest and most archaic one, on the same subject and starting from the same religious texts. Hence, the appropriate question is not: "Is Islamic law compatible with human rights?", and not even "is freedom of religion as provided in Islamic law compatible with freedom of religion as provided in international human rights law?", but can be only formulated in the following way: "Is freedom of religion, as provided in legal texts self-declaring Islamic, or at least partially referring to Islamic sources, compatible with the internationally recognized meaning of freedom of religion"?

Consequently, I shall not delve into theological debates, related to classical shari'a law and its rules as derived and interpreted *in primis* from the Quran and the *Sunna* of the Prophet.[9] I am not going in other words

[8] Tommaso Virgili, "Apostasy from Islam under Sharia Law," *Sant'Anna Legal Studies – STALS*, January 2015, http://www.stals.sssup.it/files/Apostasy%20in%20sharia%20law,%20STALS,%20def.pdf.

[9] The outcome of the exegesis of these religious/legal sources is called *fiqh*. On it, see Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge, UK ; New York: Cambridge University Press, 2009), 72–78.

to concentrate on classical sources *per se*, but only limited to those references to shariatic rules emerging from the legal texts analyzed herein. This means that the assessment of what a supposed "true Islam" says or not says about the issues at stake is outside the scope of this dissertation.[10]

The methodological approach that I shall adopt in order to undertake such an analysis will be a qualitative one, for I deem the quantitative one inadequate to give a clear picture of the concrete effects of Islamic provisions on the enjoyment of rights. Quantitative studies on this matter, such as those undertaken by Tom Ginsburg and Ahmed Dawood,[11]

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[10] With this, I do not intend to disregard the important and erudite work of those scholars who are trying to provide an interpretation of Islam compatible with homosexuality. *Inter alia,* "Tunisian Professor Amel Grami: Homosexuality Emerged from Our Heritage," *MEMRI - The Middle East Media Research Institute*, December 20, 2015, https://www.memri.org/tv/tunisian-professor-amel-grami-homosexuality-emerged-our-heritage. Olfa Youssef, in Amine Tais, "The Qur'an and Homosexuality," *Citizen of the World*, June 16, 2016, http://aminetais.com/the-quran-and-homosexuality/. Scott Siraj al-Haqq Kugle, *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (Oxford: Oneworld Publications, 2010).Kugle, Scott. *Homosexuality in Islam*. Oxford: Oneworld Publications, 2010. As the Tunisian professor Amel Grami commented during my interview with her, the theological and the human rights approach may integrate and complement each other. (interviewed by the author, Tunis, July 2016). However, this should only happen at the level of cultural and social acceptance, not at the legal one, as stressed by all scholars and activists with whom I spoke: a proposal of decriminalization based on Islam would put the legal fight in a slippery slope, by establishing Islam, rather than the Constitution and International Human Rights Law, as the source of rights. For a proposal based on Islam, see Farhat Othman, "Appel À L'abolition de L'homophobie En Tunisie À L'occasion de La Journée Mondiale Du 17 Mai," *Al Huffington Post Maghreb-Tunisie*, April 25, 2016, http://www.huffpostmaghreb.com/farhat-othman/post_11418_b_9765218.html.

[11] Dawood I. Ahmed and Tom Ginsburg, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions,"

are based on the "number" of rights or the "score" of Islamization in the constitutions of Muslim countries. In spite of the interesting idea underlying these pieces of research, the outcome does not live up to the expectations. Dawood for example sets an "Islamic Constitution Index" whose score is simply given by the sum of Islamic clauses in each constitution, but this is done having little regard to the weight and concrete impact of each of them. Although the score is slightly different according to the relevance of the Islamic clauses, this numerical system is not sufficient by itself to assess the purview of such clauses in concrete terms. Trying to identify the "most Islamic" constitution out of a quantitative analysis based on the number of "Islamic clauses" risks to become a sterile exercise revealing nothing of the effects of those clauses on the legal and social ground. Equally useless and flawed is trying to determine the compatibility of Islamic constitutionalism and human rights on the basis of the number of rights enshrined in the Constitution: human rights are not candies in a box, where the more is the better.

For these reasons, I deem the qualitative methodology more appropriate in terms of analysis and evaluation on this topic. The purpose

2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438983. Dawood I. Ahmed and Moamen Gouda, "Measuring Constitutional Islamization: The Islamic Constitutions Index," *Hastings International and Comparative Law Review* 38, no. 1 (2015).

of the qualitative approach, indeed, is to *describe*, as opposed to *measure*, a problem, situation or phenomenon;[12] as such, it allows more flexibility in the research process and a more articulated analysis of the meaning and effects of Islamic clauses, characterized by a complex mixture of religious, legal and social elements.

Concerning the sources utilized for the present work, I shall resort to a mixture of primary and secondary sources, including literature, case-law and interviews, with a partly theoretical, partly empirical approach. On the theoretical side, relevant literature on human rights, constitutionalism and Islam will enable me to provide the conceptual background, which will be subsequently put to the test of the Constitution and case studies. On the empirical side, unstructured interviews with experts and stakeholders coming from academia, human rights activism and legal practice, and victims of human rights abuses, will help me provide a more accurate picture of the issues at stake.

In order to access significant material and to interview relevant stakeholders, I have complemented the desk research with fieldwork in Egypt (June-July 2013) and in Tunisia (July-August 2016).

As concerns the languages employed, I have conducted the literature review in English, French and Italian, and the interviews in French

[12] Ranjit Kumar, *Research Methodology: A Step-by-Step Guide for Beginners* (Los Angeles: SAGE Publications Ltd, 2010), 13.

and English. Regarding the examination of constitutional texts and case-law, this has been done in Arabic, unless an authoritative translation in English or French was provided. In those cases where I was not confident on a personal translation, I have recurred to a professional translator.

In the text, transliteration from Arabic is done without diacritical marks.

A final caveat must be made as far as the basic assumptions of this work are concerned.

This research could in part described as a classical doctrinal one, or "black-letter law" study,[13] i.e. an analysis of legal rules conducted on legal texts, case-law and correlated literature. However, I will not merely take this pure approach of theoretic knowledge, but will also take a stance on the content of the law, advocating for a change thereof - as per what may be defined "law reform research".[14] Indeed, I move from a well-defined philosophical-political position, i.e. constitutionalism as a means towards implementation of human rights, following a classical liberal theory. I consider, in other words, contemporary constitutionalism as an instrument of a liberal democracy - a system combining the

[13] Paul Chynoweth, "Legal Research," in *Advanced Research Methods in the Built Environment*, ed. Andrew Knight and Leslie Ruddock (Chichester, U.K. ; Ames, Iowa: Wiley-Blackwell, 2008), 29.

[14] "The purpose of the latter will generally be to facilitate a future change, either in the law itself, or in the manner of its administration". *Ibid.*, 31.

rule of law, formal democracy and human rights.[15] As per the categories outlined by the Oxford Handbook of Comparative Law, mine may be defined a "universalist justice-seeking approach", which "entail[s] comparative work on rights, often linked with literature on human rights".[16]

Regarding the conception of human rights, I assume those to be 1) individual; 2) universal, as testified by the very etymology of the word *human*. Thus, any relativistic idea of liberty as culturally and socially determined in each different context is dismissed at the roots as an instrument of the majority to trample on minorities' rights, as well as a quasi-racist way to deprive certain individuals of their freedoms on the mere basis of their origins.[17]

The yardstick I am going to use in order to assess how Islamic rules affect such rights is international human rights law, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, along with the appropriate conventions on specific issues.

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[15] See Chapter I.

[16] Vicki C. Jackson, "Comparative Constitutional Law: Methodologies," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, Oxford Handbooks (Oxford, New York: Oxford University Press, 2012), 62.

[17] As epitomized in one sentence by prof. Alice Her-Soon Tay, recognizing the existence of universal human rights means declaring that there are no subhuman human beings. Alice Her-Soon Tay, "I valori asiatici e il Rule of Law," in *Lo stato di diritto: storia, teoria, critica*, ed. Pietro Costa and Danilo Zolo (Milano: Feltrinelli Editore, 2002), 683–707.

Definition of the research scope

I shall address my research question by restricting the focus thematically and geographically. I shall examine the Constitutions of Egypt and Tunisia in relation to a number of sensitive domains from an Islamic perspective, and conclude with two specific case-studies in the concerned countries.

There is a number of domains where the theoretical contrast between Islamic norms and modern constitutional principles is particularly acute.

An-Na'im identifies three issues in particular where the shariatic "ideal" is radically incompatible with modern constitutionalism:[18]

a) freedom of religion and prohibition of apostasy;

b) freedom of women to exert their rights;

c) constitutional status of non-Muslims (*dhimmitude*)

This happens because Islamic law distinguishes three grounds for legal discrimination under the sharia:[19]

1) Muslims vs. non-Muslims

2) Men vs. women

[18] An-Na'im, *Toward an Islamic Reformation.*

[19] Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988), 64. Mayer, *Islam and Human Rights*, 85.

3) Freemen vs. slaves.

Although the third discrimination has been revoked throughout the Muslim world, at least from a formal point of view,[20] the first two are still in place to various degrees in most Muslim states, and come along with other provisions severely curtailing fundamental rights and freedoms.

In addition to these three layers of discrimination, one has to take into account the problematic aspect of Quranic criminal penalties, which notoriously include flogging, amputation of limbs and stoning to death.

Hence, major issues related to Islamic documents, to be theoretically put under the test of international human rights law, are the following:

1) Equality between Muslims and non-Muslims;

2) Equality between men and women;

3) Prohibition of torture, inhuman and degrading punishments, with reference to Islamic penalties;

4) Freedom of religion including apostasy;

5) Freedom of expression in relation to heterodoxy and blasphemy;

[20] The situation of workers in the Gulf has been often denounced by human rights organizations as a *de facto* condition of slavery. One may even find in American academia bizarre and disturbing attempts to justify Islamic slavery from a moral point of view. See Chuck Ross, "Islamic Georgetown Prof Offers Tortured Defense Of Slavery And Non-Consensual Sex Under Islam," *The Daily Caller*, February 11, 2017, http://dailycaller.com/2017/02/11/islamic-georgetown-prof-offers-tortured-defense-of-slavery-and-non-consensual-sex-under-islam-video/.

6) Sexual freedom including homosexuality.

After providing a general appraisal of these issues based on contemporary Islamic charters of rights, the same categories will constitute the point of entry for the assessment of the Egyptian and Tunisian constitutions.

While the research question could be addressed in relation to any Muslim-majority states whose constitutions refer, in various terms, to Islam, its principles and its laws, I chose Egypt and Tunisia for they represent the two most relevant cases of the "Arab Awakening", with at least a partial transition to democracy. This however has come along with strong clashes between liberal and Islamist worldviews, as well as with new authoritarian attempts. The theoretical contrasts are reflected in politics and society of Egypt and Tunisia with similar patterns: in both cases there is, on the one hand, a strong Islamist component, mainly divided into Muslim Brotherhood and salafist groups – that are on occasion allied and on occasion in open rivalry – and a vocal anti-Islamist camp.[21] In both cases, the former obtained an initial supremacy and tried to reshape the institutions of the newly born democracies in an Islamist sense, meeting the fierce opposition of the latter. In this clash, the Constitution-making process has represented a crucial part.

[21] Defining it downrightly "secular" would fit for some groups, but would be misleading in other cases.

However, the differences between the two cases are not any less relevant than their similarities. First of all, the outcomes of the internal struggle have ended up being very different: in Egypt, President Morsi, an exponent of the Muslim Brotherhood, did not accept a compromise with the opposition notwithstanding a massive demonstration against his authoritarian, albeit formally democratic, government, whereupon the Army intervened ousting the President. A new roadmap was established, the Muslim Brotherhood was outlawed and its members prosecuted, and a new Constitution was emanated by a new Assembly. A once again authoritarian government, albeit formally democratic, is now in place. In the Tunisian case, instead, the two camps reached an agreement for a smooth transition, and now Tunisia is the only Arab country to be qualified as "free" by the Freedom House.[22] The causes of such different outcomes would deserve a longer analysis, but the strength and maturity of the Tunisian civil society has surely played an important role, that will be highlighted in the present work.[23]

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[22] Eric Reidy, "Report Designates Tunisia First 'Free' Arab Country in Decades," *Al-Monitor*, February 8, 2015, http://www.al-monitor.com/pulse/originals/2015/02/tunisia-free-arab-judiciary-political-challenges.html.

[23] Compared to Egypt, Tunisia has a tradition of civil institutions, relatively free from constraints coming from the army or the religious establishment, a history of laïcité inherited by the independence's father, Habib Bourguiba, and a better economic and social situation; all of this has brought about a strong civil society, incomparable with any other Arab country. Most of these features are lacking in the Egyptian case, and this may contribute to explain its largely uncompleted transition to democracy. Other factors too arguably played a role: one is the different strength and centrality of the army, much stronger and historically protagonist of political life in Egypt. Furthermore, it was most probably for fear of meeting the same destiny of the Egyptian Muslim Brotherhood, after the demonstrations which followed the assassinations of two

Although the final constitutional products follow two quite different models – whose comparison, in terms of approach to religion and fundamental freedoms, is extremely interesting – in both cases the struggle over the interpretation of sensitive human rights issues in relation to religion and public morals has followed similar patterns and is far from being over. Only the concrete legal implementation and jurisdictional practice will cast a light on the meanings concealed behind the constitutional terms.

In order to zoom from the abstract constitutional provisions to concrete case studies in the concerned countries, I am going to select two specific rights: the freedom from interference in one's sexual life, with particular regards to homosexuality; and the freedom of holding and expressing nonconventional religious beliefs, i.e. those deemed unacceptable from the point of view of Islam.[24]

I have chosen these issues as they represent the most controversial ones, at the fringes of the debate on individual freedoms in an Islamic context. They are rarely considered as even part of the human rights discourse (still representing taboos, both in legal and social terms), contrarily to other topics that, albeit sensitive, are at least acknowledged as human rights. For instance, not even hard-core Islamists would deny

prominent secularists, that Ennahdha agreed to reach a compromise with the opposition.

[24] As I am going to explain, those include a vast plethora of concepts.

that the concept of "women rights" exists; their attempt would be to challenge the content, rather than the qualification per se, of such notion. On the contrary, homosexuality and "blasphemy" (widely understood) are not accepted as part of the human rights discourse, but rather viewed as abuses of freedom. Remarkably, this occurs not only in the framework of politics or religion – which pursue their own agendas – but even at the scholarship level. For instance, the abovementioned Mashood Baderin - one of the most reputed scholars of human rights and Islam - claims that homosexuality is "generally seen to be strongly against the moral fabric and sensibilities of Islamic society and is prohibited morally and legally under Islamic law".[25] This implies that it would not pertain to the realm of human rights but would fall within states' "margin of appreciation".[26] Similarly, blasphemy is not considered by many scholars as being protected under the mantle of free speech, for it would represent an undue attack to religious sensitivity and social peace.[27]

[25] Baderin, *International Human Rights and Islamic Law*, 117.

[26] *Ibid.*

[27] It is not by chance that, out of 110 recommendations from the Human Rights Council on Tunisia, "the only two rejected outright concerned the decriminalization of same-sex acts and religious defamation". See Dan Littauer, "Tunisia Rejects UN-HRC Recommendation to Decriminalise Gay Sex," *Pink News*, accessed June 29, 2017, http://www.pinknews.co.uk/2012/06/06/tunisia-rejects-unhrc-recommendation-to-decriminalise-gay-sex/.

My research will push therefore the boundaries of the human rights discourse in Muslim contexts, focusing on two overlooked and under-explored issues.

Thesis outline

In Chapter I, I shall provide an overview on the concept of constitutionalism both in the Western and the Islamic traditions. After a brief historical synopsis of the two, I shall compare and contrast the main concepts underlying the Western constitutional philosophy with the Islamic ones. Profound discrepancies will emerge in relation to the key notions of good/legitimate government, citizenship, freedom and democracy, due to the religious substratum permeating the political and institutional architecture of the Islamic tradition.

In Chapter II, I shall provide a theoretical assessment on the perception of individual freedoms in an Islamic mindset. As per my premises, instead of moving from a purely conceptual analysis based on abstract discussions on ideas such as "democracy", "human rights", "women rights" and so on, I will base my study on some documents representing, we might say, the "Islamic Bill of Rights": it is about the major Islamic charters of rights which, in the mind of the proponents, should represent an ethos alternative to the Western one, and compatible with religious rules. In addition, I shall examine the constitutional project elaborated

by the University of Al-Azhar, arguably the most authoritative Islamic institution in the Sunni world.

I call such analysis "theoretical", although conducted through para-legal documents, for the inductive examination of the provisions contained therein gives a general picture of the Islamic – or to say it better, Islamist[28] - conception of individual liberties.

In Chapter III, I shall move into the core of my topic by addressing the case of Egypt as one of those Hirschl names "constitutional theocracies". The accuracy of such definition will be demonstrated through an historical overview of the role of Islamic law in the Egyptian constitutions, up to the present supremacy clause crowning shari'a as "the main source of the legislation". The concrete meaning and implementation of such a clause, enshrined in article 2 since 1980, will be examined through the lens of the Supreme Constitutional Court. It will emerge that the Court has developed an "impressionistic"[71], or "pastiche"[72] method of interpretation of shari'a, open to multiple criticisms. While adopting an overall reformist approach, the Court has built a highly dangerous structure, which pays (at least at the theoretical level) a dangerous homage to shari'a and orthodox Islamic theories.

[28] In the definition of the American Heritage Dictionary, Islamism is "An Islamic revivalist movement, often characterized by moral conservatism, literalism, and the attempt to implement Islamic values in all spheres of life." *The American Heritage Dictionary of the English Language*, *s.v.* "Islamism".

This chapter will demonstrate how problematic a shari'a supremacy clause may be, however tempered by reformist attempts.

Chapter IV will be devoted to examining the role of Islam in the two constitutions drafted in Egypt after the ousting of president Mubarak.

The analysis of the 2012 Constitution, subsequently repelled, is relevant to my hypothesis insofar as it represents a case where shari'a was not maliciously exploited by a dictatorial government to legitimize its power, but was instead intentionally sought at the culmination of a formally, albeit not substantially, democratic process, blessed by the West. The analysis of the constitution thereby emanated will show how the homage paid to Islamic principles and rules may dramatically affect, in a negative way, human rights and fundamental freedoms.

The Constitution of 2014, while solving most of the issues present in the previous one, at the same time reconfirms article 2, thereby maintaining a relevant source of problems.

With chapter V I shall move to the Tunisian case, analyzing the 2014 Constitution. In particular, I shall focus on those provisions that have witnessed a more marked clash between Islamist and secular forces within the Constituent Assembly and in the larger society. This analysis will confirm the controversy surrounding certain sensitive issues highlighted above, namely Islam and the state, women's rights, freedom of

conscience and religion. The role of Islamist actors in attempting to curtail basic rights according to their interpretation of religion will emerge.

Chapter VI, VII and VIII will be devoted to my case studies.

In chapter VI and VII, I shall concentrate on two particularly problematic topics, namely homosexuality and blasphemy, respectively in Egypt and Tunisia. Drawing from case-law, interviews and reports, it will be shown that both LGBT behaviors and the expression of atheism, blasphemy, heterodoxy or criticism against religion remain punished by vague laws - used, misused and reinvented upon judges' whim.

Chapter VIII will examine the prosecution of gays and free thinkers against the backdrop of the freedoms guaranteed by the Constitutions of Egypt and Tunisia and international law. This chapter will show that the liberticidal laws targeting homosexuals and free thinkers are in contrast with both systems of guarantees.

An interesting and quite revealing aspect that will overall emerge from such analysis is that gays, atheists and free thinkers are persecuted under similar premises, as similar are the grounds for the protection of their rights, both in the Constitutions and international law. As to the premises, homosexuality, atheism and blasphemy are viewed as threats to public order and morals, shaped upon religion. At the same time, they represent different manifestation of the same indivisible individual liberty, whose protection is the very *raison d'être* of a Constitution.

Overall, my main claim is that a religious *Grundnorm* is incompatible with the primacy of a man-made Constitution, and with a full recognition of equal and inalienable individual rights embodying the constitutional mission.

CHAPTER I

CONSTITUTIONALISM AND ISLAM

Background

In the words of Mohammad Hashim Kamali, "Constitutional law (*usul al-hukm*) is one of the most under-developed areas of Islamic law and jurisprudence (*fiqh*)", with juristic works on the caliphate hardly touching upon issues such as fundamental rights, separation of powers, government and state sovereignty.[29]

This mostly happens because there is no preference in Islam for a certain form of government or another, as long as shari'a law is scrupulously observed.[30] In the words of the Muslim Brother 'Abd al-Qadir

[29]Mohammad Hashim Kamali, "Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 19. See also Assem Hefny, "Religious Authorities and Constitutional Reform," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 95.

[30] Nicola Fiorita, *L'Islam spiegato ai miei studenti. Undici lezioni sul diritto islamico* (Firenze: Firenze University Press, 2010), 83. Massimo Campanini, *Islam e politica* (Bologna: Il Mulino, 2003), 26. Hefny, "Religious Authorities and Constitutional Reform," 95. Alberto Predieri, *Sharî'a e Costituzione* (GLF editori Laterza, 2006), 181.

'Awdah, "it does not matter whether the power is conservative or progressive, nor the regime republican or monarchical: all of this does not affect by any means the principles of *sharia*, because those do not depend on the power or the regime, but uniquely on Islam, which is eternal and immutable".[31]

As a consequence, classical Islamic thinkers did not focus on the problematic theory of statehood in itself, but only in its relationship with religion.

It must be said that a precedent often mentioned as the embryo of constitutionalism in the Islamic world dates back directly to the Prophet, when he drafted the so-called Charter of Medina to deal with the Jewish tribes therein.[32] Yet, that document is hardly something more than a "municipal charter"[33] or a "corporate organizational document",[34] as such absolutely insufficient to lay down a constitutional model; furthermore, it was drafted under the Prophet's rule, whose only

[31] Campanini, *Islam e politica*, 108.

[32] Rainer Grote and Tilmann J. Röder, "Introduction," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 3.

[33] *Ibid.*, 4

[34] Khaled Abou El Fadl, "The Centrality of Sharī'ah to Government and Constitutionalism in Islam," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 48.

criteria of accountability were towards Allah, thus making "not meaningful" to speak of it in terms of constitutionalism.[35] The historical evidence of this claim is that the Charter of Medina has not paved the way for further elaboration in the course of Islamic history. In sum, "its influence on the practice of constitution-making in Islamic countries has remained negligible",[36] and "it would be an exaggeration to claim that constitutional values or constitutionalism are inherently a part of the Islamic tradition".[37]

In fact, constitutionalism in Islamic countries has been substantially influenced by the West:[38] the idea of "constitutionalism", as a set of man-made procedures limiting the power of the ruler, never took root in the Islamic world until the contact with Europe in the 19th century.[39]

For a brief historical account of the penetration of constitutionalism in the land of Islam, we may distinguish three phases.

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[35] An-Na'im, *Toward an Islamic Reformation*, 76.

[36] *Ibid.*

[37] El Fadl, "The Centrality of Sharī'ah," 55.

[38] Rüdiger Abou Wolfrum, "Constitutionalism in Islamic Countries : A Survey from the Perspective of International Law," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 78. Grote and Röder, "Introduction," 3. C.E. Bosworth et al., *Encyclopédie de l'Islam* (Leiden: Brill, 1986), s.v. Dustur.

[39] The Constitutions of the Ottoman Empire, Tunisia and Egypt were drafted following the Belgian model. Grote and Röder, "Introduction," 4.

The first wave began in the 19th century, under the European influx. The way was paved by the Ottoman "Noble Rescript" (1839), followed by the Tunisian "Pledge of Security" (1857), the Ottoman Basic Law (1876) and the Egyptian Basic Statute (1882).[40] The initial *raison d'être* of the constitutional documents in the Sunni world was to give equal rights to non-Muslim citizens, under the pressure of European powers. While fiercely opposed by traditional ulemas,[41] liberal ideas started to take roots into local reformist circles – the most significant and successful being the Young Ottomans and the Young Turks in Turkey.

The second phase started after the decolonization. While the first wave was essentially driven by liberal ideas, in this case constitutionalism was useful to reassert the centralization of state power and the identity that the ruler wished to confer it – the majority being characterized by a "combination of socialist, nationalist and pan-Arabist ideas".[42] From this point of view, it was still a modernizer wave of constitutionalism, often influenced by the French tradition.[43]

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[40] Tilmann J. Röder, "The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 325. I exclude from this analysis the Persian experience, that would deserve a chapter on its own.

[41] *Ibid.* Bosworth et al., *Encyclopédie de l'Islam*, s.v. Dustur.

[42] Röder, "The Separation of Powers," 334.

[43] Thierry Le Roy, "Constitutionalism in the Maghreb : Between French Heritage and Islamic Concepts," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 110.

The third phase, begun in the 1960s, was instead influenced by the resurgence of Islamism.[44] One of such examples, relevant for this dissertation, is the insertion of shari'a in the Egyptian constitution in 1971, something unthinkable in the Nasserist period.[45]

While the Islamic world in its majority has adopted the formal aspects of Western constitutionalism, "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 communitarian ethic".[46]

In this chapter, I shall try to give an account of these problematic aspects, providing an overview of the main points of contact and distance between constitutionalism and Islam. As my thesis is not focused on classical Islamic theories, but on modern constitutions of Muslim countries, I do not claim to provide a complete account of classical theories on state and sovereignty in Islam; yet, I shall concentrate on those aspects requiring at least a concise preliminary explanation in order to approach the following chapters in a conscious manner.

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[44] Röder, "The Separation of Powers," 334.

[45] See Chapter II.

[46] Hatem M'rad, "The Process of Institutional Transformation in Tunisia after the Revolution," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 71.

In particular, after providing a brief overview of the Western concept of constitutionalism, I shall focus on the pillars of good government in Islam, comparing and contrasting the two. The analysis will show that, while modern constitutionalism deals with limitation of power, institutional checks and balances, rule of law and individual rights, the focus of the Islamic government is mainly placed on the implementation of shari'a law.

The Western concept of "constitution"

The Western tradition of constitutionalism is neither recent nor univocal. Indeed, it may be traced back to the Greek *polis* and the Roman republic, and in constant evolution up to the neo-constitutional wave of the post-WWII period.[47]

Within the concept of "constitution" one may detect mainly four elements (roughly corresponding to different times, but present in various degrees still today): "1) the 'constitution' as definition of the competences of the public power and of its organization; 2) the 'constitution' as safeguard of the rights of the individuals against abuses carried out by the public power; 3) the 'constitution' as a normative guarantee of the legitimation of the public power by the individuals subject to

[47] Mauro Barberis, *Breve storia della filosofia del diritto* (Bologna: Il Mulino, 2004), 30.

it; 4) the 'constitution' as the foundation of the identity of the political community."[48]

The first concept represents the idea of the constitution as the architecture of public powers, its scope of application and restraints. Since the Greek *polis*, it is based on the concept of *isonomy*, i.e. the equality of citizens before the law.

The second idea, eminently modern, views the constitution as an instrument to guarantee inalienable individual rights by bridling power so as to prevent abuses thereof. The first instance of this tendency is the *Magna Charta Libertatum* of 1215, establishing a set of rights for "free men", i.e. the members of the aristocracy.[49] These rights included, *inter alia*, property, personal liberty and some guarantees for women, whose violation would trigger the right to resist against the monarch.[50] This embryonic concept of individual rights, expanded with the *Bill of Rights* of 1689, will find its philosophical development in the jusnaturalist theories of John Locke.[51] The idea of natural rights, and the right of resistance connected to the violation thereof, will then be enshrined

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[48] Sergio Dellavalle, "Constitutionalism Beyond the Constitution: The Treaty of Lisbon in the Light of Post-National Public Law," *The Jean Monnet Center*, March 2009, 6, http://www.jeanmonnetprogram.org/paper/constitutionalism-beyond-the-constitution-the-treaty-of-lisbon-in-the-light-of-post-national-public-law/.

[49] Ibid., 9.

[50] "English Translation of Magna Carta," *The British Library*, accessed June 21, 2017, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

[51] Alexander Moseley, "John Locke: Political Philosophy," *Internet Encyclopedia of Philosophy*, accessed June 21, 2017, http://www.iep.utm.edu/locke-po/.

in the *Declaration of Independence of the United States of America*[52] and in the *Déclaration des Drois de l'Homme et du Citoyen.*[53]

Thirdly, as said, the constitution expresses the condition of legitimacy of public power, the foundation, in other words, of power itself, as descending from the constitution. This marks the overcome of a theological approach whereby legitimacy originates from Allah,[54] and it is

[52] "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 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." "Declaration of Independence of the United States of America," 1776.

[53] Les Représentants du Peuple Français, constitués en Assemblée Nationale, considérant que l'ignorance, l'oubli ou le mépris des droits de l'Homme sont les seules causes des malheurs publics et de la corruption des Gouvernements, ont résolu d'exposer, dans une Déclaration solennelle, les droits naturels, inaliénables et sacrés de l'Homme, afin que cette Déclaration, constamment présente à tous les Membres du corps social, leur rappelle sans cesse leurs droits et leurs devoirs ; afin que les actes du pouvoir législatif, et ceux du pouvoir exécutif, pouvant être à chaque instant comparés avec le but de toute institution politique, en soient plus respectés ; afin que les réclamations des citoyens, fondées désormais sur des principes simples et incontestables, tournent toujours au maintien de la Constitution et au bonheur de tous. En conséquence, l'Assemblée Nationale reconnaît et déclare, en présence et sous les auspices de l'Etre suprême, les droits suivants de l'Homme et du Citoyen. Art. 1er. Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune. Art. 2. Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression". "Déclaration Des Droits de l'Homme et Du Citoyen," 1789.

[54] Dellavalle, "Constitutionalism Beyond the Constitution: The Treaty of Lisbon in the Light of Post-National Public Law," 11.

therefore particularly relevant for my topic, insofar as creates a substantial tension with the Islamic conception of power (*v. infra*). The centrality of citizen in power's legitimization links profoundly this concept of constitutionalism with the previous one:

"In a society which did not pretend anymore to be the realization of a superior idea of the 'good' or to be based on the natural laws of human sociability, the legitimation-chain coming 'from the bottom up' became the only possible justification of the very existence of binding public laws. The clear affirmation of the epistemic centrality of the citizens' will in the construction of the society with its rules and institutions has been thus strictly associated – in the conceptual approach as well as in history – with the declaration of individual rights".[55]

Equally, a political community that has lost its transcendental references will adopt a constitution as the foundation of its very identity – which is the fourth aspect of modern constitutionalism. From this point of view, the concept of constitution is strongly linked with that of national citizenship, defined by and around the constitution of the state.

In normative terms, the concept of constitutionalism may be described broadly as a system containing "institutionalized mechanisms of

[55] Ibid., 13.

power control for the protection of the interests and liberties of the citizenry, including those who may be in the minority".[56]

Hence, constitutionalism is linked to the foundations of the liberal democracy, i.e. a system including the rule of law, formal democracy and human rights.

As to the rule of law, it contains various principles, both of procedural and substantive nature, with control mechanisms to ensure their observance:

"The main procedural standards of the rule of law, as accepted in authoritative documents and academic literature, are that (a) state policies must employ written laws – acts, ordinances, decisions – as major instruments; (b) all state actions must be subject to law; (c) the law must be clear and consistent in substance, accessible and predictable for citizens, and general in its application; and (d) the substance of the law and its effectuation must be influenced by citizen approval. As for the main substantive standards of the rule of law, there is consensus that all laws and their interpretations must be subject to (a) fundamental principles of justice; and (b) human rights and freedoms of individuals, notably civil and political rights, social and economic rights, and group rights. In order to control compliance with these procedural and substantive principles, the rule of law, as Bedner has proposed, also requires a third set of elements to be in place, namely of control mechanisms: (a) the executive arm of the state must establish internal correction mechanisms on unlawful administrative actions; (b) an independent judiciary, accessible for every citizen, must be responsible for conflict resolution

[56] Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge: Harvard University Press, 2002), 4.

through interpretation and application of the law; and (c) complementary quasi-judicial institutions, such as an ombudsman, a national human rights-institution, and various tribunals, must be in place to further ensure compliance with the rule of law".[57]

These notions have been effectively summarized as such: "1) Citizens are free from the arbitrary use of power, 2) Citizens benefit from legal certainty, 3) All citizens are treated as equal before the law, 4) All citizens are granted accessible and effective justice, 5) All citizens can claim their rights including religious rights with a substantial degree of —legal certainty".[58] An essential part of these principles is that nobody is immune to state laws, including the higher state hierarchies. That's how the "rule of law" is opposed to the "rule of the men", as per a classical definition.[59]

It must be noted that these three elements (formal democracy, rule of law, individual liberties) must always be present in a constitutional system: the rule of law in the absence of guarantees for fundamental rights, for instance, would guarantee that laws apply to everybody, but

[57] Otto, "Introduction," 37.

[58] Gábor Halmai, "Religion and Constitutionalism," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 21, 2015), 3, https://papers.ssrn.com/abstract=2609104.

[59] Gordon, *Controlling the State*, 5.

not that those laws are not discriminatory against minorities.[60] Similarly, formal democracy does not guarantee a constitutional system: "formal democracy is illiberal if either rule of law or fundamental rights are missing".[61] Even fundamental rights alone are not enough, if they are simply *octroyés* by a despotic, albeit enlightened, ruler.

In other words, when one of the above elements is lacking, a written constitution is insufficient to denote a constitutional system: after all, most autocracies, from China to North Korea, Cuba and the Soviet Union, had or have a written constitution without being constitutional systems, as Halmai remarks.[62] A system is properly "constitutional" if, irrespective of a written or unwritten constitution, "contains institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those who may be in the minority".[63]

This idea of a constitutional government is considerably distant from the one of a just government in the Islamic tradition.

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[60] "If a nation's legislature were dominated by fundamentalist Baptists, for example, the fact that laws apply to all offenders without exception could not be relied upon to constrain them from prohibiting the celebration of the Catholic mass". Ibid., 7.

[61] Halmai, "Religion and Constitutionalism," 6.

[62] Ibid., 7.

[63] Gordon, *Controlling the State*, 4.

"Liberty" in Islam

"O worthy visitors! When you look upon this fascinating display of human progress, do not forget that all these achievements are the work of freedom. It is under the protection of freedom that peoples and nations attain happiness. Without freedom, there can be no security; without security, no endavour; without enadavour, no prosperity; without prosperity, no happiness".[64]

It is by means of these words – uttered by an astonished Turkish diplomat at the view of a giant Statue of Liberty at the Parisian *Exposition Universelle* of 1878 - that Bernard Lewis introduces the issue of the difficult relation between freedom and Islam.

The constitutional concept of freedom as a political tool to constrain power in a net of limitation guaranteeing individuals' liberty was unknown to Islam. The term *hurriyya*, freedom, had nothing to do either with a philosophical idea of self-determination, or with a legal or political concept of good government: it only denoted the condition of not being slave.[65]

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[64] Bernard Lewis, *The Shaping of the Modern Middle East*, Reprint edition (New York: Oxford University Press, 1994), 44.

[65] "In Arabic usage at that time and for some time after, the word "freedom" -- hurriyya -- was in no sense a political term. It was a legal term. One was free if one was not a slave. To be liberated, or freed, meant to be manumitted, and in the Islamic world, unlike in the Western world, "slavery" and "freedom" were not until recently used as metaphors for bad and good government". Bernard Lewis, "Freedom and Justice in the Modern Middle East," *Foreign Affairs*, May 1, 2005, https://www.foreignaffairs.com/articles/middle-east/2005-05-01/freedom-and-justice-modern-middle-east. Bosworth et al., *Encyclopédie de l'Islam*, s.v. Hurriya.

"In Arabic usage at that time and for some time after, the word "freedom" - *hurriyya* - was in no sense a political term. It was a legal term. One was free if one was not a slave. To be liberated, or freed, meant to be manumitted, and in the Islamic world, unlike in the Western world, 'slavery' and 'freedom' were not until recently used as metaphors for bad and good government".[66]

The European concept of freedom was extraneous to the Arab mentality to the extent that the 19th century historian al-Jabarti could only describe it by saying that "Frenchmen are not slaves".[67]

The discovery of the political meaning of *hurriyya* happened in the 19th Century, by virtue of the more and more intense contacts with the proud and triumphant Western liberalism. An important moment of this cultural contamination was the "explorative mission" of Al-Azhar's students whom the Egyptian government sent to Paris in order to analyze the Western world, deemed powerful and successful in striking contrast with the Islamic decay. It was during this voyage that the sheik Tahtawi ran into the French obsession with "liberty", which struck him for its

[66] Lewis, "Freedom and Justice."

[67] Valentina Colombo, *Basta: Musulmani contro l'estremismo islamico* (Oscar Mondadori, 2007), XLVI.

deep political and philosophical implications, and which he tried to explain to his fellow Muslims in the following way: "what they [Europeans] call freedom and what they desire is what we call justice".[68]

In order to avoid misunderstandings, this conceptual distance did not mean necessarily hostility. Early Islamic reformers were in fact profoundly convinced of the compatibility between European-style constitutionalism and Islam.[69] Among them, the Tunisian Khayr al-Din and the Egyptian Muhammad Abdu tried to challenge the traditional Islamic discourse and to make it receptive to the new liberal ideas.[70] The former, President of the Tunisian Grand Council during the constitutional period, went thus far as to equate the aims of the European and the Islamic approaches to government, for their identical demand to hold the ruler accountable.[71] Unfortunately, they had scarce penetration within the dominant theology.[72]

The somehow unbridgeable distance between the Islamic and Western conceptions of good government lied in the fact that, while in the West there is a conceptual overlap between "freedom" and "good government", for the traditional Islamic mentality power is legitimate if it is governed by justice (*'adl*), '', which is in turn defined as ''accordance

[68] Al-Tathtawi, in Ibid. See also Lewis, ''Freedom and Justice.''

[69] Grote and Röder, ''Introduction,'' 5.

[70] Colombo, *Basta*, XLVII ff.

[71] Grote and Röder, ''Introduction.'', fn 17, 5.

[72] Colombo, *Basta*, XLVII ff.

to the law", i.e. the Law of Allah, the shari'a.[73] This is the yardstick to evaluate the ruler's conduct, rather than respect of individual freedoms and the rule of law. The only earthly aspect of '*adl* concerns the appointment of the caliph, whose power must not derive by usurpation.[74] However, this aspect remains secondary and may be derogated.[75]

The distance between the Western and the Islamic idea of good government is reflected in radically divergent conceptions as far as the relation between state and citizens is concerned: antagonistic in liberal constitutionalism, which views the constitution as an instrument to bridle to menace of power; unitary in Islam, "based on the concept of tahwīd (i.e., the Oneness of God) and thus provid[ing] a set of principles oriented toward an essential unity of basic interests between the individual and the state".[76] Because of that, some Muslim scholars qualify the democratic multi-party system, with the crucial checking role exerted by the opposition, as the seed of sinful societal discord (*fitna*).[77]

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[73] Ibid. Lewis, "Freedom and Justice."

[74] "Westerners have become accustomed to think of good and bad government in terms of tyranny versus liberty. In Middle-Eastern usage, liberty or freedom was a legal, not a political term. It meant one who was not a slave, and unlike the West, Muslims did not use slavery and freedom as political metaphors. For traditional Muslims, the converse of tyranny was not liberty but justice. Justice in this context meant essentially two things, that the ruler was there by right and not by usurpation, and that he governed according to God's law, or at least according to recognizable moral and legal principles". Lewis, "Freedom and Justice."

[75] *V. infra*

[76] Kamali, "Constitutionalism in Islamic Countries," 21.

[77] Tommaso Virgili, "Libertà e democrazia nell'Islam: un nodo di Gordio?," *Federalismi*, no. 2 (2016): 25–31.

"Right of resistance"?

It would be misleading from what exposed above to infer the idea of the caliph's power as an absolute one.

It may instead be described as "a limited, as opposed to a totalitarian, form of government with powers constrained by reference to the definitive injunctions and guidelines of the Qur'ān and authenticated Sunnah".[78] In that, it presents a relevant point of distance from democratic constitutionalism: "In a democracy the people may establish any legal order or system they wish for themselves, whereas in Islam the state is bound by implementing the Sharī'ah as expression of the sovereign will of the Lawgiver, and its powers are limited to that extent".[79]

Hence, it is the observance of shariatic injunctions that shapes the boundaries of a legitimate government as opposed to a tyranny.

How should the *umma* react against an illegitimate government?

Two opposite principles in Islam inform the relation between the ruler and his subjects, one "authoritarian and quietist" and the other "radical and activist".[80] Both of them actually drive their legitimacy from the Prophet's life and deeds: while the former looks at his role as a ruler

[78] Kamali, "Constitutionalism in Islamic Countries," 22.

[79] Ibid., 29.

[80] Lewis, *The Political Language of Islam*, 92.

deserving obedience and respect, the latter looks at his religious and political revolution against Mecca's sovereigns. Although the quietist principle became prevalent in the Sunni world - likely more for political than for religious reasons -, nonetheless "the radical activist tradition is also old and deep-rooted, and is acquiring new significance in our day, with the emergence of the idea of an Islamic revolution".[81]

Since the yardstick to evaluate the Islamic political system is not based on the degree of liberty, but on the respect of shari'a law, the Lockean "right of resistance" does not exist in terms of rebellion to a ruler who does not take into due account men's natural rights - the Quranic duty of obedience prevailing in that case -,[82] but only as a duty to be accomplished in limited cases when the ruler deviates from the path of *sharia*. In this sense, and only in this sense, it is possible to speak not only of a *right*, but a downright *duty* of disobedience against the un-Islamic ruler.

It is interesting, from this point of view, to make a comparison with the right of resistance as emerging from the *Magna Charta Libertatum* highlighted above, outlined in terms of reaction to the violation of established individual rights.

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[81] Ibid.

[82] "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you." All the translation from the Quran are from Abdullah Yusuf Ali, trans., *The Holy Quran* (Ware: Wordsworth Editions Ltd, 1997).

Furthermore, if the right of rebellion is true in the theory, the Islamic history tells a quite different story, marked by the connotation in terms of *fitna* of any attempt to challenge the ruler.[83] This authoritarian principle lied, once again, on religious bases. Indeed, whilst clerics did not praise tyranny, nonetheless they maintained that "even oppressive governments must be obeyed, because the alternatives are worse, and because only in this way can the basic religious and legal prescription of Islam be maintained".[84]

Therefore, as explained above, opposition, whether political or seditious, is qualified as *fitna*. When the influence of the West made "revolution" a term with positive connotations, Arabic had to use another word: not *fitna* anymore, but *thawra*.[85]

A theocratic state?

We have made clear that the limits of power in Islam derive from the observance of shari'a law. This happens because "Islam is a religion that does not concern itself only with the faith of its believers but also

[83] Lewis, *The Political Language of Islam*, 95.

[84] Ibid., 100. See more *infra*

[85] Ibid., 96.

seeks to regulate civil, social, and even political aspects of the life of society".[86]

From this point of view, the Islamic state is intrinsically theocratic. In fact, saying that a state is not "theocratic" has two different possible implications, as clearly explained by Bernard Lewis with reference to the origins of Islam: "In the sense of a state ruled by the church or by priests, Islam was not and indeed could not be a theocracy";[87] however, theocracy also has a broader meaning: "In the universal Islamic polity as conceived by Muslims, there is no Caesar but only God, who is the sole sovereign and the sole source of Law".[88] This means that the Islamic government is intrinsically and necessarily theocratic, although not in the sense of the power of clergy, but more profoundly in the sense of the power of Allah. "Does this mean that the classical Islamic state was a theocracy? In the sense that Britain today is a monarchy, the answer is certainly yes. That is to say, that, in the Muslim conception, God is the true sovereign of the community, the ultimate source of authority, the sole source of legislation".[89]

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[86] Ferhat Horchani, "Religious Authorities and Constitutional Reform," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 199.

[87] Bernard Lewis, *What Went Wrong?: Western Impact and Middle Eastern Response* (Oxford, New York: Oxford University Press, 2002), 114.

[88] Bernard Lewis, *The Crisis of Islam: Holy War and Unholy Terror* (New York: Random House Trade Paperbacks, 2004), 7.

[89] Lewis, *What Went Wrong?*, 113.

In other words, we may observe "the absence of a native secularism in Islam".[90] This complete identification between the religious and political domain was so pervasive in the Muslim conception of state that even the language did not provide the appropriate words to express this duality - unmistakable signal of the lack of any theoretical speculation on the subject:

> "The distinction between church and state, so deeply rooted in Christendom, did not exist in Islam, and in classical Arabic, as well as in other languages which derive their intellectual and political vocabulary from classical Arabic, there were no pairs of words corresponding to spiritual and temporal, lay and ecclesiastical, religious and secular. It was not until the nineteenth and twentieth centuries, and then under the influence of Western ideas and institutions, that new words were found, first in Turkish and then in Arabic, to express the idea of secular".[91]

Nor is the problem only one of the past, but rather increasingly important today, with the emergence of a powerful political Islam, represented in Khomeini's words "Islam is politics or it is nothing",[92] whose core is shared, according to Lewis, by most Muslims, who

[90] Ibid.

[91] Lewis, *The Political Language of Islam*, 3.

[92] Lewis, *The Crisis of Islam*, 8.

"would agree that God is concerned with politics, and this belief is confirmed and sustained by the sharia".[93] In particular, this conviction characterizes Islamist groups such as the Muslim Brotherhood. While the last-mentioned do not advocate a state run by the clergy on the Iranian model, there are noteworthy substantive similarities between that one and the "civil state with Islamic reference" they espouse: both share the idea that the state must be based on Islam and enforce a legislation conform to Islamic law and principles.[94]

Furthermore, even if the clergy does not directly govern the Islamic state, it still exerts a considerable authority over the populace. As a matter of fact, the Quranic verse "Obey those in authority over you" does not refer only to the ruler, but also to the scholars interpreting Islamic law.[95] From this point of view, one can say that, in Islam, "Church and state, political and religious authority, are the same thing".[96] This is why Islamists, while rejecting the notion of a formally "theocratic state", in which the clergy is in control, yet "do not exclude any matter of the affairs of the state, which should not be presented to scholars in order to make a judgment thereon whether is permissible or forbidden. Hence

[93] *Ibid.* Virgili, "Libertà e democrazia nell'Islam," 7.

[94] Salwa El-Daghili, "Al-Dawlah Al-Madanīyah: A Concept to Reconcile Islam and Modern Statehood?," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 194.

[95] Hefny, "Religious Authorities and Constitutional Reform," 96.

[96] Predieri, *Sharî'a e Costituzione*, 165. My own translation from Italian.

the 'civil state with Islamic 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 seek to realize the core of such a 'religious state', thereby contradicting the constitutional notion".[97]

To summarize this ambiguity over the civil or religious nature of the state, Kamali says that "Islamic governance may be characterized as civilian (*madaniyyah*), which is, however, neither theocratic nor totally secular but has characteristics of its own".[98]

This aspect maintains considerable relevance in contemporary constitutional debates, as I am going to show in the next chapters.

More "Muslims" than "citizens"

The strongly religious framework characterizing the Islamic state is reflected in the absence of the notion of "citizenship": whilst this has been always central in Western civilization from the times of the Greek *polis*,[99] in Islam it has always been obscured by the role of religion.

[97] Hefny, "Religious Authorities and Constitutional Reform," 96.

[98] Kamali, "Constitutionalism in Islamic Countries," 22.

[99] Lewis, "Freedom and Justice."

