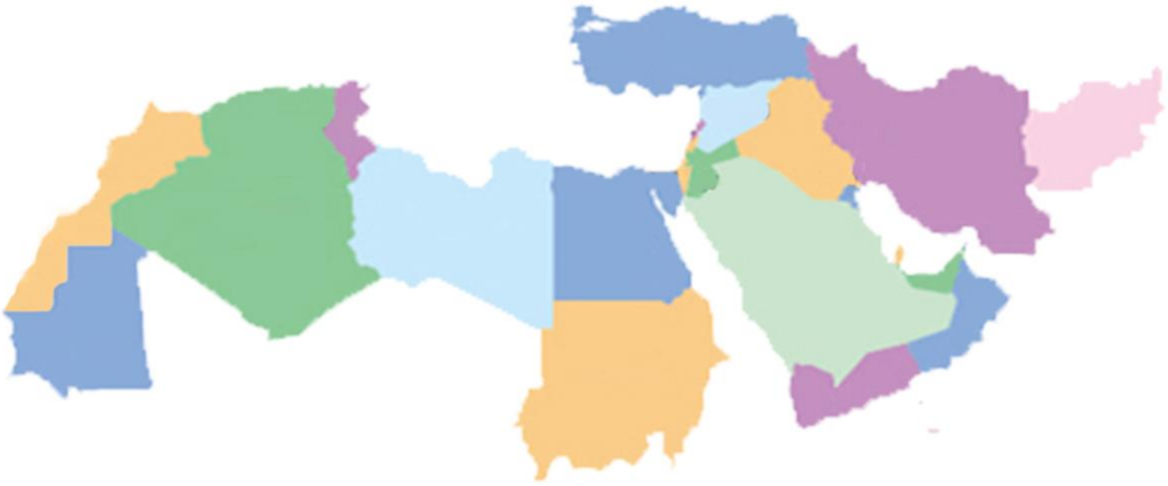
# Journal of Constitutional Law in the Middle East and North Africa

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The Arab Association of Constitutional Law

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# The Arab Association of Constitutional Law

The Arab Association of Constitutional Law (AACL) is the first regional network of constitutional experts in the Arab region. Founded in 2013, it aims to contribute to good governance and democratic transformation by encouraging the networking and exchange of expertise among the countries of the region. It aspires to provide objective and progressive analyses of the Arab constitutional frameworks and to support the legal and constitutional reform efforts in the Middle East and North Africa region.

AACL brings together leading legal scholars, judges, lawyers, parliamentarians, and civil society activists specialized in constitutional law, electoral systems, peacebuilding processes and human rights. A great number of the AACL members are prominent experts in constitution-building and have participated in the negotiations or drafting of the constitutions in the Arab region, including in Morocco, Algeria, Tunisia, Libya, Egypt, Iraq and Yemen.

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AACL endeavors to strengthen the capacities of constitutional researchers in the region through its annual Constitutional Law Academy (since 2015) and its specialized high-level working groups that bring together senior researchers, policy makers and specialists to discuss specific constitutional issues in countries that are undergoing constitutional transitions and to collaborate on joint research projects.

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# Editorial

We are very pleased to present the second issue of the Journal *of Constitutional Law in the Middle East and North Africa (JCL - MENA). JCL - MENA* is dedicated to encourage greater discussion and critical analysis of constitutional and legal developments throughout the Arab region. Featuring articles by scholars and practitioners specializing in the region, it is designed to facilitate access to information on the MENA constitutional issues and debates for the international community of practitioners and scholars in English and Arabic.

*JCL - MENA* is managed and edited by the Arab Association of Constitutional Law.

The second issue of *JCL - MENA* features five contributions. In the first article, Simona Ross argues that the multiplicity of legal instruments and the absence of constitutional legitimacy is rooted in the divergent aspirations among Libyans concerning the structure and identity of the state.

In the second article, Wissam Lahham examines the relationship between the Lebanese State and religious denominations. He provides an analysis of the civil nature of the Lebanese State despite many imperfections arising from the personal status laws.

The third and fourth articles raise the issue of religion and law from two different perspectives. Abdullah Abdullah discusses the influence of the Islamic Sharia on Arab constitutions and legislation with a particular reference to Qatar, Egypt and Lebanon, while Nabil Zegaoui focuses on the impact of religion on Morocco's constitutional policies through historical, cultural, political and legal lenses.

In the fifth article, Tarteel Darwish presents an in-depth analysis of the legal framework of transitional justice in Syria and Tunisia.

We hope this issue will have particular appeal to a readership of scholars and practitioners interested in the constitutional developments throughout the Arab region.

**Arab Association of Constitutional Law**

# Lost in Transition: Constitutional Legitimacy in Libya

Simona Ross*

ABSTRACT

At present Libya faces a dual legitimacy vacuum with its constitutional framework defined by a myriad of legal instruments that lack legitimacy, which in turn serve as the governing basis for institutions that consequently lack constitutional legitimacy. Reconciling these legal instruments under a single, coherent constitutional framework that enjoys legitimacy in the eyes of the people has proven challenging due to the diverging aspirations of different segments of Libya's society concerning the nature of the state. The roots of these divisions can be found in Libya's constitutional history, defined by short democratic and undemocratic constitutional periods, and in the formation of the modern state through the unification of the three historic regions, namely Cyrenaica, Fezzan, and Tripolitania. Throughout its history, Libyans were denied the opportunity to engage in a process of consensus-building on a common vision of the state. The adoption of clear transitional arrangements may provide Libyans with the dual objective of providing a single, coherent constitutional framework, while also granting them more time to forge consensus on a vision of the state that can be reflected in a permanent constitution enjoying constitutional legitimacy.

Keywords: *Libya; constitutional legitimacy; political transition; constitutional history; consensus-building; interim constitution; transitional arrangements; peace agreements*

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## INTRODUCTION

Libya has recently embarked on a renewed effort to foster peace and to conclude the transitional process. Since the 2011 uprising against long-ruling dictator Muammar Qaddafi, Libyans have led and engaged in numerous initiatives aimed at forging a sustainable political settlement and at reaching consensus on a permanent constitution. These efforts have resulted in the drafting and adoption of multiple legal instruments that served in one form or another as an interim constitutional basis for the state of Libya. However, all of these constitutional frameworks have in common that they lack legitimacy in the eyes of the Libyan people. In the present political context, it is unclear which of the many legal instruments serve as the guiding framework for Libya's governance arrangements, allowing the myriad conflict parties to promote the legal interpretations that best suit their interests. Determining the legal position of any new constitutional settlement within the existing web of overlapping legal instruments will represent an added challenge to a successful outcome of the ongoing political dialogue process. For any constitutional framework to be perceived as legitimate by a broad segment of society, it has to account for the competing aspirations of Libya's many constituencies. To realize constitutional legitimacy in the true sense of the *pouvoir constituant* principle, the constitutional framework must reflect the will of the people.

Ensuring that Libya's permanent constitution has legitimacy became ever more critical as Libyan parties announced that presidential and parliamentary elections will be held in December 2021. However, in the absence of a constitutional basis to underpin the elections, a preliminary agreement was reached in January 2021, according to which the constitutional proposal approved by the country's constitutional assembly in 2017 would be put to a popular referendum. Despite having been drafted by an elected and comparatively representative body and being based on long deliberations and compromises, the constitutional draft in its current design lacks broad buy-in. Another layer of complexity was added by the fact that the necessary procedural requirements for the facilitation of a referendum ahead of elections were not met and deliberations on an alternative constitutional basis for elections have commenced, which are defined by continued disagreement over core constitutional issues. For Libyans to build genuine consensus on common values and shared beliefs that ought to be reflected in a permanent constitution, they will require more time. The adoption of various legal mechanisms, including interim constitutional arrangements or a 'low-threshold' constitutional amendment procedure, could achieve the dual objective of providing a constitutional basis for the upcoming elections, while also offering a longer-term horizon for finalizing Libya's permanent constitution in a manner that genuinely embodies the people's will and identity. The constitutional basis that is being deliberated might represent such a transitional mechanism. Whatever legal instrument is adopted to serve as the constitutional basis for the elections and avenues taken to approve a permanent constitution, these mechanisms have to account for the centrality of legitimacy as a key pillar for both peace-making and constitution-building. As one observer notes, "[w]ithout a [permanent]

constitution, legitimacy in Libya will always be questioned, and therefore wars will continue because today's conflicts are based on contested legitimacies."[1]

Agreement on an election date and on the roadmap for the transitional period was reached within the framework of the Libyan Political Dialogue Forum (LPDF) launched in October 2020[2] – the third major United Nations-led initiative to bring peace to a country that has been embroiled in conflict since 2014 and experienced instability for almost a decade. Inspired by the aspirations of the Arab Spring that swept across the region in 2011 and that brought down authoritarian regimes in neighboring Egypt and Tunisia, Libyans took to the streets *en masse* in mid-February 2011 to call for an end to the Qaddafi regime. With the support of a UN-sanctioned North Atlantic Treaty Organization (NATO) intervention, the opposition announced the liberation of the country in October 2011. Earlier that year, on 3 August 2011, the National Transitional Council, which had formed the opposition and declared itself the *de facto* government during the transitional period, issued a Constitutional Declaration, which was to remain in effect until the adoption of a permanent constitution to be ratified by a popular referendum.

The 2011 Constitutional Declaration also laid out the steps for the next stages of the transition, most notably the election of a new parliament—the General National Congress, which in turn was to appoint a constitutional assembly tasked with drafting a permanent constitution. However, under pressure from a group of eastern stakeholders called 'federalists' who demanded a return to the 1951 Constitution, the National Transitional Council proceeded to amend the Declaration's framework for the constitution-making process. First, the provision regarding the composition of the constitutional assembly was changed to provide that the body would be composed of an equal number of representatives from the three historical regions of Tripolitania in the West, Cyrenaica in the East, and Fezzan in the South. A second constitutional amendment stipulated that the constitutional assembly would be directly elected by the people, as opposed to their selection by members of the Congress. The changes were intended to increase the constitution's legitimacy.

Despite successful elections to the Constitution Drafting Assembly in February 2014, which have been broadly described as fair and featured a comparatively high voter turnout—albeit marred in some controversy due to the boycott by some minority groups and significant insecurity in some voter districts[3]–the Assembly's work was disrupted with the emergence of conflict only months later. Disputes over the outcome of the elections to the House of Representatives that was meant to succeed the General National Congress, which were characterized by a very low voter turnout and insecurity, triggered an escalation of violence and effectively split the country into two. UN-mediated peace talks aimed at ending the conflict culminated in the signing of the Libyan Peace

[1] American Bar Association (ABA), In Search of lost legitimacy: The Constitutional Process in Libya 45 (2020).
[2] UNSMIL, The Libyan Political Dialogue Forum (2020).
[3] Carter Centre, The 2014 constitutional drafting assembly elections in Libya (2014).

