# The Enactment of Constituent Power
# in the Arab World

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### Summary

*Most modern states have adopted written and rigid constitutions. The existence of a constitution presupposes a constituent power, distinguished from other constituted powers, created by the constitution itself. A constituent power presupposes the ability of a society to develop its capacity to act as a collective, in order to gain (or regain) an active role in the organization of the lives of individuals and their social relationships with one another.*

*For Pan-Arabism defenders, the (Arab) nation exists as a cohesive group with its own unique characteristics, deriving from a common language, history and traditions. The ethnic concept of nation initially helped to justify an Arab revolution against other Muslims, but it was unable to distinguish individual Arab peoples or justify territorial Arab states. It was unavoidable then to switch to narrower concept of nation that covers citizens within defined state borders and living under the same laws. Despite the reference to the principle of popular sovereignty in most Arab Constitutions and the increasing attachment to territorially-defined states, there exists wide popular discontent with Arab regimes that continue to legitimize their authority based on Arab or Islamic nationalist discourses.*

*Constitutions may fill the gap of legitimacy crisis in contemporary Arab States. They are a necessary tool for the nation to express its will but also for the individuals and communities within the state to protect themselves from the nation itself and from its expression, the state. Accordingly, there shall be red lines where the people, or their representatives, shall not transgress. Those red lines may be enumerated in a text, with particular legal inviolability that will be difficult (almost impossible) to amend without joining a general consensus, that is not the equivalent to unanimity (difficult to obtain) nor majority (easy to realize).*

## Introduction

Constituent power is the authority to frame or amend a constitution. A constitution is a legal text which supersedes all others. What distinguishes framing power from amending power is that the latter changes the constitution in ways provided therein, while the former amends it outside constitutional framework. Most modern states have adopted rigid, written constitutions. The existence of a constitution presupposes the existence of a *constituent* power, as distinguished from other *constituted* powers, created by the constitution itself. Since a constitution is the highest law in the state, constituent power must be vested in those entitled to sovereignty. To come full circle, most constitutions provide that those entitled to sovereignty are the people, and consequently, the people are entitled to constituent power.

Constituent power presupposes the ability of a society to develop its capacity to act as a collective, in order to gain (or regain) an active role in the organization of the lives of individuals and their social relationships with one another.[1] Here, several approaches are possible, depending on the concept of nation. For Arab nationalists, the (Arab) nation exists as a cohesive group with its own unique characteristics, deriving from a common language, history and traditions. Various attempts at pan-Arab unity all ended in failure, and thus Arab nationalism began to exist only within, as opposed to across, Arab territorial states. The ethnic concept of nation initially helped to justify an Arab revolution against other Muslims, but it was unable to distinguish individual Arab peoples or justify territorial Arab states. What makes a Jordanian different from a Palestinian or a Lebanese from a Syrian? To distinguish between them, it was inevitable to switch to narrower concept of nation that covers citizens within defined state borders and living under the same laws.

Most modern states have written constitutions in which they declare that sovereignty belongs to the people. The Arab world also witnessed significant constitutional developments and there continues to be a constitutional movement in the Arab world. Nevertheless, one should not be

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1 *See* Ulrich K. Preuss, *Constitutional Powermaking of the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution, in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY THEORETICAL PERSPECTIVES 148 (Michel Rosenfeld ed., Duke University Press 1994).

deceived into thinking that the legislation contained in the constitution corresponds to constitutional law. There is a need, in fact, to study the constitutional text in light of the enforced and applied legislation in every Arab state.

The relation between the Arab nation and a particular Arab people may not be clearly understood by using traditional meanings of those concepts. In fact, these two concepts have to be understood in the light of the wider one of *umma*, originally used to indicate the Islamic community, or the community of believers. There is no Islamic or Arab state that embodies all Islamic or Arab *umma*; those populations need to deal with territorially defined states. In contemporary Arab states, there is a partial return to *shari'a* and an increasing reference to Islam as a justification for the state's authority or its rejection, made respectively by the state apparatus and by fundamentalist groups. In contemporary Arab states, the relation between Islamic *umma*, Arab nation and the Arab people as a whole is becoming increasingly problematic.[2]

Modern constitutions are at the hierarchical apex of normative texts. They are distinguished from other statutes by being a constitution *of* and *in* a state. A state is born in a particular moment of history, but is always a state of a people, living within a territory. The constitution inevitably reflects the state's geographical and historical dimensions. A constitution inexorably belongs to those entitled to sovereignty since it is the highest expression of self-determination. Accordingly, constituent power is delegated to a people, but its enactment has no existence outside a state. It may be argued that the process of constitution-*making* can begin before the formation of the state, but the adoption of the constitution is always subsequent to the establishment of a state, although it may coincide, in chronological terms.

The problem remains how to define the relationship between constituent power and the people. In democratic countries, the people are sovereign and exercise their constituent power directly or through representatives. In this framework, „the people" represent the totality of all citizens of the state and as different from the concept of „the nation" which includes a multitude of individuals that have a common identity and are engaged in common political actions, not necessarily within the boundaries of a giv-

en state. The relationship between constituent power and the people is not a pre-determined one; it depends in fact, on the meaning given to the concept of nation. This relationship is much more contentious when there is no common agreement over the concept of ‚We the people,' referred to in the constitution.

The problem of who is entitled to constituent power is even more complicated as it is related to an additional two questions: the question of limits and of legitimacy. In fact, many authors determine limits in the light of pre-existing elements such as culture, ethnicity and religion, which can determine the identity of the people. The reflection of the constitution on such identity may determine the legitimacy of such a document; nevertheless, the remaining problem is to understand if, and within which limits, the will of the nation shall be applied by the state and reflected in the constitution. In fact, all (or at least the majority of) those constituting a segment of the people and living in the territory where the constitution is enacted, shall consider it as their own.

Constitutionalism was ‚invented' in the United States of America (U.S.A.) and France and was possible only following philosophical and political revolutions that resulted in replacing the monarch or god as the holder of sovereignty with the nation, which became the source of all legitimate power, derived from the sovereignty of the people. Given this history, is it possible to read the theory of constituent power in ‚Arabic' terms? The principle of popular sovereignty is included in most existing Arab Constitutions. Nonetheless, there is a contradiction in the Arab world: an increasing popular attachment to territorial states, despite discontent with these Arab regimes; while Arab regimes continue to legitimize their authority, in some instances based on Arab or Islamic nationalist discourses.

### I. Pan-Arabism, Islamism and contemporary Arab States

Despite the fact that Arab rulers often justified their power based on the concepts of Islamic and Arab nations (or nationalisms), modern Arab states are undergoing the most serious and dangerous crises in their histories based on threats from within. In fact, one of the salient questions in the study of contemporary Arab states is to understand how the state's apparatus can feign obedience to the rulers without being rejected for being illegitimate by its citizens? How can Arab states maintain their existence? How can those entitled to constituent power, and those who exercise it, express the *volonté générale?* The later being not only the general will that ignore individuals', neither is the sum of individuals' will that act in egoistic and individualistic way without any consideration to the rules of the ‚living together' that are necessary for the maintenance and the unity of

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2   According to Islamic law, sovereignty belongs to God: no state has the right to exercise authority except in subordination and in accordance with the Law revealed by God and his prophet. The Pakistani, Sayyid Abul A'la Maudoodi (the founder of the *Jamaat-e-Islami* in Pakistan) invented a new concept: *al-hakemmeyya* meaning sovereignty in reference to God, while *seyyada* (also translated as sovereignty) referring to the people's power. This is only an apparent solution, since the main question remains: who has the supreme power? For Maudoodi and his followers, no human being has power to transgress God's will.

any social group, including the political ones, but rather a combination of both of them.

### 1. Arab States vs. Arab Nation

The concept of nationalism has invaded the Arab mentality but it has not been met with a clear definition of what and where the nation is.[3] Different approaches are possible: Pan-Arabism defenders subscribe to a theory of the „Arab nation" whilst Islamists talk about the „Islamic *umma"*; meanwhile, territorial nationalism is developing and territorial affiliation is being consolidated.[4] These positions co-exist in the Arab world but reconciling them is not an easy task. The situation may be explosive in terms of the ability of diverse local communities to cohere within Arab states.[5] Arab states continue to be considered by citizens as their first enemy.

#### a) Origins of Arab States

According to some authors, the concept of state is alien to Arabs, since originally they were a tribal society, not citizens – they were only kinsmen united by blood ties.[6] This idea is largely taken as a given by authors, who believe that concept of the Arab territorial state was a phenomenon created in Europe.[7] Some others go even further, positing that those states (mainly in the Fertile Crescent), which were created with the break up of the Ottoman Empire, are „artificial".[8] Certainly, as far as the boundaries are concerned, external factors predominated in the territorial definition of some Arab states;[9] but this is a common experience in other regions, such as Africa and Latin America. Besides, if the

foreign origin explains the contradictions of Arab territorial states, how can foreign origin also explain its consolidation and ascendancy?[10]

In modern times, the debate over the ‚original sin' – to quote Ghassan Salameh – of Arab state creation has never ceased.[11] According to Burhan Ghalioun, the state became the core of the debate over nationalism.[12] By tracing the origin of various Arab states, Iliya Harik concludes that they are not the creation of colonialism. Nevertheless, the same author recognizes the fact that colonialism did affect the borders of contemporary Arab states.[13] Furthermore, territorial Arab states are also not the embodiment of the oriental or Islamist state. As confirmed by Ghalioun, they are the reaction to or fear of anarchy in the Arab world. Arabs in fact felt the necessity to adapt themselves to the new world order.[14] Those who do not share this view should at least assess the extent to which these internationally recognized countries have taken root in the hearts and minds of their inhabitants.[15] In fact, Arab states are becoming increasingly entrenched and naturalized. Nevertheless, the growing strength of fundamentalist Islam is a continuous reminder of the precarious status of the state system and secularist trends.[16]

#### b) Arab Nationalism

The term *umma*, throughout the Islamic era, has referred to the universal Muslim community. Around the end of the nineteenth century, however, this term began to be used in the political literature of the time, with reference to the universal Arab community, thus acquiring a preponderantly secular meaning.[17] Not only this, Arab nationalists insist that the Arab nation is the only true nation, either in assertive way or in more subtle prose. Some have conceived Pan-Arabism as an outgrowth of Western thought; many others now think that it was engendered by attempts to reform Islam.[18]

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3  *See* Ghassan Salamé, *Introduction, in* THE FOUNDATIONS OF THE ARAB STATE 4 (Ghassan Salamé ed., Croom Helm, 1987).