The idea of "nation-state", understood in modern constitutional terms as a people, a land and a system of government, is lacking in classical Islam. The people (*umma*) identifies with the Islamic faith,[100] while Christians and Jews are second-class citizens under a pact of protection (*dhimma*). Hence the people, "as a source of legitimization of the Islamic character of the state, becomes a constitutive element of it only on condition of recognizing the sovereignty of Allah in that territory".[101]

As to the territory, in Islamic sources we find a *summa divisio* between *dar al-Islam* and *dar al-harb* (the first denoting "the land of Islam" in opposition to the infidel world, the "land of the war"). Indeed, the term nowadays denoting the "country", *dawla*, "was used as an indicator referring to the ruling family or dynasty", while the focus of the Islamic jurisprudence was on the transnational, religious entity of the "caliphate".[102]

Concerning the government, we have already shown that it is conceived as an instrument of implementation of *sharia.* It will not be surprising, in this optic, that the term "constitution", *dustur*, is originally Persian.[103] As per the classical definition of Mawdudi, the Islamic state

[100] Ibid.

[101] Ibid.

[102] Hefny, "Religious Authorities and Constitutional Reform," 95.

[103] Ibid.

"is an ideological one, i.e. neither territorial, nor ethic, nor cultural: it is based on the universalism of the Islamic religion".[104]

If nowadays one may also find the sense of belonging to nation-states, and geo-strategic affairs are shaped in accordance to the interests of the states, nevertheless the element of Islam continues to play a role which is unknown to any other civilization of the world, from the Christian (but mostly secularized) West, to the Confucian, Buddhist, Hindu Orient. An instance of that has been the creation of the Organization of the Islamic Conference,[105] whose sole common element is Islam: "The very idea of such a grouping, based on religion, in the modern world may seem anachronistic and even absurd. It is neither anachronistic nor absurd in relation to Islam".[106] This happens because "most Muslim countries are still profoundly Muslim, in a way and in a sense that most Christian countries are no longer Christian".[107]

This lack of citizenship in favor of religion has caused, according to Lewis, a grave consequence: "With a lack of citizenship went a lack of civic representation"[108], which is in its turn another cause of the deficit of democracy, as I am going to show in the next section.

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[104] Ciro Sbailò, "I Costituzionalisti europei e il califfato nero," *Federalismi*, no. 9 (2015): 16. Personal translation from Italian.

[105] Now renamed "Organization of the Islamic Cooperation".

[106] Lewis, *The Crisis of Islam*, 14.

[107] Ibid., 16.

[108] Lewis, "Freedom and Justice."

"Islamic democracy"?

Speaking of democracy, a possible bridge between Islamic principles and liberal constitutionalism could be construed by finding within shari'a itself democratic rules and/or procedures whose religious observance would at the same time guarantee a democratic system of government.

Something of this kind may be detected in the principle of *shura*, denoting the consultation of the ruler with the community. In Kamali's words, "Islamic government is committed to the implementation of Sharī'ah. Yet in a substantial sense, it is a popular government since the Sharī'ah itself approves of people's participation in government, and therefore, their direct will".[109]

Shura finds its roots directly in the Quran and the Sunna, which reports that the Prophet, upon Allah's will, used to consult with the Companions before taking a decision.[110] So imperative seems such principle in religious scriptures that neglecting it means for the ruler becoming an impious tyrant. Indeed, the accusation of despotism, *istibdad,* is not merely a political one: "it is regarded as something evil and sinful, and to accuse a ruler of *istibdad* is practically a call to depose him".[111]

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[109] Kamali, "Constitutionalism in Islamic Countries," 30.

[110] Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997), 41.

[111] Lewis, "Freedom and Justice."

But may *shura* be equated to democracy?

The answer seems to be negative, both on substantive and procedural grounds.

As to the former, Islamic jurists have erected around consultation rigid boundaries *ratione materiae*, following the same logic of limitations of individual reasoning (*ray*): in particular, the same way *ray* cannot be employed whenever the shariatic rule is clear, equally is *shura* inadmissible in such cases, for it would be at best redundant, illicit at worst.[112]

In terms of procedure, consultation does not seem by any means to be binding for the ruler.

> "According to verse 3:159 (the first of two verses of the Qu'ran which mention the term *shura*), the Prophet is enjoined to deal gently and kindly with the believers and to consult them in public affairs, but once he is resolved, he should proceed to execute his decision in reliance on God. Although he did consult in some situations, and sometimes followed the advice given to him, it was neither seen by the founding jurists as being contemplated by this verse, nor was it the invariable practice, that the Prophet always consulted his Companions and implemented their advice."[113]

Above all,

[112] Kamali, *Freedom of Expression in Islam*, 43.

[113] An-Na'im, *Toward an Islamic Reformation*, 79.

"Whatever obligation to consult his companions the Prophet may had, it was an obligation to God and not to his human subjects. This makes the whole process religious and moral rather than legal and constitutional in nature".[114]

Even Muhammad's successors, albeit lacking his religious *auctoritas*, nevertheless were not bound by a different, and earthly, code of conduct. Their responsibility remained towards God, their subjects could not depose them unless by accusing them of apostasy, and there were no mechanisms to ensure compliance of their decisions with the demands and needs of society.

"Verse 42:38 (the other verse of the Qur'an which mentions *shura*) describes the believers as a community who decide their affairs in consultation among themselves. It does not say, nor has it been interpreted by the leading jurists to mean, that the majority view should prevail. In fact, there was never any procedure or mechanism for consultation, and no legal consequences followed from the failure of the ruler to consult his subjects or to follow the advice that was given to him".[115]

[114] Ibid.

[115] Ibid.

The principle of consultation is, therefore, far from being describable in terms of modern representation of people to the power's conduct.[116] In fact, classical Islam lacks the idea of "representative government", i.e. "people participating not just in the choice of a ruler but in the conduct of government",[117] as well as the idea of "limited government" with reference to people's will. Allah's Law is the sole limitation to the ruler's power.

What exposed above pushes *shura* well away from the liberal democratic-tradition: totally absent from the classical Islamic thought is the idea of modern "citizenship", connecting the state's fortunes to those of its equal citizens by virtue of their participation in the government's conduct. Nor sustainable is the thesis of the absolute need of *shura* for power's legitimacy.[118]

The principle of *shura* goes in pairs with that of *bay'a*, or "consensus", in choosing the caliph. What the community, or rather, the notables belonging to various intermediary groups - those in other words

[116] "En général, cependant, l'autorité gouvernementale n'admettait pas de participation de l'individu en tant que tel, et celui-ci ne possédait donc pas de liberté vis-à-vis d'elle", Bosworth et al., *Encyclopédie de l'Islam*, s.v. Hurriya.

[117] Lewis, "Freedom and Justice."

[118] Ibid. An-Na'im, *Toward an Islamic Reformation*, 78–81.

having the practical possibility to depose the ruler[119] – are jointly called upon to do, is stipulating a "covenant" (the *bay'a*) with the man aspiring to the quality of caliph, or even already selected as such by his predecessor (the *bay'a* potentially being the mere ratification of what has been already decided). The logic and goals are clearly very different from those informing democratic elections.

Francesco Castro reports in particular the theories on the caliphate of al-Mawardi, one of the greatest classical Islamic jurists dealing with the question. According to al-Mawardi, the caliph may be selected in two ways: the first is the choice made not by the whole community, but by those having the "power to bind and loose", i.e. those elites that, because of their virtues, are better able to distinguish the presence of the necessary requirements in the aspiring caliph; the second is purely and simply the designation by the predecessor. Castro continues by noting how "a later doctrine has recognized a third way of acquiring the Caliphate, namely the occupation of power, under the principle that tyranny is preferable to anarchy".[120] Whence follows the existence of an "obligation of obedience and service (*nusra*) to the caliph, provided that he does not command acts contrary to religion".[121] In fact, the last occurrence would trigger, more than a right of resistance, the "very faculty

[119] Lewis, "Freedom and Justice."

[120] Francesco Castro, "Diritto Musulmano," in *Digesto delle discipline privatistiche: sezione civile*, vol. VI (Torino: Utet, 1990), 296. My own translation from Italian. See also Lewis, "Freedom and Justice."

[121] Castro, "Diritto Musulmano," 296. See also Lewis, "Freedom and Justice."

for the community to terminate the contract of imamate"[122], on the basis of a much reported tradition whereby "there is no obedience in sin" nor "obedience to a creature against his Creator ".[123] It remains obscure what authority should syndicate, and under what procedures, the deviation from God's path[124].

Tyranny has been therefore religiously sanctioned as a form of *da-rura*, the same legal necessity which, in case of starvation, makes it obligatory to eat a carrion if this is the only available food – for letting themselves starve to death would be a worse sin.[125] Nevertheless, a ruler, although not challenged on other grounds, especially on the violation of *shura* and *bay'a*, still could, and had to, be challenged on religious grounds:[126] "To confront a religious regime, one needed a religious challenge".[127]

The entire issue of the legitimacy and constraints of power may be summarized in the following way: between the *umma* and the caliph there is a pact of submission, exclusively bound to the ruler's observance of *sharia*. Should this clause be violated, the pact would be broken and

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[122] Lewis, "Freedom and Justice."

[123] Lewis, *The Political Language of Islam*, n. 9, p. 94.

[124] Ibid., 94.

[125] See Al-Ghazali, in Ibid., 101.

[126] Ibid., 103.

[127] Bernard Lewis, *From Babel to Dragomans: Interpreting the Middle East* (New York: Oxford University Press, 2004), 306.

the community not only authorized, but even required to rebel against the authority – become, in this very narrow sense, "tyrannical". As long as this does not happen, however, people are bound to the strictest obedience - Islam compelling believers to obey the authority[128] to the extent that "an hour – or even a moment – of anarchy is worse than a hundred years of tyranny".[129] This is because state authority is the only constraint that can ensure the due observance of God's Law.

This conclusion is partly challenged by Kamali, according to whom a moderate reading of Islam views legitimacy as stemming from the application of shari'a *and* people's approval.[130]

However, this leaves two relevant problems on the table. First, Kamali specifies that the community is to be understood as the *umma*,[131] thus excluding non-Muslims by definition.[132] Second, the problem remains of the application of sharia, some of whose provisions are incompatible with substantive requirements of constitutionalism related to individual liberties.[133] Third, no specification is made in terms of *procedures* binding the ruler's conduct.

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[128] Q, 4:59.

[129] Lewis, "Freedom and Justice."

[130] Kamali, "Constitutionalism in Islamic Countries," 30.

[131] Ibid.

[132] Bosworth et al., *Encyclopédie de l'Islam*, s.v. Umma.

[133] See Chapter II.

Final considerations on the inner tension between Islam and constitutionalism

In sum, although certain commentators have been trying to take certain concepts, "such as shūrā, the contract of the caliphate, the idea of bay'ah, and the supremacy of Sharī'ah, and then conclude that Islam is compatible with constitutionalism",[134] this is hardly proven both from a procedural and substantive perspective.

As to the former, *shura* and *bay'a* are not commensurate with modern democracy, for a number of reasons. First of all, they do not necessarily concern the entire population, insofar as they traditionally were the prerogative of certain elites (of Muslim faith). Secondly, they only involve the moment of the choice, with the exclusion of the systems of check and balances in the *conduct* of power that a constitution eminently provides for. Finally, they are not indispensable for the legitimacy of power, as this could even be exerted by usurpation, if the alternative is "anarchy".

From a substantive point of view, a constitutional system has stringent requirements: "To be a constitution at all, a proposed document must respect and protect the fundamental rights of all citizens equally

[134] El Fadl, "The Centrality of Sharī'ah," 55.

and without distinction on such grounds as sex, religion, race, or political opinion".[135] In terms of goals, "the objective of constitutionalism must always be to uphold the rule of law, enforce effective limitations on government powers, and protect fundamental rights",[136] as said above. Furthermore, it must temper the democratic, majoritarian rule by ensuring the inviolable rights of minorities.[137] In other words, an elective system is necessary but not sufficient to ensure a constitutional one. As we have seen, the main pillar of the Islamic state is the strict observance of shari'a law: consequently, fundamental rights will be protected or infringed insomuch as shari'a commands:[138] "in their discourses, Muslim jurists were not articulating the idea that there is a process that guards core legal values and that this process is binding upon the government. Rather, they were arguing that the positive commandments of Sharī'ah, such as the punishment for adultery or the drinking of alcohol, ought to be respected and enforced by the government".[139] This means, ultimately, "that a government could implement Sharī'ah criminal penalties, prohibit usury, dictate rules of modesty, and

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[135] Abdullahi Ahmed An-Na'im, "The Legitimacy of Constitution-Making Processes in the Arab World," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 30.

[136] Ibid., 31.

[137] El Fadl, "The Centrality of Sharī'ah to Government and Constitutionalism in Islam," 37.

[138] In the next chapter, I shall address in more details the aspect of sharia law and individual rights.

[139] El Fadl, "The Centrality of Sharī'ah," 39.

so on, and yet remain a government of unlimited powers not subject to the rule of law".[140]

On this point it has been rightfully argued that Islam bears for sure a deeply rooted idea of a government limited *by law*, i.e. the substantive provisions of sharia, but not one of a government limited by the *rule of law*, i.e. by a net of procedures, check and balances and individual liberties.[141] The very concept of "rule of law", as a human-made corpus of rules and procedures that men give to themselves, is in contrast with the theorization of the exclusive God's sovereignty, to which human beings are all and equally submitted – as testified by the very etymology of the word "Islam".[142] According to some scholars, in striving to eliminate "the rule of human beings over other beings" so as to subject them to Allah only, Islam is ultimately incompatible with the rule of law.[143]

For the same reason, there is an inner tension between Islam and constitutionalism, insofar as they claim the undisputable superiority of two different sources: the constitution in the one case, God and His word in the other. Therefore, "a 'man-made' constitution in addition to the religious' authority is deemed superfluous and futile",[144] because

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[140] Ibid.

[141] Ibid.

[142] Islam means "submission". Hans Wehr and Cowan J. Milton, *A Dictionary of Modern Written Arabic* (New York: Spoken Language Services, Inc., 1976), s.v. اسلام.

[143] Donna E. Arzt, "Heroes or Heretics: Religious Dissidents under Islamic Law," *Wisconsin International Law Journal* 14, no. 2 (1996): 369. Heinz Halm, *L'Islam* (Roma: Laterza, 2003), 6.

[144] Wolfrum, "Constitutionalism in Islamic Countries," 78.

"with the exclusive sovereignty and right to command with God, an obligation to obey manmade law would be virtually impossible to justify".[145] This is the reason why Saudi Arabia has never emanated a proper constitution, emphasizing that its constitution is the Quran and the Sunna.[146] It must be recalled that, in classical Islam, rulers were only authorized to implement *siyasa*, sort of administrative regulations aimed to keep up with public needs in domains where shari'a is laconic or silent.[147] "Rulers did not have the authority to create or change the content of fiqh scholars' articulations of God's Law. Their power extended only as far as the siyāsah arm of enforcement could reach".[148] It is important to note that *siyasa* is not something *alternative* or *additional* to sharia: first, acting for the public good through *siyasa* is a shariatic obligation; second, it cannot contradict clear shariatic provisions.[149]

In conclusion, the Islamic experience is characterized by an "absolute identification"[150] between religion and state: the Kingdom of God

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[145] El-Daghili, "Al-Dawlah Al-Madanīyah," 193.

[146] Ibid.

[147] Asifa Quraishi, "The Separation of Powers in the Tradition of Muslim Governments," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 66.

[148] Ibid., 68.

[149] Ibid., 70.

[150] "Immedesimazione assoluta", Alessandro Pizzorusso, *Sistemi giuridici comparati* (Milano: Giuffrè, 1998), 346.

is of this world, in a pervasive and unconditional way, and the state is nothing but an instrument of shari'a law.[151]

Constitutionalism, therefore, may only denote that "'Original and Eternal Constitution', destined to constitute the foundation not of a single country, but of all humanity, in that it regulates not merely the relations among men, but man's relationship with God".[152]

As I am going to show in the course of this dissertation, this inner, profound tension between civil constitutionalism and transcendental Islamic principles continues deeply to affect contemporary constitutional debates and processes. Not only do most constitutions of Muslim-majority countries mention Islam and/or sharia:[153] its basic tenets shape many countries' legislation even as constitutions express different principles – as a mark of the prevalence religion exerts, to various degrees, over civil law.[154]

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[151] See Predieri, *Sharî'a e Costituzione*, 181.

[152] Sbailò, "I Costituzionalisti europei e il califfato nero," 21. My own translation from Italian.

[153] Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (London: British Inst of Intl & Comparative, 2008). Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries," *Georgetown Journal of International Law* 36 (2005).

[154] In chapters VI and VII I am going to show respectively how this phenomenon negatively affects the rights of atheist, heretics and homosexuals in Tunisia and Egypt. Those are only two examples among others. Women's rights are also another quite obvious domain of discrimination: " Irrespective of the place of Islamic law in the constitutions, Sharī'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". Said Mahmoudi, "International Human Rights Law as a Framework for Emerging Constitutions in Arab Countries," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 541.

CHAPTER II

THE ISLAMIC CONCEPTION OF INDIVIDUAL LIBERTIES

Introduction

As explained in the introduction, looking at the concrete articulation of rights in an Islamic context is in my view more effective than a theoretical discussion to highlight the Islamist conception of individual liberties.

Therefore, following the line of scholars such as Elizabeth Mayer and Sami Aldeeb Abu Sahlieh, I am going to examine four human rights documents elaborated by Islamic states or institutions. The ones I have selected represent the most relevant, coming from different sources, and provide therefore a varied spectrum of the contemporary Islamic approaches towards fundamental rights. Although in most cases these documents are deprived of legal value,[155] they are nonetheless key in order to see how contemporary Islamic states and institutions conceive an "Islamically correct" enjoyment of individual freedoms and the limits thereof.

[155] An exception is the Charter of the Arab League.

Among these documents, the first group is composed by the three major Islamic Charters on human rights. Albeit drafted by different bodies, they all purport to represent a human rights discourse alternative to the mainstream international one (felt as a Western "imperialist agenda"[156]), and respectful of Islamic tradition and rules.

The first of them is the Universal Declaration of Human Rights in Islam, drafted by a private organization linked to the Muslim Brotherhood. The second, adopted by the Organization of Islamic Conference,[157] is the Cairo Declaration of Human Rights in Islam. The third and last major charter is an Arab League document, the Arab Charter on Human Rights. This, in spite of not being per se an *Islamic* document, but a renovated instance of "Pan-Arab" nationalism, may nonetheless be included within this group of conventions for being adopted by all Muslim majorities states, and for including religious references and the reaffirmation of validity of the OIC charter.[158]

From the charters of rights, I shall then move to examine a complete constitutional project, although never enacted, namely the constitutional draft elaborated by the Islamic University of Al-Azhar. Presented to the Egyptian parliament in 1978, in spite of remaining dead

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[156] Baderin, 14.

[157] Currently Organization of Islamic Cooperation

[158] On the ambivalence of this document, Andrea Pacini, "Introduzione. L'Islam e il dibattito sui diritti dell'uomo," in *L'Islam e il dibattito sui diritti dell'uomo*, ed. Andrea Pacini, Dossier mondo islamico 5 (Torino: Fondazione Giovanni Agnelli, 1998), 18–20.

letter it still constitutes a cornerstone of Islamic constitutionalism, due to the prestige of the drafter institution, probably the most authoritative Islamic centre in the Sunni world. In connection with the constitutional project, I will also examine the draft penal code elaborated by Al-Azhar in the same period: this will shed a light on how human rights are concretely articulated within a criminal context.

Before moving to the core of the analysis, it must be preliminarily noted that Islamic charters of rights derive their authority from religion, not from reason.[159] It is the divine revelation which establishes human rights, and simultaneously the limits thereof. No human law may overpower the divine commandments, as highlighted in chapter I.

This is to be borne in mind while approaching the articulation of rights therein, insofar as it gives them a very specific connotation, usually very distant from the international one, in spite of occasional similarities in their enunciations.

The Universal Islamic Declaration of Human Rights

The Universal Islamic Declaration of Human Rights, proclaimed in 1981 at the UNESCO, has been drafted by a private body based in London, the Islamic Council of Europe.

[159] Mayer, *Islam and Human Rights*, 48.

It is important to remark that this body, founded in 1973 with Saudi sponsorship,[160] is an offshoot of the Muslim Brotherhood in the West,[161] having also ties with the Jamaat-e-Islami, a sister organization founded in Pakistan by the radical Islamist Abu Al-'Ala al-Mawdudi.[162] The Islamic Council of Europe was also in the forefront of the fight against Salman Rushdie's *Satanic Verses*.[163]

This pedigree, not exactly encouraging, anticipates the content of the Universal Islamic Declaration of Human Rights.

Before proceeding to analyze the document, it is worth noting that the title itself reveals a well-defined setting: the oxymoronic juxtaposition of the adjectives "universal" and "Islamic" follows the Muslim classical tradition which in Islam, its principles and its rules, views a path given by God to the whole mankind, and from which only ignorance, blindness or arrogance may divert human beings.[164] This is an old

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[160] John L. Esposito, ed., "Islamic Council of Europe," *The Oxford Dictionary of Islam*, Oxford Islamic Studies Online, accessed June 22, 2017, http://www.oxford-islamicstudies.com/article/opr/t125/e1098. Lorenzo Vidino, *The New Muslim Brotherhood in the West* (New York: Columbia University Press, 2010), 32.

[161] Vidino, *The New Muslim Brotherhood in the West*, 32.

[162] Ibid., 34.

[163] Ibid., 120.

[164] "L'homme possède une double nature, sa vie se déroule sur deux plans différents. D'une part, comme toutes les autres créatures, il est complètement dépendant des lois naturelles et ne peut s'y soustraire. Mais d'une autre côté, l'homme est pourvu de raison et d'intelligence. […] Il peut tracer son propre code de conduite […]. Dans le premier cas, comme toutes les autres créatures, l'homme est né et restera musulman, et suit automatiquement les injonctions de Dieu. Dans le deuxième, il a la liberté de choisir, d'être ou de ne pas être musulman, et c'est la façon dont on exerce cette liberté qui

dogma of Islam: according to a classical doctrine, "every infant has an inborn disposition to be a Muslim, but his parents make him a Jew or a Christian or a Zoroastrian".[165] To quote Abu Al-'Ala al-Mawdudi and Sayyid Qutb,[166] "[l]'Islam […] est une idéologie universelle"[167], "the universal and eternal system for the future of humanity"[168].

It is furthermore necessary to underline preliminarily another substantial flaw of this declaration, which is by itself sufficient to cast a shadow on the whole document: the English and French translations, albeit official, present relevant discrepancies from the Arabic text, most probably to render it more palatable to a Western audience. From this point of view, the most problematic element concerns the use of the term "*shari'a*" in the Arabic version, rendered with a neutral and unproblematic "law" and "loi" in the English and French translations. Only the explanatory notes at the end clarify that "the term law denotes the *Shari'ah*". In fact, the term used in Arabic to mean human-made law, without religious implications, would be *qanun*, while *shari'a* denotes

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divise l'humanité en deux groupes: les croyants et les incroyants". Abu A'la Maudoudi, *Comprendre l'Islam* (International Islamic Federation of Student Organizations, 1973), 17.

[165] Lewis, *The Political Language of Islam*, 94.

[166] Two prominent Islamists. Abul A'la Maudoudi (1903-1979), Indian-Pakistani radical thinker, founder of the Jamaat-e-Islami, the largest Islamist organization in Asia. Sayyd Qutb (1906-1966), Egyptian leading ideologue of the Muslim Brotherhood, influential Islamist.

[167] Maudoudi, *Comprendre l'Islam,* 163.

[168] Sayyd Qutb, "Il governo islamico: la giustizia sociale nell'Islam," in *I Fratelli Musulmani e il dibattito sull'islam politico*, ed. Andrea Pacini, Dossier Mondo islamico : 2 (Torino: Ed. della Fondazione Giovanni Agnelli, 1996), 28.

religious law. Because of this deliberate discrepancy, the Western reader is confronted with a text that seems to follow the path of the classical bills of rights but in reality does not.

It is evident that the reference to shari'a law brings about a well defined configuration, potentially problematic in terms of human rights. First of all, any departure from the Quran and the Sunna is excluded *ab origine*, and only shari'a will define the borders of human rights. Secondly, the charter, albeit self-proclaiming "universal", only talks to the *homo islamicus*, implicitly assuming that Islamic law is the sole true guarantor of human rights for the entire humanity. This is indeed written explicitly in the foreword: "Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights. Due to their Divine origin, no ruler, government, assembly or authority can curtail or violate in any way the human rights conferred by God, nor can they be surrendered."[169] The inherent submission of human beings is thereby reasserted, and this brings about a preeminence of duties over rights, as stated explicitly (and quite oddly, for a declaration allegedly centered on human rights) in the preamble: "[…] by the terms of our primeval covenant with God our duties and obligations have priority over our rights".

The religious element emerges overwhelmingly in the body of the text: in the Arabic version (but significantly not in the French or English

[169] The official English translation may be retrieved at http://www.alhewar.com/ISLAMDECL.html

ones) every article granting rights is built upon a Quranic verse, with the correlative limitations ending up nullifying the rights themselves.

Let us see the most relevant example, the right to life (art. 1): this is called "sacred", and protected on the grounds of Quran 5:32, whereby "whoever kills a soul unless for a soul or for corruption [done] in the land – it is as if he had slain mankind entirely. And whoever saves one – it is as if he had saved mankind entirely". Therefore, "no one shall be exposed to injury or death, except under the authority of the Law" – where law, as we have seen, means *shari'a*. Given this formulation, "subjecting the right of life to shari'a means that this right may be 'lawfully violated' every time shari'a law requires a person's death".[170] Hence, considering that he who brings "corruption in the land" is liable to death under shari'a law, which kind of guarantee will find in article 1 of the Universal Islamic Declaration of Human Rights the homosexual, the adulterer or the apostate?

Another relevant discrepancy between the English and Arabic version lies in the principle of equality: whereas the English version states in neutral terms that "All persons are equal before the Law and are entitled to equal opportunities and protection of the Law",[171] (which should be a truism in a bill of rights), the Arabic version puts things under a very

[170] "La dipendenza del diritto alla vita dalla *sharia* significa che questo diritto possa essere 'legittimamente violato' ogni qual volta la *sharia* autorizzi la morte di un individuo". Daniele Anselmo, *Shari'a e diritti umani* (Torino: G. Giappichelli, 2007), 274. My own translation from Italian.

[171] Article 3

different light by saying that all persons are "equal before the shari'a", so that "no discrimination is admissible *in the application of shari'a*". This certainly reassures us that "even if Fatima, Muhammad's daughter, were to steal, she would have her hand cut off", as the *hadith* therein recalls, but offers less guarantees on the treatment certain sectors of society would suffer, given that discrimination against them is prescribed by shari'a itself, as explained in the introduction.[172] "That is, people are not being guaranteed the equal protection of a neutral law but rather 'equal protection' under a law that in its premodern formulations is inherently discriminatory and thereby in violation of international law."[173] Furthermore, the bad faith of the Islamic Council on this issue bluntly emerges from the third paragraph of article 3: whereas the English version states that "No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language", the Arabic version completely omits to mention the grounds for illegitimate discriminations.

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[172] "L'eguaglianza nella sharia non è l'eguaglianza tra tutti gli uomini, ma tra *uomini musulmani liberi* e ciò significa che alle minoranze non musulmane non vengono riconosciuti gli stessi diritti". Anselmo, *Shari'a e diritti umani*, 274. "But if Islamic usage rejects privilege, it admits – in certain situations even imposes – inequality. Three inequalities in particular were established and regulated by law and developed through centuries of usage – the unequal status of master and slave, of man and woman, and of Muslim and non-Muslim". Lewis, *The Political Language of Islam*, 64. See also An-Na'im, *Toward an Islamic Reformation*, 89–91.

[173] Mayer, *Islam and Human Rights*, 90.

On the same line, equality for non-Muslims is not guaranteed. The sole reference under the chapter "right of minorities" is that "[t]he Qur'anic principle 'There is no compulsion in religion' shall govern the religious rights of non-Muslim minorities". This reaffirms the Quranic ban on forced conversions, but leaves intact the system of *dhimma*, with all the discrimination against non-Muslims it entails.[174] Furthermore, while these minorities enjoy the right, ex art. 10.b, to be governed by their own rules in their civil and personal matters, this seems to apply only to Christians and Jews - the only religious minorities protected under shari'a: indeed, the Arabic version presents two Quranic references, mentioning "the People of the Gospel" (Q, 5:47) and the "followers of the Torah"(5:47), which seem to restrict the scope of protection to the *ahl al-kitab*.[175] This traces the classical Islamic law on the matter,[176] and we will see it recurring in the Egyptian constitutions as well.[177]

Similar observations apply in relation to freedom of religion, article 13. While the English version reads "Every person has the right to freedom of conscience and worship in accordance with his religious beliefs", the Arabic version adds a reference from the Quranic sura *Al kafirun* ("The infidels"): "To you your religion, to me mine". This implies, once

[174] Abu-Sahlieh, *Les musulmans face aux droits de l'homme*, 90.

[175] Mayer, *Islam and Human Rights*, 141.

[176] *Inter alia*, Abu-Sahlieh, *Les musulmans face aux droits de l'homme*, 88.

[177] See Chapter 4.

again, that freedom of religion is understood within the limits of Islamic shari'a, i.e. 1) only for the *ahl al-kitab*, given that Christians and Jews are the only ones to which the right, although with restriction, is granted; 2) with the implicit prohibition of apostasy for Muslims.[178]

Article 14 is highly problematic as it states the *hisba* principle, i.e. the right and duty of every Muslim to enjoin what is right and prevent what is wrong. The alleged "right" to "establish institutions and agencies meant to enjoin what is right (*ma'roof*) and to prevent what is wrong (*munkar*)" seems to foreshadow the institution of the "*hisba* patrols",[179] on the style of the *hisba* police harshly controlling society's behavior in radical states (such as Iran, Saudi Arabia, Taliban's Afghanistan, ISIS…), and reasserted by Hasan al-Banna, the Muslim Brotherhood's founder.[180]

As concerns women, only the rights of "married women" are mentioned in the document, at article 20, with no reference at all to the

[178] On the ban of apostasy in classical Islamic law see Abu-Sahlieh, *Les musulmans face aux droits de l'homme*, 106. Virgili, "Apostasy from Islam under Sharia Law."

[179] See Lorenzo Vidino, *Hisba in Europe? Addressing a Murky Phenomenon* (Brussels: European Foundation for Democracy, 2013), http://europeandemocracy.eu/wp-content/uploads/2013/06/Hisba_in_Europe1.pdf.

[180] On art. 14 see Mayer, *Islam and Human Rights*, 78 and 94. On this path, Hassan al-Banna, founder of the Muslim Brotherhood, organized a group of young militants, on the model of the Nazi Youth Movement, who were trained in a steel discipline to learn and impose a strict Islamic behavior, even by resorting to violence. Ali Rahnema, *Pioneers of Islamic Revival* (Palgrave Macmillan, 1994), 146.

rights of the unmarried ones or to equality in general. Most likely, in the scheme of a declaration completely hinged on the pre-modern system of shari'a, a woman free from male authority is not even envisaged, hence there is no need to focus on such a category.[181] Whatever the rationale, it is evident that categorizing rights on the basis of marital status is outside the logic of international human rights law.[182]

Freedom of expression is one more fictitious right within the declaration: article 12 states that "every person has the right to express his thoughts and beliefs *so long as he remains within the limits prescribed by the Law*".[183] Indeed, "No one […] is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons."

To quote the Algerian professor Ali Merad, "taken outside their historical context […] and put into a human rights declaration, these doctrinal references evoke the Inquisition. What would become of tolerance in an Islamic state which would reserve such treatments to those citizens having a nonconformist view of freedom of thought and expression, not to talk about non-Muslims?" [184] It is evident that such a

[181] Mayer, *Islam and Human Rights*, 110.

[182] Ibid., 108–10.

[183] Emphasis added.

[184] Ali Merad, "Riflessioni sulla Dichiarazione islamica universale dei diritti dell'uomo," in *L'Islam e il dibattito sui diritti dell'uomo*, ed. Andrea Pacini, Dossier mondo islamico 5 (Torino: Fondazione Giovanni Agnelli, 1998), 133.

provision would be more appropriate as preamble of a blasphemy law than of a declaration of rights.

But even worse is the Arabic version: by saying "everyone may think or believe [*li-kull shakhs an yafkara wa yaata'qada*]… within the limits of the shari'a", it seems to imply that not only *expressions*, but also the inner *thoughts* and *beliefs* are subjected to the Islamic law.

The Cairo Declaration of Human Rights in Islam

This document[185] is an official one, although not legally binding, adopted by the Organisation of Islamic Conference[186] in 1990. Saudi Arabia sponsored it at the 1993 World Conference on Human Rights, held in Vienna, as the human rights document embodying the consensus of the world's Muslims on human rights issues.[187]

From the structural and formal point of view, the present charter is more similar to the universal ones as there are no references to the Quran. This does not mean, however, that the document is more secular: as has been observed,[188] sometimes the 25 articles seem carbon copies of Quranic verses.

Nor does the content speak a different language.

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[185] Organisation of the Islamic Conference, "Cairo Declaration on Human Rights in Islam," 1990, http://hrlibrary.umn.edu/instree/cairodeclaration.html.

[186] Now Organisation of the Islamic Cooperation

[187] Mayer, *Islam and Human Rights*, 31.

[188] Anselmo, *Shari'a e diritti umani*, 280.

First of all, we can find here, as in the UIDHR, the preeminence of duties over rights and the general submission of all human beings to God.[189]

The principle of equality is apparently laid down generously, "in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations". However, a more accurate reading immediately reveals that such equality is not in *rights*, therefore a legal one, but only a vague and abstract one, in *dignity*. Were this not enough, even this partial equality is immediately curtailed by the clarification that "[t]he true religion is the guarantee for enhancing such dignity along the path to human integrity".[190] To put it in Orwell's terms, all animals are equal, but some animals are more equal than others. The natural superiority of the *homo islamicus* is inherent to his belonging to the *umma*, "which Allah made as the best community [as written in the Quran, 3:110] and which gave humanity a universal and well-balanced civilization", to the extent that it is even vested with a downright civilizing mission "to guide all humanity which is confused because of different and conflicting beliefs and ideologies and to provide solutions for all chronic problems of this materialistic civilization".[191]

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[189] Art. 1, section A (see Mayer, *Islam and Human Rights*, 50.).

[190] Art. 1.

[191] Preamble

The same rationale applies to women's equality: article 6 grants them equality in "dignity", but nothing is said about equality in *rights*. As to the latter, the same article 6 merely concedes that the woman "has her own rights to enjoy as well as duties to perform", far from decreeing them equal with those enjoyed and performed by men. Rather, this article seems to be tailored on Q, 2:228, which in its first part says something very similar: "And women shall have rights similar to the rights against them, according to what is equitable"; but then goes on in this way: " but men have a degree (of advantage) over them".

Also article 12, on freedom of movement, may be read as a limitation against women, and be actually considered a *violation* of freedom of movement, insofar as it grants human beings[192] the right to enjoy it *within the limits of Islamic shari'a*: bearing in mind that such limits are mainly posed on women, the provision can be read as the reaffirmation of the shariatic restrictions on women's mobility.[193]

We could also mention article 5 that, while affirming the rights of men and women to marriage with "no restrictions stemming from race,

[192] The official English translation reads "every man", but this must be understood in generic terms as human being, like the original Arabic *insan*.

[193] Mayer, *Islam and Human Rights*, 121.

colour or nationality", omits to mention religion among the inadmissible restrictions: indeed, under shari'a law, a Muslim woman is not allowed to marry a non-Muslim man.[194]

While freedom of religion is not even touched upon, we may find instead a cryptic provision negatively affecting freedom of conscience, and *de facto* reaffirming the ban on apostasy: article 10 states indeed that "Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism".

This captious argument is often employed in the Islamic "human rights" discourse to justify the prohibition of, and the harsh penalties against, apostasy. For instance, Saudi Arabia opposed the inclusion in the ICCPR of the explicit mention of the right to change one's religion, present instead in the UDHR, by arguing that "if the individual was to enjoy real religious freedom, he had to be protected against pressure, proselytism and also against errors [*sic*!] and heresies. Men could in fact be induced to change their religion not only for perfectly legitimate intellectual or moral reasons, but also through weakness or credulity".[195]

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[194] An-Na'im, *Toward an Islamic Reformation*, 91.

[195] Baderin, *International Human Rights and Islamic Law*, 119.

Similar arguments were advanced by Egypt.[196] According to this sophistic reasoning, apostasy from Islam is merely conceivable out of physical or psychological coercion, otherwise nobody would ever want to leave the "religion of true unspoiled nature".

Furthermore, this declaration of Islamic supremacy, in the absence of specific guarantees for minorities, seems to reconfirm the classical shariatic discriminations against non-Muslims. This interpretation is also corroborated by article 23b, which submits one's right to assume public offices to the provisions of sharia: bearing in mind the limitations provided by Islamic law for non-Muslims in the public domain, we may clearly spot here a violation of article 2 UDHR.

As to freedom of expression, the same considerations set out above apply here as well: it shall be enjoyed only in such manner "as would not be contrary to the principles of the Shari'ah",[197] while information "may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith".[198]

Again, freedom of expression is linked to the *hisba* principle, defined as the "right to advocate what is right, and propagate what is good,

[196] Abu-Sahlieh, *Les musulmans face aux droits de l'homme*, 104.

[197] Art. 22.

[198] Article 22.c.

and warn against what is wrong and evil according to the norms of Islamic Shari'ah."[199] This would bring about dreadful limitations to free speech, insofar as "it would enable every Muslim to go to court as a private prosecutor or 'public informant' to prevent acts deemed contrary to Islamic orthodoxy. In practical terms it would be possible to report to the court another citizen, Muslim or not, whose ideas are not in tune with certain interpretations of Islam established by religious authorities or official established by tradition"[200], as we will see in Chapter VI.

After all, it is formulated as a "human right" the one "to live in a clean environment, away from vice and moral corruption, that would favour a healthy ethical development of his person". This article would be enough to affect the entire apparatus of the Convention, in those conservative realities where vices and moral scourges are detected almost anywhere, even in '"impurities" of a suffered rape.[201] This is an emblematic example of how rights may be exploited so as to actually deprive people of freedoms.[202]

But the crucial point is another. Beyond the formulation of individual items, and even trying to give them a benevolent interpretation,

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[199] Art. 22b

[200] Pacini, "Introduzione," 13.

[201] Amnesty International, "Annual Report: Saudi Arabia 2010," *Amnesty International*, March 19, 2011, https://www.amnestyusa.org/reports/annual-report-saudi-arabia-2010/.

[202] See Mayer, *Islam and Human Rights*, 56.

enlightened by the general principles of international human rights law, what is virtually able to nullify the document in its entirety is the content of the final rules at articles 24 and 25. The second is an interpretation clause, sanctioning shari'a as the sole valid reference to shed light on each article of the declaration. The first decrees that "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah". In that, it represents a downright Trojan horse, able to spoil the whole declaration: if all rights must comply with sharia, i.e. that archaic law presenting all the problems enunciated above, one cannot but wonder what ever value might be of this declaration, constantly exposed to manipulation, in good or bad faith, in the name of Islam.

This is the same clause present in the Al-Azhar project (*v. infra*).

As a final note on the Cairo Declaration and its founding body, it must be mentioned that the Organisation of the Islamic Cooperation has even established a "separate 'regional' 'Islamic' human rights system",[203] by founding the "Independent Permanent Human Rights Commission of the Organisation of the Islamic Co-operation (IPHRC)". This body was created with three main goals: " (1) promoting 'an alternative discourse on women's rights, centred on the family' and 'in opposition to [the established] women's sexual and reproductive

[203] Vanja Hamzić, "A History in the Making: Muslim Sexual and Gender Diversity between International Human Rights Law and Islamic Law" (King's College London, 2012), 116.

rights'; (2) opposition to 'a narrow "Western" conception of sexuality'; and (3) advocacy for the concept of 'defamation of religion'".[204]

The establishment of this body has been read as the pursuing of the attempt to build a novel "Muslim law of nations (*siyar*)" already began with the Universal Islamic Declaration of Human Rights.[205]

The Arab Charter on Human Rights

A slightly different case is represented by the last of the tree main charters, namely the *Arab Charter on Human rights*,[206] approved a first time by the Council of the League of Arab States in 1994, then revised in 2004 with the inclusion of enforcement mechanisms, and officially entered into force in 2008.[207] In spite of not being "Islamic" but "Arab", having therefore a geographical rather than religious connotation, it has been included here, following Pacini,[208] as a document whose ratifying states are all Islamic, and for its reaffirmation of the OIC declaration.

The Arab Charter has full legal force for the States Parties, and provides a, albeit feeble, control mechanism of rights. This is entrusted to

[204] Ibid., 117.

[205] Ibid.

[206] League of Arab States, "Arab Charter on Human Rights," 2004, http://hrlibrary.umn.edu/instree/cairodeclaration.html.

[207] Merat Rishmawi, "The Arab Charter on Human Rights and the League of Arab States: An Update," *Human Rights Law Review* 10, no. 1 (2010): 169.

[208] Pacini, "Introduzione," 19.

an "Arab Human Rights Committee" (composed of seven independent members proposed by the member and elected by secret ballot) to which states must periodically report "on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof."[209] The Committee, on its part, shall consider the reports submitted by States and publish one in its turn every year, containing "comments and recommendations" of unspecified nature.[210] Mechanisms for individual complaints are completely absent.

This Charter presents a more moderate religious influence, aimed at harmonizing the Islamic inspiration with international principles, to which in its preamble refers specifically by mentioning the Universal Declaration of 1948 and the Covenants of 1966. Yet, this comes along with a parallel reference to the Cairo Declaration, as said before.

One should note the wider formulation of the principle of equality, "without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability",[211] this time with no shariatic limitations.

Religious references are present only in the preamble, where God is mentioned as the source of human dignity, and the Arab Nation as "the cradle of religions and civilizations". The preamble also states the

[209] Art. 48.1

[210] Art. 48.6

[211] Art. 3.1.

intent to further "the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion and the other divinely-revealed religions".[212]

The world *shari'a* is mentioned only once in the text, although in a very sensitive place: art. 3.3, on equality between men and women, states that they are "equal in respect of human dignity, rights and obligations *within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws* and by applicable laws and legal instruments".[213]

Other problematic provisions are the one at art. 2, which defines Zionism as "an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples", and art. 7, which allows death penalty even under the age of 18.

As regards freedom of expression, under art. 32, there is no direct reference to religiously based restrictions. Yet, among the lawful limitations to its enjoyment are listed not only the classical "rights or reputation of others or the protection of national security, public order and public health or morals", but also an ambiguous reference to "conformity with the fundamental values of society"[214]: the latter may easily result in severe restrictions on speech deemed blasphemous or any other kind of

[212] Preamble.

[213] Emphasis added

[214] Present indeed also in the 2012 Egyptian constitution, see Chapter IV.

heterodox though - firm deference to religion being undoubtedly a supreme value of many states of the Arab League.

A provision notably in conflict with international human rights law, *in primis* with article 18 of the Covenant on Civil and Political Rights, is Article 30, which, in ensuring the freedom of thought, conscience and religion, states that no restriction may be imposed on their exercise "except as provided by law." This clause is extremely serious, insofar as it is not referred to freedom to *manifest* ones' opinions (art. 32) and creeds (next paragraph at the same art. 30), but to that inner dimension which is, for its very nature, unknowable and incoercible, with no derogation admitted in any circumstances whatsoever by art. 4 ICCPR.[215] This happens in spite of article 43 decreeing that "Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set force in the international and regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities." Since this is the same formulation used in the Arabic version of the

[215] U.N. Human Rights Committee, "General Comment 22, Art. 18: The Right to Freedom of Thought, Conscience and Religion" (HRI/GEN/1/Rev.1, 1994). Par. 3: "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief".

UIDHR, as explained above, it is unlikely a mere oversight, but most probably the deliberate assertion that even the inner dimension of the human being is submitted to God and His rule.

In general terms, Mayer notes that the 1994 Charter, albeit more secular in character than the other documents, nonetheless reduced the scope of rights and reflected elements of the Medieval Islamic tradition.[216]

As to the 2003 version, the High Commissioner for Human Rights criticized the text as incompatible with international standards on, *inter alia*, women's rights, non-citizens' rights, death penalty of minors and the equation of Zionism with racism.[217] Also the International Commission of Jurists put forward similar criticism.[218] It added furthermore that "[a]ny reference to cultural, religious or civilization-based specificities should be interpreted and understood as a specific effort by a region

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[216] Ann Elizabeth Mayer, "The Respective Roles of Human Rights and Islam: An Unresolved Conundrum for Middle Eastern Constitutions," in *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan*, ed. Said Amir Arjomand (Oxford; Portland: Hart Publishing, 2008), 80.

[217] Louise Arbour, "The Arab Charter on Human Rights Is Incompatible with International Standards - Louise Arbour," *International Humanist and Ethical Union*, March 11, 2008, http://iheu.org/arab-charter-human-rights-incompatible-international-standards-louise-arbour/.

[218] International Commission of Jurist, "The Process of 'Modernising' the Arab Charter on Human Rights : A Disquieting Regression," December 20, 2003, https://www.icj.org/the-process-of-modernising-the-arab-charter-on-human-rights-a-disquieting-regression/. Para 8, 9, 10, 16.

to reinforce the principle of the universality indivisibility and complementarity of human rights and should in no case be considered as a means of eclipsing or even denying the universality of such standards or as a justification for their violation. As regards the recourse to notions such as the sharia' or the reference to Islamic law to which the Arab Charter refers, notably in the preamble, such recourse to notions of uncertain legal import and which are susceptible to varied or even contradictory interpretations should be limited as much as possible".[219] In the same optic, the Commission stressed that "[i]n the case of normative conflicts between the Declaration on Human Rights in Islam and the provisions of the International Bill of Human Rights, the latter should prevail".[220]

The Al-Azhar Constitutional Project

The Al-Azhar constitutional project of 1979[221] is a relevant case for our hypothesis for two main reasons. Firstly, it comes from what is probably the most prestigious institution in the Sunni world:[222] this means that it vaunts strong credentials as a trustworthy interpreter of the

[219] Ibid., para. 6.

[220] Ibid., para 7.

[221] See Hefny, "Religious Authorities and Constitutional Reform," 97.

[222] The *Encyclopedia Britannica* defines it as the "chief centre of Islamic and Arabic learning in the world" "Al-Azhar University," *Encyclopedia Britannica*, accessed June 23, 2017, https://www.britannica.com/topic/al-Azhar-University.

authentic Islamic doctrine. Secondly, it is "the only modern constitution to be developed by a religious entity with minimum interference from formal institutions of the state":[223] this means that it should indicatively represent a "pure" example of Islamic constitutionalism, with no ulterior motives related to political power.[224]

It is not by chance that Dawood and Gouda use the Al-Azhar project as a paradigmatic model to test the level of islamization of Islamic constitutions.[225]

It must be noted that there exist two versions of this project, one longer than the other as containing more detailed provisions on Parliament and Government.[226] Default references, unless indicated otherwise, will concern the shorter text, as that is the one circulating after the 2011 uprising in Egypt.[227]

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[223] Gouda, "Islamic Constitutionalism and Rule of Law," 58.

