The Role of the Constitution in the Arab World

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Introduction

Most modern states have adopted written and rigid constitutions. A constitution presupposes the existence of a *constituent* power, as distinguished from other *constituted* powers, created by the constitution itself.[1] Since a constitution is the highest law in the state, constituent power invest in those entitled to sovereignty. To close the vicious cycle, most constitutions provide that those entitled to sovereignty are the people, and consequently, 'the 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 each other (Preuss 1994, 148).

For Arab nationalists, the (Arab) nation exists as a human group with its own characteristics, such as language, history, and traditions. Attempts to unify Arabs in one state ended in failure, and Arab nationalism began to co-exist *with* and *within* Arab territorial states. The ethnic concept of nation initially helped to justify a revolution against other Muslims (the Ottomans), but it was unable to distinguish individual Arab peoples or justify territorial Arab states. What makes a Jordanian different from a Palestinian, a Lebanese from a Syrian? Adopting the concept of nation that covers all citizens living under the same laws and within state borders, became unavoidable.

The relation between Arab nation and a single 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. Since there is *no unique* Islamic or Arab state that contains *all* belonging to Islamic or Arab *umma*. Rather, they need to deal with territorially defined states. Besides, in contemporary Arab states, there is a partial return to *shari'a* and an increasing reference to *Islam* as justification for the state's authority, from one side, and its rejection from the other, made respectively by state apparatus and by fundamentalist groups.

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[1] Constituent power is the authority to frame or amend a particular text, which is superior to other laws and known as the constitution. What distinguishes framing power from amending power is that the latter changes the constitution in ways provided therein, while the former amends it outside the existent constitutional framework.

In contemporary Arab states, the relation between Islamic *umma*, Arab nation and the Arab people as a single whole is becoming increasingly problematic.[2] Those tensions are highly reflected in constitutional texts.

In modern times, most states have written constitutions in which they declare that sovereignty belongs to the people. The Arab world witnessed a development in relation to constitutionalism, and the constitutional movement continues to the present day. Nevertheless, constitutional texts are often misleading since they often do not coincide with the reality. There is a need, in fact, to study the constitutional text in light of enforced and applied legislation in every Arab state.

1. CONSTITUENT POWER vs. THE NATION

If a constituent power is the power to frame and to amend a constitution, we need first to define what a constitution is. The constituent power takes us back to the authors of the constitution and its legitimacy: the people;[3] now, the word 'people' has not always a common understanding; different approaches are possible and will be presented here.

First, a Constitution Presupposes a Constituent Power

There are two different 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

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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) refers to the power of the people. This is only an apparent solution, since the main question remains: who has supreme power? For Maudoodi and his followers, no human being has power to transgress God's will.

[3] There are two doctrinal approaches of the Constituent Power: the *first* proposes a formal criterion of distinction that is represented by positivist authors such as Raymond Carré de Malberg, while the other proposes a material criterion by such as Carl Schmitt and recently, Olivier Beaud. The positivists distinguish between framing power and amending power by the form: if it is enacted outside a constitutional framework it is 'original constituent power', while it is a 'derived constituent power' when it is enacted inside a constitutional framework.[3] On the other hand, the non-positivists distinguish between the two concepts by their objectives: if it changes the constitution or the national sovereignty of the people, it is a 'constituent power'; otherwise it is an 'amending power'. Opting for this or that approach had direct implications on the way constituent power is conceived.

and the principal functions of the organs of the state, and declares the principles by which those organs must operate (Wade & Phillips 1977, 1-5).[4]

The American and French model of written and rigid constitutions was adopted by states worldwide; 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 consequences (Esmein 1927, 607). Some others went further by considering the constitution as a limit to the sovereignty of the parliament through its subordination to a superior law (Avril 1994, 299). 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 powers, which are separate and not necessarily hierarchically graded, then a constitution is necessary to limit those powers and establish the relationship between them.[5]

Second, a Constitution *of* and *for* a nation

Authors used to distinguish between the term of 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 (Töpperwien 2001, 4-5). When a nation substitutes the people as an element of the state, we have a nation-state.[6] 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*. But, what if the people as demos do not concur with the people as ethnos? What is, then, 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).[7]

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[4] 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 (*i.e.* a comprehensive system of government) but it may not have a constitution in its formal sense (one document declared to be supreme).