4  The terms nation, people and state are often confused. The same occurs in Arabic terminology. The concept umma (translated as 'nation') is used when it refers to Islamic and/or Arab nation, while sha'b (translated as people) refers to single Arab peoples and dawla (translated as state) refers to the territorial Arab states (dawla qutryya). The term dawla is relatively modern and refers to a ruler's (or dynasty of rulers) administration in the recent past, similar to the concept of Sultanate in the Ottoman Empire. The concept of ard or arady (territory or territories) refers to all the Arab territories as one unit, or to the territory of single Arab states, while the concept qutur refers only to the territory of a single state. In addition, the adjective of the word ‚nation' (translated as ‚national') is qawmiyya when it refers to the Arab nation, while it is wataniyya (also translated as ‚national') when it is related to territorial Arab nationalism, also meaning patriotism. While the concept of muwatana refers to citizenship; this concept has its origin in watan – homeland, although sometimes it is used to refer to Arab land, alwatan al-arabi!

5  The reference to ‚Arab countries' does not mean that they reflect a general situation. We are conscious that every Arab state reflects a particular history developed over a period of time. In fact, the commonness with other Arab countries in relation to language, culture, history, habits… did not hinder the growth of territorial nationalism; rather it encouraged and favored its development.

6  *See* P.J Vatikiotis, *Islam and the State,* 19 (Croom and Helm, 1987).

7  *See* Bahgat Korany, *Alien and Besieged Yet Here to Stay: the Contradictions of the Arab Territorial State,* in THE FOUNDATIONS OF THE ARAB STATE 48 (Ghassan Salamé ed., Croom Helm, 1987).

8  *See* Burhan Ghalioun, *Le Malaise Arabe. l'Etat contre la Nation* 24 (La Découverte/ENAG, 1991).

9  Salamé, *supra* note 3, at 6.

10  *See* Bahgat Korany, *Alien and Besieged Yet Here to Stay: the Contradictions of the Arab Territorial State,* in THE FOUNDATIONS OF THE ARAB STATE 73 (Ghassan Salamé ed., Croom Helm, 1987).

11  *See* Salamé, *supra* note 3, at 3.

12  *See* Ghalioun, *supra* note 8, at 53.

13  *See* Salamé, *supra* note 3, at 5-6.

14  *See* Ghalioun, *supra* note 8, at 53-66.

15  *See* Salamé, *supra* note 3, at 3.

16  *See* Iliya Harik, *The Origins of the Arab State System, in* THE FOUNDATIONS OF THE ARAB STATE 20 (Ghassan Salamé ed., Croom Helm, 1987).

17  *See id.* at 20-21.

18  *See Encyclopedia of Nationalism* 1, 489 (Academic Press, 2001).

This concept of nation is based on the same unifying cultural characteristics that were generated through common language and religion throughout the ages, which bequeathed a sense of collective identity.[19] These common elements have been enforced by a similar history throughout the centuries. For Michel 'Aflaq, *umma* is the Arab nation, since a nation exists when the population believes that it constitutes one, independently from the increasing or decreasing of numbers; for 'Aflaq *„a nation is an idea, a matter of will"*.[20] Most Arab leaders subscribed to Arab nationalism, a reference to which is made in most constitutional texts.[21]

Nevertheless, pan-Arabism was not capable of defying international and local forces which protected the Westphalia division of territory into internationally sanctioned territorial states. Most Arab states do not tolerate the violation of their sovereignty for the sake of Arab pan-nationalism.[22] Many newly established countries in the region (such as Kuwait and Qatar) retain the word ‚State' in their official name, as if their statehood were too vulnerable not to be systematically reasserted.[23]

Nowadays, Arabism is taking a different course: rather than an appeal to construct one single state, a reference is increasingly made to an Arab Alliance or an Arab union of states – a vision that was institutionalized with the establishment of the Arab League in 1945. Questions remain relating to further integration of Arab states, in a context of increased regionalization all over the world. In fact, the state is losing part of its sovereignty in favor of supra-national and international entities and organizations. Historical and contemporary experiences show that such collaboration between states can be the source of mutual development. In those terms, the unity of Arab states can be envisioned and encouraged,[24] always considering the territorial and cultural particularities and requirements of individual Arab populations.

### 2. *Return to Islam in Contemporary Arab States*

Although Arab nationalism continues to exert an emotional appeal in the region, its power has been sapped by some of the very factors which aided its earlier gains. Today, Islamism seems to enjoy the appeal that once marked Arab nationalism. In fact, one of the most salient features of contemporary Middle Eastern politics is the resurgence of political Islam.[25] Many call this phenomenon ‚Islamic nationalism' while others consider it to be the antithesis or anti-nationalism.[26] Some believe that Islamist thinkers accept the basic principles of a constitutional system on the grounds that such principles not only agree with, but are also derived from Islam; for Said Bensaid, the Islamist attitude towards the European political model is more open and positive than that of the pan-Arabists.[27]

Nevertheless, Islamists do not recognize state borders. As Hasan al-Banna, the spiritual father of the Muslim Brothers puts it: „Islam does not recognize geographical frontiers and does not take into account racial differences. On the contrary, it considers all the Muslims as one *umma* and regards all Muslim countries as one *watan*, regardless of the distance and boundaries which separate them."[28] At the same time, al-Banna shows an interest in the principles that direct a constitutional government since they correspond with Islam.[29] According to 'Ali Oumlil: „Al-Banna adopts the notions of *watan*, *umma*, and constitution, but tries to translate them islamically." This is why „there is no inconsistency in al-Banna's view which considers that one individual can at the same time be a citizen of a *watan* like Egypt, for instance, and a member of Islamic *umma*."[30]

In fact, the proponents of an Islamic *umma* overshadowing all these territorially, linguistically or ethnically defined *'asabiyyas* (group feelings), to use Ibn Khaldûn's concept, tend to view these loyalties as pre-Mohammed (*Jahiliyya*) and thus anti-Islamic concepts, which should have disappeared when the Islamic *Da'wa* (Call) emerged.[31] Moreover, Islam distinguishes between the land of Muslims and that of non-Muslims, the first being termed *Dar-es-Salam* (abode of peace), whereas non-Muslim political entities represented *Dar-al-Harb* (abode of war).[32] According to the Ibn Manzur's Lexicon (*Lisan al-Arab*), the land of Islam is the Muslim community which necessarily constitutes one *umma*, „which includes every country in which Islam is freely accepted as a religion and where Islamic laws reign over Muslim as well as over non-Muslim citizens who enjoy protection by paying Jizya."[33]

19  *See* Harik, *supra* note 16, at 20.
20  A common belonging to the Arab nation continues to feed public debates and official discourses. *See* Said Bensaid, *Al-Watan and Al-Umma in Contemporary Arab Use, in* THE FOUNDATIONS OF THE ARAB STATE 166-167 (Ghassan Salamé ed., Croom Helm, 1987).
21  *See Encyclopedia, supra* note 18, at 385.
22  *See id.* at 488.
23  *See* Salamé, *supra* note 3, at 2.
24  *See* Korany, *supra* note 10, at 55.
25  *See* Eichelman, *Changing Perceptions of State Authority: Morocco, Egypt and Oman, in* THE FOUNDATIONS OF THE ARAB STATE 200 (Ghassan Salamé ed., Croom Helm, 1987).
26  Other authors have dissimilar opinions, and consider Arab nationalism as an ideology, more so than Islam, which denies legitimacy to the state system. *See* Harik, *supra* note 16, at 20.
27  *See* Bensaid, *supra* note 20, at 169-170.
28  *Id.* at 171.
29  *See id.* at 170.
30  *Id.* at 171.
31  *See* Salamé, *supra* note 3, at 5.
32  *See* Korany, *supra* note 10, at 57.
33  Bensaid, *supra* note 20, at 151-152.

*a)   Religion and State in Early Islam*

There are different narratives regarding the first Muslim community and the way power was transferred to the *Khalifat Rasul Allah* (normally translated as Vicar of the Prophet of God). The appellation was not neutral.[34] Although the Prophet left behind him a complete religion and state,[35] the real problem remained after His passing: that of maintaining the relation between religion and state which, during his lifetime, he had done through his authority based on the Word of God and on his concrete command of the Muslim community.[36]

Things were different for his successor who was compelled to impose his authority upon the clans who were contemplating dissociation from the state, as they considered the liaison with the Prophet as personal and consequently, dissolvable after his death. For this reason, one of the main challenges of the Caliph was to crack down on apostasy, which was not necessarily related to the rejection of the Islamic message but rather to the paying of *sadaka* or *zakat*,[37] which, although of a religious nature, was the most visible aspect of their subjugation. The Prophet's successor, Abu Bakr (632-634), believed that things should remain as they were left by the Prophet, and accordingly, state and religion were one and the same.[38]

The rapid 'election' (*mubaya'a*, acts of alliance) of Abu Bakr can be explained by various factors, such as the role played by the new religion which unified different clans that were previously at constant war. In other words, it not only depended on the way Abu Bakr was able to impose himself on the various clans but also on the support of 'Umar Ibn al-Khattab. 'Umar Ibn al-Khattab's compelling personality made him one of the most influential consultants to the Prophet, who promoted him to a top-rank *mu-*

*hajirun*. The *ansar* and *muhajirun* gave allegiance (*bay'a*) to Abu Bakr and the Caliphate was founded.[39]

Still, the conditions under which Abu Bakr was 'elected' were also the origins of a number of divisions, which the first community surpassed, not without difficulties.[40] Although the circumstances were in Abu Bakr's favor, they were not so for his successors. In fact, the other three 'Right-going' Caliphs (*al-khulafa' al-rashedun*) ('Umar Ibn al-Khattab, 634-644; Uthman Ibn Affan, 644-656; and 'Ali Ibn Abi Taleb, 656-661) were all killed, resulting in a civil war which lasted for many years.[41]

With the death of 'Ali Ibn Abi Taleb, his son, al-Hassan, accepted the passing of power to Mu'aweyya Ibn Abi Sufian thus ending a long civil war which had started when Uthman was killed and replaced by 'Ali, signaling, the first division in the Islamic *umma*. Those who considered the first four Caliphs as legitimate, are called the Sunnis; they were (and are) the majority of Muslims, who accepted the *fait accompli* and the defeat of 'Ali by Mu'aweyya. *Sunnism*, in fact, opposes *shi'ism* and *kharajism* in regard to the politico-theological question of Caliphate.[42] The *Shi'ites* are those who took the side of *'Ali* while the *khawarij* are those who left the ranks of the followers of *'Ali* (*kharaja*) after he accepted arbitration with *Mu'aweyya,* during the battle of *Siffin*.[43]

*b)   Why Early Islam Seems Attractive*

The Muslim community had already organized itself into a state-like system before the death of the Prophet, and the question of the head of Islamic *umma* was not relevant before his passing since he ensured that role. However, after his death, the Islamic *umma*, similar to other social

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34   As Hicham Djaït, a Tunisian historian, puts it: „*L'appellation de successeur de l'Envoyé de Dieu est à elle seule tout un programme de continuité du pouvoir prophétique, non pas dans sa part supra-humaine liée à la Révélation mais dans sa part transmissible, lié au pouvoir temporel pour l'essentiel. Le Calife est le chef de la communauté islamique, il a hérité du prophète le commandement*". Hisham Djaït, *La Grande Discorde. Religion et Politiques dans l'Islam des Origines,* 52-53 (Gallimard, 1989).