Agreement in December 2015. The Agreement provided for a unity government and outlined mechanisms for joint decision-making between the House of Representatives as the legitimate legislature and the High Council of State—composed of remnants of the General National Congress, which was to serve as a 'consultative' legislative body. It also prescribed a revised pathway for the drafting and adoption of a permanent constitution. As discussed in greater detail below, the Agreement was to derive legitimacy and legal recognition through an amendment of the 2011 Constitutional Declaration by the House of Representatives—an endorsement it never received. Despite remaining in place and continuing to serve as the constitutional basis governing the internationally recognized unity government and guiding the political process, the Agreement failed to bring peace and divisions between the main conflict parties continue to represent a major obstacle to the adoption of a permanent constitution.

Since its formation, the Constitution Drafting Assembly has produced as many as seven constitutional drafts. Most were put to deliberations among all Assembly members and some were even printed for circulation among civil society groups and the public. These include the constitutional drafts of December 2014, October 2015, and March 2016, each of which failed to win the required support from a two-thirds plus one majority of Assembly members. Eventually, in July 2017 a constitutional draft was approved by the required number of Assembly members. It is this 2017 Constitutional Proposal that was supposed to be put to a referendum ahead of the 2021 elections. The Libyan Political Dialogue Forum also devised and agreed upon an additional legal instrument to guide the transition by complementing the existing legal framework. In accordance with this political roadmap, a Legal Committee was established to oversee the adoption of a constitutional basis for the upcoming elections. The Committee, together with two delegations from the House of Representatives and the High Council of State, as foreseen by the Libyan Political Agreement, agreed at a meeting in Hurghada, Egypt, on 20 January 2021, that a ratified 2017 Proposal should serve as the required constitutional basis.[4] According to one interpretation of the roadmap, however, the two legislative bodies have missed a deadline to implement the Agreement.[5] Thus, the Legal Committee met again in Tunis, Tunisia, from 7 to 9 April 2021, to agree on a proposal for a constitutional basis to be submitted for deliberation among all Forum delegates.[6] In a context where Libya's myriad legal instruments and the institutions emanating from them lack legitimacy, it is unclear which entity has the legitimate authority to devise a constitutional basis for elections. Elections in turn are paramount to overcome this challenge and to usher in legitimate state institutions, which in turn can lead a constitution-making process that may result in the adoption of a permanent constitution enjoying broad-based legitimacy.

[4] UNSMIL, UNSMIL Welcomes the Meeting of the Constitutional Committee in Hurghada (20 January 2021).
[5] The Libya Observer, Legal Committee of LPDF to meet next Tuesday in Tunis (19 February 2021).
[6] UNSMIL, LPDF Legal Committee Concludes a Three-Day Meeting and Agrees on a Proposal for a Constitutional Basis to be Submitted to LPDF (10 April 2021).

In this article, I seek to provide an overview of the overlapping web of constitutional instruments, each of which lack legitimacy and underpin state institutions that in turn lack constitutional legitimacy. I argue that the multiplicity of legal instruments and absence of constitutional legitimacy is rooted in the divergent aspirations between Libyans concerning the structure and identity of the state. These divisions can be traced back to the country's relatively young constitutional history, which was defined by short and undemocratic constitutional periods and by the formation of the state through the unification of the three historical regions. Libyans have been denied the space and time to build consensus on a common vision of a state that can be reflected in a legitimate constitution. I propose that the adoption of clear and legitimate transitional arrangements can provide a single, coherent constitutional framework, while also creating a platform to devise a truly legitimate permanent constitution.

## I. Conceptualizing Constitutional Legitimacy

Assessing the state of constitutional legitimacy in Libya requires closer examination of the concept of constitutional legitimacy—both in the sense that any constitutional instrument ought to garner popular legitimacy, and accordingly, that the institutions emanating from it ought to enjoy constitutional legitimacy. While there is consensus among constitutional scholars on the centrality of legitimacy as a core element of constitutionalism, there is a degree of divergence in what is perceive as the key pillars underpinning constitutional legitimacy. Drawing a distinction between international and internal legitimacy, Al-Ali proposes that a constitution cannot achieve internal legitimacy if it is (a) "undemocratic"; (b) "out of date" by failing to reflect the social and political reality of the time; and (c) "has been manipulated by specific actors such that the text has been applied is a manner not encapsulating the interests of the general population)."[7] Wolfrum affirms the latter point arguing that a legitimate constitution needs to "reflect the aspirations of the population as a whole".[8] In a similar vein, An-Na'im posits that constitutional legitimacy has to be measured by a constitution's performance in achieving its main purpose, which according to him is to strike a balance between majority rule and the protection of individual and minority rights.[9] Particularly with regards to the rights of minorities—but also regarding the interests of society more broadly—none of the constitutional instruments in Libya appear to enjoy constitutional legitimacy. For instance, some constitutional analysts maintain that while the legal challenges that were raised against the voting procedure adopted by the Constitution Drafting Assembly to approve the 2017

[7] Zaid Al-Ali, The Arab Spring Constitutions: For Whose Benefit?, In: Tom Ginsburg & Aziz Z. HUQ (EDS.) *Assessing Constitutional Performance*. Comparative Constitutional Law And Policy. 471 (2016).

[8] Rüdiger Wolfrum, Legitimacy of Constitution-Making Processes: Reflections from the Perspective of International Law, In: Rainer Grote & Tilmann J. Roeder. Constitutionalism, Human Rights, And Islam After The Arab Spring 49 (2016).

[9] Abdullahi A. An-Na'Im, The Legitimacy of Constitution-Making Processes in the Arab World, In: Grote & Roeder (Supra note 8) 29 (2016).

Constitutional Proposal were resolved, questions remain about the lack of buy-in from Assembly members representing minorities. The internal rules and regulations of the Assembly stipulate that a successful vote requires support for the draft from minority representatives,[10] as informed by Constitutional Amendment No. 7 enacted by the General National Congress, which stipulates that decisions pertaining to cultural affairs and minority rights are to be based on consensus.[11]

Focusing on the procedural and substantive aspects of constitutional legitimacy, Wolfrum stresses the importance of national ownership and rejects any attempts at interfering in the constitution-making process as undue influence. Drawing attention to the relevant international law, he references Article 2(7) of the UN Charter asserting that "constitution-making is traditionally the hallmark of state sovereignty and the ultimate expression of national self-determination."[12] Moreover, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to public participation in political affairs. The Human Rights Committee, in its General Comment on Article 25, explicitly notes that "citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process." [13] This underscores the significance of the constitutional principle of *pouvoir constituant*, recognizing the people as the only entity entitled with the power to award legitimacy to the constitution.[14] As Tushnet notes, "the constituent power is the body of the people from whom the constitution's authority emanates," which also entails "a reference to real people whose consent is the basis of a constitution's legal legitimacy."[15] Constitutional legitimacy in this sense derives from "both appropriate constitutional content as well as its well-informed popular acceptance."[16]

The notion of constitution-making as an act of national self-determination in recognition of state sovereignty stands in stark contrast to the persistent practice of external involvement in what should be an inherently domestic exercise. This is particularly the case in post-conflict and transitional settings such as the Libyan one. In this regard, Bell affirms that "contemporary post-conflict constitution-making often involves international actors and organizations in a critical role, posing challenges for articulating the constitution's legitimacy in terms of its 'we the people' origins."[17] In fact, Wallis argues that "constitutions have tended to be made by political elites and/or international state builders with little public participation, partly because liberal theorists understand the principle of popular sovereignty in hypothetical terms, as what individuals would agree to if they were acting

[10] ABA (Supra note 1).
[11] Constitutional Amendment No. 7 of 11 March 2014.
[12] Wolfrum (Supra note 8).
[13] Human Rights Committee, General Comment No. 25, CCPR/C/21/Rev. 1/Add. 7, para 6.
[14] Wolfrum (Supra note 8). 44.
[15] Mark Tushnet, Advanced Introduction To Comparative Constitutional Law 18 (2018).
[16] An-Na'im (Supra note 9).
[17] Christine Bell, Introduction: Bargaining on Constitutions: Political Settlements and Constitutional State-building, 6 Global Constitutionalism 13, 21 (2017).

rationally, rather than as requiring their actual consent."[18] Over the last decade since the revolution, external actors have played an ambivalent role in Libya's constitution-making process. The drafting of the 2011 Constitutional Declaration and of the *final* version of the 2017 Constitutional Proposal[19] was primarily led by local stakeholders. In contrast, the 2015 Libyan Political Agreement, which *de facto* serves as the country's main constitutional framework, was brokered—and to a significant extent also written—by the UN. The ongoing process of devising a constitutional basis for the elections that are scheduled for December 2021 is being led by Libyans, but under the auspices of the UN.

The case of Libya is also indicative of a trend that manifested itself with the constitution-making processes arising from the political events of the Arab Spring, where in most cases not only foreign actors but also controlling elites dictate these processes. In a rather bleak assessment, Al-Ali finds that the outcomes of the Arab Spring constitutions rarely reflected noteworthy differences in line with the degree of public input that informed the constitution drafting process. He observes that "most of the Arab Spring constitutions largely reflect the drafters' and controlling elites' prioritization of continuity and incremental change over the desire to establish social justice and protect fundamental freedoms."[20] However, in recognition of the complex contexts of the political transitions emerging from the Arab Spring, An-Na'im emphasizes the non-linear progression of constitutional legitimacy, concluding that "[t]he path to legitimate constitutionalism includes setbacks and failures, as well as apparently successful steps that may still not be consistently maintained in practice—the progression of the process includes instances of regression."[21]

Ultimately, constitutional legitimacy ought to derive from three key factors. One, the *process* of constitution-making, which has to ensure the inclusion of a broad segment of society. This has to be based on democratic practices such as the election of a constituent assembly and/or ratification through a popular referendum. Two, the *content* of the approved constitution—especially if it is to serve as the permanent constitution—has to be informed by public input and reflect the aspirations of society and the realities of the country's unique cultural, social, and political context. This also means that the negotiations on and formulation of the constitutional text ought not to be dominated and shaped by political elites, or—even worse—external actors. And three, in line with Al-Ali's criteria for internal legitimacy, the governance arrangements provided for by the constitution have to be based on a democratic state system rather than an authoritarian regime of the kind experienced in Libya during the Qaddafi era.

[18] Joanne Wallis, Constitution Making During State Building 3 (2016).
[19] Earlier versions, specifically the March 2016 draft, featured significant external engagement.
[20] Al-Ali (Supra note 7) 384.
[21] An-Na'im (Supra note 9) 31.