[5] 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 (Carré de Malberg 1922, 541).

[6] 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 (Vatikiotis 1987, 35).

[7] 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.

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 concept of nation determines the interpretation we give to the constitution.[8] 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 they have submitted themselves for the king. The submission itself is a civic 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 become a people, for that act, being necessarily antecedent to the submission to the king itslef, and is the real foundation of society (Preuss 1994, 161). Some modern constitutions express this fact, in the same constitutional document indicating that "*We, the people of... adopt the constitution*". Nevertheless, there is not always a common understanding of that 'WE', especially in divided societies (Lerner 2004, 2). 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 of contemporary new states.

The problem here is to understand whether a constituent power will necessarily reflect a pre-existent identity or is it a political organization of a society (Lerner 2004, 6,7,9)? 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 the following: is there any connection between the constitution and the collective who holds the constituent power?[9] If 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. The constitution shall be considered by the majority of the polity (as individuals or as groups - ethnic, religious, linguistic…) as being *their own* and

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[8] 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 (Preuss 1994, 145).

[9] 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 (Lerner 2004, 13-14).

they shall *identify themselves* with the document. In other words, the importance of the constitution does not lie in its expression of political identity, but rather in its ability to transform it into a civic one (Lerner 2004, 12, 16).

Third, the constitution shall reflect the 'We the people'

Modern constitutions are at the hierarchical apex of normative texts. They are distinguished by 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 shall inevitably reflect the state's geographical and historical dimensions. A constitution is inevitably related to those entitled to sovereignty since it is the highest expression of self-determination. Accordingly, constituent power is related to a people, but its enactment has no existence outside a state; it may be argued that the process of constitution-making can start much earlier, but 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. Now, the people here express the totality of citizens and not the concept of nation covering a multitude of individuals that have common identity and are engaged in common political actions. The relationship between constituent power and people is not pacific; it depends in fact, on the meaning we give to the concept of nation. This relationship is much less conciliatory when there is no common agreement over the concept of 'We the people', referred to in the constitution.

The problem of the entitled to constituent power becomes much more complicated since it is related to another two questions: the question of limits and legitimacy. In fact, many authors determine the limits in the light of pre- existing elements such as culture, ethnicity, religion… these elements 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 making part of the people and living in the territory where the constitution is enacted, shall consider it as their own.

2. Dilemmas of Contemporary Arab States

Arab rulers had often used religion or Arab nationalism to justify their power; nevertheless; modern Arab states undergo the most serious and dangerous crises for their stability and very existence, and the threats come from within. In fact, one of the salient questions in contemporary Arab states is to understand how the state's apparatus can pretend citizens' adherence or at least obedience.

First, *umma*, *sha'ab* and *dawla:* what are we talking about?

The terms nation, people and state are often confused.[10] The same confusion occurs in Arabic terminology. The concept *umma* (translated as a 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.

In his book (*Az-Zahir fi ma'ani Kalimat an-Nas),* Ibn al-Anbari notes that the term *umma* (nation) occurs in eight different senses in Arabic. Some of these meanings are: a community or a group of people; a religion; time… In addition, the terms nation (*umma*) and mother (*umm*) prove, by virtue of their same linguistic root, that 'nation' is an extension of one's family – indeed it is the bond of brotherhood *par excellence* (Bensaid 1987, 150, 176).