35   For some authors, such as Abdou Filali-Ansary (who took the reflections of Ali Abdel-Raziq), considering that the Prophet had created in the *medina* the first nucleus of the Islamic state is based on a confusion between two forms of organisation that need to be distinguished since their respective natures are totally different: the state and the religious community. For both, in fact, it is normally used to refer at with the term *umma* that is translated sometimes community and others nation. *See* Abdou Filali-Ansari, *Islam, Laïcité, Démocratie,* in POUVOIRS 104, 8 (2003).

36   *See* Djaït, *supra* note 34, at 47.

37   *Zakat*: Islamic religious tax, one of the five basic pillars of Islam.

38   *See* Djaït, *supra* note 34, at 53-54.

39   *See id.* at 51. *Muhajirun* means the emigrants while *ansar* means the auxiliaries.

40   Such as neglecting to invite some of the members of the *bayt,* family, to the assembly of *saqifa. See id.* at 52.

41   The *Umayyads* governed for 90 years (661-750) and the Caliph's office became hereditary. They were then defeated by their cousins, the *Abbassids* (the descendents of the Prophet's uncle *Abbas*), who killed most of the *bayt (family)* of the *Umayyads,* but Abd-elrahman I escaped to Spain and was the first Umayyad Caliph of Cordoba. There were seventy-three Abbasid Caliphs, based in Baghdad, and the dynasty remained in power for almost five hundreds years (750-1258)! Nevertheless, it was under their authority that the Islamic State began to lose its unity, especially after the beginning of military chaos in what the historians call the second Abbasid era (847-1258). It should be noted that some of the Abbasid first-era Caliphs, and most of the second era, were replaced by force or killed. With the end of the Abbasid dynasty, the *Mamelukes* seized power (1250-1217). The difference between them and their predecessors was that they were not Arabs, but rather good soldiers, originally slaves, taken from central Asia. After their replacement by the Ottomans (1281-1921), they continued to govern Egypt until they were defeated by Muhammad Ali in 1811.

groups, required a leader, a chief to handle the *affaires d'état*, and they also needed an *imam* to guide the Muslims in their prayers and to defend Islam. Those roles were entrusted to the same person in the beginning: the Caliph. This necessitated particular qualities in a chief which philosophers tried to enumerate.

Should the chief violate or infringe his duties, a problem of legitimacy would arise which, in Islamic and Arab history, sometimes meant his loss of power (and his life). Nevertheless, he could continue as the leader by imposing his authority by force. This explains the readily apparent phenomenon in the history of Arab-Islamic empires that many Caliphs were assassinated and replaced by force. Transference of power was accompanied by bloodshed, especially when it was transferred from one tribe or family to another. Of course, this meant that the new holder of power could also be usurped in the future, for the same reason. This may suggest that the real motive behind such events was not being necessarily the zeal for Islam or faith but rather for power. In other words, it was mostly a struggle for power between individuals, families or clans rather than a question of faith, morality or culture.

But nowadays, is it really necessary to refer to early Islam in order to understand contemporary territorial Arab states? Is it really crucial to make reference to the Arab particularity in a context of general acceptance of modern state structure? It may be considered a waste of time and energy to return to such a period, but in fact it is not, especially due to a certain resurgent nostalgia for this period of Islam by some groups. Such groups may dedicate concerted political efforts to restoring an Islamic state by democratic means (through popular legitimacy and elections), or clandestinely, by opposing those governments which do not follow the true teachings of Islam.

This ,nostalgia' motivated the fathers of Islamist groups to study and write about early Islam. They presented the principles that can be considered as the basis of the political theory of early Islam. This was the case with Sayyid Abul Ala Maudoodi. For him, the assumption of political power in Islam was founded on certain clear-cut principles such as: sovereignty belongs to God; all Muslims have equal rights; *shari'a* is the supreme law; the government, its authority and possessions are a held in trust for God; the head of state should be appointed by mutual consultation of

Muslims; and the Caliph or the Emir is to be obeyed unreservedly in whatever is right and just (*ma'ruf*).

Such a system seems attractive to Maudoodi, especially in the case of the first four Caliphs, who did not impose themselves by force, but rather were elected by the people, of their own free-will.[44] It is clear that behind such presentation there is a hidden message: the current governments in the Muslim and Arab world are not following the example of the early Caliphs. Such authors seem to have one foot in the present and the other in the past. Not only is it a contradiction but diametrically opposed.

Many problems arise from a historical discourse when applied to contemporary times. First, most Arab and Muslim countries have adopted a constitution and declared the people as sovereign; what Maudoodi invented (*al-hakemmeyya* which refers to God, while *seyyada,* translated also as sovereignty, refers to the power of the people) does not resolve the real problem.

Second, the ,equality of all Muslims' does not recognize territorial limits or borders. In fact, Islamist groups envisage the establishment of an Islamic state for all Muslims. The membership to Islamic *umma* is based on *jus religionis* and not on *jus sanguinis* or *jus solis*.[45] In which case, what about the non-Muslim communities present in those territories?

Third, any law that contradicts the *shari'a*, including the constitution, is illegitimate, and Muslims shall not obey it. This gives rise to the problem of finding the political game rules necessary in every social organization. What is the supreme law of the land? Shall *shari'a* have a super-constitutional value? If so, how can the constitution be the supreme law?

Fourth, authority is entrusted by God; if the one in power misuses it by contradicting *shari'a,* he loses his *raison d'être* and may be removed from his position, resulting in the instability of the state.

Fifth, the consultation does not mean necessarily free elections or the participation of all citizens in the decision making process directly or indirectly since consultation may be limited to the ,wise people' that know and are able to distinguish the truth, as revealed by the Koran and the Hadith.

Sixth, the governor may pretend obedience only in the case of right and just commands (*al-amr bel ma'ruf*); the

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42  For the *Shi'ites*, the *imamat* (similar to a Caliph) represents divine law, and his power is simultaneously temporal and spiritual. Accordingly, as confirmed by Ahmad Beydoun, „Le Chiisme partage le malaise qu'éprouvent les doctrines religieuses du Pouvoir face au principe démocratique de souveraineté populaire". Slim Laghmani, *Les écoles juridiques du Sunnisme,* POUVOIRS 104, 43 (2003).

43  *See id.* at 21-22.

44  *See* M. M. Sharif (ed.), *A History of Modern Philosophy,* 659 (Pakistan Philosophical Congress, 1963-1966), published also online at: http://www.muslimphilosophy.com (accessed on 7 February 2006).

45  *See* Vatikiotis, *supra* note 6, at 31.

problem here is that justice or rightness remains a general concept which does not have a precise content.

There seems to be a hidden message behind all the writings of Maudoodi that the current governments are serving evil and Muslims should not obey them. The real Islamic State is the pure one of the first four Caliphs or better yet, it is the one which I (Maudoodi) decide upon. The real problem with these groups – and all religious fundamentalist groups in general – is that they claim to have exclusivity over the truth. In fact, the real problem is to know who will be in charge of deciding what is right or just. Some may say that it is the *shari'a*, but then another question arises: What is *shari'a*? Is there one *shari'a*? In fact, the Koran, considered by Muslims as God's Word dictated to his prophet, cannot be called into question. Nevertheless, there are many situations that need an answer that may not be directly mentioned in the Koran or in the *Hadith*. What should be done, then?

There is no doubt that there are different interpretations for the same text. This explains the existence of different schools of the Law of Islam, besides the different secessions within the Islamic community (*Sunni* and *Shi'ites* for example) and the multiple Islamic sects that developed throughout history, which further complicates this task. Accordingly, it would be preferable to speak about multiple Islamic concepts, and multiple *shari'a*s, rather than one, unique, collection of precise and clear principles. Some may then suggest leaving the task of interpreting the *shari'a* to a group of specialized persons: the Muslim „theologians". Now, the same fact that this task is given to competent and informed personalities means that *shari'a* does not have a stable and precise content but rather, is adapted to new and unattended circumstances, related to a specific context (time and space), and as such needs interpretation and explanation; but, these people are human beings, and as such, not infallible. Their views may reflect their own will and not necessarily that of God. What is the solution? Not forgetting that, in the meantime, the state needs to be governed and decisions need to be taken.

### 3. *Arab States and Popular Sovereignty*

According to some authors, the European distinction between secular and divine rule led to a more modern, realistic approach towards politics while a similar rupture with medieval philosophy did not occur in the Arab tradition.[46] This absence led, in Charles Butterworth's view, to a ‚quietist acceptance' of non-democratic governments by the citizens of Arab countries.[47]

#### a) *Arab Culture and popular Sovereignty: Any Compatibility?*

Western countries have had two revolutions: the American and the French; those were preceded by a number of theories that justified the power of the state by popular will rather than that of God or the king.[48] This was possible in a context of (first partial then complete) separation between Church and State. Nevertheless, the consequences of these revolutions are not limited to western countries: the establishment of modern states and the dispersion of nationalism and theories of popular sovereignty globally are the proof.

Nevertheless, the concept of popular sovereignty was possible in Europe only in the context of a separation from the Church and the subsequent approaches to the new bearer of sovereignty, and not – as some may think – to the French or American Revolutions. In fact, those two revolutions gave birth to the new modern states, based on the separation and balance between the three branches of government (legislative, executive and judicial). However, the concept of popular sovereignty is much older; these two revolutions changed only the way that sovereignty may be exercised and balanced.

By the end of the First World War, there was a turning point in the Arab world's modern history, when Sheikh Hussein of Mecca declared a revolt against the Ottomans, justifying his allegiance to Christian Europeans against the Muslim Ottoman Caliph, through the need to establish a modern state for Arabs. This revolution did not have the consequences of the American and French revolutions in terms of fulfillment, but the ideas behind it are interesting: what prevailed for Sheikh Hussein was the realization of a political unity of Arabs (or most of them) in one state rather than of allegiance to other Muslims. To do that, he pledged

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46  *See* Charles Butterworth, *State and Authority in Arabic Political Thought, in* THE FOUNDATIONS OF THE ARAB STATE 91-92 (Ghassan Salamé ed., Croom Helm, 1987).

47  *See id.* at 91-92. This position is somewhat exaggerated although not totally void of logic, as we will show in the following sections.

48  Accordingly, power has no more its origin in God than in His earthly representative (the Pope). Consequently, it was necessary to find out who were the newly entitled to sovereignty. BODIN (1530-1596) answered that the bearer of this indivisible and unlimited sovereignty was the monarch. HOBBES (1588-1679) said that it was the highest representative of the state who had undivided and unlimited sovereignty, since the people formed a social contract, and every person cedes his/her freedoms and powers to one person and community. While John LOCKE (1632-1704) proposed that it was the representative(s) of the state who had undivided power, but it was not ‚unlimited' since it was bound by natural law. Rousseau (1712-1778) related the sovereignty to the people, which expressed ‚*volonté générale*'; as such, a rational and just state was governed by direct democracy. In brief, the shift in sovereignty can be expressed in the following way: while BODIN still relied on the notion of the rule over the people, HOBBES and LOCKE introduce the rule for the people and Rousseau argued in favor of the rule for the people by the people. *See* Nicole Töpperwien, *Nation-State and Normative Diversity* 28 (Helbing & Lichtenhahn coed., 2001).

loyalty to non-Muslims against the Muslim Ottomans, in the name of an Arab nation. This was the revolutionary consequence of that unsuccessful and incomplete revolution.