## II. Absence of Constitutional Legitimacy in Libya

Constitutionalism in Libya is characterized by a dual legitimacy vacuum both from a constitutional and institutional perspective. A web of overlapping legal instruments is based on a number of constitutional instruments adopted since the 2011 revolution, including; the 2011 Constitutional Declaration and its many amendments, the 2015 Libyan Political Agreement, and the 2020 Libyan Political Dialogue Forum Roadmap, each of which in turn outline a process for the adoption of a constitution, presumably through the ratification of the 2017 Constitutional Proposal or an amended version. At the heart of this constitutional fragmentation are the divergent aspirations of different segments of society, most notably concerning the degree of centralization and decentralization of the country's governance system, which have rendered agreement on a single constitutional framework elusive.

### Dual Legitimacy Vacuum

In Libya, the challenges posed by an absence of constitutional legitimacy are two-fold. First, the various legal instruments that serve as constitutional foundations in some form or another lack legitimacy as they fail to reflect the will of the people, which is further complicated by the fact that there are no defined shared norms and beliefs among Libyans. In addition to the multiplicity of legal instruments, the mandates of the institutions governed by these instruments have for the most part expired. This has created a situation where all of Libya's legal instruments to varying degrees lack constitutional legitimacy. And arguably none of the institutions emanating from these instruments have ever held or do presently hold legitimate authority. Constitutions ultimately have a legitimizing function in providing "a solution to the problem of legitimation and limitation of political power."[22] If, as in the case of Libya, constitutional instruments fail to legitimize governing institutions, they shall be unable to serve their core function. As Maghur points out, Libya's contemporary governance system is defined by a multitude of institutions (GNA, HoR, HCS, LPDF) deriving authority from numerous, ambiguous, and at times contradictory legal bases governing them. And of these legal instruments most have been devised by controlling elites with varying degrees of external engagement and in the absence of national ownership.[23]

Further weakening the legitimacy of Libya's constitutional instruments and the institutions emanating from them, are the ubiquitous number of legal challenges raised against the legality of these instruments, their amendments, and their institutions. The multiplicity of overlapping legal instruments has allowed for creative interpretations of the legal text and encourages parties to leverage legal uncertainties and court challenges to stall the political

[22] Dieter Grimm, Constitutionalism: Past, Present, And Future 61 (2016).

[23] Azza Maghur, The Next Presidential Council and The Powers of The New Regime in Libya: A Complex System for a Brief Span, Al Marsad. (1 February 2021).

transition and resist the implementation of provisions that fail to advance, or worse, contradict their interests. The challenge of determining the validity and interpretation of various legal instruments and of addressing unresolved legal cases has been compounded by the fact that the Constitutional Chamber of the Supreme Court, which holds jurisdiction over constitutional issues, was suspended in 2014.[24]

In the absence of a legitimate constitutional basis that can chart a pathway for the transitional period or of legitimate institutions with the authority to devise such a legal framework, it is difficult to envisage how a future governing authority and the constitutional basis underpinning it can enjoy constitutional legitimacy. To untangle this web of legal instruments it is worth examining the main transitional arrangements introduced since 2011, which together serve in some form or another as constitutional bases for Libya's institutions, in greater detail.

## CONSTITUTIONAL INSTRUMENTS SINCE THE REVOLUTION

### *2011 Constitutional Declaration*

The 2011 Constitutional Declaration does not hold legitimacy in the sense of representing an expression of the will of the people. Without any kind of popular consultations, the Declaration was issued by the National Transitional Council shortly after its formation and amidst the turmoil of the 2011 civil war. The Council itself was not an elected body and was dominated by political and military elites from the East. Yet, in its early days, the Declaration enjoyed significant public buy-in, likely because it clearly outlined a transitional process that would result in the adoption of a permanent constitution through ratification by popular referendum.

An argument could also be made that the principle of *pouvoir constituant* implies that "revolutions—if undertaken by the population at large or at least clearly endorsed by the latter—have, as a matter of principle, the legitimacy to end a previous and to establish a new constitutional regime."[25] In fact, the 2011 Constitutional Declaration justifies its legitimacy and the legitimacy of the institutions emanating from it on the basis of the 2011 revolution. The Declaration's preamble explicitly states that its legality is "[b]ased on the *legitimacy* of this revolution, and in response to the desire of the Libyan people and their aspirations for achieving democracy and promoting the principles of political pluralism and statehood based on institutions (…)." Article 17 of the Declaration reads that the National Transitional Council is the "highest authority of the Libyan state" and that "[i]t shall be the sole *legitimate* representative of the Libyan people which draws its *legitimacy* from the revolution of February 17th."

As will be discussed in more detail below, the 2011 Constitutional Declaration was envisaged to serve as a transitional arrangement—a mandate it has outlived a decade after its issuance. Thus, when discussing the

[24] ABA (Supra note 1).
[25] Wolfrum (Supra note 8) 44. *Referencing* Bruce Ackermann, We The People: Foundations (1991).

Declaration, it is also worth mentioning the February Committee, which was established amid public discontent over the failure of the General National Congress to "complete its constitutional mandate."[26] Born out of Constitutional Amendment No. 6 adopted on 5 February 2014 and composed of Libyan lawyers and constitutional experts, the Committee was tasked with charting a framework to conclude the transitional period and with formulating a constitutional basis for presidential and parliamentary elections to replace the Congress. The February Committee Proposal was, however, deemed invalid by a Supreme Court decision on Constitutional Amendment No. 7 based on procedural issues.[27]

Today, it is unclear what exactly the legal hierarchy between the 2011 Constitutional Declaration and the 2015 Libyan Political Agreement looks like. Most constitutional analysts contend that the Declaration remains the *de jure* constitutional basis in Libya.

*2015 Libyan Political Agreement*

The Libyan Political Agreement is foremost a peace agreement between the main political adversaries and their aligned armed groups that emerged in the civil conflict commencing in 2014. However, given its extensive provisions outlining Libya's governance arrangements, it effectively provides a constitutional framework for what should have been an interim period of two years and that foresaw the adoption of a permanent constitution. Agreed to by a small number of political and military elites and with the role of the UN in the drafting process reaching beyond what might be termed 'assistance,' the Agreement lacks any form of legitimacy. In fact, it is anathema to the ideals of constitutionalism. Theorizing about the legitimacy of constitution-making processes, An-Nai'm concludes that while external actors may provide technical assistance in the constitution-making process, particularly in post-conflict settings in the Arab world, it is ultimately local actors who have to lead and mediate contestations over power relations.[28]

The Libyan Political Agreement was never fully integrated into the legal framework as foreseen in Annex 4, which stipulates that the 2011 Constitutional Declaration should be amended in accordance with the Agreement and that "[a]ny provision or article in the Declaration (…) that contravenes the Agreement shall be cancelled."[29] While Constitutional Amendment No. 11 incorporated a part of the Agreement, it faces legal challenges on procedural grounds and Article 12 of the Agreement foresees that it ought to be adopted in its entirety. Nor has the unity government—the Government of National Accord—received endorsement from the House of Representatives. And by one interpretation, the Agreement expired in December 2017, with the passage of a

[26] ABA (Supra note 1) 23.
[27] Ibid.
[28] An-Nai'm (Supra note 9).
[29] Libya Political Agreement Annex 4: Art 1 & 2 (2015).

period of two years since its signing.[30] Despite this lack of legal authority, the international community has *de facto* awarded the Agreement legitimacy by recognizing the unity government as the legitimate state authority and by using its provisions as a frame of reference for the transitional process. At the same time, the UN and Libyan leaders, notably the unity government, argue that the two-year timeline before the expiration of its mandate has not yet begun as the Agreement only enters into force following its incorporation into the Declaration. Paradoxically, this argument is also often raised by the House of Representatives and aligned Field Marshall Khalifa Haftar—an eastern-based warlord and major power-broker—, when seeking to challenge the legitimacy of the UN-recognized unity government or the legal framework of the Agreement itself.

*2020 Libyan Political Dialogue Forum Roadmap*

The legitimacy of decisions and legal instruments agreed upon within the framework of the ongoing LPDF has been questioned by some observers. The (initially) 75-member Forum is composed of an equal number of delegates from the House of Representatives and the High Council of State respectively and of a number of delegates representing women's groups, minorities, and civil society more broadly, handpicked by the UN. It claims to derive its legitimacy from both domestic and international sources. The 'Roadmap For the Preparatory Phase of a Comprehensive Solution' bases its legitimacy on: (a) "United Nations Security Council Resolution 2510 (2020), which adopts the conclusions of the Berlin Conference" calling for the formation of a transitional government; and (b) the 2015 Libyan Political Agreement, specifically Article 64, and the 2011 Constitutional Declaration. Concretely, Article 7(3) on the Legal Framework of the Roadmap stipulates that "[t]he outcomes of the LPDF combined shall be considered an added agreement to the Libyan Political Agreement signed in 2015 as incorporated in the constitutional framework."[31] However, neither of the sources supposedly legitimizing the LPDF process stand on solid grounds. With regards to international law, while UN Security resolutions adopted under Chapter VII authorities are understood to be binding, UNSCR 2510 (2020) was not passed under such authorities. As for Article 64 of the Agreement, which provides that the Libyan Political Dialogue—a forum of Libyan dignitaries and political representatives—may reconvene to deliberate on breaches of the Agreement, it is questionable whether the LPDF, which is composed of a different set of delegates, can be viewed as a continuation of the Libyan Political Dialogue. Additionally, this rests the legitimacy of the LPDF on the legality of the Agreement, which is itself questionable.[32]

[30] Interview, Naureen Haque, American Bar Association, (15 January 2021).
[31] Roadmap: For The Preparatory Phase Of a Comprehensive Solution Art 7 (2020).
[32] Haque (Supra note 31).

*2017 Constitutional Proposal*

While not representing one of the adopted legal instruments making up Libya's fragmented constitutional framework, examining the 2017 Constitutional Proposal, which was set to be put to a popular referendum for ratification as the country's permanent constitution, is imperative when discussing constitutional legitimacy in Libya. Approved by a two-thirds plus one majority of the Constitution Drafting Assembly as per the 2011 Constitutional Declaration, the Proposal has attained the legally required support to secure internal approval and to be 'handed over' to the Libyan people to determine its fate in a referendum. In an effort to achieve constitutional legitimacy, ratification of a new constitution through a popular referendum is a positive step to ensure internal legitimacy.[33]

From an institutional perspective, the Constitution Drafting Assembly itself enjoys considerable legitimacy. According to a number of surveys, the Assembly is the only institution assigned legitimacy by Libyans from across the country. While the Assembly derives significant legitimacy from its relatively successful election, it is critical to note that insecurity in a number of voter districts meant that a second round of elections had to be held to fill some of the outstanding seats, while two seats had to be assigned to candidates nominated by the electoral commission.[34] The elections were also boycotted by minority groups contending that the composition formula awarding only six seats for minority groups did not grant sufficient representation for minorities. In particular, the Amazigh objected already to the electoral law and demanded that decisions on critical issues had to be reached by consensus as their low representation meant that they could easily be overruled.[35] They eventually refused to partake in the elections, which meant that the body only comprised fifty-eight members.[36] In addition to their dismay over what they perceived as a low quota for minorities, their boycott was driven by their rejection of the 2011 Constitutional Declaration, which they thought should have paid more attention to linguistic demands in a break with the Qaddafi era.[37] Similarly, the Assembly enjoyed little credibility among the Tebu and Tuareg, whose representatives at times boycotted the drafting process. Moreover, only 64 out of 649 of the registered candidates were women and only six seats in the Assembly were assigned for women, falling well short of the 33 seats advocated for by women's groups.[38] Even so, overall, the Assembly is relatively representative of a cross-section of Libya's society.

