



DEMOCRACY STANDARDS *in an* ISLAMIC CONTEXT

23 June 2013 • Tripoli, Libya
Conference Report

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INTRODUCTION

Public figures in Libya are enthusiastic about applying international democracy standards and comparative best practice to emerging legal frameworks. Civil-society organisations are eager to receive training on international law, especially the International Covenant on Civil and Political Rights, as a guide for their own work in monitoring electoral and constitutional politics. Members of the General National Congress (GNC) have sought to incorporate international standards of political pluralism into their rules of procedure. And the defunct Libyan constitution of 1951 makes one of the first references to international law in a national constitution, well before the drafting of landmark international human rights treaties, such as the ICCPR.

An equally powerful influence on political decision-making in Libya, though, is the role of Islamic *sharia* in institutional development. Politicians, scholars and activists, when discussing international standards, often question their compatibility with their reading of religious doctrine. Certain understandings of Islam are in conflict with each other, inhibiting a conversation about how international law can be implemented in an Islamic context.

There is an on-going debate about constitutionalism and the Islamic and Middle Eastern legal legacy throughout the region and beyond. Leading contemporary thinkers have developed rights-based theories with the compatibility of Islamic law and basic rights as a premise. Misconceptions surrounding the development of democratic and rights-based theories of Islamic law and governance warrant further exploration, especially given the institutionalisation of Islamic principles in modern constitution making, such as Egypt's (failed) constitution of 2012 (consultative role for Al-Azhar in law-making) and Pakistan (an Islamic court in parallel to a constitutional court, "repugnancy clause").

Democracy Reporting International, the Libyan Centre for Strategic & Future Studies and the National Council for General Freedoms & Human Rights co-hosted a conference in Tripoli on 23 June 2013 to explore international standards of human rights and democracy in the context of Islamic and Libyan law. The conference emphasised Islamic notions of essential elements of democracy and the constructive incorporation of language drawn from classical *fiqh* in modern constitutions. The conference covered four themes in four panels of equal length during one day, each with scholars from inside and outside Libya. One chair wrote a paper for each panel, which the other scholars critiqued. The themes and their leads were:

- Human rights — Chibli Mallat, Right to Nonviolence and the University of Utah
- Women's rights — Zahra' Langhi, Libyan Women's Platform for Peace and the American University in Cairo
- Court systems — Mohammad Fadel, University of Toronto
- Balance of power — Saif Nasrawi, Democracy Reporting International

This conference report includes the papers presented and a summary of the resulting discussion. The papers and notes reflect only the opinions of the authors.

The four themes covered salient topics in both international standards and Islamic law. They were chosen for their political relevance and for the already rich scholarship on their compatibility.

The conference and this report are supported by the British Embassy in Tripoli.

Session Summary: Conference Themes

Chibli Mallat (chair)

Chibli Mallat spoke on the principle of the separation and balance of powers as one of the most important modern constitutional principles since the writings of the French thinker Charles-Louis Montesquieu in the eighteenth century. He also spoke on whether the roots of these concepts are present in the history of thought and political practice in Islam. Mallat said that Islam knew “limits and restrictions” on power, especially executive power. Mallat discussed the concepts found in Sarakhsi’s “Book of Water” in the tenth century AD to illustrate how the ruler or the sultan’s powers and authority were limited according to Islam. In Islam, everyone is equal before the law, so the policy of limiting and reducing strength and power occurred through the judiciary. However, he added that the idea of separation between the three powers, executive, legislative and judicial, is not found in its modern form in Islam’s heritage of *fiqh* (jurisprudence). Therefore, there is a need to enhance this aspect.

Mallat tried to explain the development of the separation of powers in the horizontal tripartite system (legislative, executive and judicial), in addition to the relationship between the authorities and the people (vertical) by returning to the writings of the Syrian thinker Abd al-Rahman al-Kawakibi in the nineteenth century. Chibli said that there is a third level to the analysis, the relationship between the “centre,” the “sides,” and the “followers,” or what could be called today “federalism” and “decentralisation.”

Mallat ended by confirming that Islamic *fiqh* understood the centrality of the concept “the origin of things is permissibility” to affirm that Islam can be compatible with the principle of the separation and balance of powers.

ISLAMIC LAW AND INTERNATIONAL HUMAN-RIGHTS STANDARDS: WRITING *FIQH* INTO THE BILL OF RIGHTS OF THE LIBYAN CONSTITUTION

Chibli Mallat

Chair, Right to Nonviolence

Presidential Professor of Middle Eastern Law and Politics, University of Utah

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Method

There are several ways to deal with Islamic law in the constitution. One is to ignore it altogether, a practice that was common in twentieth-century Arab constitutionalism and continues today in Tunisia.¹ It is the simplest approach. Just remove all divisive religious-legal references in the text, including Islamic law. Another is to make Islamic law a point of reference, either exclusively or with other sources, in an article or set of articles in the Constitution. This is what we have in the famous Article 2 of the Egyptian Constitution, which remains in the Constitution passed in 2012, and in Article 2 of the Iraqi Constitution of 2005.²

I propose here a third method, hopefully innovative as well as scientific, that resolves the tension between classical law, *fiqh*, and its contemporary constitutional *aggiornamento*.³ This is a method that is more generally inscribed in the debate over Islamic law and democracy, including the important theme of our conference, reconciling minimal international standards of the human rights movements with the legacy of Middle Eastern and Islamic law.⁴

In terms of political philosophy, the proposed solution is rooted less in a concept of the political as purely secular (leave your religion at home, here you are a religion-less citizen) than in the active search for a richer set of identity references, which I call Middle Eastern because they tend to be shared across the three monotheistic religions and their millions of adherents. We must keep in mind that Islamic law came late to the Middle East, and that a formidable continuum of local traditions can be attested back to Babylonian, Zoroastrian and Pharaonic times. Babylonian and other religions have long died, but Babylonian law hasn't. Then there are the evidently different legal traditions of other religions, chiefly Christian and Jewish, the latter particularly important in Libya until Qaddafi and the Arab-Israeli conflict decimated its 2,000-year-old Jewish community. And there are national traditions that build on the positive forms of

¹ All references to constitutions can be found on the dedicated section of the Middle East Constitutional Forum on the Right to Nonviolence site, www.righttononviolence.org/mecf/, established and animated by Tobias Peyrerl. The latest formulation of the Tunisian draft constitution does not mention Islamic law.

² Article 2 of the Egyptian Constitution of 2012: "Islam is the religion of the state and Arabic its official language. Principles of Islamic Sharia are the principal source of legislation."

Article 2.1 of the Iraqi Constitution of 2005: "Islam is the official religion of the State and is a foundation source of legislation:

- A. No law may be enacted that contradicts the established provisions of Islam
- B. No law may be enacted that contradicts the principles of democracy.
- C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution."

³ *Fiqh*, *sharia*, *qanun*, all mean law in Arabic. The scholarly discipline of Islamic law is known as *fiqh*, hence my preference to use it over other terms. *Aggiornamento*, Italian for putting up to date, refers to the national legislative and political efforts to modernize Italy upon unification in the last quarter of the nineteenth century.

⁴ It is current to use "best standards" for what is actually the inclusion of minimal standards accepted in a bill of rights. "Best" has a more ambitious feel.

constitutionalism in the legacy of the West and its iteration over two hundred years of Middle Eastern constitutionalism. This legacy is evident in all constitution making in the Middle East revolution that is under way. Last and not least, there is the rich example formed by societies across the world. In the past, people always looked at other constitutional experiments for inspiration, ranging from the American and French constitutions in the eighteenth century, copycat models in more ways than one, to the attention given by the Libyan Constitution of 1951 to international human rights conventions.⁵ Why should experiments elsewhere be excluded a priori?

None of these traditions can be dispensed with in making good law in the region.

So the response to the reference to Islamic law is to make it non-exclusive, in an openness which matches its reality everywhere. Islamic law, Middle Eastern law, other religious laws (especially if the country has citizens who are not Muslim), national laws and international standards, they should all be considered seriously to inspire a constitution and to enrich later legislation. This corresponds to the reality of how twenty-first-century constitutionalism and legislative drafting work best.

This makes the emphasis different when we write a constitution. Silencing Islamic law altogether, as demanded by militant secularists, or drowning it in a series of other references, by sequencing it in the Egyptian and Libyan Civil Codes (Article 1)⁶ or juxtaposing it with international standards (Article 2, Iraqi Constitution of 2005), is less convincing than its effective use as an important part of the national and regional legacy of Middle Eastern law.

Every legal strand is included, and it is then left to the legislators and the judges to make the effort needed to include the most appropriate and most enriching tradition in the laws they later pass or interpret respectively as legislator or judge.

This is the easy part.

The more challenging question is how to effectively operate the constitutional *aggiornamento* of these laws, especially Islamic law because of the formidable baggage that it brings to the Middle East over the past millennium and a half. It is too easy to project Islamic law as the source for future legislation in the Article 2 model. To take Islamic law seriously is to integrate it in the constitution we are making *now*. How does a constitution take Islamic law seriously as a prominent feature in the region's constitutional landscape, and specifically in our subject today, to the bill of rights we prepare for our constitutions?

In constitution drafting, the way I propose going about it is profoundly different from the way of traditional constitutionalism in the Middle East. In the fundamental text to be adopted by the

⁵ Even this reference was circumscribed in Article 189 and Article 191 of the 1951 original text to refugees and foreigners. South Africa's constitution includes an open adoption of international law (Section 232: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament").

⁶ The judge, in the absence of a clear disposition of the Code, must find an answer to the case before him using "custom, Islamic law principles, natural law and the principles of justice," in that order (Article 1, Egyptian Civil Code). The Libyan Civil Code puts Islamic law principles first.

Middle East revolutionaries, the interminable debate over “the” and “a” for the Islamic principles or sources of legislation is trivial. If we are serious about Islamic law, we need to incorporate it *in the constitutional text itself*.

Rather than worry about the general reference in the constitution to some set of rules left to apply at a later time, the immediate question for the Islamic legal tradition across the Middle East is how we can put it at work to obtain the best constitutional text we wish to adopt as a break with the authoritarian past. If we want to include the Islamic legal tradition in the constitution, why postpone the debate by way of Article 2 to later legislation? We might as well start with what Islamic law can offer to the constitution we are writing presently.

The language of Islamic law, *fiqh*, provides a uniquely rich legacy of rights and duties into the legal corpus. My contention is that a purposeful revival of this tradition would better address the problem by starting the discussion between the national tradition, including principally Islamic law, and various comparative and international law models for the enumeration of fundamental rights, which is what we are doing in this conference. Such adaptation will eventually be completed by the constitutional courts, but one can start immediately with the very drafting of a constitution’s bill of rights.

Let me first say what I will *not* do. Some constitution drafters follow an exercise developed in a number of ‘Islamic human rights documents’, where a common list of rights culled from various international and domestic declarations is dressed up with caveats stipulating compliance with Islamic law. This is easily done, but it has failed to impress the imagination of the very people it was addressed to, or to those observing these texts from outside the faith.⁷ For a more universal community of human rights defenders, caveats are rightly denounced as onerous conditions that empty the right from its meaning.⁸ Such texts and the considerable efforts that accompany them to devise Islamic reservations to universal rights written in the West are a dead end.