As a result, new theories on state legitimacy in the Arab world started to appear. Arabs in fact, needed to justify their revolution and their right to statehood by referring to the concept of ‚Arab nation' and/or to the concept of popular sovereignty, based on the people's right to self-determination. These two concepts helped Arabs in general, and single Arab states in particular, to justify their authority within, and to the outside world. The first concept provided internal legitimacy and the other, international legitimacy. In other words, Arabs justified their rebellion against other Muslims through the concept of an Arab nation, as opposed to other nations (although they were also Muslims), while Arab territorial states justified their territorial autonomy and independence through the concept of popular sovereignty.

Contemporary Arab societies are much more complex than ancient ones; for this reason, they have adapted the methods and techniques of positive law in order to function. This was possible after the end of traditional doctrines which were attached to religion, and their replacement by elaborate concepts based on modern science and modern thinking. Religious law was then confined to a limited sphere, such as personal status. This was the case in most Arab countries. The problem is that there is sometimes confusion between religious commandment and religious law, two concepts that need to be distinguished in order to avoid an amalgam and misunderstanding.[49]

Some may advocate then, that ideas such as popular sovereignty in the Arab world were asserted mostly against colonialism; on the whole, it is perceived mostly as a group self-determination rather than individual self-rule.[50] This is true, but the debate regarding the content of popular sovereignty and its relationship to individuals has never ended, even in Western countries. The different concepts of nation, as demonstrated in the foregoing sections, determine the concept of constituent power which is the expression of that self-determination of a community internally.

### b) A Return to Cultural Origins

Arab philosophers tried to justify royal power. They did that without necessarily referring to religion, though it remained important as an element in helping diverse populations (or clans) stay cohesive under one political system. Islam was a necessary unifying element for the various communities in the Islamic Empire. Two different authors are presented here as case studies: Abu Nasr al-Farabi and Ibn Khaldûn.

Those authors do not cover all possible theories and positions in ancient Arab and Muslim history; nevertheless, they represent three different historical moments, with different attempts to answer doctrinal problems. Abu Nasr al-Fârâbi was born about 870 and died in 950 A.D. He was the eminent founder of a philosophical system and devoted himself entirely to contemplation and speculation and kept himself aloof from political and social disorder. He left a considerable body of literature including *Kitâb Ara' Ahl al-Madinat al-Fddilah* (Book on the Views of the People of the Excellent State); *Kitâb al-Siyâsat al-Madaniyyah* (Book on Civic Administration); *Kitâb Tahsil al-Sa'ddah* (Book on the Achievement of Happiness); *Kitâb al-Tanbih 'ala Sabil al-Sa'ddah* (Book on Caution on the Path of Happiness); and the Bodleian manuscript of his *Fusûl al-Madini* (Chapters on the Civilian). The second author is Ibn Khaldûn whose death in 1406 signaled the end of Arabic political philosophy, and was followed by five hundreds years of political thought, whose sole exponents were jurists and theologians.[51]

We will discuss their main ideas regarding the state, the qualities of the head of state and the relationship between the one who governs and those who are governed.[52]

### i) Al-Farabi

In his famous book „*Opinions of People of the Perfect State,*" al-Farabi dedicated chapter twenty six to the human needs of society and cooperation, and the two successive chapters to the need for a leader/s and his/their qualities.[53] Human societies for him are either perfect or imperfect; the perfect society may be large, medium, or small. A large human society (*ma'moura*) is one consisting of several *umam* (plural of *umma*) united and mutually supportive. A medium one is the society of one nation (*umma*) in some part of the world, and the small one is the society of the people of a city (*madina*). It is interesting to note that only *madina* is

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49  *See* Filali-Ansari, *supra* note 35, at 7-8.
50  *See* Butterworth, *supra* note 46, at 91-92.
51  *See* Sharif, *supra* note 44, at 96, 405,704.
52  To avoid misunderstandings, one shall keep in mind that in no way, does this paper insinuate that problems regarding democracy or the respect of human rights is linked to the ‚cultural particularity' of Arabs; nor does it suggest that the solution to such a situation is the return to pre-Islamic concepts such as *'asabeyya* (social cohesion), to which Ibn Khaldûn dedicated some of his analyses. The situation in the Arab world is predominantly the result of its recent history, beginning with the four centuries under the Ottoman Empire, but also to European colonialism in the twentieth century.
53  *See* Al-Farabi, *Opinions of people of the Perfect state {Arabic: 'Ara' ahl al-Midnia al-Fadilah}*, 112-126 (Bumelham ed., Al-Helal, 1995). Published also online at: http://www.muslimphilosophy.com/farabi/works/fadilah.pdf (accessed on 7 February 2006).

defined territorially, since the *umma* refers to a community of people,[54] while *ma'moura* refers to the world as a whole.

The *madina* is compared to a human body, in which different organs have different roles. There is a dissimilarity that is outlined: in a human being, the collaboration between organs is natural, in a *madina,* this cannot be other than voluntary.[55] Although considered as the smallest (perfect) society, the *madina* constitutes the most basic one. In fact, the ideal city-state is the city in which the members of the society cooperate to attain happiness. The same applies to *umma,* but the collaboration is not between imperfect societies[56], nor is it between individuals but rather, it is between the *mudun* themselves. The ideal *ma'moura* then is the one in which different *umma* (each distinguished by its natural character, temperament, habits, and language) cooperate to attain happiness. Accordingly, the *madina* is not a closed society; it cooperates with other *mudun* (the same principle of voluntary will can be applied by analogy here). The same is valid for *umma*.

Now, for a similar existence of the *al-madina al-fadela* there is a need for a leader who cannot, by definition, be so if he is subjugated to someone else. The leader cannot be just anyone, nor is anyone excluded *a priori*. The only condition is to have the qualities of a leader (the ideal leader, the *imam*, according to al-Farabi, has twelve characteristics[57]). It is however, impossible to have all these qualities in one person (a man); therefore it is necessary to consider the second option: a leader who has at least six of the ideal qualities.[58] Al-Farabi calls this ruler the traditional king. Accordingly, it is not necessary that this role is ensured by one physical person; these qualities, in fact, may be distributed in different persons who constitute then, perfect leaders.[59] If these characteristics are present in more than one person, together they form ideal heads of state. If these characteristics are not present in anyone, then there would be no sovereign and the state would be exposed to destruction.[60]

For al-Farabi, the sovereigns of an ideal state, who succeed one another and the group of people who administer that state, are considered as one and sovereign. The people of an ideal state have something in common, although they may enjoy happiness in different ways. The ideal state, as explained above, is the state administered by the best and most talented, who aim at prosperity and happiness. If its constitution fails to provide the people with prosperity, and the rulers do not possess the qualities of ideal rulers, then the state ceases to be ideal and is called the state of evil-doing (*al-madinat al-fâsiqah*), the ignorant state (*al-madinat al-jâhilah*) or the state which has gone astray (*al-madinat al-dâllah*).[61]

This section will conclude with three comments on al-Farabi's concept. First, there is only a description *a posteriori*, of the qualities of a perfect leader, not the way in which he is chosen or designated. Accordingly, the consequence of not having a perfect leader for the perfect *madina* will be the destruction of the *madina* itself. Perhaps it is a kind of justification for regime changes and the destruction of monarchies/rulers, and not the way they are to be preserved. Second, the qualities presented are all human qualities and not related to religion, gender or a particular dynasty. Nevertheless, it is not easy to have a perfect leader (these qualities are rarely found in one person, unless he is a prophet or philosopher).[62] In this case, a king is enough to guide the affairs of the perfect *madina*. His qualities are of a different order: he just needs the wisdom to follow in the steps of his predecessor. Third, governance is not related to the *umma* but to a *madina* that is territorially defined.[63] Accordingly, wherever a perfect leader exists, he will be the head of the *madina*, and the *umma* and also the *ma'moura*. Nevertheless, this is often difficult to realize, so the other qualities may be held by different persons who shall reign collectively as the perfect leadership.

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54  *See id.* at 113.

55  *See id.* at 113.

56  The imperfect society is that of the people of a village, a locality, a lane, or a house, the last being the smallest.

57  Sound health; Intelligence and sagacity; Good memory; Prudence and talent; Eloquence; Devotion to education and learning; No greed for food, drink, and sex; Friendliness towards truth; Bigness of heart; Indifference to *dirham* and *dinar* and other forms of wealth; Devotion by nature to justice; Strong resolution. *See* Sharif, *supra* note 44, at 712.

58  (1) He should be wise and philosophical; and (2) learned and abreast with the laws, customs, rites, and rituals adopted by his predecessor to discharge the function of the ideal State with all perfection. (3) He should be an expert in deriving principles in case he does not find airy law, and (4) farsighted, possessing an insight to frame rules and regulations in accordance with the conditions and circumstances he finds himself in, and capable of keeping up the reforms he introduces. (5) He should also be well experienced and eloquent in giving directions to urge the people to follow him in accordance with the *Sari'ah*. (6) In addition he should be skilful in physical display of exercises needed in warfare, and in the use of arms, ammunition, and other equipments. *See id.* at 713.

59  *See* Al-Farabi, *supra* note 93, at 126.

60  *See id.*

61  *See* Sharif, *supra* note 44, at 964.

62  *See* Al-Farabi, *supra* note 93, at 14.

