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# The Relationship between Constitutions, Politics and Islam: A Comparative Analysis

*Baudouin Dupret*

## **I. Introduction**

Contemporary experiences of integrating Sharia in the legal body of nation-states took place in such a way that we can talk about disruption of the economy and the epistemology of Islamic normativity. Its overall balance, its fundamentals and its morphology – or what we might call its grammar – have been transformed completely. This is true at a substantial level, where applicable norms are largely formulated through codification. This is also true at an institutional level, with the establishment of constitutional architectures dedicated to the separation of powers, the hierarchy of jurisdictions, the legislative principle, the popular representation, and the fundamental rights and freedoms, within which Sharia is deemed to be a reference framework rather than specific and directly applicable rules.

The use of certain terminology does not necessarily mean the use of the same language. It is thus seen that the vocabulary of Sharia is mobilized in different contexts, without any greater permeability between the argumentative logic of any register. This is not due to different levels of truth, but in fact it is due to the purposes towards which the people involved orient themselves in terms of these discursive activities. As a law, the Sharia is an invention of the nineteenth century. As a reference in the political register, it is a formulation of the second half of the twentieth century. However, as a constitutionalized source of legislation, it is an innovation of the last quarter of twentieth century. But as an ethical paradigm autonomous from legal normativity, it is a current resurgence.

Sharia went through, to use Armando Salvatore's heuristic formula, a true implosion.<sup>1</sup> This has led, in terms of the positivist 19<sup>th</sup> century logic, to the dissociation of normativity between law and ethics. Each of these realms became autonomous, at least in appearance, according to very specific terms. In the mid-20th century, the Islamic referent was marginalized in the political, ethical or legal discourse. Then, under pressure exercised from national, regional and international dynamics, Sharia began to gain more sphere, both from below – what might be called the Islamization of societies – and from above – its come-back

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<sup>1</sup>A Salvatore, 'La shari'a moderne en quête de droit : raison transcendante, métanorme publique et système juridique' (1998) 39 *Droit et Société*, 293-316.

as a constitutional and political referent. This dynamic, however, is more variegated than it appears at first glance, as the advent of Islamic-conservative government does not necessarily mean the establishment of Sharia-centered political and constitutional systems.

## **II. Implosion, eclipse and come-back in politics**

Nowadays, what is called Sharia belongs primarily to morality, and the tensions observed in political and constitutional matters derive from complex relationship maintained in modern societies between politics, religion, law and morality. In some former work, I talked about the invention of Islamic law, a phenomenon that is part of the political emergence of the nation-state and the corollary development of a positive legal system.<sup>2</sup> ‘As in Japan during the Meiji era, says Shibli Mallat, there was a need for clear, simple and complete codes that would address the most common legal transactions, and only the Napoleonic Code could provide the right necessary model’.<sup>3</sup>

As Sharia is Islamic normativity, it may have ethical, religious, political and legal dimensions – without necessarily making it a ‘law’ in the current sense of the word. This composite nature is found torn apart by a tendency to the autonomization of each of these dimensions, due to, among other, the Islamic reform movement (*islah*). In Egypt, for instance, especially during the late 19<sup>th</sup> century, one observed at the same time the organization of a public sphere, the dynamics of codification of the law and the emergence of a constitutional movement. This reorganization of the public sphere - which brought about the establishment of a state apparatus and the means with which it legally regulates its relationship with its citizens – led to the progressive fragmentation of Sharia between a legal framework, where it found itself both positivised and confined; and a public space where it acquired the place of a hegemonic reference built around a core that was characterized as authentic, civilizing and normative.

The ambivalence of Sharia is reflected in the conception that people demanding Sharia have<sup>4</sup>. It can sometimes be ‘the basis on which the law is based’, sometimes ‘a life project’, and

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<sup>2</sup> L Buskens and B Dupret ‘L’invention du droit musulman. Genèse et diffusion du positivisme juridique dans le contexte normatif islamique’, in F Poullion et J C Vatin (eds.), *L’Orient créé par l’Orient* (Karthala, Paris 2011), 71-92.

<sup>3</sup> C Mallat, ‘Islamic law, droit positif and codification: reflections on longue durée’: *Plurality of Norms and State Power from 18<sup>th</sup> to 20<sup>th</sup> Century*, Vienna, Workshop 1997.