The way advocated here is very different. It goes from the legal corpus, in a methodological conclusion drawn from the experience of civil code drafting in the past two hundred years. The answer to why the Civil Code of the Ottoman Empire was never questioned over its Islamic authenticity and why the Egyptian Civil Code continues to be questioned to date despite the repeated, and genuine efforts made by Sanhuri to say that it was Islamic, is a matter of style, not a matter of substance.⁹

This is also true in constitution drafting, and, to my knowledge, the work done in the Majalla on civil law was never attempted for the constitution. The effort is more one of style commanding substance, as I will presently illustrate it in the Bill of Rights section of the constitution concerning freedom of religion.

⁷ See an example of what he calls the “complementary approach” in Mashood Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003), pp. 218-219.

⁸ For instance, Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder: Westview Press, 5th ed., 2013). Examples of such texts include various list of rights in constitutions like the one in Iran or the Cairo Declaration of Human Rights (1990), and, in a germane way for the rights of women, the caveats of Muslim authoritarian governments like Iran and Saudi Arabia to CEDAW (entered into force 1981).

⁹ Argument developed in my *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2009), chapter 8 on civil law, pp. 244-99.

Illustration

The clause on religious freedom in the Qur'an generally translates as "No compulsion in religion, *la ikrah fil-din*."¹⁰ The paraphrase of the Arabic is that religion is a choice that cannot be forced or compelled on anyone, and that each person may adopt a religion or reject it as she chooses. It is the citizen's decision to adhere to, and practise, the religion she prefers. There is no place in life for any compulsion, any duress, in matters of religion. Freedom of religion is absolute. The formulation is short, neat, precise and absolute. Four words: "No compulsion in religion."

The equivalent expression of the principle in international and domestic bills of rights can be found in countless documents. Let us take four examples from famous constitutional texts:

The French Declaration of the Rights of Man of 1789 states in Article 10 that "No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law."¹¹ The formulation amalgamates freedom of opinion and freedom of religion, and is constrained by the exception of public order.

The American text was adopted contemporaneously in the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It reads as an injunction addressed to the legislature to keep away from religion when making a law.

The Universal Declaration of Human Rights (1949) is more specific. It states in Article 18 that "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."

Finally in our selection, Chapter 2, Section 15 of the South African Constitution on "Freedom of religion, belief and opinion," is far more prolix:

"Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

1. Religious observances may be conducted at state or state-aided institutions, provided that
 - a. those observances follow rules made by the appropriate public authorities;
 - b. they are conducted on an equitable basis; and
 - c. attendance at them is free and voluntary.
2.
 - a. This section does not prevent legislation recognising
 - i. marriages concluded under any tradition, or a system of religious, personal or family law; or
 - ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
 - b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

¹⁰ Qur'an ii (*baqara*), 256.

¹¹ "Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi."

Examples can be multiplied. The point should be clear by now. None of these texts has a Middle Eastern or Islamic feel, but there is no particular reason to choose one of these formulations over the four-word Qur'anic injunction, *la ikrah fil-din*, no duress in religion. The style is different. The substance is the same. What the constitutional rendering loses in terms of precision when the formulation is short, it gains in terms of mnemo-technic referencing, elegance, pith, and, as importantly, in terms of identity and culture. No duress in matters religious means no duress whatsoever, from the state, any other constitutional agent, another citizen, or the public at large. A robust interpretation of the phrase "No duress in religion" can cogently and forcefully convey the constitutional request that there is 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," as in Article 18 of the Universal Declaration of Human Rights, or indeed any other expression that the other documents convey.

Taken alone, this verse as constitutional article may sound too bare, and too contrived. As a matter of widely documented fact, some legal traditions constrained the Qur'anic principle of absolute freedom of religion — "No duress means no duress" — with a number of practices that range from forced collective conversion since the Islamic conquests, to the prevention of the *ridda* (one cannot opt out of Islam), to the punishment of those who are accused of rejecting, denying or ignoring Islamic law in derivative principles, for instance by drinking wine, committing adultery or wearing a veil. Such readings may have been a dominant interpretation at some points in history; they are interpretations that run contrary to the plain text of the Qur'an.¹² If anything, the more recent legal tradition of the modern Middle East supports the opposite trend, with individuals being left free to practise their religion, change it and honour the obligations they choose to be important in the faith. There is no sense in forcing the constitutional drafter of the twenty-first century to adopt a contrived, regressive interpretation of the plain Qur'anic text.

This makes that particular section of constitution-drafting uniquely exciting. To couch a universal human rights principle in a language which the Middle Eastern — here the Libyan citizen, is more familiar with, surely has a natural allure. Even more alluring perhaps is the work that would go, in proper constitution making, in the discovery and reading of the tradition in a mode that makes it universal. Rather than any of these — a mere translation of a Western bill of rights even if dubbed 'universal', or a bill of rights full of caveats that empty it from any meaning, in the first case Islamic law considered an enemy of progress, in the second case transformed into the exclusive reference for progress — a bill of rights constructed on the wealth of Middle Eastern law, including Islamic *fiqh*, takes our minds beyond the lazy postponement of the Article 2 template.

This is hard work, but worth the aspirations of the Middle East nonviolent revolution, and from Libya, where violence prevailed, a potentially major contribution to the universalism of Islamic law.

¹² There is of course another counter-tradition, which I call a humanist interpretation, ranging from Sufi *tafsir* (Ibn 'Arabi) to luminaries like Mutanabbi and Abu al-'Ala' al-Ma'arri. For the revival of this tradition, see my *Philosophy of Nonviolence*, forthcoming 2014, part one, chapter 2.

Session Summary: Human Rights

Chibli Mallat (chair)

Mallat began his comment on “Islamic *fiqh* in the Constitution: Evoking the Heritage in the List of Human Rights” by pointing to two different methods for dealing with Islamic *sharia* in the writing of the constitution. The first is completely ignoring the topic, as in the Tunisian constitution before the 2011 revolution. The second method is listing “Islamic *sharia*” as a source of law in the constitution, as is the case in the second article of the suspended Egyptian constitution of 2012, and the second article of the 2005 Iraqi constitution.

Mallat suggested a third method to achieve compatibility and coexistence between Islamic *sharia* and the international standards for human rights. Mallat presented the concept of the “Middle East” to find the commonalities in the three divine religions that make up the population of the region. Mallat said that the Libyan writers of the constitution must deal with Islamic *fiqh* as one of the important legal sources, along with national laws and international standards for human rights. Therefore, Mallat called for dealing with the question of Islamic *sharia* with complete seriousness during the writing of the constitution, instead of resorting to delaying the discussion to a later time, as was the case in the second article of the Egyptian and Iraq constitutions.

Mallat explained that the section related to freedom of religion in the list of human rights represents an important opening for how to apply the approach he advocates. Mallat said that the Quranic verse, “No compulsion in religion,” points clearly to the fact that “religion is a choice that no one can be forced into, and the individual is created to choose his own religion free from any compulsion. The citizen is the one who decides whether to embrace or reject his religion, and to what degree he will be religious. There is no place in religion for compulsion. The freedom of religion is absolute, and the verse is clear, focused, precise and absolute. It is four words, “No compulsion in religion.”

Mallat compares the Quranic verse with other models of national and international human rights lists, such as Article 10 of the French declaration of human rights of 1789 which states, “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.”

Mallat also compares this verse with the text of paragraph 15 of Chapter 2 of the South African constitution, which is entitled, “Freedom of religion, belief, and opinion,” which states:

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that
 - a. Those observances follow rules made by the appropriate public authorities;
 - b. They are conducted on an equitable basis; and
 - c. Attendance at them is free and voluntary.
3.
 - a. This section does not prevent legislation recognizing
 - i. Marriages concluded under any tradition, or a system of religious, personal or family law; or
 - ii. Systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
 - b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Mallat confirmed that the two preceding examples are completely consistent with the content of the Quranic verse, and that, in his opinion, the Quranic verse is distinguished by its ease of “memorisation, beauty, vigour and the protection of identity.”

Professor Iman al-Obeidi, University of Benghazi

Iman al-Obeidi discussed the “Convention on the Elimination of All Forms of Discrimination against Women” as an introduction to understanding the relationship of international agreements to Libyan legislation. Al-Obeidi presented all of the reservations that the previous Libyan government had on the convention, particularly Articles 2, 6, 9, 16 and 29, and how these reservations were translated into various Libyan legislation.

Then Al-Obeidi discussed the text of the Vienna Convention of 1969, which is on the laws that regulate international agreements. She said that the convention clearly asks that states do not invoke local laws to avoid carrying out clauses of the international agreements and treaties that they have ratified.

Al-Obeidi said that the new Libyan constitution must state clearly that international agreements and conventions take priority over domestic legislation.

Discussion

During the discussion a number of points of view were raised regarding the topic. They can be summarised as follows:

- How can the principle of national sovereignty be reconciled with giving international treaties priority over the constitution and legislation?
- How can the clash between some of the texts of international treaties and Islamic *sharia* be resolved?
- What is the definition of “international treaties and agreements”? Are they limited to only those specific to human rights, or do they include other agreements on commerce, weapons, etc.?

FACTORS FOR THE ASSUMPTION OF A COMPLETE CLASH BETWEEN ISLAMIC SHARIA AND INTERNATIONAL TREATIES ON THE RIGHTS AND THE EMPOWERMENT OF WOMEN

Zahra' Langhi

Libyan Women's Platform for Peace

American University in Cairo

Outline

- Foreword
- The definition of Islamic *sharia*
- Factors leading to the assumption of a complete clash between Islamic *sharia* and the international treaties on women's rights
- Complete framework or structural state of the Islamic societies in which there are factors leading to the assumption of a complete clash between Islamic *sharia* and international treaties on women's rights
- Characteristics of Islamic *sharia's* position on women
- Examples of the similarities between the positions of treaties and Islamic *sharia* in issues related to women
- A look to the future: necessary steps to correct the relationship between international treaties and Islamic *sharia* as relates to women's rights
- Summary

Foreword

Those who follow the atmosphere surrounding the approval of international treaties on women's rights in Islamic societies notice a phenomenon.

Definition of Islamic *sharia*

Before we delve into the topic of the relationship between Islamic sharia and international treaties, we must articulate the definition used here for the term Islamic sharia. Islamic *sharia* is the overall teachings of the true religion that are lived and practiced by its followers. The shahada (witnessing that there is no god but God and Mohammad is his prophet), prayer, zakat (giving alms), the hajj (pilgrimage), jihad, morals, rituals, rites, instructions, prohibitions and the taking of the Prophet Mohammed (PBUH) as an example are all aspects of Islamic *sharia*. From this, we conclude that Islamic *sharia* cannot, and may not be reduced to instructions and prohibitions. From this we also conclude that Islamic *sharia* is lived by a Muslim with all meanings of the word "live," and in all aspects of Islamic *sharia*, the apparent and the hidden which is reflected in behavioural, practical and factual aspects. The individual should strive to live Islamic *sharia* based on the given weights of its components in a way that follows the manner in which the prophet (PBUH) lived Islamic *sharia*. So, Islamic *sharia* is a state of bearing witness, presence, thought, behaviour and practice. The other aspect that we must not forget is that understanding Islamic *sharia* occurs through depending on a disciplined methodology represented in the substantive and methodological Islamic *sharia* sciences like the science of hadith and the science of the origins of *fiqh*. The followers of this disciplined methodology are led to — among other things — the building of what is called *fiqh*. These sciences and the methodology therein are based on interacting with time and place, and realizing the individuality of each time period and each place. This makes them dynamic and flexible.