63  According to some authors, the post-medieval idea of a state –a territorially defined entity apart from a ruler or a dynasty organized in accordance with man-made rules was alien to Muslim political theory. Ottoman theories of state and government were derived from the Muslim concept that God is the source of all authority and law and that government exists to enable the community of true believers (Muslims) to fulfil its obligations to God. The community, not the state, constitutes the basic Muslim policy transcending all boundaries. *See* Korany, *supra* note 45, at 75.

ii) Ibn Khaldûn

It was through the examination of culture that Ibn Khaldûn investigated the phenomenon of government which is considered to be the constituent part and form (e.g. the organizing principle) of culture.[64] This particular and independent science of Ibn Khaldûn, that is, the science of culture, is not an art concerned with how man ought to live, or how society should be rightly governed, or how the multitude should be convinced, but rather a scientific inquiry into how human beings have actually lived in the past. His study includes an examination of the natural causes determining the modes of human association which necessitate those activities and ways of life, pursued in diverse human societies; which can be judged by history.[65]

Ibn Khaldûn presented various political theories of his predecessors, but he did not do that merely as a historian; he severely criticized them, basing his criticisms on theoretical and practical considerations. In fact, he demonstrates the necessity for social organization and a ruler, but in order to do that, some philosophers refer to divine law. For Ibn Khaldûn, this is clearly false, since a ruler can rule by virtue of royal authority alone, and even a poorly educated person knows that there have been innumerable rulers without divine authority.[66]

Of the Muslim philosophers, it was Ibn Rushd who (like Ibn Khaldûn) was a recognized religious judge (*qâdi*), and a philosopher who criticized *al-Farabi* and *Ibn Sina* for imitating the dialectical theologians. Ibn Rushd who wrote the most celebrated treaties on religion and philosophy, the main theme of which was the defense of the legitimacy of religion and philosophy in their proper spheres – a devastating attack upon the combination of religion and philosophy in the form of theology.[67]

According to Ibn Khaldûn, humans cannot live without social organization and solidarity, since these are indispensable in procuring basic nourishment and objects of primal necessity. This absolute human need for social organization is fundamental to civilization (*umran*).[68] For him, '*asabiyya* (social solidarity or group feeling) is a specific property of the human soul, a combination of the natural feeling for one's relatives and friends, and the need for defense and means of survival. It cements a group together, dictates the need for a ruler, leads to conflicts with other groups, and generates the power of conquest leading to victory over others. Its initial power determines the extent of this conquest; the fulfillment of appetites and desires; and finally, weakens it and leads to the disintegration of political power.[69]

Political life, as practiced by all human communities, has to take into account the nature of all humans, and should be directed to the common good of the multitude. This requires a ruler and a law based on the rational understanding of their common needs and interests in this world, or a divine law based on their common good in this world and the next. Accordingly, for every social organization, political government is necessary; human beings require a person who will make them do what is good for them, and who will forbid them by force (if necessary) to do what may harm them. However, obeisance to a superior depends on his being good and fair; he is so, when he does not oppress the population with unjust laws, and treats everyone equally.

In the case of a holder of authority despising his own people, he will be rejected by them, and, after ascertaining the qualities of a successor in the name of the clan, he will be removed, and his authority given to another. In fact, the allegiance oath, *albaya'*, consists of paying homage to obeisance. The person who takes the oath, binds himself in contract to his emir, and in doing so, confers upon him the governing of his affairs and those of all Muslims; he is bound to recognize his emir's authority and to execute his instructions, whether he is in accordance with him, or not. Similar to a buyer being bound by a contract with a seller, those who take the oath of allegiance to, and enter into a contract with, an emir, put their lives in his hands.[70]

The first form of government was the Caliphate. The origin of the word means 'to replace' because the Caliph is the one who represents the Prophet, in Islam. The Caliph is like the vicar of the lawgiver (Mohammed).[71] Ibn Khaldûn distinguishes between the objectives of natural royal power and those of the Caliphate: the exercise of the first consists in making it possible for the masses to operate in harmony with their projects and destinies, that is, allowing them to safeguard their material interests and avoid what may harm them, in accordance with reason. As for the second, it is the guidance of people according to divine law, in order to ensure their happiness in this world and the next.[72]

When the Prophet died, his companions took their oath of allegiance to Abu Bakr and charged him with directing their affairs; people were never left open to anarchy. Governmental functions depended on the Caliphate, which is

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64 *See* Sharif, *supra* note 44, at 962.
65 *See id.* at 966.
66 *See id.* at 968.
67 *See id* at *937*.
68 *See* Ibn Khaldûn, *The Muqaddimah, An Introduction to History*, 45-48 (Franz Rosenthal trans., N. J. Dawood ed., Bollingen Series/Princeton, 9th printing 1989).

69 *See id.* at 160f.
70 *See id.* at 166-167.
71 *See id.* at 170.
72 *See id.* at 154f.

simultaneously, a spiritual and temporal institution. This is why the Caliph is also called *imam*, since he is the one who guides Muslims in their prayers. The *imamate* was a necessary institution: the proof lies in the fact that the agreement was unanimous. The dignity of the *imam* is part of religious law since it is in the service of a public good; nevertheless, it is a grave error to consider the *imamate* as one of the Pillars of Faith; it has only the function of public interest; the entitled are empowered by delegation.[73]

Nevertheless, the characteristics of Caliphate disappeared, all that remained was the name, and the regime became purely and simply an autocracy. The Caliph became absolutist and served the vanities of this world, including the use of force, and the satisfaction of arbitrary desires and passions.[74] Some began calling this institution *sultanate*, in reference to the powers and prerogatives of those who pretended them, or in relation to the allegiance that was made to the Caliph, when it was imposed by force.[75]

### 4. Conclusion to Part One

The authority of Arab rulers is often questioned; to maintain their power, some have the tendency to govern by force (or by money). Otherwise, they may opt for an ethnic, pre-existing (pre-state) nation, or use religious justification; in the first case, their existence depends on the persuasive capacity of their military or economic means; in the second, their power is based mostly on a transcendental will, that of a pre-existent culture independent from the state; or by *shari'a*, ,The Way' revealed by God to humans.

The relationship between authority, power and/or force is subtle, as seen in Arab literature and terminology. In fact, the word force is translated as *kuwwa* and authority as *sulta,* while power can be translated as *sulta* and *kuwwa.* The term *authority* may have connotations related to legitimacy, since it is transcendent to power, which is related to the exercise of a function; therefore, the word power (as *sulta*) may have connotations of legality. Accordingly, when those who are exercising public functions do not enjoy *sulta* (authority), they are tempted to impose their *sulta* (power) by *kuwwa* (force); they justify this action by being legally authorized (mixing authority with power). In this case, *sulta* may endure as long as it can be imposed by *kuwwa* or otherwise, as much as the ruler can convince the governed that his power, through his adherence and respect of *shari'a*, is based on God's Will.

A different type of government, based on popular will and the respect of law, started to permeate the Arab world only recently, although it has been articulated in constitu-

tional and legislative texts for a long time. The answer to the Arab legitimacy crisis requires the reconciliation of Arab countries with themselves; there is no blueprint solution, made in the U.S.A. A return to their origins may be helpful for the Arabs' reconciliation with their history, but also in looking forward to the future. To do so, harmony with what is voiced in the constitutions and in reality, will be a priority. In which case, for the existence of Arab states, it is no longer sufficient to govern by *kuwwa* or *mal* (money), that are intrinsically related, nor can the rulers justify their power by transcendental will: the only remaining option for Arab states is *kanun* (law). The rule of law shall provide the needed legitimacy that ensures their cohesion.

To say that Islamic fundamentalism tries to fill the void left by the legitimacy crisis in modern states is only partly true; such ideologies, in fact, exist in all religions. Although the fundamentalist approach may be wrong, it is not the only possible solution; the challenge is not to eradicate it but rather, to provide an alternative, since the religious answer to social and political problems shall be considered only a reaction, and has very little to do with the Islamic faith. Without an alternative, the problem will not be resolved, but encourage the wrong reaction. On the other hand, combating fundamentalism without resolving the real problem will give more popular credence to the reasoning of those groups who consider religion as *the only* solution to the current deficit of justice, morality and equality.

### II. Challenges of Contemporary Arab Constitutions

Modern society is characterized by the drafting of new constitutions in many states and of certain similarities between them. Most modern states have a written constitution, and almost all of them adopt the system of a rigid constitution.[76] The diffusion of written and rigid constitutions has different sources. First, the American one: colonies could adapt charters that did not contradict British statutes and customs. Second, the philosophical and French example: it was necessary to initiate a new order, considering the constitution as the initial act of national sovereignty and the renewal of the social contract, in order to distinguish between ordinary and constitutional laws. Finally, the federal source: in order to organize relations between the federal state and federated states, and to protect the pact from arbitrary changes in the future, without unanimous approval of all those concerned, and following precise procedures.[77]

There are different forms of exercising framing power: first, the non-democratic or authoritarian way, which excludes popular participation; and secondly, the democratic

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73  *See id.* at 156f.
74  *See id.* at 181f.
75  *See id.* at 155.

76  *See* Joseph Barthélemy & Paul Duez, *Traité de Droit Constitutionnel,* 188 (Economica, 1985).
77  *See id.* at 188-191.

way.[78] The distinctive point here is the existence or absence of a consensus by the people who will be governed by the constitution. People exercise this sovereignty through representatives, a special assembly or referenda.[79] In the case of a hypothetical democracy, the framing power is effectively in the hands of the autocracy, which can be one person, or a group of people.

The will of the constituent power aims at transforming itself into an objective and enduring incarnation: a constitution; but it cannot simultaneously submit itself to its own creation without losing its character as the supreme, secular power. The experience of the last two hundreds years has proved that the leading forces of the revolution endeavored to consolidate the achievements of the revolution, particularly the new distribution of political power, in a constitution – a legal document which bears the unequivocal authority of a written text superior to all other laws of the land. However important the character of the constitution as a written text may be, its lasting authority depends on the persistence of the authority of its creator. By making a constitution, the revolutionary forces are digging their own graves; the constitution is the final act of the revolution. Constitution-making is an act of self-liquidation of the revolution.[80]

First I will present the different concepts of constitution and its relationship to the nation and/or the people, and then I will present challenges of contemporary Arab states in relation to constitutionalism.

### 1. Modern Constitutions

There are two diverse approaches to the constitution: the material and the formal. To begin with, the constitution, in its material sense, refers to the whole system of government of a country. According to this definition, constitutional law is that part of the legal system which regulates the structure of the principle organs of the state, their relationship to each other and to the citizen, and determines their main functions. Second, the constitution, in its formal sense, means a document having a special legal inviolability which sets out the framework and the principal functions of the organs of the state, and declares the principles by which those organs must operate.[81]

The wider (material) sense of constitution covers also the narrower (formal) one but not vice versa; besides, every state, by definition, has a constitution in its material sense (a comprehensive system of government) but it may not have a constitution in its formal sense (one document declared to be supreme). According to Adhemar Esmein, the eighteenth century concept of constitution as a fundamental and systematic written law is based on three ideas: first, the superiority of a written law over a customary one was generally agreed upon at the time: the same should apply to constitutional law; second, the people of the eighteenth century (French and American) revolutions considered a new constitution, edited by national sovereignty, as a true renewal of the social contract. As such, it was necessary to register the clauses of that contract in the most solemn and complete form; third, they thought that a clear, systematic presentation of such a document in a clear and systematic way would provide an excellent means of political education, since it would provide the citizens with the knowledge and desire for their rights.[82]

The American and French model of a written constitution was adopted by states worldwide; accordingly, constitutional laws were distinguished from ordinary ones. The constitution, in fact, was considered the initial act of national sovereignty, while the other acts were only its consequence.[83] Some others went further by considering the constitution as a limit to the sovereignty of parliament by subordinating it to a superior law.[84] In fact, if sovereignty resides in parliament, then there is no need to establish a constitution, since there is no need to limit parliament by a law that determines its powers. If, on the contrary, the sovereignty of the state is shared by the three branches of government, which are separate and not necessarily hierarchically structured, then a constitution is necessary to limit those powers and establish the relationship between them.[85]

#### a) The Constitution and the nation

According to Sieyes,[86] the constitution is not based, nor is it dependent upon, tradition, historical legacy, or religious revelations, but originates from a secular willpower.