<sup>4</sup> B Dupret, *Au nom de quel droit ?* (Droit et Société, Recherches et Travaux du Réseau Européen Droit et Société à la Maison des Sciences de l’Homme, Série anthropologie, LGDJ, Paris 2000).

sometimes even something else: 'Islam is not limited and can never be reduced to mere laws', as an Egyptian lawyer told me in the 1990s<sup>5</sup>. Thus, in general, Sharia is a reference, not a specific content, and it refers to the idea of an authentic tradition that a society would keep for only legitimate. As for the purpose of this reference, it varies depending on the many worldviews of the people.

Originally, Pan-Arabism was not but a variant of 19<sup>th</sup> century nationalism. The Arab idea was first expressed around the concept of Arab Caliphate, as formulated by Abdelrahman al-Kawakibi (d.1902) in the *Mother of Cities*, or by Rashid Rida (d.1935), in *The Caliphate*. We note, however, that the Arab argument was during all times combined with an Islamic affirmation. This trend was reflected into the doctrine of the Ba'ath, the Arab nationalist party par excellence. In his *Manifesto* of 1943, Michel 'Aflaq (d.1989) speaks of the 'Arab Spirit'(ruh 'arabiyya), 'the irreducible essence' in which Islam is a fundamental component: 'Islam is the vital impulse which revealed to the Arabs the forces residing in them and which made them known in the stage of history'. 'Aflaq attempted to make a synthesis in which Islam is Arab as well as Arab is Muslim, in which Arabism is the body and Islam is the soul. Nasser's discourse, although less doctrinaire, is marked by the same characteristics. Islam is considered the easiest way to permeate the country in depth. However, Islam has also a global purpose. Thus, in an annex to the National Action Charter of 1962, a reference text of Nasserism, a *Charter Report* was published. The first chapter thereof was entitled 'Religion and Society'. It aimed to reconcile those who held a 'sociological perception of Islam' and the 'defenders of a conformist conception'<sup>6</sup>, as well as to conciliate, through ambiguous formula, modernity and the Islamic legacy. The content of this Islamic socialism coincided pretty much with the Muslim Brotherhood's Islamic socialism: 'It believes in God and His prophetic messages, in religious and moral values; it believes in the community ... while respecting human dignity and individual liberty.' This shows, incidentally, that the opposition between the Muslim Brothers and Gamal Abdel Nasser (d.1970) was more for a fight for power than an ideological opposition.

The Algerian socialism was not devoid of any reference to Islam either, or even to early Islamism. The Association of Algerian Muslim Scholars, founded in 1931, had during independence a strong position. Its influence is materialized in the development of the doctrine of Islamic socialism which was different from the Muslim Brotherhood's. The early

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<sup>5</sup> Ibid.

<sup>6</sup> CAMAU, Michel, personal communication.

1970s was marked by the strengthening of Islamic tone in public discourse, with the launch of the *Authenticity* magazine (*al-Asala*). The magazine reflected the ambivalence of Algerian Islamism, both in and outside the state. The magazine actually symbolized both the instrumentalization of Islam by the leading team, and the performance of the fundamentalist purpose by part of the elite. It was in the process of Arabization and the adoption of the Personal Status Code that such tone was fully expressed.<sup>7</sup>

It is therefore incorrect to claim that the Islamic referent disappeared from the scene in the first three quarters of the 20<sup>th</sup> century. Nevertheless, it was subject to the overriding goal of building a nation-state. If one examines the constitutional translations in the Arab context, one observes the inclusion of the objective of ‘creating a unified Arab state’ (Article 1 of the Iraqi Constitution of 1970), but also the primacy of ‘defending the socialist gains, their consolidation and preservation’ (Article 59 of the Egyptian Constitution of 1971).

In addition to that, and within the Arab context, the failure of nationalism, the 1967 defeat, the lack of freedom and the impossible success of authoritarian policies of modernization were all factors that facilitated the emergence of a political Islamic vision. If the first phase of the 20<sup>th</sup> century was marked by a translation of the Caliphate utopia to the Arab nation utopia, the second phase was more however characterized, within the Islamist movement, by a return to the original utopia. This return was made possible by the failure of the nationalist culture to play a competitor role over that of religion, and therefore a role in enabling the development of ideologies as a counterweight to religion.

At the same time, the return of such religious referent to the forefront was largely sponsored by the ruling regimes that had little difficulty in exploiting the ideological points of convergence such as the Unitarian utopia. Some Islamist movements have not hesitated to use the term ‘*ba‘th islami*’ (Islamic resurrection), while nationalists appropriated the term of ‘*Umma*’ (community), characterized as Arab for the occasion, in parallel to the *Umma islamiyya*, the Islamic Community, to which all religious literature refers. The concept of social justice is one of those convergence points, as it is attested in Sayyid Qutb’s (d.1966) writings, the rhetoric of the deprived people (*mustad‘ifun*) in the Iranian revolution or the socialist discourse of most Arab states in the 1960s.