Factors Leading to the Assumption of a Clash

The first factor supporting the hypothesis of a complete clash between Islamic *sharia* and international treaties regarding women's rights and empowerment is the widespread reliance on a limited definition of Islamic *sharia* which reduces it to the rulings that include clear behavioural orders and prohibitions, in a way that contradicts the meaning of Islamic *sharia* mentioned above. When someone who is not a specialist looks at some of these texts he imagines from their surface that they grant women fewer rights than men. Therefore, he reaches the conclusion that Islamic *sharia* constrains women and is biased towards men. This occurs because the outward appearance of these texts was taken out of the context of the fundamentals of the science of the origins of *fiqh*. It also happens because the text was taken out of the context of the general framework, and the general view towards women, in which these texts emerged. This is true especially since some of the texts from which the general view toward women is constructed could appear in a form different than the form of conclusive instructions and clear prohibitions. One example suffices. The commending of men with the care of women was a major topic in the Farewell Sermon. Despite this, the centrality of this commendation is not reflected in the writings of many jurists as being considered a part of Islamic *sharia*. Perhaps the reason for this is that a portion of *fiqh* does not consider this section of the Farewell Sermon as coming from Islamic *sharia*. It sees it as a noble commendation and nothing more, because its form does not conform to the form of direct orders and prohibitions like the verses on punishment, or the verses on divorce or usury. In other words, a large portion of *fiqh* limited its definition of Islamic *sharia* to what came in a form similar to the law in the sources of legislation. This hindering reduction is expressed by the English term used to express Islamic *sharia*, "Islamic *sharia* law," a term that is distorted. In reality, there is a great deal in Islamic *sharia* that contributes to confirming women's high status, but it is not interpreted as coming from Islamic *sharia*. The reliance on this limited definition of Islamic *sharia* that reduces it to the rulings that include clear behavioural instructions and prohibitions in a way that contradicts the meaning of Islamic *sharia* mentioned above contributes to solidifying the corrupt perception that Islamic *sharia* takes a general position towards women whose essence is the discrimination against them. This limited understanding of Islamic *sharia* is very widespread today in Islamic communities, especially in the movements for modernist change that call themselves "Islamic movements." It is widespread among activists and researchers throughout the world, especially in western countries. It's clear that this factor has a conceptual and methodological character.

The second factor that leads to the assumption of a complete clash between Islamic *sharia* and international treaties on women's rights and empowerment is the narrow perception of Islamic *sharia* in which there is no room for treaties with people belonging to a different religion. Essentially, the fact that a Muslim is a human is a fundamental consideration in the Quran's and the *Sunnah's* discourse to a Muslim, and in legislation. The Quran's discourse approaches the believer as a human more than as a believer. Not only this, but the Quran spoke to the believer as one of the people and showed him the pilgrimage rituals, as in the *hajj sura*. The Quran speaks to the listener as a human and a believer at the same time. The last consideration is the fact that the person, as an abstract concept, was created by God as a successor. This means that all people have a share in this successorship and, therefore, a share of reason. In this, we evoke *hifl al-fudul* (the League of the Virtuous) that was founded by members of the Quraysh tribe. They made a covenant and agreed that no one in Mecca would be wronged, from among its people or from outside. The prophet, prayers and peace be upon him, witnessed this alliance and said, after the

revelation, “I witnessed a confederacy in the house of ‘Abdullah bin Jad’an. It was more appealing to me than herds of cattle. Even now in the period of Islam, I would respond positively to attending such a meeting if I were invited.” This means that the unity of belonging to a wise humanism is one of the unities of belonging to which religion sees the believer as belonging, and regulates his relationship to his human brother who belongs to a different religion. In other words, the unity of humanity is not outside of the unity of religion or a rival to it. In Islamic *sharia*, there can be agreements with people of other religions with certain provisions. The believer could participate with people of other religions in establishing this agreement in a believing manner. A believer’s agreement could be built on a believing foundation, making the adherence to this agreement a part of the believer’s religion, through which he worships God, in addition to it being a legal agreement to which he adheres. For the other side, the agreement is a legal agreement to which he adheres. Despite the fact that the teachings of Islamic *sharia* abound with that which confirms this fundamental vision, the view that Islamic *sharia* does not accommodate agreements with people belonging to other religions has become widespread in Islamic societies. Likewise, it is believed that international agreements — all of them, by their nature — are a competitor or a rival. One of the results of this corrupt assumption is the taking of a negative position towards international agreements and a lack of prudence in revising them and sifting through them to sort out what in their contents might suit Islamic *sharia* and what might conflict with it. One of the results of this is an assumption that the adoption of international treaties involves, by its nature, betraying Islamic *sharia*, as well as the assumption that these treaties are inadequate and deficient. Perhaps those who look closely at the position of a number of actors such as thinkers and preachers— especially those who ascribe to the active thought of the modernist Islamic movements — in the face of international treaties on issues related to women’s rights would not be wrong in their words that articulate a refusal on principle, sometimes complete and sometimes partial, of the international treaties based on the surmise that these treaties inevitably seek to achieve goals that contradict, in form and substance, the goals of Islamic *sharia*. It is clear that this factor has a humanist conceptual character.

The third factor that leads to an assumption of a complete clash between Islamic *sharia* and international treaties regarding women’s rights and empowerment is that some of the assumptions that frame efforts to promote international treaties still abound with elements of the modernist orientalist discourse that includes an inferior image of the Muslim woman, or the eastern woman in general. In reality, many of the studies on what is known as gender and women’s rights that frame efforts to promote international treaties seeking to empower women still teem with many aspects of the arrogant modernist discourse that reduces women in Islamic societies and the Middle East in general to the image of a victim that has no will or tools to liberate herself. Therefore, she is always in dire need of someone to lead her and to liberate her! This is an extension of the policies of western colonialism that employed an orientalist excuse with a stereotypical view of the eastern woman in general as inferior. This excuse centred on the white man’s taking up the “moral” burden that fate placed on his shoulders to save the peoples of the east, and especially women. It is important to point out here the similarities between this modernist discourse which calls for the empowerment of women with the extremist religious discourse, in that both sides consecrate viewing women as inferior. They both see her as always “weak,” always “powerless,” always a “victim,” always “lacking will,” and always in need of a protector and saviour. It’s also important to mention that both views ignore the history of women in Islamic societies in the era before the modern nation state, and the positive role that women

played in those eras. This role was characterized by an effective presence and participation in all political, economic and religious fields. Therefore we are in dire need of a re-examining of the prevailing ideas about women lagging behind in the Islamic eras before modernism. This history should be looked at without the bias rooted in the modernist viewpoint. It is clear that this factor has a psychological civilizational — in the immortal meaning of the term — character.

The fourth factor that leads to the assumption of a complete clash between Islamic *sharia* and international treaties regarding women's rights and empowerment is the extreme sensitivity that some in Islamic communities feel towards the contents of these treaties, fearing that they will be an extension of the modernist orientalist discourse which has an insulting view of the Muslim or eastern woman, as discussed above. In other words, a number of circles deal with treaties related to women in the context of a sharp, emotional reaction towards the problem of these treaties' connection to the modernist orientalist discourse that is dominated by excessive generalization. They believe that all of the texts included in these treaties will inevitably be an extension of the modernist orientalist discourse, and that all of the texts of these modern international agreements are an extension of western colonialism's efforts to dominate. These circles fail to grasp the complexity of writing treaties today which makes them, at least in part, different from the previous treaties that included many obviously orientalist views. The emotional reaction prevents these circles from observing the role of nationalist frameworks, which is widening every day, in participating in creating an increasing number of international treaties related to women's rights. It realizes the orientalist tendency's intentions and knows how to confront them. It is clear that this factor has a civilizational, humanist, psychological character.

The fifth factor that leads to the assumption of a complete clash between Islamic *sharia* and international treaties on women's rights and empowerment is that the effort of some sides that participate in preparing international agreements and treaties is characterized by a hegemonic tendency. They do not consider the context or the civilizational and cultural character of the places that are asked to adopt these international treaties. It is well known that the human rights movement, of which the issue of women's empowerment is considered a part, emerged in a particular historical context and geographic area. It is the context of the sequences of liberation in Europe since the emergence of modernism. Despite this fact, some sides that participate in preparing international agreements seek to expand the scope of certain rights that developed during the experience of European countries through the march of modernity to different societies throughout the world. This is a standardized extension that does not take into account the historical and sociological context in which they emerged or their modern needs. Likewise, it does not take into account the cultural context and the value system that frame the condition of women in Islamic societies, especially as related to the family system which is strictly regulated by Islamic *sharia*. It is clear that this factor has a cultural, sociological character.

The sixth factor that leads to an assumption of a complete clash between Islamic *sharia* and international treaties on women's rights and empowerment is the fact that some of those in seats of power in Islamic societies base their justifications of human rights violations on Islamic *sharia*, and on culture and religion which, according to their corrupt pretence, justify oppression and violence against women. In a number of societies the authority seeks to keep some traditions that include oppressing women's rights. Sometimes the authority does this to satisfy some societal trends or the pressures of groups determined to preserve these traditions. These groups

believe that the survival of these traditions is the survival of their definition of themselves to which they've grown accustomed. They believe that in their survival there is loyalty and preservation of the way of the predecessors, and that their survival is their deliverance from decay. Sometimes the authority does this in order to keep the society under pressure and in a position of defence, which puts the authority in the position of exerting the pressure and allows it to frame any amendments it makes to these traditions as a gift or a favour to the society. It is clear that this factor has an (internal) political and sociological character.

The seventh factor that leads to an assumption of the complete clash between Islamic *sharia* and international treaties regarding women's rights is the disagreement surrounding whom the discourse of reform addresses and the way to achieve rights. International treaties focus on the discourse of the individual, who possesses rights, it is his duty to seize his rights and it is the state's duty to enforce these rights (law enforcement). In reality this system is modernist, in that it is born of the modernist framework at whose heart is the battle between the authority and the individual over sovereignty, and the individual's struggle to protect himself from the authority's oppression, especially after the demise of the intermediate structures that contribute to protecting the individual from state oppression. On the contrary, in Islamic societies the focus is mainly on the discourse of he who carries the burden of duty, who, by practicing this duty towards the individual who has rights, can achieve the goal of the individual enjoying his own rights. This is accompanied by the discourse of the individual who has rights regarding the necessity of achieving those rights. It is clear that this factor has a systematic, conceptual nature.

The eighth factor is the difference in the ruler's vision of the ladder of reform. The institutions built on international agreements are affected by the ruler's vision of reform, which is dominant in modernist societies that are built on the idea that the path to reforming society and to reforming the conditions of its different groups, including reforming women's conditions, is through amending the law, either through addition, elimination or modification. This vision is the result of the emergence of the concept of rule of law. However, in Islamic societies, despite the emergence of the centralized modern state which writes and enforces law, the more common view of the reform movement and its ladder is that general reform begins with a return to the heart of the truth of the teachings (first), and goes through moral reform (secondly), and the reform of norms and traditions (thirdly), then moves in the end to the stage of codification (fourthly). Throughout their history, these societies have experienced many periods in which they settled for the first three steps on the ladder of reform, and dispensed with the fourth step, or the step of codification, but the opposite has never occurred. This difference and some of its affects become apparent when the current institutions write international treaties that seek to empower women through holding a conference in a certain country. They are primarily interested in pressuring local societies to take a specific legal position regarding an issue related to women, without any preceding cognitive consciousness-raising or preparatory effort that clarifies the moral foundation upon which this legal position, whose approval and adoption is requested, is based. Likewise, this is done without exerting enough effort to carry out thoughtful dialogues and serious discussion that seek to build shared convictions and concepts at the heart of the matter in question. It is clear that this factor has a conceptual systematic sociological character.