In the *al-muheit* dictionary the term *umma* means a group of people (*nas*) united by common land, language, tradition, interests, emotions and aspirations; Accordingly, the Arabs would be considered as one complete *umma* although they may be distributed in different states, each holding its own political independence. Almost the same definition is given in the *al-Ghany* dictionary, where it is mentioned that it is used to indicate the Arabic *umma* and the Islamic *umma.* The same term is used in the plural: *umam* to indicate for example the United Nations. While the word '*sha'ab*' in the *al-Ghany* dictionary, means a group of people (*nas*) united by common liaisons and speaking one language. Here the concept of *sha'ab* is not distinguished from *umma.* The only difference is that *sha'ab* can be used to indicate distinct Arab populations (thus, it can also be used in the plural) when referring to all Arab people considered as a single entity, while the concept of *umma* can be used only in the singular and in reference to the Arab nation as a single unit.

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[10] For example, the charter of the United Nations (UN) provides a good example: "we the *peoples* of the United *Nations*…" while the organization membership is limited to *states.*

By contrast, the semantic field of the term *watan* (fatherland, or *patrie,* in French), is much narrower than that of the *umma*. According to Ibn Manzur, *watan* is "*the house in which one lives; one's residence or native place*", while the word *istawtana* means "*to settle in a country*" (Bensaid 1987, 151). Nevertheless, this association is totally refuted by fundamentalist authors. For them, there is no connection between *watan* and territory. According to Sayyed Qutb, "*the fatherland of a Muslim ceased to be a portion of land. Instead, his watan became the home of Islam, the land in which Islam and Islamic law are the sole authority*". Sayyed Qutb considers that a "*Muslim's watan is not a piece of land, and his nationality is not that of a government*" (Bensaid 1987, 172,173).

Nevertheless, in contemporary Arabic, the use of *watan* reflects an evolution to the concept of 'state' in the Arab and Islamic culture. In fact, the term *watan* is a return to a certain people living in a certain territory, and to consider them as the only source of legitimacy and power. This same notion was used then, to justify the rebellion against Turkish occupation, even though the occupier professed the same religion as the occupied. Likewise, it was used to justify the rebellion against western colonialism under the mandate. It is clear that the concept of nation here switched to its civic dimension; the people are "*equal in rights and duties in front of their watan*" (Bensaid 1987, 153, 163-164). The totality of these citizens constitutes the people.

Second, the 'original sin' of Arab States' creation

According to some authors, the concept of state is *alien* to Arabs, since originally they were a tribal society, not citizens – they were only kinsman united by blood ties Vatikiotis 1987, 19). This idea is largely taken by authors, who considered the Arab territorial State as a phenomenon created in Europe (Korany 1987, 48). Some others went further by considering some of those states (mainly in the Fertile Crescent), were shaped after the end of the Ottoman Empire, as artificial (Ghalioun 1991, 24). As far as the boundaries are concerned, one can agree that external factors predominated in the territorial definition of some Arab states (Salamé 1987, 6); 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 state, how can foreign origin explain its consolidation and supremacy (Korany 1987, 73)?

In modern times, the debate over the 'original sin' - to quote Ghassan Salameh - of Arab state creation has never ceased (1987, 3). According to Burhan Ghalioun, the *state* became the core of the debate over nationalism (1991, 53). By tracing the origin of various Arab states, Iliya Harik, proves 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 (Salamé 1987, 5-6). Furthermore, territorial Arab states are not the embodiment of the oriental or Islamist state, but rather, as confirmed by Ghalioun, they are the reaction to or fear of archaism in the Arab world. Arabs in fact felt the necessity to adapt themselves to the new world order (1991, 53-66).[11] In fact, Arab states are becoming increasingly entrenched and naturalized. Nevertheless, the growing strength of fundamentalist groups at present is a continuous reminder of the precarious status of the state system and secularist trends (Harik 1987, 20).

Third, Arab states against Arab nation

Nationalism has invaded Arab mentality but it has not been met with a clear definition of where the nation is (Salamé 1987, 4). Here too, different approaches are possible: Pan-Arabism defenders refer to Arab nation whilst Islamists talk about the Islamic *umma;* meanwhile, territorial nationalism is developing and territorial belonging is being consolidated. These positions coexist in the Arab world but the conciliation between them is not an easy task. The situation may be explosive in terms of the cohesion of communities forming Arab states.[12]

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 (Harik 1987, 20,21). Not only this, Arab nationalists insist that the Arab nation is the only true nation, either in Sati' al-Husri's rather assertive way or in 'Abd al-'Aziz ad-Duri's 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 (Encyclopedia 2001, 498).