The multiple conjunctions of nationalism and Islamism allow us to realize how much the nationalist enterprise never intended to stand out from the Muslim anchorage of societies, but

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<sup>7</sup>J- C Vatin, ‘Chronique Algérie’, (1976) vol. XV *Annuaire de l’Afrique du Nord*, 305-341.

rather to find Islamic roots endorsing the advanced project, while taking the power away from the first proponents of this return to sources.

The stumbling block is therefore not ideological, at least not in principle. The issue is more political. The denunciation of the illegitimacy of the existing powers, the indictment of authoritarian practices, the fight against nepotism and corruption, are all the constants of Islamism. The challenge was even greater for in-power regimes that secular forms of opposition had failed or were recuperated by the regimes. Their reactions varied between concessions and violence, intimidation and State Islamism. The last technique was to ensure the system stability that coercion failed to provide and to give it a legitimacy making therefore Islamist demands inoperative.

In fact, it is the dual status of ideological convergence of nationalism and Islamism, and the instrumental recovery of the Islamist rhetoric by in-power regimes that explains the inversely proportional size of the victory of Islamist groups in the rise of the so-called 'Arab Spring', and the return to the use of Islam and Sharia repertoires. The resurgence of old partisan oppositions firmly grounded in political Islam was not surprising, if one wants to remember that the only organized opposition groups regarding authoritarian regimes had left the shores of marxism and socialism and resorted to those of religious authenticity. But at the same time, on the ground of Islam, little features distinguished the regimes from their oppositions. In Egypt, the heads of the National Democratic Party competed under the dome of the Parliament to show their piety.<sup>8</sup> In Algeria, several parties claiming Islamism involved for years in government, which is also engaged in the construction of the largest mosque in the world. Sudan, on its part, has adopted a criminal Code labelled 'Islamic'. And one can hardly be more dogmatic than the Saudi monarchy. In a nutshell, the Islamic relevance had long been imposed in the public space to the point of becoming unavoidable; to the extent that it was no longer possible not to pay it tribute; and to the extent that it was not necessary to enter in an inflationary process regarding Islamic reference, since the most important thing had already been acquired as to the matter. In this regard, we can say that ideological Islam is dissolved in political Islam, that is to say, in the game of power and politics.

## **II. An essential reference, a diversified content**

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<sup>8</sup> B Dupret and J- N Ferrié, *Délibérer sous la coupole. L'activité parlementaire dans les régimes autoritaires* (Presses de l'IFPO, Beyrouth 2014).

The reference to the Sharia can be achieved in different ways, only some of which are political. In this latter case it means that one can resort to the Sharia in an institutional setting, in an electoral process or in opposition demonstrations against the ruling power. These political uses rely upon a religious dimension which gives credibility to the action committed in the name of religion. This does not mean that religion and politics are combined; on the contrary, each one of them responds to multiple logics, which are sometimes convergent. This does not mean either that the political use of religion is purely cynical, nor does it preclude any calculation of costs and benefits.

Hence, when a politician wants to pass, in the name of religion and his conviction, a law prohibiting the sale of alcohol, it is not only the effect of his will to apply the divine order; in fact, he also formulates a political position that is beneficial to him, since it corresponds, in his way of assessing the situation, to something that is expected by the public opinion. He may predict popularity gain or even electoral gain. At the same time, this calculation is only possible if the reference system on which he bases his proposal is credible, that is to say, in an Islamic context, if the religious language is widely present, disseminated and accepted. In this respect, there is no reason to exclude that he himself accepts this language game. We see that the religious reference belongs, in this case, to something other than politics and therefore cannot be reduced to that only.

However, it also directly affects politics. In other words, the fact that he acts according to political calculation does not contradict his conviction of the rightness of his claim: we can desire power, struggle for a standard and try to attain the first using the second<sup>9</sup>. From this point of view, the political uses of the divine Law does not draw a Muslim conception of politics, but a natural way of making policy using an Islamic frame of reference. This reference frame functions ordinarily, since it refers a position to principles commonly agreed upon and therefore taken for granted. As self evidence does not require to be demonstrated, this promotes argumentative economy and obliges the others to show a discursive alignment: in fact, it is not easy to publicly challenge what is recognized by many others. This does not mean that the content given to this common reference repertoire is shared by all, by far. All that people place behind a referent such as Sharia can be contrasted and the consequences they derive from the invocation of the commonly accepted reference may be different and even contradictory.