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78 The first can be openly authoritarian: the charters granted by (a) Louis XVIII in 1814, and (b) by Nicolas II to Russia in 1905, or veiled such as when the people apparently participate in ratifying a constitution that has been prepared by a non-elected group of people appointed by the executive, that continues to exercise political pressure on that designated committee. Democratic ways are those which confer the election of the constituent assembly upon the population, and may request their ratification. *See* Pierre Pactet, *Institutions politiques Droit Constitutionnel,* 70 (Masson 15e éd., 1996).

79 *See* Shiba, *Le Pouvoir Constituant, in* MODERN CONSTITUTION 107 (International Association of Constitutional Law, First World Congress, Belgrade – August 29th of Septemeber 2nd 1983).

80 *See* Preuss, *supra* note 1, at 144-145.

81 *See* E.C.S. Wade & Godfrey Phillips, *Constitutional and Administrative Law,* 1-5 (9th ed., Longman Group Ltd., 1977).

82 *See* Adhemar Esmein, *Eléments de Droit Constitutionnel français et comparé,* 603-604 (Sirey, 1927).

83 *See id.* at 607.

84 *See* Pierre Avril, *La Séparation des Pouvoirs Aujourd'hui, in* 1789 ET L'INVENTION DE LA CONSTITUTION 299 (Michel Troper & Lucien Jaume eds., Bruylant, 1994).

The concept of the constituent power of a nation implies that the empirical subject of this power is the people, not a monarch or aristocratic *élite*s. As such, the nation's will is a pre-constitutional source of the constitution, which in turn, is nothing more than the institutionalization of the nation's will.[87] At this point, the question arises regarding the content of the word ‚nation'.

### i) The Definition of Nation

The term ‚nation' is accepted as a central political concept of recent times; sometimes it is synonymous with a state, its inhabitants, or with a human group bound together by loyalty and common solidarity.[88] Authors used to distinguish between defining people as demos or as ethnos. Demos refer to the totality of citizens while ethnos is a community based on the belief in a common descent or culture.[89] When a nation substitutes the people as an element of the state, we have a nation-state.

Now, if those entitled to constituent power are the people, then, they who have the right to limit themselves in a constitution are the sovereign people, considered as the citizens *in toto*. In case the people as demos do not concur with the people as ethnos, a problem exists: what is the relationship between these groups? It is clear that vital decisions need to be taken and those entitled to sovereignty need to make a kind of legal fiction, acting as if they represent the people in their totality – including those who are not, or not yet, citizens of the state (post-World War II Germany, for example).[90]

Defining the concept of nation is essential to state-building (in the case of a non-existent state) or to preservation of the state (if the state exists already); in fact the nation provides an identity for the individual and legitimacy for the state. The different concepts of nation determine the interpretation we give to the constitution. According to the radical-democratic one, we always refer to the people to resolve problems: a constitution is a continuous revolution, and as such, unstable. The other interpretation is the institutionalized one, which creates institutions that will allow people to return to their normal lives.[91]

### ii) „We the people"[92] and the Constitution

In quoting Hugo Grotius, who contended that a people may submit itself to a king, Jean Jacques Rousseau commented that, according to Grotius, a people is so even before it has submitted itself for the king. The submission itself is a civil act; it presupposes public deliberation. Hence, before considering the act by which a people submits to a king, we ought to scrutinize the act by which a people becomes a people, for that act, being necessarily antecedent to the submission to the king itself, is the real foundation of society.[93] Some modern constitutions express this fact, in the same constitutional document indicating that „*We, the people of… adopt the constitution.*"[94]

Nevertheless, as outlined by Hanna Lerner, there is not always a common understanding of that „We," especially in divided societies.[95] For her, since the people are the authors of the constitution, it should reflect their specific identity and delineate their shared values and principles. In fact, national identity played a necessary role in the emerging phase of the nation-state, by making possible a new mode of secular legitimization to the state, based on a new form of social integration. This is also the case with contemporary new states. The problem is to understand whether a constituent power will necessarily reflect a pre-existent identity or will it reflect a political organization of a society?[96]

The answer is simple (at least theoretically): both cases are possible. It depends in fact, on the country and the particular context in which a constitution is enacted. Nevertheless, the second question is, then, to know if there is any connection between the constitution and the collective who holds the constituent power.[97] Although the constitution does not always express a predefined identity, it is nevertheless important that the constitution be felt as the result of the act of all those who compose the „we" of the constitution. Otherwise it will lack necessary legitimacy. The con-

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85   This is why, in a country like England, there is no need for a constitution, whereas in countries like France and the USA, it is essential. Consequently, it is completely logical that in the English system the question of constituent power is irrelevant, since the power to issue laws, organize the state and limit the power of its organs, is left entirely to parliament. *See* Raymond Carré de Malberg, *Contribution à la Théorie Générale de l'Etat,* 541 (Tome II, 1922).

86   Emmanuel Joseph Sieyès, known also as 'l'Abbé Sieyès (1748-1836) is a French revolutionary and statesman, author of *Qu'est-ce que le tiers état?* (What is the third estate?), in 1789.

87   *See* Preuss, *supra* note 1, at 149.

88   *See See* Vatikiotis, *supra* note 6, at 31.

89   *See* Töpperwien, *supra* note 48, at 4-5.

90   In the Palestinian case, the citizens of the future state of Palestine would exercise their constituent power and would adapt a constitution. This constitution needs to discuss some key arguments by which the regulation interests all the Palestinian people, not the Palestinian citizens only.

91   *See* Preuss, *supra* note 1, at 145.

92   Quoting Bruce Ackermann's reflection in his volume *We the People. Foundations* (Cambridge, Mass./London, 1991).

93   *See* Preuss, *supra* note 1, at 161.

94   For example the preamble of 1996 South Africa constitution.

95   *See* Hanna Lerner, *The people of the Constitution: Constitution-making, legitimacy and identity* 2 (paper presented at the mini-APSA, Department of political science, Columbia university, April 30, 2004). Hanna Lerner is Ph.D. candidate in Columbia University. The paper was not published yet.

96   *See id.* at 6,11, 19.

stitution shall be considered by the majority of the polity (as individuals or as groups – ethnic, religious, linguistic) as being their own and they shall identify themselves with the document.[98] In other words, the importance of the constitution does not lie in its expression of political identity, but in its ability to transform it into a civic one.[99] This is why constituent power is tightly related to the question of constitutional legitimacy. In contemporary times, the constitution that is adopted through democratic means is considered legitimate.[100] Here another debate may arise, but is tangential to our main inquiry here: is it sufficient that a nation wants something, for this will to be considered good? The problem with accepting this conjecture is that the guiding political status will lose all rationality.

*b) The Nation and the Constituent Power*

The father of constituent power (Emmanuel Joseph Sieyes defines the nation exclusively as demos; for him, the nation is a „body of associates living under common laws and represented by the same legislative assembly."[101] In other words, the nation consists of the totality of its citizenry. This reflects the French idea of nation. According to the German and Eastern European concept, the nation is a pre-political community, which is constituted by commonalities in origin, race, language, religion, culture, history and the like. The French concept of nation, based on the idea of citizenship, is an example of a state-nation (the nation is the demos). In contrast, the German perception includes the idea of an ethnic nation (the nation is the ethnos). A nation based on common citizenship is necessarily a state-nation, whereas the ethnic-nation can be entirely stateless and can be politically organized in a plurality of states.[102]

### i) The Constitution as a Reflection of a pre-existent entity

In contemporary states, it is very rare – even impossible – that one homogeneous ethnos is politically organized in a nation; normally the ethnos and the demos of a state are in-

congruous. This has serious consequences, as it has for the concept of self-determination, for example, as shown by Ulrich Preuss: „In Western Europe it [self-determination] meant that the demotic nation took over the government of an existing sovereign state, thereby safeguarding its self-determination. In the freedom movement that spread from Germany east and south, however, the term ‚self-determination' meant the liberation of a pre-established ethnic society from alien influence and foreign domination."[103]

In fact, different concepts of nation would have serious consequences on the concept of constituent power; for example, according to the French concept of nation, the constituent power is the power of a collective body, which, by the very act of constitution-giving, exercises its right to self-rule. The constituent power of a nation presupposes the notion of a demotic entirety of individuals – the citizenry – an entirety which originates from this very act of creating common laws and a common representative body. Therefore, it was not the commonness of the language that constituted the nation, but, conversely, it was the nation that required and created the commonness of the language.[104]

According to the German concept, the meaning of nation-state is that a nation (in its ethnic sense, defined in terms of commonness of language and/or religion, culture, origin, etc.) acquires its political existence in its own state. The nation is pre-state, pre-politics, existential and almost an eternal entity, whereas the state is a quasi-accidental and ephemeral phenomenon, which supports the survival of the nation in its history, but is not really the embodiment of the essence of the nation. However, the political self-determination of a nation requires statehood; but it is a statehood based on ethnic homogeneity. It is the self-determination of ethnos, directed against alien influence, rather than the political self-rule and freedom of demos, which is directed against political pressure and social inequality.[105]

### ii) The Constitution as a Social Contract

Studying the foundation of the legitimacy of the constitution, one should inevitably consider the social contract as the basis of its legitimacy. Social contract means that popular sovereignty is expressed by the constituent assembly. Rousseau wrote: „Each one of us puts into the common stock his person and all his power, under the supreme direction of the general will; and we receive as a body each member of an indivisible part of the whole."[106]

Yet, there are different social contract approaches: a) the British approach – which did not need a written constitution – emphasizes the political self-government of society

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97  Here there are two options: *First*, there is no connection at all between the two. This is the position of Hans KELSEN; with his legal positivism, he solves the paradox of constitutional legitimacy by separating the legal from the political; *secondly*, there is a direct connection between the constitution and the people. Here there are three alternatives: a) the identity of „We the people" derives from the making of the constitution itself; b) the people as well as their constitution emerge simultaneously in a gradual and incremental manner; or c) the constitution does not create the collectivity but mirrors a pre-political unity while recognizing the pre-constitutional exercise of a homogeneous nation's general will. *See id.* at 13-14.
98  *See id.* at 12.
99  *See id.* at 26.
100  *See id.* at 11.
101  Preuss, *supra* note 1, at 149.
102  *See id.* at 149-150.

103  *Id.* at 150.
104  *See id.* at 150, 152.
105  *See id.* at 152.

through parliament; b) the French approach – which had few scruples in replacing its constitutions – emphasizes the nation as it is manifested in the state; c) the American social contract approach which reflects the American concern with a society consisting of a multitude of individuals whose mutual contract is contained in the Supreme Constitution.[107]

Nevertheless, many authors expressed serious criticisms towards the social contract as the foundation of constitutional legitimacy. For them, justifying law by social contract is fiction; law has to be justified by something outside itself. The constitution, indeed, has to be effective. It must be adopted and put into operation with authority. In a constitutional state, authority is characterized by democratic legitimization to which also the democratic minority acquiesces.