This nation is based on the same unified culture that was generated from language and religion throughout the ages, which bequeathed a sense of collective identity trends (HARIK 1987, 20). 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

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[11] Those who do not share this view may at least assess the extent to which these internationally recognized countries have taken root in the hearts and minds of their inhabitants (Salamé 1987, 3).

[12] 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.

population believes that it constitutes one, and not according to the increment or reduction of numbers; for 'Aflaq "*a nation is an idea, a matter of will*" (Bensaid 1987, 166-167). Most Arab leaders subscribed to Arab nationalism, a reference to which is made in most constitutional texts. 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 nationalism (Encyclopedia 2001, 385, 488).

Nowadays, Arabism is taking a different course: rather than an appeal to construct one single state, a reference is increasingly done 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 regionalization mania in all over the world. In fact, the state is losing part of its sovereignty in favor of supra-national and international entities and organizations. Many experiences show that such collaboration between states was the source of mutual development. In those terms, the unity of Arab states can be envisioned and encouraged (Korany 1987, 55) always considering the territorial and cultural particularities and requirements of Arab populations.

Fourth, Return to religion 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 genesis. Today, Islamism seems to enjoy the vigor that once marked Arab nationalism. In fact, one of the most salient features of contemporary Middle Eastern politics is the resurgence of political Islam (Eichelman 1987, 200). Many call this phenomenon 'Islamic nationalism' while others consider it more anti-nationalism (Harik 1987, 20). 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 (Bensaid 1987, 169-170).

Nevertheless, as Hasan al-Banna puts it: "*Islam does not recognize geographical borders 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*" (Bensaid 1987, 171). At the same time, al-Banna shows an interest in the principles that direct a constitutional government since they correspond with Islam (Bensaid 1987, 170). 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*"* (Bensaid 1987, 171).

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 (Salamé 1987, 5). Moreover, Islam distinguishes between the land of Muslims and that of non-Muslims, the first being called *Dar-es-Salam* (abode of peace)*,* whereas non-Muslim political entities represented *Dar-al-Harb* (abode of war) (Korany 1987, 57). 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 reigns over Muslim as well as over non-Muslim citizens who enjoy protection by paying Jizya*" (Bensaid 1987, 151-152)*.*

Fifth, why Early Islam Seems Attractive?

Is it necessary to refer to early Islam in order to understand contemporary territorial Arab states? Is it really crucial to make reference to Arab cultural 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 for us it is not, since we notice certain nostalgia to this period of Islam in some groups. Such groups may dedicate concerted political efforts to restore 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.[13] 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 of 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

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[13] It is not the intention here to present or to analyze the political system and power in early, Islam since it is an extensive subject and not of direct interest here. Reference is made to early Islam as predicated by some fundamentalist groups who regard the past with nostalgia, and work towards the realization of an Islamic state similar that of early Islam.

be appointed by mutual consultation of the Muslims; the Caliph or the Emir is to be obeyed unreservedly in whatever is right and just (*ma'rŭf*).

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 (Sharif 1963-1966, 659). 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.[14]

Many problems arose from a historical discourse when applied to contemporary times:

First, most Arab and Muslim countries had adopted a constitution and declared the people as sovereign; what Maudoodi had 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* (Vatikiotis 1987, 31). 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 games' rules

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[14] There seems to be a hidden message behind all the writings of Maudoodi. As he said: 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 still, it is exactly the way we –or I- predict or present it. The real problem with these groups – and all religious fundamental groups in general- is that they pretend to the exclusiveness to 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 put into question. Nevertheless, there are many situations that need an answer that may not be directly mentioned in the Koran nor in the *Hadith*. What should be done, then? 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'is* for example) and the multiple Islamic sects that developed throughout, history complicate this task. Accordingly, it would be preferable to speak about multiple Islamic concept, and a multiple *shari'a,* 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 place), and as such need interpretation and explanation; but, these people are human beings, and as such, not infallible. Their view may then 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.

necessary in every social organization. What is the supreme law of the land? Shall the *shari'a* have a super-constitutional value? If so, how can the constitution be the supreme law?