[224] In fact, it is a recurrent case that Islamization responds to a design of power, to reinforce a dictator's grip: Sadat in Egypt, Numeiri in Sudan, Zia u-Haq in Pakistan, etc.

[225] Ahmed and Gouda, "Measuring Constitutional Islamization," 42.

[226] Both versions are available in Sami A. Aldeeb Abu-Sahlieh, *Projets de constitutions islamiques et déclarations des droits de l'homme: dans le monde arabo-musulman* (St-Sulpice: CreateSpace Independent Publishing Platform, 2012), 41–54.

[227] Gouda, "Islamic Constitutionalism and Rule of Law," 66. An English version of this text may be retrieved here: https://sites.google.com/site/moamengoudaecon/al-azhar-s-islamic-constitution

The constitutional project immediately states that "Islamic shari'a is the source of all legislation".[228] This has multiple repercussions, including on state powers and fundamental freedoms.

As concerns the three state powers, the Legislature shall only approve "legislation that is not inconsistent with the rulings of Islamic shari'a";[229] the Executive is represented by an "imam" who must be obeyed by citizens as long as he does not commit "an action that was unanimously declared forbidden under shari'a";[230] the Judiciary "shall rule justly in accordance with the rue of Islamic shari'a",[231] and "judges will be subject only to the Islamic shari'a in their judgments".[232] This puts in question the role of the Parliament and its legislation as a whole, insofar as it seems that the judge should directly refer to shari'a according to his own discernment. It is true that the Parliament (called "shura council", *majlis al-shura*[233]) may only produce legislation which is not

[228] Art. 1b

[229] Art. 83.1.

[230] Artt. 45.

[231] Art. 61.

[232] Art. 65.

[233] According to Dawood and Gouda, it is not clear if the shura council denotes the parliament (Ahmed and Gouda, "Measuring Constitutional Islamization," 41.). However, it is legitimate to presume so, given that the word "majlis" is always used throughout the Arabic text to denote the Parliament. Furthermore, art. 83 seems to describe typical legislative functions: "1. [producing] Legislation that is not inconsistent with rulings of Islamic shari'a. 2. Approving the annual budget of the state and its final account. 3. Monitoring the actions of the executive power. 4. Holding those responsible in any ministry accountable for their actions and withdrawing the confidence from the ministry when necessary."

incompatible with Islamic *sharia*,[234] but it is not clear at all who, and per which procedure, should be the final interpreter of shari'a law, and who has the final saying on its violations, potentially even leading to the President's impeachment.[235]

As far as rights are specifically concerned, subordination to Islamic law finds confirmation in many other articles defining the enjoyment of rights "in accordance with the rules", or "within the limits" of the Islamic sharia. We find such reference both in (apparently) trivial provisions, such as that forbidding "finery" and "vulgarity",[236] as well as in substantial ones. The latter include freedom of expression and religion,[237] freedom of the press,[238] freedom of association,[239] women's right to work,[240] and

[234] Art. 83.

[235] Art. 50.

[236] Art. 14: "Finery 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'a."

[237] Article 29: Freedom of religion and thought, the freedom to work, the freedom to express opinion directly or indirectly, the freedom to establish trade union associations and participate in them, personal freedom, and the freedom of movement and congregation are all basic and natural rights that are protected within the framework of the Islamic shari'a".

[238] Article 41: "The founding of newspapers will be allowed and freedom of the press is guaranteed, all within the framework of Islamic shari'a".

[239] Article 42: "Citizens have the right to form collectives and unions according to the law. Those which go against the social system or which secretly have a military character, or which go against any aspect of Islamic shari'a are not allowed".

[240] Article 38: "Women have the right to work within the framework of Islamic shari'a".

also a final clause stating that "rights will be practiced in accordance with the aims of *shari'a*".[241] It would be redundant to repeat what said above about the potential consequences of this kind of clauses.

On apostasy, the text is uncommonly crystal clear: it falls within the *hudud* penalties as per article 71, from which one can infer that the punishment, following the classical shari'a norm, will be death.[242] This is confirmed in the Islamic penal code also drafted by Al-Azhar in the same period (*v. infra*).

Equality between citizens is barely mentioned. The only references provide that "Justice and equality are the basis of governance"[243] and that "the people are equal before the courts"[244] – which, as said above, are Islamic courts, and are therefore bound to observe the discriminations between Muslims and non-Muslims, and between men and women, laid down by shari'a law.

With regards to female rights, indeed, it has been correctly noted that "discrimination against women is found throughout the constitution".[245] In particular, they are not allowed to run for presidency (art. 47), they cannot be member of the judiciary (art. 68), their duty inside the family is to "serve" husband and children (art. 8), and outside the

[241] Art. 43.

[242] Virgili, "Apostasy from Islam under Sharia Law," 9–11.

[243] Article 28.

[244] Article 62.

[245] Gouda, 72.

family they are allowed to work only within the limits prescribed by shari'a (art. 38). The abovementioned art. 14 on "finery" may also represent a substantial restriction on women's rights: it is the door through which a rigid dress code could be imposed on them.

As to non-Muslims, they are not mentioned anywhere in the text. By combining this omission with the predicaments of art. 1a and 1b, respectively stating that "Muslims form one Islamic nation", and "Islamic shari'a is the source of all legislation", it is fair to suppose, with An-Na'im, that the classical discriminations provided within shari'a law would entirely apply[246] - with the courts called upon to enforce them, as said above.

At any rate, non-Muslims and women are explicitly prevented from becoming head of state.[247] In the longer project, non-Muslims are even implicitly banned from parliamentary and governmental duties, for members of Parliament[248] and ministers[249] are required to take an oath of obedience to the sole God and to his prophet Muhammad.[250]

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[246] "It is very interesting that a draft constitution produced in Egypt, a country with a significant non-Muslim minority, did not contain a single word about the status and rights of non-Muslim citizens. We are not even told whether these non-Muslims are citizens. The reason for this serious omission is clear enough. The document could not specify the rule of Shari'a on non-Muslims and yet claim to be a proposal for a constitution. It is for this reason that the document referred all relevant matters to Shari'a, in full knowledge of the status rights of non-Muslim subjects under Shari'a." An-Na'im, *Toward an Islamic Reformation*, 97.

[247] Art. 47

[248] Art. 87 longer version.

[249] Art. 131 longer version.

[250] Abu-Sahlieh, *Les musulmans face aux droits de l'homme*, 152.

On top of this, the constitutional project explicitly mentions *hudud* penalties: they shall be applied "for the crimes of fornication, theft, banditry, drinking alcohol, and apostasy".[251] The imam is responsible for, *inter alia*, enforcing the *hudud*,[252] for which no amnesty or pardon shall be admitted.[253] As to non-*hudud* crimes, the Al-Azhar constitution states that "flogging is the principle punishment".[254] All of them can clearly be categorized as torture or cruel, inhuman and degrading punishment. [255]

This part requires to be seen in couple with the draft penal code elaborated by the same Al-Azhar, with full endorsement of its Sheikh

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[251] Art. 71.

[252] Art. 56.

[253] Art. 59. The draft penal code elaborated by Al-Azhar in the same period shows us what they concretely mean by "enforcement of *hudud* penalties", *v. infra*.

[254] Art. 79.

[255] "Ḥudūd and qiṣāṣ 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." 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 Sharī'ah law". Mahmoudi, "International Human Rights Law," 542. See also Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (The Hague; London; Boston: Martinus Nijhoff Publishers, 2001), 215.

'Abd al-Halim Mahmud,[256] and presented to the Parliament in 1977.[257] It is articulated into seven parts, one for general provisions common to Quranic penalties, and six for each specific *hadd* penalty. In the general part, one may find a brief description of Quranic principles on the matter of criminal law. Article 3 gives a hint of evidential procedures, without providing details but limiting itself to state that offenses are proven "by the testimony of two men – as it is established– and, in case of necessity, by the testimony of one man and two women, or four women". For each *hadd* crime, specific Quranic rules are recalled, in a typical mixture of legal and religious sources, both of which the judge is supposed to master (as seen above while discussing the Al-Azhar constitution).

Article 4 specifies that *ta'zir*, or discretionary, penalties are the residual ones, applicable in all those cases where Quranic punishments are not prescribed by sharia. It is pointed out that "it is not permitted to order the suspension of punishments defined in this Code as 'Quranic', nor to commute them in other punishments, nor to reduce or quash them". This is fully consistent with the nature of *hudud* as limits fixed by Allah, whose satisfaction God Himself is entitled to demand as His

[256] Tawfiq 'Ali Wahha, "Progetto di codice di pene coraniche in Egitto," in *Dibattito sull'applicazione della Shari'a.*, ed. Andrea Pacini (Torino: Edizioni della Fondazione Giovanni Agnelli, 1995), 37.

[257] Sami A. Aldeeb Abu-Sahlieh, "L'apostasia nel diritto musulmano. Il caso dell'Egitto," *Veritas et Jus* 6 (2013): 43.

own rights, and which men are therefore merely required to enforce in the way they are fixed by religious sources.[258]

As regards Quranic penalties, these are provided in the following cases: theft, banditry, fornication, slanderous accusation of fornication, alcohol consumption and apostasy. It must be noted that this is an extended interpretation of *hudud* offenses, insofar as not all school include apostasy among *hadd* crimes.[259] The punishments trace the Quranic ones without any attempt to soften their rigor. Alcohol consumption encounters 40 whiplashes.[260] For theft, amputation of the right hand the first time, amputation of left foot in case of recidivism are foreseen.[261] For banditry, the two amputations are both performed, unless certain conditions recur for mere imprisonment.[262] Fornication, consisting in carnal conjunction between a man and a woman (and, because of judicial analogy, between two men) in the absence of marriage bond,[263] encounters death penalty by stoning in case the guilty (male or female) is married, otherwise 100 lashes.[264] Apostasy also entails death penalty, in the lack of any hope of repentance, or in case repentance does not come further to a granted delay of maximum 60 days.

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[258] See Hallaq, *Sharī'a*, 310.

[259] Ibid., 311.

[260] Article 23.

[261] Article 13.

[262] Article 16.

[263] Article 20.

[264] Art. 22.

Some caveats are prescribed for the penalties' execution. With the exception of the capital punishment and stoning, a preliminary medical exam is required to ensure that "there is no danger for [the convicted] to undergo the sentence".[265] As to amputation, article 8 informs that "the hand's amputation shall be performed at the base of the wrist, where the carpal joints itself with the two bones of the forearm. The foot is amputated to half the length, so that the heel remains, thanks to which one can still walk". As regards flogging, this shall be performed "with a whip of medium size, with one strap, and this without any knots. The condemned is stripped of clothes which would impede strokes from causing pain to the body. Strokes must be moderate and inflicted on the entire body, but avoiding the private and delicate parts."

It is worth having a deeper look into apostasy. The crime is defined as the act of a Muslim leaving Islam, whether to adopt another religion or none.[266] It is very interesting to analyze the following article which clarifies the ways the crime can actually be consummated: "Apostasy consists in the following:

1) a clear confession or an act unequivocally meaning the abandonment of Islam;

2) the denial of what is recognized as a necessary element of the religion;

[265] Article 9.

[266] Article 30.

3) the derision, by word or deed, against a prophet, a messenger, an angel or the Quran."[267]

It is thereby made clear that apostasy does not merely consist in the explicit abandonment of Islam to embrace another religion or none, but also in heterodoxy, i.e. the denial of some tenets of faith recognized as dogmas, and in blasphemy against a sacred element of Islam.

This is emblematic of how the concept of apostasy is a broad one, capable of widely curtailing freedom of religion, free speech, including political speech,[268] and freedom of scientific research. This is in line with what I am going to show in chapter VI.

In conclusion, we can say that a conflict with fundamental rights clearly emerges in the Al-Azhar constitutional text. This mainly happens for "the reference to shari'a in the constitution obliges the authorities in general and the judiciary in particular to enforce religious proscriptions at the expense of those rights. This is because shari'a has not evolved in harmony with international human rights principles".[269]

Talking about the shari'a conformity clauses, Mayer rightfully observes that those are " 'claw-back clauses' that allow the state 'almost un-

[267] My own translation from Italian.

[268] In relation to those liberal reforms which imply the abandonment of Quranic principles in favor of equality between men and women, Muslims and non-Muslims, humane penalties, etc.

[269] Gouda, "Islamic Constitutionalism and Rule of Law," 75.

bounded discretion' in using domestic legal standards to restrict internationally guaranteed human rights."[270] On the contrary, "International law does not accept that fundamental human rights may be restricted – much less permanently curtailed – by reference to the requirements of any particular religion. International law provides no warrant for depriving Muslim of human rights by according primacy to Islamic criteria".[271]

As An-Na'im comments on this text, "[i]n view of the various constitutional problems of Shari'a, it is clear that any blanket incorporation of Shari'a in a constitutional document is unsatisfactory. In fact, Al-Azhar proposed constitution explicitly illustrates several of the points made. Two general points should be noted. First, the main question is not whether Shari'a requires a specific form of government; rather, it is whether Shari'a does or does not apply. *If Shari'a is to apply, then all its features that discriminate against women and non-Muslim citizens will necessarily follow regardless of the form of government* [emphasis added]".[272]

Moreover, from a formal point of view, the constitution does not fulfill the conditions required to be considered "written", i.e. complete codification of constitutional principles and supremacy thereof. In fact, "[t]he Al-Azhar constitution fulfills neither condition, as constitutional

[270] Mayer, *Islam and Human Rights*, 68.

[271] Ibid., 69.

[272] An-Na'im, *Toward an Islamic Reformation*, 97.

principles are not codified and Islamic shari'a is the supreme law from which the constitutional principles originate. As Article 1b states that Islamic shari'a is the source of all legislation, there is no real reason to have a written constitution as religious scholars are authorized to interpret shari'a as they see fit and as the sole source of legislation."[273]

In sum, although Al-Azhar is often presented as a bulwark of moderation,[274] and one could have reasonably expected this constitutional model to represent "a moderate version of contemporary Islamic thought",[275] it is instead a blatant instance of militant Islamism. After all, one should not forget that Al-Azhar was the moral instigator of the killing of two of the most relevant Muslim reformers, namely Muhammad Taha and Farag Fodah, among others.[276]

It will not come as a surprise that after the 2011 revolution even the Salafists, "adherents of one of the most puritanical strains of Islam [...] pointed out that the main model to frame the new Constitution was the Al-Azhar Constitution".[277]

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[273] Gouda, "Islamic Constitutionalism and Rule of Law," 76.

[274] "[T]he religious entity that supervised this constitution is considered by many as the most moderate entity in the Islamic world". Ibid., 58. "Even outside the Muslim world, Al-Azhar is known as the voice of moderate Islam". Ahmed and Gouda, "Measuring Constitutional Islamization," 38.

[275] Gouda, "Islamic Constitutionalism and Rule of Law," 58.

[276] Abu-Sahlieh, *Projets de constitutions islamiques*, 110–11.V. also *infra*, chapter VI.

[277] Ahmed and Gouda, "Measuring Constitutional Islamization," 39.

Final Remarks

Against the backdrop of those who, both in the West and in the Muslim world, consider universal human rights as an imperialist discourse trampling on different cultures, it should be noted that universalism remains the only viable theoretical and practical framework for the protection of all individuals, especially those in the minorities. It should not be surprising, therefore, that universalism is exactly what non-Western victims and activists advocate. I will show in the following chapters some instances related to the constitutional processes and case studies under consideration. In connection with this general overview, it is worth mentioning the 1999 Casablanca Declaration, reflecting the views of Arab human rights NGOs reunited in the First International Conference of the Arab Human Rights Movement. "The declaration included a ringing affirmation of support for international human rights law and its universality, stating that '(T)he only source of reference in this respect is international human rights law and the United Nations instruments and declarations. The Conference also emphasized the universality of human rights'."[278]

From the documents analyzed above, many points of contrast between their content and the universal International human rights law clearly emerge, thus validating the views of authoritative scholars on sharaitic principles as clashing with human rights. Far from combating –

[278] Mayer, "The Respective Roles of Human Rights," 81.

at least conceptually – discriminations and violations of various degrees, these charters grant them an ideological mantle. It is evident that the classical shariatic discriminations still influence the mainstream Islamic discourse of human rights. "Despite the great diversity in Islamic legal doctrines, on certain points of premodern jurisprudence there is sufficient consensus to allow reasoned calculations of how the application of Islamic principles would likely affect rights. Reliance on rules of the premodern *shari'a* to determine the permissible scope of modern human rights could open the way to nullification of rights in areas where the *shari'a* traditionally called for restrictions on rights, such as the rules relegating women and non-Muslims to subordinate status or those prohibiting conversion from Islam".[279]

In other words, certainly shari'a is a complex concept susceptible of many interpretations, but denying that serious human rights violations occur exactly *because of* shari'a means turning a blind eye to the reality of its implementation.

In the next chapters, I shall examine the influence of shari'a and Islamic principles on individual liberties, as emerges from constitutions and criminal provisions actually in force.

[279] Mayer, *Islam and Human Rights*, 69.

CHAPTER III

THE PRINCIPLES OF *SHARI'A* AS THE MAIN SOURCE OF LEGISLATION IN EGYPT

Introduction

The Egyptian case is a very relevant one when it comes to the relation between shari'a and human rights at the constitutional level. It represents a paradigmatic instance of what Hirschl defines a "constitutional theocracy", i.e. a system characterized by "(1) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority and the existence of some form of active judicial review; (2) the presence of a single religion or religious denomination that is formally endorsed by the state, akin to a "state religion"; (3) the constitutional enshrining of the religion and its texts, directives, and interpretations as a or the main source of legislation and judicial interpretation of laws— essentially, laws may not infringe on injunctions of the state- endorsed religion; and (4) a nexus of religious bodies and tribunals that often not only carry tremendous symbolic weight but are also granted official jurisdictional status on either a regional or a substantive basis and operate in lieu of, or in uneasy tandem with, a civil court system".[280]

[280] Ran Hirschl, *Constitutional Theocracy* (Cambridge: Harvard University Press, 2010), 3.

The analysis of article 2 of the Egyptian constitution, since 1980 making shari'a law "the main source of legislation", enables us the examine the serious problems wrought by such a powerful Trojan horse in a modern system of law.[281]

Historical background

The issue of shari'a law within the Egyptian constitutional and legal framework has been a *vexata quaestio* for a long time.

The first reference to Islam in an Egyptian constitution dates back to the text of 1923, whose article 129 declared that "the religion of the state is Islam and Arabic is its official language".[282]

The same statement was repeated in all the subsequent constitutions (1930, 1956, 1964, 1971), with the relevant exception of the Constitution of the United Arab Republic, in 1958, in the aftermath of the unification between Egypt and Syria.[283]

Yet, such a clause was basically a cultural and stylistic one, with no implication in terms of law. The actual mention of shari'a dates back to 1971, when, for the first time, "the principles of Islamic shari'a" made their appearance at article 2 as "*a* main source of legislation".[284] This was

[281] As emblematically exemplified in the Abu Zayd case, see Chapter VI.

[282] Abdelaal, p. 36.

[283] *Ibid.*

[284] *Mabadi' al-shari'a al-islamiyya masdar ra'isi al-tashri'.*

subsequently amended in 1980 in the form which it has maintained thenceforth, wherein shari'a is raised to become "*the* main source of legislation".[285]

In the version of 1971, shari'a could be considered nothing more than a cosmetic concession on the part of Sadat's regime to the religious sentiments of the population, intended to mark the distance from the militantly socialist Pan-Arabism of Nasser. Indeed, the principles of shari'a were only a source among others, "thus, it seemed, a law would not be invalid if it were inconsistent with the principles of *sharì 'a*".[286]

However, its effects started to be visible in the new frame of mind of Egyptian judges. For instance, in 1979 the Court of cassation stated for the first time that public policy in Egypt should be directed to enact public interest by following religious principles.[287] Also the Supreme Court,[288] in an opinion of 1976, held the obligation for state institutions to conform to Islamic norms because of the constitutional reform: "According to constitutional stipulation, the legislator is committed in enacting new legislation after 1971, to go back to the sharì 'a and shun any regulation that appears contradictory to a given Islamic principle or source".[289]

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[285] *Mabadi' al-shari'a al-islamiyya masdar ra'isi al-tashri'".*

[286] Clark Benner Lombardi, *State Law As Islamic Law in Modern Egypt* (Leiden; Boston: Brill Academic Publishers, 2006), 126.

[287] Ibid., 129.

[288] Now the Supreme Constitutional Court.

[289] Lombardi, *State Law As Islamic Law in Modern Egypt*, 132.

The uncertain meaning of the "principles of sharia" as "the main source of the legislation"

The 1980 amendment, crowning shari'a as *the* main source of legislation, represents the culmination of this process of islamization, potentially marking a decisive change in the state architecture: if shari'a is constitutionally put at the apex of the hierarchy of sources, any statute contravening Islamic law becomes possibly unconstitutional for contrast with art. 2.

One of the major flaws about how the amendment was discussed and drafted, regards the vagueness of the wording "principles of shari'a". "Art. 2 specifies 'principles of Sharīʿah,' but this cannot determine which of the often diametrically opposed views of Muslim scholars of the principles of Sharīʿah are to be used. "[290]

Indeed, the official report of the committee called by the People's Assembly to assess the effect of the proposed amendment, contented itself with holding the following: article 2 "means that it is imperative to review the laws which were in effect before the Constitution of 1971 and to amend these laws in such a manner as to make them conform to the principles of Islamic law",[291] which is nothing more than a truism in the absence of a legal definition of such principles. The only guideline

[290] An-Na'im, "The Legitimacy of Constitution-Making," 39.

[291] *Ibid.*, p. 133

provided to the legislature was the requirement to amend laws considering "the Qur"an, the Sunna, and the opinions of learned jurists and imams".[292]

Thenceforth, the problem of definition has always afflicted any decision concerning the compatibility of legislation with *sharia*. This actually left the Courts with room and flexibility for dismissing complaints based on article 2: for instance, in a 1982 opinion concerning the claim that Egyptian criminal law did not respect the shariatic guarantees in terms of evidence for conviction,[293] the Court of Cassation rejected it by noting "the disagreements about the proper methods of identifying and interpreting the universally applicable principles of the sharì'a"[294] and also that "Article 2 did not give any guidance to the courts as to what method they should use".[295]

In other terms, only the executive and the legislature could actually interpret and apply article 2, conferring it a concrete meaning for a concrete application: "In practice, therefore, that choice remains in the hands of ruling elites."[296]

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[292] *Ibid.*, p. 134.

[293] In particular, two police officers, accused of brutality and convicted under the testimony of the victim, lamented that *sharia* requires more than a witness.

[294] Lombardi, *State Law As Islamic Law in Modern Egypt*, 161.

[295] Ibid.

[296] An-Na'im, "The Legitimacy of Constitution-Making Processes in the Arab World," 39.

Several issues stem from these assumptions, the first of which concerns the notion and content of "*sharia*": it probably goes without saying that one would try in vain to derive unequivocal provisions from the jurisprudential corpus of Islamic law, as if it were to be considered a digest or a modern code. It is impossible to deal with Islamic law in the same terms as we do with state law – be it Western or not. The Quran and the Sunna are full of contradictions, the latter is also often uncertain as to its authenticity, and there is no interpreter – legislator or religious scholar – who may rightfully claim to be the holder of the "true Islam".[297]

This brings about legal uncertainty to a large extent, and consequently an overbroad role of the judges of last resort in determining the content of the religious norms, in potential violation of the principle of legality and separation of powers.

In the abovementioned 1982 verdict, the Court of Cassation highlighted this point, remarking that the judiciary has the power and the obligation to enforce only the existing law, not "legal principles that are

[297] "Whatever 'the principal source of legislation' might mean in terms of the influence that the shari'a might have on legislation […] surely it must mean that the legislation in question cannot be repugnant to the shari'a. Of course, the shari'a is not a legal code. It is a vast juristic compendia of rules derived from sacred text, spanning centuries across various schools of thought. These rules, as developed by individual jurists, are not always consistent with one another." Haider Ala Hamoudi, "Repugnancy in the Arab World," *Willamette Law Review* 48 (2012): 431. " [L]aws stemming from [sharia] are not stable due to the many differences among schools of Islamic jurisprudence as to the methodology of interpretation of qur'an and sunna". Gouda, "Islamic Constitutionalism and Rule of Law," 59.

incompatible with a precise definition of its jurisdiction",[298] and which are per se unfathomable, since "the application of the *sharì 'a* requires that it should be determined which exactly of the manifold conflicting views of the founders of the law schools [madhhabs]... must be used as a basis for judgments".[299]

There is also another as obvious as sensible objection over the constitutional role of shari'a enshrined at article 2: "Logistically, it is difficult to imagine a court examining a complex piece of legislation, trying to find a source for each and every provision in it, and then making a determination as to whether or not the legislation as a whole 'principally' derives from shari'a or any other source. Moreover, not only is such an approach logistically difficult, it also would almost surely result in the invalidation of large amounts of vitally important legislation".[300]

Interpretation of article 2 by the Supreme Constitutional Court: non retroactivity

The Supreme Constitutional Court eventually attempted to bring some order to the matter in 1985, with a casuistic and unsatisfactory

[298] Lombardi, *State Law As Islamic Law in Modern Egypt*, 162.

[299] Ibid.

[300] Hamoudi, "Repugnancy in the Arab World," 430.

decision intended to find a compromise between the two factions of Islamists and secularists over the shaping of the state.[301]

The decision in question concerned a case of *riba*, an interest that the religious University of Al-Azhar had to correspond for having failed to pay in due time some medical supplies. The University claimed that article 2 required the invalidation of *riba*, provided at article 226 of the Civil Code, as incompatible with *sharia*, and therefore unconstitutional.

The case turned up before the Supreme Constitutional Court, which found itself in a very awkward position: on the one hand, had it simply dismissed the claim, it would have deprived article 2 of any value, at the same time engaging in an open struggle with the most prestigious Islamic institution perhaps in the entire world; on the other hand, had it upheld the complaint, this would have brought about dramatic (and disastrous) consequences on the Egyptian economy and system in general. Theoretically, a third way was possible: the Court could try to embrace a very loose interpretation of the prohibition of *riba*, or to contextualize it, or to employ tertiary sources of Islamic law so as to argue

[301] Decision 20/1985.

that such prohibition would be nowadays incompatible with public interest.[302] Indeed, some modern - and modernist – Islamic thinkers have tried to follow this path, although with scarce success.[303]

However, that being perhaps too difficult to justify before the highest Islamic institution, the Court followed another path, inventing the "doctrine of the non-retroactivity of Article 2".[304] In fact, the Court acknowledged that the 1980 constitutional amendment required the legislator to harmonize legislation with the principles of shari'a; however, it stated also that such obligation should be seen as a gradual process begun with the amendment itself, as affirmed also in the preparatory report at the moment of promulgating the amendment. Whence it follows that claims under article 2 for laws emanated before the introduction of the article itself are not justiciable: it will be up to the legislature to gradually amend laws according to its own determination.[305]

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[302] "For example, the SCC could have maintained that under the prevailing Sunni school of thought which historically prevailed in Egypt, the Hanafi, the prohibition as against the trading of items for delay and with gain (a common form of riba as per foundational text) did not apply to money, but only items measurable by weight or volume. Hence it was forbidden to trade 10 pounds of gold for 15 pounds in the future, but a trade of $ 10 for $ 15 in the future (i.e. money interest) was not intended to be covered. The SCC could have instead cited authority from a second school that permitted trades of copper coins for more coins in the future because that school, the Maliki, excluded from the forbidden trades metals that were not precious. Or the SCC could have attempted a more modernist approach in the fashion developed by the drafter of the Egyptian Civil Code, Abdul Razzaq al Sanhuri, who does justify Article 226 as being consistent with shari'a. Any of these approaches was, from a purely doctrinal standpoint, plausible.". Hamoudi, "Repugnancy in the Arab World," 433.

[303] Lombardi, *State Law As Islamic Law in Modern Egypt*, 165.

[304] Ibid., 167.

[305] Ibid.

To summarize this concept in technical terms, the Court denied that article 2 had direct effect, and was thus liable to immediate application by the judge, asserting instead its being an injunction directed to the legislator.[306] Indeed, the Court remarked, this was in line with the report of the Constitutional Committee, which stated clearly, in presenting the 1980 amendment, that it was part of a process of gradual islamization of the Egyptian legislation, to be completed only after a due delay.[307] Furthermore, the SCC justified its choice by stressing that stating otherwise would bring about a total destabilization of the Egyptian juridical order, and consequent legal chaos.[308] On the other hand, upon the legislator falls the *political* responsibility to harmonize the existing law with the principles of shari'a.[309]

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[306] Nathalie Bernard-Maugiron and Baudouin Dupret, "«Les principes de la sharia sont la source principale de la législation». La Haute Cour constitutionnelle et la référence à la Loi islamique," *Egypte/monde arabe*, no. 2 (1999): 109.

[307] *Ibid.* See also Gen. Committee, cit. in Tamir Moustafa, "The Islamist Trend in Egyptian Law," *Politics and Religion* 3, no. 3 (December 2010): 619.: "[T]he change of the whole legal organization should not be contemplated without giving the lawmakers a chance and a reasonable period of time to collect all legal materials and amalgamate them into a complete system within the framework of the Qur'an, the Sunna and the opinions of learned Muslim jurists and the 'Ulama".

[308] "Donner force obligatoire et effet direct aux principes de la Loi islamique « entraînerait non seulement l'abrogation de toutes les législations antérieures contraires aux principes de la Loi islamique dans les domaines civil, pénal, social ou économique, mais obligerait aussi les tribunaux à appliquer aux litiges qui leur sont soumis des règles non codifiées à la place des lois abrogées, avec tous les risques que cela comporte de contradictions entre ces règles, de contrariété entre les jugements et de déstabilisation [de l'ordre juridique] »". Bernard-Maugiron and Dupret, "Les principes de la sharia," 110.

[309] Ibid.

It is by means of this legal expedient that the Court, in later cases, could avoid to intervene on the Criminal Code on issues like sexual relations outside marriage or alcohol trade.[310] In this last case,[311] the petitioner demanded that the laws allowing alcohol and gambling be struck down under both article 2 and article 12 of the 1971 Constitution, whereby "Society shall be committed to safeguarding and protecting morals, promoting the genuine Egyptian traditions and abiding by the high standards of religious education, moral and national values, the historical heritage of the people, scientific facts, socialist conduct and public manners within the limits of the law. The State is committed to abiding by these principles and promoting them". It would have been interesting to see how the Court would reach a conclusion on the basis of shari'a law, but it simply rejected the petition on the grounds that the plaintiff did not have a direct interest in the case.[312]

Interpretation of article 2 by the Supreme Constitutional Court: "absolute" vs. "relative" principles of shari'a

If the non-retroactivity expedient solved the problem of article 2 for the cases preceding the 1980 amendment, it was also opening the door to a huge one for the future: not only was the decision debatable

[310] Bernard-Maugiron and Dupret, "Les principes de la sharia," 110.

[311] See Moustafa, "The Islamist Trend in Egyptian Law," 621.

[312] Ibid.

under a legal point of view;[313] more seriously, the Court was officially ruling that the legislator thenceforth had no choice but to apply shari'a, at the same time binding itself to strike down any new law not in compliance with it. This happened in spite of the fact that the 1980 amendment did not clearly imposed the voidance of any law in conflict with shari'a.[314]

In thus doing, the Court put itself in an awkward position, both under a socio-political and a legal point of view: on the one hand, it risked to be forced to interfere with any modernization process inspired

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[313] Theoretically, the principle *lex superior derogat inferiori* (meaning that the higher-rank law prevails over the subordinated one, making the latter illegitimate if it contravenes the constitution), prevails over the chronological criterion (*lex posterior derogat priori*), which should not apply in such cases. The Court, however, circumvents this problem by making article 2 a mere principle directed to the legislator, not a rule immediately applicable. Indeed, the Court itself was somehow conscious of the oddity of such a ruling, as it felt the need to justify it with realistic concerns about "the separation of powers and the practical impact of an over-broad Article 2 review". Lombardi, *State Law As Islamic Law in Modern Egypt*, 168.

It must be also noted that this was the only time the Court gave such a chronological value to an article of the Constitution: "Si la Court refuse de contrôler la constitutionnalité par rapport à l'article 2 de toute loi antérieure à la date d'entrée en vigueur de sa formulation actuelle (1980), parallèlement elle n'a jamais refusé de contrôler la conformité aux autres dispositions constitutionnelles de lois antérieures à leur entrée en vigueur (1971 pour la plupart). De plus, si elle enjoint au législateur d'amender les lois antérieures à 1980 pour les rendre conformes aux principes de la *sharia* islamique, elle ne lui fixe toutefois pas de délai pour s'acquitter de cette responsabilité et ne fait pas de cette obligation une responsabilité juridique". Bernard-Maugiron and Dupret, "Les principes de la sharia," 116. The 2012 Constitution removed all ambiguities from this point of view, by stating clearly at art. 222 that "Provisions stipulated by laws and regulations prior to the proclamation of this Constitution shall remain valid and in force. They may not be amended or repealed except in accordance with the regulations and procedures prescribed in the Constitution", thus giving the Constitution value *ex nunc*.

[314] See Hamoudi, "Repugnancy in the Arab World," 435.

to Western legislation and in possible contrast with classical Islamic law;[315] on the other hand, it had necessarily to assume the role of a *qadi* (the Islamic traditional judge), assessing the content of this "classical shari'a" in order to verify the compliance of laws and statutes with its requirements. This was also a technically difficult task, as SCC justices receive a modern legal education and do not follow religious curricula. Furthermore, the very nature of shari'a law, i.e. a legal system which is loose, incomplete, contradictory, and subjected to opposed interpretations even among classical jurists, makes it impossible to reach undebatable and definite conclusions.

It is interesting that the Court has had apparently no problem in interpreting shari'a directly, without the intermediation of '*ulama* and Islamic scholars. "The SCC seemed to be asserting that lay Muslims, including judges who had not received a traditional religious training, could interpret Islamic law for themselves".[316] However, this ought to have come along with a conscious and responsible method of interpretation of Islamic law, which instead has been lacking.

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[315] For instance, soon after the "non-retroactivity" verdict, it had render a decision on a law meant to improve gender equality: since this was promulgated before the amendment of article 2, it did not have to enter into the core of the *sharia*tic issue, and struck down the law on the different ground of an abuse of Presidential powers in issuing the decree (see Lombardi, *State Law As Islamic Law in Modern Egypt*, 171.). However, it would have been interesting to see its reasoning in case the law were emanated just a few months after.

[316] Ibid., 177.

The first case in which the Court found itself to the test of its own theory was judgment 7/1993, concerning divorce law as amended in 1985, therefore after 1980. In particular, the petitioner challenged the constitutionality of the provisions of Law 100/1985, concerning wife's compensation and children's custody, claiming their violation of article 2, insofar as they granted the woman ampler rights than those classically recognized by Islamic scholars.

The Court rejected the claim, stating that only a bulk of "authentic rules" are eternal and unchangeable, while the rest may and must be adapted to the needs of times, bearing in mind the "general purposes" of *sharia*, intended to preserve religion, life, reason, honor and property,[317] with the ultimate view to promoting justice and welfare[318].

"A legislative text is not permitted to contradict Islamic legal rulings that are absolutely certain in their authenticity and meaning (*al-ahkam al-shar'iyya al-qa'iyya fi thubutiha wa-dalalatiha*). It is these rulings alone in which *ijtihad* is not permitted. They represent the Islamic shari'a, its universal principles and established roots which are not subject to interpretation or alteration (*mabadi'uha al-kulliyya wa-usuluha al-thabita allati la tahtamil ta'wil an aw tabdil an*); and it is inconceivable that the interpretation of them [the universally applicable principles] will change with a change of time or place. . . . [It may only contravene] the rulings that are probable whether with respect to their authenticity or their meaning or both (*al-ahkam al-zanniyya sawa' fi*

[317] Mohamed Abdelaal, "Religious Constitutionalism in Egypt: A Case Study," *Fletcher Forum of World Affairs* 37 (2013): 39.

[318] Ibid.

thubutiha aw dalalatiha aw fihima). The sphere of *ijtihad* is limited to them [the probable rulings of the shari'a]... And they [the rulings that are merely probable] change with the change of times and place in order to guarantee their malleability and vigor in order to face new circumstances and in order to organize the affairs of the people, with respect to their welfare from the consideration of law . . . It is necessary that *ijtihad* occurs within the frame of the universal roots of the Islamic shari'a (*al-usul al-kulliyya li-'l-shari'a al-Islamiyya*)... building practical rulings and, in discovering them [these rulings], relying on the justice of the *shari'a*, [and] expecting the result of them [these rulings] to be a realization of the general goals of the *shari'a* (*al-maqasid al-'amma li-'l-shari'a*), among which are the protection of religion, life, reason, honor, and property."[319]

Hence, in those cases where there is no such certainty and consensus about the meaning of the concerned Quranic verses, "the *wali al-amr* is permitted to practice ijtihad so as to develop a legislation (*nass al-tashri'i*) and to organize [the *shari 'a's*] rules by establishing the essence of the right (*asl al-ʿaqq*) in them".[320]

A twofold law review may be inferred from this fundamental ruling. On the first level, laws must not violate the "authentic rules of shari'a". On the second level, laws must be consistent with the "general purposes" of Islamic law.[321]

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[319] Lombardi, *State Law As Islamic Law in Modern Egypt*, 180.

[320] Ibid., 214–15.

[321] See also Nathan J. Brown, "Debating the Islamic Shari'a in 21st-Century Egypt," *The Review of Faith & International Affairs* 10, no. 4 (2012): 11.

Regarding the first point, the Court has so far acknowledged the existence of absolute rules only in *obiter dicta*, which did not influence the final verdict.[322] Furthermore, it has never struck down a law on the sole base of article 2.[323] Yet, this does not change the fact that, in case of contrast between an absolute rule and a fundamental right, the former must prevail,[324] thus working like a superconstitutional *Grundnorm*. Indeed, this is not merely a theoretical hypothesis: in the mentioned *obiter dicta*, the Court has identified absolute principles of shari'a in patent conflict with constitutional rights. In particular, it was about the duty of the wife to obey her husband,[325] the obligation for the woman to dress modestly and the ruler's faculty to dictate the standards in this domain,[326] and the right of a man to marry up to four wives.[327]

It must also be noted that the Court, in distinguishing between absolute and mutable rules, has totally neglected to focus on the difference between "rules" and "principles" of Islamic law:[328] "does the phrase 'the principles of Islamic *Sharia*' signify that the law must be identical with

[322] Bernard-Maugiron and Dupret, "Les principes de la sharia," 117.

[323] Ibid., 114.

[324] Ibid., 117.

[325] Case 18/14 (Supreme Constitutional Court of Egypt 1998).

[326] Case 8/17 (Supreme Constitutional Court of Egypt 1996).

[327] Case 35/9 (Supreme Constitutional Court of Egypt 1994).

[328] Abdelaal, "Religious Constitutionalism in Egypt," 43.

Islamic *Sharia*, or does the word "principles" take the Article somewhere else?"[329] Indeed, the letter of article 2 refers merely to the *principles* (*mabadi*) and working on this important issue could have been an easy way to limit the purview of shari'a, perhaps to the extent of considering it nothing more than a general and inoffensive source of moral and cultural guidance. However, since the SCC has not delved into this aspect, it is not clear what the exact meaning of the word *mabadi* may be. Basically, "when the SCC interpreted Article 2, it interpreted 'the principles of Islamic *Sharia*' to mean the authentic rules of Islamic *Sharia*".[330]

Furthermore, the Court has never unequivocally defined what those "authentic rules" are. It has contented itself to provide a superficial method of identification, based on their unambiguous character after careful examination ("absolutely certain with respect to their authenticity and meaning"[331]) although, as highlighted above, rulers and judges of modern states are not trained in Islamic law, thus they are not in the best position to know and judge over the rules of shari'a. Consequently, the Court somehow (unwillingly) paved the way for article 4 of the 2012 Constitution, which consistently entrusted Al-Azhar with such a task, and for article 219, which tried to provide a guidance in interpreting

[329] Ibid., 39.

[330] Ibid., 43.

[331] Lombardi, *State Law As Islamic Law in Modern Egypt*, 184.

article 2.[332] Nevertheless, the justices clearly reserved for themselves the monopoly of interpretation of shari'a: "In explaining why it reaches the conclusions it does about Islamic law and about the consistency of state legislation with the principles of the sharì'a, the SCC has never deferred to the opinion of the *'ulama* or even cited the *'ulama* as additional evidence to support a conclusion that it had independently reached".[333]

In the lack of absolute clarity over a certain rule, the landmark judgment of 1993 addressed a subordinated point, i.e. the "benefits" or "goals" of shari'a, meant to guide the ruler (*wali al-amr*) in the interpretation of Islamic law. In such cases, the SCC argued, Islamic law itself requires an elastic interpretation based on reason and directed to the best implementation of human welfare in the given conditions. This goal can be attained by bearing in mind the "necessaries" of Islam: if, as per Al-Ghazali and subsequent classical jurists, they comprehend the protection of religion, life, reason, progeny and property, the SCC omits progeny and mentions instead honor, adhering to a minority position.[334]

In other words, when it comes to relative rules uncertain in their meaning, the Court has endowed the *wali al-amr* with the duty to exert his *ijtihad*. In thus doing, he cannot rely simply on the imitation of classical jurists, who could have guiltily or maliciously promoted a wrong

[332] *V. infra*

[333] Lombardi, *State Law As Islamic Law in Modern Egypt*, 183.

[334] Ibid., 191.

interpretation, but has to resort to his own reason.[335] These rules are indeed characterized by continuous reinterpretation, and nobody can claim to hold the sacredness (*qudsiyya*) necessary to provide the final and correct interpretation, as if he were sinless and infallible.[336] Therefore, it is only by using the compass of reason that government, legislator and judge can find the right way between opposite views, with no constraint from the past, as long as the interest of society is pursued.[337]

This position may be collocated in the strand of Rashid Rida's utilitarian and modernist concept of *ijtihad*, which requires an inquiry into the *ratio legis* of *sharia*tic norms, and even into God's objectives in prescribing such rules, in order to get to the right solution in the concrete circumstances.

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[335] "'L'ijtihâd n'est rien d'autre qu'un effort intellectuel visant à déduire les règles pratiques de la *sharia* à partir de ses signes circonstanciés (*adilla tafsîliyya*). Il n'est donc pas possible qu'il se contente d'imiter les prédécesseurs (*al-awwalîn*), qu'il calomnie Dieu par le mensonge en posant des autorisations ou des interdictions sans fondement ou se détourne de la Révélation pour ce qui concerne les affaires des gens et ce qu'il y a d'honorable dans leurs coutumes. Il s'agit d'utiliser le jugement de la raison (*hukm al-aql*) lorsqu'il n'existe pas de texte, afin de parvenir à l'établissement des règles pratiques imposées par l'équité et la clémence de Dieu à Ses serviteurs'". SCC cit. in Bernard-Maugiron and Dupret, "Les principes de la sharia," 111.

[336] "[…] ces règles sont contenues dans la *sharia* islamique, dès lors que celle-ci n'est pas repliée sur elle-même et n'attribue pas de sacralité (*qudsiyya*) aux propos d'un jurisconsulte quelconque dans l'une ou l'autre des matières la concernant et n'interdit pas qu'on l'interprète, qu'on l'évalue ou qu'on lui substitue une autre règle. Les opinions interprétatives n'ont pas en elles-mêmes de force obligatoire s'étendant à d'autres que ceux qui les soutiennent. Il n'est donc pas permis de les considérer comme des règles fixes, immuables et incontestables, sinon ce serait nier la réflexion (*ta'ammul*) et la clairvoyance (*tabassur*) dans la religion du Dieu Très-Haut et ne pas admettre une vérité qui est que l'erreur est potentielle dans tout *ijtihâd*.'" SCC in Ibid.

[337] Ibid., 112.

For instance, in a 1994 case concerning the prohibition for women to wear *niqab* covering their face, the Court's reasoning worked in this way: shari'a rules in women's clothing are aimed at promoting modesty; there is no clear indication in the scriptures, or consensus among scholars, as to whether modesty requires or not complete covering; the SCC, subsuming the rule of modesty under the general goal of human development and welfare, arrived to the conclusion that the specific goal of a law cannot conflict with the general one of promoting women's personal development: since the integral veil makes it difficult for women to get an education or to work, and harms their self-esteem, a law prohibiting it in the public sphere is compatible with the general goals of shari'a.[338]

The Court made this utilitarian reasoning explicit soon thereafter, in a 1995 case:

> The holder of power (*wali al-amr*) has a right to act so as to push away harm (*darar*) as much as possible and also to prevent the causing of harm. . . . If two harms (*dararan*) compete, it is necessary to bear the lesser of them in order to ward off the greater. And included in this [principle] is the acceptance of the specific harm (*al-darar al-khass*) in order to repel the general harm (*al-darar al-'amm*).[339]

[338] Lombardi, *State Law As Islamic Law in Modern Egypt*, 197.

[339] Ibid.

It is evident that the general parameter adopted by the Court, on the basis of a rule formulated by the Prophet ("no harm and no retribution"[340]) is a typically utilitarian one intended to maximize welfare for society and to repel harm.[341] Therefore, "the SCC says the government may not regulate in a way that is likely to decrease the aggregate enjoyment of justice and human welfare in society".[342]

Having said that, the problem is to determine what "human welfare" is, how to interpret the five goals, and how to put them in correlation with the specific goals of any single law.

In general terms, it may perhaps be said that the Court identifies the result it wants to attain, and then justifies it retrospectively by resorting to shari'a. For instance, in the aforementioned *niqab* case, the Court, being unable to find some guidelines in classical Islamic law, ended up upholding the law on the ground that it was generically compatible with the goal of promoting (or, at least, of not harming) women's honor.

It is evident how concepts like "welfare", "honor", etc., are so vague, relative and mutable that the final outcome will depend solely on the justices' will and on the result they want to pursue, for they are compatible with a solution as well as with its very opposite. As it has been correctly – and obviously, I would add – noted,

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[340] Ibid., 196.

[341] The Oxford Dictionary defines utilitarianism as "The doctrine that actions are right if they are useful or for the benefit of a majority." https://en.oxforddictionaries.com/definition/utilitarianism

[342] Lombardi, *State Law As Islamic Law in Modern Egypt*, 196.

"[p]eople can naturally disagree about how to define welfare. To evaluate 'welfare', the Court assumes that a person's welfare is to be equated with that person's enjoyment of the "general goals" of the *shari'a*. The SCC, however, does not discuss in this case how it identified these goals except to say that they include the preservation of religion (*din*), self (*nafs*), reason (*'aql*), honor (*'ird*), and property (*mal*). It does not say how it arrived at these goals. Nor does it say what other general goals there might be. Finally, it does not indicate what method the Court would use to try to determine whether such goals are, in the aggregate, being promoted".[343]

The ambiguities of the Court's method are even more evident if one considers a case concerning a 1985 statute allowing a first wife to seek divorce in case of a second marriage contracted by her husband without her consent. Here the SCC could not avoid acknowledging the existence of an absolutely certain rule of shari'a which allows and even recommends polygamy under certain circumstances. Nevertheless, it did not refrain from linking even this rule to the general interest of all the wives and society at large,[344] and from limiting men's right. Yet, it did not do that on the basis of the Quran itself, as one could expect,[345] let alone through *hadiths* or *ijma'a*, but on the basis of an independent

[343] Ibid., 217.

[344] Ibid., 219.