[33] Tushnet (Supra note 16).
[34] ABA (Supra note 1).
[35] Carter Center (Supra note 3).
[36] International Commission of Jurists (ICJ), The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws (2015).
[37] Leonid Issaev & Andrey Zakharov, Decentralization in Libya after the Arab Spring, 27 Middle East Policy, (2020).
[38] Carter Center (Supra note 3).

It is difficult to ignore the fact, however, that while the Constitution Drafting Assembly itself does enjoy a relatively high level of legitimacy as compared to Libya's other institutions, this is not necessarily the case for the constitution-drafting process or its outcome. Given the tight timeline provided for by the Libyan Political Agreement, and in light of the challenging political and security context, consultations with international experts, civil society organizations, or Libyans more broadly were limited. For the most part, the political process and the technical exercise of negotiating and drafting a constitution were held in parallel, and power-holders were largely excluded from the constitution-making process. The legitimacy of the process is also brought into question by the fact that some Assembly members have launched legal challenges against the draft by contesting the legality of the voting procedure.[39]

Nonetheless, as Al-Ali rightly notes, "[t]he fact that a relatively representative body successfully negotiated a constitution in such circumstances necessarily grants the final outcome a certain amount of *legitimacy* that should be considered in any discussion of the country's future."[40] From a regional comparative perspective, the deliberations of the Constitution Drafting Assembly were also relatively open and transparent while the voting requirement of its internal rules and regulations for approval of the draft is considerably high.[41] In practice, constitution-making processes are awarded legitimacy by adopting one of two approaches either by holding direct elections for a constituent body, *or* by ratifying a constitutional proposal that has been drafted by a nominated constitutional committee through a popular referendum.[42] It is rare that both mechanisms are combined, as is the case in Libya, suggesting that the constitution-making process itself ought to enjoy some legitimacy.

## DIVERGING ASPIRATIONS

A fundamental incompatibility of constitutional issues that different segments of Libya's society aspire to is a major driver of the country's protracted instability and conflict, rendering agreement on a single legitimate constitutional framework elusive. For instance, the 2017 Constitutional Proposal faces significant opposition from some members of the Constitution Drafting Assembly, powerful eastern tribes and elites, federalists, monarchists, minorities, and women's groups.[43] If the premise of constitutional legitimacy is based on a reflection of the will of the people, it is important to also recognize that it is difficult to establish what the will of the general public is if there are strongly divergent opinions on the most fundamental constitutional issues.[44]

[39] ABA (Supra note 1).
[40] Zaid Al-Ali, Libya's final draft constitution: A contextual Analysis, International Idea, 6 (December 2020).
[41] Ibid.
[42] Undppa & Berghof Foundation, Constitutions And Peace Processes: A Primer (2020).
[43] Al-Ali (Supra note 41); ABA (Supra note 1).
[44] Al-Ali (Supra note 7).

The constitutional debate over the last decade has brought to light a number of key issues that Libyans have fundamentally divergent views on, including the exact role of religion in the state and minority and women's rights. But by far the most divisive issue that lies at the heart of the constitutional deadlock and the ongoing conflict is the degree of centralization and decentralization of governance structures, and shaped by it, the distribution of political power and state resources. Thus, Schnelzer notes that "[r]egional or more centralised government has been a constant factor of negotiation in Libya's constitutional history, [and that] [t]he distribution of resources and the provision of government services have played a role as both the reason for changes to the administrative system and as a tool of the political leadership to prevent or suppress opposition."[45] Country-wide consultations conducted by the Center for Humanitarian Dialogue underscored that Libyans' primary concern is that "Libya's unity and national sovereignty must be preserved, while recognizing local and cultural differences within a framework of decentralization."[46] The centrality of regional factors also came to the fore when the 'federalists' successfully pushed for a constitutional amendment concerning the formation of the constitutional assembly. The 'federalists' were concerned that an assembly selected by the General National Congress would dismiss demands for greater regional autonomy, as the body was dominated by representatives hailing from Tripolitania. The proposed approach for equal regional representation also mirrored arrangements adopted for the National Assembly in 1949.[47]

Despite the centrality of these issues in the constitutional discourse and Libya's political context, they have never been successfully reconciled in any of the constitutional instruments since the founding of the state. Consequently, the number of subnational governance entities has changed frequently since 1951. During the Qaddafi era, the subnational governance system and its precise subdivisions changed about twelve times.[48] In its skeleton nature, the 2011 Constitutional Declaration sought to avoid the divisive issue of how to draw the boundaries of the intermediary governance layer between the national and local level of government. Article 18 of the Declaration merely calls for a national level legislation and for elected local councils with municipal legislative power.[49] More importantly, the form of the state reflected in the 2017 Constitutional Proposal does not take account of the divergent aspirations of different groups. At the center of opposition to the Proposal is the degree of centralization and decentralization, notably the strong presidential system and weak decentralization, as well as the lack of autonomy for cultural affairs.[50] Moreover, if a government based on a strongly centralized system were to retain legitimacy, it ought to commit to a clear intragovernmental system for fiscal transfers to ensure a fair and

[45] Nadine Schnelzer, Libya In The Arab Spring: The Constitutional Discourse Since The Fall Of Gaddafi 39 (2016).
[46] Centre for Humanitarian Dialogue, The Libyan National Conference Process Final Report, 9 (November 2018).
[47] Dirk. J. Vandewalle, A History Of Modern Libya (2012).
[48] Markus Boeckenfoerde, Mansour M. Elbabour, & Tarek Megeris, Decentralisation in Libya, Democracy Reporting International (2013).
[49] Ibid.
[50] Al-Ali (Supra note 41).

equitable distribution of Libya's wealth, which together with calls for greater political power, is the key factor driving regional divisions.[51] In its current form, the Proposal falls short in offering any specifics on the structure of decentralized governance, the assignment of competencies, and the distribution of state resources. Thus, people in the East and the South, in particular, have expressed concerns over the Proposal.

## III. ACHIEVING LEGITIMACY IN A FRAGMENTED SOCIETY

The roots of this divergence of aspirations can be found in Libya's constitutional past, which was defined by short constitutional periods, including periods that featured no constitution or constitutional framework at all. Reluctantly unified at the founding of the modern state of Libya, the populations of the three historical regions never engaged in a consensus-building process exercise to forge a common vision of the state. To achieve constitutional legitimacy in the true sense of *pouvoir constituant*, Libyans therefore need more time to launch a national debate on constitutional issues, agree on shared norms and beliefs, and foster their national identity. While riddled with pitfalls, including the need to accept a delay in achieving 'true' constitutional legitimacy, clear transitional arrangements may offer an avenue by providing a coherent constitutional framework for an interim period, while also granting more time for participatory constitution-making that can result in the adoption of a permanent constitution enjoying broad public buy-in and support.

### MYTHS OF A CONSTITUTIONAL PAST

Libya barely has a history of constitutional legitimacy to speak of, where "[f]or most of the century, the inhabitants of the three provinces that became incorporated into the United Kingdom of Libya in 1951 (...) stood on the sidelines as a succession of foreign and local rulers and interests shaped their country."[52] Tripolitania and Cyrenaica were first brought under one administration during the Italian colonial period between 1911 and 1943. And "[s]ince the end of Italian colonial rule, Libya's constitutional history has been characterized by short-lived constitutional periods."[53] The boundaries of the modern state of Libya as they are drawn today have only emerged following World War II, "at the behest of, Great Power interests and agreed to by the local provinces who feared other alternatives."[54] The first constitutional period was ushered in with the adoption of the monarchical constitution in 1951, which set up a federal system for the new state of Libya. The 1951 Constitution was "prepared by foreign officials and advisers with only minor input from locals."[55] Following a UN General

[51] Boeckenfoerde et. al. (Supra note 50).
[52] Vandewalle (Supra note 49) 1.
[53] Schnelzer (Supra note 47) 39.
[54] Vandewalle (Supra note 49) 40.
[55] Al-Ali (Supra note 7) 378.

Assembly vote in 1949, a UN Commissioner was appointed to 'assist' the local community in drawing up a constitution and to guide the country's transition to independence. The UN selected twenty-one Libyans from the three regions to form a Preparatory Committee to decide on the constitution-making process, which in turn established the National Assembly. On 7 October 1951, the Assembly approved a permanent constitution consisting of 213 articles. The Constitution described the three regions as provinces rather than federal states or regions to promote the country's unity, as Cyrenaica and Fezzan in particular expressed opposition to the formation of a unified state.[56] That the regions agreed to "[t]he very establishment of the monarchy and the proclamation of a federation were considered compromises that they had to make in order to avoid new colonial guardianship."[57] The newly formed constitutional monarchy was governed by King Idris Sanusi, who derived some legitimacy from his ancestry in the Sanusiyya order.