Fourth, the authority is entrusted by God; if a governor misuses it by contradicting the *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'rŭf*); the problem here is that justice or rightness remains a general concept which does not reflect the necessarily a precise content.

Sixth, Arab Culture and popular Sovereignty: Any Compatibility?

According to some authors, the distinction between secular and divine rule that occurred in Western Countries led to a modern realistic approach towards politics while a similar rupture with medieval philosophy did not occur in the Arab tradition. This absence led to a 'quietistc acceptance' of non-democratic governments by the citizens of Arab countries (Butterworth 1987, 91-92). In fact, 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.[15] This was possible in a context of (first partial then complete) separation between Church and State. This is true. Nevertheless, the consequences of these Revolutions are not limited to western countries: the establishment of

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[15] 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 (Töpperwien 2001, 28). Interesting to note that some Arab countries adopt Rousseau's vision in their constitution, such as that of the 1996 amended Algerian one which states in article 11 that "[t]he State takes its legitimacy and its *raison d'être* from the People's will. Its motto is "By the People and for the People". It is exclusively for the service of the people".

modern states and the dispersion of nationalism and theories of popular sovereignty all over the world are convincing proof.

However, 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 changed only the way sovereignty may be exercised and the new system of checks and balances between different powers of the state.

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 American and French revolutions in terms of fulfillments, 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 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.

In fact, new theories of state's legitimacy started to appear in the Arab world. 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 to justify their authority within, and to the outside world.[16]

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.[17]

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[16] 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 albeit Muslims, while Arab territorial states justified their territorial autonomy and independence through the concept of popular sovereignty.

[17] The problem is that there is sometimes confusion between religious commandment and religious law, two concepts that always have to be distinguished in order to avoid an amalgam and misunderstanding (Filali-Ansari 2003, 7-8).

Some may advocate that popular sovereignty were asserted in the Arab world mostly against colonialism; overall, mostly as a group's self-determination rather than individual self-rule (Butterworth 1987, 91-92). This is true, but the debate regarding the content of popular sovereignty and its relationship to individuals has never stopped, even in Western countries themselves.

Seventh, from government by *kuwwa* to governed by *kanun*

The authority of Arab rulers is often put under question; to maintain their power, they may have the tendency to govern by kuwwa (force) or by *mal* (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 convincing capability 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'. Authority* has connotations related to *legitimacy* since it is transcendent to *power*, which is related to the exercise of specific function, having connotations related to *legality*. Now, 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 way of government, based on popular will and the respect of law, started to invade the Arab world only recently, although it has been expressed in constitutional and legislative texts for a long time. The answer to Arab legitimacy crisis passes through the reconciliation of Arab countries with themselves; there is no solution made in USA to this effect. The return to origins may be helpful towards the Arabs' reconciliation with their history, but also in looking forward to the future. To do so, harmony with what is expressed in the constitutions and the reality, shall become a priority. In which case, for the same existence of Arab states, it is no longer sufficient to govern by *kuwwa* or *mal* (that are intrinsically related)*,* nor can the rulers justify their power eternally 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.

For some, Islamic fundamentalism fills the gab left by modern states' legitimacy crisis. This a simplistic analyses of the phenomenon of religious fundamentalism that is not the exclusivity of specific religion. The challenge is not to eradicate it but rather to provide an alternative. The return to religion to find solutions to social and political problems is the most natural human phenomenon: in front of impasses, humans return often towards God. Without finding an alternative, the problem is not resolved but maybe postponed. Combating fundamentalism without resolving the real problem related to the legitimacy crises of the state, incapable to provide development to its citizen, will give more popular credence to the reasoning of fundamentalist groups who consider religion as *the only* solution to justice's, morality's and equity's deficiency.