[345] The Court for instance did not mention Q, 4:129, which reads " Ye are never able to be fair and just as between women, even if it is your ardent desire: But turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If ye come to a friendly understanding, and practise self-restraint, Allah is Oft-forgiving, Most Merciful." Lombardi cites instead 4:29, but this is most probably a printing error.

reasoning - detached from a rigorous exegesis - whereby "polygamy, while not in itself harmful, inevitably gives rise to ancillary harms",[346] i.e. material and psychological sufferance between the spouses, which the husband cannot avoid. Therefore, as the law in question did not violate the clear shariatic rule of polygamy, and was at the same time intended to prevent harm, it was judged as absolutely compatible with shari'a.[347]

Overall assessment of the SCC's interpretation of article 2

The method employed by the Court is a hybrid one. It is it mainly based on "neo-*ijtihad*", i.e., on a utilitarian form of *ijtihad* which, following the path of Rashid Rida, admits a reinterpretation and a new exegesis of the classical texts, independently from the opinion of classical jurists,[348] with the ultimate view to maximizing human welfare.[349] At the same time, the Court does not abstain from "neo-*taqlid*", in asserting

[346] Lombardi, *State Law As Islamic Law in Modern Egypt*, 234.

[347] Ibid. See also Bernard-Maugiron and Dupret, "Les principes de la sharia," 112.

[348] Lombardi, *State Law As Islamic Law in Modern Egypt*, 185. ff. In a 1993 case concerning children custody, the Court explicitly "declared that modern Muslims were not bound by the classical juristic tradition. Accordingly, under certain circumstances, Islamic law permitted rulers to promulgate laws that were inconsistent with rulings accepted by all Sunni jurists of the past.". Ibid., 205.

[349] Lombardi, *State Law As Islamic Law in Modern Egypt*, 189.

that there exist "certain rules" whereof "it is inconceivable that the interpretation […] will change with a change of time or place",[350] thus implicitly recognizing the consensus of classical jurists on them, and denying any possible reinterpretation.

Beyond this external framework, however, there is no systematic method of analysis: for example, the Court does not bother to explain at which classical jurists it looks, how it defines some rules as "absolutely certain", how it solves the contradictions inside the Quran, or how it assesses the authenticity of *hadiths*. The latter are even hardly – if ever – mentioned in the SCC rulings, as to suggest that only the Quran must be taken into consideration in order to ascertain the "authentic" and "eternal" rules of shari'a; some Court's statements, in fact, assert this theory explicitly.[351] Yet, there are a few cases in which *hadiths* are mentioned and considered, but nonetheless there is no explanation for doing so, or for deeming them as authentic.[352] And even if one considered them as a subsidiary source to be used only *ad adiuvandum*, to confirm the Quranic injunctions, a method of exegesis of the Book itself ought to be provided – which the Court fails to do.[353]

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[350] Ibid., 186. In the words of Sanhuri, "the quality of being permanent and reproducing itself in all times and all places", in Ibid., 187.

[351] "In searching for absolutely certain legal rulings, it says, it was looking for rulings 'rooted in principles laid down in Qur'ànic *nusus*'". Lombardi, *State Law As Islamic Law in Modern Egypt*, 213.

[352] Ibid., 185.

[353] Ibid., 216.

It can be ultimately said that the Court resorts to an "impressionistic"[354], a "pastiche"[355] method of interpretation of the Scriptures, which is open to multiple criticisms.

From the perspective of Islamic law, it arbitrarily cherry picks some rules and principles from different sources, without being able to justify its options – after all, how could justices trained in modern law justify their choices in front of traditional scholars who have devoted their whole life to the exegesis of the Scriptures?

From the perspective of constitutional law, it fails to explain how it justifies the odd theory of "non-retroactivity".

In the view of the principle of legality, it has built an unpredictable system open to any possible interpretation (and distortion), which does not provide either citizens or state institutions with certain parameters to regulate their conducts in sure compliance with the Constitution.

Last but not least, from the perspective of human rights, the Court has built a highly dangerous structure, which pays (at least at the theoretical level) an abnormal homage to shari'a and anti-modernist Islamic theories, by unequivocally asserting the eternal and unchangeable superiority of some undefined rules established in the 8th century in the Arabian desert for a bedouin society, and nonetheless capable of ruining any attempt at reformation in a modern 21st century state.

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[354] Lombardi uses this adjective frequently.

[355] Lombardi, *State Law As Islamic Law in Modern Egypt*, 247.

This could turn out to be very dangerous in relation to the *hudud* penalties, which are unequivocally mentioned in the Quran: "thus, a judge should follow them as prescribed in the Qur'an without relying on his Ijtihād".[356] Consequently, if the legislature is bound not merely to the "principles" of shari'a, intended as cultural and moral values, but to its actual rules, it should enforce the *hudud* offenses, banning alcohol, lashing the fornicators and amputating thieves. It could try to limit their applicability, but never formally expunge them from the penal code. This acquired a disquieting dimension in the light of article 76 of the 2012 Constitution, whereby a criminal conviction could be inflicted directly on the basis of the Constitution even in the absence of a specific law (*v. infra*).

But human rights may be put at stake in their foundational principles even outside the realm of criminal law: the concept of "civil citizenship" itself is in contrast with a religious system which divides citizens into different categories according to their being men or women, Muslims or non-Muslims, free or slaves. These concerns acquired further substance against the backdrop of article 219 of the 2012 Constitution - which further restricted the freedom of interpreting article 2 -, and of article 4 - which placed Al-Azhar side by side with the Constitutional Court in assessing the conformity (of what? Law? Governmental decrees? Judicial verdicts?) to shari'a law.

[356] Abdelaal, "Religious Constitutionalism in Egypt," 42.

These problems perhaps explain why even the Muslim Brotherhood has shifted its focus from the "application of *sharia*" to a more general "Islamic reference" (*marja'iyya islamiyya*):[357] mere references can be sufficient to build an Islamist state. I will return on this point *infra*.

To summarize, one can say that the SCC' s exegesis of article 2 has proved to be a very subjective one mainly dependent on the juridical, social, or even political result the judge wants to achieve, more than on a rigorous legal evaluation.

If the Court has occasionally promoted a reformist interpretation of single cases,[358] it has not challenged the conservative superstructure of a model based on Hanafi hermeneutical theories,[359] forged upon the traditional conceptions of *taqlid* and *ijtihad*, therefore open to modernization only in specific cases and in the classical light of the necessaries of Islam.[360]

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[357] Brown, "Debating the Islamic Shari'a in 21st-Century Egypt," 14.

[358] El Fegiery remarks that the Court did well, but not enough: it had to seek compromises to satisfy Islamists, and this brought about stagnation on certain issues, especially regarding gender equality. Moataz El-Fegiery, Ph.D candidate at the School of Oriental and African Studies, London, and human rights activist at the Cairo Institute for Human Rights Studies. Interviewed by the author, Cairo, June 2013.

[359] Gianluca P. Parolin, "(Re)Arrangement of State/Islam Relations in Egypt's Constitutional Transition," *New York University Public Law and Legal Theory Working Papers*, no. 13/15 (2013): 5.

[360] "In sum, the SCC interprets the 'principles of Islamic law' as a set of firm and solid traditional obligations (what Hanafis would call *furud*) that allow no re-engagement with the sources, and five generic objectives that need to be pursued when re-engaging with the sources in all other cases" Ibid.

The fact that the Court is deemed to have promoted, so far, quite a reformist approach, does not change an iota of the defects of such system, ready to be exploited by the most various political interests, according to the forces that will be able to extend their influence on the judiciary.

Final considerations and open challenges

Article 2, in the form assumed after the amendment of 1980, has survived all political, legal and institutional turmoil lived by Egypt ever since, and has been incorporated almost unchallenged in the current constitutional text.

This creates a substantial theoretical problematique: is shari'a, as the main source of legislation, superior to the Constitution itself? As said in Chapter I, the idea that a man-made source can prevail over the law of God is incompatible with Islam: if shari'a as the law of God is superior to any other norm, and it becomes the main source of legislation within the constitution, syllogistically the Constitution would seem to recognize shari'a as prevailing over any other norms.

"Rather than the constitution sanctioning Islam as an official religion and observance of the Islamic Sharī'ah in specific areas, some juristic interpretations of this provision imply that the Sharī'ah supersedes the positive legal order — including, potentially and by implication, the constitution. If the Sharī'ah is a principal source — or

even the principal source — of legislation, then it becomes possible to argue that it forms the fundamental legal framework".[361]

At the same time, as per the jurisprudence of the SCC, all constitutional provisions must be read as a harmonic whole. This implies that no norm should prevail over the others, "hence, Art. 2 shall not be used to undermine the rest of text".[362]

In fact, the core of the constitutional debate in Islam may be summarized as follows: " 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?".[363]

Given the absolutism claimed respectively by both the religious and the civil-constitutional mindset, they are mutually exclusive and irreconcilable: either God determines the supreme law of men through shari'a, therefore article 2 is merely pleonastic and even slightly "heretical" (for recognizing the "principles", and not the "rules" of Islamic *sharia*, and allowing the presence of different sources), or the man-made Constitution is the apex of the legal architecture, which means that the status conferred to shari'a is *octroyé* by the Constitution itself, and that all the other provisions are on the same level. *Tertium non datur*.

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[361] Adel Omar Sherif, "The Relationship between the Constitution and the Sharīʿah in Egypt," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2012), 127.

[362] Ibid., 130.

[363] Horchani, "Religious Authorities and Constitutional Reform," 204.

This aporia has no legal or even logic solution, and only ideological and political consideration will tip the scales towards one side or the other.

As emerges from the foregoing analysis, this debate does not merely pertain to the realm of theory, but has very concrete reverberations on the constitutionality of laws improving individual rights but conflicting with definitive norms of shari'a.

CHAPTER IV

ISLAMIC LAW IN EGYPT'S CONSTITUTIONS AFTER THE SPRING

Introduction

In the previous chapter I have gone through the history, interpretations and effects of article 2, making shari'a the main source of Egyptian legislation. The analysis has shown the serious problems wrought by such a powerful Trojan horse in a modern system of law.

The purview of Islamic law was considerably expanded in the Constitution of 2012, adopted by an Islamist-dominated Assembly under the government of the Muslim Brotherhood. The analysis of such text, subsequently repelled, is relevant to our hypothesis insofar as it represents a case where shari'a was not maliciously exploited by a dictatorial government to legitimize its power, but was instead intentionally sought at the culmination of a formally, albeit not substantially, democratic process.[364] The analysis of the Constitution thereby emanated will show

[364] Indeed, one has to take into account Morsi's "constitutional decree" of 22 November 2012. In this declaration, patently *ultra vires*, president Morsi ruled that: 1) the public prosecutor would be dismissed, with the President appointing a new one; 2) all trials against officials of the former regime, including those concluded, would be re-celebrated, with an ad hoc prosecutor endowed with broader powers; 3) No judicial authority could dissolve the Constituent Assembly or the Shura Council; 4) No judicial authority could cancel any declarations, laws and decrees made since Morsi assumed power on 30 June 2012, all pending lawsuits against them being void; 5) The president could take any measures he saw fit in order to preserve and safeguard the

how the homage paid to Islamic principles and rules may dramatically affect human rights and fundamental freedoms.

The Constitution of 2012 will be examined in parallel with the one of 2014, approved following President Morsi's deposition. The 2014 Constitution offers, at least from a purely formal point of view, significant improvements as far as individual rights are concerned.

Article 2, the untouchable

First of all, it is interesting to note that nobody, even in the non-Islamist camp, dared to push in favor of a reform of article 2, whether in the 2012 or in the 2014 Assemblies. As Abu-Odeh notes, non-Islamists acquiesced to the Islamist rhetoric to the point that, in the constitutional debates, "many followed the practice of prefacing their positions with the perfunctory 'Nobody is opposed to Art 2' in their exchanges with the Islamists"[365]. Non-Islamists also tried to avoid by any means to be qualified as "secularists", not least because of the odious practice of *takfir*,

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revolution, national unity or national security. Tommaso Virgili, "The 'Arab Spring' and the EU's 'Democracy Promotion' in Egypt: A Missed Appointment?," *Perspectives on Federalism* 6 (2014). The constitutional decree "was clearly unconstitutional",[364] and in violation of the rule of law: "Without the rule of law, democracy has little value. Democratic elections did not give the president a mandate to elevate his own powers even to hasten the passage of the constitution".[364] Nirmala Pillay, "The Rule of Law and the New Egyptian Constitution," *Liverpool Law Review* 35, no. 2 (August 2014): 151.

[365] Lama Abu-Odeh, "Egypt's New Constitution: The Islamist Difference," in *Constitutional Secularism in an Age of Religious Revival*, ed. Michel Rosenfeld and Susanna Mancini (Oxford; New York: Oxford University Press, 2014), 162.

i.e. the accusation of heresy and apostasy that may lead to judicial proceedings and even endanger one's life.[366] As I will show later on, the secular retreat over article 2 in Egypt is mirrored by a similar one in Tunisia (a much more secularized country) over the establishment of a secular state on the Turkish model – at least in the Constituent Assembly, if not in the larger society.

The expansion of article 2

Not only article 2 remained untouched, but the global purview of Islamic law was largely expanded in the 2012 text, somewhere in a very visible and somewhere else in a subtler way.

First of all, the scope of art. 2 was broadened by two specific provisions, article 219 and article 4, respectively dealing with the *quid* and the *quis* in the interpretation of *sharia*, i.e., how actual norms have to be derived by the abstract corpus of divine commandments, and who is called to provide the right interpretation thereof for the purposes of the law-making process.

[366] Ibid.

How to interpret the "principles of sharia"?

The first provision was enshrined in article 219, which blatantly amplified the role of shari'a in the Constitution and was harshly criticized and eventually targeted for abolition by the new Constituent Committee.[367] This was intended to limit the possibility of heterodox interpretation of article 2 by circumscribing its content and definition. It stated that "The principles of Islamic *Sharia* include general evidence [*al-adilla al-kulliyya*], foundational rules, rules of jurisprudence, [*al-qawa'id al-usuliyya wa-l-fiqhiyya*] and credible sources accepted in Sunni doctrines [*madhahib ahl al-Sunna*] and by the larger community [*al-jama'a*]".

It was a downright "explanatory note"[368] of article 2, by means of which the generic "principles" of shari'a were no longer a vague and general clause liable to be understood as a generic moral guidance,[369] or at least following modern, reformist theories of Islamic law: they were now to be interpreted in the light of "all the rules of jurisprudence and credible sources that are accepted in Sunni doctrines",[370] meaning that

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[367] Bassem Sabry, "22 Key Points in Egypt's New Draft Constitution," *Al-Monitor*, August 23, 2013, http://www.al-monitor.com/pulse/originals/2013/08/egypt-draft-constitution-guide.html.

[368] Parolin, "(Re)Arrangement of State/Islam," 5.

[369] Although the Court never meant it in this way, as explained above.

[370] Zaid Al-Ali, "The New Egyptian Constitution: An Initial Assessment of Its Merits and Flaws," *openDemocracy*, December 26, 2012, http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws.

the "principles" assumed a concrete content made of classical Islamic jurisprudence, which came to be officially incorporated in the constitution and to be directly applicable.

The first element, *adillataha al-kulliyya*, literally means "the whole of its proofs", "its holistic evidence".[371] It denotes the general rules of deduction, the legal sources, and, by metonymy, the foundational texts. In sum, they constitute the backbone of the *usul al-fiqh*, thus indicating the classical sources of law: Quran, Sunna, *ijma'*, *qiyas*, and tertiary sources, like the Hanafi juristic preference (*istihsan*) and the Maliki public interest (*istislah*).[372]

The second element, *qawa'idaha al-usuliyya* indicates the "fundamental rules", both within the general theory of law (*usul al-fiqh*) and substantive law (*furul al-fiqh*), while [*qawa'idaha*] *al fiqiyya* are the "rules" or "bases" of *fiqh*, the Islamic jurisprudence, i.e. shari'a as interpreted and systematized by Islamic scholars. It must be noted that traditional *fiqh* deals potentially with any single aspect of individual life, regulating moral behavior, religious rituals, daily life, even beards' length.[373]

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[371] Ramy Yaacoub, "219: A Detailed Cultural Translation of Egypt's Draft Constitution's Most Controversial Article," *Atlantic Council*, December 14, 2012, http://www.atlanticcouncil.org/blogs/menasource/219-a-detailed-cultural-translation-of-egypt-s-draft-constitution-s-most-controversial-article.

[372] Parolin, "(Re)Arrangement of State/Islam," 7.

[373] These "trifling details" are those targeted by some modern Islamists, including the Muslim Brotherhood. Ali Rahnema, ed., *Pioneers of Islamic Revival* (New York; Kuala Lumpur; Beirut: Zed Books, 2005), 134.

The third element listed at art. 219 was the "sources acknowledged by the schools of the people of Al-Sunna" (*masadiraha al-mu'tabarah fi madahib ahl al-sunna*), i.e., basically, the same as *al-adilla al-kulliyya*,[374] but with the specification of the "*Sunni schools*": this implied that different legal doctrines, such as the Shiite ones or those considered "heretical" because outside the four orthodox Schools (like the Mu'tazila, for instance) should not have to be taken into consideration.

As to the final part, *jama'a* was rendered in the Government official translation as "larger community"; however, this was only one of the possible interpretations, because "larger" is not in the text, and the whole expression "*masadiraha al-mu'tabarah fi madahib ahl al-sunna wa al-jama'a*" could be considered in its entirety as a reference to the orthodox scholars of Islam.[375]

Article 219 represented the reversal of an hypothesis circulating since the 2011 constitutional amendments, i.e., to leave article 2 unchanged while anchoring its interpretation to the constant jurisprudence of the SCC, so as to avoid radical changes in the case of an Islamist-dominated Court. What the Constituent Assembly under the Islamists ended up doing was the exact opposite, in a "desire to depart from the existing jurisprudence",[376] considered too innovative. As it has been

[374] Parolin, "(Re)Arrangement of State/Islam," 8.

[375] Yaacoub, "219: A Detailed Cultural Translation." There is indeed an old debate in Islam on who is called to form the *ijma'a*: see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2005), chap. 8.

[376] Parolin, "(Re)Arrangement of State/Islam," 6.

said, "[e]ssentially this article ensures two things; it prevents any other Islamic denominations from being used as the basis for legislation, and paves the path for literal interpretations of *Sharia* law, as well as archaic forms of the law and application of punishments".[377]

It is not difficult to see that the main target of Islamists was the SCC and its eclectic interpretation of sharia. According to Moataz al Fegiery,[378] a human rights activist from the Cairo Institute for Human Rights Studies, the rigidly "traditionalist" formulation of article 219 was a way to restrict innovations, making it harder for the SCC to adopt the flexible and somehow liberal approach followed thus far.[379] Indeed, article 219 left no room to the technique of re-engagement with the sources (neo-*ijtihad*) constantly employed hitherto by the SCC. On the contrary, "[m]ost of Article 219's technical terms come from this traditional Sunni methodology, as taught by the *madhhabs*".[380] Reference here is to the "neo-traditional" method of interpretation, whereby "Islamic law should be interpreted according to the methods that had traditionally been used by pre-modern jurists associated with the four

[377] Yaacoub, "219: A Detailed Cultural Translation."

[378] Moataz El-Fegiery, interview.

[379] See also Diana Serodio, "Interview with Dr. Amr Darrag on the New Egyptian Constitution," *Arab West Report*, April 18, 2013, http://www.arabwestreport.info/year-2013/week-16/20-interview-dr-amr-darrag-new-egyptian-constitution.

[380] Clark Benner Lombardi and Nathan J. Brown, "Islam in Egypt's New Constitution," *Foreign Policy*, December 13, 2012, http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution.

Sunni '*maddhabs*'".[381] Thereby, a strict imitation of traditional jurisprudence and a more respectful approach to *hadith* was imposed.[382]

Someone also expressed preoccupation over the authority and the decisive role that not only classical, but also modern clerics (such as the renowned and controversial al-Qaradawi) would thus acquire.[383]

Not only was art. 219 in contrast with the SCC, but created potentially a fracture even with Al-Azhar, which had on some occasions referred to minoritarian jurists, including Shia.[384]

Furthermore, article 219 widened the Pandora's box of article 2, through "extra constitutional principles that will operate constitutionally in the same manner as the formal provisions of the constitutions".[385]

The Role of Al-Azhar

Article 4 of the 2012 Constitution dictated that "Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law [*sharia*]."

The first aim of this provision was perhaps to concentrate the monopoly of interpretation of Islamic law into one body, so as to avoid

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[381] Ibid.

[382] Nathan J. Brown and Clark Benner Lombardi, "Contesting Islamic Constitutionalism after the Arab Spring: Islam in Egypt's Post-Mubarak Constitution," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 256.

[383] Sabrina Gasparrini, "Il Medio Oriente visto dal Cairo" (Radio Radicale, December 5, 2012), http://www.radioradicale.it/scheda/367573/il-medio-oriente-visto-dal-cairo.

[384] Abu-Odeh, "Egypt's New Constitution," 173.

[385] Ibid.

what has been defined the "fatwa shopping"[386] traditionally occurring between the opinions released by Al-Azhar, the Dar al-Ifta' (office of the state mufti, appointed by the President), and the judiciary.

However, this choice was objectionable on multiple grounds. An-Na'im notes that it posed a democratic problem insofar as Al-Azhar scholars are neither elected nor otherwise accountable.[387] Even from an Islamic point of view, considering that all scholars are on an equal foot, singling out those of one institution, albeit prestigious, was questionable. Furthermore, the role of the Constitutional Court, as the final interpreter of article 2, risked being jeopardized.

It must be said that this was not the first occasion where Al-Azhar was empowered with some kind of jurisdiction on state issues: in 1993, for instance, the State Council (*Majlis al-Dawla*) endowed it with the monopoly of censorship for audio and audiovisual products, even declaring its opinion to be binding on the Ministry of Culture.[388] Yet, it was the first time that, at the constitutional level, Al-Azhar was granted such potentially vast powers. The formulation, indeed, was as broad as unspecific. Although for someone "there is little doubt that such consultation is mandatory",[389] not everyone agreed on this point: an expo-

[386] Brown, "Debating the Islamic Shari'a in 21st-Century Egypt," 14.

[387] An-Na'im, "The Legitimacy of Constitution-Making," 39.

[388] Moustafa, "The Islamist Trend in Egyptian Law," 625.

[389] Al-Ali, "The New Egyptian Constitution."

nent of the Freedom and Justice Party, member of the Constituent Assembly, stated the contrary.[390] The wording itself was ambiguous: "*yuhaddu*" simply means "is taken", thus allowing both speculations.

Other issues remained unclear. First of all, there was no mention of the consequences of the consultation, i.e. whether it was binding or not. And even if considered binding, it was not clarified whether, in case of disagreement, the consultation had be repeated on a second draft bill or at that point was up to the Parliament to decide how (and whether) to implement Al-Azhar's remarks. Furthermore, the article, by simply requiring the consultation in "matters pertaining to Islamic law", did not specify what was to be considered as "matters pertaining to Islamic law": as remarked above, potentially everything, even the colors to be worn or how to cut a beard, pertains to a loose interpretation of "Islamic law", in that it may be found in *hadiths*. In order to define this matter, a secondary procedural rule would have been necessary, adding further sources of tension in the balance of power.[391]

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[390] "Even if somebody has to consult al-Azhar, it doesn't mean its opinion has to be taken into account. But actually its interpretation, and this was adopted by the Shūrá Council in the latest law on Islamic bonds; it says we can consult with al-Azhar, but we don't have to. This is up the legislators and the Constitutional Court to consult with Azhar *if they want to*. And things are made clear. I mean, the Azhar can step in and give its opinion, but this opinion is *by no means obligatory*. Because if it was, ours would be a theocratic state and nobody wanted that, not in the assembly, not in the larger society." Amr Darrag, in Serodio, "Interview with Dr. Amr Darrag on the New Egyptian Constitution.". [emphasis added].

[391] Abu-Odeh, "Egypt's New Constitution," 170.

Interestingly, during the short life of article 4, these doubts moved from the theoretical realm to the practical one, manifesting the problematic nature of the provision. In January 2013, the Ministry of Finances presented to the Parliament a draft bill on an Islamic financial instrument. The Parliament consulted Al-Azhar, which raised a number of remarks, both linked to the procedure of consultation, deemed not enough deferent to the institution's weight,[392] and to the content of the law.[393] After amending the bill, the majority in the Parliament, linked to the Muslim Brotherhood, estimated that it was not under the obligation to submit it again to Al-Azhar's judgment. Interestingly, the Chamber also gave a positive judgment on the conformity of the final text to shari'a law, thereby triggering a potential theological struggle with Al-Azhar. In front of the level of criticism this decision raised, the president decided to send the text back to Al-Azhar, and the law was finally emanated only further to the latter's approval.[394]

Another controversial point concerned the addressees of article 4: was the text directed only to the Parliament in exerting the legislative function, or also to the Government as well as to the courts?[395]It is evi-

[392] Brown and Lombardi, "Contesting Islamic Constitutionalism," 258.

[393] Bernard-Maugiron, "La Constitution égyptienne de 2014 est-elle révolutionnaire ?," 74.

[394] Ibid.

[395] Al-Ali for instance seems to take for granted that "all bodies", included the Courts, must consult Al-Azhar, leaving it in doubt only the purview and the final weight of such a consultation. Al-Ali, "The New Egyptian Constitution."

dent how the non-theocratic nature of the state would have been seriously undermined, especially should the opinion of Al-Azhar have been configured as binding, or at least its final approval as necessary. Even if this were not the case, as the section regarding the independence of the judicial power seemed to confirm,[396] concerns were raised over the social and psychological pressure for a judge to disobey the Noble Al-Azhar: even the SCC, albeit maintaining the power of final decision *ex art.* 175, [397] would have been bound, in such scenario, to request the opinion of Al-Azhar, so that "the legitimacy of its determinations would broadly depend on its ability to outshine the opinion of the most prestigious religious institution in the Sunni world".[398] It must be further noted that the room for interpretation the Constitution granted to Al-Azhar was broader than that of the SCC, insofar as the former, contrarily to the latter, was limited neither by article 2, nor by article 219. Having said that, on a theoretical level, we must also report that in one case decided shortly before the suspension of the Constitution, the SCC showed it did not consider itself bound by either article 4 or article 219:

[396] *Inter alia*, art. 168: "The judicial power is independent. It is exercised by the courts of varying specializations and levels of jurisdiction. They pass their rulings in accordance with the law. The law determines their jurisdictions. Interference in the affairs of the courts is a crime that has no statute of limitations".

[397] "The High Constitutional Court is an independent judicial branch. Its seat is in the city of Cairo. It alone decides on the constitutionality of laws and regulations".

[398] Parolin, "(Re)Arrangement of State/Islam," 9.

in addressing an article 2 challenge to a provision regarding grandparental visitation rights, the Court did not either asked for Al-Azhar's opinion, or engage with *hadiths* and scholarly opinions.[399]

The 2012 Constitution had too a short life to assess the entity of the institutional conflicts art. 4 and 219 could raise. However, and in spite of those who see the concurrence of views on shari'a in a positive light, for ensuring the plural interpretation thereof,[400] the few cases emerged in 2013 showed that the system outlined in the constitution of 2012 risked either to deprive considerably the Parliament and the SCC of authority over the Egyptian legal system, or to create problematic institutional paralyses.

At any rate, neither article 4 nor article 219 have been taken up again in the text of 2014.

Nulla poena sine lege… or maybe not?

Another provision of the text of 2012 must be taken into consideration as one of the most dangerous Trojan horses of shari'a - although apparently neutral and not even mentioning Islam -, even in the form

[399] Brown and Lombardi, "Contesting Islamic Constitutionalism," 258.

[400] Giancarlo Anello, "'Plural Sharīʿah'. A Liberal Interpretation of the Sharīʿah Constitutional Clause of the 2014 Egyptian Constitution," *Arab Law Quarterly* 31, no. 1 (2017): 86.

of *hudud* punishments. It was about article 76, on the principle of *nullum crimen et nulla poena sine praevia lege poenali* – per se unknown to Islamic law, where judges decided on a case-by-case basis,[401] but sacrosanct in a system of rule of law. The article read as such: "There shall be no crime or penalty except in accordance with the law *or* the Constitution [emphasis added]".[402] In fact, criminal laws are not laid down in the *Constitution*, but in ordinary laws. The phrase *dusturi aw qanuni* constituted a grave violation of the abovementioned principle, in that it theoretically enabled the judge to establish a punishment not necessarily provided by the law, by referring to the Constitution itself: this could pave the way for the *hudud* penalties by virtue of article 2 and 219.[403]

The constitution of 2014 comes back to a classical guarantee of statutory reserve in criminal law. Article 95 reads as follows: "Penalties are personal. Crimes and penalties may only be based on the law, and penalties may only be inflicted by a judicial ruling. Penalties may only be inflicted for acts committed subsequent to the date on which the law enters into effect".

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[401] Nathalie Bernard-Maugiron, "Quelle place pour la Charîa dans l'Égypte post-Moubarak?," *Les Cahiers de l'Orient*, no. 3 (2012): 55.

[402] *Dusturi au qanuni.*

[403] Parolin, "(Re)Arrangement of State/Islam," 5. See also Mahmoud Salem, "Why the Salafis Agreed to the Constitution," *Atlantic Council*, December 3, 2012, http://www.atlanticcouncil.org/blogs/menasource/why-the-salafis-agreed-to-the-constitution.

Civil, military or theocratic state?

A pivotal issue bearing paramount importance in the ideological battleground between liberals and Islamists is the reference to the "civil" nature of the state (*dawla madaniyya*). The concept, undefined in itself, originates in the definition that Egyptian students sent to Europe in the 19th century gave of European states.[404] For liberals, this issue takes on great importance, as they read it in antithesis to a theocratic state. On their part, Islamists accommodate this concept either by adopting a narrow meaning of "theocratic", or by reading it in opposition to the "military" government, with no religious implication. This ambiguity explains why salafists despise the term as a Trojan horse of a secularist agenda, but the Muslim Brotherhood developed an accommodating position.[405] I am going to delve into the matter in further details while examining the Tunisian Constitution – where *dawla madaniyya* represented a downright battleground of words and interpretations.

The 2012 Constitution did not make any reference to this concept.

As to the 2014 Charter, although for a long time different versions mentioned the civil character of the state, the conjoint pressure of religious forces (Al-Azhar, Salafists, Copts) obtained the removal of such

[404] El-Daghili, "Al-Dawlah Al-Madanīyah," 189.

[405] Ibid., 191.

article, replaced by a reference to a "civil government" in the preamble[406]: "We are now drafting a Constitution that completes building a modern democratic state with a civil government".

It is not easy to ascertain whether this concept is going to have any practical effect whatsoever. At any rate, it must be mentioned that the preamble has legal force, as per article 227.

Contempt of the sacred

Another very dangerous provision of the 2012 Constitution was the free speech restriction provided at article 44, whereby "Insult or abuse of all religious messengers and prophets shall be prohibited".

Such a norm, not present in any form whatsoever in the 1971 Constitution, presented the typical formulation of the notorious "blasphemy laws", thus being clearly in conflict with the guarantee of free speech,[407] as more than once remarked also at the international level.[408]

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[406] Bernard-Maugiron, "La Constitution égyptienne de 2014 est-elle révolutionnaire ?," 17.

[407] Nathalie Bernard-Maugiron, Which Egypt in the New Constitution, interview by Michele Brignone, December 19, 2012, http://www.oasiscenter.eu/articles/arab-revolutions/2012/12/19/which-egypt-in-the-new-constitution.

[408] See for instance the remarks of the Human Rights Committee, the control body of the International Covenant on Civil and Political Rights to which Egypt is bound: "[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant", U.N. Human Rights Committee, "General Comment 34, Art. 19: Freedoms of Opinion and Expression" (CCPR/C/GC/34, 2011), para. 48.

The wording was indeed so vague that it left the way open for as severe as undetermined restrictions on speech, there being no specification at all on what "insult", "messengers" and "prophets" meant. And not only would have freedom of expression be undermined, but also freedom of religion and cult, insofar as denying the quality of "prophet" to someone recognized as such in Islam could easily be considered as an "insult".[409] This risk was increased by the fact that the three "religions of the Book" enjoyed a privileged status, being the only ones explicitly mentioned in the Constitution, at article 3.[410]

The text of 2014 does not contain a specific provision related to free speech, which represent a noteworthy formal improvement in the perspective of decriminalization of blasphemy.[411]

It remains to be seen which concrete effects this will have on the legal practice, considering that persecution against blasphemers and atheists has been going on for decades without an explicit constitutional provision, and in presence of constitutional guarantees for free speech.[412]

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[409] Cfr. Al-Ali, "The New Egyptian Constitution."

[410] "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".

[411] *V.* chapter VI

[412] *V.* chapter VI

Status of non-Muslim minorities

Both the Constitutions of 2012 and 2014 do not recognize minorities as such, attributing instead a privileged status to the "Heavenly religions" of Christianity and Judaism – the only ones tolerated in Islam.

According to article 3 of the 2012 constitution, "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".

During the drafting of the subsequent text, several members of the Constituent Committee had proposed to extend the recognition of minority rights to all non-Muslims, but in the face of fierce opposition from salafis and Al-Azhar, dreading a disruption of social order, they had to drop the idea. Hence, article 3 has been taken up word by word.[413]

This limited recognition also reverberates on freedom of worship: in fact, article 64, after declaring freedom of belief "absolute", specifies that the "freedom of practicing religious rituals and establishing places of worship *for the followers of revealed religions* is a right organized by law [emphasis added]". This provision too has been taken up from the

[413] Bernard-Maugiron, "La Constitution égyptienne de 2014 est-elle révolutionnaire ?," 12.

2012 Constitution, and is linked to the idea of different cults threatening public order.[414]

Women's rights

In the Constitution of 2012 no specific provision addressed women's equality. Significantly, women were taken under consideration only in the framework of the family, and mentioned in the article dedicated thereto (in striking similarity with the Universal Islamic Declaration of Human Rights, equally a Muslim Brotherhood product[415]). Article 10 read:

"The family is the basis of society and is based on religion, morality and patriotism. The state and society oversee the commitment to the genuine character of the Egyptian family, its cohesion and stability, and the consolidation and protection of its moral values. The foregoing is as organised by law.

The state guarantees maternal and child services free of charge, and guarantees the reconciliation between the duties of a woman toward her family and her work.

The state provides special care and protection to breadwinning and divorced women as well as widows."

[414] *V. infra,* chapter VI.

[415] *V. supra*, chapter II.

This is a typically conservative norm aimed at reinforcing the concept of the heterosexual family based on "religion, morality and patriotism", guaranteed by the control of both the "state and society", called to oversee "the protection of its moral values". Against this backdrop, it is no coincidence that women were taken into consideration only in this specific framework, insofar as, according to this mindset, therein they find their natural role, while their outside activities must not infringe these familiar "duties".

It is relevant to note that this provision constituted already an improvement from the earlier drafts Islamists proposed, which spoke of "complementarity" of women with men inside the family.[416] The obsession with women's "complementarity" is a recurring Islamist *topos*, that we find also in the Tunisian case.[417]

The constitutional text of 2014, article 11, partially maintains this conservative view (already present, it must be said, in the text of 1971): article 11 contains a paragraph stating that "The state commits to the protection of women against all forms of violence, and ensures women empowerment to reconcile the duties of a woman toward her family and her work requirements". The same article, however, contains clauses reinforcing the position of women in a significant way. First of all, it is worth noting that it is not placed anymore in the context of the

[416] Abu-Odeh, "Egypt's New Constitution," 168.

[417] *V. infra*, cap V.

family protection,[418] but is shaped as a specific provision centered on women rights. Completing the classically liberal provision guaranteeing the equality of all citizens with no discrimination (article 9), article 11 identifies a wide plethora of domains in which women need to be equal to men, and envisages elements of positive discrimination in order for the state to actually achieve such equality. In particular, "The state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution". Furthermore, "The state commits to taking the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by law. It grants women the right to hold public posts and high management posts in the state, and to appointment in judicial bodies and entities without discrimination". Finally, "the state commits to the protection of women against all forms of violence", with the acknowledgement of an endemic problem for Egypt.[419]

[418] Where the conservative attitude remains: article 10 reads as follow: " Family is the basis of society and is based on religion, morality, and patriotism. The state protects its cohesion and stability, and the consolidation of its values."

[419] Human Rights Watch, "Egypt: Epidemic of Sexual Violence," *Human Rights Watch*, July 3, 2013, https://www.hrw.org/news/2013/07/03/egypt-epidemic-sexual-violence. Rothna Begum, "How Egypt Can Turn the Tide on Sexual Assault," *Human Rights Watch*, June 15, 2014, https://www.hrw.org/news/2014/06/15/how-egypt-can-turn-tide-sexual-assault.

In conclusion, while the text of 2014 is still subject to criticism for assigning a "natural" role to women, as if this could be established by state and society and not remittable to the individual choice, it contains also positive elements that considerably improve the condition of women with respect to the Constitutions of 1971 and 2012.

Individual liberties vs. society's will

The more subtly dangerous provision – in a human rights perspective - of the 2012 Constitution was article 81, para. 2, whereby all rights and freedoms "shall be practiced in a manner not conflicting with the principles pertaining to State and Society Part included in this Constitution."

This meant that all articles enouncing freedoms and rights were subjugated to the moral and social norms expressed in Part One of the constitution. Hence, all rights expressed in the constitution were somehow submitted to a bunch of moral and societal norms which could impair their enjoinment in a unforeseeable way. The ultimate goal was that rights "be applied and interpreted in accordance with a conservative vision of society".[420]

For example, we have seen that article 10 contained very specific references to the "genuine character of the Egyptian family" and to its foundations constituted by "religion, morality and patriotism", and

[420] Al-Ali, "The New Egyptian Constitution."

called both "state and society"[421] to preserve its cohesion, stability, and "*moral* values", at the same time making an ambiguous statement over the role of the woman within it.[422] What kind of repercussion could these statements, read in combination with art. 81, have on personal freedom (art. 34[423]), especially in the domain of sexual rights, or on equality between men and women (not even explicitly stated, but only inferable from the general equality provision of art. 33[424])?

On the same line, art. 11 expressed a problematic and overbroad mission for the state to promote "ethics, public morality and public order, and foster a high level of education and of religious and patriotic values, scientific thinking, Arab culture, and the historical and cultural heritage of the people". This hodgepodge of ethical purposes assumed a dangerous purview in combination with article 81, in that it could be used as a "guidance" or even as a "limitation" in the enjoyment of rights, lying down the foundations of an ethical state: freedoms would have been in this way easily compressed by laws intended to further "ethics",

[421] The official governmental translation omits "المجتمع " (community, society), which instead is clearly present in the Arabic text.

[422] "The State shall ensure maternal and child health services free of charge, and enable the reconciliation between the duties of a woman toward her family and her work". Art. 10.3.

[423] " Personal freedom is a natural right. It is inviolable and untouchable."

[424] " The citizens enjoy equality before the law. They have identical rights and public duties. There is no discrimination among them".

"public morality", "public order", etc., defined according to the (religious) sensibility of legislators and rulers.

Furthermore, the kind of "final rule" enshrined at art. 81 immediately recalls the structure of the Cairo Declaration on Human Rights in Islam, articles 24 and 25, as seen in chapter II. The former states that "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah", and the latter that " The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration".[425] Final rules of this kind are particularly dangerous in a bill of rights, as they might void the latter of any meaning by submitting them to an undefined ethico-legal superstructure.

Indeed, in the words of El Fegiery, article 81 represented a direct threat to human rights, realized through a breach in the constitution: the legislator would have enjoyed greater flexibility in compressing the rights of women and minorities in the name of vague clauses such as "morality", "public decency", "public order", etc. The secular members of the Constituent Assembly stated the same.[426] On the same line Bernard-Maugiron, for whom it could be deduced from article 81 "que tous

[425] Cairo Declaration, *v. supra.*

[426] See for instance George Massiha: " Massīḥa also states that a couple of articles could provide extra possibilities for the Muslim Brotherhood and Salafist groups to interfere in peoples' lives, with the excuse of morality and maintaining traditions". Eline Kasanwidjojo, "Opposition to the Draft Constitution; Interview with George Massīḥa, One of the Members of the Constituent Assembly Who Has Withdrawn in Protest," *Arab West Report*, January 2, 2013, http://www.arabwestreport.info/ar/opposition-draft-constitution-interview-george-massiha-one-members-constituent-assembly-who-has.

les droits et libertés doivent être exercés d'une manière conforme à la *shari'a*, ce qui serait effectivement une interprétation potentiellement liberticide."[427] The Freedom and Justice Party tried instead to play off article 81 as merely redundant, and lacking any practical effect.[428]

As a matter of fact, although clauses referring to "public order" or "public decency" are often mentioned in constitutional texts, article 81 established a precise hierarchy excluding a judicial balancing test between contrasting interests (e.g., free speech vs. public order): it explicitly submitted individual liberties to superior "social interests", to be thus deemed prevalent by default in the balancing test.

This was confirmed by some disquieting declarations on the part of a member of the Constituent Assembly belonging to the Freedom and Justice Party: pressed by the interviewer over the ambiguity and the related risks of article 81, Amr Darrag rebutted that, far from being vague, it was very clear in the mind of Egyptians: "Based on this article, you can never pass a law in Egypt stating that a relationship between a man and a woman outside the marriage establishment is legal, ok? This is something that is basic in the society, in Islam, Christianity, and everywhere. Maybe not in most European countries right now, and maybe not it the

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[427] Bernard-Maugiron, Which Egypt in the New Constitution.

[428] " And what is wrong with that? In my opinion this is also redundant. It is redundant to say that nothing issued can contradict any part of the Constitution. Why do you have a Constitution in the first place then? You put it because you don't want anything in it or from it to contradict that text. But if you put it here, fine. It's just explaining things further. It doesn't add anything actually.", Darrag in Serodio, "Interview with Dr. Amr Darrag on the New Egyptian Constitution."

United States: in most of those countries they already legally accept, or are considering accepting, a family formed by two men or two women even, and it is ok, but it is not acceptable in the Egyptian society. So you have to have a reference to that in the Constitution".[429] Upon the interviewer's objection that such purpose should be clearly stated, since not all Egyptians share the same ethical views and see things in the same way, the genuine liberalism of the Muslim Brotherhood could get fully disclosed: "No, but on this issue, *you can never have dissent*. I dare you to have somebody coming out in public and say something of the sort. I mean, homosexuality is considered a crime in Egypt. For Egyptians, those for whom this Constitution applies, this article is not vague. It is very clear. […].Yes, there are people who have other opinions, but *the society does not accept them as legitimate*.[430]

These statements clearly show that article 81 was a instrument for the tyranny of the majority, in the framework of a Constitution conceived as a vehicle for the supremacy of certain moral views over individual rights.

The 2014 Constitution adopts a different approach in terms of limitations of rights, in fact aimed at *restricting* legitimate limitations: as per article 92, "Rights and freedoms of individual citizens may not be sus-

[429] Ibid.

[430] Ibid.

pended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation".

This formulation, recalling human rights treaties and article 49 of the Tunisian constitution,[431] should theoretically shelter constitutional liberties from legislators' whims.

Such guarantee is further reinforced by a radical novelty in the history of Egyptian constitutions, namely the force of law attributed to international agreements and conventions by article 93.[432] Although the mere "force of law" does not bestow international treaties with superiority over ordinary laws, with the consequence that, in case of conflict with an internal statute, the latter will prevail over a treaty adopted beforehand,[433] nevertheless this marks the first formal commitment of the Egyptian state to respect international treaties.[434]

Furthermore, chapter 4 is entirely consecrated to the rule of law, with the explicit assertion that "The rule of law is the basis of governance in the state".[435]

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[431] *V. infra,* chapter V.

[432] " The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances".

[433] On the basis of the chronological criterion.

[434] Bernard-Maugiron, "La Constitution égyptienne de 2014 est-elle révolutionnaire ?," 7. Further considerations on this article will be developed in chapter VIII.

[435] Article 94.

Final considerations

The Egyptian Constitution of 2012, adopted by an Islamist-dominated Assembly under an Islamist government, raised a multitude of serious preoccupations from a human rights perspective. These are the direct outcome of the extremely ample role that the tenets and rules of Islam, in their orthodox, conservative interpretation, came to play into the text, subsequently revised by a new Constituent Assembly after the deposition of president Morsi.

The comparison between the Constitution of 2012 and that of 2014 shows several theoretical improvements for the rights herein under consideration.

The heavily religious mark of the Constitution drafted by an almost entirely Islamist Assembly under the government of the Muslim Brotherhood has given in to a more modern and tendentially liberal text.

Yet, what is on paper often is not what is recognized in citizens' daily lives, as testified by the increasing human rights violations.[436] This is the unfortunate fruit of a tradition of military authoritarianism combined with an oppressive mantle of traditions and religion, which has

[436] Freedom House, "Egypt Country Report 2016," accessed June 25, 2017, https://freedomhouse.org/report/freedom-world/2016/egypt. Amnesty International, "Egypt 2016/2017," *Amnesty International*, accessed June 25, 2017, https://www.amnesty.org/en/countries/middle-east-and-north-africa/egypt/report-egypt/. Human Rights Watch, "Egypt, Events of 2016," accessed June 25, 2017, https://www.hrw.org/world-report/2017/country-chapters/egypt.

constantly reduced a certain version to legal liberalism, mainly due to the European transplant, to a merely formalistic simulacrum.[437]

[437] "It is true that Egyptian law per legal system embodied a certain version of legal liberalism, given its origin as a European transplant, but it had on the one hand picked up a great deal of illiberal residue over the years as a result of authoritarian governance and, on the other, it had not had the benefit of political liberalism as a background ideological formation to feed its interpretation precisely for the same reason. And while by virtue of being a European transplant that had historically displaced Islamic law by cornering it, making it an instance of "secular law," it had had to make do without the benefit of ideologized secularism to feed it interpretively. Indeed, it is by virtue of this "lack" that law had to function as a metonym for political liberalism and secularism—perhaps a poor one at that—for if one had to look for liberalism in Egypt one would find its traces in law—to propertrights, consent of contract, punishment only with proven guilt, protection of minors. And if one looked for secularism, one looked at transplanted civil, and criminal codes, evoking in their organization, structure, and rationale, far more the achievements of European enlightenment than anything related to pre-modern Islamic jurisprudence." Abu-Odeh, "Egypt's New Constitution," 164.

CHAPTER V

COMPROMISES AND AMBIGUITIES IN THE TUNISIAN CONSTITUTION OF 2014

Introduction

The Tunisian constitutional transition, even more than the Egyptian one, has been affected by the clash of two different worldviews. On the one hand, Habib Bourguiba's tendentially secular heritage, influenced by a local, moderate reading of Islam.[438] On the other hand, the Islamist forces linked either to the Ennahdha party - belonging the Muslim Brotherhood's galaxy[439] - or to Salafism.

The clash between these two worldviews could not but affect the Constitution's drafting, especially if we consider the decision of the Constituent Assembly not to use the text of 1958 as a basis, but to adopt a "blank canvas" approach.[440]

The main bones of contention in the Tunisian constituent process confirm the hypotheses enunciated in the introduction and in chapter

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[438] "Habib Bourguiba | President of Tunisia," *Encyclopedia Britannica*, accessed June 25, 2017, https://www.britannica.com/biography/Habib-Bourguiba.

[439] Valentina Colombo, *Tunisia: A Nascent Democracy under Siege* (Brussels: European Foundation for Democracy, 2015), 35, http://europeandemocracy.eu/wp-content/uploads/2015/09/Tunisia-a-nascent-democracy-under-siege.pdf.