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<sup>9</sup> J- N Ferrié, 'Usages politiques de la Charia' in B Dupret (ed.), *La Charia aujourd'hui*, (La Découverte, Paris 2012) ; see also: B Dupret and J- N Ferrié, 'Participer au pouvoir, c'est imposer la norme : sur l'affaire Abu Zayd (Égypte, 1992-1996)' (1997) vol. 47 no. 6 RFSP, 762-775.

One specific characteristic of the political use of Sharia lies in the prevailing consensus on the need to use it as a reference. At the same time, variations may be very important regarding its content. As it is almost impossible to withdraw from the necessity to refer to Sharia, the political actors anticipate positions that others might have adopted, pre-empt their argument or prejudice their ends and intents. Political strategies are outlined that aim at forcing opponents to align to the prescribed register and thus reduce their room for manoeuvre.

Yet, these strategies have a cost : involving in the religious repertoire, one finds oneself in an argumentative framework that makes some debates more difficult than others, among other things in the field of manners and freedoms. I think of issues related to equality of men and women, freedom of conscience or liberalization of sex. Moreover, it is noted that it is the particular circumstances that give the Sharia register a specific content. The latter is not substantiated until it is invoked in specific situations. Thus, it is not possible to know in advance with certainty what will be the arguments and, most importantly, what will be said regarding diverse subjects such as loan interest, divorce by compensation, biomedical ethics, restoration of virginity, homosexuality, alcohol sales, tourism, wearing the veil, apostasy or blasphemy.

It is not that the content is opportunistically invented by cynical politicians, but there is an extremely wide range of possible solutions as to Islamic standard reference. It is thus a balance of political forces, backed by a moral vision of the world, which leads to one configuration rather than another. In other words, what varies is not the content of Sharia, but the state of public opinion towards this content. ‘From this point of view, relying on divine Law in the course of a political action is first relying on a state of public opinion- at least as it is interpreted. This attitude is of course highly political. This is what politicians generally do. By the way, nothing is more natural, since it is the opinion course and variations that, at least, partially determine their future (if not more bluntly their career)’<sup>10</sup>. This political game is primarily that of conformism, out of which it is difficult for a political actor to stand without paying a heavy price.

This conformism in today Muslim majority societies goes through a conservative reference to Islam and its normativity, the Sharia. Certainly, everyone can make it appropriate for his own ends, but that still requires the acceptance of the obligatory track: doing politics in a Muslim context means recognizing the primacy of the Islamic referent, be it purely symbolic.

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<sup>10</sup> J- N Ferrié (n. 9).



### **III. Reference to Islam and the devolution of power in religious matters**

The term 'Islamic law' has become unfit to designate both the law of a Muslim majority country and a range of mechanisms that do not belong to the continuity of doctrine (*fiqh*) but rather to techniques specific to contemporary law-drafting and constitutionalism. A particular phenomenon is actually observable, among others in the constitutions of the states with Muslim majority. It is that of referencing to Islam, to Sharia, or to *fiqh*. It is no longer here the issue of codifying Islamic normativity, but most importantly, to refer contemporary legislators to this divine Law in order to inspire their works. Thus, there will be provisions making Islam the religion of the State, providing that the Head of the State is a Muslim or making the Islamic normativity the inspiration source of positive law.

With the transition movement initiated by the overthrow of the Tunisian regime in January 2011 and the beginning of the drafting of new constitutional texts, this issue has taken a new urgency, especially as there are Islamic-conservative political forces that have emerged as winners of the elections. The concern with political consensus yet often seems to have prevailed over the desire of religious hegemony, and ideological pragmatism to have prevailed over the utopian ideal. One of the reasons helping to explain the ease with which this pragmatic trend has emerged is doubtlessly due to the plasticity of the reference that the Sharia constitutes and its ability to function as a flexible resource rather than as a set of binding rules.

Many are the state constitutions in predominantly Muslim population that refer to Islam. This is illustrated, generally, at four levels: the preamble, the determination of a state religion, the principle of conformity of the legislation to the principles of the religion, and the conditions to be met by the head of the state. The inclusion of Islam as the state religion is an ancient practice that dates back to the 1950s<sup>11</sup>. Some constitutions reserve high positions to Muslims and devolution to the throne in monarchies is through Muslim geniture. Many constitutions also limit the scope of certain rights and freedoms in respect of Sharia, as they affirm the centrality of the family formed around the religion and the Islamic values. Numerous basic texts consecrated the normative value of Sharia, principles of sharia or Islamic *fiqh*, but they differ on the place given to it. Two specific constitutional experiences will allow us to explore the contrasting nature of reference to Islam.