3. Challenges of modern constitutionalism in the Arab World

Modern society is characterized by the drafting of many new constitutions and of certain similarities between them.[18] Modern constitutionalism had a characteristic: there is a kind of transfer of constituent power (framing and amending) to international organizations or actors. The 'internationalization' of constituent power is strictly connected to another phenomenon: the 'constitutionalization' of international law. The constitutional movement began in the Arab world, and never stopped. 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 (Canal-Forgues 2000, VII).

First, the internationalization of constituent power

The internationalization of 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.[19] The Partial internationalization of original constituent power

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[18] 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, member states of the UN were 159. After the independence of East Timor in 2002, 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 (Venter 1999, 9).

[19] 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 may be considered as a preamble to the effective exercise of sovereignty, such as the case of Trieste in 1947, Cyprus in 1960 and more recently the example of Kosovo in 2001 (Maziau 2002/3).

can be the result of a treaty or an act of international law,[20] or simply that of a *de facto* situation.[21]

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 rest of the world countries in this renewed phenomenon of constitutionalism with its characteristic of being partially internationalized.[22]

Second, constitution-making or changing as part of legal reform in the Arab World

In the Arab world, constitutions may describe 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.[23]

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*" (Canal-Forgues 2000, X). This is also the case of other collections in which Arab constitutions have been studied as if they were identical (which they are not), in which we may find common features and some similarities, since they might have reproduced information from the same sources; nevertheless, every Arab state has its own constitution, and its own constitutional history. In recent history, reform made part of political agenda of Arab regimes: "law" changing was targeted but the legal change did not realize its objectives in terms of development.

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[20] 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 (Maziau 2002/3).

[21] The classical examples are those of Germany 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 (Maziau 2002/3).

[22] The Palestinian case show how a Liberation movement had ended up, within the vision of 'two states', endorsed by the Security Council by institutionalizing itself in a quasi state aspect. A BL was first necessary to rule and separate the three powers in the transitional period, but also a Draft constitution was prepared as a step towards statehood. This constitution making attracted international support and interest.

[23] 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.

To start with, we shall outline that there is no unique nation-state for Arabs but there are multiple Arab states; each state has its own history and consistency. Each had developed its own legal system; some may start a reform process but their priorities and timetables are inevitably converging. Nevertheless, there are common elements between Arab states (such as culture, language, religion…) but mainly, their modern history.[24] In contemporary Arab states, there is also a tendency to unification of legislative texts and legal procedures. This was possible (and here is a paradox) thanks to the attachment to territorial Arab states and the increasing diffidence towards appeals to *political* unity for Arabs in one state.

Some domains necessitated a complete reformulation in order to answer to international criteria, mainly in relation to economic requirements and governance in an always more globalized world. A determinant role is played by international organizations (such as WTO), agencies or programs (UNCTAD, UNDP), and by regional organizations (EU) or by states individually, through bilateral agreements and programs. A determinant role is played increasingly by non-institutionalized grouping of states (G7/8) or by simple forum of states and other actors (Davos). Besides, most Arab countries had signed and ratified Human Rights conventions, without necessarily rendering them relevant on the ground. Some may explain this by necessity to respect cultural (and religious) particularities.

Many proposals had emerged from the debate on the need for reform, from within and from outside the region, sometimes with contradictory priorities and others with hidden agendas. Nevertheless, the consensus over the necessity of reforms seems to be joined: the requirements of international community of open (liberal) economy and the demands of the civil society to achieve the promised development had ended up by convincing (some) Arab regimes to accept or encourage some political changes, although they are sometimes gradual and others simply formal.

The areas that necessitate urgent interventions are related to economic, social, and political issues; though, significant changes and major turning points all over the world and throughout history have had a legal dimension or legal manifestation. The deficiencies in those three areas will be presented with the legal framework necessary to run over them.