[440] Chawki Gaddes, "Il processo costituente (2011-14): fasi e protagonisti," in *Tunisia: la primavera della Costituzione*, ed. Tania Groppi and Irene Spigno (Carocci, 2015), 55.

II, and confirmed by the Egyptian case, insofar as they gravitate around the usual suspects: role of Islam and shari'a law, freedom of thought and religion, freedom of expression, women's rights.

In generic terms, one may observe that the quest for consensus, while making a peaceful transition achievable – which was not to be taken for granted, considering the disastrous outcomes of the Arab Spring in the other countries of the region –, has come to a considerable price: a marked ambiguity over the most controversial articles of the Constitution. This was the inevitable result of the compromise between polarized oppositions, as the only way for each part to obtain a certain room of manoeuvre while securing a deal with the counterparts. Thereby, as has been rightly argued, the agreement on the terms came at the expense of the agreement on their meaning.[441]

For these reasons, the consensus over the Constitution has been defined a "legal fiction, but a necessary one".[442]

I shall examine here the most sensitive and controversial articles of the 2014 Constitution, all gravitating from different angles around religious issues. References to previous constitutional drafts will be made when appropriate.

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[441] Jean-Philippe Bras, "Un État « civil » peut-il être religieux ? Débats tunisiens," *Pouvoirs*, no. 156 (2016): 56.

[442] Ibid.

Article 1: the role of Islam

The first crucial issue the Constituent Assembly had to solve, whence any other stemmed, concerned the role of Islam in the new fundamental charter.

We may say that the constituents faced three main options. On the one side of the spectrum, one option was the establishment of an *état laïque*, a secular state with no official role for Islam, bringing to completion the reform process started by Habib Bourguiba[443] by tracing a downright Kemalist model. On the opposite side, the Tunisian transitional process could radically abandon its secular heritage by establishing an Islamic state regulated by shari'a law. The middle ground would entail a reference to Islam but not to *sharia*.

As to the first option, only some independent intellectuals fought in favour of secularism, but this idea did not take root in the Assembly

[443] Country leader from the Tunisian independence in 1956 until 1987, when he was removed from power by his prime minister, Zine El Abidine Ben Ali. A tendential secularist, he consistently pursued a modernization of Tunisia, economically and socially, that may be largely considered a main cause of the thriving middle-class civil society of the country. Its heritage, defined as "Bourguibism", is sometimes described as a less consistent and radical instance of Kemalism. See Steven A. Cook, "Tunisia: First Impressions," *Council on Foreign Relations*, November 12, 2014, https://www.cfr.org/blog-post/tunisia-first-impressions.

itself.[444] This is the same liberals' weakness that we have seen, in more extreme terms, in the Egyptian case: advocating strongly against Islam is never easy, as the tragic end of the secular leftist politicians Chokri Belaid and Mohamed Brahmi testifies.[445]

Religious parties, including Ennahdha in the first phase, sought to install shari'a as a main source of the legislation,[446] the same way we have seen to be the case for Egypt since 1971.[447] In March 2012, Ennahdha circulated a constitutional text whose article 10 decreed that "The Islamic shari'a is a main source of the legislation". The project also provided for a "High Shariatic Council" entrusted with the scrutiny of draft laws in order to assess their compatibility with shari'a law (following the model already in place in Iran and Pakistan, and attempted in Egypt with the 2012 Constitution).[448]

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[444] Yadh Ben Achour (Professor of Public Law, member of the Human Rights Committee and President of the Higher Authority for Realisation of the Objectives of the Revolution, Political Reform and Democratic transition), interviewed by the author. Tunis, August 2016.

[445] The two were killed by Islamists respectively in February and July 2013 for their openly secular positions.

[446] Elyès Bousbih and Abderrahmen Yaalaoui, "The Interplay of Politics and Religion in the New Tunisian Constitution: A Legal Analysis," in *The Tunisian Constitutional Process: Main Actors And Key Issues*, ed. Mathieu Rousselin and Christopher Smith (Duisburg: Centre for Global Cooperation Research, 2015), 18.

[447] Chapter II.

[448] The original text is available at "Ennahdha's Constitutional Project," accessed June 30, 2017, http://www.chawki.gaddes.org/resources/ennahdha.pdf. See also Bras, "Un État « civil »."

This effort was in parallel brought forward within the Constituent Assembly, with Ennadha's attempt to introduce a reference to shari'a law in the preamble and in article 1.[449] Yadh Ben Achour[450] reports that certain members even demanded that shari'a be *the* main source of the legislation. One, Sadok Chorou, former Ennahdha's chief, went thus far as to declare those opposing this proposal foes of Allah, to be punished accordingly per the Quran, 5:33, i.e. either with crucifixion, amputation of hand and feet or banishment.[451]

The middle ground consisted in granting Islam an official role while avoiding automatic legal implications therefrom. This intent, in its turn, could be fulfilled in two quite different ways: should Islam be the "religion of the state", with an institutional role, or the "religion of Tunisia", to be interpreted in sociological and cultural terms? In spite of the similar wording, the difference is substantial. In the first case, we have a legal recognition of the institutional role of Islam as a fundamental element of the state; Islam acquires in other words a *prescriptive* value, with all

[449] Bras, "Un État « civil »," 58. Bousbih and Yaalaoui, "The Interplay of Politics and Religion," 18.

[450] *V. supra* note 444.

[451] Yadh Ben Achour, "La force du droit ou La naissance d'une constitution en temps de révolution. (Pour Farouk Mechri)," *Le blog de Yadh Ben Achour*, January 25, 2015, http://yadhba.blogspot.com/2015/01/la-force-du-droit-ou-la-naissance-dune_25.html.

the legislative consequences that follow. In the second case, instead, Islam is a mere *descriptive* element, referring to the cultural and historical heritage of Tunisia.[452]

In the 1959 Constitution this issue was purposely left in the shade, with article 1 reading as follows: "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican." In the Arabic text, the possessive adjective in the clause "its religion" (*dinuha*) may grammatically refer either to the state (*dawla*) or to Tunisia, intended as the "nation", the "people".[453] This formulation was Bourguiba's strategic and ingenious ruse to appease Islamists by mentioning Islam while at the same time leaving a profound ambiguity over its meaning and effects into the legal system.

In the optic of compromise that informed the ANC's work, taking up again article 1 as it was seemed the only solution adoptable by consensus.

According to Fadhel Moussa, a member of the Constituent Assembly, "reference to Islam in this case is ambivalent, but it must be understood as the religion of the people, namely of human entities, more than as the religion of the state. The state, in fact, is a moral entity, and as such it cannot have a religion".[454]

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[452] Ben Achour, interview.

[453] Bras, "Un État « civil »," 60.

[454] Fadel Moussa, "Dalle tre paure... alle tre grazie. Testimonianza di un costituente-costituzionalista," in *Tunisia: la primavera della Costituzione*, ed. Tania Groppi and Irene Spigno (Carocci, 2015), 82. My own translation from Italian.

It goes without saying that this is not the interpretation of Ennahdha and the other Islamists. In fact, they tried another constitutional blitz, namely the introduction of an article that, while listing the non-amendable constitutional provisions, made explicit mention of "Islam as the religion of the state".[455] Such a move, dispelling the ambiguity over article 1, would have terminated the consensus around it. A panel of experts[456] consulted by the President of the Republic found also a legal contradiction between the proposed wording and article 2, enunciating the civil character of the state, contradiction furthermore reiterated within article 141 itself qualifying the civil character of the state as another non-amendable provision.[457] The panel of experts warned indeed that the vague concept of "state religion" paved the way for a theocratic, totalitarian system, incompatible with the civil nature of the state and jeopardizing the very democratic mission of the revolution.[458]

The Venice Commission of the Council of Europe also criticized this article, deeming it to go "far beyond the wording of Article 1, which states that Islam is the religion of Tunisia (= of the majority of Tunisians). This is problematic, because it is inconsistent with Articles 1 and 2 and

[455] Art. 141, draft 1 June 2013. Bras, "Un État « civil »," 61.

[456] Yadh Ben Achour et al., "Muqtarahat Hawla Mashru' Al-Dustur (Proposals on the Constitutional Project)," June 1, 2013.

[457] Ben Achour, "La force du droit."

[458] Ibid.

with the guarantees of the state's impartiality and neutrality contained in Articles 14 and 15".[459]

The only way to restore consensus was eventually to restore the ambiguity: the article listing the non-amendable provisions was finally deleted and replaced with a non-amendability clause at the bottom of each concerned article.

As a final consideration related to article 1, it must be noted that, whatever its interpretation, a substantial privilege for Islam is contained in article 74, whereby the President of the Republic must be Muslim. This obviously represents at one time a serious breach of freedom of conscience (article 6), and of the principle of equality of all citizens (article 21).

On these bases, the 2014 Constitution may be classified as "not secular, but friendly to democracy" as per Stepan's criteria.[460] Furthermore, with the final formulation of article 1, "Tunisia becomes […] the only Arab country not to proclaim Islam as the religion of the state".[461]

Or not to proclaim it explicitly, at least.

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[459] Venice Commission, "Opinion on the Final Draft Constitution of the Republic of Tunisia," October 17, 2013, 8.

[460] Pietro Longo, "L'islam nella nuova Costituzione: dallo Stato neutrale allo Stato 'protettore,'" in *Tunisia: la primavera della Costituzione*, ed. Tania Groppi and Irene Spigno (Carocci, 2015), 109.

[461] Ben Achour, "La force du droit."

Article 2: The "civil state", *Dawla Madaniyya*

I have already touched upon the concept of *dawla madaniyya* in the Egyptian case. In Tunisia the greater strength of secular forces triggered a more heated debate over a definition they deem crucial.

The notion of civil state appears twice in the final text of the Constitution, in the preamble and in article 2 – another non-amendable one.

Once again, this achievement of the secularist bloc has been substantially made possible by the ambiguity of the adjective "civil", which is basically interpreted in as many ways as the readers, as already highlighted: "In the Islamic constitutional lexicon, the adjective 'civil' (*madaniyya*) is used to define a state governed by civilians, as opposed to a military regime (*dawla 'askariyya*) and to a theocratic one (*dawla ilahiyya*)." [462]

Even in the latter acceptation, the principle may be easily accommodated within the Islamist discourse: for Islamists, a state may be "civil", as long as it has "Islamic reference" (*dawlah madaniyya bi-marja'iyya islamiyya*).[463] In consideration of the duplicity around the concept of "theocracy", explained in chapter I, we may argue that it is very easy for Islamists to accept that the state is "civil" and not "theocratic", in

[462] Longo, "L'islam nella nuova Costituzione," 112. My own translation from Italian. El-Daghili, "Al-Dawlah Al-Madanīyah," 191.

[463] *Ibid.*

that it is not governed by the clergy, hence "the adjective has no meaning in relation to laicity and secularism".[464] As Ameur Larayedh, previously head of Ennahdha's political bureau, said: "Il n'y a pas d'État religieux en Islam".[465] The story is likely to change radically as far as "God's sovereignty" is concerned, as demonstrated by the attempt to introduce shari'a in the Constitution. In other words, the civil nature of the state does not seem to imply for Islamists a separation between religion, law and politics, but merely the construction of a state ruled by non-religious figures. This must be nevertheless shaped upon Islamic values (and possibly rules).[466]

That is how, for Islamists, article 2 is perfectly compatible with article 1: "Al-Nahdha's emphasis on democracy was also accompanied by a desire to keep established religion at the heart of the polity. […] This allowed the movement to speak of the state as a 'civil state' (dawla madaniyya) that was nonetheless the guardian and the regulator of Islam and to keep Islam–and conservative moral values–at the center of politics."[467] Forsaking shari'a *de iure* does not mean renouncing it *de facto*, as long as legislation is tailored upon Islamic teachings. That is why "Ghannouchi does not talk of 'shari'a implementation' (*tatbiq al-shari'a*,

[464] Longo, "L'islam nella nuova Costituzione," 112.

[465] Bras, "Un État « civil »," 67.

[466] Ibid.

[467] Malika Zeghal, "Competing Ways of Life: Islamism, Secularism, and Public Order in the Tunisian Transition: Competing Ways of Life," *Constellations* 20, no. 2 (June 2013): 13, https://dash.harvard.edu/bitstream/handle/1/12724047/64185274.pdf?sequence=1.

a phrase widely used by other Islamist movements), but rather of 'Islamic implementation' (*tatbiq islami*)",[468] i.e, a "policy making based on religious values (*nizam mina'l qiyam*)".[469] In other words, "the civil state with Islamic reference" that Ennahdha espouses.[470] As Baudoin Dupret rightfully notes, never did the party renounce the project of islamization, "but as in Erdoğan's Turkey, it prefers to substitute to symbolic moves a more gradualist approach using the de facto acceptance of Sharīʿah 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 Sharīʿah'".[471] This is confirmed by a leaked video secretly filming Ghannouchi addressing Salafists: therein, he recommended them a tactical approach in pursuing sharia, urging them to build schools and universities to spread the Islamist ideology. He also mocked secularists, opposing shari'a while accepting the role of Islam enshrined in article 1, as being like "those who accepted the content but rejected the name itself".[472]

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[468] Ibid., 16.

[469] Ibid., 17.

[470] Longo, "L'islam nella nuova Costituzione," 110.

[471] Baudouin Dupret, "The Relationship between Constitutions, Politics and Islam: A Comparative Analysis of the North African Countries," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 241.

[472] Imen Gallala-Arndt, "Tunisia after the Arab Spring: Women's Rights at Risk?," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 609.

This is precisely the kind of "secularism" and "civil state" which is acceptable to Islamists. As stated by Shawqi Bu'anani in the weekly En-nadha party's journal *al-Fajr*, there are "two sorts of secularism: the first, which [Bu'anani] accepted, separated the state and the religious institution; the second was 'radical' and sought to eliminate religion from the public space and from life altogether. For Bu'anani radical secularism could only produce dictatorship."[473]

We find a similarly narrow acceptance of secularism in Ghannouchi's statements. In a lecture he gave in 2012 on "Secularism and Relation between Religion and the State from the Perspective of the Nadha Party", he spoke of secularism as a "procedural solution", evolved as such even in the West, "and not as a philosophy or theory of existence".[474] This concept, continued Ghannouchi, has always been clearly present also in the Islamic polity. Indeed, if it is true that "Islam, since its inception, has always combined religion with politics, religion and state",[475] this is because "Islam is not merely a religion but also carries a civilizational meaning". The Constitution of Medina (*Sahifa*) consecrates this new order, by putting under one nation Muslim and Jewish tribes, so that "the distinction between that which is political and that

[473] Zeghal, "Competing Ways of Life," 22.

[474] Sami A. Aldeeb Abu-Sahlieh, "Full Transcript of Rached Ghannouchi's Lecture on Secularism – March, 2, 2012," *Savoir Ou Se Faire Avoir*, March 9, 2012, http://www.blog.sami-aldeeb.com/2012/03/09/full-transcript-of-rached-ghannouchis-lecture-on-secularism-march-2-2012/.

[475] Ibid.

which is religious is clear in the Sahifah, in that Muslims are a religious nation (ummah) and the Jews another, but the combination of the two plus other polytheists made up a nation in the political sense".[476]

Here we have according to him the first instance of secularism, in its acceptable meaning: the Prophet was at the same time "the founder of religion as well as the state",[477] but the two entities remained distinct.

At this point, one must try to understand what qualifies, in this picture, as extraneous to religion. Ghannouchi's answer to this question is that

> "It is not the duty of religion to teach us agricultural, industrial or even governing techniques, because reason is qualified to reach these truths through the accumulation of experiences. The role of religion, however, is […] to provide us with a system of values and principles that would guide our *thinking, behaviour*, and the *regulations* of the state to which we aspire".[478]

This extremely revealing statement shows clearly that only the "technical", and non-personal, domains are conceived as non-religious, or "secular", while religion must guide *thinking, behaviour* and *regulations* of the state: i.e., the entire spectrum of both the interior and exterior human life. In other words, what he champion is not a *substantial*

[476] Ibid.

[477] Ibid.

[478] Ibid. Emphasis added.

secularism that leaves individuals free to determine their own convictions and conducts, and the state its democratic legislation, without religious interference. This is clearly ruled out by the very nature of Islam:

"Islam since its inception and throughout its history has not known this separation between state and religion in the sense of excluding religion from public life. And Muslims, to this day, have been influenced by Islam and inspired by its teachings and guidance in their civic life, with the distinction remaining clear".[479]

When it comes more specifically to state legislation,

"Throughout Islamic history, the state has always been influenced by Islam in one way or another in its practices, and its laws were legislated for in light of the Islamic values as understood at that particular time and place".[480]

Democracy, in this sense, is merely meant to avoid a certain interpretation of Islam being imposed by the ruler. The very essence of this reasoning is made explicit a few lines below:

"While the problematique in the west revolved around ways of liberating the state from religion and lead to destructive wars, in our context the problem is one of liberating religion from the state and preventing it from dominating religion, and keeping the latter in the societal realm, open to all Muslims to read the Qur'an and

[479] Ibid.

[480] Ibid.

understand it in the manner that they deem appropriate, and that there is no harm in the plurality that is combined with tolerance".[481]

Once again, Islamist parties' main preoccupation seems to avoid state's control of Islam; that's the meaning and the goal of democracy: "the democratic mechanism is the best embodiment of the *Shura* (consultation) value in Islam".[482] This also explains Ennahdha's ambivalence surrounding the reciprocal relation between state and religion: if, on the one hand, they clearly ask of the state to give up the control on mosques, on the other hand they also clearly express the idea that "the state must 'organize' (*tanzim*) religion without controlling it".[483] We find here a pattern already seen in the case of Egypt, reflecting similar position of the Freedom and Justice Party: while one of their major preoccupations is to end the control of non-Islamists regimes over religious institutions and place of prayers, and equally to avoid a theocratic state where imams rule the polity, in parallel the state is called upon to enact Islamic rules.

The understanding of democracy and civil state showed above falls within the theory enunciated in Chapter I: the state is regulated by shari'a and its rules, allowing flexibility on *procedures*, which are largely irrelevant to it, as long as the substance of its provisions is maintained.

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[481] Ibid.

[482] Ibid.

[483] Zeghal, "Competing Ways of Life," 16.

As previously said, *shura* can inspire the democratic procedure of casting the vote in the ballot box, but is totally silent when it comes to the rule of law, separation of powers and individual rights.

From this point of view, hardly could one seethe Islamist reading of *dawla madaniyya* as opposed to *dawla diniyya*, or "religious state".[484] As Rached Ghannouchi himself has stressed, article 1 is clear: not only does it prevent conceiving Tunisia as an "atheist" state, but even as a "secular" one in which religion is detached from politics.[485]

Conversely, non-Islamists read article 2 as the guarantee of the primacy of the constitution and democratic, man-made law over religious rules. In other words, as a guarantee that the state is not a religious one in terms of government.[486] In the words of Fadhel Moussa, "[t]he entire Constitution is summarized in this article 2, which is a bulwark against those who would go looking for the foundation of our positive law outside the Constitution".[487] This interpretation of *madaniyya* is therefore in opposition not only to a theocratic state, but even to a state shaped

[484] Ben Achour, "La force du droit."

[485] Gérard Haddad, "Ghannouchi : « Le Modèle Pour La Tunisie ? Les Pays Scandinaves »," *L'Obs*, December 25, 2013, http://tempsreel.nouvelobs.com/rue89/rue89-monde/20131225.RUE0981/ghannouchi-le-modele-pour-la-tunisie-les-pays-scandinaves.html.

[486] Tania Groppi, "L'identità costituzionale tunisina nella Costituzione del 2014," in *Tunisia: la primavera della Costituzione*, ed. Tania Groppi and Irene Spigno (Carocci, 2015), 32.

[487] Moussa, "Dalle tre paure," 82.

by religious rules and morals, and becomes closer to the secular state. According to Gamal al-Banna, younger brother of the Muslim Brotherhood founder's Hasan al-Banna, "[t]he 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".[488]

Once again, consensus in the *Assemblée National Constituante* could be reached just because each part has been left with room for interpreting the provision in the way it feels more congenial.

Article 6, sive "Le poutpourri de la constitution tunisienne"

This is one of the most crucial, controversial, and also innovative articles in the Constitution. It is the instance *par excellance* of the various ideologies informing the constitutional process, making it "le poutpourri de la constitution tunisienne", to quote Yadh Ben Achour.[489]

Article 6 stipulates:

"The State is the guardian of religion. It guarantees freedom of conscience and belief, freedom of worship, and the freedom of mosques and places of worship from all partisan abuse. The State undertakes to disseminate the values of moderation and

[488] El-Daghili, "Al-Dawlah Al-Madanīyah," 192.

[489] Ben Achour, interview.

tolerance, to safeguard the sacred and prohibit any attack on the latter. It also undertakes to prohibit, and confront, calls for *takfir* [excommunication] and incitement to violence and hatred."

From the very first reading, one may remarks that it contains several elements, each of them requiring scrupulous analysis.

There are four main pillars in article 6:

1) Protection of religion and prohibition of attacks against the "sacred";

2) Protection of freedom of conscience and belief;

3) Promotion of moderation and tolerance;

4) Prohibition of *takfir.*

The overall goal of this article is to strike a delicate balance between liberal and religious elements, by guaranteeing freedom of conscience while ensuring that it stop short of abusing "religion" and the "sacred". At the same time, the religion deserving protection must not be radical, but based on the values of "moderation" and "tolerance", while any attempt to impose the former, through the odious practice of excommunication (*takfir*), shall be banned.

This formulation, however, is problematic and ambiguous, especially in relation to the safeguard of religion.

Starting from the very beginning, what does it mean that the state is the "guardian of religion"? First of all, which religion? "Religion" in general, as the generic reference to the "sacred" in the same article would

suggest,[490] or Islam,[491] as would appear by reading article 6 in combination with article 1, sanctioning Islam as Tunisia's religion, and article 146, requiring that all articles of the Constitution be read harmonically as an indissoluble whole? It goes without saying that only the first acceptation would allow an interpretation compatible with international standards,[492] and even in that case it would entail discrimination against non-religious philosophies and creeds.

The term "guardian" is extremely ambiguous as well: which role does it vest on the state? "It could mean it is a general overseer of religion, empowered only to manage its broad outlines; or it could mean it is a promoter of religion, and as such invested with the power to refashion it".[493] The Arabic term is *raia*, from the root *ra'a*, which the Wehr dictionary translates as "to guard, protect, take under one's wing", "take care of", "respect". The Arabic word is therefore a polysemic one too, allowing for multiple interpretations and legal uses.

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[490] It must be also noted that the Arabic term for "sacred" is in the plural form (*muqaddasat*), which seems to corroborate the hypothesis that it is not limited to Islam. However, another possible interpretation is that it merely refers to the "sanctities" of Islam. *V. infra.*

[491] Horchani, "Religious Authorities and Constitutional Reform," 205.

[492] Venice Commission, "Opinion on the Final Draft," 7. Irene Spigno, "Diritti e doveri, tra universalismo e particolarismo," in *Tunisia: la primavera della Costituzione*, ed. Tania Groppi and Irene Spigno (Carocci, 2015), 100.

[493] Bousbih and Yaalaoui, "The Interplay of Politics and Religion," 20.

What is a "guardian" required to do in order to safeguard the object of its protection? One of its duties is explicitly stated in article 6: "safeguard the sacred and prohibit any attack on the latter". What is "sacred"? The first legitimate question, once again, is to understand whether it refers exclusively to Islam or also to other religions, and what it concretely denotes. The term used in Arabic is *muqaddasat*, which Wher translates as "sacred things". He further specifies that the verb *qadusa* (sanctify, glorify) is used also in a Christian milieu to denote the process of canonization and the celebration of the Mass. At the same time, one cannot exclude an interpretation centered on the *res sacrae* of Islam: mosques, Qurans, etc.

Inevitably, these provisions, having the nature of mere principles, will be defined in concrete terms by secondary norms and by their jurisprudential implementation.[494] However, as correctly pointed out by the Venice Commission, "[a] state which proclaims itself to be civil (Article 2) should not be competent to determine what is sacred and 'protect' that which is held to be so".[495]

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[494] "The ambiguity of this constitutional provision (Article 6), as it appears in the chapter on 'General Principles', allows maximum capture of the varied real-life situations involving religion. The actual process of pin-pointing will then take place via other legal provisions, which will act empirically, on an 'as and when' basis. This is the core function of 'principles' in law: they take the form of programmatic norms that require the creation of further norms to bring about their own implementation." Ibid.

[495] Venice Commission, "Opinion on the Final Draft," 9.

Furthermore, such wording could legitimize the criminalization of blasphemy, thereby curtailing freedom of thought, conscience and expression. This risk has been stressed, once again, by the Venice Commission,[496] as well as by Human Rights Watch: Amna Guellali, director of the Tunisian office, remarked that the protection of the sacred could lead to the imposition of an orthodox interpretation of the sacred texts and their immutable dogmas, thereby undermining any possibility of "critique and dispute".[497]

The abovementioned panel of experts also criticized this article on several grounds. First of all, they observed, it is not the task of a democratic state to protect one religion with the exclusion of the others; therefore, the experts suggested the replacement of *ra'aya ad-din* with the plural *ra'aya ad-diyan*, i.e. "guardian of religions".[498]

Secondly, they pointed the finger toward another crucial part, i.e. the safeguard of places of worship form all "*partisan* [*hizbi*] instrumentalization": as the panel correctly observes, such formulation does not guarantee a safe space from *political* [*siyasi*] instrumentalizations – the real danger, in consideration of the use and misuse that imams serving a

[496] Ibid.

[497] Anna Guellali, "The Problem with Tunisia's New Constitution," *Human Rights Watch*, February 3, 2014, https://www.hrw.org/news/2014/02/03/problem-tunisias-new-constitution.

[498] Ben Achour et al., "Muqtarahat Hawla Mashru' Al-Dustur (Proposals on the Constitutional Project)."

political agenda do of *hadiths* with political content. They suggested therefore amending the article accordingly.[499]

Regrettably, these proposals from the Panel of Experts did not find their way into the final draft.

Freedom of conscience also represented a minefield within the Assembly.

It is interesting to note that the amendment to suppress the clause was presented and voted by a plethora of different deputies representing the entire political spectrum.[500] The reason why deputies coming from such different ideological, religious and political backgrounds wanted all together to suppress freedom of conscience is not immediately intelligible, and I received different explanations for that. According to Chawki Gaddes,[501] Secretary General of the Tunisian Association of Constitutional Law and President of the Tunisian Privacy Commission, political games took place inside the Assembly that went beyond rigid ideological lines: votes were also casted in fulfillment of political tradeoffs.[502] In the opinion of Yadh Ben Achour, who personally conducted a campaign in favor of freedom of conscience, the last-mentioned constitutes the gate

[499] Ibid.

[500] *V.* "Vote Sur Un Amendement de L'article 6: Supprimer 'liberté de Conscience' et 'libre Exercice Du Culte,'" *Marsad*, January 4, 2014, http://majles.marsad.tn/fr/vote/52caea0112bdaa7f9b90f457.

[501] Interviewed by the author, Tunis, July 2016.

[502] Gaddes, interview.

towards blasphemy and apostasy: this possibility is unacceptable even to some non-Islamists.[503] According to the jurist Wahid Ferchichi,[504] President of the Tunisian Association Defending Individual Liberties, all the above are true, as multiple and personal were the reasons to vote against it: some did it out of political calculation; others for conservatism; still others, paradoxically, for fear of the door freedom of conscience might open to Islamists. For instance, Ferchichi warns, one could invoke freedom of conscience to justify his adherence to the Quranic verses instigating hatred against Jews or homosexuals.[505]

In relation to freedom of conscience, we must further note the notable absence of her "sister", namely freedom of religion. The state is bestowed with the "protection of religion", but no provision in the constitution mentions the individual freedom of religion. This may assume a worrying connotation if correlated with the privilege granted to Islam

[503] Ibid.

[504] Jurist, professor and president of the Tunisian Association Defending Individual Liberties (ADLI), interviewed by the author, Tunis, July 2016.

[505] I had a personal confirmation of this during a public exchange of opinion with Rached Ghannouchi at the Euromediterraneans Dialogues 2016, organized in Rome by the Italian Ministry of Foreign Affairs and the Istituto per gli Studi di Politica Internazionale (ISPI). I asked Mr. Ghannouchi the position of Ennadha on three issues which start to emerge in the Tunisian public debate, namely the decriminalization of homosexuality, the right of Muslim women to marry a non-Muslim man and the equality between men and women in inheritance rights. He accurately avoided to reply, by invoking the "freedom of conscience" that the constitution bestows on every member of parliament. My question and the reply may be found here, min. 40.00: https://www.youtube.com/watch?v=-YtAyBlOYkE

in different parts of the Constitution,[506] and with the shariatic prohibition of apostasy.

Furthermore, in spite of freedom of conscience, the President of the Republic (art. 76), the members of the Government (art. 89) and the members of Parliament (art. 58) must take an oath "by God Almighty": this represents a patent discrimination against atheists and agnostics, and a serious breach of freedom of conscience.

The last section of article 6 is split into two parts, linked to each other. "The state undertakes to disseminate the values of moderation and tolerance": this part of the article builds upon the preamble, expressing Tunisian people's "commitment to the teachings of Islam and its aims characterized by openness and moderation". By reading the two provisions combined, as per articles 145[507] and 146[508], it emerges that "the sole purpose of the teachings of Islam would be to foster openness and tolerance".[509]

Such "openness" and "tolerance" are clearly intertwined with the prohibition of *takfir*: by means of these provisions, seculars aimed to secure an interpretation of Islam rejecting the extremism and exclusiveness typical of Salafism and Wahhabism, as well as the deadly threats

[506] Venice Commission, "Opinion on the Final Draft," 9.

[507] "This Constitution's preamble is an integral part of the Constitution."

[508] "The Constitution's provisions shall be understood and interpreted in harmony, as in indissoluble whole."

[509] Bousbih and Yaalaoui, "The Interplay of Politics and Religion," 22.

against the unorthodox. This is a very unique provision, added at the last minute further to an incident within the Constituent Assembly: a prominent Ennadha leader publicly accused a socialist of unbelief, after the latter asked to amend article 1 so as to read that Islam is "the religion of the people". As stressed above, the accusation of unbelief is a particularly serious in an Islamic context, not only for the reputation of a Muslim, but also for his very safety. This is why, following the incident, the secular opposition demanded an explicit prohibition of *takfir*.[510]

While the intention and the spirit behind the promotion of "moderation" and the prohibition of *takfir* are commendable, not all liberals are happy with it. Gaddes, in criticizing the whole article as a "terrible compromise, which did not satisfy anybody", adds that the "prohibition of takfir" has no concrete meaning whatsoever.[511] Ferchichi equally warns against introducing such purely religious elements in the state's constitution, insofar as it creates a dangerous commixture between heterogeneous elements.[512]

In other words, giving religion such a legal relevance, albeit with the best intentions, puts the "civil state" on a slippery slope.

[510] Longo, "L'islam nella nuova Costituzione," 115.

[511] Gaddes, interview.

[512] Ferchichi, interview.

Women vs men: not equal, but "complementary".

Tunisia has traditionally been a very advanced state compared to the rest of the Arab world as far as women's rights are concerned. The "Code of personal status" since 1956 has been granting women the right to divorce, abolished polygamy and established the principle of freedom of consent to marriage.

The Ennahdha party has taken an ambivalent stance on this issue: while it has been purporting to be a staunch advocate for women rights and a supporter of the Code of personal status,[513] its proposals in the constituent phase and some written statements of the head of the party, Rached Ghannouchi, tell a quite different story.

Starting from the latter, a public exchange of view I personally had with Mr Ghannouchi over the right of Muslim women to marry non-Muslim men and the equality between men and women in inheritance rights (both still not guaranteed in Tunisia), confirmed his ambiguity on the matter.[514] But his most explicitly controversial statements are contained in an essay published in 2000 by the Maghreb Center for Research and Translation in London. Therein, Ghannouchi devotes a chapter to the Code, significantly titling it "The destruction of the family in Tunisia and the Code of Personal Status".[515] Ghannouchi criticizes

[513] Colombo, *Tunisia: A Nascent Democracy under Siege*, 48.

[514] See above, note 505.

[515] Colombo, *Tunisia: A Nascent Democracy under Siege*, 32.

the code for being "'dangerous' and 'against the intellectual, cultural and legal heritage' of Tunisia, and for being a clear influence of the 'Western wave'".[516] He also attacks the egalitarian idea behind it, for aiming to push the woman in any role of society, thereby creating social troubles: "Woman was pushed into the police creating many problems, in the army, women became drivers of buses and planes [...] all this to demonstrate that our regime was really civilised... and that the Tunisian woman was free!".[517] To this view, he opposes one based on the *complementary* roles of men and women, and on the Islamic *authority* (*qawwama*) of the former over the latter.[518]

Such idea of complementarity between men and women is what Islamist parties tried to inject into the Constitution during the first drafting.

It must be firstly said that Ennahdha, in its constitutional project, did not even mention women. The article focusing on equality, art. 3, merely referred to the equality of all "Tunisians" before the law, using the male adjective *tunisiyyin* and without mentioning the forbidden grounds for discrimination (sex, race, religion, ethnicity, and so on).

In the first constitutional draft of August 2012, religious parties advanced an article on women's "equality" reading as such:

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[516] Ibid., 33.

[517] Ibid.

[518] Ibid.

"The state shall guarantee the protection of the rights of women and shall support the gains thereof as true partners to men in the building of the nation and as having a role *complementary* thereto within the family. The state shall guarantee the provision of equal opportunities between men and women in the bearing of various responsibilities. The state shall guarantee the elimination of all forms of violence against women."[519]

Ennadha voted against an alternative version binding the state to guarantee women's rights and their advancement in all fields, and prohibiting the emanation of any laws undermining them.[520] According to Faridah al-Abidi, Ennadha chair of the committee on Rights and Freedoms within the Constitutent Assembly, "there is no absolute equality between men and women".[521]

Why did Islamists push for this idea, and how should "complementarity" be read from an Islamic perspective?

The concept has its roots in the Quran itself, II.228: " […] And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. And Allah is Exalted in Power, Wise". It is interesting to read the explanation for this verse provided by Hamza Roberto Piccardo in his Italian edition of the Quran:

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[519] Mounira M. Charrad and Amina Zarrugh, "Equal or Complementary? Women in the New Tunisian Constitution after the Arab Spring," *The Journal of North African Studies* 19, no. 2 (March 15, 2014): 235. Emphasis added.

[520] Gallala-Arndt, "Tunisia after the Arab Spring," 612.

[521] Ibid., 611.

"This verse may give rise to misunderstandings, because it might give the impression that enshrines a disparity between the rights of men and women. [...] It is therefore a relative superiority in certain fields [...] but it has to be understood in terms of the intrinsic value of being male and female, and never to be discharged in the direction of a hateful domain or blind imposition. [...] The physiological and psychological differences between male and female should, in respect of their diversity, create a harmonious development of the family and society. Male sensibility is mostly exterior, projected in a field outside the family that tends to become public and political. The female one is mostly interior, attentive to itself, aiming at the protection of the acquired or the acquisition of simple means of sustenance and security [...] Within the family the respect of the Law and the Tradition of Allah means to avoid creating situations that require an affirmation of power that mortifies the complementarity of spouses. [...] Being different and complementary also implies the assumption by man of the lead, which exercised in the right way, does not undervalue the female, but completes her".[522]

Tunisian women were not quite convinced with such reasoning. The reference to them as "partners" of men, as if they had no autonomous function in society, and even more the degradation from "equality" to "complementarity", caused an uproar within the civil society.[523]

Eventually, the article was withdrawn. In the final version adopted by the Constituent Assembly, article 21 specifies that all *male* and *female* citizens (*al-muwatinun wa-al-muwatinat*) are equal before the law.

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[522] Piccardo in Colombo, *Tunisia: A Nascent Democracy under Siege*, 33.

[523] Tania Abbiate, "La partecipazione popolare al processo costituente," in *Tunisia: la primavera della Costituzione*, ed. Tania Groppi and Irene Spigno (Carocci, 2015), 69. Moussa, "Dalle tre paure," 80.

Furthermore, article 46 secures the protection and reinforcement of women's accrued rights, and binds the state to guarantee equal opportunities between men and women "to all level of responsibility in all domains". In terms of positive actions, "The state works to attain parity between women and men in elected Assemblies" and "to take all necessary measures in order to eradicate violence against women".

Although the wording is generally considered very advanced, we must also report the doubts of those scholars who see therein the protection of women equality only in the public domain, given that article 21 guarantees equality in citizenship rights, while article 46, addressing "all domains", does not speak of equality of rights but merely of "opportunities". Considering the difficulties civil society groups are encountering to reform inheritance law in an egalitarian way, and the fact that the right of a Muslim woman to marry a non-Muslim man is still controversial,[524] these preoccupations may not be immediately dismissed.

Some concerns for women's rights may also come from article 49, in that this allows restrictions of rights for the sake of public morals – a vague and open provision that could be read in a liberticidal way, as recent facts testify.[525]

[524] Gallala-Arndt, "Tunisia after the Arab Spring," 601–2.

[525] Rihab Boukhayatia, "En Tunisie, Est-Il Interdit Aux Filles D'aller Dans Un Bar? Oui, Selon Le Ministère de l'Intérieur," *Al Huffington Post*, accessed June 30, 2017, http://www.huffpostmaghreb.com/2016/11/24/tunisie-bar-filles-_n_13206756.html.

To conclude on this topic, it is appropriate to recall that Tunisia in 2011 dropped all reservations to the Convention on the Elimination of Discrimination Against Women (CEDAW). Such reservation concerned article 9, on acquiring nationality for matrilineal descent; article 15, on the woman's right to choose her domicile; and article 16, on equality of rights in the field of marriage, family law and succession.[526] Ennadha tried to oppose the move claiming that the CEDAW would "encourage promiscuity and a chaotic sex life",[527] but eventually the reservations were lifted.

In consideration of article 20, conferring international treaties a higher status than ordinary laws, the latter will now have to comply with CEDAW provisions.[528]

Final considerations

Overall, the Tunisian constitution represents a progressive text, with a significant potential in terms of democratic development for the state, and perhaps for the region as a whole. Tunisia, indeed, is not only

[526] Gallala-Arndt, "Tunisia after the Arab Spring," 604. It is interesting to note that such reservations had been presented as a temporary measure before conforming the Tunisian legislation.

[527] Ibid., 608.

[528] Eleonora Ceccherini, "La questione dell'eguaglianza uomo-donna," in *Tunisia: la primavera della Costituzione*, ed. Tania Groppi and Irene Spigno (Carocci, 2015), 127. On article 20 see also *infra*, chapter VIII.

the initiator of the Arab Spring, but also the only country that has survived the Winter that followed. Furthermore, its constitution does not take place in a vacuum, but in the context of a civil society much more mature than the Egyptian one, therefore more able to push for its concrete enactment.

At the same time, it suffers from several ambiguities that at some point could erupt in open conflicts between secularists and Islamists, insofar as the two groups, albeit sharing the procedural preference for a democratic system, do not seem to conceive it the same way in substantial terms. As an author notes, "In a way, the fight against Islamic tyranny has supplanted the fight against the dictatorship. The same is true of Egypt. 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".[529]

The establishment of the Constitutional Court, prefigured by article 118 of the Constitution, will arguably represent a crucial step in dispelling the ambiguities.

In the next chapters, I shall focus on two controversial case-studies that show how steep is the climb towards a full recognition of individual liberties, even in presence of a formally advanced constitutional text.

[529] M'rad, "The Process of Institutional Transformation," 72.

INTRODUCTION TO THE CASE STUDIES

This three following chapters concentrate on two major social taboos in Tunisia and Egypt, namely homosexuality and "blasphemy" – the latter being widely understood so as to include heresy and apostasy, or whatever expression is perceived against the dominant religious doctrine and mores.

In spite of the political turmoil, social debates and constitutional processes the countries have gone through, any attacks, real or imagined, against religion, and against the sexual heteronormativity entrenched with that religion (or at least perceived as such[530]), are still considered unacceptable wounds inflicted to society and its values. This

[530] *Inter alia*, is by now notorious in Tunisia the case of Sfax's imam calling for the execution of homosexuals on religious bases. See "صفاقس : إمام جامع يدعو إلى إعدام المثليين (فيديو)," *Nessma Tv*, May 1, 2016, https://www.nessma.tv/article/صفاقس-إمام-جامع-يدعو-إلى-إعدام-المثليين-فيديو-8209. In so doing, he follows the path of more famous Islamic scholars such as the well-known Yusuf al-Qaradawi. See "Sheik Yousuf Al-Qaradhawi: Homosexuals Should Be Punished Like Fornicators But Their Harm Is Less When Not Done in Public," *MEMRI - The Middle East Media Research Institute*, June 5, 2006, https://www.memri.org/tv/sheik-yousuf-al-qaradhawi-homosexuals-should-be-punished-fornicators-their-harm-less-when-not. See also Scott Kugle and Stephen Hunt, "Masculinity, Homosexuality and the Defence of Islam: A Case Study of Yusuf Al-Qaradawi's Media Fatwa," *Religion and Gender* 2, no. 2 (May 15, 2012): 274. For this and other example of "neo-orthodox" homophobic Islamic scholars, Barbara Zollner, "Mithliyyun or Lutiyyun? Neo-Orthodoxy and the Debate on the Unlawfulness of Same-Sex Relations in Islam," in *Islam and Homosexuality*, ed. Samar Habib, vol. I (Santa Barbara: Praeger, 2010), 193–221.

represents a major obstacle for the legal acceptance of LGBT rights and a full freedom of conscience, belief and expression; therefore, in spite of the constitutional guarantees, homosexuality and "blasphemy" are still punished, in courts and in the larger society.

Starting from the assumption that the rights in question fully fall within the civil liberties protected both at the domestic Constitutional level and at the one of international law, and that they shall be limited only according to strict criteria,[531] I will examine the criminal prosecution against homosexual acts and expressions offending religion and public morals. For both cases, I shall briefly introduce the main criminal provisions in the books, and shall present some relevant case-law.

Finally, in order to verify my initial hypotheses, I will assess the compatibility of such restrictions with both the Constitutions of Egypt and Tunisia and International Human Rights Law.

It will be shown that the two issues share noteworthy similarities: on the one hand, similar is the *ratio legis* for prosecution; on the other

[531] Eg, art. 49 Tunisian Constitution, based on human rights international covenants: "The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought".

hand, the same constitutional and international guarantees protect both rights.

In other words, gays, atheists, blasphemers and their kinds are persecuted under laws that respond to the same logic, vaguely protecting public morals; at the same time, the latter violate several constitutional and international provisions protecting the autonomy and self-fulfillment of the individual against the interference of both state and society.

The analysis is mainly developed through the analysis of legal texts and case-law. In addition to that, interviews I conducted on the ground with relevant experts and civil society actors are used to better define the legal issues or to contextualize the topics.

As clarified in the introduction, the universality of human rights at a philosophical and moral level are the main assumption underlying this study. To say it with Samar Habib, "rights discourses can be universally applicable with respect to torture and persecution, since these constitutionally affect human beings in similar ways, irrespective of cultural differences or social constructions".[532]

[532] Samar Habib, "LGBT Activism in the Middle East," in *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*, ed. Angela Wong et al. (Singapore: John Wiley & Sons, Ltd, 2016), 1, http://doi.wiley.com/10.1002/9781118663219.wbegss664.

CHAPTER VI

(IL)LEGAL PERSECUTION OF FREE THINKERS

Introduction

In this chapter I am going to focus on freedom of belief and expression in Egypt and Tunisia, and on the limitations thereof correlated to religion.

I will take into account different types of nonconformist manifestations of the individual conscience: atheism, i.e. " a lack of belief or a strong disbelief in the existence of a god or any gods"; apostasy, i.e. "the act of refusing to continue to follow, obey, or recognize a religious faith"; heterodoxy, i.e. what is "contrary to or different from an acknowledged standard, a traditional form, or an established religion; heresy, i.e. "dissent of deviation from a dominant theory, opinion or practice"; and blasphemy, i.e. " the act of insulting or showing contempt or lack of reverence for God" and "irreverence toward something considered sacred or inviolable .[533]

As one may easily observe, these different concepts are as heterogeneous as tangent to each other: a heterodox opinion on religion may

[533] Definitions from the Merriam-Webster dictionary.

be perceived as blasphemous, and his/her author in turn designated an apostate.

This confusion of terms and ideas is reflected in the legislation and case-law of Tunisia and Egypt, where vague clauses and legal aporias are exploited to expel the undesired ones from society.

The specific case-studies I have selected reflect the attempt to provide relevant examples of the entire spectrum of religious "free-thinkers": one is a pure case of atheism, two involve also aspects of blasphemy and the fourth one is an emblematic case of a professor declared apostate just because of his scholarly approach to religion deemed too liberal and unorthodox.

Other cases will be touched upon in this chapter. In the conclusions, I shall summarize the main pillars of the criminal edifice against free-thinkers, showing their intrinsic aporias. In chapter VIII I will provide instead the legal counter-arguments from the Constitutions and international law.

TUNISIA

Statutory provisions

In Tunisia there is no law against "blasphemy" as such, i.e., a specific provision criminalizing contempt of the sacred. An attempt to introduce it came repeatedly from Ennahdha, both at the Constitutional and at the

secondary legislation level.[534] Although a vigorous reaction from civil society forced the proponents to step back from an explicit "blasphemy law", this does not mean that provocative, nonconformist speech is permitted, it being instead prosecuted under different labels. In fact, contempt of religion is interpreted in Tunisia in a very wide way.

Within the penal code's section where also the criminalization of homosexuality is located,[535] dedicated to the "offenses against morals", a subsection refers to "offenses against decency and sexual harassment".[536] Therein, Article 226 criminalizes with a 6-month prison term and a fine any action tantamount to "public indecency";[537] article 226bis[538] punishes with the same prison term and a higher fine those who "publicly undermine decency [*bonnes moeurs*] or public morals [*morale*

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[534] Habib Ellouz, a hard-liner of Ennahdha, argued in favor of a law against blasphemy (two-year prison for first-time offenders, 4 year for repeat offenders), in favor of sharia as the main source of legislation, and against freedom of conscience. Likewise, in the drafting process, several Ennahdha leaders argued for more restriction on free speech. In June 2012 Ennahdha proposed an art. 3 reading "The state guarantees freedom of religious belief and practice and criminalizes all attacks on that which is sacred". *V.* Human Rights First, "Blasphemy, Freedom of Expression, and Tunisia's Transition to Democracy," May 2013, http://www.humanrightsfirst.org/uploads/pdfs/HRF_blasphemy_in_tunisia_report_apr2013.pdf. Rory McCarthy, "Protecting the Sacred: Tunisia's Islamist Movement Ennahdha and the Challenge of Free Speech," *British Journal of Middle Eastern Studies* 42, no. 4 (October 2, 2015): 447–64.

[535] See Chapter VII.

[536] "*Des atteintes aux bonnes mœurs et du harcelement sexuel.*"

[537] *Outrage public à la pudeur* in the French version; *kull man yatajahir 'amd*[an] *bi-fuhsh* (lit. "those who publicly and intentionally declare obscenity").