The ninth factor leading to an assumption of a complete clash between Islamic *sharia* and international treaties regarding women's rights is the partial difference between the nature of the reform discourse in modernist societies, which is responsible for defending the rights of women and the nature of reform discourse in Islamic societies before the modern nation state. The reform discourse in modernist societies is usually a technical-procedural discourse related to values — in a narrow scope — most of which are pragmatic. On the contrary, the nature of the traditional Islamic reform discourse is usually a situational/moral discourse related to principles arising from the overall outlook.

The overall framework or the civilizational state of the Islamic societies containing the factors leading to an assumption of a complete clash between Islamic *sharia* and international treaties on women's rights

It is necessary to work to observe the overall framework or civilizational state of the Islamic societies, which motivate the factors that lead to an assumption of a complete clash between Islamic *sharia* and international treaties on women's rights. These societies are subject to a hybrid legal system, which is the result of injecting the foundations and aspects of the modern legal system adopted by the modern national state into the environment of a traditional legal system, which emerges from the teachings of the true religion. The modernist legal system is born of big conceptions on big truths and basic conceptions of civilization formation that are born out of the march of modernism which the European peoples entered into starting in the fourteenth century. It is also born out of their interaction and their conflict with the Christian, Greek, and Roman heritage that the imperialist colonial tendency sought to impose on different societies around the world and which the “dazzled” circles of society that fell captive to colonialism sought to voluntarily adopt. As for the traditional legal system, it has been emerging since the era of the Prophet, passing through the period of the Rightly Guided Caliphate, then the period of the states that possessed the caliphate, and then to the sultanate in its different forms. The fundamental characteristic of this legal system became manifest, and it is the characteristic of diversity within unity in the Millet system that the Ottoman Empire used in dealing with the members of different religious and religious schools. The previously mentioned system of injecting this legal system with aspects of the modern nation state resulted in a hybridization of this legal system in all of its sections, including the sources, the origins of *fiqh*, the major ruling principles of *fiqh*, the partial codification, the comprehensive judicial structure, the judicial policy, the conduct of the litigation process, and adjudication.

A key difference on women's issues between the international treaties in the modernist framework and Islamic *sharia* in the framework of the era preceding the injecting of the modernist legal system into the traditional framework is that international treaties seek to depend on one standard final position for a given issue related to the status of women. In contrast, the position is completely different from the perspective of Islamic *sharia*. The Islamic *sharia* ruling is characterized by diversity, and takes into account place and time, and unique social factors in the correct understanding of Islamic *sharia*, not the pragmatic understanding of Islamic *sharia*. In other words, in the context of the modern state and international treaties and agreements all groups in society must submit to this unified position. This is also the case in the homogenous pragmatic perspective of Islamic *sharia* which is dominated by the concept of a common law whose articles are formed based on the adoption of a ruling or a single moral position which

cannot be combined with another moral position. It is indisputable that the standardization of the legal position towards a given issue constrained women. In the context of the Millet system for example, scope and diversity reigns. There is more than one legal position on the issue or life phenomenon in question. This diversity reflects the flexibility of the Islamic *sharia* text and the diversity of the doctrines of *fiqh*. Perhaps the number of historical studies of Islamic societies in the pre-modern era illustrate that women benefited from this diversity in *fiqh* schools and opinions. Islamic *fiqh* cannot in any case be reduced to a certain historical stage but its genius is manifested in its development throughout the ages starting from the era of the Rightly Guided Caliphs, and progressing through the era of the emergence of the Islamic schools of thought, until today. It interacts dynamically with geography and history in a way that refutes the theory of “the closing of the doors of *ijtihad* (independent reasoning).” Therefore, it is extremely unfair to restrict and reduce the dynamism and genius of Islamic *fiqh* with its rigor and the sobriety of its logic and the splendour of its eloquence, into one time period which we make into the model for Islamic *sharia*, ignoring other historical periods which came after and could be more inspirational and appropriate for our circumstances today. For example, in the issue of *tafriq*, or separation, which is one of the types of divorce, we find that the Hanafis do not accept *tafriq* except in the case of impotence or apostasy. Therefore, in the case of a wife who wishes to annul her marriage because of the absence of her husband, the Hanafis require that the husband be absent for 99 or 120 years before it is permitted for the wife to be separated from her husband. However, with the Shafi’is and the Hanbalis, the issue is easier. As a result women, as articulated in the Islamic *sharia* court records, resorted to the Shaafa’i or the Hanbali courts to receive a ruling of *tafriq*. We can also look at the example of *khula* (wife-initiated divorce). There are many differences between the religious schools of thought regarding this issue, and the records illustrate that Ibn Hanbal’s school was the easiest of the schools on this issues. This led women to go to a Hanbali judge in order to get a ruling of *khula*. Therefore, researchers and those who study the history of Islamic *fiqh* and Islamic *sharia* court records fear that the codification of Islamic *sharia* in a homogenous way, modelled on the modernist laws that adopt a single position on an issue will lead not only to the abandonment of the diversity and flexibility of *fiqh* but also to the choosing of the most strict opinions regarding women’s issues from each school and creating constraints on women, leading to a monolithic drafting of law.

The characteristics of Islamic *sharia*’s position on women

When one looks closely at Islamic *sharia*’s position, one finds that it guaranteed for women the basic rights that international agreements and national constitutions sought and are seeking to ratify. Islamic *sharia* made it so that men and society were obliged to preserve these rights, and made the preservation of these rights a virtuous act, which the individual will be rewarded for in the afterlife. Likewise, Islamic *sharia* made the oppression of women or the denial of their rights a sin whose perpetrator deserves torture in the afterlife. Perhaps we can summarize some of these rights. Islamic *sharia* confirmed the women’s right to education, the right to move about safely, the right to work outside the home and the wife’s right to alimony and to remain in the marital home. It also confirmed the independence of financial property for women, and confirmed the right of women to political participation. Muslim women have issued *fatwas*, become judges and studied *fiqh*, the hadith and Sufism.

Examples of the similarities between the position of treaties and Islamic *sharia* towards issues related to women

It is important to note in this context the agreement that has emerged on many occasions between the goals of Islamic *sharia* and the goals of an international treaty, with both rejecting a certain behaviour towards women. In these cases, the discussion around the international treaty was an occasion for the maturation of a legal position rooted in *fiqh* towards this behaviour which illustrated that Islamic *sharia* is innocent of accusations that it condones this behaviour. In reality, the source of the behaviour in question was, mainly, the tyranny of old traditions. In the framework of the heated discussion around the controversial 1994 conference on population, the maturity of a *fiqh* legal position towards an issue like female circumcision illustrates that Islamic *sharia* is innocent of this behaviour and that the source of the adoption of this behaviour was, mainly, the tyranny of old traditions. The articles of the document did create some storms of controversy. This expresses the fundamental difference in the dominant sources in the societies of relevant states. In this discussion, the disagreement around the religion's position on female circumcision became heated. Sober legal studies emerged which refuted the issue and denied the existence of a sound basis for female circumcision in religious teachings. Likewise, Al-Azhar denied the existence of a religious basis for female circumcision. Many works emerged illustrating that the foundation, on which wide segments of the society had based their adoption of this behaviour on was their loyalty to social traditions that go back thousands of years. This foundation was much more present than these segments' perception that this behaviour is a religious duty. As a result of this, at least a degree of consensus has emerged regarding the necessity of encouraging the societies in relevant states to abandon this practice.

Summary: The relationship between Islamic *sharia* and international treaties regarding women's conditions and their rights is a complex, diverse relationship and will remain so
Based on the preceding we believe it is correct to say that the relationship between international treaties and Islamic *sharia* regarding women's conditions and their rights is a relationship, which involves differences in certain matters and partial agreement in others. The reason for this is the difference between the nature of the perceptions from which international treaties emerged and the foundations upon which Islamic *sharia* are built. It is expected that this difference will continue to govern the relationship for a long time. At the same time the source of the partial agreement is the compatibility of some of the norms from which international treaties emerge with some of the purposes of Islamic *sharia* and some of the dominant norms in some Islamic societies.

Future outlook: Steps necessary to make the relationship between international treaties and Islamic *sharia* more beneficial as related to women's empowerment

The preceding presentation and analysis show that there is an urgent need for a number of steps to make the relationship between international treaties and Islamic *sharia* more beneficial regarding women's empowerment in the future. The first of these steps is concentrating on eliminating the major aspects of women's suffering according to a realistic ordering of priorities and an accurate "suffering index." It is necessary to find inspiration in, and adhere to, the major principle in *fiqh*, which states that warding off evil takes priority over bringing about benefits. For example, it is necessary to give the issue of "women's security" precedence in the list of priorities for international treaties, and to expand this issue to cover number of dimensions. Perhaps we could evoke the fact that among the purposes of Islamic *sharia* are the preservation of self, along with the preservation of reason, the preservation of honour, the preservation of the religion, and the preservation of money. Unfortunately, despite the fact that the circles concerned

with women's issues have made large strides during the period in which they have been consistently active, working towards empowering women, women in a number of Islamic societies are still the first victims of political and social conflicts. We must be candid with ourselves and with our societies that the continuation of the severe harming of women as a group in Islamic countries during times of conflict is a sign of the absence of a bare minimum of understanding of Islamic *sharia*'s purposes, and the absence of a bare minimum of respect for the religion. It is also a sign of the absence of a bare minimum of adherence to the international treaties that call for rejecting violence and protecting women's safety. All of this calls for undertaking a radical review of the nature of the awareness that is being spread and the nature of official community education and family education. It also calls for a radical review of the way that relevant international treaties are dealt with. Perhaps the lack of sufficient adherence to this self-evident principle during the past periods of work to empower women was one of the reasons for the cementation of the conviction that the effort of many international circles seeking to ratify international agreements or treaties related to women's rights, and seeking to empower women is in part an elitist classist endeavour. The second step is a distancing from the sterile demagogic debate that rears its head every time an international agreement seeking women's empowerment is discussed. Sober, calm intellectual debate is absolutely necessary. The call for avoiding demagoguery is not a call to detach from the deep intellectual treatment of women's issues. The third step is concentrating on practical measures and proven and innovative tools that truly improve women's conditions along with theoretical and intellectual preparation in fields relevant to women's empowerment. The fourth step is abandoning the reductionist view, the pragmatic view, and the utilitarian view of Islamic *sharia* that have been adopted by those who want to turn the religion into an ideology on the one hand, and by those who are biased against Islamic *sharia* on the other. It's strange that, despite the fact that the two sides take opposite positions regarding treaties related to women, they share a reductionist view of Islamic *sharia* that reduces it to legal and punitive provisions. They also share in a pragmatic view, which trivializes the core aspects of Islamic *sharia*. They also share in a utilitarian position, which deals with Islamic *sharia* as though it is a tool for control and gaining power. The fourth step is for the concerned parties to concentrate on the points of agreement that make it possible to bring the position of treaties closer to the position of Islamic *sharia*. Perhaps one of the things that those who adopt Islamic *sharia* can rely on is the concept of norms. The norms that are proscribed in the Quran have levels, meaning that among them are norms that emerge in societies that follow other religions. In these societies there are correct, rational norms and incorrect ones.

Sources

Nisrine Abiad, "Islamic *Sharia*, Muslim States and International Human Rights Treaty Obligations: A Comparative Study," *British Institute of International and Comparative Law* (4 December 2008), p. 33.

Bharath Anandi Venkairm, "Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination against Women: Are the Islamic *Sharia* and the Convention Compatible?"

Amira El-Azhary Sonbo, ed., *Divorce Laws in Islamic History* (Syracuse: Syracuse University Press, 1996).