#### **A. Egypt**

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<sup>11</sup> Although countries such as Indonesia do not do so; and others, such as Turkey, emphasize the secular character of the state.

In Egypt, the Constitution of September 11<sup>th</sup>, 1971 marks a break, in the sense that it introduces, for the first time, a reference to the normativity of Islam in the institutional system by providing, in Article 2 that ‘the principles of Islamic Sharia are a main source of legislation.’ On May 22<sup>d</sup>, 1980 Article 2 has been amended and has stated since that time that ‘the principles of Islamic Sharia are the main source of legislation.’ For the special commission in charge of preparing the constitutional reform, the new formulation aimed to ‘compel the legislator to make use of the commands of the Shariah, to the exclusion of any other source, to discover what it looks for. If it finds no explicit command, it may, by deduction from the sources of interpretation (*ijtihad*) of Sharia find out the rules to be followed and that do not violate Sharia’s fundamentals and general principles.’

On the basis of this article, many constitutional complaints have been brought before the Supreme Constitutional Court (SCC), the case-law of which is of particular interest. Initially, the Court had tendency, when it was asked to review the constitutional character of laws and decrees, to avoid engaging in the field of interpretation of Sharia. Thus in 1985 the SCC canceled the decree Jihan (which borrowed the name of the late President Anwar Sadat’s wife, who inspired it), reforming the personal status<sup>12</sup>, not for its alleged contravention to Article 2 as recently amended, but for the purely technical reason that there was no need to use the exceptional powers granted by the Constitution to the President of the Republic in order to change a text dating back to 1929 and not modified since then. In another decision taken on the same day, the SCC formulated a principle that constitutes a precedent. In the origin of the lawsuit, there was condemnation of the Ministry of Waqfs (endowments) and the Faculty of Medicine at the University of al-Azhar to pay a large debt that had been added default interest as provided by the Civil Code. This article was the subject of a case of unconstitutionality and the SCC then established the principle of the non-retroactivity of Article 2: ‘The obligation of the legislature to adopt the principles of the Sharia as the main source of legislation... extends only to legal texts promulgated after the date of its entry into force... Concerning texts that preceded that date, they cannot for that reason alone be subject to this obligation, and are thereby out of the control of constitutionality. ‘The SCC added that the application of Sharia as if it were codified rules would risk conflict and destabilization of the legal order.

However, over time, the possibilities to sue on unconstitutionality of texts subsequent to this reform have increased. Thus, in a judgment of 15 May 1993, the Court was required to take

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<sup>12</sup> This law – among other things – granted the first wife whose husband remarries an almost automatic right to divorce.

stance in the field of Sharia and its interpretation. It explained what is meant by Sharia and what, in this context, can be a work of interpretation. It was the case of a divorced woman who had filed a petition for custody of her son and the right to stay with him in the former marital home, according to law No. 100 of 1985. She also claimed the right to receive compensation in an amount equivalent to ten years of alimony. On the basis of the non-compliance of these provisions to the Sharia, the ex-husband had gone to the SCC. In its decision, the Court drew a distinction between Islamic absolute and relative principles. For it, only the principles 'whose origin and meaning are absolute', that is to say, the principles that represent unquestionable Islamic norms, whatever their source is (Qur'an, Sunna, consensus, analogy) or their significance, must be applied without margin for interpretation. However, there is also, for the SCC, a set of rules considered as relative, which are subject to interpretation, are evolving in time and space, are likely to be different in interpretation and can adapt to the changing needs of the society.

As noted Nathalie Bernard-Maugiron: 'The Supreme Constitutional Court gave great freedom to the authorities of the State to adapt the rules relating to Sharia to the evolution of the society'. Indeed, it is the legislator's responsibility to proceed to the interpretation of Sharia principles by referring to one or the other doctrinal school, without being bound by previous opinions of jurists. The only conditions which apply to it are to make rules consistent with the current social conditions, based on the general principles of Islamic law and without violating an absolute principle... If it recognized the legal value of the principles of the Islamic Sharia and the need for the legislature to meet those 'whose origin and meaning are absolute', it is paradoxically to better limit its effects. The Court declared to be bound by the norms derived from the Islamic sharia, but reserved itself the right to determine the content.'<sup>13</sup>