The original supremacy of the constitution is therefore founded in the authority of the constitution-writing entity, but this does not explain the perpetuation of its predominance. In fact, predominance of the constitution is maintained by the operation of the legitimately established devices of the constitution itself, which can remain effective only as long as citizenry and the authority of the state's organs –which are governed by the constitution – continue to lend legitimacy to its institutions through the proper employment of the mechanisms and procedures provided by the constitution. The force outside the constitution, which ensures its primacy, is its practical legitimacy, since it gives reasonable and realistic expression to the principles and needs of the legal community that it serves. Accordingly, a legitimate constitution can be considered a solemn codification of basic rules for the operation of the state. It tends to reflect national customs and rules from which the legal culture of the state is strongly influenced, if not determined by.[108]

## 2. Modern Constitutions in Contemporary Arab States

In the Arab world, constitutions may codify a variety of political structures: federal, as in the United Arab Emirates and the Sudan; unitary, as in Tunisia; a constitutional monarchy, as in Jordan; a republic, as in Egypt; or a traditional hereditary monarchy, as in Saudi Arabia. While most Arab constitutions are documents with roughly similar provisions, some constitutions are noteworthy products of historical and political circumstances. In Saudi Arabia, for example, the Koran itself is considered the constitution, accompanied by a series of royal decrees compiled to function as a manual for the application of its principles. Procedures for constitutional amendments vary; sometimes requiring direct referenda or legislative action, while in some countries, the head of state may issue amendments by decree.

The comparison of constitutions in different regions of the world uncovers a remarkable variety of fundamental texts, since they are the „product of their unique history and geography."[109] This is also the case in the Arab world, even though some studies treat Arab constitutions as if they were identical (which they are not). There are of course common features and similarities, since they may have adapted texts from the same sources; nevertheless, every Arab state has its own constitution, and its own constitutional history.[110]

### a) Nation-People in Arab Constitutions

Many Constitutions in the Arab world refer to the word ‚Arab' to qualify the State. For example, „the Arab Republic of Egypt," mentioned in the constitution's first article. The same applies to Jordan (Art. 1) and to Syria (Art.1). Special attention should be drawn to the Tunisian Constitution, where the people make part of the greater Arab *Maghreb* (Art.2) while the Lebanese Constitution, without referring to itself as an Arab nation, mentions only that Arabic is the official language (Art.11). This is noteworthy since it recurs in many other constitutions of Arab states: Egypt (Art.2); Syria (Art. 4); and Tunisia (Art.1).

Now, what makes a state an Arab one? Is it a state whose population speaks Arabic? The English, French and Spanish languages are commonly spoken in different countries; this does not mean that those countries constitute or

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106 Nevertheless, one shall distinguish between the foundation of the society and the the constituent power. As explained by PREUSS: „*ROUSSEAU speaks of the foundation of civil society, not of the process of constitution making. We must distinguish both steps, although empirically they will normally coincide. It is hardly conceivable that in real life the formation of a group out of multitude of individuals, and the determination of the structure according to which the group is enabled to act as an entity, can be separated from each other. However, the distinction is analytically important because the generation of a constitution for a group presupposes the very existence of the group. Hence, before the group gives itself a constitution, it must clarify who is subject to this constitutional determination, and who is entitled to participate in this decision. In other words, who is a member of the group*". *Id.* at 161.

107 *See* François Venter, *Constitution Making and the Legitimacy of the Constitution, in* NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 10-12 (Antero Jyranki ed., Kluwer Law International, 1999).

108 *See id.* at 12.

109 *See* Eric Canal-Forgues (ed.), *Recueil des Constitutions des Pays Arabes*, X (Bruylant, 2000).

110 Since the second half of the nineteenth century, the constitutional movement began, and never stopped, in the Arab world. The Arab world was familiar with evolution in relation to constitutionalism; the democratization process experienced a relatively pacific transformation. There is also a brand of creativity in the Arab world, wherein new techniques and institutions that are unknown elsewhere are invented. *See id.* at VII.

are part of a single nation. Although important, language then is not sufficient by itself. If we consider different elements such as history, culture, language and traditions, they suggest the existence of an Arab nation. To some extent, religion is also relevant, since the majority of Arabs are Muslim (mostly Sunni). Nevertheless, not all Arabs are Muslims, nor are all Muslims Arab.

The existence of such an Arab nation means that it is one unit divided into different Arab states (not the first time it has been historically so); consequently, Arab states would simply be a transitory period on their way to the consolidation of an Arab Nation. Nevertheless, this assertion contradicts the reality of Arab peoples who are attached to their states and to their individuality, even though they may not be happy with the achievements of their rulers. This can be one of the effects of the existence of individual Arab states. The dream of Arab unity switched to a new goal: it does not call for the establishment of one centralized state which eliminates all particularities; rather it means a tendency towards collaboration and harmonization of the existing states. Unity in this sense – similar to that of the European Union – becomes the future, when the future is intended to be prosperous, secure and progressive.

The preambles of the Arab constitutions may provide a brief vision of the unitary Arab state, regarding the relationship between the people and the Arab nation. Some submit that the *state* is part of the *Arab world,* and others that *the people* of a single Arab state are part of the *Arab nation*. Here are a few examples.

The 1952 *Jordanian Constitution* was applied to the West Bank which was part of the Kingdom of Jordan, until its occupation by Israel in 1967 and the formal separation between the East and West banks in 1987. In its first article, the Jordanian Constitution states that Jordan is a sovereign Arab state. The same article states that the people (*sha'b)* of Jordan are part of the Arab nation (*umma*). The sovereignty of the state and its independence from other countries is emphasized in that constitution, and this can be understood in its historical context of rivalry between Arab leaders, especially in relation to the Palestinian territories that were unified with (or annexed to) Transjordan. The Jordanian constitution has a particularity: it refers to the Jordanian people as *umma.* This is the case in Article 24: „(i) The Nation is the source of all powers. (ii) The Nation shall exercise its powers in the manner prescribed by the present Constitution.“ Besides, the Jordanian constitution refers to the Jordanian Parliament as *Majles al-umma* (Art.29). Normally the Arab parliaments are translated as National Assembly. But in fact, the National Assembly is usually understood to mean „*al-majles al-watanee*“, where *watanee* refers to homeland (*watan*) and not to nation (*umma).* This

confusion in terms disappears in the Jordanian National Charter of 1990 where the term *umma* (nation) refers to the Arab nation and *sha'b* (people) refers to the Jordanians.

We read in the *Egyptian Constitution* of 1971 that the Egyptian people are part of the Arab nation. The amendment of 1980 introduced the interesting concept of comprehensive unity in the constitution's first article: „The Egyptian people are part of the Arab Nation and work for the realization of its comprehensive unity.“ What does this comprehensive unity mean? It may be a constitutional adaptation to, and harmony with, the actual territorial divisions of Arab states; few would envision a united Arab state in the near future, but most Arabs encourage Arab unity that is based on the actual division of Arab states. This unity would envisage special relations between the states that have a common culture, language and history. In fact, sovereignty of a single Arab people is enhanced in all the Arab constitutional documents and no state would compromise it; in the Egyptian Constitution, Article 3: „Sovereignty is for the people alone, they are the source of authority. The people shall exercise and protect this sovereignty, and safeguard national unity in the manner specified in the Constitution.“

*b) Religion and State in Arab Constitutions*

In different ways today, legal systems in the Arab states have become positive sets of principles, with a status comparable to those of Western countries, and Islamic law has become a ‚branch of positive law' (e.g. personal status). In fact, most contemporary Arab states include in their constitution the article that Islam is the state religion and *shari'a* is ‚a' or ‚the' principle source of legislation: a symbolic concession to the ideology of political Islam according to some, and a step towards the re-evaluation of its judicial system, according to others.

Islam is considered the State religion (*al-islam din al-dawla*), in the first articles of the constitution of most Arab states (Algeria, Bahrain, Egypt, Emirates, Jordan, Kuwait, Morocco, Sudan, and Tunisia). Some constitutions forbid the revision of this article, such as that of Algeria (Art.178), for example. It is this author's view that declaring Islam as the official religion does not raise problems as such. The only question that arises is whether, under such constitutional provisions, all individuals can enjoy freedom of conscience and religion. In fact, the reference to a religion of state is not particular to the Arab or Muslim world; until very recently, some western democracies declared Christianity or a particular confession as the official religion of the state, without necessarily infringing the sensibilities and rights of others. On the other hand, Arab states have shown different ways in assimilating Islamic principles, de-

pending on their particular geographical, historical, and political context.

The problem, in fact, lies elsewhere. In the last few decades, a growing tendency to return to *shari'a* in Muslim and Arab legal systems is accompanied by a particularity: it is not *shari'a* as presented by *ulama'* (Muslim experts in religion-related affairs) but as imposed by the state; accordingly, there are now *shari'a* systems as much as Muslim and/or Arab states. In fact, most Arab states refer to *shari'a* as a/the main source of legislation. Others refer also (such as the Algerian and the Jordanian) or exclusively (such as Syria) to the religion of the Head of State as Islam.[111] The substance of the problem remains unresolved: which is the supreme law: the constitution or *shari'a*? In other words, in the case of a contradiction (in relation to women's rights, for example), what should prevail, the constitutional provisions or *shari'a?*[112]

The main question that arises here is the following: is Islam a religion, a state or both? Apparently, two options are possible: first, Islam is only a religion, as presented by 'Ali 'Abd al-Raziq, Khaled Muhammed Khaled, and Ibn Badis; second, Islam is religion and state, as presented by Shaykh Muhammad Bakhit al Muti'i, Hasan al-Banna (founder of Muslim Brotherhood in 1928), and 'Abd al-Qadir 'Awdah. The first approach wanted religion to be free of political manipulation; the separation between the religious and the political was intended to protect religion. This position was rejected by the others, who considered Islam to be a way of life.[113]

The idea of Islam as religion and state developed further, arriving at a radical position of calling for the establishment of an Islamic state ('Abd al-Karim al-Khatib, Taha 'Abd Baqi Suru, Muhammad Yusuf Musa, Muhammad al-Mubarak and Yusuf al-Qadrawi). For them the Islamic system is unique: it is neither theocratic nor monarchic, it is merely Islamic. Regarding the form of government, two positions developed: some believed that Islam does not impose a form of government that is well-defined and detailed (such as al-Mubarak); while others believed that Islam should serve as the basis and the pillars of such a government (such as Taqi ad-Din an-Nabhani and his *Hizb al-Tahrir al-Islami* or Islamic Liberation Party).[114]