Economic and social development is often indicated jointly (socio-economic) and most Least Developed Countries (LDC) accumulate social and economic handicaps, but there is thin

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[24] In fact, all contemporary territorial Arab states have been part of the Ottoman empire –with exceptions regarding the degree of the autonomy of certain territories, mainly in the last decades of the four centuries lasting empire- and most of them have been under European colonialism or/and mandate.

difference that had to be outlined. Economy, in fact, remains primordial for social development but the later does not depend exclusively on economy; in fact, economic development does not guarantee, *per se,* the social development. Many other elements are necessary, such as knowledge, education, employment, crime prevention, justice system, security, culture…

Under developed economy can be measured with numbers. The risky tendency here to adopt an exclusively economic approach to human development; in which case there is much more opportunity to fail since sustainable development does not depend exclusively on the performance of economy (having) but also in its correspondent social development (the being). Nevertheless, this underdevelopment does not depend necessarily in the resources or money; it does not depend neither of sophisticated international projects, which may be also very well funded and administered. Money can be there, international intervention also but there are many sectors (concern the society) that need to be involved.

The three areas presented before (related to socio-economic-political issues) represent a handicap for the human development in the Arab world. A reform process necessitates an intervention that distinguishes between those three levels without having necessarily a sectarian approach. *Reforms, as much as the handicaps are inter-related, need to be global.* This urgent intervention needs to be accompanied by three levels of legal accommodation that we want to call here for simplification: the law making, the law executing, and the law enforcement: In the first, a determinant role shall be played by the parliament, duly prepared through specialized committees and with possible consultation with civil society in direct or indirect ways. The feedback of the civil society shall be duly considered since laws first destination is the society itself.

Individuals but also their groupings are the first interested and concerned by the law; in fact, law is supposed to be the expression of their will, expressed directly or through representatives. The existing gab between law and reality express a deeper problem, that we can call 'an existential one', since law is no more considered as being *also* the expression of general will but rather as being *exclusively* the limitation of individual wills.

Law shall be conciliated with the reality, otherwise the law will loose its *raison d'être.* Here is the first level of intervention. There is a need for real representative institutions; otherwise there is a deficiency in democracy (that is not the equivalent of holding elections). Now, even when the competent authority is legislating, or changing the existent laws to adapt new realities, law remains a dead letter without being duly executed by competent authorities. The

role of government and the administrative apparatus attached to it, become primordial. Laws in fact express general orientations and have no vocation to regulate particular cases. It is then left to the executive the task to put those general enunciations (that is not the equivalent to vague, unclear or imprecise ones) in act. In case this does not happen, we have a non-accountable executive although it may reflect, nominally, representative system.

Law making and law executing are not enough, since those rights and obligations, based on legal texts, shall be protected by the judge and executed by the state who monopolizes the legitimate use of violence. The decisions of the judges shall not create new obligations and rights but apply the legal texts, approved and executed by legitimate authorities. A weak judicial system will force citizens to look for alternatives: parallel judicial like systems (such as the return to tribal customs). In case this happen, we will have a (nominally) democratically elected institutions with responsible executive but there is no Rule of Law.

<p style="text-align:center">***</p>

The following table expresses the different challenges that are facing the Arab states. This particular period may end up by radical changes or generalized instability; in both case, the consequences will not be delimited by the borders of Arab states themselves. The constitution shall be re-given its principle role that is to be the supreme law on the land.

# The demarcation of the Political compromise through the constitution

Left column labels (rotated):
- Chaos / international law — Outside any precedent legal framework
- Order ensured by state law and citizens adherence — Legality + Legitimacy — Legal framework
- Order imposed by the state by force — Lack of legitimacy — Law does not realize its
- Chaos: citizens refuse to apply the law — Lack of legality — Tendency to transgress legal framework

Row categories:
- Sovereignty — State — Citizen/s — State against the citizen/s — Citizen/s against the state

People — Entitled to — **Constitution**

| Self-determination. Struggle for independence: liberation movement | | Self-determination: state building, conflict solution, transition to democracy |