Session Summary: Women's Rights

Zahra' Langhi (chair)

Zahra' Langhi in her comment rejected the idea that there is a clash between Islamic *sharia* and international treaties on women. Langhi said that the reasons for the perception of a clash between these two concepts go back, fundamentally, to a narrow view of Islamic *sharia*, in which there is no possibility for coexistence among those who belong to different religions.

Langhi said that the Quran speaks to "the person" first, before it speaks to the believer, citing the example of *hif al-fudul* (the League of the Virtuous). Langhi added that the prevalence of the impression that international treaties are hostile to Islamic *sharia* did not open the door for a serious discussion on the complex relationship between Islam and international standards for human rights. Langhi added that Muslims criticise international treaties' lack of interest in "cultural individualism and historical context," which led to a misunderstanding between the two concepts. Langhi confirmed that one factor hampering the integration of international standards on women's rights into constitutions and domestic legislation is the attempt of post-colonial regimes, in Libya and elsewhere, to lend legitimacy to their rule under the cover of "protecting religion." Langhi criticised what she called the use of Islamic *sharia* as a tool by the forces of political Islam that do not look at the soul and the essence of Islamic *sharia*, and limit their vision to a literal understanding, especially as related to women's rights.

Amer Abu Dawia, University of Tripoli

Amer Abu Dawia began by presenting the political rights that women enjoy in the east and west, pointing out that the number of women in the German and British parliaments is close to their number in the parliaments of Algeria, Afghanistan and Iraq.

After this, Abu Dawia moved to a presentation on the emergence of the concept of "rights" in the Middle Ages and its link to the emergence of the right to "property" and the development of social contract theories.

Abu Dawia said that the concept of "conflict" represents the essence of western civilisation, whereas the concept of "unity" is the essence of Islamic civilisation.

Discussion

During the discussion a number of points of view on the topic were raised. They can be summarised as follows:

- Some of the participants called to expand the examination of violations of women's rights in Libya outside of the circle of Islamic *sharia* to include cultural and tribal factors.
- Some of those present asked how women's rights can be guaranteed in the constitution without being circumvented or rendered meaningless by the parliamentary majority.
- Some of the participants asked if the allotment of a "quota" or a specific number of women in the Constituent Assembly to Write the Constitution could ensure the representation of Libyan women. Others suggested the idea of affirmative action for women in the law for the election of the Constituent Assembly and not in the Assembly itself.

JUDICIAL SYSTEMS: ISLAMIC LAW AND INTERNATIONAL NORMS OF DUE PROCESS

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As Arab states move from an authoritarian past into a new, democratic future, they face the challenge of building democratic institutions that are responsive both to the will of their people and meet the requirements of international standards. While in a broad, abstract sense, conflicts between the democratic manifestation of the people's will and international norms are unlikely to be systematic, it is also true that many conflicts, or at least questions, are likely at the level of detail when the particular practices of various institutions become measured against abstract international norms. Moreover, some in the international community may be concerned that a Libya which is more representative of its people's views will necessarily adopt legal principles more deeply rooted in Libya's Islamic traditions than those of international law, a development that many will portray as a setback for international law.

This paper will consider the question of international norms governing courts, compare them to Islamic norms governing courts, with particular reference to the *Mālikī* school of law — given its historical role in Libya — and explore possible paths of reconciliation between the two sets of norms in circumstances where there is a conflict.

The most important source of international law regulating the operation of courts is the International Covenant on Civil and Political Rights (ICCPR). Libya acceded to the ICCPR on 15 May 1970. For purposes of this paper, the principal object of concern is Article 14 of the ICCPR, which establishes broadly the right of individuals to fair trials and due process of law. Compliance with Article 14, therefore, should be a matter of highest concern for the revolutionary Libyan judiciary.

This paper sets out an analysis of Article 14's provisions in light of traditional doctrines of Islamic law.

1. "All persons shall be equal before the courts and tribunals."

The first provision of Article 14 is that "all persons shall be equal before the courts and tribunals." Traditional *Mālikī* doctrines are only partially compliant with this provision. With respect to the right to bring a complaint, whether before a judge (*qāḍī*) or an executive officer (*wālī*), all persons were treated the same. The law did endorse discrimination in other respects, however, most prominently, with regard to the capacity to act as a witness (*shāhid*). Accordingly, only a free Muslim man of upright character (*ʿadl*) could unqualifiedly act as a witness before a *qadi*. Free Muslim women of upright character, by contrast, lacked the capacity in the *Mālikī* school to testify in a range of cases, including capital cases (*ḥudūd*), cases involving retaliation in kind (*qiṣās*) and disputes related to status, e.g., marriage, divorce, slavery or emancipation. Accordingly, the testimony of Muslim women was effectively limited to matters involving claims of money or property. Muslims, who were deemed to be of immoral character, lacked the capacity to testify in any proceeding. Non-Muslims, whether male or female, were barred from testifying against Muslims on any matter, whether civil or criminal.

At the same time, however, one should not place too great a weight on these exclusionary rules. Much of the logic of these rules depended on the fact that a *qadi*, in accordance with applicable rules of procedure, was not given any discretion in assessing the credibility of witnesses once he found that they were of sufficiently good character to act as witnesses. In other cases, however, where a judge retained discretion to determine the legally relevant facts, these discriminatory rules did not apply. However, instead of calling them witnesses, Islamic law called them informants, *mukhbir*, to make clear that the exclusionary rules that applied to testimony did not apply to this class of persons who introduced evidence into courtroom proceedings.¹³ To the extent that the Libyan judicial system affords the fact-finder, whether the judge or someone else, discretion in judging the credibility of statements, which is the modern trend, then Islamic law poses no problem to recognizing the equal capacity of all persons to be witnesses in a proceeding, because from the perspective of Islamic law, they are acting as informants (*mukhbirūn*), not witnesses (*shuhūd*). The most serious remaining area of conflict between traditional norms of Islamic law and the first sentence of Article 14 will be in the area of family law. There, judges rely on testimony, not the statements of informants, and while I know of no authority in the *Mālikī* school that would allow marriage or divorce to be established on the basis of statements rather than the testimony of male witnesses, relying on the distinction between testimony and statements should provide Libyan judges with a principled basis for adhering to Article 14's equality requirement and the basic principles of Islamic law.

2. "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

With respect to civil suits, Islamic procedural law required that a complainant (*mudda'ī*) state clearly in his complaint (*al-da'wā*) the grounds on which he believed the respondent (*al-mudda'ā' alayhi*) was liable to him before a court would compel the defendant to appear before it. In criminal proceedings, the capital crimes known as *ḥudūd* were rigorously defined, with clear elements, all of which had to be proven by eyewitness testimony of free Muslim men of upright character. The two exceptions to this were the penalty for wine drinking (*shurb al-khamr*) and highway robbery (*al-ḥirāba*). In the case of wine drinking, circumstantial evidence could be used to prove guilt, such as testimony regarding the breath of the defendant or that his vomit smelled of alcohol. With respect to the public crime of highway robbery, circumstantial evidence was also admissible to obtain a conviction, including, widespread hearsay regarding the defendant's character. For both of these crimes, then, while the elements of the charge are clearly established in the law, the relaxed evidentiary standards applicable to these charges may run afoul of Article 14's requirement that the proceedings against the defendant be "fair." The more important area of conflict, however, lies in the traditional Islamic concept of judge-made crimes, known as *ta'zīr*. This category of crimes was quite broad indeed, and unlike the limited class of *ḥudūd* crimes, could include any immoral act or even any act that was otherwise not immoral but constituted a disruption of the public order. Minors, for example, could be punished for actions that undermined the public order even though they were not moral subjects of the law and thus are not viewed as morally blameworthy for their acts. Judges, moreover, were not limited in the exercise of this power to actions that had been pre-determined by statute, for example, to deserve

¹³ For more information on the difference between testimony (*shahāda*) and declarations (*ikhbār*) and its impact on Islamic evidentiary law, see Mohammad Fadel, "Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought," *International Journal of Middle East Studies* 185 (1997).

penalty. Finally, the precise punishment meted out by judges pursuant to the power of *ta'zīr* was limited only by the judge's good faith exercise of discretion (*ijtihād*).

Islamic law raises no problems with respect to Article 14's requirement that proceedings be "public." For example, a judge had to appoint official witnesses, among other members of the court's professional staff, who were required to attend judicial proceedings in order to insure that the judge followed applicable law. Islamic procedural law certainly strove for fairness, subject to the previous discussion regarding discriminatory rules that applied to testimony. In addition, Islamic evidentiary law also imposed categorical bars on the testimony of witnesses who had an interest in the case's outcome, whether that interest arose out of an identity of financial or familial interest with one of the parties to the case. To insure the neutrality of judges, Islamic law imposed numerous grounds for disqualification of a judge in circumstances where an actual conflict of interest arose, or the appearance of a conflict of interest existed. Accordingly, a judge, like a witness, could not try a case in which he had personal stake in the outcome, whether financial or familial. But more generally, judges were expected to keep aloof from the kinds of dealings, such as engaging in commercial partnerships that would potentially undermine their ability to act as neutral decision-makers. Indeed, some authorities even suggested that it was preferable for outsiders to be appointed judge so as to enhance the perception of his neutrality. Judges had to be competent in that they had undergone a substantial amount of legal training. Finally, traditional Islamic law took the position that lawful courts could only come into existence pursuant to a valid appointment pursuant to public authority that established the court's jurisdiction.

3. "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Islamic law does not have any specific provisions regarding the rights of the press or even the public to attend judicial proceedings, but this value is generally consistent with the principles underlying Islamic law. Because the judge is viewed as a public servant, the public ought to have the ability to monitor the judge's performance of his duties. Attendance by the public, and by the press, would appear to be crucial means for the public to monitor the performance of the courts, and therefore, is a consistent value with the rules of traditional Islamic law.

4. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

This presumption is wholly consistent with Islamic criminal law's *ḥudūd*-category of crimes where the crime can only be established, as a general rule, by means of direct testimony of free male Muslims of upright character. It is more complicated with *ta'zīr* penalties, however. Because Muslim jurists viewed these crimes as related to the public welfare, evidentiary standards were greatly relaxed in *ta'zīr* proceedings relative to *ḥudūd* crimes. More problematically, traditional Islamic law changed evidentiary standards in circumstances where

character evidence cast suspicion on the defendant. Defendants falling into this category could be described as *al-mathūm* or *al-muttaham* or *al-mashhūr bi-l-fasād wa-l-‘udwān*. For these defendants, their character reputation effectively stripped them of the presumption of innocence, and even if a *ḥadd* crime could not be proven — due to the strict evidentiary requirements of the *ḥadd* crimes — they could be found guilty of a *ta‘zīr* offense based on general evidence of dangerousness and a reputation for criminality or thuggery.

5. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him

I know of no principle in traditional Islamic law that stated, in categorical terms, that the defendant has a right to understand the legal proceedings, and if he cannot, he is entitled to a translator; however, among the various offices traditionally associated with a Muslim court was that of the official translator (*tarjumān*) who was responsible for ensuring that parties appearing before the court could understand the proceedings. Accordingly, compliance with such an obligation poses no problem of principle from the perspective of Islamic law.