Then in 1959, with the discovery of oil revenues, the Sanusi monarchy undertook to change the governance system again by abandoning the federal system in favor of a unitary system, which was realized in the 1963 Constitution. The rapid change in Libya's economic outlook led to social unrest and the Sanusi leadership sought to reduce tensions by strengthening the central government.[58] At the time of independence, Libya was also among the poorest countries in the world, with some estimates suggesting that GDP per capita was only USD 25 a year, and the large bureaucracy of the federal system came at a huge financial burden on the young state. In the period between the abolishment of the federal system and the coup in 1969, Libya was administered by the monarchy along ten provinces.[59]

Following the overthrow of the monarchy in 1969, Qaddafi introduced a very brief temporary revolutionary Constitutional Proclamation inspired by the Egyptian constitution and containing merely 37 articles.[60] The Proclamation was to serve as an interim arrangement until the adoption of a permanent constitution. Abolishing the previous constitution, the Proclamation effectively concentrated all authority in Qaddafi's Revolutionary Command Council. In 1977, Qaddafi issued the 'Declaration on the Establishment of the Authority of the People,' which was an even shorter constitutional framework merely comprising 10 Articles and stipulating that the Qur'an serves as the country's constitutional basis.[61] Qaddafi complemented these legal instruments with sections from the Green Book, in which he dismissed constitutionalism altogether, and with it the need for constitutional legitimacy. The Green Book specifically declared that "[t]he natural law of any society is either

[56] Ronald Bruce St John, Libya: From Colony to Revolution (2017).
[57] Issaev & Zakharov (Supra note 38) 64.
[58] Schnelzer (Supra note 47).
[59] Vandewalle (Supra note 49).
[60] Schnelzer (Supra note 47).
[61] Nathan J. Brown, Constitutions In A Nonconstitutional World: Arab Basic Laws And Prospects For Accountable Government (2002).

tradition (custom) or religion. Any other attempt to draft law for any society, outside these two sources, is invalid and illogical. Constitutions are not the law of society."[62]

It is clear that constitutional legitimacy was practically absent in Libya under the Sanusi monarchy and the Qaddafi regime. The 'constitutional' system defining the Libyan state under the Qaddafi regime can be described as 'totalitarian.' Qaddafi also "kept most institutions underdeveloped, and other political actors weak, such that when he fell, little was left standing."[63] Thus, if one applied Al-Ali's criteria for internal legitimacy of constitutions,[64] the fact that the state systems were monarchical and totalitarian, and thereby 'undemocratic,' itself renders the constitutional frameworks and the institutions they governed illegitimate. Even so, proponents of a return to the 1951 Constitution contend that it continues to represent Libya's legitimate legal framework as the Qaddafi coup merely suspended its validity. However, this argument has been rejected by most constitutional analysts and fails to reflect the contemporary context, particularly with regards to the democratic aspirations of all Libyans.[65]

## Building Consensus on a Common Vision of the State

As a consequence of Libya's complex constitutional history and its relatively short constitutional periods, Libyans have not been able to deliberate on the nature of their shared values and beliefs and to forge consensus on a governance system that reflects their common identity. As Schnelzer argues, the "[l]imited constitutional experience, totalitarian system under Ghadafi and the suppression of both public discourse and the emergence of a Civil Society that would have provided the sphere for public discourse during the totalitarian period preceding the 2011 uprising renders the drafting of a constitution and consensus on issues of national importance particularly difficult."[66] Others argue that the seeds for Libya's societal fragmentation were planted early on, even before the beginning of its constitutional history, when the Ottoman Empire proved unwilling to foster a common identity across the three regions beyond their adherence to Islam.[67] As Vandewalle notes, "the separate histories of the three provinces, as well as the absence of incentives for greater economic interaction within essentially self-contained local economies, had added to distinct outlooks and orientations among the citizens of each territory over the centuries."[68] The prevalence of oil also impacted Libyans' notion of statehood and of a common identity. First, the revenues of Libya's vast resources enabled rulers to avoid state-building in the

[62] ICJ (Supra note 31) quoting from the Green Book, Part I, The Law of Society.
[63] Brookings Institutions, Empowered Decentralization: A City-Based Strategy For Rebuilding Libya 6 (February 2019).
[64] Al-Ali (Supra note 7).
[65] Issaev and Zakharov (Supra note 38).
[66] Schnelzer (Supra note 47) 90.
[67] Vandewalle (Supra note 49).
[68] Ibid 15.

formative sense while extending their authority across the country's territory.[69] Second, with eastern communities facing economic marginalization while most of the oil reserves are situated in the East, it is understandable that people are distrustful of the central government and that regional divisions have deepened. In the face of all of these factors Libyans still hold a sense of national identity, but the persistent instability and conflict over the last decade have manifested differences and deepened divisions.

Despite the considerable challenges posed by Libya's young and complex history and the people's divergent aspirations on the nature of the state, an argument could be made that "creating constitutional agreement in the face of fundamental disagreement as to the nature, territorial and political configuration of the state is exactly the aim of constitution-building in divided conflict societies."[70] In this regard An-Na'im finds that "[t]o the extent that such consensus is achieved, over a 'national settlement', which is in accordance with the principles of constitutionalism, that society has a constitution."[71] However, this settlement has to enjoy constitutional legitimacy in the sense of *pouvoir constituant*. To achieve this, Libyans require more time and a more stable setting that allows for a national dialogue on these issues without the negative influences of internal divisions that characterize the nature of civil conflict. A push for a swift constitution-making process does not sufficiently take account of the complex political nature of constitutional issues and the importance of building legitimacy. The sixty days originally provided for the drafting process in the 2011 Constitutional Declaration quickly proved an inadequate timeframe in the volatile and divisive context of the transitional period.[72] Boeckenfoerde, Elbabour, and Megeris affirm that "consensus will be reached on a system that will fit Libya's current state, but after a period of time, once the post- revolutionary dust has settled and things are normalised, another consensus may form on the question of [its governance system]."[73] This can be achieved either through the adoption of interim arrangements that can serve as the constitutional basis of the state until a permanent constitution has been adopted or through the incorporation of various mechanisms for amending a permanent constitution.

## OVERCOMING THE DILEMMAS OF TRANSITIONAL LEGITIMACY

Efforts to achieve constitutional legitimacy in post-conflict settings, where a break from the old constitutional order is often followed with a transitional period that ends with the adoption of a permanent constitution, face a number of dilemmas concerning the sequencing of constitution-making and the trade-offs between elite bargains and participatory constitution-making.

[69] Ibid.
[70] Bell (Supra note 18) 28.
[71] An-Na'im (Supra note 9) 29.
[72] Undppa & Berghof Foundation (Supra note 43).
[73] Boeckenfoerde et. al. (Supra note 50) 8.

With regards to the sequencing of constitution-making processes in post-conflict countries, there will always be a "chicken-and-egg"-problem with regards to either putting in place legitimate institutions or legitimate law. In any context where the people seek a complete overhaul of the old system, they have to contend with transitional arrangements that are devised by non-elected figures in order to have a constitutional basis for elections that give birth to legitimate institutions. These institutions, headed by and composed of leaders who have been elected by the people as their legitimate representatives, in turn, have the authority to formulate a process for the adoption of a permanent and legitimate constitution. With the commencement of the 2011 revolution and the people's rejection of the constitutional order of the Qaddafi regime, the National Transitional Council formed as the outcome of an agreement between elites. These unelected 'officials' then introduced the 2011 Constitutional Declaration without any input from the public to provide a roadmap for elections, stipulating that the newly elected body would lead the process to adopt a permanent constitution. Then again, the 2015 Libyan Political Agreement, which sought to end the conflict that interrupted the constitution-making process, justified its legitimacy as "[r]esponding to the needs of the legitimate state institutions to have clear arrangements with regards to the management of Libyan affairs until the adoption and implementation of the Libyan Constitution."[74]

Related to the challenge of sequencing with regards to institutional and constitutional legitimacy, are the underlying tensions between striking elite bargains to accommodate powerful actors and ensuring the participation of the people as the sovereign. These are ultimately trade-offs between stability and democracy faced in the immediate aftermath of conflict. Drawing attention to the complexities of transitional constitution-making, Bell stresses that "[t]he most central dilemma concerns how power-balances between political/military elites can be broadened to ensure the constitution's capacity to fulfil its normative role in restraining power and delivering broader social inclusion,"[75] adding that "transitional constitutionalism is characterized by an attempt to navigate from a foundational elite pact, to a more normative constitutional order."[76] The 2011 Constitutional Declaration represented just that. Widner cautions that in theory "[c]onstitution-building programs that exclude key players or social segments generally result in short-lived documents and rarely reduce violence."[77] This point has been echoed by Tushnet, who finds that to ensure constitutional endurance, the framework must accommodate the main power holders. He observes that "[c]onstitution-makers hope that the institutions they are creating will be stable over time, [and that] [p]olitical stability requires at least acquiescence from nearly all groups that have significant power."[78] Thus, even though the Constitution Drafting Assembly is a considerably

[74] LPA (Supra note 30) Preamble.
[75] Bell (Supra note 18) 13.
[76] Ibid 14.
[77] Jennifer Widner, Constitution Writing in Post-conflict Settings: An Overview, 49 William & Mary Law Review, 1513, 1520 (2008).
[78] Tushnet (Supra note 16) 24-25.

representative body and the 2017 Constitutional Proposal represents a genuine compromise among its members, the negotiations and drafting process was exclusive of the main power-holders, which has been one of the greatest obstacles in securing support for the Proposal and its adoption. In fact, the absence of support from Libya's political and military elite risks that even if the Proposal were to come into force, they would likely object to its implementation.[79] A failure to account for existing power constellations also contributed to the collapse of the 2015 Libyan Political Agreement. With Haftar excluded from the Agreement's negotiations, he became its key opponent and spoiler of the peace process. The exclusion of major power-holders in constitutional settlements also weakens their legitimacy. Ghai finds that "[t]here is also the danger that an over-ambitious constitution will be honored more in breach than observance, and thus it will gradually lead to frustration and loss of legitimacy."[80]

*Transitional Arrangements*

Answers to these dilemmas might be found in An-Na'im's recognition of the non-linear progression and dynamic nature of constitution-building processes and efforts to achieve constitutional legitimacy.[81] Recognizing these phenomena allows for a reconciliation between the adoption of transitional arrangements in the form of interim constitutions that may fall short of meeting the criteria of constitutional legitimacy, while striving for 'robust' constitutional legitimacy in a permanent constitution. Although "the process through which they were agreed and adopted and the political arrangements that they establish may limit their legitimacy," "their temporary nature does not detract from their constitutional status."[82] Recognizing that interim constitutions are often agreed to and drafted by elites behind closed doors and that procedural legitimacy is near absent in such cases, Wolfrum suggests in relation to the Sudanese interim constitution that "what made the situation tolerable and even legitimate was that this constitution was an interim one, meant to cover a certain period in which peace and stability should be regained."[83]

The two-stage approach for the adoption of a permanent constitution and the achievement of constitutional legitimacy is particularly pertinent in the context of ongoing violence or peace negotiations, where it may be more suitable to adopt interim constitutional arrangements. These in turn can serve as a foundation for the drafting of a permanent constitution at a time when tensions have ebbed and focus can be given to the more functional

[79] Al-Ali (Supra note 41).
[80] Yash Ghai, A Journey around constitutions: Reflections on Contemporary Constitutions, 122 South African Law Journal 804, 829 (2005).
[81] An-Na'im (Supra note 9).
[82] Undppa & Berghof Foundation (Supra note 43) 24.
[83] Wolfrum (Supra note 8) 49.

aspects of constitutions, such as how to ensure government accountability.[84] In fact, Rodrigues argues for a more purpose-driven use of interim constitutions in post-conflict settings, suggesting that with the right design they can reduce the stakes of divisive issues and ensure that more time can be allocated for consensus-building on a long-term settlement.[85] Interim constitutions in this sense can provide linkages between different constitutional frameworks by enabling "a pact between political/military actors on the broad parameters of a political settlement (and often elections) to be reached prior to the constitution-making process, while allowing the final constitutional settlement to be based on a broader participative process."[86]

Transitional arrangements can also take the form of relatively easily implementable constitutional amendments of a permanent constitution. Constitutional amendments have been identified as a key mechanism to account for changes in power constellations[87] and political realities. Preferences in society concerning constitutional issues also change over time.[88] For instance, around 2016-17, Libyans might have had a preference for stability and unity to be realized through a strong presidential system,[89] but these preferences do not reflect the sentiments held immediately after the revolution when people fought against the authoritarian Qaddafi regime, or, following Haftar's attempt to capture the state through violence. The 2017 Constitutional Proposal's clause determining that it may not be amended for a period of five years after its adoption is problematic in this sense.