[538] *Kull man ya'tadi 'alanan 'ala al-akhlaq al-hamida aw al-adab al-'amma bi-al-ishara aw al-qawl aw ya'mad 'alanan ila mudayaqa al-ghayr bi-wajh yukhall bi-al-hiyà.*

publique] through words or deeds, or intentionally disturb others through indecent behavior [*atteinte à la pudeur*]". The same punishment applies to those who publicly induce others to debauchery through printed, audiovisual or electronic material. In addition to that, article 121ter (whose current validity is questioned[539]) makes provision for imprisonment up to 5 years for the publication or distribution of any kind of material liable to harm public order or decency.[540] Other norms curtailing free speech in the name of decency, morals and public order come from equally vague provisions in the Telecommunications code and the Press code, all having criminal nature.[541]

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[539] This article is particularly problematic now as regards its current legal validity. Indeed, the Decree-Law 115/2011, which has renovated the press code, has also explicitly abrogated all those laws having modified the old one. Considering that article 121ter penal code was previously part of the press code, and has been transferred to the penal code by the "Organic Law 2001-43 du 3 Mai 2001, amending the press code", such law should also be considered abrogated, thereby including those articles that it transferred from the press code to the penal code. See Ahlem Eddhif, "Le Code pénal à la lumière du Décret-loi 2011-115," *Reporters Sans Frontières*, June 2014, https://www.reporter-ohne-grenzen.de/fileadmin/Redaktion/Presse/Downloads/Berichte_und_Dokumente/2014/140700_Le_Code_penal_a_la_lumiere_du_Decret-loi_2011-115_-_RSF-Gesetzesanalyse.pdf.

[540] "Distribution, sale, exposure to public view and possession for distribution, sale, exposure for propaganda purposes of leaflets, reports and fliers, be they of foreign origin or not, which are likely to harm public order or decency, are prohibited. Any breach of the prohibition of the preceding paragraph shall entail, in addition to the immediate seizure, imprisonment from 6 months up to 5 years and a fine from 120 up to 1,200 dinars". *Yuhaǰjir tawzi' al-manashir wa-al-nasharat wa-al-kitabat al-ajnabiyya al-masdar aw ghayriha allati min sha'niha ta'kir safu al-nizam al-'amm aw al-nil min al-akhlaq al-hamida wa-kadhalika bay'uha wa-'aradhuha 'ala al-'umum wa-maskaha buniyya tarwijiha aw bay'uha aw 'aradhuha li-gharad da'a'i.*

[541] Article 86 Telecommunications code punishes with imprisonment those who deliberately insult others or disrupt their quietude through the public telecommunications network. On the Press code, *v. infra.*

It is evident how vague and broad such norms are – with clauses hard to define and to distinguish from one another –,[542] as widely are they interpreted by judges.

Several cases arose in the aftermath of the revolution, testifying the clash between opposite worldviews taking advantage of the new climate of freedom. I am going here to examine two of them, which are particularly interesting from a legal point of view insofar as they show how broad is the courts' interpretation of the clauses referring to "public decency" and "public morals".

Case-law: two relevant examples

The first is the so-called "*Affaire Mahdia*", against two atheist freethinkers, Jabeur Mejri and Ghazi Béji, who had posted some sexual caricatures of the Prophet Muhammad on their Facebook pages.[543] A lawyer, after seeing the pictures, decided to lodge a legal complaint based on "offense to the Prophet, to the Islamic religion and to all those who belong to that religion" and "incitation to discord [*fitna*]".[544] Another

[542] It is even difficult to find in English a univocal translation for each of them, as there are no specular expressions and the ones employed here ("offense to public decency", "offense to public morals", "indecent behavior"…) are quite interchangeable.

[543] For an account of the events, see Olfa Riahi, "« Affaire Mahdia » : L'Enquête – « Athéisme, Délit de Pensée, Atteinte Au Sacré ? »," *To Be Good Again*, April 5, 2012, https://tobegoodagain.wordpress.com/2012/04/05/affaire-mahdia-lenquete-atheisme-delit-de-pensee-atteinte-au-sacre/.

[544] My own translation from Arabic official documents, reported in Ibid.

plaintiff followed right after, adding the arguments of the attack against the Islamic community (*umma*) and of "a sharp moral damage"[545] he would have personally suffered.

Thereupon, a formal investigation was opened against Mejri and Béji, for alleged violation of articles 121ter and 226 of the penal code, and 86 of the Telecommunications code.

The verdict fully confirmed the initial allegations.

In the sentence's reasoning, the judge begins by paying formal tribute to the defendants' freedom of belief, by saying that "religious beliefs or the absence thereof […] cannot be the object of a criminal proceeding, as pertains to the individual religious freedom guaranteed by international conventions, notably by the Universal Declaration of Human Rights that Tunisia has ratified [*sic*][546]".[547] What is outside the boundaries of the law is the depiction of the Prophet with a sexual and degrading connotation, "able to provoke others' sentiments and whose diffusion has the consequence of disrupting public order", under article 121ter of the penal code.[548] Furthermore, such images are liable to violating decency and public morals under article 226bis.

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[545] *Dhurur m'anwy had.*

[546] Not being formally a treaty, the UDHR is not subjected to ratification.

[547] My own translation from French. The document may be found here: "Dossier Juridique," accessed June 26, 2017, http://jabeurghazifree.blogspot.com/p/dossier-juridique.html.

[548] For a critique of the "provocation" argument, *v. infra*. On "defamation of religion" in general, see Leonard A. Leo, Felice D. Gaer, and Elizabeth K. Cassidy, "Protecting

Then, the judge addresses a very sensitive point: "the Tunisian legislator has not provided a definition of decency/good morals [*bonnes moeurs* in French, *al-akhlaq al-hamida* in Arabic]". Indeed, this is the very problem of the various clauses criminalizing free speech in the Tunisian legislation, which allows all sorts of abuse and misuse in violation of the principle of legality in criminal law. Nor does the interpretation given by the judge improve the situation: "The jurisprudence dealing with the issue has considered *bonnes moeurs* as the whole of moral rules, traditions, mores, religious prescriptions *prevailing* [*dominantes*] in society and *which it is forbidden to contravene*".[549] Thereby, 1) the interpretation given to the clause is a very broad and vague one; 2) it is based on a hotchpotch of moral and religious customs that, albeit not binding by law, are still considered mandatory on indistinct bases; 3) such moral and religious rules are those *prevailing* in society: in other words, those defined by the majority.

In sum, the penal code contains a clause allowing a judge to deprive an individual of his personal freedom if he/she disregards indistinct non-legal rules based on morals and religion as defined by the majority.

The detrimental effect on the principle of legality is engraved in the final statement concerning article 226bis: "As per the constant jurisprudence, the legal system represses any attempt to lash out what people

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Religions from 'Defamation': A Threat to Universal Human Rights Standards," *Harvard Journal of Law & Public Policy* 34, no. 2 (March 22, 2011): 769–84.

[549] Emphasis added.

considers sacred (as is the case of blasphemy, which is a verbal offense against God), *this being equivalent to impairing bonnes moeurs*".[550] Such an "equivalence" is a clear breach of the principle of legality, as it creates by analogy a crime of blasphemy which is not statutorily provided, notwithstanding the prohibition of analogic reasoning in criminal law.[551]

Another case, relevant for the public scandal it made and for its legal implications, is the one regarding the film *Ni Allah ni maître* (Neither Allah nor master) by Nadia el Fani. The movie shows the hardship non-fasting Tunisians endure during Ramadan, and represents a *j'accuse* against Islamists who seek to impose their mores upon the others, and against state authorities who are often complicit with the former's demands – even outside any legal framework.

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[550] Emphasis added.

[551] As jurists criticizing the verdict rightly commented: "The Mahdia Tribunal could not, in the absence of a law criminalizing the alleged offense to the 'sacred', condemn the defendants on such basis. The legal label employed here is a ruse that nullifies the judgment's unproved assumption [*pétition de principe*] according to which the accused are not prosecuted for their religious convictions. […] In so doing, this label breaches not only the principle of legality of offenses and penalties, but also the guiding principles of interpretation in criminal law. For the sake of people's freedom, it is not permitted to extend the application of criminal laws through analogic, *a fortiori* or *a contrario* reasoning. Criminal statutes requires the so-called strict construction" These considerations are developed by Ali Mezghani, Kalthoum Meziou– Doraï, Monia Ben Jémia, Souhayma Ben Achour, law professors, and Mokhtar Trifi, lawyer and former president of the "Ligue Tunisienne des Droits de l'Homme". "Dossier Juridique." My own translation from French.

Not only was the screening theatre raided by Salafists during the première,[552] but three lawyers also filed a legal complaint,[553] whereupon the Tunis' prosecutor, finding it *prima facie* well grounded, ordered the initiation of an investigation.[554] Although the legal proceeding did not continue, and the crime is by now time-barred,[555] it is very relevant to examine the reasoning behind the accusations.

In the legal complaint, the movie's title itself[556] is brought as evidence of El Fani's deliberate will to offend Allah, "the most sacred entity for the Tunisian people […] *by explicitly denying its existence*".[557] The same malicious intent would be further demonstrated by El Fani's appearance in the Tunisian television two weeks before the movie's

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[552] I received a personal account of this story from Bochra Triki, who was inside the cinema when the salafists attacked; *v. infra* note 660. For a detailed report and videos, see "Attaque Du Cinéma Africart Par Des Islamistes : La Vie Culturelle Tunisienne Est-Elle En Danger ?," *Les Observateurs de France 24*, June 28, 2011, http://observers.france24.com/fr/20110628-attaque-cinema-africart-islamistes-vie-culturelle-tunisienne-est-elle-danger.

[553] I obtained this information, as well as the legal documents, by Ms. El Fani's lawyer, Mr. Mounir Baatour, whom I thank. The document of the legal complaint, also containing the opening of the investigation by the Prosecutor of Tunis, is the number 7032916/2011, 7 July 2011. The following references in the text are based on a professional translation of this document. See also Mourad Zeghidi, "Tunisie : La Liberté inch'Allah !," *JeuneAfrique.com*, August 10, 2011, http://www.jeuneafrique.com/190476/politique/tunisie-la-libert-inch-allah/.

[554] According to article 30 Tunisia code of penal procedure, the prosecutor freely considers the appropriate follow-up for complaints and information he receives.

[555] According to Mr. Baatour. However, at the time of my interview with him, the competent authorities had not yet officially declared the effects of the statute of limitation.

[556] After all the uproar caused by the film, the title was changed in *Laïcité Inchallah*.

[557] Emphasis added.

screening, "*where she proclaimed her atheism* [*ilhadaha*]".[558] In other words, the body of the crime would not even lie here in offensive, vulgar or blasphemous speech, like in the case examined above, but in a mere declaration of atheism. The complainants show to be aware of the conflict thus created with freedom of belief,[559] and reaffirm that "everybody is bestowed with the freedom to believe or not to believe". However, "this shall remain a personal matter" whereas the offender "has intentionally chosen first of all to express it in the media, and secondly to use a shocking title, thus injuring [*khadash*] our people's beliefs and religion, and committing a big transgression [*ta'diyy*^{an}] and provocation [*istafzaz*^{an}] against the entire society".

In other words, freedom of conscience, belief and speech succumb to an overbroad interpretation of a vague and non-legal interest such as society's "sensitivity". This proves what the Mahdia sentence's detractors affirmed,[560] i.e. that the real taboo is atheism per se, considered already in itself as an infraction, a provocation trespassing the limits of the licit.

With her statements, according to the complainants, El Fani "has created discord [*fitna*]", exciting violent reactions from "more than 10,000 people taking to the streets to express their profound rejection and anger over this gratuitous provocation and injure against their sentiments and the most sacred things".

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[558] Emphasis added.

[559] And under the new Constitution we should add also freedom of conscience, art. 6.

[560] *V. supra* note 551

The hypothesized crimes are two articles of the former Press code,[561] 44 and 48, having a penal character. While the latter punished with imprisonment those who, by using the media, committed offense against "one of the cults whose exercise is admitted", the former referred specifically to the hypothesis of, *inter alia*, incitation to hatred between religions and spread of ideas based on religious extremism. By using these arguments, the complainants on the one hand equate a declaration of atheism to a form of "religious extremism"; on the other hand, they hold Nadia El Fani responsible of the riots against her movie, as if she had "incited" them.

The same pattern, based on such distorted concept of "provocation", applies to other post-revolutionary cases, which have gotten public attention. Article 121ter, with the accusation of disruption of public order, was used for instance against two artists performing in the exhibition *Printemps des Arts*: Nadia Jelassi, for exposing in her artwork the Quranic penalty of stoning; and Mohamed Ben Slama, for portraying the name of Allah made by ants. An Islamic preacher called for their murder, and salafists erupted in violent riots. Yet, political condemnations and legal charges for disruption of public order were wrought

[561] Now abrogated by a new one established with Law-Decree115-2011 of 2 November 2011, although some provisions remain identical.

against the victims of such irrational rage.[562] In other words, the constitutional protection of minorities yielded to the "law of the strongest".[563]

Fortunately, according to relevant figures I have interviewed, the situation nowadays seems to be improving; many salafists have been arrested under terror charges, and Ennahdha does not seem to have anymore the political interest to back certain manifestations of religious extremism.[564]

However, until laws are in the books, and prosecutors and judges maintain a certain mentality giving those laws a liberticidal interpretation, atheists and free thinkers will remain under constant threat of persecution.

EGYPT

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[562] Afef Abrougui, "Tunisia's Red Lines," *Index on Censorship* 41, no. 4 (December 1, 2012): 148–51.The Troika condemned the provocation, and Ennadha proposed a law against blasphemy. Ziad Krichen, journalist at *Le Maghreb*, interviewed by the author, Tunis, July 2016. On the law, see also *supra* note 534.

[563] The very essence of freedom of expression is exactly the opposite, i.e. the protection of minorities. On the fallacy of the "provocation" argument, see the conclusions of this chapter.

[564] Ziad Krichen, interview. Amna Guellali, Director Human Rights Watch Tunisia, interviewed by the author, Tunis, July 2016. Both mentioned the detrimental role of Ennahdha at that time in fostering religious violence. Krichen referred in particular to the Leagues for the protection of the revolution, linked to Ennahdha, which ignited a generalized political violence. (Cfr. Thibaut Cavalliès, "La Ligue de Protection de La Révolution : Le Bras Armé d'Ennahdha ?," *France Inter*, November 12, 2012, https://www.franceinter.fr/emissions/ailleurs/ailleurs-12-novembre-2012.) Raja Ben Slama, professor and director of the Tunisian National Library, interviewed by the author, Tunis, July 2016.

Legal references against apostasy and blasphemy

Even more than Tunisia, Egypt persecutes atheists, blasphemers and free thinkers.

A comparative analysis between the Tunisian statutes and case-law and the Egyptian ones shows how the legal basis and the ideological reasoning behind the repression follow similar patterns, in spite of some relevant differences.

First of all, similarly to the Tunisian case, no norm interdicts apostasy. Furthermore, the 2014 Constitution, art. 64, states that " Freedom of belief is absolute" (implicitly including atheism), and prohibits discriminations based on, *inter alia*, religion (art. 53). Such a wide recognition of freedom of belief represents, conceptually, a jusnaturalistic improvement compared to the constitution of 1971, where, rather than recognizing it as a natural right, it was formulated as a guarantee granted by the state.[565] However, these inclusive and liberal provisions are limited (and even contradicted) by the privilege enjoyed since 2012 by the "Heavenly religions" (Islam, Christianity, Judaism): these are the only

[565] Article 46.

ones explicitly mentioned in the Constitution, which grants them a specific legal status[566] (articles 2 and 3) and restricts to them the right of practicing religious rituals.[567] Hence, only Muslims, Christians and Jews are entitled to manifest and practice their faith, in spite of the principle of equality and non-discrimination enshrined at article 53.

Furthermore, the prohibition of apostasy and "idolatry/paganism" has been *de facto* created in case law, by variably resorting to: 1) the concept of public order;[568] 2) the criminal ban on blasphemy, *ex art.* 98(f);[569] 3) inconsistencies and gaps in civil law, which has permitted the direct reference to Islamic jurisprudence.[570]

Regarding the first instance, the Egyptian Court of Cassation has made the prohibition of apostasy, since 1975, a fundamental element of

[566] Article 2: "Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation". Article 2: "The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders".

[567] The freedom of practicing religious rituals and establishing places of worship *for the followers of revealed religions* is a right organized by law". (article 64, emphasis added).

[568] Moataz Ahmed El Fegiery, "Islamic Law and Freedom of Religion: The Case of Apostasy and Its Legal Implications in Egypt," *Muslim World Journal of Human Rights* 10, no. 1 (January 10, 2013): 6. Bernard-Maugiron, "Quelle place pour la Charia," 56.

[569] El Fegiery, "Islamic Law and Freedom of Religion," 6.

[570] *V. infra*, case Abu-Zayd. Ibid., 11.

public order.[571] This argument has been used, *inter alia*, to deny Baha'is the right to practice their religion.[572] It stems from the premise that the fact of leaving Islam, or believing in a religion other than the "religions of the book", does not pertain to personal belief but to the rules of "public policy".[573] Public policy is defined as "'the social, political, economical or moral principles in a state related to the highest (or essential) interest (*maslaha 'ulya, or: masalih jawhariyya*) of society', or as 'the essence (*kiyan*) of the nation'".[574] In the words of the renowned jurist al-Sanhuri, general interests must always prevail over the individual ones.[575] However, nowhere are they clearly outlined, and their concrete definition is up to the courts on an *ad hoc* basis. The only general guideline is that they must correspond to the "essential principles of Islamic law", as per a consistent Egyptian jurisprudence.[576]

The consequence is that the absence of an explicit law against apostasy is not an obstacle to condemn it nevertheless, since it pertains to the very foundations of the Egyptian legal order.

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[571] Omar Faraj, "Religious Minorities under Pressure: The Situation in Egypt, Iraq and Syria," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford, New York: Oxford University Press, 2016), 642.

[572] El Fegiery, "Islamic Law and Freedom of Religion," 6.

[573] Maurits S. Berger, "Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts," *Human Rights Quarterly* 25 (2003): 725.

[574] Ibid., 726.

[575] Ibid.

[576] Ibid.

Concerning blasphemy, the Egyptian criminal code imposes an explicit ban on it (which is not the case in Tunisia). Article 98(f)[577], states the following:

"Detention for a period of not less than six months and not exceeding five years, or paying a fine of not less than five hundred pounds and not exceeding one thousand pounds shall be the penalty inflicted on whoever exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist [*mutatarrifa*] thoughts with the aim of instigating sedition and division [*fitna*] or disdaining and contempting [*tahqir aw azdra'*] any of the heavenly religions or the sects belonging thereto, or prejudicing national unity [*al-wahda al-wataniyya*] or social peace ".[578]

The analysis of the Arabic wording is very revealing, as it shows a marked similarity with the accusations against Nadia El Fani, Jabeur Mejri and Ghazi Beji, examined above. As has been correctly stated, "[t]he law does not specify what constitutes an 'insult' or amounts to 'inciting', leaving it almost fully to the judge's discretion and, hence, the dominant cultural influences. This could lead to such absurd situations

[577] Sometimes translitterated as 98(w), because of the letter و used in the Arabic text.

[578] "Egypt's Penal Code," Pub. L. No. 58/1937, accessed June 30, 2017, http://hrlibrary.umn.edu/research/Egypt/criminal-code.pdf.

in which the Egyptian state is a member of an international military coalition against ISIS but its judiciary jails people who mock ISIS".[579] The reference is to the conviction of four Christian teenagers who made fun of ISIS prayers.[580]

It is impossible to circumscribe *a priori* the object of article 98(f). The wording is so vague, and the matter so sensitive, that whatever stands out from the accepted orthodoxy is a fair target for incrimination. We may even detect confusion *ratione materiae* and *ratione personae*, insofar as, in some cases, people appears to be targeted just for what they *are* rather than for what they *do*, such as Shia, Baha'is and atheists. [581]

I will examine the third way of criminalization, i.e. the direct access of shariatic rules to the civil legal system, while examining the Abu Zayd case *infra*.

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[579] Khaled Mansour, "Freedom of Expression in Egypt: How Long Hair, Pink Shirts, Novels, Amateur Videos and Facebook Threaten Public Order and Morality!," *International Journal of Applied Psychoanalytic Studies* 13, no. 3 (September 2016): 235.

[580] http://www.nbcnews.com/news/world/egypt-should-quash-blasphemy-convictions-christian-teens-who-mocked-isis-n537781

[581] Ishak Ibrahim, *Besieging Freedom of Thought: Defamation of Religion Cases in Two Years of the Revolution* (Cairo: Egyptian Initiative for Personal Rights, 2014), https://eipr.org/sites/default/files/reports/pdf/besieging_freedom_of_thought_0.pdf. El Fegiery, "Islamic Law and Freedom of Religion." Mansour, "Freedom of Expression in Egypt." Declan O'Sullivan, "Egyptian Cases of Blasphemy and Apostasy against Islam: Takfir Al-Muslim," *The International Journal of Human Rights* 7, no. 2 (August 2003): 97–137. Alber Saber, "Report: Inquisitions in Egypt 2014," *ALBER SABER ألبير صابر*, May 11, 2014, http://www.albersaber.com/2014/11/report-inquisitions-in-egypt-2014-en.html.

Patterns of persecution against atheists and blasphemers

We may roughly detect five main patterns of groups persecuted for religious reasons, embracing an extremely wide spectrum: 1) blasphemers *stricto sensu*, i.e. those who willingly mock one of the "heavenly religions";[582] 2) those who publish "obscene" content; 3) "free-thinkers", i.e. those intellectuals that take a critical approach towards religious matters, and towards the derived laws; 4) atheists and apostates; 5) members of unaccepted sects or religions, such as Shia and Baha'is.[583]

In other words, a widespread persecution targets atheists, blasphemers and free thinkers in Egypt, whatever their creeds.[584] Figures show that the Christians are by far the most targeted in relation to the population.[585] Accusations may be based on acts, drawings, writings and speeches, both blasphemous *stricto sensu* or simply unorthodox as per the dominant doctrine, and transmitted in various ways (although Internet is the most frequent medium).[586]

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[582] Actually Islam and Christianity. There are not to my knowledge cases concerning Judaism.

[583]Ibrahim, *Besieging Freedom of Thought*. Mansour, "Freedom of Expression in Egypt." O'Sullivan, "Egyptian Cases of Blasphemy and Apostasy." El Fegiery, "Islamic Law and Freedom of Religion." Saber, "Report."

[584] Ibid.

[585] The EIPR calculated that, after the 2011 revolution, accusations of blasphemy against Christians accounted for more than 41% of the tolal, while Christians represent around 10% of the Egyptian population. Ibrahim, *Besieging Freedom of Thought*, 10.

[586] Ibid., 16.

In most cases, the legal prosecution comes after protests and vigilante actions from the "offended" populace, frequently involving acts of violence against the victims and their properties, with scarce intervention by the police to halt the assailants.[587] Rather, police is often in the forefront to further harass the victims, search and arrest them in the absence of legal grounds, and refer their cases to the public prosecution.[588]

Once complaints reach the public prosecution, the odds are that the case will end up in court, as only 10% of the files brought before the public prosecutor since 2011 have been dismissed.[589]

The Public Prosecution often fails to protect suspects from the abuses they suffer. On the contrary, the tendency is to detain them automatically, even in the absence of the grounds for pre-trial detention. Unconstitutional questions, such as those aimed at proving the faith and observance of the accused, make often part of the interrogatory.[590] Only well-known figures, usually from Cairo, are sometimes able to avoid custody (at least the pre-trial detention), while common citizens are nearly automatically detained during the trial, and later convicted.[591] "This gives haters the chance to lock undesirable people away from so-

[587] Ibid., 17.

[588] Ibid.

[589] Ibid.

[590] Ibrahim, *Besieging Freedom of Thought*, 27.

[591] Ibid. Saber, "Report."

ciety with great ease, using a single meaningless piece of paper or sending a complaint to the Public Prosecutor, turning this unethical law into a weapon that could be used against anyone".[592]

Most cases end up with a conviction.[593] Yet, penalties are not necessarily inflicted by a court per the law: in some occasions, especially those involving humble people in rural areas, the matter is dealt with through the use of customary reconciliation processes, which typically entail dramatic abuses of the victims' rights, such as the eviction from their villages, with no compensation for the lost properties and economic activities.[594]

A unique jurisprudential opinion against the liberticidal trend is worth noting:

"The judgment in case 529/2012/ Agouza misdemeanor, issued on 26 April 2012, stated that the intent of the criminalization was not to protect ideas and beliefs and therefore prohibit a discussion and debate about them; nor is it to protect the sentiments that are naturally inflamed if a person transgresses established intellectual principles, especially religious principles. Rather, the court stated, the provisions provide legal protection for unity and deter civil strife. Faith may be exercised freely as long as it does not impinge on public morals. The protection exists first and foremost for the benefit of society and social peace".[595]

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[592] Saber, "Report."

[593] Ibrahim, *Besieging Freedom of Thought*, 19.

[594] Ibid., 22.

[595] Ibid., 30.

If, on the one hand, this verdict sets down a very important principle, i.e. that the law cannot prevent intellectual discussions nor is it intended to protect sentiments of inflammable people, on the other hand it reasserts the ambiguous concept of social peace.

Islamist forces constitute a relevant protagonist in this picture.

Islamist parties are not only in the forefront as complainants before the courts against the alleged blasphemers, but also ignite violence against them.[596] The same has been done by imams, while religious institutions have advocated in favor of censoring unwelcomed writings and punishing the authors.[597] A relevant case is that of Sayyid Al-Qimni, a prominent liberal and rationalist writer who was even awarded Egypt's highest cultural prize in 2009.[598] Not only was he virulently attacked by Islamist groups (including the Muslim Brotherhood),[599] but the Dar al-Ifta', a state body releasing religious opinions, issued a fatwa demanding the application of article 98 against him. The fatwa stated:

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[596] Ibid., 25.

[597] Ibid., 24. Saber, "Report."

[598] L. Azuri, "Dispute over Granting of State Award to Egyptian Liberal Sayyed Al-Qimni," *MEMRI - The Middle East Media Research Institute*, October 6, 2009, https://www.memri.org/reports/dispute-over-granting-state-award-egyptian-liberal-sayyed-al-qimni.

[599] Mustafa Suleiman, "Egyptians Protest Award to Controversial Writer," *Al Arabiya*, July 13, 2009, http://www.alarabiya.net/articles/2009/07/13/78580.html.

"The Muslims [believe] unanimously that whoever curses the Prophet or slanders Islam removes himself from the fold of Islam and [from the community] of Muslims, and deserves punishment in this world and torment in the world to come… The statements [from Al-Qimni's writings] quoted by the [individual] who requested the fatwa are heretical, regardless of who wrote them; they remove their author from the fold of Islam… and [also] constitute a crime according to Article 98 of [Egypt's] penal code. If these depraved, loathsome, and invalid statements were indeed made by a specific individual, then this individual should be convicted rather than awarded a prize, and punished to the full extent of the law".[600]

In this case, fortunately, the Court of Administrative Justice refused to revoke the prize, remarking that "cutting off freedom of reason and thought is the equivalent of cutting a person's throat".[601]

Also Al-Azhar (which, as said before, is considered a "moderate" institution) has not abstained from igniting the fire against "blasphemers" and apostates - being in several occasion the initiator of vicious campaigns.[602] In the case of the famous writer Farag Foda, an opponent of Islamism and defender of the Coptic minority, Al-Azhar went thus far as to publicly declare him an apostate. One week later, he was shot dead. The killer "referred specifically to the Al-Azhar statement as providing pure justification for the writer's killing".[603] Far from disowning and

[600] Azuri, "Dispute over Granting of State Award."

[601] Ibrahim, *Besieging Freedom of Thought*, 33.

[602] Ibid., 24, 42. O'Sullivan, "Egyptian Cases of Blasphemy and Apostasy," 102, 105, 109.

[603] O'Sullivan, "Egyptian Cases of Blasphemy and Apostasy," 106.

condemning the horrendous act, Al-Azhar sent Sheikh al-Ghazali, one of its most prominent religious figures, to defend the accused in court. Al-Ghazali told the court that, in his view, "anyone who objected to the implementation of the Shari'a is an excommunicate and an apostate. He further stated that any individual, or group of people, who killed such a person is not liable to be punished, because in carrying out the act of such a killing they would be executing the legitimate *hudud* penalty on apostasy, within Shari'a".[604]

The former Grand Imam of Al-Azhar himself, Muhammad Sayyid Tantawi, has stated that apostasy, when it goes along with disrespect towards Islam, should be tantamount to a "seditious crime of treason against the Islamic state".[605] This is in line with the theoretical framework outlined in chapter 1: "Islam is conceived as a polity, not just as a religious community. It follows therefore that apostasy is treason".[606] This reasoning has been scrupulously followed by the Egyptian Courts, as I am going to show in the next paragraph.

Relevant sample cases

[604] Ibid.

[605] Ibid., 129.

[606] Lewis, *From Babel to Dragomans*, 306.

In this section I am going to examine two relevant sample cases of persecution against Egyptian free-thinkers. The first, and older, concerns the condemnation for apostasy of a renowned Egyptian professor. The second, recent, is about the condemnation for blasphemy of a born-Christian atheist.

The case Abu Zayd: an unfortunate milestone

The case of Nasr Hamid Abu Zayd remains an unfortunate cornerstone of the mingling between shariatic and secular elements in the Egyptian legal order. It also represents an example of how liberal thinking may be interpreted as blasphemous, and consequently bring to a condemnation of apostasy entailing the loss of civil rights, albeit in the absence of clear norms criminalizing the conduct.

The case dates back to 1994, when Abu Zayd, professor at Cairo University, submitted his publication to the University panel for review in order to obtain a promotion. A member of the examining Committee argued that some of the writings contradicted well-established Islamic truths, and thereby initiated a legal proceeding aimed at designating Abu Zayd an apostate.[607]

[607] Abdullahi Ahmed An-Na'im, "The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts," *Emory International Law Review* 11 (1997): 51.

The legal complaint was based on the principle of *hisba*, a religious obligation requiring believers to enjoin good and forbid evil, as such also defined by the Egyptian Court of Cassation following the religious tradition.[608] In fact, the principle was not part as such of the Egyptian legal system, insofar as Law 462 of 1955 had abrogated Law 78/1931 on the religious tribunals, which included implicit and explicit references to this principle. Those were enshrined in particular in a clause admitting the direct recourse to the "main texts of Abu Hanifa's school" as subsidiary sources in the absence of special statues regulating a case, and in another equating "God's rights" with public order, traditionally guaranteed by imposing *hisba*.[609] Was part of this framework the right of a private individual to file a complaint based on *hisba*, thereby enforcing public order and a religious obligation at the same time.[610]

Law 462 of 1955, in theory, established a different rule, since article 5 referred to the code of civil and commercial procedure, whose article 3 required a direct personal interest in order for the plaintiff to file a legal complaint. As *hisba* is eminently a matter of public interest, it is incompatible with a private one, as also clarified in Egyptian case-law.[611]

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[608] Muhammad Salîm al-'Awwâ, "Un arrêt devenu une « affaire »," *Égypte/Monde arabe*, no. 29 (March 31, 1997): para. 17.

[609] Castro, "Diritto Musulmano," 33.

[610] Jörn Thielmann, "La jurisprudence égyptienne sur la requête en hisba," *Égypte/Monde arabe*, no. 34 (December 31, 1998): para. 24.

[611] Ibid.

However, the law also created some legal aporias. First of all, the same article 5 created an exception for the rules of procedure set forth by the law on religious tribunals.[612] Secondly, article 6 stated that all matters of personal status that would have originally pertained to Islamic courts should be decided in accordance with article 280 of Law 78/1931. Since article 280 was the one establishing the abovementioned subsidiary recourse to the texts of Abu Hanifa's school, article 6 of Law 462/1955 may be considered a downright Trojan horse of sharia, creating an antinomy with the overall civil system established by the law. Hence, in the Abu Zayd case, it was not clear which one between the procedure established by article 5 or the shariatic rules set forth at article 6 should prevail.

This contradiction was highlighted by the first-instance tribunal of Giza.[613] Its decision, in denying the procedural admissibility of the complaint, interestingly quoted the Constitutional jurisprudence examined in Chapter III: "Had the constitutional legislator wished to make the principles of Islamic shari'a downright rules enshrined in the Constitution, or had it wanted such principles to be directly applied though the courts which enforce the laws, without the necessity to develop them

[612] "Les règles du Code de procédure seront applicables à la procédure en matière de statut personnel et en matière de waqf, précédemment de la compétence des tribunaux religieux de statut personnel ou des Assemblées communautaires, sauf les cas qui ont fait l'objet de règles particulières dans le règlement d'organisation des tribunaux religieux de statut personnel ou dans d'autres lois complémentaires", cit. in ibid., para. 23.

[613] Baudouin Dupret and M. S. Berger, trans., "Jurisprudence Abû Zayd," *Égypte/Monde arabe*, no. 34 (December 31, 1998): 169–201.

in specific legislative texts and in conformity with the procedures imposed by the Constitution, it would not have failed to do so expressly".[614]

The Court of appeal and the Court of cassation, however, radically overruled the first instance verdict. From a procedural point of view, the complaint was deemed admissible on the basis of the abovementioned exception laid down in article 5, which would allow the *hisba* appeal as *lex specialis* derogating the code of civil procedure by directly referring to article 280 of the law on the Islamic tribunals;[615] furthermore, it specified that the ruler's authorization is not a precondition for enforcing *hisba* against something religiously inadmissible.[616] From a substantive point of view, the Court of cassation pointed out that the lack, within the Egyptian legislation, of a norm proscribing apostasy is not to be considered an obstacle: from the silence of the law, the Court argued, one should not infer the legislator's will to contradict the text of the Sacred Quran, the Sunna and the Islamic jurisprudence.[617] In particular, in the view of the court of appeal, "any attack against the fundamental tenets of religion means attacking the state itself in its very constitutive nature",[618] for Egypt "is not secular, atheist or Christian; the

[614] Supreme Constitutional court, cit. in *ibid.*, para. 35.

[615] Cairo Court of appeal, cit. in ibid. para. 70

[616] *Ibid.*, para. 148.

[617] Court of Cassation, cit. in ibid. para. 149.

[618] Court of Appeal, cit. in ibid. para. 135.

state is Muslim and its religion is Islam", as per article 2 of the Constitution.[619] The Court of cassation pushed this reasoning forward by explicitly establishing a direct connection between apostasy and public order in a sort of syllogistic reasoning: if Islam is the religion of the state, and apostasy is an attack against Islam, the apostate is also a *hostis publicus*, a foe of the state, therefore it is legitimate to curtail freedoms that undermine the nation's public order: "To depart from Islam is to revolt against it, and this necessarily finds its reflection in the loyalty of the individual to the *Sharî'a,* the state, and his ties with the society. This is what no law or state tolerates." [620] "No individual has the right to call for what contradicts the public order *(al-nizâm al-'âmm)* or morals *(al-adâb),* or use his opinion to harm the fundamentals upon which the society is built, or to revile sacred things, or to disdain Islam or any other heavenly religion".[621]

Yet, Abu Zayd had not renounced his faith: on which grounds, then, declaring him an apostate? This is another as sensitive as troubling point of this verdict. Both the appeal and the cassation judges did not take in whatever consideration the fact that, not only Abu-Zayd's essays did not contain any profession of apostasy, but neither did they contain anything blasphemous (i.e., derogatory against Islam): rather, it was

[619] *Ibid.*

[620] Court of cassation, cit. in ibid., para. 175. On the link between apostasy and treason, *v. supra.*

[621] Ibid., para. 175

about scientific works aimed at a critical analysis of the sacred texts. The Court of cassation stated explicitly that apostasy does not require a patent declaration of unbelief, but "may be deduced from the meaning of clear wording",[622] and that the scientific motive of Zayd's writings was irrelevant for the purposes of apostasy: "[i]nterpretation should not deviate the researcher from the fundamentals of the *Sharî'a* and dogma, and their meanings, fundamentals and foundations".[623]

Zayd's fault would consist, *de facto*, in adopting a liberal, rationalist and historicized approach to the scriptures, thereby "denying what is axiomatic to any educated Muslim having a religious cultural background".[624] In particular, he would have described the Quran as a human and cultural product, denied the eternal validity of shari'a law and seen it as the cause of backwardness of Muslims, scorned certain aspects of religion as pure superstition, decried slavery and objected to the female share of heritage, denied the divine origin of the sunna, *et al.* In a word, he had dared to defy a well-entrenched and undisputable orthodoxy. The fact that he had done so on the basis of scholarly research is totally irrelevant: he had trumped on a terrain of dogmata set once and for all, which no believer is allowed to discuss, let alone challenge:

[622] Ibid., para 169.

[623] Ibid., para. 164.

[624] Ibid., para 163.

"His pretext that his words are only allegorical interpretations (ta'wîl) is rejected, since such interpretation should not deviate the researcher from the fundamentals of the *Sharî'a* and *dogma, and their meanings, fundamentals and foundations*. Interpretation has its rules and criteria *set by Muslim legal scholars*. Otherwise, it would be a means for dissenters *(ashâb al-hawâ)* to deviate from the Law of God, and to escape from any legal text and legislate what God has not allowed, which would lead to *error and misguidance*. Interpretation does not mean to attack the *Sharî'a* texts and scorn them, to consider them invalid, to describe abiding by their stipulations as backwardness, to call for deviation from the Law of God to something else, or to *deny knowledge which is axiomatic to religion*."[625]

As a result, Abu Zayd was declared an apostate and forcefully divorced from his Muslim wife, as per a clear sharaitic rule that prevents a Muslim woman from being married to an unbeliever.

The Abu Zayd case remains a milestone for several reasons. First of all, it gives a practical demonstration of the consequences of a hybrid system, wherein modern, codified civil law mingles with archaic, undefined religious rules, especially in presence of a constitutional supremacy clause such as article 2 of the Egyptian constitution. Secondly, this case shows how the concept of heresy is so broadly understood that a merely rational epistemology of religion, in contrast with the rigid, century-old orthodox interpretation, may be judged heretical. Finally, the case is relevant because it creates an automatic connection between

[625] Ibid., para. 164. Emphasis added.

heresy and apostasy, without any explicit renunciation of faith by the person concerned.

Not only does this violate the constitutional principles of freedom of thought, expression, religion and scientific research, but also wounds the separation of powers, for it enables a judge to create rules and obligations not from state laws, but from doctrinaire opinions.[626]

The case of Alber Saber: An example of a revolution without freedom

The other case I am going to examine now took place after the 2011 revolution.

A similar case to those examined for Tunisia, it concerned Alber Saber, a former Christian, now atheist, who created webpages where he dared to criticize religions and to promote atheism.[627] This cost him a criminal prosecution and a prison conviction. This case is relevant to my hypothesis for the similarities it presents with the Tunisian ones examined above, and for showing the consequences whoever dares freely to express his/her unbelief may face.

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[626] Thielmann, par. 25.

[627] Mona Eltahawy, "Egypt's War on Atheism," *The New York Times*, January 27, 2015, sec. Opinion, https://www.nytimes.com/2015/01/28/opinion/mona-eltahawy-egypts-war-on-atheism.html.

An atheist since a long time, even before the criminal prosecution Saber had already suffered several attacks by Islamist groups at the university, with the police unable (or unwilling) to protect him.[628]

The criminal file was opened after he uploaded on his website the film "The Innocence of Muslims", considered blasphemous, in order to expose the lies circulating about it.[629] A mob of enraged Muslims attacked Saber's family house. The police, called by his mother to protect them, apprehended him and put him in custody, allegedly as the only way to guarantee his safety. On the contrary, he was kept in jail, brutalized by the police and inmates instigated by the former, and his file transmitted to the public prosecutor who sent him to trial, further to a 13-hour interrogatory focused on his religious beliefs and practice.[630]

The prosecutor filed a case against him based on a bunch of criminal provisions: articles 98(f), 102, on stirring sedition, 160/1, on perturbing religious rituals, 161/1, on printing and publishing holy books in a perverted way, and 171/3, on the public induction to commit crimes.

Both the court of first and second instance upheld all the allegations, condemning Saber to three years in prison. However, the appeal verdict was rendered *in absentia*, as Saber in the meantime had found asylum in Switzerland.

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[628] Alber Saber, telephone interview by the author, May 2017.

[629] Saber, interview.

[630] Saber, interview.

The appeal ruling[631] reports Saber's ideas, spread through Facebook, Twitter and Youtube, in terms of calls for atheism, insult against God, sawing of doubts about the holy books, derision of Muslim and Christian rituals and prophets.

The Court holds that the defendant's intent was "to evoke turmoil between the Christians and the Moslems [*sic*] in the country, to despise holly [*sic*] religions and to harm national unity". Furthermore, its views are depicted as "extremist", with the accused being fully conscious of the "extremity of the ideology he [was] spreading" by demolishing the founding pillars of Islam and Christianity and demeaning the believers.

The Court shows to be aware of the principle of freedom of belief "which is protected by the provisions of all the Egyptian Constitutions". Still, "this does not give the excuse to [the one] who argues the principles of a religion to disrespect its sanctity or to degrade it or to disrespect this religion". In other words, not only does not freedom of belief extend to challenging the tenets of a faith: even the very "sanctity" of religions is placed outside the realm of criticism.

Not for nothing, the Court describes itself as a "sanctuary" and the "protector for holly [sic] religions". Its duty is to be "a protector to the religions against everyone who cross [*sic*] the boundaries and limits by abuse [*sic*] these religions through propagating insults, lies and to speak of these publicly. This can lead to grave turmoil that can not be controlled as it storms the society's principles and basics".

[631] Examined here in the official English translation provided to me by Saber.

This brings us to the usual suspect: the disruption of public order. Insofar as "the deepness of religious sentiments are not easy to calm or to sooth", "evoking [*sic*] these feelings subject order and security to the gravest dangers".

Another interesting point of the verdict is the terminology employed to describe Saber's statements: not only "insults", but also "lies". This line of argument is typical of judgments on blasphemy, and is used as a "justification" for the violation of free speech, insofar as the latter could not extend to "erroneous beliefs".[632] This clearly follows the path highlighted in Chapter II: moving from a religious perspective, the constitutionally required neutrality between different beliefs is dismissed, and an irrefutable religious "truth", unilaterally identified by a state judge, is counterposed to the "lies" denying it. The Court becomes the guarantor of such truth, assuming a role indistinguishable from that of a religious institution.

The conclusion of Saber's ruling is emblematic from this point of view, as it completely shifts the focus from a legal to a religious perspective, consecrating the sacred function of the tribunal: "Believing in the message that the Court bares, the court was horrified by this extremist thought that the accused propagated […]. He was led behind the devil, and closed his mind so that he fell by and with the devil". Whence it follows that the role of the court is to purify the defendant and society

[632] O'Sullivan, "Egyptian Cases of Blasphemy and Apostasy," 100.

from such evil, with a conviction that assumes the form of a judicial exorcism. I will elaborate more on this point in the next chapter.

The two cases presented above, albeit emblematic, are far from being a *unicum*. Blasphemers, apostates, atheists and free thinkers are under constant threat in Egypt.

As we have noted in the Tunisian case, the border between "blasphemy" as a deliberate contempt and mockery of religion, and pure declaration of disbelief, is non-existent. For instance, in the case of the atheist writer Salah al-Din Muhsin, a condemnation to three years of hard labor was issued not only for his criticism against the Quran ("a book of holy ignorance", written not by God but by the self-proclaimed prophet Muhammad[633]), but also for his open atheism:

"Mohsen has openly stated that he is an atheist. He has also called for the establishment of an Egyptian atheists' association. In Egypt, such blasphemous sentiments are not only illegal, but widely considered to be contemptuous of the great majority of the population".[634]

The parallelism with the reasoning of Tunisian judges and prosecutors is striking: the mere expression of *personal* beliefs is deemed "contemptuous" for the "majority". The lip service paid to freedom of

[633] Ibid.

[634] Ibid.

expression by judicial advisors involved in the case follows the same scheme:

"We are not against freedom of expression, but we strongly fight the spread of deviant beliefs in our society […]. Mohsen was not arrested because of his beliefs; he is free to embrace whatever ideology he pleases, but this freedom should not extend to propagating erroneous beliefs".[635]

Again, the idea emerges of an undisputable "religious truth" that the state is called to enforce. Only in the small precinct of its boundaries freedom of belief and expression are permitted.

In sum, the state establishes by law what is "right and true" or "wrong and false" in the domain of inner beliefs, enforcing in courts such undisputable assumption, and considering any deviation wherefrom as both illegal and contemptuous for the majority. An antagonism is thereby construed between "blasphemy", widely understood, and public morals, and used as an instrument of oppression against bloggers, artists and writers.[636]

[635] Ibid.

[636] Eg. Haider Haider, in ibid., 102.

Final considerations

The Tunisian and Egyptian cases show similar patterns in dealing with unconventional expressions on religious matters. First of all, the letter of the provisions is of secondary importance: vague norms shaped upon open clauses, unmistakably linked to the feelings of the majority and the disruption of public order, prove to be flexible instruments to target every kind of unorthodox utterances. Another pattern is the lip service judges pay to freedom of belief and expression – just to abnegate the substance thereof. Indeed, while pretending to respect freedom of belief, including atheism, judges *de facto* radically deny it, first of all by qualifying atheism or heterodox statements as an "error", or a "lie", that the court, as the guardian of religion, must reject; then by demanding they remain private, in order to avoid 1) injuring believers' sentiments; 2) bringing division (*fitna*) in society 3) endangering public order.

A reflection is needed on the term *fitna*, for it is a very sensitive concept: as also touched upon in Chapter I, *fitna* belongs to the religious realm, where it denotes one of the most heinous crime, first and foremost a "state of rebellion against God's Law",[637] and the intent to sow the seeds of doubts in the hearts of pure believers.[638] Even in its social and political connotation, *fitna* bears therefore a unique sense of religious depravity; not for nothing, the first and most terrible *fitna* was the

[637] Bosworth et al., *Encyclopédie de l'Islam*, s.v. Fitna.

[638] Quran, III:7.

political and religious split occurred around the fourth caliph, producing the schism between Sunnis and Shiites.[639] Mejri, Beji, El Fani, Abu Zayd, Saber and all the other free thinkers, in other words, are guilty before the man and before God for maliciously trying to sow doubts, division and depravation.[640]

As concerns the argument of public order, it is based on the assumption that contempt of religion "incites" social turmoil. This "incitation" argument is not new in the context of blasphemy. In the words of Kamali, an authoritative scholar of Islamic law, "blasphemy today continues to be a dangerous offence, which can incite violence and loss of life, and pose a threat to law and order in society, as was seen in the aftermath of Salman Rushdie's misguided venture".[641] This is a captious argument willingly muddying the waters: "incitement" may be defined as the "advocacy […] directed to inciting or producing imminent lawless action and […] likely to incite or produce such action";[642] in other words, the inciter and the perpetrator play in the same team, to the extent the latter commits the crime following the former. Our case is the very opposite. Muddling the two cases on the basis of the similar result entails a very transference of liability: responsibility for violence is moved from its direct cause (the actual perpetrator, the exalted crowd

[639] For an ampler examination of the term, Virgili, *supra*, note 77.

[640] *Fitna* is also the promotion of immorality, often with sexual implications. See ibid., 30.

[641] Kamali, *Freedom of Expression in Islam*, 249.

[642] Brandenburg v. Ohio, No. 395 U.S. 444 (U.S. Supreme Court 1969).

or individuals that kill and destroy) to the indirect one (the alleged "blasphemer"), that would make the explosion of violence inevitable, almost in terms of naturalistic necessity.

Furthermore, paying formal homage to freedom of belief and unbelief, but demanding that the latter remain "private" – just because opposed to that of the majority – creates a paradoxical alternative: either one patently discriminates against a minoritarian creed (i.e., atheism), or he should require the same from any similar expression in similar conditions, with the ironic consequence that the utterance "I am Muslim", in a predominantly non-Muslim environment, should be considered tantamount to "incitation to the disruption of public order", "insult to public decency", and a manifestation of "religious extremism".