- b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

The *Mālikī* school has historically protected the rights of parties to have a full opportunity to present favorable evidence in their defence. Accordingly, a judge is required to delay proceedings sufficiently to allow a party (*talawwum*) reasonable opportunity to secure rebuttal evidence. Before the judge issues his final judgment, he is also required to give a party a final opportunity to secure exculpatory evidence (*i‘dhār*). While traditional Islamic law did not recognise a right to counsel as such, recognition of such a right is consistent with its insistence that parties have a full and fair right to present their case. Lawyers are an indispensable tool in achieving this right, particularly in complex modern legal systems where parties typically will be ignorant of many of their rights. This would especially true in criminal proceedings where the government prosecutor could be expected to be a highly trained expert. The lawyer’s role, far from obfuscating the facts, is to insure that truth is respected within the limits provided by law. Convicting defendants who have not had the benefit of legal counsel poses a great risk that the government, in its zeal to obtain convictions, will not respect the limits that the law places on its ability to prosecute and convict defendants.

- c. To be tried without undue delay;

This provision of the ICCPR lacks an explicit analogue in traditional Islamic law, but it does not raise any grounds for principled objection either. Accordingly, there is no reason to believe that this guarantee of the ICCPR might be controversial.

- d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Islamic law does not permit criminal trials in the absence of the accused. As for the right to legal counsel, see the discussion in 5.b above.

- e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

See the discussion in 5.b above regarding *talawwum* and *i 'dhār*.

- f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

See the discussion in 5.a above regarding the appointment of an official court translator.

- g. Not to be compelled to testify against himself or to confess guilt.

Islamic law's position on this question depends on the nature of the charge: a defendant was never under an obligation to testify against himself or herself if she was accused of a *ḥadd* crime, and any evidence, e.g., a confession, obtained under duress could not be used to obtain a conviction of a *ḥadd* crime. Indeed, in the case of *ḥadd* prosecutions, even a defendant who had voluntarily and freely confessed to the charges was entitled to withdraw his confession at any time prior to the execution of the punishment. Traditional Islamic law, however, permitted the limited use of compulsion in *ta 'zīr* proceedings. Lawful compulsion included imprisonment as well as corporal punishment in the form of lashes. Even here, however, the compulsion was justified usually on the grounds that the defendant was failing to satisfy a just private claim, e.g., for the restitution of misappropriated property. Accordingly, the coercion that traditional Islamic law legitimated is analogous to the concept of civil contempt in the Anglo-American law. Evidence obtained pursuant to these procedures, though lawful, could not be used to obtain a *ḥadd* conviction, e.g., for theft. While traditional Islamic law, therefore, permitted the use of coercion against defendants in limited cases, its overall position was that confessions had to be freely given if they were to have any legal validity. Accordingly, adherence to this provision of the ICCPR poses no principled problem from the perspective of traditional Islamic law.

6. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

Traditional Islamic law did not allow juveniles to be convicted of capital crimes, the *ḥudūd*, on the theory that their minority meant that they were not old enough to be morally culpable (*mukallaḥ*) for breaching the law. To the extent that juveniles could be implicated in criminal proceedings, they would be subject to the norms of *ta 'zīr*, one of whose express goals was rehabilitation (*istiṣlāḥ*) of the defendant. Accordingly, Islamic law broadly agrees with the ICCPR's approach toward juvenile offenders. The principal area of concern, however, is the definition of "juvenile." In traditional Islamic law, a minor became culpable for violations of the law, as a general rule, upon physical puberty (*bulūgh*). Effectively, this means that, were Libya to adopt traditional Islamic law's understanding of juvenile, teenagers could be tried as adults for violations of the criminal law. There is no reason, however, to believe that this is an inevitable outcome of a decision by Libya to incorporate Islamic legal principles into its legal system. As a matter of fact, statutory criminal law is a species of *ta 'zīr*, and because this category of crimes is discretionary, Libya could adopt international law's definition of a juvenile without undermining

any fundamental principle of traditional Islamic law.

7. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

One of the most commonly repeated claims about Islamic law is that it did not recognise a right of appeal. This is a misunderstanding of a doctrine related to the enforcement of judgments: while it is true that an enforcing court was not entitled to refuse recognition of a previous judgment on the grounds of a disagreement with the first court's legal reasoning, a prior decision could nevertheless be overturned in one of three circumstances. The first is if the first court committed legal error by applying a standard that has no reasonable basis in the law, i.e., an unreasonable interpretation of Islamic law. The second is if the first court committed a factual error, e.g., by ruling without sufficient evidence, or applying an erroneous rule of evidence to the dispute. The third is if fraud was committed on the court, e.g., if the witnesses committed perjury. Accordingly, Islamic law poses no principled objection to the idea of judicial review.

8. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
9. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Traditional Islamic law has a very robust doctrine of *res judicata* and even issue preclusion. In the absence of evidence that the first trial was tainted by fraud, there is no reason to believe that traditional Islamic law would raise a principled objection to this requirement of the ICCPR.

Session Summary: Judicial Systems

Chair: Mohammad Fadel, University of Toronto

Mohammad Fadel presented a paper dealing with the international standards that govern the courts and fair court proceedings as presented in ICCPR Article 14. He compared them with similar concepts found in the Maliki school of *fiqh*, which is dominant in Libya.

Fadel analysed the important themes in Article 14, which are the idea of equality in the judicial system, public and fair proceedings in an independent court, openness in the issuing of judicial decisions, and the assumption of "the innocence of the accused until his guilt is proven." This is in addition to all of the guarantees of a fair trial, such as the right to a lawyer, the right that confessions will not be taken under duress, the right to clarity and timeliness in court proceedings, and finally the right to appeal the ruling in a higher court.

Fadel clarified that Islam in general guarantees the concept of equality when presenting a complaint in front of a judge or an executive official such as a governor. However, the concept of equality is flawed when it relates to bearing witness in court, especially for women and non-

Muslims. Fadel explained that Islamic legal *fiqh* employed a group of “informants.” The judge would look to them for evidence, in addition to the witnesses. This group did not have any distinguishing aspects. Fadel ended the discussion of this topic by confirming that the Libyan judicial heritage easily accepted the idea of equality for all in front of the law and the courts, relying on the existence of this group as supporting evidence, even though the issue was more difficult in topics related to family affairs.

Fadel divided the issues that were presented in the Islamic courts into two large categories. The first is related to *hudud* (a class of punishments that are fixed for certain crimes) that set specific conditions for witnesses and evidence. The second, and the wider category, falls under the group of “censure.” In this type of issue, the judge’s authority is expansive and very discretionary. The conditions for justice arise from the judge’s good moral code, and not from institutional safeguards.

Fadel explains all of the standards that Islamic *fiqh* put into place to guarantee the neutrality and fairness of the witnesses on the one hand, and the neutrality and fairness of the judge on the other. For example, judges were forbidden from handling cases in which they might have a personal interest. This is in addition to the general trend that sought to prevent judges from entering into commercial partnerships in order to protect their neutrality, and to the opinions which say that the judge shouldn’t be from the same town, so that he will not be biased to those with whom he was raised.

Regarding the “assumption of innocence” before the ruling, Fadel said that in cases of *hudud* crimes, there were strict standards for proving the accusation according to the accounts of witnesses based on certain rules. However, the issue was more difficult in case of censure crimes when the accused’s “bad reputation” was enough evidence to inflict punishment upon him in many cases.

As for the guarantees of a fair trial, Fadel said that Islamic *sharia* provided all of the guarantees in a manner that is consistent with international standards. However, Fadel pointed out one issue, which is that Islamic *sharia* sometimes permits the use of limited coercion (such as imprisonment or lashing) to extract confessions in cases of censure crimes. However, he confirmed that, in general, Islamic *sharia* is completely compatible with international guarantees of fairness.

Regarding the trying of juveniles, Fadel explains that Islamic *sharia* forbade the implementation of penalties on juveniles in *hudud* crimes and sought to “reform” the juvenile accused in censure crimes. However, Fadel said that the biggest challenge related to this issue is defining the age of juvenility, and whether it is tied to puberty, as Islamic *sharia* holds, or if the Libyan legislators will adopt the idea that criminal law is a type of censure law and therefore nothing prevents the definition of “underage” from being similar to that of international charters.

Fadel ended his comment by discussing the prevalent idea that it is not possible to reverse rulings in Islamic *sharia*, confirming that a previous ruling can be overturned in three instances. The first instance is when the first court made a legal mistake by applying a principle without a rational basis in the law, or in the case of an irrational interpretation of Islamic *sharia*. The

second is when the first court makes a mistake in terms of proof, for example, ruling without sufficient evidence or relying on an erroneous procedural rule. The third instance is the occurrence of fraud on the part of one of the litigants, such as witnesses giving false testimony, which the judge then depended on in issuing the ruling. Therefore, Islamic *sharia* has no initial objection to the idea of judicial review.

Zaid Al-Ali, International Institute for Democracy and Electoral Assistance

In his comment, Zaid al-Ali discussed the concept of the independence of judges and international standards, explaining that the concept of the independence of judges means that the executive authority and the legislative authority do not interfere in:

- The removal of judges
- The transfer of judges
- The punishment of judges

Al-Ali added that there are two mechanisms for protecting the judiciary's independence; the constitution or the establishing of judicial councils.

Al-Ali discussed a number of modern and historical Arab constitutions that contained examples of circumventing judicial independence. In the 1970 Iraqi constitution, we find that Article 60 states "the judiciary is independent and there is no authority over it except the law." However, the same constitution grants in Article 42 what was known as the "Revolutionary Command Council," a body which was not elected by the people, the powers to "issue laws and decisions that have the force of law and to issue decisions necessary for applying the rulings of enacted laws." This was used by the executive authority to impose its complete dominance over judicial affairs.

Al-Ali explained that the more detailed constitutional articles related to the independence of the judiciary are, the more effective they are at preserving judicial independence. In the suspended 2012 Egyptian constitution, Article 170 states: "the judges are independent and cannot be removed. There is no authority over them except the law and they are equal in rights and duties. The law determines the conditions and procedures for their appointment, and regulates disciplinary action against them. Any assignment of them must be complete, and it must be to bodies and positions that the law determines. This is all in a manner that protects the independence of the judiciary and the completion of its work." In this article, for example, the principle of "the assignment of judges" is protected constitutionally, especially because the concept of assignment had been used by previous regimes to guarantee the loyalty of some judges.

Al-Ali also presented the example of Article 109 in the 2011 Moroccan constitution, which provides more details on ensuring the independence of the judiciary. It states that it, "forbids any intervention in the cases before the judiciary, and the judge shall not receive any orders or instructions regarding his judicial duties, nor shall he submit to any pressure. Whenever he feels that his independence is under threat, the judge must refer the issue to the Supreme Council of the Judiciary. Any violation by the judge of his duty of independence and impartiality is a serious professional error, to say nothing of the potential legal repercussions."

Al-Ali said that the 1997 South African constitution included detailed sections to strengthen the independence of the judiciary, which makes it one of the pioneering constitutions in this field. For example the constitution states in Article 177 that:

A judge may be removed from office only if

- a. the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
- b. the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

Al-Ali said that the second step to strengthening and guaranteeing the independence of the judges is the presence of independent and neutral judicial councils. This poses two important questions, the first is who will appoint their members and the second relates to the law that regulates the council's powers and its role.

Al-Ali added that despite the existence of the Supreme Judicial Council in Egypt, the suspended Egyptian constitution of 2012 does not include a detailed text on its existence. Al-Ali added that despite the fact that Article 90 of the Iraqi constitution of 2005 includes text on the presence of the Supreme Judicial Council, it leaves the manner in which the council will be formed, its responsibilities, and the rules for its workflow to the "law" which is usually prepared by the government. In al-Ali's opinion, the 2011 Moroccan constitution presents the best guarantees, relatively, for strengthening the judicial authority in the Arab world. In Article 113 it states that "the Supreme Council of the Judiciary works for the application of the guarantees granted to the judges, especially as related to their independence, their appointment, their promotion, their retirement, and disciplinary measures taken against them." It determined clearly in Article 115 the manner in which the Supreme Council of the Judiciary would be formed and the number of its members, who are chosen according to their judicial positions or are elected by other judges. Al-Ali said that the text regarding the "number" of members of the council constitutionally prevents the executive authority from interfering in the council's affairs by increasing [the total number of members] or decreasing the number of members that the government believes are not loyal to it.