While transitional arrangements are invaluable mechanisms to bridge political transitions, Libya's transitional period has already lasted for a decade and the incredibly abstract and brief text of the 2011 Constitutional Declaration has served beyond its purpose of providing a constitutional basis for a short interim phase. As can be extracted from the Declaration, it was not foreseen that the process of adopting a permanent constitution would be drawn out over many years. And frankly, if the aim is to achieve constitutional legitimacy in both the procedural and substantive sense, it does not appear that an end of the transitional period is near. This equally underscores the need for a single coherent transitional framework outlined in an interim constitution that balances the need for the inclusion of power-holders and broader public participation, while also reflecting a genuine compromise between the diverging aspirations of different segments of Libya's society.

[84] Widner (Supra note 79).
[85] Charmaine Rodrigues, Letting off steam: Interim constitutions as a safety valve to the pressure-cooker of transitions in conflict-affected states?, 6 Global Constitutionalism, 33 (2017).
[86] Christine Bell & K. Zulueta-Fülscher, Sequencing Peace Agreements and Constitutions in the Political Settlement Process, International Idea, 27 (2016).
[87] Tushnet (Supra note 16).
[88] Al-Ali (Supra note 7).
[89] Al-Ali (Supra note 41).

## CONCLUSION

Efforts to resolve the decade-long instability and conflict and to conclude the political transition in Libya are hindered by the consequences of a dual legitimacy vacuum. That is, the constitutional framework governing Libya's institutions is based on numerous legal instruments, each lacking legitimacy, and consequently the institutions emanating from these instruments lack constitutional legitimacy. And every time a settlement process collapses, an additional layer of complexity is added with the emergence of another constitutional instrument that has to be incorporated into the existing constitutional framework. With the launch of the Libyan Political Dialogue Forum process, Libyans are leading a renewed initiative to find a way out of the transitional period and to replace the myriad of overlapping and contradictory constitutional instruments and the institutions they are governing, with a single coherent constitutional basis to underpin the December 2020 presidential and parliamentary elections, and selected leaders with elected officials holding legitimate authority.

Achieving constitutional legitimacy, however, will be challenging in the context of continuing fragmentation and the absence of a common vision of the state. The divergence of aspirations regarding the nature and identity of the state has its roots in Libya's constitutional history, which is defined by numerous short constitutional periods and ever-changing structures of a state that unified the peoples of traditionally distinct regions. Denied the opportunity to forge consensus on shared norms and beliefs and on a governance system that reflects a genuine compromise among all segments of Libya's society, Libyans now have to build on the momentum of the early successes of the ongoing political dialogue and devise a mechanism for the attainment of constitutional legitimacy. With the 2017 Constitutional Proposal falling critically short in meeting the people's aspirations, transitional arrangements in the form of an interim constitution or the incorporation of an implementable amendment procedure meet the dual objective of providing one coherent constitutional framework, while also creating space and time for consensus-building. The constitutional basis deliberated on by the Libyan Political Dialogue Forum and its Legal Committee may represent such a transitional arrangement. The agreed upon constitutional basis would also have to clearly lay out a pathway for the adoption of a permanent constitution. This may potentially involve an amendment or re-drafting process of the Proposal informed by country-wide consultations and a national dialogue aimed at reaching consensus on core issues pertaining to the nature of the state. Whatever transitional arrangement will be adopted, it would have to be complemented with mechanisms to address changing realities to avoid further stalling of the transitional process, such as dispute resolution mechanisms, a forum for continued negotiation, and clear amendment procedures. Despite further prolonging the transitional period, such arrangements will be key to achieving constitutional legitimacy and through it sustainable peace.

# Lebanon: The Nature of the Civil State and the Sectarian Personal Status Laws

Wissam Lahham*

ABSTRACT

It is not possible to understand the relationship between the Lebanese State and religious denominations, as it arose under the French mandate, except by going back to the Ottoman era, where the first legal attempts to regulate that relationship were registered. Therefore, this research paper will review the direct historical roots of the relationship between confessions and the State as it was established in the Ottoman era, and then explain the fundamental modifications introduced by the French Mandate, to determine what is meant by the civil nature of the Lebanese State despite any imperfection arising from post-independence laws.

Keywords: *Civil State, Personal Status Laws, sectarianism, Lebanon*.

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## INTRODUCTION

The relationship between the State and confessions has forever been a problematic topic in Lebanon. While some would consider the Lebanese State to be intrinsically sectarian – mainly concerned with preserving the "rights" of confessions – others would consider secularism to be the only solution to all the crises of the political system next to building a Civil State governed by the freedom and equality of its citizens.

Such discrepancy is mainly reflected in the sectarian personal status laws and the constant disagreement over the possibility of adopting civil personal status laws. For example, on February 18, 2019, the media office in Dar Al-Fatwa issued a statement stating that civil marriage "is a violation of Article 9 of the Lebanese Constitution which provides for the obligation to respect the personal status laws applicable before Lebanese religious courts. Therefore, it may only be enacted in Parliament with the consent of Dar Al-Fatwa and the relevant religious references in Lebanon". Rejection didn't only stem from religious authorities as it was echoed by parliamentarians and political figures who embraced the same position based on the assumption that a civil personal status regime necessitates a constitutional amendment, which suggests that the State is sectarian in nature, and that its legislative authority is baulked by personal status laws that are entirely subject to sectarian whim.

On account of this contradiction, be it deliberate or spontaneous, the discussion became mainly political, and drifted from its sound human rights foundations. Hence, the need to study the nature of the relationship between the State and confessions in Lebanon only to point out that the State's recognition of the confessions' competence in managing their personal status does not contradict the civil nature of this state. The State's recognition is in fact the criterion clarifying the constitutional premises on which the legal structure of the Lebanese State rests.

It is not possible to understand the relationship between the Lebanese State and religious denominations, as it arose under the French mandate, except by going back to the Ottoman era, where the first legal attempts to regulate that relationship were registered. Therefore, we will try in this research paper to first review the direct historical roots of the relationship between confessions and the State as it was established in the Ottoman era, and then explain the fundamental modifications introduced by the French Mandate, to determine what is meant by the civil nature of the Lebanese State despite any imperfection arising from post-independence laws.

Although the relationship between the State and religious denominations is not limited to personal status, but is reflected in what is known as political sectarianism, i.e. the need to secure a representation of confessions in key public constitutional and administrative institutions, this paper will only address sectarian personal status laws which will hold true to the nature of the Lebanese State.

The political representation of religious denominations has always been subject to amendments approved by key political figures, this representation has clearly evolved in line with the evolution of the constitutional life in Lebanon. Since the independence, the need to abolish political sectarianism took over the political discourse. However, abolishing sectarian personal status laws was not equally acclaimed which might imply that preserving the personal status of religious denominations is a fixed untouchable principle. This is precisely what this research paper will attempt to dissect yet prove inaccurate.

## THE OTTOMAN MILLET SYSTEM OR THE LEGAL ESTABLISHMENT OF RELIGIOUS DENOMINATIONS

During the second half of the XIX century, the Ottoman Empire launched a comprehensive modernization plan known as the Tanzimat, which mainly aimed at developing the Ottoman economy at various levels, and enacting a modern legal system that would protect the interests of foreign merchants and Western countries.

The European legislative model, especially the French, was the main source of inspiration for the Ottoman Empire. The main drive was that the Ottoman leadership felt that to save the State from disintegration and collapse reforms emulating the Western view of human rights and equality between individuals are a must. This was evident in the firman issued by Sultan Abd al-Majid I on February 18, 1856, known as the Humayun script, which guaranteed religious freedoms and equality between the various subjects of the State. It read as follows:

"Concrete measures are required to protect the followers of a given confession, regardless of their number, and to safeguard their freedom of belief. Shall be erased and permanently removed from the diwan papers, all expressions, words and discrepancies that suggest the inferiority of any non-Sunni sultanate subject on the grounds of sect, language or nationality. Subjects of the sultan or public officers shall not use any defamatory, disgraceful or improper designation or label. Every confession shall

exercise its religion freely in the Sultanate. Subjects of the Shahan kingdoms (ottomans lands) shall not be prevented from carrying out the duties of their religion nor would be caused injustice or harm, or forced to renounce to their religion or confession.[1]"

The firman declares equal acceptance of all Ottomans in public jobs without any difference or discrimination. The same shall apply to taxes, because "the taxes due by all subjects under my august authority are payable by all inconspicuously of class or religious denomination.[2]"

Not only did the firman declare equality, but rather affirmed the rights of confessions to manage their own affairs. It read as follows: "the spiritual privileges and welfare bestowed by my great-grandfathers or endowed in recent years upon Christians and non-Muslim followers living in our shahan velāyāt, shall be endorsed and maintained"[3].

Firman 1856 reflects the tension that the Lebanese State will endure since 1920. On the one hand, the firman embedded the concept of citizenship in its western sense and the consequent necessity of establishing a legal system based on equality and individual freedom. And on the other hand, it declared its firm support to the privileges of religious denominations in terms of independent personal status laws and courts vis-à-vis the central state. Citizenship, according to the modern liberal understanding arising from the French Revolution, cannot in any way authorize special legislations to apply to different categories of citizens.

But the said reform-oriented firman will go beyond this general position that recognizes the rights of confessions to manage their internal affairs. Rather, it will impose, in line with the philosophy of the "tanzimat" that support the central authority of the state, the administrative organization of confessions within what has become known as the millet system. Thus, the Ottoman Sultan will, over the years, issue specific legislations for each confession, on how to elect its spiritual leader and designate his powers, or establish mixed councils consisting of clerics and laymen in order to ensure the interests of the confessions and represent it before public administrations. We can mention, for example, the Protestant regulation issued in 1850, that is, even before the firman of reforms, which made Protestants the first confession in the region in the modern sense of the word. This was followed by the special

[1] Al-Dustour, translated from Turkish into Arabic by Nawfal Effendi Nematullah Nawfal, Volume I, Literary Press, Beirut, 1301 (1883), p. 7.
[2] Op. Cit, p.9.
[3] Op. Cit, p.5.

legislations for the Roman Patriarchate between 1860 and 1862, then the Armenian Orthodox in 1863 and the Jews in 1865[4].

As a result of the foregoing, the Ottoman Empire's relationship with religious denominations during the Tanzimat period can be pictured as follows:

- Increased State intervention to enact positive legislations to recognize and organize religious denominations administratively.