In other words, the argument whereby criticism against largest creeds should be banned because of the greater reactions it can provoke, is in polar opposition with constitutionalism as an instrument of protection of minorities, and a pure manifestation of surrender to the "law of the strongest".[643]

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[643] Nicola Colaianni, "Diritto di satira e libertà di religione," *Rivista Italiana di Diritto e Procedura Penale* 52, no. 2 (2009): 594–620. Furthermore, such an interpretation of a criminal provision is flawed in that it detects the *objective* aspect of the offense in the *subjective* perception that the commission of such crimes may provoke within the public opinion, expressed in the so-called "social alarm". Lorenzo Picotti, "Istigazione e propaganda della discriminazione razziale fra offesa dei diritti fondamentali della persona e libertà di manifestazione del pensiero," in *Discriminazione razziale, xenofobia, odio religioso: diritti fondamentali e tutela penale : atti del seminario di studio, Università degli studi di Padova, 24 marzo 2006*, ed. Silvio Riondato (Padova: CEDAM, 2006), 132.

Overall, we may note that on this matter legal and religious elements mingle, with the court being at the same time a civil institution enforcing the law and a religious temple enforcing God's will. The role of the Court, therefore, is to purify this twofold treason against God and against the state with a conviction assuming the form of a judicial exorcism.

I am going to show in the next chapter how the same pattern applies to homosexuality – a crime sharing more than one might imagine with blasphemy and apostasy.

CHAPTER VII

(IL)LEGAL PERSECUTION OF HOMOSEXUALS

Introduction

The present chapter is devoted to the analysis of the legal situation homosexuals face in Tunisia and in Egypt.

In both cases, vague liberticidal laws and a fiercely homophobic culture are the instrument of persecution of many individuals, in spite of the constitutional guarantees.

While in Tunisia there are some signs of openness towards the issue, which has started to be publicly discussed even in the media thanks to the activism of civil society, in Egypt the situation does not show any perspective of improvement.

As a preliminary remark, the analysis will be a purely legal one, not addressing the debate over sexual identifications and taxonomies. In other words, it is not pertinent to this study to ascertain whether the concept of homosexuality represents the imposition of a "Western taxonomy of sexuality" – as Joseph Massad puts it[644] – to a cultural context which was traditionally characterized by a fluid sexuality and ignorant of a binary conception thereof. What is relevant here is not issues of

[644] Habib, "LGBT Activism in the Middle East," 1.

denominations, nature or self-perception, but how certain identities and behaviors are targeted by the law.[645]

To put it in different terms, it is not relevant who is a Jew as per the Mosaic law, but who is a Jew as per Hitler's law.

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Relevant provisions

Criminalization of homosexuality in Tunisia is mainly hinged on the explicit prohibition set forth in article 230 of the penal code, under the chapter regarding "offenses against morals"[646], sub-section "indecent behavior".[647] Such contextualization betrays immediately a clear cultural premise: the criminal norm is not linked to a concrete individual interest, but to the collective and indefinite honor of society.

While the French version of article 230 only mentions "sodomy" (which has created relevant ambiguities in the West[648]), the official Arabic text - the sole one having legal value - reads as follows: "Male or

[645] For an analysis of sexual taxonomies in the Muslim world, see Hamzić, "A History in the Making: Muslim Sexual and Gender Diversity between International Human Rights Law and Islamic Law," 55 ff.

[646] "*Attentats aux moeurs*" in French

[647] "*De l'attentat à la pudeur*".

[648] Thereby, the French text excludes other male-to-male intercourses and any lesbian behavior, while it would paradoxically criminalize heterosexual sodomy, given that

female homosexuality, if it does not fall into one of the cases provided by the preceding articles, will be punished with a prison term of three years".[649]

The term used for male homosexuality, *al-liwat*, has the same root of Lot, the Biblical and Quranic patriarch who escaped the divine destruction of Sodom and Gomorrah. The term bears therefore a religious origin, and a marked ambiguity over its meaning: often employed to denote the act of "sodomy", (paradoxically, in classical Arabic mostly active sodomy[650]), it may equally refer to less specific homosexual acts,[651]

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the French word *sodomie* may equally refer to anal sex between a man and a woman. This discrepancy between the French text and the Arabic one (the latter being the sole official one, it is important to stress again) has sometimes created significant misunderstandings among scholars and activists. As a very relevant example, we may consider the 2015 Report on "State-sponsored homophobia" released by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which, in reviewing the world legislation against homosexuality, mistakenly lists Tunisia as a country where female sexuality is legal, on the basis of the French version of article 230. *V.* Aengus Carroll and Lucas Paoli Itaborahy, "State Sponsored Homophobia 2015: A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love" (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 2015). Such mistake is corrected in the 2016 Report.

[649] *Al-liwat aw al-musahaqa idha lam yakun dakhilan fi ayy sura min suwar al-muqarrara bi-al-fusul al-mutaqaddima yu'aqib murtakibuhu bi-sujn madda thalatha a'wam.* (Unless differently specified, translations are my own from Arabic).

[650] Bosworth et al., *Encyclopédie de l'Islam.*

[651] The Wehr dictionary translates لواط as "pederasty". Hans Wehr and Cowan J. Milton, "لواط," *A Dictionary of Modern Written Arabic* (New York: Spoken Language Services, Inc., 1976). *Hadiths* report than even a kiss between two men will deserve 1000 years in Hell. See *Encyclopédie*, entry: *Liwat*

and even to the mere homosexual tendency.[652] If, from a conceptual point of view, this confusion between sexual behaviors and sexual orientation is not surprising in a pre-modern (and even modern[653]) context,[654] it poses serious concerns from a criminal perspective. Indeed, the principle of legality requires that a criminal provision identify a specific act and be clear and unascertainable. A generic ban on "homosexuality"[655] is first of all susceptible of targeting those who merely declare themselves as such;[656] secondly, it poses a problem in terms of conduct,

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[652] Daniel Reig, *Dictionnaire Arabe-Français Français-Arabe* (Paris: Librairie Larousse, 1983). Hans Wehr and Cowan J. Milton, *A Dictionary of Modern Written Arabic* (New York: Spoken Language Services, Inc., 1976).

[653] Be it sufficient to mention that, until 1975, the American Psychological Association did not acknowledge the existence of a natural, albeit minoritarian, orientation, but spoke of a "mental illness". See American Psycological Association, "Sexual Orientation, Homosexuality and Bisexuality," accessed September 27, 2017, https://web.archive.org/web/20130808032050/http:/www.apa.org/helpcenter/sexual-orientation.aspx.

[654] Although contemporary Muslim preachers continue – either intentionally or negligently – to muddy the waters in this respect. See Kugle and Hunt, "Masculinity, Homosexuality and the Defence of Islam," 274. Levi Geir Eidhamar, "Is Gayness a Test from Allah? Typologies in Muslim Stances on Homosexuality," *Islam and Christian-Muslim Relations* 25, no. 2 (April 3, 2014): 246.

[655] I use this term as in my view it may encompass the polysemic meaning of *liwat*. See for instance the entry "homosexuality" in the Merriam-Webster dictionary, that refers both to "the quality or state of being homosexual" and to "erotic activity with another of the same sex". https://www.merriam-webster.com/dictionary/homosexuality.

[656]This is not a merely theoretical possibility nowadays, given the public appearance of openly homosexual activists on Tunisian mass media; *v. infra*

for it does not specify whether only sodomy or any kind of homosexual contact will be punished under article 230.[657]

As concerns *musahaqa*, lesbianism,[658] the occurrence of condemnation of women under article 230 is much less frequent than against men, both for cultural reasons and for the absence of forensic evidences to be used against them.[659] However, this does not mean that lesbians are immune: in some cases they are charged with other crimes (such as prostitution, indecency, etc.), in other cases under article 230 itself, especially when they are caught *in flagrante delicto* in prisons.[660]

Finally, article 230 only applies to those conducts as are not covered by the previous articles: from this on may infer that it concerns acts which are 1) consensual; 2) private; 3) between adults.[661]

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[657] Cfr. Ferchichi: " As such, these materials can be interpreted variously—one is free to interpret a homosexual act as only "homosexual sex" or as any act involving members of the same gender with a sexual aim or dimension (kissing, oral sex, foreplay, etc.)." Wahid Ferchichi, "Law and Homosexuality: Survey and Analysis of Legislation across the Arab World" (Working Paper prepared for the Middle East and North Africa Consultation of the Global Commission on HIV and the Law, 27–29 July 2011, Cairo, Egypt, 2011), 2, http://bibliobase.sermais.pt:8008/BiblioNET/upload/PDF/0576.pdf.

[658] مساحقة in Wehr and Milton, *A Dictionary of Modern Written Arabic*.

[659] *V. infra* on the anal test.

[660] Mounir Baatour, *Shams'* lawyer and founder of the Tunisian Liberal Party, interviewed by the author, Tunis, July 2016. Bochra Triki, member of *Chouf*, a feminist organization also fighting for lesbian rights, interviewed by the author, Tunis, July 2016. Amina Sboui, also known as Amina Tyler, former member of FEMEN arrested for posting on Facebook a picture of herself with naked breast, interviewed by the author, Tunis, August 2016.

[661] Wahid Ferchichi, Article 230 du Code pénal : La criminalisation anticonstitutionnelle, interview by Sana Sbouai, May 26, 2015, https://inkyfada.com/2015/05/article-230-code-penal-criminalisation-anticonstitutionnelle-homosexualite-tunisie/.

Relevant case-law

In this section, I am going to analyze three legal judgments concerning two cases of homosexuality. Both recent and not yet definitive, these are relevant for showing two different procedural ways of proving *liwat*.

The first case is one which has been quite covered by international media, thanks to the NGOs that put a spotlight on it. Six young students were arrested in their dorm in Kairouan[662] and charged with sodomy, under article 230,[663] and with publicly undermining decency or public morals under article 226bis.[664] It must be noted that there was no *flagrante delicto* and that their private place was raided without a search warrant.[665]

All students underwent an anal test aimed at verifying "whether they [were] used to passive sodomy, and, if so, to ascertain the date of

[662] A city approximately 130 kilometers south of Tunis.

[663] Human Rights Watch, "Tunisia: Men Prosecuted for Homosexuality," *Human Rights Watch*, March 29, 2016, https://www.hrw.org/news/2016/03/29/tunisia-men-prosecuted-homosexuality.

[664] *V. supra*

[665] Case 6782 (Tribunal of Kairouan December 12, 2015). I thank Mr. Mounir Baatour for giving me this and the other original documents. References to the case are from a professional translation from Arabic.

the latest anal intercourse".[666] The defendants accepted to undertake it only upon verbal and physical abuses by the police.[667]

The forensic report, far from showing scientific certitude, affirmed that all the accused presented physical signs demonstrating firstly that they were "relatively" [*nasbi*^{an}] used to passive sodomy "in the past", and secondly the recent occurrence, in the previous days, of "anal penetration by a solid body compatible with an erected penis".

In spite of such vagueness, and of some of the defendants' denial, the judges both of first and second instance used this report as the irrefutable proof of the material element of the crime. Additional items of evidence produced were a condom, female clothes and a computer storing one video of the LGBT organization Shams and one of pornographic homosexual content.[668] The latter cost a defendant an additional condemnation for *publicly* undermining public decency and inciting to debauchery – in spite of the computer being private – under the assumption that "new technologies make public access and diffusion of those recordings easy".

In total, all the defendants were sentenced to a prison term of 3 years under article 230, with six additional months for the one found guilty under article 226bis as well. Furthermore, as the offenders showed "the evident will to mobilize others and spread the vice", they received

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[666] Ibid.

[667] Human Rights Watch, "Tunisia: Men Prosecuted for Homosexuality."

[668] *v. infra*

the ancillary punishment of banishment from Kairouan,[669] in order to avoid "offense to social identity", "provocation of public sentiments" and "reactions" from society.

Several elements for reflection emerge from this verdict. First of all, it gives the empirical demonstration of how the anal test is completely unreliable to provide scientific evidences of consensual sodomy:[670] the "attitude to sodomy" is formulated in merely hypothetical terms, and in any case the exam cannot prove – as the lawyer Mounir Baatour observes in his appeal to the Court of cassation – that the penetration, if ever occurred, was done by a penis and not by an object.[671] Nevertheless, the judgment of appeal[672] did not challenge this element, and even though it considerably reduced the penalty,[673] it did so by taking into account "attenuating circumstances",[674] while sharing *in toto* the outcome of the forensic examination.

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[669] Art. 5 Tunisian penal code.

[670] *V. infra* for more details on this aspect.

[671] Mounir Baatour, "Appeal to the Court of Cassation, Case 6693/2015," May 9, 2016.

[672] Case 6693 (Court of Appeal of Sousse March 3, 2016). Professional translation from Arabic.

[673] From 3 years to 1 month of jail.

[674] Probably due to international and civil society pressure. Such a mitigation seems also *contra legem*, as article 230 "calls for a punishment of 'three years' for the perpetrators of 'sodomy or lesbianism' and does not allow the judge to mitigate the sentence but only to decide whether or not to impose it." Ferchichi, "Law and Homosexuality."

Similarly, the banishment from Kairouan was revoked in appeal just for being an "unreasonable" sanction, in the lack of a critical reflection on the arguments held in the first instance verdict.

As concerns the second allegation, the oddity of the argument used to justify the "public diffusion" was so blatant that the appeal court had no choice but to overrule the conviction, for "the videos were on the defendant's laptop, in his home, and they were not publicly diffused nor sent to another person".

From such analysis, it emerges that the Kairouan condemnation was mostly grounded on anal tests "proving" passive sodomy. Although the lack of official figures on the number of convictions under article 230, let alone on the specific grounds of culpability, prevents a rigorous quantitative analysis, this seems indeed to be the prime cause for condemnation in such cases.[675] However, it is not the *sole* cause, as I am going to show.

In a very recent trial, dating back to March 2016, two men were condemned under article 230 by the tribunal of Sfax.[676] This case is relevant for two reasons: 1) no anal test was performed on the two accused; 2) no distinction was made between active and passive sodomy.

[675] As confirmed by all the relevant interviews I made in Tunis.

[676] A city around 237 kilometers south-east of Tunis

From the judgment,[677] it emerges that the two culprits had initially admitted the occurrence of sodomy, with the aggravating circumstance of prostitution; the confession however took place when the police raided their house, therefore without a lawyer's assistance[678] and allegedly under mistreatment.[679] Afterwards, both men recanted their confession, denying all allegations.

Considering that the accused did not undergo any medical examination and that their admission of guilt was recanted, the prosecution's case remained quite weak in terms of evidence. At any rate, per article 69 of the code of criminal procedure, a confession does not dispense the judge from searching for additional pieces of evidence. In the instance under consideration, such elements were identified in SMS where the two men made arrangements over their sexual encounter, and in the presence of condoms and lubricant in the house. Those, according to one of the accused, were not even of his own, but of an association fighting HIV where he worked; however, this fact was not taken under

[677] Case 1757 (Tribunal of Sfax March 19, 2016).

[678] Here it is important to take into account the reform of the code of criminal procedure occurred on 2 February 2016, which restricts the powers of the judiciary police and in any case requires the presence of a lawyer for all interrogations (with some exceptions in case of terrorism). However, this law having entered into force only last June, it was not yet applicable at the time of the men's arrest. For more information, see Henda Chennaoui, "Tout Sur Les Nouvelles Réformes Du Code de Procédure Pénale," *Nawaat*, February 4, 2016, https://nawaat.org/portail/2016/02/04/tout-sur-les-nouvelles-reformes-du-code-de-procedure-penale/.

[679] Mounir Baatour, interview.

consideration, and the judge concluded that "the defendants' denial [was] worthless, given the amount of other circumstantial elements".[680]

This verdict marks an important change, for the bad, with respect to the Kairouan's one: while in the latter the possession of condoms was considered mere circumstantial evidence, and the main proof came from the forensic examination,[681] in this case purely presumptive elements are deemed sufficient to reach the burden of proof to condemn for *liwat*.

Strategies for decriminalization

Downright abrogation of article 230

A number of civil society organizations are currently fighting in Tunisia for gay rights. Each of them has its own approach, but they are all gathered under the "Collective for individual freedoms",[682] an umbrella for 29 organizations[683] defending individual liberties.

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[680] Case 1757.

[681] It must be stressed that I am not discussing here how flawed or inhumane that is, I am merely making an assessment regarding the burden of proof for convicting.

[682] EuroMed Rights, "Tunisie : Recommandations Du 'Collectif Pour Les Libertés Individuelles,'" January 19, 2016, https://www.facebook.com/notes/euromed-rights-emhrn/tunisie-recommandations-du-collectif-pour-les-libert%C3%A9s-individuelles/169179610116331.

[683] ATFD : Association Tunisienne des Femmes Démocrates; EuroMed Droits; Beity; ADLI : Association de Défense des libertés individuelles; ASF : Avocats Sans Frontières; Damj : Association Tunisienne pour la Justice et l'Egalité; Association Shams;

Among those NGOS, *Shams* is the first to explicitly mention the "rights of sexual minorities" in its statute.[684] Its focus is mainly a legal one: the abrogation of article 230. To this aim, the organization has prepared a draft bill illustrating the legal grounds for abrogation, based both on the International Human Rights Law and on the Tunisian Constitution.[685] The members of the association have also taken a very direct approach vis-à-vis the issue, by publicly appearing on Tunisian mass media in order to defend their sexual identity and their fight against article 230.[686]

While this has been a dramatic step forward for Tunisian gays, who for the first time have manifested their existence publicly, proudly and with their faces uncovered – something unthinkable until a very few

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LTDH : Ligue Tunisienne pour la Défense des Droits de l'Homme; Kelmti; FIDH : Fédération internationale des Droits de l'Homme; Chouf; OMCT :Organisation Mondiale Contre la Torture; Free Sight; CALAM: Coexistence with Alternative Language and Action Movement; Association Tunisienne pour la défense des valeurs universitaires; Mawjoudine; Waai; Jamaity; Mnamti; Oxfam; Horra; Association Tunisienne de la Santé Reproductive; Fanni Raghman anni; Association Tunisienne de Lutte contre les MST et le SIDA; Tahadi; Groupe Tawhida Béchikh; Association Art Rue; Association Tunisienne pour l'égalité sociale et la solidarité; ATP + : Association Tunisienne de Prévention Positive.

[684] Bouhdid Belhadi, responsible for external communication of the association *Shams*, interviewed by the author, Tunis, July 2016.

[685] Association Shams, "Un Projet de Loi Présenté Par L'association Shams Au Parlement Visant L'abrogation de L'article 230 Du Code Pénal," *Association Shams*, May 6, 2017, http://shams-tunisie.com/un-projet-de-loi-pr%C3%A9sent%C3%A9-par-l%E2%80%99association-shams-au-parlement-visant-l%E2%80%99abrogation-de-l%E2%80%99article-230.

[686] Many of their public interventions may be viewed on the Youtube channel "LGBT Tunisia" https://www.youtube.com/user/kkaasser134/videos (accessed September 5, 2016).

years ago –, it has also provoked a backlash.[687] At the same time, sadly, very little support has come from the so-called progressive and secular politicians,[688] with the unique relevant exception of the former Minister of Justice Mohamed Salah Ben Aissa, who called for abrogation of article 230[689] but was immediately disowned by the President of the Republic in person.[690]

For these reasons, other organizations for the protection of minorities such as *Damj* and *Mawjoudin-We exist* declare to prefer a more nuanced approach, less exposed and focused on more cautious activities such as awareness campaigns, training, psychological and logistical support, *ac similia*. It goes without saying that, in spite of tactical differences, all of them share the hope to see article 230 repelled. [691]

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[687] Conor McCormick-Cavanagh, "Is Homophobia at All-Time High in Tunisia?," *Al-Monitor*, May 4, 2016, http://www.al-monitor.com/pulse/originals/2016/05/tunisia-lgbt-homophobic-attacks.html. Imam of Sfax calling for the execution of homosexual, *v. supra* note 530.

[688] The number of MPs disposed to back the abrogation of article 230 varies, according to different sources I interviewed, between 0 and 3 (in a Parliament composed of 217 members).

[689] Yassine Bellamine, "Le Ministre de La Justice tunisien: 'Le Problème Originel Est L'article 230 Qui Criminalise' les Pratiques Homosexuelles," *Al Huffington Post*, September 28, 2015, http://www.huffpostmaghreb.com/2015/09/28/ministre-justice-article-_n_8208718.html.

[690] Sarah Leduc, "En Tunisie, le président Essebsi s'oppose à la dépénalisation de la sodomie en Tunisie," *France 24*, October 7, 2015, http://www.france24.com/fr/20151007-tunisie-essebsi-depenalisation-pratiques-homosexuelles-sodomie-droits-lgbt-lesbien-gay-test.

[691] Ali Bousselmi, president of the association *Mawjoudin-We exist*, interviewed by the author, Tunis, July 2016. Shams Radhouani Abdi, member of the same organization, interviewed by the author, Tunis, July 2016. Hafedh Trifi, member of the association *Damj*, interviewed by the author, Tunis, July 2016.

Global revision of the penal code

An overall reform of the penal code, aimed at harmonizing it with the new Constitution and the new democratic order, has been on the table for a couple of years, according to Antonio Manganella, director of *Avocats sans Frontières* (ASF) in Tunis.[692] ASF is part of the "Observatory of Tunisian Justice" (ROJ),[693] a body aimed at scrutinizing criminal justice in Tunisia in order to harmonize it with international legal standards. The abovementioned Collective for Individual Liberties has similarly been created with the explicit intent to push for a global reform of the penal code and the code of criminal procedure, so as they comply with Constitutional liberties.[694]

Such a comprehensive approach, according to some,[695] is strategically more productive than a frontal fight exclusively focused on article 230, for it dilutes conservative social pressure between a plethora of different issues.

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[692] Antonio Manganella, Tunisia office director of *Avocats sans Frotières*, interviewed by the author, Tunis, July 2016. ASF is directly involved in the Kairouan case, examined above, as lawyers from the network are defending some of the culprits.

[693] "ROJ-TUNISIE | Réseau D'observation de La Justice Tunisienne," accessed June 27, 2017, http://www.rojtunisie.com/fr/accueil/. The other founding members are the Tunisian Human Rights League (LTDH, *Ligue Tunisienne pour la Défense des Droits de l'Homme*) and the Tunisian Order of Lawyers (ONAT, *Ordre National des Avocats de Tunisie*), better known for being part of the Quartet that won the 2015 Nobel Peace Prize.

[694] *V. supra* note 682.

[695] Antonio Manganella, interview. Amna Guellali, interview. Yadh Ben Achour, interview.

Judgment of the will-be Constitutional Court

The establishment of the Constitutional Court, a crucial advancement provided by the new Constitution, ought to be a potentially critical step for furthering human rights, according to all sources I have interviewed in Tunisia. Especially when it comes to LGBT rights, given the hermetic sealing of the parliamentary road, the Constitutional Court raises high expectations for the elimination of article 230 on unconstitutionality grounds.

Having said that, nothing is to be taken for granted, much depending on the justices' cultural, religious and political background. Indeed, as Wahid Ferchichi - president of the Tunisian Association Defending Individual Liberties - warns,[696] in spite of multiple grounds for decriminalization, the Constitution also contains legal anchors for preserving article 230. One might be article 1, enshrining Islam as the religion of Tunisia, due to a (real or supposed) Islamic aversion toward homosexuality. Other obstacles are "public morals" and "public health", identified by article 49 as legitimate limitations to the exercise of rights. Consid-

[696] *V. supra*, note 504.

ering the extensive reject of homosexuality within the Tunisian society,[697] and the stereotypes surrounding homosexuals' attitude to spread illnesses, this hypothesis cannot be quickly ruled out.[698]

Ban on the anal test

From a procedural point of view, there are three possible ways to prove someone's homosexual behavior: *flagrante delicto*, confession, or the medical examination of the male anus in order to discover signs of passive sodomy. Tunisian authorities largely recur to anal tests,[699] which are performed by forensic physicians, as seen above.

Not only is it highly debatable that such tests have any scientific value whatsoever,[700] they also raise problems as to their compatibility with the rules of medical ethics. This conflict may strongly affect the entire edifice of criminalization of homosexuality: if doctors are found

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[697] According to a poll of the Pew Research Center, 94 per cent of Tunisians consider homosexuality unacceptable. Pew Research Center, "The Global Divide on Homosexuality," *Pew Research Center's Global Attitudes Project*, June 4, 2013, http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/.

[698] I am going to address article 49 in more details *infra*.

[699] Human Rights Watch, "Tunisia: Men Prosecuted for Homosexuality."

[700] "According to Physicians for Human Rights, anal exams have no medical or scientific value in determining whether consensual anal sex has taken place." Ibid. According to a Tunisian forensic doctor I have interviewed (and whose name I am not authorized to disclose), there are some physical signs that could be connected to sodomy, but it is impossible to reach a scientific certitude on that (unless violence was involved). See also the detailed criticism against anal tests coming from a Lebanese medical association: Lebanese Medical Association for Sexual Health, "Anal Tests in Lebanon," *Lebanese Medical Association for Sexual Health*, July 7, 2014, https://lebmash.wordpress.com/2014/07/07/anal-tests/.

in violation of the ethical code while performing anal tests, such forensic examination will become illegal, with the consequence that it will be impossible to claim any pseudo-scientific evidence of sodomy before the court.

For this reason, Amna Guellali, director of Human Rights Watch Tunisia, [701] says that the fight for a ban on anal tests is strategically wiser than one for a very unlikely parliamentary abrogation of art. 230, which, in the current circumstances, is doomed from the beginning. It is therefore integral part of HRW's action. Guellali recalls that this path was successfully followed in Lebanon, where steps have been taken to end this practice, thanks to the conjoint efforts of the Lebanese Order of Physicians and the Ministry of Justice.[702]

A positive sign in this sense came in 2015 from the Tunisian Council of the Order of Physicians: in a communiqué, the Council, "as the guarantor of respect for medical ethics, strongly condemn[ed] any forensic examination without consent or not justified, against the dignity and the physical or mental integrity of the person examined". Furthermore, it declared that it would conduct "an investigation in order to

[701] *V. supra* note 695.

[702] Human Rights Watch, "Dignity Debased: Forced Anal Examinations in Homosexuality Prosecutions," *Human Rights Watch*, July 12, 2016, https://www.hrw.org/report/2016/07/12/dignity-debased/forced-anal-examinations-homosexuality-prosecutions.

assess a possible breach of the code of medical ethics".[703] Unfortunately, after this press release, the Order has taken no official position to halt this practice.

In fact, this road is narrower than one could expect, for in the code of medical ethics,[704] quite surprisingly, no norm requires the patient's consent for a medical treatment – meaning that the physician is not directly bound to obtain it before performing an anal test. However, other norms may apply to the matter. First of all, the patient must be informed of the nature of the examination before it is undertaken (art. 73). The doctor must also refuse to perform an examination in certain circumstances, namely if he assesses that the interests of his patient are at stake (art. 72), or "if he considers that the questions posed to him are extraneous to strictly medical techniques" (art. 74).[705] In spite of the ambiguity of these provisions, a Tunisian forensic physician[706] confirmed to me that ethical issues arise when a judicial authority requires an examination to prove somebody's homosexuality, as it may be tantamount to a degrading and discriminatory treatment.[707] Although he remarked that the free and informed patient's consent exempts the doctor from liability,

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[703] Conseil National de l'Ordre des Médecins de Tunisie, "Communiqué," September 28, 2015, https://www.facebook.com/OrdreMedTun/posts/430298250496205. My own translation from French.

[704] "Code de Déontologie Médicale Tunisien," Pub. L. No. Decree 93 (1993).

[705] My own translation from French.

[706] *V. supra* note 700.

[707] *V. infra.*

he added that the latter himself ought to dissuade the patient from taking the examination if he deems it discriminatory. Furthermore, in no case should he allow the police's presence inside the medical cabinet, as this could turn for the patient into a form of psychological (or even physical) pressure to accept the examination.

Yet, an additional element has to be taken into consideration, i.e. the conflict between the code of ethics and the norms regulating the duties of the forensic physician before the judge.[708] This is not the place to develop this issue in depth; be it sufficient to say that the judge's request is formulated in terms of "order" (*ma'muriyya*) to the doctor[709] – which is why a joined action from the Order of Physicians, the Ministry of Health and the Ministry of Justice would be desirable.

EGYPT

"Fujur"

Unlike Tunisia, Egypt does not impose in explicit terms a legal ban on homosexuality. However, the crackdown against the category is even more egregious than in the "Jasmines country", due to article 9(c)

[708] I thank Dr. Sami Ben Sassi for brainstorming with me on these intricate matters. Interviewed by the author, Tunis, August 2016.

[709] Based on an official court document, Order of medical examination, No. Document 1027, case 2032/16 (Court of Appeal of Sfax May 25, 2016).

of the Law 10 of 1961 "on the Combating of Prostitution". This reads as such:

> "Whoever incites a person, be they male or female, to engage in debauchery or in prostitution, or assists in this or facilitates it, and similarly whoever employs a person or tempts him or induces him with the intention of engaging in debauchery [*fujur*] or prostitution, is to be sentenced to imprisonment for a period not less than one year and not more than three years and a fine between 100 and 300 LE in the Egyptian administration and between 1000 and 3000 Lira in the Syrian administration".[710]

Fujur is interpreted as to denote male homosexuality. However, there is debate among scholars and activists about whether the letter of this article may directly refer to homosexuality or not.

According to the *International Lesbian, Gay, Bisexual, Trans and Intersex Association* (ILGA), *fujur* merely denotes a generic "debauchery", whence it would follow that there is actually no ban of homosexuality as such in the Egyptian penal system.[711] Wehr translates *fajar, fujur* as "act immoraly, sin, live licentiously, lead a dissolute life, indulge in debauchery": there is no explicit mention of sodomy or male-to-male

[710] The law dates back to the time of the United Arab Republic. Translation provided by Human Rights Watch, "In a Time of Torture: The Assault on Justice In Egypt's Crackdown on Homosexual Conduct," *Human Rights Watch*, March 2004, https://www.hrw.org/reports/2004/egypt0304/.

[711] Aengus Carroll, "State Sponsored Homophobia 2016: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition" (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 2016).

acts, although of course they may be implicitly included in a genus-species relation.

According to Scott Long, instead, *fujur* is not any more ambiguous than "sodomy" or "unnatural acts" in the Anglo-Saxon legal tradition, both used to variably punish bestiality, homosexuality, or even anal sex between a man and a woman.[712] It has to be considered, as stressed above, that Arabic lacks the exact equivalent of "homosexuality" in all its facets.

Furthermore, according to Long, the Egyptian jurisprudence has made clear a long time ago, without any possible ambiguity, that *fujur* refers to homosexuality.[713] In particular, the Court of cassation, in a landmark decision of 1975, held that *fujur*, when committed between two men, is punished even if non-commercial (contrarily to sexual intercourses between a man and a woman).[714] In the judgment, the Court condemned the passive partner, caught *in flagrante*, and rejected his argumentations that he had not done it under payment:

"The legislator explicitly stated that this crime [the habitual practice of debauchery] happens when one practices vice [fasha'] with people with no distinction, and

[712] Colin Stewart, "How 'debauchery' Law Set up Egypt's Gay Crackdown," *76 CRIMES*, June 6, 2014, https://76crimes.com/2014/06/06/how-debauchery-law-set-up-egypts-gay-crackdown/.

[713] Ibid. Scott Long, "Entrapped! How to Use a Phone App to Destroy a Life," *A Paper Bird*, September 20, 2015, https://paper-bird.net/2015/09/19/entrapped-how-to-use-a-phone-app-to-destroy-a-life/.

[714] Human Rights Watch, "In a Time of Torture," 14.

when this happens habitually. He did not necessitate for this charge that the practice of debauchery [fujur] … happens in return for a payment."[715]

Even so, Baudoin Dupret correctly notes that the criminalization of homosexuality in Egypt is based on the use of analogy, which is clearly forbidden in criminal law.[716] The vague text of the law, only defined by an unpublished ruling of the Court of cassation,[717] paves the ground for legal uncertainty which is filled through the recourse to commonsense (i.e., not legal) understanding of what is "normal" and "natural", in a mixture of legal, moral and stereotypical argumentations.[718]

Furthermore, some confusion on the commercial nature of *fujur* continues to resurface. This happened, for instance, in the Queen Boat affair – one of the most egregious instance of collective prosecution against suspected homosexuals apprehended in a police raid at the gay floating nightclub "Queen Boat" in 2001.[719] From one of the verdicts, a

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[715] Court of Cassation, case 683 of 1975, cit. in ibid.

[716] Baudouin Dupret and Jean-Noel Ferrié, "Morale ou nature: Négocier la qualification de la faute dans une affaire égyptienne d'homosexualité," *Négociations* 2, no. 2 (2004): 49.

[717] Baudouin Dupret, *Adjudication in Action: An Ethnomethodology of Law, Morality and Justice* (Farnham: Ashgate Publishing, Ltd., 2011), 313.

[718] Ibid.

[719] See Katerina Dalacoura, "Homosexuality as Cultural Battleground in the Middle East: Culture and Postcolonial International Theory," *Third World Quarterly* 35, no. 7 (August 9, 2014): 1295. Human Rights Watch, "In a Time of Torture."

certain ambiguity over the alleged commercial nature of the crime clearly emerged:

> "The crime designated in [this text] is only committed when a man or a woman fornicates (*mubasharat al-fasha'*) with people without distinction, habitually. When a woman fornicates and sells her virtue to whomever asks for it without distinction, she commits prostitution (*da'ara*) […]; *fujur* occurs when a man sells his virtue to other men without distinction."[720]

Another element emerging from the Queen Boat affair is that only passive sodomy is taken into consideration, as the only one detectable by a forensic physician, according to the judge.[721] This reflects a pattern that was originally typical for all instances of *fujur* (as was the landmark case of 1975), whereas in more recent cases courts have avoided such distinction and condemned defendants irrespective of their sexual roles (*v. infra*).[722]

As concerns the requirement of "habituality", this has been interpreted in case-law as to mean that the act must be committed "more than once in three years, with more than one person",[723] or "to give

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[720] Case 182/2001, Qasr al-Nil, in Dupret, *Adjudication in Action*, 313.

[721] Dupret and Ferrié, "Morale ou nature," 45.

[722] Human Rights Watch, "In a Time of Torture," 15. Dalia Abdel Hamid, gender issues officer at the Egyptian Initiative for Personal Rights, phone interview by the author, May 2017.

[723] Ibid., 16.

ourselves 'indiscriminately'".[724] *De facto*, this is an element which is almost impossible to prove and that even the Court of cassation has stipulated to be "left to the given court to determine […] as long as this determination is reasonable".[725]

Elements of evidence

In terms of evidence, the ways to prove homosexual conducts are the same seen for Tunisia: *flagrante delicto*, confession, circumstantial evidence, forensic expertise.[726]

As to the last-mentioned, Egyptian prosecutors and judges – like their Tunisian peers – require anal examinations, which are carried out by the Forensic Medical Authority, a department of the Ministry of Justice.[727] As in the Tunisian case, a positive anal test seems to be a crucial element for homosexuality-based convictions, being regarded by judges as the irrefutable proof of "habituality" to sodomy. This happens in spite of the fact that forensic reports are far from showing scientific certitude in ascertaining habituality to penetration,[728] as also discussed above. Even the director of the Egyptian Forensic Medical Authority, interviewed by Human Rights Watch, has admitted that "the test cannot

[724] Abdel Hamid, interview.

[725] Human Rights Watch, "In a Time of Torture," 137.

[726] Dupret, *Adjudication in Action*, 307.

[727] Human Rights Watch, "Dignity Debased," 24.

[728] Human Rights Watch, "In a Time of Torture," 44.

prove criminal behavior according to the letter of the law". In fact, in his own words, "there is no way to determine through the forensic examination whether the vice is practiced 'without discrimination', with multiple partners. […] Circumstantial or other evidence is needed."[729] It must be further said that even a negative test is no guarantee of acquittal: "doctors routinely add a caveat in medical reports that concealment of signs of anal intercourse is possible through the use of lubricants and cosmetics".[730]

The bar on circumstantial evidence is set very low, and based on gross stereotypization: an effeminate appearance, a profession seen as typically feminine or "perverted",[731] possession of female cloths, detention of condoms,[732] even the hair style or colored underwear[733] may be sufficient to reach the burden of proof. Decisive pieces of evidence now increasingly used in court are online conversations and photos taken from dating applications and websites.[734]

Another common pattern in term of evidence is extorting confession with torture and inhuman and degrading treatments, as vastly documented by human rights organizations.

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[729] Ibid., 112.

[730] Human Rights Watch, "Dignity Debased," 28.

[731] In the Queen Boat case, for instance, the profession of masseur was seen as an element of proof. Dupret, *Adjudication in Action*, 308.

[732] Abdel Hamid, interview.

[733] Human Rights Watch, "In a Time of Torture," 4.

[734] Abdel Hamid, interview.

Recent trends and strategies for decriminalization

Since the advent of the Internet, and more largely with the emergence of dating apps, specific patterns have started to emerge.

First of all, the *Egyptian Initiative for Personal Rights* (EIPR) has documented a dramatic increase in homosexuality cases: while 185 men had been accused of debauchery in 13 years from 2000 up to 2013, more than 200 have been indicted since.[735] The NGO *Solidarity with Egypt LGBT* notes that, in the aftermath of the 2011 revolution - during the government of the SCAF[736] before and Mohammed Morsi after - attention was more on protests and civil disobediences. Nevertheless, "the most famous charge which revolutionists and human right activists were accused with, was being homosexual, or their political opinions support homosexual rights".[737] The reason for the rapid increase under Sisi seems equally political, driven by the quest for an easy consensus among the religious and conservative Egyptian society: "he has wanted to show

[735] Abdel Hamid, interview. A document produced by the NGO "Solidarity with LGBT in Egypt" spoke of 91 to 150 cases only in the biennium 2013-2015. Ibrahim Abdella, "From Mubarak to Sisi: LGBT in Egypt, a Timeline of Repression" (Solidarity with LGBT Egypt, Lesbian and Gay Federation in Germany, 2015), http://www.lsvd-blog.de/wp-content/uploads/2015/08/Vortrag-%C3%84gypten.pdf.

[736] Supreme Council of the Armed Forces.

[737] Abdella, "From Mubarak to Sisi," 4.

Egyptians that he is as conservative as the ousted Muslim Brotherhood".[738]

Another probable explanation is the increasing diffusion of dating apps, which have made the occurrence of "internet entrapment" by the police (a phenomenon documented by Human Rights Watch as early as in 2004) a much more frequent, and easier, occurrence.[739]

Besides article 9, two other provisions become relevant here: article 178, on manufacture and possession of material against public morals; and article 269*bis*, on incitement to indecency on the public street.

Article 178 states:

"Whoever makes or holds, for the purpose of trade, distribution, leasing, pasting or displaying printed matter, manuscripts, drawings, advertisements, carved or engraved pictures, manual or photographic drawings, symbolic signs, or other objects or pictures in general, if they are against public morals, shall be punished with detention for a period not exceeding two years and a fine of not less than five thousand pounds and not exceeding ten thousand pounds or either penalty".

This article is used to target detention of pornographic materials or sexual conversations on the Internet. Even conversations having non-

[738] Ibid.

[739] Abdel Hamid, interview.

sexual character are criminalized under this provision, if they are occurring between gay men.[740]

Article 269*bis* states:

"Whoever is found on a public road or a traveled and frequented place inciting the passers with signals or words to commit adultery shall be punished with detention for a period not exceeding one month. If the felon recurs to committing this crime within one year from the date the court ruling is passed against him in the first crime, the penalty shall become detention for a period not exceeding six months and a fine not exceeding fifty pounds. A ruling of indictment shall necessitate placing the convict on police parole for a period equal to that of the penalty".

This article is particularly relevant in internet entrapments – when the moral police in disguise shows up at dates planned with the victim on gay chats. In those cases, where there is clearly no *flagrante delicto* of debauchery, the police claims it caught the accused *in flagrante* while committing the other crime of inciting people to vice in the public street.[741]

As concerns the perspectives of decriminalization, there is much less social openness towards the issue compared to Tunisia; furthermore,

[740] Human Rights Watch, "In a Time of Torture," 137.

[741] Ibid., 138.

human rights organizations and NGOs suffer from a generalized crack-down leaving them with a considerably narrower room for manoeuvre. Nevertheless, the Egyptian Initiative for Personal Rights is pursuing a multi-strategy campaign based on four main pillars. The first is a draft law aimed at decriminalizing sexual relations between consenting adults. The second aims at involving the Order of Physicians and the doctors' syndicates in issuing deontological guidelines against the anal test. The third is joint action with the United Nations Programme on HIV/AIDS (UNAIDS) aimed at preventing the use of condoms from being exploited in court as an element for conviction; in fact, Egypt lives the paradoxical situation of receiving UNAIDS funds for condoms promotion, while at the same time encouraging sexual partners not to use them lest a criminal prosecution. The fourth action consists in an advocacy campaign with the dating apps company to push them to adopt measures of protection for the users, such as end-to-end encryption, fast deletion, possibility to flag suspect individuals, and others.[742]

Religious bases for prosecuting homosexuality

For the purposes of this dissertation, it is very relevant to note that Egyptian case-law on debauchery also presents the accusation of "offense against religion", as a mark of my main claim: whatever deed, irrespec-

[742] Abdelhameed, interview.

tive of its aim and content, is perceived as a threat to the dominant culture (which is shaped around Islam), will be criminalized. This puts on a similar conceptual level the crimes of blasphemy and homosexuality, as highlighted in the previous chapter.[743] In the Queen Boat case, indeed, some of the defendants were condemned under this charge, either alone or combined with debauchery.[744] Article 98(f) of the criminal code was explicitly invoked, with defendants accused of exploiting religion in advocating and propagating extremist thoughts with the aim of instigating sedition and division.[745] According to the court, one of the accused "adopted deviant (*munharifa*) ideas inciting others to hold revealed religions in contempt (*izdira'*) and to call to abject (*radhila*) practices and sexual acts contrary to revealed laws".[746] The UN Working Group on Arbitrary Detention reports that the defendants were charged with "making homosexual practices a fundamental principle of their group in order to create social dissensions, and engaging in debauchery with men".[747] "Social dissensions" is the *fitna* of article 98f, i.e. a religious crime, as explained before.

Debauchery emerges in other words as an epiphenomenon of contempt for "revealed revealed religions" and their laws. Baudoin Dupret

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[743] I will show in the following chapter that potential solutions are also similar.

[744] Dupret, *Morale ou Nature*, 45

[745] Dupret and Ferrié, "Morale ou nature," 50.

[746] Case 182/2011, Qasr al-Nil, in Dupret, *Adjudication in Action*, 307.

[747] U.N. Working Group on Arbitrary Detention, "Yasser Mohamed Salah et Al. v. Egypt" (U.N. Doc. E/CN.4/2003/8/Add.1, 2002).

rightly notes how, in the Queen boat affaire, totally different elements mingle, in a mixture of moral, legal, political, identitarian categories.[748] The judge's attitude is the same already seen about blasphemy: the crime is a sin requiring a sort of judicial exorcism, meant to show the defendant the abnormity of his perversion, so as to bring him to repent while purifying him through the punishment.[749] The rulings show several passages stressing that the arrest prompted the defendants "to cleanse of their sins" and "repent" of their "sexual perversion".[750]

> "Religious morality works here as the ultimate criterion for the evaluation of human action. Human justice […] proceeds from this superior authority: forgiveness belongs firstly to God, and secondly to the judges; pity belongs to God, and secondly to the judges; pity belongs to God, so as to soften the judges' hearts afterwards; mistakes must be confessed to God, and only after to the judges".[751]

From this point of view, it will not be surprising that the debate around the Queen Boat case was constructed following the category of an authentic Egyptian culture under threat from the West, with homosexuality depicted as a Trojan horse of the latter, maliciously spread to bring moral corruption.[752]

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[748] Dupret, *Adjudication in Action*, 300.

[749] Dupret and Ferrié, "Morale ou nature," 55.

[750] Dupret, *Adjudication in Action*, 300.

[751] Ibid., 311.

[752] Dalacoura, "Homosexuality as Cultural Battleground in the Middle East," 1296.

According to Jeffrey Redding, the religious accusation in homosexuality cases actually comes before, and takes on greater relevance, than the debauchery one: "[…] it has often been overlooked that "debauchery" and "gayness" actually entered into the picture later than what is commonly understood: the original charges against the 'Queen Boat 52' concerned not 'debauchery,' but 'contempt of heavenly religion'."[753]

The entire case was built up as the discovery of a satanic cult aimed to destroy Islam and replace it with an evil cult allowing the worst indecencies.

"[…] several Egyptian government officials who were involved with the (public) trials of the "Queen Boat 52" attempted to portray it as a matter of "religiosity" and "religious" morals. Thus, not only did Judge Hassan al-Sayes […] attempt to link the "Queen Boat 52" with violations of Islamic religious/moral norms, but so did an Egyptian prosecutor who was involved in the trial of a juvenile boy who was arrested during the May 2001 crackdown in Cairo. Speaking to the court concerning this boy, the prosecutor submitted that there were '[a] number of those who submitted to vice, until they became its servants with no conscience, have hurried towards all that God has prohibited, ridding themselves of all morals. They strayed from the straight path that God has drawn for man and through which He organized his desires.' Finally, the Prosecutor General of Egypt himself, responding to international condemnation of

[753] Jeffrey A. Redding, "Human Rights and Homo-Sectuals: The International Politics of Sexuality, Religion, and Law," *Northwestern Journal of International Human Rights* 4 (2006): 444.

Egypt's conduct in relation to the 'Queen Boat 52', has emphasized that '[w]e are dedicated to protecting society against perversion, from a religious, social, and cultural point of view'."[754]

Nor is this trend by now overcome: in a 2014 report on state-sponsored homophobia, ILGA found that article 98(f) is still used to prosecute homosexuals.[755] The same emerges from the 2015 report.[756]

While the EIPR did not find article 98(f) explicitly invoked in the cases they analyzed, nonetheless they confirmed that religious passages from the Quran and the Sunna are constantly reported in the rulings and used to ground the convictions against homosexual men.[757]

It is relevant to note that the connection between "debauchery" and "Satanism" has been made by Egyptian courts also in relation to other cases not involving homosexuality - which reasserts the commonalities in prosecuting homosexuality, blasphemy and atheism. This is well exemplified in the case of a novelist, Ahmed Naji, brought to court for

[754] Ibid., 445.

[755] M. S. Mohamed, "Sexuality, Development and Non-Conforming Desire in the Arab World: The Case of Lebanon and Egypt" (IDS, 2015), 12, https://opendocs.ids.ac.uk/opendocs/handle/123456789/7115.

[756] Carroll and Itaborahy, "State Sponsored Homophobia 2015," 52.

[757] Abdel Hamid, interview.