Al-Ali ended his comment with the example of South Africa where the constitution states in Article 178 the standards for the formation of the Judicial Service Committee, which is made up of important judges and lawyers.

Abdelkarim Farag, Benghazi Court of Appeals

Abdelkarim Farag discussed in his comment the necessity for the executive and legislative authorities to adhere to international treaties and agreements in legislating or in ruling in courts, explaining that it is necessary to refrain from issuing laws or court decisions that violate the texts of these treaties.

Farag clarified that a state's ratifying of an international agreement does not necessarily mean anything without the presence of a number of conditions, the most important of which are:

- A clear statement in the constitution that international agreements have higher authority than the constitution

- A clear statement in the constitution that international agreements and treaties supersede the ordinary law, which paves the way for amending any law which violates the clauses of these agreements.

Discussion

During the discussion, a number of ideas related to the topic were raised. They can be summarised as follows:

- Those present agreed unanimously that the Gaddafi regime imposed its authority on the judicial system by giving expansive powers to the Minister of Justice to interfere in the affairs of the judiciary.
- Some of the members warned of comparing the concept of judicial independence and the proceedings of a fair trial that are written in international agreements and treaties with these concepts in the Islamic context. One of the participants said that Islamic history did not have any “procedures law” for example.
- A number of those present asked about the mechanisms in international treaties or stable democratic constitutions for overseeing the judicial authority and holding it accountable.

THE SEPARATION OF POWERS: INTERNATIONAL STANDARDS AND ISLAMIC *SHARIA*

Saif Nasrawi, Researcher in Political and Constitutional Affairs

While Libya is preparing to elect the members of the constituent assembly to write the constitution of the February 17 revolution that expresses the aspirations of Libyans for a democratic future, it is natural to discuss the relationship between the hoped for constitutional construction and global standards and principles for democratic regimes.

In the context of the Arab Spring revolutions, and the political and cultural reality in Libya, it is expected that the question of the relationship between Islamic *sharia* and the establishing of a democratic political regime will be a key issue on the agenda for the drafters of the new Libyan constitution.

This paper does not seek to promote one particular kind of political system (presidential, parliamentary or mixed), centralized or federal. Instead, it seeks to shed light on the central fundamentals of any democratic regime in light of the conventions and treaties that Libya has signed, such as the International Covenant on Civil & Political Rights (ICCPR) and the African Charter on Human & Peoples' Rights (ACHPR).

It also discusses some of the similarities between Libya's international commitments and some of the principles of Islamic *sharia* that have a specific link to the regulation of the relationship between the powers or between the citizens and the state in any constitutional democratic regime. This discussion is not only beneficial for the writers of the constitution as a way of exploring the questions that their discussions in the constituent assembly may touch on, it may also be beneficial to the general public by establishing a greater legitimacy for a democratic constitution that is in line with the political and cultural inheritance of the country, both modern and traditional.

In this context, this paper does not aspire to discuss all of the schools of Islamic jurisprudence or all the forms of government in the history of Islam. Instead, it will focus only on the general principles that Islamic *sharia* established to support a modern constitutional construction built on the principles of power representing the popular will, *shura* (consultation) and the right to legislate.

The Foundations of the Democratic Regime between International Law and Islamic Sharia

The major international treaties, such as ICCPR and the Universal Declaration of Human Rights, do not include a clear text on the principle of the "separation and balance of powers" and defining the relationship between the three branches of power (executive, legislative, and judicial). Even so, the UN Human Rights Committee used this principle extensively in its observations regarding several countries, in a way that made it one of the general, stable principles of international law.¹⁴

Without generalization, we are concerned here with translating this principle to detailed formulations in the constitutional drafting, especially as related to preventing the excessive

¹⁴ For an extensive discussion regarding this topic, see "Strengthening International Law to Support Democratic Governments and Genuine Elections," Democracy Reporting International (April 2012), pp. 13–14.

concentration of power in the hands of the executive branch, strengthening the powers of the parliament in legislating and overseeing the government, and strengthening the independence of the judiciary in a way that precisely defines the powers of each authority, as long as all of them submit to the rule of law.

Reducing the Concentration of Powers in the Executive Authority

ICCPR Article 25 stipulates the right of citizens to participate in political life through running for office and voting in elections in order to choose their representatives in elected councils. The seventh paragraph of General Comment 25 of the UN Human Rights Committee states: “Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power.”¹⁵

Based on this, the committee warned in several reports, and in several different ways, of the concentration of powers in the executive authority — even if the president of the state is directly elected — at the expense of the elected parliament’s ability to oversee the government and hold it accountable in an effective manner.

The ways in which power is concentrated in the executive authority are numerous. Among them is the right of the ruler, whether he is the president, prime minister or king, to legislate by issuing decrees and decisions that have the power of law without consulting the elected assembly. Others are his right to dissolve the government or to dissolve the parliament alone, or to resort directly to a citizen referendum regarding contentious issues with the parliament, in a way that could sometimes lead to referendums on articles in the constitution.¹⁶

Going back to the schools of Islamic jurisprudence before the twelfth century — or before the formation of the modern nation state — might not be useful, since all of the regimes in the Islamic states, like all political organizations around the world, lacked the bureaucratic and administrative division that distinguished the modern nation state. However, this does not preclude referencing the fact that the history of Islamic governance and legislative, since the era of the first caliph Abu Bakr al-Siddiq, has seen a clear link between the idea of obeying the ruler and the degree to which he adheres to God’s law and the *sunnah* of His prophet (PBUH) especially as related to issues that are ruled on by definitive texts which cannot be doubted.¹⁷

It is true that the history of Muslims before the nineteenth century saw at times expansion of the concept of “jurisprudence of necessity” and the prevailing conditions that give the ruler or a group of religious men loyal to him practically absolute powers to legislate anything that the ruler pleases without clear legal restriction.¹⁸ However, this same time period also saw the emergence of the science of jurisprudence, and the institution of jurists, judges, judicial institutions and *ahl al-hall wa’l-aqd* (those qualified to elect or depose a caliph on behalf of the Muslim community). These formed, in a way, a restriction on the caliph or the governor,

¹⁵ The provisions of ICCPR Article 25, detailed in General Comment 25.

¹⁶ See “Strengthening International Law,” p. 14.

¹⁷ See Noah Feldman, “The Rise and Fall of the Islamic State,” p. 24.

¹⁸ See *Abdullahi Ahmed An-Na’im*, “Islam and the Secular State,” p. 131–180.

especially in times in which the regime's legitimacy was shaken, leading it to give more independence to the jurists to support the legitimacy of the state in general.¹⁹

Generally, during these periods the principles of "opposition's rights" or the "right to rebellion" crystallized. These rights permitted social groups such as the Khorasan rebels or jurisprudence schools such as the followers of Imam bin Hanbal to confront the ruler on the grounds of having violated God's law. This represents, in the final analysis, a theoretical confirmation of the necessity that the ruler adhere to Islamic *sharia* or, naturally, to a certain reading of Islamic *sharia*.

What we are interested in now are the modern readings of Islamic *sharia* and Islamic political thought that were produced, essentially, in the nineteenth and twentieth centuries with the beginnings of the emergence of the modern state in the Islamic world.

The Egyptian thinker Mohammad Diya al-Din al-Rees says that there is nothing in the texts of Islam that decisively prevents taking into account the principle of the separation of powers. This is based on two jurisprudence principles that are the principle of permissibility (things are at first permissible as long as there is no text which forbids them), in addition to the principle of interests, as long as the separation establishes the concept of not concentrating powers in the hands of the executive.²⁰

This idea was embodied later in a number of Islamic constitutions such as the constitutions of Pakistan, Iraq, Egypt, and Indonesia, and the latest Tunisian draft constitution, notwithstanding the difference of the political regimes between presidential, parliamentary, and mixed. It must be pointed out here that the general direction in most modern Islamic political literature says that the executive authority alone has the "powers" to legislate and enforce in issues ruled by definitive texts which cannot be doubted, such as the punishments for adultery and usury, as well as jihad, which falls under national security in modern parlance.

Other Islamic states, such as Pakistan or Egypt (the 2012 constitution that was toppled in July 2013) develop constitutional clauses through which unelected bodies such as Al-Azhar share in advising regarding bills related to Islamic *sharia*. There is no law regulating the relationship between the parliament and Al-Azhar in Egypt, or determining the organizational issues regarding who has the right to refer a law to Al-Azhar, or who has the right to resolve any controversy in case of dispute. However, the approval by the Muslim Brotherhood-dominated parliament of the Sukuk law in the first half of 2013 despite Al-Azhar's opposition could lead one to believe that the power of elected assemblies is being strengthened at the expense of religious institutions.²¹

¹⁹ See Na'im.

²⁰ Mohammed Diya al-Din al-Rees, "Islamic Political Theories," p. 77.

²¹ It is striking that the Islamic Research Academy, the highest body in Al-Azhar for issuing *fatwas*, opposed the Islamic bonds bill with justifications closer to the principles of national sovereignty and the people's ownership of public resources, instead of looking into the degree to which usury was absent from the bonds. The members of the Council who belonged to the Muslim Brotherhood were adamant that the law that was passed in May 2013 is in agreement with "their vision" of Islamic *sharia*, even if it contradicted, in some of its sections, Al-Azhar's opinion. It is true that the legal and *sharia* foundation finds its justification in Islamic jurisprudence, but the idea that the

In the end, the general focus in Islamic literature on executive power contributed to keeping some of the regulatory questions vague, such as the right of the executive to veto laws²² or the powers of the president or the prime minister to dissolve parliament or call for a referendum.

The Role of the Legislative Body

The presence of an active and directly elected parliament is considered a primary element of a democratic government. The sovereignty of the law requires that all important legislation be issued by the legislative body. The multi-party system is built on the competition to issue legislation that reflects different interests. Integrity and transparency comes a result of public and comprehensive negotiations around bills, and through the discussions of the legislative body that deal with public affairs. Consequently, the legislative branch of the government becomes the core of democratic institutions.

A number of international documents endorsed the three major functions of the legislative body, which include legislating, overseeing the executive branch, and working as a platform for discussing and examining the interests of the citizens.

ICCPR Article 25 stipulates the guarantee of the citizens' right to political participation in public life, and the guarantee of their right to vote and to run for public office.²³ This was explained by the UN Human Rights Committee, which stated that this proves the importance of an active parliament.

Many of the modern Islamic writings develop traditional concepts in the history of Islamic rule, such as *bay'ah* (allegiance), *shura*, *ahl-al-hall wa'l-aqd* and *ijma* (consensus) to come to the conclusion that there is no conflict between the rulings of Islamic sharia and the presence of elected legislative councils.

The leader of the Tunisian Al-Nahda Party, Rashid al-Ghannushi, for example, says that the shura system is the second foundation of the Islamic regime, after the religious texts, and that he uses it as a starting point to confirm the right of the individual and the Islamic umma, to general participation in governance.²⁴ Starting from this principle, Ghannushi discusses the idea of the obedience due to the guardian, and whether this refers to the princes or the scholars. The

representative of the people is "entrusted" with interpreting jurisprudence opinion confirms the principle of the popular will, at least as it is understood in the discussion of this law.