- Recognition of non-Muslim denominations, namely Christians and Jews, since the Ottoman Empire, which is officially Hanafi Sunni, had refused to recognize the existence of non-Sunni Islamic denominations such as Shiites, Alawites and Ismailis.

- Recognition did not include all Christian denominations, as some were excluded from the millet system, namely the Maronites, who were always considered independent; the Maronite patriarch would never, upon his election, require a confirmation patent from the Ottoman Sultan.

Not recognizing the confessions' personal status did not prevent the Ottoman Empire from politically recognizing them and accepting their representation in certain administrative bodies. Mount Lebanon came to know the idea of officially representing confessions for the first time under the two Qaemaqams (1842-1858), which divided the mountain into a northern province administered by a Maronite qaemaqam, and a southern province administered by a Druze kaymakam. Each qaemaqam would be supported by a council composed of representatives of the following confessions: Maronite, Greek Orthodox, Roman Catholic, Sunni, Druze and Shiite. The political representation of the religious confessions was enshrined in the Mount Lebanon Mutasarrifate, especially in the Basic Law of 1864, which Article 2 provided for the establishment of a "Grand administrative council" consisting of 12 members distributed among the confessions (4 Maronites, 3 Druze, 2 Greek Orthodox, one Catholic, one Sunni and one Shiite).

The reforms peak is the Ottoman Constitution enacted in 1876 at the early days of the reign of Sultan Abdul Hamid II. The first articles thereof embodied the main contradictions of the modern Ottoman

[4] On the legislations related to organizing the different religious denominations recognized in the Ottoman Sultanate, refer to: George Young, Corps de Droit Ottoman, Volume II, Oxford, 1905.
Translation into Arabic of the rules applicable to the Roman Patriarch, the Armenian Patriarch and Judaism rules in volume II of the Doustour op.cit.

State. Article 8 defined the principle of citizenship as follows: "The title of Ottoman is endowed upon every Ottoman citizen, without any exception on the grounds of religion or denomination…"[5] Article 9 stipulates that "all Ottomans shall enjoy their personal freedom and shall not infringe upon the rights of others"[6]. In addition to these articles related to the rights of citizens, Article 11 of the Constitution protected the millet system: "Islam shall be the religion of the Ottoman State. All religions known in the Ottoman kingdoms may, on the grounds herein and without prejudice to common decency, freely exercise worship under the protection of the State, and maintain the privileges granted thereto.[7]"

Salim Baz explains the jurisdiction of courts or spiritual councils at that time saying that their powers would include "cases arising from purely doctrinal matters such as marriage, divorce or similar disputes that occur between non-Muslims as well as civil disputes arising from doctrinal issues, as determined in the relevant laws namely the regulations granted by the sultan's grace to the Roman, Armenian and Jewish denominations. According to these regulations, spiritual councils shall examine cases arising from wills, endowments - the revenues, expenses or the mismanagement of the same - and the cases arising from dowry[8].

The central authority would not only interfere in the administrative organization of the confessions or the recognition of their spiritual courts. It would go as far as passing legislations that eventually led to an increased secularization of the Ottoman legal system. In the year 1879 a new law was issued to establish "regular courts" as a judicial authority meant to settle civil and criminal disputes in pursuance of the modern legislations adopted in the second half of the nineteenth century. As a result, the powers of traditional courts, which used to rule according to Hanafi jurisprudence was curtailed. All issues related to contracts, trade and penalties were no longer the jurisdiction of the Sharia courts, whose role was gradually restricted to the personal status of Muslims.

The centralized tendency peaked with the Union and Progress party, and its ultra-nationalist Turkish tendency, in 1909, following the toppling of Sultan Abdul Hamid. On October 25, 1917, Sultan Muhammad Rashad issued the Family Rights Law, a combined legislation for all Ottomans, with some exceptional provisions for Christians and Jews. Article 156 stipulated the following: "Shall be canceled

[5] Basic Law, published by Al Ijtihad press owner, p.9, (not dated)
[6] Op. cit.
[7] Op. cit., pp. 7-8.
[8] Salim bin Rostom Baz, the Lebanese, Explanation of the Temporary Law of Human Rights Trials, Literary Press, Beirut, 1895, p. 110-111.

the judicial rights entrusted with spiritual leaders regarding the marriage contract, its annulment, and the maintenance of wives, dowry, and financial settlements arising therefrom."

Thus, the Ottoman Empire, only a year before its final withdrawal from Lebanon and Syria, had, through the Family Rights Law, unified the judicial reference for all its citizens regardless of their confession, and subjected them to a single legislation regarding their personal status. However, with the defeat of the Ottomans by the Allies in September 1918, and the upcoming French mandate, Lebanon will be exposed to a new type of relationship between the State and confessions.

## THE FIRST STEPS TO THE RECOGNITION OF CONFESSIONS ON AN EQUAL FOOTING

The establishment of Greater Lebanon on September 1, 1920, under the French mandate, imposed a new type of relationship between the State and confessions. Lebanon, with its new, expanded borders, not only became a multi-confessional entity, but this diversity was demographically balanced, so that the proportion of Christians in the total population was almost similar to the proportion of Muslims[9]. Therefore, the French authorities had to find a formula that would respect this pluralism while preserving equality between confessions in their legal relationship with the Lebanese State.

From this point of view, we understand why the ruler of the State of Greater Lebanon "Trabaud" issued Decision No. 1003 on December 7, 1921, which abolished Article 156 of the Ottoman Family Rights Law. Article 2 would stipulate the following: "Every judgment issued by non-Muslim religious courts preceding the present decision and that used to be under its jurisdiction prior to the law dated October 25, 1333 (1917), shall be implemented in accordance with the provisions of the Procedures Law."[10] This decision has not only restored spiritual courts, but also considered that all judgments issued thereby shall remain valid even if they were issued at a time where these courts were rescinded pursuant to Article 156 of the Family Rights Law.

[9] According to the official census that took place in 1921, Christians constituted 55.12% of the total population, while Muslims constituted 44.87%. These percentages changed in the 1932 census, the last official census known to Lebanon, where the percentage of Christians became 50.73% and the percentage of Muslims became 49.26% of the total population. To see the detailed figures for the major confessions in the 1921 census and the 1932 census, cf: Meir Zamir, The formation of modern Lebanon, Cornell University Press, Ithaca and London, 1988, p. 98.

[10] Collection of Decisions for the State of Greater Lebanon, between September 1, 1920 and December 31, 1923, Al-Adab Press, Beirut, 1925, p. 99.

The restoration of the powers of the spiritual courts constituted a preemptive step for the principles proclaimed by the Mandate deed after it was approved by the Council of the League of Nations on July 24, 1922[11]. Article VI stipulated France's duties in this field as follows: "The Mandatory State in Syria and Lebanon shall establish a judicial system that fully safeguards the rights of foreigners and nationals, and also guarantees to residents, regardless of their confessions, the respect of their personal status and religious interests. The Mandatory State shall, in particular, monitor the management of endowments (waqf) in accordance with what is required by religious laws and the will of the endowment holders[12]. Thus, we note that respect for the sectarian personal status law was an imperative imposed, at the time, by international law on the Mandate authorities, not only in Lebanon but in all the countries that France had created in the Syrian regions[13].

One of the first steps taken under the French Mandate was to expand the official recognition of Muslim denominations to include the Alawite and Shi'a. The French Governor of the State of the Alawites issued Decision No. 623 on September 19, 1922, enabling the implementation of religious Alawite legislations, while at the same time preventing the Sunni Sharia courts from examining matters that fall within the jurisdiction of the Alawi courts.

In Lebanon, the Jaafaris were also recognized by virtue of the decision issued by the Governor of the State of Greater Lebanon "Cayla" No. 3503[14] of January 17, 1926. Article 1 stipulated the following: "Shiite Muslims in Greater Lebanon constitute an independent religious denomination, their personal status matters shall be tried according to the provisions of the doctrine known as the Jaafari doctrine". The following articles determined the powers of Shiite judges in the governorates and the means of appeal before a special cassation court[15] composed of Shiite judges, having its headquarters in Beirut.

[11] The Mandate deed officially entered into force on September 29, 1923.

[12] The full text of the Mandate Deed was published in the Official Gazette of the State of Greater Lebanon on October 19, 1923, No. 1706.

[13] The state of Damascus, the state of Aleppo, the state of Jabal al-Druze, and the state of the Alawites. Later, pursuant to Decision No. 2980 dated December 5, 1924, the state of Damascus and the state of Aleppo will be joined into one State known as the State of Syria.

[14] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=172922

[15] The Representative Council had discussed during the January 25, 1926 session, the draft Decision recognizing the Jaafari doctrine before it was officially issued. It was amended during the discussion so that the word "Muslims" was added before "the Shiites" upon the request of MP Subhi Haidar. The deputy of the south, Habib Nassif, declared that the Shiites "do not have access to jobs equally to other denominations, so I ask the Council to establish a relevant Court of Cassation," while Representative Petro Trad rejected the position, saying that "the objection to a Shiite court of cassation is not an infringement upon the honorable Shiite community, but is a burden on the budget that can be

These Muslim confessions won for the first time the State recognition of their religious legislations after centuries during which these laws were implemented informally. The followers of these confessions used to resort to local religious scholars for arbitration instead of seeking remedy before the Ottoman Empire Sharia courts, which only recognized the Hanafi Sunni school.

It is worth mentioning here that this official recognition of the Shiite community in Lebanon was preceded by the political recognition of the same. The presence of representatives of the Shiite community was established in the administrative committee[16] appointed in 1920, as well as in the representative council[17] elected in 1922, when they were given five out of the thirty seats that were designated for confessions.

The recognition of the personal status of non-Sunni Muslim confessions was accompanied by a serious attempt from the Mandate authorities to reduce the powers of the various religious courts and to enhance the powers of the civil courts. On April 28, 1926, the French High Commissioner issued Decision No. 261, Article 1 of which stipulated the following: "In all mandated countries, ordinary courts shall examine the litigations that were the competence of personal status judges, with the sole exception of affairs that are expressly the jurisdiction of these judges pursuant to this decision". Article 2 on the other hand, defines the exclusive jurisdiction of religious courts as follows: "Personal status judges shall have authority over the following issues related to the status of marriage: the marriage contract, the annulment of marriage, the dissolution of the marriage bond (separation, divorce), and alimony between the spouses."

Not only did this decision limit the powers of religious courts, entrusting the issues of inheritance, custody and wills with ordinary courts, but also laid down in Article 4 of the same, the general principle that is still in force today namely: "In a marital status lawsuit, the competent personal status judge shall be the judge of the religious authority before which the marriage was contracted." In other terms, one of the spouses embracing a different denomination shall have no effect on the other spouse, since the competent court remains the one that contracted the marriage.

mitigated by adding a Shiite judge to the Sharia Court of Cassation." For more details about the political background recognizing the Jaafari denomination and the debate arising on the matter, ref: Max Weiss, In the Shadow of Sectarianism: Law, Shi'ism, and the Making of Modern Lebanon, Harvard University Press, 2010, Chapter 3.