A new constitution was promulgated in Egypt on December 26, 2012, following the 2011 revolution and the Muslim Brotherhood's electoral successes. It fully duplicates Article 2, while adding a new provision, Article 219, which states that 'the principles of Islamic Sharia include its general evidence and its fundamental and doctrinal rules, as well as its sources considered by schools of the People of tradition and consensus (*ahl al-sunna wa'l-jama'a*).'<sup>13</sup> The convoluted wording of this article and its insertion at the end of the constitutional text show the precipitate adoption of the Egyptian constitution, but they also reflect the desire to limit the power of the SCC, by defining, instead of the Court itself, the terms 'sharia principles' formulated in Article 2. These principles are expressed in an all-embracing

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<sup>13</sup> N Bernard - Maugiron, 'La place de la charia dans la hiérarchie des normes', in B Dupret (ed.) (n. 9).

manner: the term ‘general evidence’ (*adilla kulliyya*) refers to everything that comes from the Revelation; that of ‘fundamental rules’ (*qawa‘id usuliyya*) refers to the science of the foundations of doctrine (*‘ilm usul al-fiqh*), that of ‘doctrinal rules’ (*qawa‘id fihiyyah*) refers to Islamic doctrine, *fiqh*; that of the ‘sources taken into consideration by schools’ refers to everything on which the Sunni schools of thought are based. In other words, the principles of Sharia correspond to all sources of Islamic normativity. Nothing is said, however, as to the constrain these principles have on the Egyptian legislator and hence on the SCC when it is required to check the compliance to them. More than ever, the Sharia imposes itself as a reference register, not as a substantial and compelling content.

With the military coup of July 2013, the 2012 Constitution was suspended. The new regime, which ousted the Muslim Brotherhood, appointed a commission of experts in charge of presenting propositions of amendment. A new constitutional text was drafted, which again duplicates Article 2 as amended in 1980, but discards the controversial Article 219. The new constitution was approved by referendum in January 2014.

## **B. Tunisia**

Contrary to Egypt, there is no provision in Tunisia making of the Sharia a formal source of legislation. In the 1959 Constitution, Article 1 provided: ‘Tunisia is a free, independent and sovereign state; its religion is Islam, its language is Arabic and its regime is the Republic’. This formulation was adopted under the initiative of Tunisia’s first President, Habib Bourguiba, in order to overcome the differences which had appeared within the first constituent assembly, although it was monopolized by the members of the National Front (i.e. the Neo-Destour party and its allies). Together with the constitution’s preamble, which invokes Islam, it created interstices in which some representatives of the conservative forces (often supporters of Salah Ben Youssef) within the judiciary.<sup>14</sup>

Some judges used this opportunity to give Sharia the status of a subsidiary source in case the law is silent or obscure, especially in the field of personal status. In the rulings which make reference to it, it becomes ‘the source’ of personal status, although it is only one of its many sources in principle. In other domains of civil law, some judges also used Sharia by invoking its being one of the material sources of the Code of obligations and contracts. Tunisian jurisprudence questioned for long the judges’ rights to elevate Sharia to the status of a subsidiary source. For those who were in favor of it, the issue was to know which was the

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<sup>14</sup> Y Ben Achour, ‘Statut de la femme et État de droit au Maghreb’ in Y Ben Achour, J-R Henry, R Mehdi (eds.), *Le débat juridique au Maghreb. De l’étatisme à l’État de droit. Études en l’honneur de Ahmed Mahiou* (Iremam, Paris 2009).

right interpretation of Sharia, while for those who were against it, the question was to imagine a means to expel it from the positive legal order.<sup>15</sup>

Of course these tensions came back to the surface after the ousting of President Ben Ali and his clique in 2011. The place of Islam and Sharia was the object of tense debates. One of the many paradoxes was the polarization of the political scene around the opposition Islamists v. Liberals, while there was little reference in the official texts to Islam and Sharia. Under the pressure of its opponents and because of its political pragmatism, the Islamist party Ennahda, which led the government since the 2011 elections, renounced making any mention of Sharia in the Constitution. It does not mean, however, that Ennahda renounced its project of the Islamic moralization of the society, but as in the Erdoğan's Turkey, it prefers to substitute to symbolic moves a more gradualist approach using the *de facto* acceptance of Sharia as a source of legislation and case-law. As Rashid al-Ghannouchi put it in press conference on the 26<sup>th</sup> of March, 2012: 'nearly 90% of our legislation finds its origins or sources in Sharia'. All this shows the importance of Islam as a resource and constraint in the inchoative structuring of the political field.<sup>16</sup>

After many turbulences a new constitution was adopted in January 2014. It states in its Article 1 that Islam is the religion of the state. Article 6 provides: 'The state is the guardian of religion, the protector of the freedom of belief, conscience and religious practice, the guarantor of the neutrality of mosques and of cult places against partisan uses. The state is committed to the spreading of the principles of equity and of tolerance, to the protection of the sacred, and to the forbidding of any blow against it. It is also committed to the forbidding of apostasy accusations and of the inducement to hatred and violence'. Thus, Sharia is not given the role of a legislative referent, but this does not mean that Islam cannot be legally mobilized, since it is the religion of a state which is required to protect the sacred. It is the political climate that will determine the interpretation given to provisions which are not consensual.