²² This point is one of the problems of Islamic political heritage. There are many fatwas and historical events that show that the opinion of the ruler or the caliph or the sultan is not binding on all Muslims or their scholars especially in jurisprudential issues that were not related to the issue of governance. There are schools that say that the ruler does not have the right to veto a judge's ruling. However, because of the nature of the law in Islamic states, which was far from the concept of codification in a state that covers a specific geographic area, i.e. the law and legislation of the modern state, the concept is still ambiguous. However, in principle Islamic sharia can provide legal justifications that prevent the executive branch from interfering harshly in the legislative process.

²³ For examples, read the publications of the Inter-Parliamentary Union and the National Democratic Institute, in particular, "Toward the Development of International Standards for Democratic Legislatures" (2007). For other concerns, see the Commonwealth Parliamentary Association, "Benchmarks for Democratic Legislatures" (December 2006). See also, The Parliamentary Forum of the Southern African Development Community, "Norms and Standards for Elections in the SADC Region" (2001).

²⁴ Rashid al-Ghannushi, "Public Freedoms in the Islamic State," p. 108.

Tunisian leader demonstrates that the nation's participation in legislation is guaranteed in Islam, especially since the concept of *ijma* is one of the fundamental sources of Islamic sharia.

He says, "*Ijma* in Islamic *sharia* is an honoring of a person, whoever he may be, and recognition of his reason and his responsibility for himself...[and] a clear invitation to recognize public opinion, in its different trends."²⁵

After this he builds on the writings of the Pakistani thinker Muhammad Assad, in which he confirms: "The formation of a legislative body...the meaning of shura must be represented in it... in modern societies you can't know the nation's opinion or achieve the principle of shura except through general elections."²⁶

The Egyptian Islamic thinker Muhammad Khalid confirms that "the modern conception of Shura that Islam gave us is parliamentary democracy... for the people to elect representatives who represent their will."²⁷

Despite the broad spectrum of modern Islamic movements' acceptance of the idea of a legislative body, it must be noted that many of them require that the "legislators" adhere to the principles of Islamic sharia, so that the passing of any law that conflicts with these principles becomes illegal. This was written into the constitutions of a number of Islamic countries, such as Egypt, Yemen, Pakistan, Iraq and others.

Despite the fact that most Islamic constitutions endorse the right to vote — with a few exceptions such as Saudi Arabia — practices that could limit the conditions of justice and integrity must be pointed out, such as the presence of councils that examine and choose candidates, as is the case in Iran, or the fact that some Arab countries, such as Egypt before the 2012 constitution, resort to the introduction of a second chamber to the legislative councils. This chamber includes a large number of representatives appointed by the executive branch, which threatens the right of the people's elected representatives to exercise their powers.²⁸

Since the legislative bodies represent peoples, they must have the freedom to conduct their work independently. This concept can be understood in two ways; first the legislative body must have freedom in establishing and amending its special procedural rules independently. Likewise, the legislative bodies have the right to freedom to schedule their meetings and determine the pace

²⁵ Ghannushi, p. 120.

²⁶ Ghannushi, p. 124.

²⁷ Khalid Muhammad Khalid, "The State in Islam," p. 49.

²⁸ The idea of choosing candidates for the representative councils or for the presidency, as is the case in Iran, is justified usually by a "religious" rationale, the degree to which the candidate adheres to the principles of the Islamic Republic of Iran's constitution. However, the idea of the presence of a second chamber of parliament, as is the case in Egypt and Morocco, has not been justified, in principle, in any religious way. Generally, it seems that the prevailing trend in the schools of modern jurisprudence, among them the Salafi schools, do not conflict, in principle, with the idea of elections and running for office. However, there are some trends that say that it is not permissible to run for public office if the regime is not "Islamic." Therefore, even in this case, the discourse is primarily directed to the citizen as coming from a religious point of view, and not as prohibiting the "right" to elections as part of an Islamic political regime.

with which they engage in their activities and the necessary time to prepare, review, and amend proposed laws.

The Right to Legislate

The authority to legislate is considered one of the most important features of legislative bodies. These bodies must have the authority and capacity to carry out this role. Despite the fact that the executive has the right to issue binding decisions that have the power of law (such as regulations and decrees) this right must be built upon the constitution or a decision from the legislative body. It could be permitted to move the legislative powers to the executive branch for short periods of time, according to specific circumstances in a narrow system. This would happen, for example, when the legislative body is not in session. However, the Council of Europe's Venice Commission confirms that moving legislative power to the executive body is "unacceptable in democratic and constitutional states."²⁹

With the exception of the jurisprudential differences regarding the possibility of legislating in the case of the presence of definitive texts which cannot be doubted, it seems that there is a general agreement inside Islamic reformist circles on the fact that Islamic *sharia* does not conflict with the presence of an elected legislative body, even if some differences have emerged around legislative powers in issues related to *jihad*.³⁰

The Right to Oversight of Executive Authority

The international treaties and conventions, and the decisions of the UN Human Rights Committee do not include any detailed formats for the mechanisms for the parliament to practice its right of oversight over the executive authority. However, the norms of constitutional democracy have settled on the fact that the essential elements for the presence of an active oversight include the parliament's right to summon ministers or their deputies, the right of representatives to submit requests for interrogations or briefing, the right of the parliament to form special inquiry commissions, the right of the representatives to request information regarding the government's plans and policies, in addition, of course, to the parliament's essential right to oversee and approve the state's budget.

Islamic political history has seen debates around the concept of oversight of the ruler in his relationship to the application of Islamic *sharia*, or what has been termed the promotion of virtue and the prevention of vice, in addition to the judicial institutions that received complaints regarding state employees violations and the presence of "intermediary groups" or by their modern name, "lobbies." However, generally, Muslims' political organization lacked the "institutional mechanisms" that support the effectiveness of accountability.

Even so, a number of modern Islamic thinkers approved the idea of the oversight of government, even if they left the formation of the mechanisms and the details to be determined according to the nature of the political context of each Muslim state.³¹

²⁹ Paragraph 21, the comments of the Venice Commission on the constitutional amendments in Kyrgyzstan.

³⁰ See Ghannushi, p. 241.

³¹ See for example Mohammad Salim al-Awa, "In the Political System of the Muslim State." See also Abd al-Qader Awda, "Islam and its Legal Situations," Hamid bin Abdallah al-Ali, "The Accountability of the Ruler and the Means Therefor in Islamic *sharia*," in which he tries to prove, based on letters and historical stories, the presence of three

We find also in the constitutions of a number of Muslim countries — such as the Indonesian, Malaysian, Egyptian and Moroccan constitutions — clear articles that allow for the oversight of the government by the people’s representatives. If they sometimes lack effectiveness, this is certainly for reasons completely unrelated to Islamic *sharia*.

Session Summary: Balance of Power

Saif Nasrawi (chair)

Saif Nasrawi stated that the concept of the separation and balance of powers is considered one of the central concepts to building any constitutional democratic regime, regardless of the nature of this regime or whether it is presidential, parliamentary, or mixed. Nasrawi added that the political history of Islam did not know the concept of the balance of powers in its modern form, but there are many political practices and *fiqh* principles that illustrate the presence of limits and restrictions on the executive authority in Islam, especially as regards the prevention of excessive power in the executive body, the right to legislate, and the independence of the judiciary.

Nasrawi added that *fiqh* and the political experience in Islam, recognised, for example, the restriction of the ruler’s powers, albeit if theoretically, in Islamic *sharia*, especially in the case of definitive rulings which cannot be doubted. This is despite the occasional expansion of the concept of “*fiqh* of necessity.”

He added that the restrictions on the ruler were not limited only to the theoretical and intellectual in the writings of the jurists and Islamic thinkers. The first foundational portents of this are found in the intermediary institutions in the history of Islam, such as the schools of *fiqh*, the judiciary, the ombudsman, *ahl al-hall wa’l-aqd* and other institutions.

Nasrawi discussed some of the modern writings of progressive Islamic intellectuals that confirmed the compatibility of Islamic *sharia* with the concept of the balance of powers, relying on two important principles. They are the principles of “permissibility” and “interests” which have been translated into the constitutions of a number of Islamic countries, such as Egypt, Iraq, Pakistan, Indonesia, Malaysia and others.

On the topic of *sharia*, Nasrawi explained how a number of Islamic researchers developed the idea of “popular sovereignty” and its relationship to the religious texts. They based this on the concepts of “bay’ah (allegiance), shura (consultation), *ahl al-hall wa’l-aqd* and *ijma* (consensus) to reach the principle of the legitimacy of a “parliament” in the Islamic context, as well as the legitimacy of related rights such as the right to vote and to run for office.

Finally, Nasrawi discussed the principle of parliamentary oversight of the government’s performance and gave examples of the presence of a kind of oversight in Islam’s history, represented essentially in the judiciary and the Ombudsman that received citizens’ complaints about employees of the state. However, he said that this principle is considered the weakest in the history of Islamic political thought.

mechanisms for overseeing the ruler in Islam, theoretically at least. They are the accountability of *ahl al-hall wa’l-aqd*, the freedom of opinion and expression and the presence of lobbies.

Professor Mansour Milad, University of Tripoli

Mansour Milad presented a short presentation on the important political challenges in post-revolution Libya, which he said are developing a sense of citizenship, fighting corruption and preserving the territorial unity of the country. He criticised the failure of the Libyan elite to defend these important themes. Then, Milad presented an explanation of the concept of the separation and balance of horizontal and vertical powers. He said that many countries in the Third World had the idea of the “separation of powers” but they did not have balance among them, and that they had a clear inclination towards the concentration of powers in the executive authority.

Regarding Arab heritage, Milad discussed the writings of the most important political thinkers such as Al-Mawardi and Ibn Khaldun to confirm that the general trend was focused on the “self-restrictions” which the ruler places on himself, without an institutional mechanism to hold him accountable or oversee his performance. Milad said that any coming Libyan constitution must not only affirm the concepts of democracy, but it must also be engineered to ensure “good governance” and the efficiency of the state’s bureaucratic system to achieve economic development.

Discussion

During the discussion a number of questions were posed to Nasrawi and Milad, in addition to points of view on the issue. They can be summarised as follows:

- The concept of *ijma*, which is central to Islamic *fiqh*, cannot be applied to the political arena in modern states because of the complexity of societies and the difference in their groups’ interests. However, there is a need to strengthen the principle of agreement or of a large (two thirds) majority in the writing of the country’s new constitution.
- Around 80 per cent of those present announced their preference for the “mixed system” in the constitution, emphasizing that the experience of Muammar Gaddafi’s rule was built on the concentration of powers and authorities in the hands of the executive branch.
- Ninety per cent of those present said that Islamic *sharia* is completely compatible with international standards of the separation and balance of powers.

Nasrawi ended by confirming that the principle of the separation and balance of powers cannot be consolidated except through strengthening the institutions of civil society (political parties, labour unions, nongovernment organisations, the media, etc.). Therefore, the Libyan constitutional construction must ensure the strengthening of the right to organize and the right of freedom of expression and opinion.

Nasrawi confirmed that Libyans must benefit from the experiences of Egypt and Tunisia in writing the constitution and especially in strengthening the principle of the agreement of a large majority for approving the articles of the constitution. He stated that the process itself of writing the constitution is as important as the contents of the constitution and that this process should be as inclusive as possible.

Milad said that there are two major challenges for Libyans in writing the constitution. The first is building democratic institutions and the second relates to strengthening democratic values and culture that focus on the individual and society.