Maybe there is a middle ground between the two extreme positions of 'Abd al-Raziq, who reduced religion to the realm of spirit, pushing politics away from its domain, and that of al-Banna, who strived for the restoration of an Islamic state and the Caliphate. The former considers Islam as only a religion while the latter considers it as a religion and state; the latter was the solution presented by those who predicted a legislative role for *shari'a* ('Ali Abu al-Futuh, 'Abd al-'Aziz Jawish, 'Abd al-Razzaq as-Sanhuri). Sayyid Qutb (1907-1966) refused such moderate solutions. His radical position is also expressed by Yusuf al-Qardawi who presents the ‚Islamic solution': the establishment of an Islamic state based on pure Islamic rule, which takes Islamic law as its „*one and only guide*" and „*reference*" for all its rulings.[115]

With time, the idea of a legislative role for *shari'a* became further diffused. In 1939, the lawyer Ahmad Husayn called for the revision of constitutional laws in the light of Islamic *shari'a*, maintaining that Islam is the source of legislation. In 1940 the Iraqi 'Abd al-Rahman al-Bazzaz condemned those who dispel *shari'a* from the constitution of their country. He confirmed the doctrine that Islamic legislation is open to evolution and does not deny canonical change. 'Alla al-Fasi, the historic leader of the *Istiqlal* Party in Morocco, agrees in general terms with the thesis of al-Bazzaz. He condemned 'Abd al-Raziq, since religion cannot be put outside the domain of socio-political life, for such a separation would imply the estrangement of the „highest ideal which Islamic *shari'a* lays down for the people" and that is the „realization of the divine will to build life on this earth and achieve justice among people."[116]

'Abd al-Hamid Mutwalli discussed these when considering the controversy of Islamic *shari'a* as the main source of legislation or among others, just a source of legislation, in the Egyptian Constitution.[117] For him Islam contains the general basis for a ruling system in the state (he does not agree that Islam is only a religion, nor is it a complete ruling system). For him, Islam is a religion and a state, without a specific system of government. Some went further by presenting a kind of humanistic Islam, as appears in the writings of Muhammad Ahmad Khalafallah *The Koran and the State*, (1973), and in Muhammad 'Amarah's *Islam and Religious Power*. Both agree that Islam does not adopt the idea of a specific political government, and both believe that government is the realm of people; they called for a distinction – not separation – between religion and state. Furthermore, they both propose that the state is national in nature, committed to the rulings of *shari'a*, but in the human field,

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111 The Constitution of Lebanon, because of the unique relations between the communities, makes no reference to Islam

112 This is in substance what justifies such a paper: who has the supreme powers? Who or what is the source of authority? This question needs to be clarified especially in case of constitutional review.

113 *See* Fahmi Jadaane, *Notions of the State in Contemporary Arab-Islamic Writings, in* THE FOUNDATIONS OF THE ARAB STATE 112-148 (Ghassan Salamé ed., Croom Helm, 1987).

114 *See id.* at 128-132.

115 *See id.* at 139.

116 *Id.* at 140-141.

117 *See id.* at 141.

where legislation is effected through the will and power of the community.[118]

For them, religious questions are a divine matter in which human beings have no say. Worldly questions, on the other hand, such as the policies of the nation, are delegated by God to Muslims. This means that, „He has given us full freedom and independence in our worldly affairs and social interests."[119] The legislative council would be elected by the nation and would act freely; but its authority would be limited to worldly affairs. These affairs include the choice of the head of state, who should be elected and not appointed. 'Amarah's main concern was to separate political power from that of religion, thereby stripping the ruler of the sanctity and infallibility implied in endorsing religious power. The real Islamic attitude, in 'Amarah's opinion, is that a separation of religion from the state is to be rejected as much as a union between religious and political power.[120]

### 3. Conclusion to Part two

In the final decade of the twentieth century, and mostly due to the collapse of the Soviet Union, 29 new countries gained independence and became states. Up until 1990, there were 159 member states of the United Nations (U.N.). After the independence of East Timor in 2002, the number of member states rose to 191; this means that there was a 20% increase in 12 years. This vast number of new states gave constitutionalism renewed significance and importance.[121] Modern constitutionalism exhibited a new characteristic: there is a kind of transfer of constituent power to international organizations or actors, leading to a kind of ‚internationalization' of constituent power that is related to another phenomenon that we may call the ‚constitutionalization' of international law. In fact, international legal commitments that contradict constitutional law necessitate the amendment of the constitution. This places an increasing demand on states to apply international law in their internal order, which would give it a constitutional value.

The interference of international law in questions related to constituent power can be related to the amending power,[122] or to the framing power itself. The internationalization of original constituent power, surprisingly evolving since the second half of the twentieth century, can be total or partial. In the first case, it means that the elaboration process of the constitution is entirely left to international actors; the same constitution forms part of an international

treaty.[123] The partial internationalization of original constituent power can be the result of a treaty or an act of international law,[124] or simply that of a de facto situation.[125]

Different examples show that international intervention and interference in constitution making as part of state building or re-building show that the Arab world is not distinguished from other countries of the world in this renewed phenomenon of constitutionalism with its characteristic of being partially internationalized. The Palestinian case shows how liberation movement has ended up, within the vision of ‚two states', endorsed by the Security Council by institutionalizing itself in a quasi state form. A Basic Law was first necessary to rule and separate the three branches of government in the transitional period, but also a draft constitution was prepared as a step towards statehood. This constitution–making process attracted international support and interest.

States and international organizations become central actors in constitution-making, while the people entitled to sovereignty also remain, at least theoretically, entitled to constituent power, and adopt the constitution in toto. The people are ‚free' to accept that constitution together with the political and economic system it represents. This legal fiction is necessary since popular adherence is also necessary to ensure the provision of legality for that text, and also its legitimacy. The internationalization of constituent power means that this supreme national act is not, and cannot be, exclusively a domestic issue. There are many examples of the internationalization of constituent power. Now, rich and ‚democratic' countries may confuse the indispensable Constitutionalism of new born states (or old, but changing

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118 See id. at 142-143.

119 id. at 143.

120 See id. at 143, 146-147.

121 See Venter, supra note 35, at 9.

122 It is enough to notice the limits imposed on the amending power in modern constitutions.

123 Here, International intervention in constituent power is total, although sovereignty may not always be contested, such as the case of Bosnia-Herzegovina in 1995, or it can be considered as a preamble to the effective exercise of sovereignty, such as the case of Trieste in 1947, and Cyprus in 1960 and more recently the example of Kosovo in 2001. See Nicolas Maziau, L'internationalisation du pouvoir constituant. Essai de typologie: le point de vue hétérodoxe d'un constitutionnaliste, in REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 106, 549-579 (2002/3)

124 Here we may distinguish between: i) Territories that were being granted independence, and which the international community had judged opportune to decide their self-determination (Palestine in 1947, Namibia in 1990, East Timor in 2001); and ii) States that in a specific moment in their history, found themselves obliged to put their sovereignty under custody. This is the case of Cambodia in 1991 and Macedonia in 2001. See id.

125 The classical examples are those of German Federal Republic and Japan after World War II. In this case, the winning powers (USA, France and the United Kingdom in Germany; USA in Japan) controlled the Constitution-making process, and imposed new Constitutional norms in a regime of occupation; less pressure was made on Italy, in relation to the exercise of constituent power. Most recently a similar scenario, mutatis mutandis, was repeated in Afghanistan and Iraq. See id.

countries), with the imposition of a particular constitutional model. Their foreign and cooperation policy may be partially determined by the adherence of new and weak states to such a model. The risk here is to suffocate the local population, its particularities and its culture. This may have a boomerang effect, with negative consequences, even as far as complete rejection, since the constitution may be considered as an outside product.

In fact, nations, which are formed by human beings, have their individual history and the state should respect this, since it is never born *ex nihilo.* A state is born of a people who may have their own history, language and culture, and the state structure and its institutions should, inevitably, reflect these. Nevertheless, once a state exists, it should not use these elements to discriminate against citizens who are not part of its cultural heritage. The real challenge of contemporary states is their being *multi* in terms of nations, cultures, languages and ethnicities, that live within their borders. The constitution may create the common tent under which all citizens take shelter. All constituent groups and individuals should be able to consider the state as their own and should be able to identify with the constitution in order to preserve the unity of the state.

However, as important the character of the constitution as a written text may be, its lasting authority depends on the persistence of its authors' authority. Constituent power remains inherent in the people, which may be achieved through mass mobilization, peaceful or bloody, and should result in the enactment of original constituent power. The examples here are multiple including the Rose revolution in Georgia in November 2003 and the Orange revolution in Ukraine in November 2004. The role of international actors and states was decisive in making these popular uprisings succeed and in obtaining the changes towards democracy. To some extent it is also the case in the Cedar revolution in Lebanon in February 2005, following the assassination of Rafik Hariri. In these three revolutions, the Lebanon case is unique since it is the only (personal) federation and the only Arab state. Besides, it was the only revolution against outside interference in internal affairs, rather than against electoral irregularities or regime oppression. The challenge was how to implement the changes, without returning to a civil war nightmare. The pacification of the different communities that constitute the Lebanese nation was possible, thanks to the *Ta'ef* agreements which guaranteed a pact between them.

Things are different when changes are made following a military intervention. The case of Iraq may provide an example, in which a lot of importance is given to the constitution, in order to create a system that reflects the reality on the ground and represents all the communities, ethnicities and religions in Iraq. This is not an easy task in a country that was governed by a dictator for decades, and in which national resistance to occupation is manipulated and confused by religious fanatics. The risk here is that the local population may consider this as a product of the U.S.A., a one-size-fits-all product.[126]

*General Conclusion*

This analysis has many limitations; it does not pretend to be exhaustive although many points on the subject have been covered. The breadth of the study means sacrifices in depth. Besides, the fast development of constitutional and international laws proves that the conclusions of this paper will – and need to – be relative in the light of new experiences, since they reflect the understanding of the development of a state itself, and the way it intends to conduct its relations with others.

The most important development of the last century was to discover that the state has no originality or sovereignty in individual and group rights, consequently, modern states ended up admitting that they may have their sovereignty limited in certain areas, since fundamental rights and freedoms owe their existence to a source that is outside the state. This source has nothing to do with an ideal imaginary city, but concerns individuals. The *raison d'être* of states was to protect humans from the violence of others, from their animal instincts and evil tendencies. These same states ended up by repeating the sins of their creators; like any social organization, the state also has a tendency towards evil. The modern state's first enemy is itself; if left to itself, the paradise of a state's legality may end up by being worse than the chaos of its absence.

The twenty first century began with discourses of hatred and vengeance. Groups and individuals took initiatives which jeopardized the security apparatus within the state. New methods have to be found to combat them, since citizens need urgent answers. As usual, erroneous solutions are the easiest: wars are conducted in the name of God, human rights and/or democracy. Wars are being presented as humanitarian. In this context, genuine humanitarian efforts find it difficult to prove their (political) impartiality.

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126 Different interrogatives remain to be resolved: The role of the constitution in accommodating ethnical, religious and national diversities; the adaptability of the federal system in Iraq; the relationship between religion and state in the new Iraqi state; the role played by states and international organizations in the process of constitution making especially with the coalition military presence, led by the USA; the way the constituent assembly was composed and the way the constitution will be adopted; the delicate balance between internal and international legitimacy.