"obscenity" under article 178 of the penal code[758] punishing the publication of material which undermines "public morals".[759] After the acquittal in the first instance, taking into consideration the artistic nature of the work, the court of appeal sharply differed, and condemned Naji to two years in prison for "undermining public morality".[760] The judge concluded that

"[t]he law was meant to protect *public morality, religion, patriotism, and the family*. This way, Naji's writing, the judge argued, undermined the society itself. He accused the writer of ignoring the values and ethical boundaries of Egyptians in a '*diabolical* way' that incited *debauchery*. The judge called on parliament to increase prison terms for such offenses 'because spreading vice in an attempt to destroy the values and the moral code of society is such a grave matter requiring a harsh reprisal.' He then severely criticized all those who think that the moral code is relative and not immutable and unchangeable. It was shameful, he said, to leave 'the fate of our nation at the mercy of those who would treat it lightly and scandalously as if they were playing cards.' He concluded: 'Down with such freedom that brought to us corruption, loss of ethics, and moral looseness since the incidents that hit our beloved Egypt.'"[761]

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[758] "Ahmed Naji," *PEN America*, accessed June 27, 2017, https://pen.org/advocacy-case/ahmed-naji/.

[759] "Whoever makes or holds, for the purpose of trade, distribution, leasing, pasting or displaying printed matter, manuscripts, drawings, advertisements, carved or engraved pictures, manual or photographic drawings, symbolic signs, or other objects or pictures in general, if they are against public morals, shall be punished with detention for a period not exceeding two years and a fine of not less than five thousand pounds and not exceeding ten thousand pounds or either penalty".

[760] Mansour, "Freedom of Expression in Egypt," 234.

[761] Ibid., 237 (emphasis added).

Several elements require attention.

First, the judge mentions all the pillars of the Egyptian collective morality that we have seen curtailing individual rights in the Constitution of 2012: "public morality", "religion", "patriotism" and the "family".

Then he inserts a very relevant element, the reference to the "diabolical", in connection with "debauchery". This clearly puts the crime, once again, under a typical theological light, where it acquires the contours of a sin requiring a form of modern, judicial exorcism to purify the sinner.[762] It is also relevant to note that debauchery here is used in a non-technical way to denote expressions which are perceived as being outside the boundaries of public morality. This confirms what stated earlier about the Tunisian case: the homosexual, the blasphemer and the free thinker represent the same kind of offenders, pariahs whose behaviors constitute an attack to religion and society.

Final considerations

The Egyptian and Tunisian laws against homosexuality fall within the typical scheme of moral crimes: they do not identify a "victim" of the crime, insofar as the victim is represented by society itself.

[762] Ibid., 238.

They are also shaped on vague and polysemic terms, which pave the way for arbitrariness, through the use of the analogical reasoning and moral categories of interpretation.

Such categories have strong religious grounds,[763] sometimes even reported explicitly in the verdicts.

Dalacoura observes that, if hostility towards homosexuality in the Middle East may not be exclusively associated with Islamism, "there is no doubt that the latter's rise and expansion after the 1970s exacerbated the tendency to vilify homosexuality and depict it as part of the West's corrupting cultural influence".[764]

The religious factor is also evident in the social revulsion against homosexuality.[765] According to a study of the Pew Research Center,[766] only 2 per cent of Tunisians and 3 per cent of Egyptians declare that society should accept homosexuality, while 94 per cent of Tunisians and 95 per cent of Egyptians believe it should not. These figures are not much different from what emerges in Jordan, Pakistan, Palestinian Territories and Indonesia – just to mention some. The situation is slightly

[763] For an overview of different Islamic positions on homosexuality, mostly hostile, *v. supra*, note 654.

[764] Dalacoura, "Homosexuality as Cultural Battleground in the Middle East," 1295.

[765] Susanna Berkouwer, Azza Sultan, and Samar Yehia, "Homosexuality in Sudan and Egypt: Stories of the Struggle for Survival," *LGBTQ Policy Journal*, 2015, 17, http://www.hkslgbtq.com/wp-content/uploads/2015/01/ARTICLE_BERKOUWER.pdf.. Pew Research Center, "The Global Divide on Homosexuality."

[766] Pew Research Center, "The Global Divide on Homosexuality."

(albeit not much) better in Turkey and Lebanon,[767] where, as Jaspal notes, "Islam arguably plays a less central role in social and political life".[768] The abovementioned poll evidences a clear inverse correlation between the countries' religiosity scale and the tolerance for homosexuality, with Muslim states scoring the worst rates. This trend of rejection of homosexuality among Muslims does not change even among Islamic communities in Europe, where homophobic attitudes appear considerably higher than among the average population.[769]

This explains why targeting homosexuals "is thought to be an easy way to gain religious credentials and to distract people from the state's other failures",[770] as explained above with regards to Sisi's crackdown.

The social attitude is reflected at the legal level: of the 13 states which impose death penalty on homosexuals, all are Muslim-majority countries, and do so on the basis of shari'a law.[771] Even when gays do not face execution, persecution in different forms is endemic.[772]

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[767] 9 per cent of Turks and 18 per cent of Lebanese declare that society should accept homosexuality. Ibid.

[768] Rusi Jaspal, "Islam and Homosexuality," in *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*, ed. Angela Wong et al. (Singapore: John Wiley & Sons, Ltd, 2016), 3.

[769] Ibid.

[770] Mohamed, "Sexuality, Development and Non-Conforming Desire," 12.

[771] Carroll, "State Sponsored Homophobia 2016," 36.

[772] "Straight but Narrow," *The Economist*, February 4, 2012, http://www.economist.com/node/21546002.

In consideration of all of this, it should not be surprising that the Organisation of the Islamic Cooperation has constantly been in the forefront of the battle against the protection of sexual orientation in international fora.[773]

This picture contributes to explain the striking similarities, at the social, ideological and legal levels, between the persecution against gays and free thinkers, both perceived as different instances of the same threat against religion.

In the next chapter, I am going to show that the legal grounds for protection as well are mostly the same.

[773] Hamzić, "A History in the Making," 104. Javaid Rehman and Eleni Polymenopoulou, "Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World," *Fordham International Law Journal*, 2013, 38.

CHAPTER VIII

CONSTITUTIONAL AND INTERNATIONAL FREEDOMS

In the present chapter I am going to address the main principles and norms of the Tunisian and Egyptian Constitutions, as well as International Law (with particular regard to ICCPR), that apply to the issues at stake.

The analysis is structured by isolating the key freedoms related to the topic. For each of them, I shall present the constitutional provisions and the norms deriving from international treaties and jurisprudence.

Constitutional obligation to respect international law

As a preliminary remark, it is important to bear in mind that International Law norms analyzed below, besides being binding for Egypt and Tunisia at the *international* level – in that they derive from treaties ratified by the states, or belong to customary, even *ius cogens,*[774] law –,

[774] On the International Law obligations incumbent upon states see, *inter alia*, Malcolm N. Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008). Antonio Cassese and P. Gaeta, *Diritto internazionale* (Bologna: Il Mulino, 2013). Dailler, Quoc dinh Nguyen, and Pellet, *Droit international public* (Paris: Lgdj, 2009).

also obligate both countries at the *internal constitutional* level, albeit to different degrees.

In Tunisia, article 20 of the Constitution reads as such: "International agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws and inferior to that of the Constitution". Consequently, the penal code, as part of ordinary legislation, must conform to International Law – at least to its conventional part.[775]

In Egypt the preamble declares the constitution to be "in line with the Universal Declaration of Human Rights". Furthermore, article 5 binds the state to respecting "human rights and freedoms, as set out in the Constitution". Several other generic references to human rights occur here and there in different *loci* of the text.[776]

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[775] "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".

[776] Article 24: " The Arabic language, religious education, and national history in all its stages are core subjects of pre- university public and private education. Universities are committed to teaching human rights, and professional morals and ethics relating to various academic disciplines". Article 91: " The state shall grant political asylum to any foreigner who has been persecuted for defending the interests of peoples, human rights, peace or justice. Extradition of political refugees is forbidden. All of the above is according to the law". Article 206: " The police force is a statutory civil body that is in the service of the people. Its loyalty is to the people. It ensures safety and security to citizens, preserves public order and morality. It is committed to undertake the duties imposed on it by the Constitution and the law, and to respect human rights and basic rights. The state guarantees that members of the police force perform their duties. Guarantees for that are organized by law". Article 214: "The law specifies independent

As to the effective legal force of International Law, we see a significant difference from the Tunisian case: although with the 2014 Constitution the state binds itself to international law for the first time in its history,[777] there is no consecration of international law as superior to ordinary internal laws. Indeed, article 93 states that "The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances". This means that, unless ratified with constitutional law, international treaties will not be above ordinary statutes. Whence it follows that a conflict between international and national norms will be solved through the mere chronological criterion (*lex posterior derogat priori*), with the consequence that a law adopted after an international treaty will prevail

national councils including the National Council for Human Rights, the National Council for Women, the National Council for Childhood and Motherhood, and the National Council for Persons with Disability. The law sets out their structures, mandates, and guarantees for the independence and neutrality of their members. They have the right to report to the public authorities any violations pertaining to their fields of work".

[777] Bernard-Maugiron, "La Constitution égyptienne de 2014 est-elle révolutionnaire ?," 7.

over the latter.[778] If this, in a dualist approach,[779] is coherent at the internal level, at the international one may raise doubts of compatibility with article 27 of the Vienna Convention of the Law of Treaties, whereby "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[780] It must be added, at any rate, that the issue of the ranks of treaties remains ambiguous: "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'. Furthermore, the Supreme Constitutional Court has 'accorded treaty provisions a special status' by asserting that 'the human rights clauses of Egypt's Constitutions be interpreted in accordance with those human rights standards generally recognized and applied by democratic States, as reflected in international human rights instruments'."[781]

It must be further mentioned that, at the moment of ratifying the ICCPR (as well as the ICESCR), Egypt entered a broad reservation, in the form of a declaration: "Taking into consideration the provisions of

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[778] Ibid. Ali M. El-Haj, "The Relationship between International Law and National Law in New and Amended Arab Constitutions," in *Constitutionalism, Human Rights, and Islam after the Arab Spring*, ed. Rainer Grote and Tilmann J. Röder (Oxford; New York: Oxford University Press, 2016), 786.

[779] The dualist approach considers the international and the national orders as independent and distinct. Conversely, the monist approach views national and international law as forming a single legal order. El-Haj, "The Relationship between International Law and National Law," 765–66.

[780] Ibid., 786.

[781] Ibid., 786.

the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it".[782] While this is not technically a reservation but only an interpretative declaration, it may raise a relevant ambiguity: while it seems to merely affect the interpretation of the treaty, not allowing exceptions or deviations from it,[783] *de facto* the state considers itself unbound from any provision not compatible with Islamic law.[784] This argument has been invoked more than once by Egyptian courts to deny "controversial" rights such as apostasy.[785] However, it is not an acceptable one. Although the ICCPR does not contain an explicit prohibition of reservations of general character, as is the case with the European Convention on Human Rights, there are other elements to be taken into consideration. First of all, article 19 of the Vienna Convention on the Law of Treaties interdicts reservations which are incompatible with the object and purpose of the treaty: one may easily argue that a reservation giving generic preeminence to sharia – i.e. to a legal system which we have seen in Chapter II contain several provisions antithetical to human rights principles – is incompatible with the object and purpose of ICCPR.

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[782] "International Covenant on Civil and Political Rights: Declarations and Reservations," *United Nations Treaty Collection*, accessed June 27, 2017, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

[783] Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff Publishers, 2001), 272.

[784] Raj Bhala, *Understanding Islamic Law* (New Providence: LexisNexis, 2011), 1267.

[785] El Fegiery, "Islamic Law and Freedom of Religion," 13.

Although not directly pertinent to the countries under consideration, it is also relevant to recall here the reasoning on shari'a made by the European Court of Human Rights, in the case *Refah Partisi v. Turkey*:

"The Court concurs in the Chamber's view that shari'a is incompatible with the fundamental principles of democracy, as set forth in the Convention: 'Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.' "[786]

At any rate, whatever one may think of shari'a in the abstract, the conflict thereof with human rights is demonstrated *in re ipsa* by the interpretation given by Egyptian courts, using shari'a to deny basic and indisputable rights such as freedom of religion and belief.

[786] Refah Partisi and Others v. Turkey, No. Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (European Court of Human Rights, Grand Chamber February 13, 2003).

Furthermore, leaving aside the content of shari'a with regards to human rights and their theoretically compatibility, its indefinite nature makes a reservation generically based on it non-ascertainable, and therefore illegitimate, due to the carte blanche it gives to states in deciding whether or not to respect the treaty.[787] This clearly represents a violation of art. 19 VCLT.

Scholars have also noted how broad and vague reservations based on shari'a law violate the principle of good faith in international treaties.[788]

Non-discrimination

The Tunisian Constitution at article 21 clearly stipulates that "All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination".

Even broader is the Egyptian one, article 53:

"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.

Discrimination and incitement to hate are crimes punishable by law.

[787] Abiad, *Sharia, Muslim States*, 79.

[788] Ibid., 70

The state shall take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose".

At the international level, this fundamental principle is enshrined at article 7 of the Universal Declaration of Human Rights (UDHR)[789], and made legally binding by article 2 of the International Covenant on Civil and Political Rights (ICCPR)[790] and article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[791], both ratified by Tunisia and Egypt.

[789] "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

[790] "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

[791] "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals".

Citizens' equality is to be understood as including sexual and religious (or non-religious) minorities, as clearly provided in International human rights law.

Concerning homosexuality, the Human Rights Committee (HRC), in a crucial decision of 1994,[792] held that reference to "sex" in article 2 as a forbidden ground for discrimination is to be interpreted as including sexual orientation,[793] a concept that has been subsequently reiterated.[794] The UN Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child[795] and the Working Group on Arbitrary Detention (WGAD)[796] have stated the same concept. The Committee on the Elimination of Discrimination against Women,[797] as well, has made clear that discrimination based on sex and gender is "inextricably linked" with other factors, including sexual orientation and gender identity.[798]

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[792] The body created under the auspices of the ICCPR to monitor its implementation

[793] U.N. Human Rights Committee, "Toonen v. Australia" (Communication No. 488/1992, CCPR/C/50/D/488/1992, 1994), para. 8.7.

[794] Hamzić, "A History in the Making," 99.

[795] U.N. Committee on the Rights of the Child, "General Comment No. 4: Adolescent Health and Development in the Con-Text of the Convention on the Rights of the Child" (CRC/GC/2003/4, 2003).

[796] U.N. Working Group on Arbitrary Detention, "Opinion No. 22/2006, François Ayissi et Al. v. Cameroon" (A/HRC/4/40/Add.1, 2006).

[797] It is pertinent to recall here that Tunisia has withdrawn all reservations to this Convention.

[798] UN Committee on the Elimination of Discrimination Against Women, "General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW/C/GC/28, 2010).For a comprehensive overview of these issues, Hamzić,

As regards unbelief, the Human Rights Committee has stated clearly that both theistic, non-theistic and atheistic beliefs are equally protected by article 18 of the International Covenant on Civil and Political Rights,[799] and that, consequently, the legal guarantees adopted by states have to respect "equality and non-discrimination on all grounds specified in articles 2, 3 and 26".[800]

It is appropriate to note that the same conclusions have been reached by the European Court of Human Rights (ECtHR) with reference to article 9 of the European Convention on Human Rights (ECHR).[801]

Freedom of conscience and belief

The right to fulfill one's life in accord with personal inclinations and convictions, without interference from the dominant social, cultural and religious beliefs, is an expression of freedom of conscience.

"A History in the Making," 99. M. O'Flaherty and J. Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," *Human Rights Law Review* 8, no. 2 (January 1, 2008): 207–48.

[799] U.N. Human Rights Committee, "General Comment 22," para. 2.

[800] Ibid., para. 8.

[801] Jim Murdoch, "Freedom of Thought, Conscience and Religion" (Strasbourg: Council of Europe, 2007), 16, http://www.refworld.org/pdfid/49f185b22.pdf.

In Tunisia, this fundamental principle is enshrined in the Constitution at article 6, along with freedom of belief:

"The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalisation.

The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred".

In the context herein under consideration, freedom of conscience has a particular value with respect to her "sisters" (freedom of thought and belief). As the renowned Tunisian jurist Yadh ben Achour[802] has put it,

"Freedom of conscience […] guarantees philosophical and metaphysical freedoms. More profound than freedom of thought, it affects religious beliefs and philosophical convictions. It implies in particular one's possibility to choose a religion, to change or modify it, or to have no religion at all according to his/her conscience. In this perspective, what was considered in the past as crime of apostasy, *irtidâd*, blameworthy innovation, *bid'a*, disbelief *zandaqa*, dissidence, *khourouj*, become now expressions of man's creativity and of the power of his intellectual potential".[803]

[802] *V. supra*, note 695.

[803] Ben Achour, "La force du droit." My own translation from French.

As has been noted, the novelty and importance of this principle are extraordinary in an Islamic context.[804]

The Egyptian Constitution, unfortunately, does not explicitly mention freedom of conscience, but only freedom of belief (article 64[805]) and freedom of thought (article 65[806]). However, the former is qualified as "absolute".

At the international level, freedom of conscience is guaranteed by article 18 UDHR[807] and article 18 ICCPR.[808]

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[804] Baraket Hédia and Olfa Belhassine, *Ces Nouveaux Mots Qui Font La Tunisie* (Tunis: Cérès éditions, 2016), 143. Jabeur Mejri is explicitly mentioned here as a case of prisoner of conscience in violation of this constitutional principle.

[805] "Freedom of belief is absolute. The freedom of practicing religious rituals and establishing places of worship for the followers of revealed religions is a right organized by law".

[806] "Freedom of thought and opinion is guaranteed. All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication".

[807] "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

[808] "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the

The HRC observes that, while art. 18.3 ICCPR admits restriction on freedom of thought, conscience and religion due to, *inter alia*, public morals, "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".[809]

In other words, the state may not invoke dominant religious principles or socio-cultural views of the majority to trample on the rights of minorities, be they sexual or religious.[810]

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liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

[809] U.N. Human Rights Committee, "General Comment 22," para. 8.

[810] The link between freedom of conscience and LGBT rights is made explicit in the Yogyakarta Principles - a comprehensive compilation of international law obligations on sexual orientation and gender identity, launched in 2007 by a group of human rights experts. See "The Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity," accessed June 27, 2017, http://www.yogyakartaprinciples.org/. Principle 21 reads: "Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity". Hamzić notes that this is in line with the HRC's and ECtHR's interpretation of this right. Hamzić, "A History in the Making," 110. On the Yogyakarta Principles, see O'Flaherty and Fisher, "Sexual Orientation, Gender Identity."

Freedom of expression

In the Egyptian Constitution, freedom of expression is gathered with freedom of thought at article 65. No limitation is explicitly provided there: "All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication."

The Tunisian Constitution guarantees freedom of expression in broad terms at article 31, along with freedom of opinion, thought, information and publication.[811] Furthermore, when it comes to artistic expression,[812] one has to consider article 42 protecting "the right to culture" and "the freedom of creative expression", while the state is called to promote "the values of tolerance, rejection of violence, openness to different cultures and dialogue between civilizations".

On the other hand, one must also bear in mind the abovementioned article 6, which calls on the state to "safeguard the sacred", as well as the ban on blasphemy present in the Egyptian legislation. How should those be read?

[811] " Freedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship".

[812] As is the case of El Fani's movie.

Once again, International Human Rights Law may contribute to provide an answer. According to article 19 ICCPR, any compression of freedom of expression has to be considered as an exception to the rule of freedom.[813] Hence, it will be allowed only if provided by law and in compliance with the Covenant's requirements, which include the protection of "public morals". With regards to the last-mentioned, the Human Rights Committee has firmly maintained that "[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used

[813] "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."

to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith". [814]

In other words, taking into account the combination of the afore-said principles of free speech and non-discrimination, the safeguard of the sacred must be read in a very restrictive way (as the material protection of places of worship, for instance), and never in a way to impair the free circulation of ideas.

Finally, any law restricting free speech "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution".[815] The latter, we have seen, is exactly the case of restrictions merely based on general and vague principles such as "public morals" "public decency" and "public order".

The same constitutional and international norms bestow LGBT people and their defenders with the right to manifest, privately and publicly, and with various means including art, their sexual identity and the arguments for their struggle.

As already observed, there are noteworthy similarities in the prosecution against blasphemers and homosexuals. Overcoming a certain

[814] U.N. Human Rights Committee, "General Comment 34," para. 48.

[815] Ibid., para 25.

interpretation of concepts such as *moeurs* and *pudeur* will benefit both categories, considered offensive to public morality.[816]

Right to privacy

The right to establish sexual and sentimental relations is part of individuals' private sphere. Public authorities are not entitled to interfere arbitrarily with domestic privacy.

Respect for private life is ensured by article 24 of the Tunisian Constitution, according to which "The state protects the right to privacy and the inviolability of the home, and the confidentiality of correspondence, communications, and personal information".

A similar guarantee is present in the Egyptian one, declaring that public life is "inviolable, safeguarded and may not be infringed upon" (article 57).

The right to private and family life is granted at the international level by article 12 UDHR[817] and article 17 of the ICCPR, stating that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his

[816] See International Council on Human Rights Policy, ed., *Sexuality and Human Rights* (Versoix: International Council on Human Rights Policy, 2009), 38, http://www.ichrp.org/files/reports/47/137_web.pdf.

[817] "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

honour and reputation". Given the generic formulation of the provision ("No one shall be subjected"), there is no doubt that individuals' gender is irrelevant for the purposes of privacy's protection. This is made explicit in the abovementioned HRC's decision: "It is undisputed that adult consensual activity in private is covered by the concept of 'privacy', and that [the complainant] is actually and currently affected by the continued existence of the Tasmanian laws [criminalizing homosexuality]".[818]

This opinion follows a consistent jurisprudence of the ECtHR,[819] and the WGAD has reaffirmed the same concept.[820]

Yet, article 17 ICCPR does not ensure absolute protection, requiring that interference be not "arbitrary or unlawful". While in the cases herein under consideration the second requirement is respected, given the existence of provisions criminalizing homosexuality,[821] what does constitute "arbitrary" interference? May there be some legitimate grounds for the state to interfere with homosexual intercourses? From

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[818] U.N. Human Rights Committee, "Communication No. 488/1992: Toonen v. Australia" (CCPR/C/50/D/488/1992, 1994), para. 8.2.

[819] O'Flaherty and Fisher, "Sexual Orientation, Gender Identity," 220.

[820] "The existence of laws criminalizing homosexual behaviour between consenting adults in private and the application of criminal penalties against persons accused of such behaviour violate the rights to privacy and freedom from discrimination set forth in the International Covenant on Civil and Political Rights. Consequently, the Working Group considers that the fact that the criminalization of homosexuality in Cameroonian law is incompatible with articles 17 and 26 of the International". U.N. Working Group on Arbitrary Detention, "François Ayissi et Al. v. Cameroon," para. 19.

[821] Although this is debatable in the case of Egypt, as said above.

this point of view as well, the HRC has been clear in rejecting arguments based on public health or public morals.[822] On the latter, in particular, it has firmly denied that "moral issues are exclusively a matter of domestic concern. As this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statues interfering with privacy."[823]

In other words, social, cultural and religious mores are not valid excuses to deprive individuals of the rights granted by article 17 ICCPR.

Freedom from torture and inhuman treatments

Anal examinations to prove somebody's homosexuality "constitute a form of torture or cruel, degrading, and inhuman treatment, prohibited under the Convention against Torture, the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and Peoples' Rights".[824] For this reason, such examinations have been condemned by the Committee against Torture, the Special Rapporteur on torture and the WGAD.[825] Very recently, the UN Committee against Torture, under the auspices of the Convention Against

[822] U.N. Human Rights Committee, "Toonen v. Australia," para. 8.5-8.6.

[823] Ibid.

[824] Human Rights Watch, "Tunisia: Men Prosecuted for Homosexuality."

[825] U.N. Human Rights Council, "Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity" (A/HRC/19/41, 2011), para. 37.

Torture (CAT) to which Tunisia is part, has called once again Tunisia to abrogate article 230 and halt anal tests.[826]

It is appropriate to recall that prohibition of torture is considered in International Law as a peremptory norm of *ius cogens*, which may never be derogated and constitutes an *obligatio erga omnes*.[827]

The Tunisian Constitution, article 23, firmly protects dignity and prohibits torture: "The state protects human dignity and physical integrity, and prohibits mental and physical torture". As anal tests are both a form of violation of human dignity and violation of physical integrity, tantamount to mental and physical torture, as illustrated above, they should be banned per this article.[828] Furthermore, in conformity with international law, article 23 adds that "Crimes of torture are not subject to any statute of limitations". The importance of this addition lies in the fact that it interdicts any form of balancing test, even with other constitutional provisions, thus granting it a sort of supra-constitutional status. Concretely, this should imply that laws or regulations allowing or even requiring anal tests are to be considered unconstitutional *in re ipsa*, for article 23 prevents a balancing test with other constitutional principles

[826] U.N. Committee Against Torture, "Concluding Observations on the Third Periodic Report of Tunisia" (CAT/C/TUN/CO/3, 2016).

[827] M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," *Law and Contemporary Problems* 59, no. 4 (October 1, 1996): 63–74.On the definition of *jus cogens*: 63; on the prohibition of torture as a peremptory norm: 68.

[828] Cfr. Ferchichi, Article 230 du Code pénal.

often invoked as a justification in these cases, such as public order, public health or public morals, under article 49 Constitution.

Also the Egyptian Constitution, theoretically, prohibits torture in the amplest term. Article 52 reads that "All forms of torture are a crime with no statute of limitations".

The ban is further developed in article 55, on due process:

"All those who are apprehended, detained or have their freedom restricted shall be treated in a way that preserves their dignity. They may not be tortured, terrorized, or coerced. They may not be physically or mentally harmed, or arrested and confined in designated locations that are appropriate according to humanitarian and health standards. The state shall provide means of access for those with disabilities.

Any violation of the above is a crime and the perpetrator shall be punished under the law.

The accused possesses the right to remain silent. Any statement that is proven to have been given by the detainee under pressure of any of that which is stated above, or the threat of such, shall be considered null and void".

Legitimate restrictions of rights

Both the Tunisian and the Egyptian Constitutions envisage legitimate limitations of rights on certain grounds.

In Tunisia, most constitutional rights[829] are subjected to the limitations provided by article 49, reading:

"The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought".

Such provision is molded almost word by word upon the language used in the ICCPR and in the ECHR in relation to certain rights.[830] From a formal point of view, therefore, article 49 may vaunt an impeccable international pedigree. Of course, its concrete application (and abuses) will depend on the interpretation given to void and abstract principles such as "public order", "public health" or "public morals", as stressed above.

However, in the opinion of Chawki Gaddes, Secretary General of the Tunisian Association of Constitutional Law and President of the Tunisian Privacy Commission,[831] the full reading of article 49 bears an

[829] With the relevant exception of those explicitly recognized as intangible, such as art. 24 on the prohibition of torture.

[830] ICCPR: Freedom of movement (art. 12); freedom to manifest one's religion (art. 18); freedom of expression (art. 19); freedom of association (art. 22). ECHR: Privacy and family life (art. 8); freedom to manifest one's religion (art. 9); freedom of expression (art.10); freedom of assembly and association (art. 11).

[831] *Instance nationale de protection des données personnelles.*

overall liberal meaning due to its strict requirements. Therefore, according to him, one's right to dispose of his/her own body, including sexual freedom, cannot be limited on grounds of "public morals" or "public health", for this would mean depriving it of its essence with no necessity for a *civil*[832] and democratic state.[833]

Furthermore, with specific reference to article 230, "it only concerns acts committed in private. It is therefore illogic to attack homosexuality speaking of public morality".[834]

This reading of art. 49 is reflective of international law. The HRC has very clearly stated that restrictions may not put in jeopardy the right itself, that they may never reverse the relation between the right as the norm and the restriction the exception, and have to respect necessity, proportionality and non-discrimination.[835] Similarly, the ECtHR has elaborated very strict requirements in defining legitimate interferences with rights.[836]

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[832] This adjective, defining Tunisia in article 2 ("*Tunis dawla madaniyya*"), is for secularists the guarantee of the non-theocratic nature of the state. A joke I heard from professor Ferchichi on the hypocrisy predominant in Tunisian society is that "Tunisians pray as per article 1, and drink as per article 2".

[833] Gaddes, interview.

[834] Ferchichi, Article 230 du Code pénal.

[835] *Inter alia*, HRC, *General Comment 22*, para. 8 and *General Comment 34*, para. 22. See also U.N. Human Rights Committee, "General Comment 27: Article 12 (Freedom of Movement)" (CCPR/C/21/Rev.1/Add.9, 1999), paras. 11–18.

[836] For a very clear and short summary of the ECtHR requisites, see Douwe Korff, "The Standard Approach under Articles 8–11 ECHR and Article 2 ECHR," *London, Dorling Kindersley*, 2008, http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf.

Article 92 of the Egyptian Constitution formally reasserts such conditions:

" Rights and freedoms of individual citizens may not be suspended or reduced.

No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation."

Interestingly, the logic of this provision is reversed compared to the Tunisian case: while article 49 moves from the perspective of identifying legitimate grounds for restricting constitutional protections, article 92 responds to the aim of impeding legislative abuses.

Final considerations

From this analysis, two main points emerge.

I have already stressed in the previous chapters the commonalities between homosexuality and blasphemy in terms of legal grounds and rational for prosecution. In this chapter, my thesis is confirmed from the opposite side, given that similar are also the arguments for their decriminalization.

The second consideration is that, on paper, both the Tunisian and the Egyptian constitutions would be altogether adequate to guarantee the respect of those freedoms as required by International law.

It remains to be seen whether social, political and religious pressure will allow the crucial transition from pure theory and constitutional clichés to a factual implementation concretely affecting citizens' life.

CONCLUSION

From a Chapter-by-Chapter to an overall response to the research question

The purpose of this thesis was to analyze theoretical and practical aspects of the constitutional protection of individual liberties in an Islamic context and mindset. The analysis followed a progressive trajectory from general to particular, starting with a theoretical appraisal of Islamic constitutionalism and conceptions of human rights - compared and contrasted with the Western and international ones -, proceeding with a focus on the constitutions of Egypt and Tunisia, and finally zooming on two controversial rights in the same countries.

The study sought to answer the following research question:

- How does the reference to Islam, its laws and principles, in constitutional documents affect individual liberties?

Each chapter aimed to provide an answer to the research question from different, but intertwined angles, in order to elaborate a comprehensive, facts-grounded, response at the end.

In the first Chapter, I have compared and contrasted the Western idea and foundations of constitutionalism with the Islamic conception of power. The analysis showed that, while Western constitutionalism

links the legitimacy of power to the respect of institutional rules and individual liberties, for classical Islam the legitimacy of power is contingent on the respect of the Law of God. Therefore, in Islam, power will never descend from a human-made constitution, but always from the religious scriptures, and the human constitution, where it exists, shall never overcome the latter. This bears two consequences: on the one hand, the ruler is not allowed to trespass the boundaries of shari'a law; on the other hand, the subjects are entitled to contest, and ultimately oppose, his power only to reinstate the respect of God's rule, not to demand respect for individual liberties. Overall, relevant discrepancies emerged with regards to the main constitutional notions: Constitution, rule of law, citizenship, democracy, fundamental rights. This has an impact on the Islamic constitutional provisions, especially with regards to fundamental rights therein.

In the second Chapter, I have zoomed the analysis on the main contemporary Islamic charters of rights, and on the constitutional project elaborated by the most reputed Islamic university in the Sunni world. I have focused on those rights representing the most controversial from an Islamic perspective, namely equality of all citizens before the law irrespective of religion, freedom of religion (including atheism and apostasy from Islam), freedom of expression, women's rights, sexual rights and freedom from torture and inhuman and degrading treatments (which is relevant in relation to the *hudud* penalties).

From this analysis, radical aspects of incompatibility between universally protected individual liberties and Islamic rules have emerged.

First of all, human rights are neither conceived as a *quid naturae*, inherently pertaining to each and every human being, nor as a political or legal construction, but as the expression of the Will of God, who at the same time has fixed rigid and immutable limits thereto. The enjoyment and boundaries of rights are defined by sharia, which is God's eternal law. This point is repeated clearly in all the documents under consideration, save the Arab Charter on Human Rights.

Under sharia, as emerging from the charters under consideration, equality between citizens is heavily curtailed: although the classical distinction between freemen and slaves is overcome, the two other classical discriminations persist, namely between men and women and between Muslims and non-Muslims. Consequently, the principle of equality is never laid down in full terms: either it is recognized "within the application of sharia", or it is in "dignity" but not in "rights". In other cases, the mention of religion or sex as a forbidden ground for discrimination (whether in general or within the marriage, for instance) is omitted. This in particular reverberates against women's and religious rights. As far as women's rights are concerned, women find restrictions in terms of general equality, in family rights, in the social and political spheres and even in their freedom of movement.

Freedom of conscience and religion is also severely curtailed. The superiority of what is defined the "true religion", i.e. Islam, is reaffirmed

in several ways, both in declarations of principles and in concrete provisions. As concerns other beliefs, only the "Heavenly religions of the Book" are taken into consideration – in patent discrimination vis-à-vis other creeds and atheistic/non-theistic beliefs. Furthermore, the freedom to change one's religion, i.e. apostasy, still constitutes a radical taboo, when it means leaving Islam. Apostasy it is still seen as a crime to extirpate and high treason against the state and society, rather than a basic right of every individual to determine his/her intimate convictions freely.

On the same vein, freedom of expression is not left to the individual self-determination, as a free manifestation of one's conscience, but surrounded with a net of limitations meant to safeguard the sacredness of religion with all its orthodox dogmas.

Insofar as all these limitations are justified in the name of Islamic principles and shari'a law from the sacred scriptures, the Islamic conception of rights proves to be totally inadequate to guarantee basic individual liberties, and the problem seems to lie in the very interpretation of religious rules. The fact that the document closer to the international standards, i.e. the Arab Charter of Human Rights, is also the less permeated with religion, further corroborates this conclusion.

In order to evaluate the concrete effect of a sharia-supremacy clause in a constitutional text in force, I have dedicated the third Chapter to

the study of article 2 of the Egyptian constitution, through the lenses of the Supreme Constitutional Court.

This analysis showed that article 2 has proven to be highly problematic, from the optic of individual liberties and the rule of law. The interpretation overall provided by the SCC has mitigated certain asperities of shari'a via two different methods: the first is a (questionable) legal ruse denying retroactive effects to article 2, thereby leaving all the previous legislation untouched; the second consists in identifying, within sharia, rules that are subjected to reinterpretation according to the needs and sensibilities of modern times. However, along with the latter, the Court has also identified some "authentic rules" which are "absolutely certain with respect to their authenticity and meaning", therefore not subjected to discussion and reinterpretation, let alone abrogation. Among those, the Court includes the persistence of polygamy, the obligation of women to observe a modest clothing, and the subjugation thereof to the authority of their husband (interestingly, all wounds against women's rights).

This chapter has shown that, whatever the reformist attempts on the part of a moderate judicial body, a sharia-supremacy clause remains a Trojan horse seriously jeopardizing fundamental rights.

In the fourth Chapter, I have focused on the Egyptian constitutional texts drafted after the 2011 revolution: the one of 2012, a heavily

religious document adopted by an Islamist majority under the government of the Muslim Brotherhood, and the one of 2014, following the ousting of president Morsi.

By tracing the analytical path undertaken in Chapter I, I have concentrated on the Islamic-related provisions capable to affect the individual liberties previously selected. I have shown how the Constitution of 2012 presented conspicuous critical aspects, mainly related to the attempt of fixing shari'a in its most orthodox view, and to entrust a religious body with the compatibility check of bills with sharia. The provisions specifically meant to protect individual liberties resulted affected as well against this backdrop. The pattern was exactly the same seen above: women's equality was not recognized, while the role thereof was addressed only in connection with family duties; a vague blasphemy law prohibited any "insult or abuse of religious messengers"; the rights of minorities other than Christian and Jews were not recognized, and a subtle legal loophole paved the way for the introduction of *hudud* penalties. Furthermore, a generic norm submitted all individual rights to the moral values prevalent in society.

The Constitution of 2014, on paper, improves all these aspects. It has canceled the articles concerning the conservative interpretation of sharia, the guardianship of Al-Azhar on draft laws and the blasphemy provision. It has reinstalled the principle of statutory reserve in criminal law and amplified women's rights. However, it still maintains discrimination against minorities not belonging to Judaism or Christianity and,

more seriously, has maintained the principles of shari'a law as the main source of legislation.

In these texts, as well, the influence of religion appears detrimental to human rights, and the comparative improvements in the latest one may be attributed to the abrogation of the most charged religious provisions.

In Chapter V I have moved my analysis to Tunisia and its post-revolutionary Constitution.

In this case as well, several problems have arisen in a human rights perspective because of political Islam.

First of all, the main Islamist party, Ennahdha, has initially sought to advance a constitutional project based on shari'a law, to be supervised by a "Shariatic Council" bestowed with assessing the conformity of statutes with Islamic law. That being impossible to be accepted in a society having a vibrant, tendentially secular, civil society, religious parties advanced less blatant attempts of islamization. Fall into this logic the proposals intended to make Islam the "religion of the state", constitutionalize a blasphemy law, replace the principle of equality between sexes with that of "complementarity".

While the above proposals were repelled, due to the secular opposition inside and outside the Constituent Assembly, other found their way into the final draft. Islam remains enshrined in article 1 of the Constitution, with an ambiguous formulation allowing the interpretation

thereof either as the religion of "Tunisia", with a descriptive value, or as the religion of the state, with a prescriptive one. Other provisions grant religion a special status: the President of the Republic is to be Muslim, and he, MPs and ministers must take an oath "by God Almighty". Furthermore, article 6 calls upon the state to assume the role of the "guardian of religion", entrusted with the "safeguard of the sacred" and prohibiting any attack thereto.

On the other hand, some progressive clauses have been established: Tunisia is defined a "civil state", i.e., neither military not theocratic (article 2), which respects "freedom of conscience", prohibits excommunications (article 6), and recognizes full equality between men and women (article 21). While these represent major victories of the secularist camp, they suffer from an ambiguous interpretation which might still lead to a more theocratic outcome.

In fact, the Tunisian Constitution represents overall a compromise in which key terms and principles remain ambiguous and allow opposite interpretations by secularist on the one hand, and Islamists on the other. The latter's vision has proved, in this case too, detrimental for individual liberties.

While constitutional guarantees constitute a fundamental framework, human rights do not live on paper. Thus, a reality check based on concrete cases was necessary to my study in order to appraise the

concrete state of individual liberties in Egypt and Tunisia. For this reason, I have devoted Chapters VI and VII respectively to the situation of free thinkers and LGBT people in the two countries under consideration. I have made this choice considering how problematic those are in an Islamic perspective.

As to the first issue, I have examined in particular the repression of atheism, heresy and blasphemy. While Tunisia has no norms directly interdicting expressions of atheism or derogatory utterances against religion, those are prosecuted under vague laws defending public morals, decency, public order *et al.*, grounded on the assumption of the Islamic nature of the state. The examined cases evidence an axiomatic link between mocking, criticizing or even merely refusing religion, and the criminal offense to public goods shaped on the majority's values. Egypt, similarly, has no norms against atheism or apostasy from Islam, but legal loopholes allow the direct influence of shari'a law into the legal system. Blasphemy, on the contrary, is clearly envisaged as a crime. My case studies have shown how these norms criminalize atheism, criticism of the tenets of Islam or the laws derived therefrom, and even reformist attempts aimed at reengaging with the orthodox approach. The result is a widespread witch-hunt in the name of religion.

Chapter VII concentrated on another controversial right, namely homosexuality in Egypt and Tunisia.

In the Jasmine country, article 230 of the criminal code poses an explicit ban on male and female homosexuality, punished with a three-

year prison term, without any further definition thereof. Indeed, case-law shows vagueness and confusion as to the conduct which is actually outlawed, as well as to the procedural means to prove it. Interesting parallelisms with the ban on blasphemy have emerged, in relation to the provocation of public sentiments.

In Egypt there is no explicit ban on homosexuality. However, homosexuals are prosecuted mainly under articles of the criminal code generically prohibiting "debauchery" (consistently interpreted as male homosexuality), incitation thereto and, interestingly, under the same article banning offenses against religion. The latter occurrence, along with the description judges make of gays as acolytes of Satan, and the frequent references in conviction verdicts to religious passages, show an evident correlation between religion and criminalization of homosexuality – a pattern confirmed in the law and practice of many other Muslim countries. On the political side, the endemic social homophobia among Muslim communities makes the persecution of gays an easy tool to raise consensus and prove religious credentials.

Overall, this analysis has demonstrated that homosexuals, atheists and heretics of all kind represent for the Tunisia and Egypt two faces of the same coin: a wound inflicted on the good morals of a decent society, a threat hurled at its public order. Indelible and ingrained taboos, both LGBT behaviors and expressions of atheism or criticism against religion remain punished by vague laws and legal aporias - used, misused and reinvented upon judges' whim, against the freedoms guaranteed by the

new Constitutions. The examination of case-law and the interviews I conducted with experts and activists have shown that social conservatism and religious principles and rules intertwine in filling these concepts with a liberticidal interpretation.

In the final Chapter, I have shown how the persecution of gays and free thinkers violates both International law and the very Constitutions of the countries under consideration. In particular, for both categories, such persecution conflicts with the principle of non-discrimination, freedom of conscience and belief, freedom of expression, the right to privacy and the prohibition of torture and inhuman treatments.

While both the Constitutions of Egypt and Tunisia would be already in themselves perfectly equipped, at a theoretical level, to guarantee those freedoms, they further bind the state, to different degrees, to respecting International law.

I shall try now to provide an overall answer to my initial research question: how does the reference to Islam in constitutional documents affect individual liberties?

In the first place, we may note that constitutionalism and Islam base the source and legitimization of power on two opposite foundations and goals – human in one case, divine in the other. While the main idea

behind modern constitutionalism is either to protect pre-existing natural liberties, or to define in a dialectic way the mutual guarantees and liberties of the society's components, in Islam God and God only has established a set of rights and duties, which men are not allowed to challenge. This, in practical terms, always proves to affect individual liberties in a negative way, and such negative impact seems to be *directly* linked to religious norms, or to a certain interpretation thereof, and not to their exploitation for political purposes. This is proven by the fact that it is impossible to remark significant differences between abstract charters of rights, constitutional projects drafted by non-political bodies and actual constitutions legally adopted. All of them testify the attempt to grant primacy to shari'a law with mechanisms of enforcement reshaping individual liberties in conformity. However, the substantial and procedural guarantees provided for in shari'a law (or at least in the way it is commonly interpreted), are far from offering the same protections of international human rights law and contemporary constitutionalism. The same ideological pattern and its negative impact are confirmed by the analysis of the Tunisian and the Egyptian constitutions.

We must at this point distinguish between two different layers: the first is the mere reference to Islam, the second is the very presence of shari'a law. Both are problematic for a real, full recognition of individual rights.

The reference to shari'a, as a very specific system of archaic laws, is incompatible with the modern sensitivity of human rights. This is demonstrated both at a theoretical level, by the Islamic declarations of human rights and the Al-Azhar project, as well as at a concrete one: in the Egyptian constitution, article 2 has been representing a downright Trojan horse for the violation of basic rights (freedom of expression, women rights, *et al*), and the attempt to further widen its scope, undertaken in the constitutional text of 2012, marked several points of contrast between shariatic rules and a modern understanding of individual rights.

While the mere reference to Islam bears less deep consequences, it may also be highly problematic, as testified by the harsh contrasts occurred in Tunisia between secularists and Islamists. After all, as Islamists argue, shari'a need not be mentioned explicitly to find its way into a constitutional text. The attempts towards complementarity of women, criminalization of blasphemy and removal of freedom of conscience move from deference to shari'a law and tend towards its surreptitious enforcement. At a sub-constitutional level, the same may be said about the enduring opposition against the code of personal status and especially against its reform so as to recognize the right of the Muslim woman to marry a non-Muslim man and the equality in inheritance rights between men and women.

Sensitive categories such as homosexuals, blasphemers, atheists and apostates are particularly vulnerable in this picture. In spite of what different interpretation of Islam may say or not say about these issues, as a matter of fact religion is used both at a legal and societal level to oppress such individuals.

Overall, my main claim is that a religious *Grundnorm* is incompatible with the primacy of a man-made Constitution, and with a full recognition of equal and inalienable individual rights embodying the constitutional mission.

Limitations of the present work and perspectives for future research

The research question wherefrom I moved may be addressed from many different perspectives. Hence, this work was necessarily restricted as far as its thematic and geographical scope are concerned.

From the first point of view, the analysis that I have conducted on two specific manifestations of individual freedom could be expanded so as to embrace other human rights issues, among those areas that I have identified as problematic. As far as sexual rights are concerned, for instance, women's right to self-determination and the unequal treatment of male and female adultery are worth exploring. Remaining in the precinct of this thesis, a deeper study of homosexuality in Egypt is advisable,

given the limitations this work suffered due to the political situation. Indeed, not only did the security situation prevented me from conducting a second trip there to focus on this issue, but it also made it hard to approach civil society activists – often scared and working underground –, and overall to access relevant material.

From a geographical point of view, the impact that an Islamic reference has on a modern understanding of individual liberties could be studied in relation to all countries whose constitution mention shari'a or Islam in an institutional role. In addition, the comparison between those states and the Muslim-majority ones which are constitutionally secular (such as Turkey and Azerbaijan) is relevant in a comparative perspective.

Besides these limitations, due to my choice to restrict the scope of the analysis, one must also take into account the fact that the Constitutions of Egypt and Tunisia are very recent. The evaluation of their impact, and their capacity to improve civil liberties, need to be reconsidered in the longer run.

Final considerations

It is not my intention to conceal the fact that the main purpose of this work was not merely theoretical and descriptive, but moved from a well-defined conceptual mindset with a precise normative intent. In other words, it was not simply about analyzing *in vitro* the newly drafted

Constitutions produced after the Arab Spring in the two main epicenters of the revolutionary wave, but also undertaking a human rights-based critique thereof with a view to advocating for a deeper liberalization.

There is an evident tension between the majoritarian rule intrinsic to a democratic system, and the protection of individual liberties loathed by the majority. Constitutionalism is the supreme barrier between democracy and its degeneration into an odious tyranny of the majority: it is the "antimajoritiarian"[837] instrument *par excellence* tempering the majority's will by ensuring is stops short of violating inalienable individual rights.[838]

The Constitutions of Egypt and Tunisia mark important steps in the path of freedom, but the road is still long and rough when it comes to individual liberties of minorities clashing with values, conventions and anathemas deeply rooted in society. Still, as long and rough it may

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[837] El Fadl, "The Centrality of Sharī'ah," 37.

[838] "The appropriate normative purpose of a constitution-making process is […] to maintain proper balance between majority rule and the rights of each and every individual person. […] 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" An Na'im, Constitutionalism… after the arab spring, 32. "Constitutionalism, as a concept, is not the same as a majoritarian democracy. In fact, as several commentators note, constitutionalism is antimajoritarian and therefore exists in tension with democratic practice. Constitutionalism mandates that there are fundamental social values and individual entitlements that may not be negated by the will of the majority. The will of the majority is respected as long as it does not trump the fundamental rights of the minority". Ibid.

be, the battle must be fought, for the real essence of a democracy is not defined by how powerfully the will of the majority is implemented, but by how scrupulously the rights of minorities are guaranteed. And the smallest minority in each and every part of the entire globe, whatever its latitude, its religion and culture, is the individual, whose liberties no majority has the right to infringe.[839]

This is the very meaning of that liberty, *hurriyya*, invoked by people in the streets and squares of Egypt and Tunisia in 2011. This is what their Constitutions are now called to achieve.

[839] "The smallest minority on earth is the individual. Those who deny individual rights, cannot claim to be defenders of minorities." Ayn Rand, *Capitalism, the Unknown Deal* (New York: New American Library, 1966).

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