### **C. Morocco**

The case of Morocco also is interesting, regarding the reference to Islam and the devolution of religious competences. The constitutional history of the country is rich. After the authoritarian constitution of 1970, there was the 1972 constitution, which reintroduced the parties in politics after the king was convinced, following two attempted coups, that he could

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<sup>15</sup> M Ben Jemia, 'Le juge tunisien et la légitimation de l'ordre juridique positif par la charia' in B Dupret (ed.) (n. 9).

<sup>16</sup> Camau, Michel, personal communication.

not rely only on the security apparatus. A major reform was made in 1996, which prepared the consensual 1998 alternation and laid the bases of succession. The constitution of 2011 is in line with the reformist trend, accelerated by the Moroccan version of the Arab Spring, which the power has seized as an opportunity to engage in a consensual political remodeling. The Constitution has three essential features: delineation of a wide scope of action of the head of government who has the necessary means to carry out its task and, above all, to control the parliamentary majority supporting it; the affirmation of the arbitration and influence powers of the sovereign; the establishment of independent bodies responsible for the protection and development of rights. This separation is aimed less at separating the Executive, the Legislative and the Judiciary than to define the spheres of influence of three functional blocks.

If it comes to provisions relating to religion, we note the distinction between Islamic frame of reference and devolution of powers in religious matters. The reference to Islam in the Moroccan case is both prolific and non-implicative. Article 3 states that it is ‘the religion of the state,’ while recognizing ‘the free exercise of religion.’ Although freedom of conscience is not recognized in the Constitution – despite its inclusion in an earlier draft – Article 25 states that ‘are guaranteed freedoms of thought, opinion and expression in all its forms’.

Unlike the technique of limiting the scope of the provision by reference to the law – which draws its limits or affects its application – this text establishes an inviolable principle. Thus, we see that the predominance of Islam is not coupled with a reference to Islamic normativity (Sharia or *fiqh*). Islam, the religion of the state, is primarily a national frame of reference. The text reads, in fact, that in its ‘moderate version’, the ‘Islamic religion’ is one of the unifying elements of the state, with national unity, territorial integrity and the one and indivisible identity of the nation (Article 1). The articles of the Constitution that refer to Islam almost always emphasize the principles of tolerance and openness, and freedom of worship. What is characteristic of the Moroccan constitutional system is, unlike situations where the religious legitimacy of the head of state is lacking, the superfluous nature of the identification of the Islamic normativity as a legal reference. The constitution of 2011 is no exception to this constant<sup>17</sup>.

The new constitution differs from previous texts in the dissociation that occurs between the functions of the king ‘Head of State, the supreme representative, symbol of the unity of the

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<sup>17</sup> Note also Article 175 of the Constitution: ‘No review can be on the provisions relating to the Muslim religion, the monarchical form of the state, the democratic choice of the nation or the achievements in matters of freedoms and fundamental rights stated in this Constitution.’

nation, guarantor of the perpetuation and the continuity of the State and Supreme Referee between its institutions' (Art. 42); and the king 'Commander of the Faithful' (*amir al-mu'minin*). In Article 41, it states, in effect:

'The King, Commander of the Faithful, ensures respect for Islam. He guarantees the free exercise of religion. He chairs the Higher Council of Ulema, responsible for the study of questions submitted to it. The Council is the only body empowered to give religious consultations (*fatwa*) officially approved on matters referred to it and that, based on the principles and precepts of Islam tolerant designs. The powers, composition and procedures of the Council are set by Dahir. The king exercises by Dahirs religious prerogatives inherent to the institution of the commander of the believers conferred exclusively by this article.'