⬅ ... ➡

| *Legislative* | *Executive* | *Judiciary* | — Shall respect

| *Law Making* | *Law Executing* | *Law Enforcing* |

Human beings — Individuals / Groups

| Respect of their Identity | The realization of their Well-being | And the guarantee of their Freedoms |

Otherwise

From a tool of pacification, law becomes one of the reasons of conflict — **LAW looses its raison d'être**

Individuals and groups may feel the moral obligation to act in order to ensure the respect, consideration, and realization of:

Particularities: Culture, religion, ethnicity…	Human development: Socio- economic and political	Justice	**Legitimate objectives**
Ethnicitization of the conflict	Traffics (arms, drogues, humans)	Parallel judicial like systems.	**Illegal means**
Refuse diversity (return to origins: radicalism)	Reject material well-being (return to personal belief: new spiritualism)	Mistrust institutions (return to revenge: law of the forest)	**Risks of collateral effects**

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In this case, the enactment of constituent power may avoid such clash between individuals and groups. It may also avoid the dissolution of the state that is no more considered by those entities composing the state as their own but rather as their first enemy.

Conclusion

In modern times, the 'constitution' is considered as the most appropriate legal instrument to 'eternalize' a political compromise between entities composing the state. It is the guarantee of the respect of that 'pact' or 'social contract' to which individuals and groups adhere, in order to stop reclaiming rights through violence but rather to obtain them through law. Modern constitution is often conceived as the last act of a revolution. Besides, modern constitutionalism had proven that the "super law" is no more a purely 'domestic issue' although it is rightly considered as the first act (in terms of importance) of national or popular sovereignty. Modern Constitutions have the tendency to convert from a highly desired expression of self-determination to a highly rejected self (or rather, a pseudo-self)-limitation. Modern constitutions become the domestic legal instrument to 'impose' international conditions and limits. In this sense, the constitution becomes an instrument to impose on new-born entities wishing to make part of the 'club of states', a minimum of rules considered as the basis of the international community: the pacific coexistence between territorially defined states.
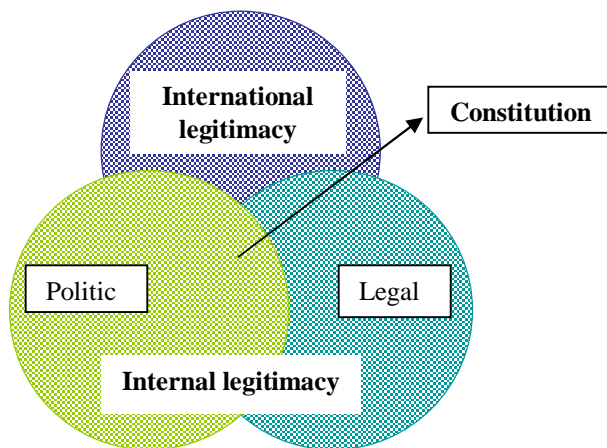
Nevertheless, the constitution remains a necessary tool for the nation to express its will but also for the individuals and communities within the state to protect themselves from the nation itself and from its expression, the state. There shall be red lines where the people (or their representatives) shall not transgress. Those red lines shall be enumerated in a text, with

particular legal sanctity 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).

For this reason, the constitution, the best expression of popular sovereignty, is at the same time its most serious limitation. The nation continues to be free to *will* but it cannot do that legally unless within the limits of the constitution itself. No changes in the legal and constitutional system are permitted, unless through the procedures provided by the same constitution. The constitution limits the popular manoeuvrability and institutionalizes it. This explains the presence of a (constitutional) judge who is supposed to ensure the subordination of the legislator to the constitution, and the (administrative) judge controls the respect of the executive to the spirit and letter of laws. Accordingly, the party on government shall not be tempted to change the basis of social cohesion and the basic rules of 'living together'.[25]

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[25] To notice that there is always a way to break up with precedent system (conceived in its broader since of making changes outside any constitutional limits), and this may happen in a pacific way but is most likely to be violent, through a popular revolution or coup d'état, or following a foreign intervention.

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