In other words, the Constitution distinguishes the two 'bodies' of the king and seeks to reduce the possibility of confusing the powers of the one with the other. In the course of a development that, as Hassan Rachik underlines, marks the secularization of Sultanic function that began with the establishment of the Protectorate and was pursued by the nationalist movement, this allows us to imagine the long term, a deepening demarcation of the two functions, where the executive role of the head of the state always become even more a role of arbitration, while his role as the supreme religious authority would be exercised in a strong and extensive way.<sup>18</sup>

For now, however, it is in an exclusive manner that the king exercises the powers of commandery (*imara*) of believers. The differentiated devolution of royal powers is accompanied by a maximum definition of his powers in the field of religious regulation. The question, then, is to know what exactly the commandery of the believers is. It is not the subject of a list either illustrative or exhaustive, listing the powers that are related to it. We can talk in this regard, of a subsidiarity principle: everything that is not explicitly outside the religion is likely to be attached to it by the will of the commander of the faithful. Recent history has provided an example of this type of connection, when the king committed himself to the reform of the family Code (*mudawwanat al usra*). The regulation of this legal domain does not strictly belong to the realm of religion, but it is under the umbrella of commander of the believers that Mohamed VI took stance. One can imagine a number of areas where the

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<sup>18</sup> H Rachik, conference, Fondation Bouabid, 19 January 2012 : <http://bit.ly/1bib0yL>.

same mechanism would be activated, and neither the legislative nor the executive, nor the Constitutional Court can much oppose it: freedom of conscience, abortion, death penalty, heritage, public organization of fasting in Ramadan, legality of extramarital sexual relations, Islamic finance, etc.

The Moroccan system is unique in that it is able to narrow the normative field of Sharia. As noted by Mohamed Mouaquit, it operates in a way inversely proportional to the centrality of the commandery of the believers. Where, as in Morocco, the symbolism of the commandery is constitutionally strong the normativity of sharia is less relevant politically, ‘as if the strength of the former had a compensatory effect on the weakness of the latter.’

Morocco is a case of over-determination of the monarchical order rather than Sharia. The power of the king enhances or undermines the normativity of it as he wants to take advantage of or, conversely, contains it. When it comes to nationalize the legal order through the islamizing of its sources or to defeat the leftist political forces, the trend is that of an opportunistic exploitation of this resource. On the contrary, when it comes to stem the Islamist surge, the trend is to establish limits on the normativity of Sharia through the use of the Islamic commandery<sup>19</sup>.

#### **IV. Conclusion: Sharia as an ideology**

We know that religions change, however unsettling these thoughts for those who are attached to permanence. This applies to Islam, which is not a ‘nomocracy’ that would be irreducibly frozen in its past. How religious and political spheres are articulated affects very directly the form of discourses legitimizing authority. They oscillate between ideology and utopia. While it is difficult to identify a political, constitutional or moral truth from the sources of Islamic normativity, it is equally clear that people, when they refer to a foundational past and interpret it, participate in the recreation of their tradition. In doing so, they feed on utopias. When these utopias are anchored again in the political and social reality, and take a concrete form in it, they become ideologies. It is not absurd to think that Sharia is today confirmed in this function, especially in the context of accession to power of Islamic-conservative forces. By ideology, this author, following Paul Ricoeur, refers to this set of shared representations, in a given society, transformed into action. These representations are both moral and normative. When they are projected into the political arena, these value-ideas often acquire

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<sup>19</sup> M Mouaquit, ‘Marginalité de la charia et centralité de la Commanderie des croyants : le cas paradoxal du Maroc’ in B Dupret (ed.) (n. 9).



an unquestionable status. This is what Jean-Noel Ferrie calls an effect of negative solidarity<sup>20</sup>. In their development, political ideas ground themselves on what makes sense in a given context, in a movement of retrieval that allows them to add the weight of normativity while remaining free enough to give it a new content. From this process of ideological sedimentation emerge new rationalizations. Political discourse claims then to express – when in fact it creates – what everyone is supposed to know, thereby producing metaphors and a sense of belonging, continuity and consistency. Whatever the degree of innovation, the ideological discourse constantly reaffirms its roots in pre-existing and deep moral ties, which can project a very personal version of reality in the world of public consensus and, at the same time , to naturalize its authority.

Islamic normativity is in the process of being integrated in the political and constitutional, but also moral and social domains. Sharia, as it combines an understanding of the world and a set of values, and as long as it is represented as such, tends to be particularly usable in ideological terms. Sharia has become somehow consubstantial with the public and political life, in the context of predominantly Muslim societies. Most protagonists of politics tend to throw the representation they make and the use they claim to have of it in the public arena, which is not expected to see but the expression of evidence. Views on its contents remain very diverse, but it has become difficult in the contemporary Muslim world, to position outside the space it defines. It is certainly only a framework, but it is the framework of a sieve through which all discourse seems to have to go.

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<sup>20</sup> J- N Ferrié, *Le Régime de la civilité. Public et réislamisation en Égypte* (CNRS-Editions, Paris 2004).