[16] Ref. Article 6 of the High Commissioner decision No 336 dated September 1, 1920

[17] Ref. Article 2 of the Governor of Great Lebanon decision No 1545 dated April 1, 1922.

This decision will raise a wave of objection, the authorities refusing to jeopardize the powers of religious courts. This objection will recur before any attempt of the French mandate to curtail the authority of sectarian personal status references. On June 30, 1926, President Charles Debbas, issued issue Decree No. 102[18], which stipulated in Article 1 the following: "The implementation of Decision 261 amending the jurisdiction of Sharia courts and spiritual councils dated April 28, 1926 shall be suspended for an indefinite period." Edmond Rabat remarks in 1928 that Decision 261 did not get the attention it deserved "the irrational national circumstances and protests against a reform that tends towards a desirable secularization, and some objections of a technical nature, have resulted in a Decision that suspended its implementation, save for the Alawites state, where there was no resistance[19].

The Lebanese Constitution, approved on May 23, 1926, provides for equality among confessions and maintains the autonomy thereof. Article 9 of the Constitution stipulates: "Freedom of belief is absolute, and the State, by showing respect for God Almighty, shall respect all religions and confessions, and guarantee the freedom to perform religious rites under its protection, with due respect of public order. The Sate shall guarantee to its inhabitants, all categories combined, the respect of personal status and religious interests".

On May 20, 1926, the Representative Council approved this article, the reporter of the committee that drafted the principles of the constitution, Chebel Dammous, answered an important point related to the nature of the Lebanese State. The minutes of the meeting, read as follows:

"Al-Khazen: What does it mean that it shall also guarantee to its inhabitants the respect of personal status …?

Damous: This is meant to support Article VI of the Mandate Deed. Since confessions for 600 years used to practice their personal status system, the League of Nations and this Constitution have reflected this freedom.

Munther: And what does it mean that "the State by showing respect for God Almighty"?

Dammus: A State is a group of religions, all of which are a minority, and it does not belong to any of them, but it is "not religious" and rather respects everyone.

[18] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=173090

[19] Edmond Rabat, Syria's Political Development under the Mandate, translated by Suleiman Riachi, Arab Center for Research and Policy Studies, Beirut, 2020, p. 230.

Equality between confessions means that the State does not adopt an official doctrine, and therefore does not aim to elevate one faith at the expense of other faiths, and does not grant any religion legal privileges that would make it superior to other religions. Thus, the difference is evident between the spirit of the Lebanese constitution and the Syrian constitution issued by the High Commissioner on May 14, 1930, as Article 3 stipulates the following: "Syria is a representative republic, the religion of its president shall be the religion of Islam, and its capital shall be the city of Damascus[20]." Lebanon's balanced sectarian composition required not only the recognition of this pluralism, but also guaranteeing equality between all confessions in their legal relationship with the state.

Edmond Rabat explains this point, saying: "Regarding the State of Syria, which was established to include in its borders a Muslim (Sunni) majority, the State remained Muslim and practiced Islam (...), it is noticed at present that the two conditions inherent to the state's religion - practice and spending - are fulfilled in the State of Syria"[21] . Thus, Lebanon's Constitution today, unlike Arab countries, has remained devoid of any reference to the official religion of the State or the religion of the head of the State, or to a text that considers the Islamic Sharia as a source of legislation which means that positive laws may not conflict with its provisions.

The subsequent important development related to personal status occurred when Emile Eddé became prime minister in 1929. Emile Eddé, when granted confidence before the House of Representatives, has asked to be given exceptional powers that entitle him to issue legislative decrees. This was the first time in Lebanon that Parliament delegates the government the authority to issue legislative decrees, as this was done in accordance with the law issued on December 26, 1929.

The ministerial statement read on November 22, 1929 included a paragraph on the government's strategy on personal status: "The law that is particularly urgently needed is the law on reforming the personal status (...) amendment is mainly intended to no longer subjecting Christians to the jurisdiction of the Sharia courts. As for Muslim litigants their situation remains unchanged, and the personal status courts remain competent".

Sharia courts, which rule according to the Hanafi jurisprudence - the common law prevailing since the Ottoman era - sometimes examined some cases related to Christians. Therefore, it was necessary that

[20] The Constitution of the State of Syria was published in the Official Bulletin of the Administrative Work of the High Commissioner on June 15, 1930, No. 11

[21] Edmond Rabat; Op. Cit., p.251.

Sharia courts are no longer competent in these matters, in pursuance of the principle of equality between confessions. The Rapporteur of the Parliamentary Committee scrutinizing the ministerial statement of Emile Eddé's government explained this point during the December 16, 1929 session, saying: "The wording of the statement may be erroneous, as it reads "no longer subjecting Christians to the jurisdiction of the Sharia courts"... It is known that Sharia courts are not competent to examine the personal status of Christians. Sharia courts used to exclusively examine civil affairs related to minors, wills, inheritance, the division of inheritance, and custody, for Muslims and Christians alike. We believe that the government meant to say that these matters shall not longer be the competence of Sharia courts".

Indeed, Legislative Decree No. 6[22] on the judicial organization was issued on February 3, 1930. Article 33 included provisions related to the personal status of confessions: "The Court of First Instance shall be competent in all disputes that have so far been within the jurisdiction of Sharia or confessional courts, with the exception of disputes that are the competence of these courts in accordance with this legislative decree." That is, the topics that are not exclusively enumerated in this legislative decree are ipso facto outside the jurisdiction of the Shari'a courts and become the prerogatives of the ordinary courts for Christians. Article 34 enumerates the matters that fall within the jurisdiction of the Christian judge as follows: engagement, marriage, nullity or dissolution of marriage, filiation, custody, alimony, dowry and irrevocable divorce, appointment of a guardian and some points related to endowments.

Article 38 of this legislative decree sustained the Islamic courts, declaring that their powers would not be jeopardized: "Islamic and Druze personal status courts retain their current authority in view of Muslim and Druze litigants."[23]

This legislative decree triggered the objection of the Christian clergy, as it "benefited non-Christians, and caused prejudice to Christians who, being the majority, had barely nothing left of their doctrinal law articles, narrowing the power of the Christian confessional courts and expanding the competence of Muslim Doctrinal Courts"[24]. Peter Hobeika, principal of St. Peter's School in Baskinta, says that justice

[22] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=176830

[23] This article was amended by a law issued on December 9, 1930 as follows: "Sunni and Shiite personal status courts retain their present jurisdiction over litigants from the same religious denomination - and the Druze courts shall have the same jurisdiction over their followers." It is noted that this new text does not differ from a legal point of view from the old text, but merely deletes the word "Islamic" so that it no longer reads that the Druze are not considered Muslims.

[24] Archbishop Boutros Hobeika, Personal Status in the Lebanese Republic, Doctrinal and Social Legal Research, Catholic Press, Beirut, 1931, p. 19.

means equality between all confessions and that Christian courts are endowed the same powers entrusted with Muslim courts. "How can the good governance of the same French State, which was our protector before becoming our Mandator, narrow down the jurisdiction of our confessional courts?"[25].

According to the same writer, the Roman Catholic Patriarch Cyril IX Al-Magghab sent a letter to the President of the Republic, Charles Debbas, asking him to amend Legislative Decree No. 6 "because it humiliates the Christian authority"[26]. Hobeika refers back to 1926, recalling the objection of Christian religious authorities to the High Commissioner's Decision No. 261, saying these issues may not be tackled "without prior agreement with the spiritual authorities that are more knowledgeable of their legislation compared with civilian legislators"[27]. A recurring situation indeed, since, until today, the sectarian authorities claim that the State shall agree with them if it wants to amend the personal status legislations.

In any case, the opposition of Christian religious authorities did not put the political authority to its knees. Rather, the aforementioned legislative decree remained in force[28], consecrating the state's right to determine the powers of confessions in the matters of personal status. But this confrontation between the State and the religious authorities will not be the last, but will rather become more severe and dangerous in the near future.

## DECISION 60 L.R. AND THE CONSOLIDATION OF THE PRINCIPLE OF THE SUPREMACY OF THE CIVIL STATE

Decision 60 L.R.[29] issued on March 13, 1936 by the French High Commissioner, Damien de Martel, is one of the most important decisions ever issued during the French Mandate. It still constitutes to this day the legal framework that fosters the relationship between the State and religious communities.

[25] Op. Cit., p. 21.
[26] Op. Cit., p. 23.
[27] Archbishop Peter Hobeika, Personal Status in the Lebanese Republic, Part Two, in Response to Criticism, Catholic Press, Beirut, 1931, p. 16.
[28] For example, Decision No. 2 issued on January 21, 1931 by the Lebanese Court of Cassation, in which we can read regarding the distribution of inheritance among Christian heirs that the Sharia court, based on Legislative Decree No. 6, "shall no longer examine cases of discrimination because the litigants are non-Muslims." Since the settlement of cases between Christians has become the jurisdiction of the regular courts (...) and since it has been stipulated in Article 38 of Legislative Decree No. 6 that the jurisdiction of Islamic courts has become limited to Muslim litigants." To view the full decision: Judicial Journal, Year Thirteenth, May 1933, No. 5, p. 248.
[29] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=183853

In order to understand the spirit of this decision, it is necessary to return to the preparatory memorandum of Philip Genardi, Inspector General of Awqaf, on June 7, 1934, based on the directives of the High Commissioner whereby the nature of the civil state and its relation with confessions is obvious. If the goal of the decision is to secure equality between confessions and respect their internal independence, the civil authorities must also "reserve the right to examine and interfere in the legal recognition of these confessions and groupings, and in approving and implementing their internal organization." As for the privileges of confessions, the memorandum stresses the need to "eliminate everything that obstructs public authority, especially in the political, administrative or fiscal fields." Finally, this memorandum concludes that in defining the relationship between the State and confessions, "the sovereignty of the civil authority must be the basic rule, and shall therefore preclude any jeopardizing provision made by sectarian organizations[30]."

The main principles embodied in this Decision can be summarized in the following points:

- Religious denominations that the decision defines as "historical confessions" cannot legally apply their personal status to their followers except after the State recognition of their rules, provided that this is done by a legislative instrument, namely a law approved by the House of Representatives. Appended to the decision is a list of the recognized historical confessions, that is subject to amendment[31].
- The historical confessions must submit to the governmental authority the rules governing their teachings, courts, and personal status legislations and specifying how their spiritual leaders are appointed and the applicable hierarchy. These rules shall be approved by the law "provided they do not include a text contrary to public security, morals, the constitutions of countries and confessions or the provisions of the present Decision" (Article 5).

- Article 11 maintains the freedom of belief, as it states: "Anyone having attained the age of majority and having his full mental faculties may leave or embrace any confession that has a recognized personal system…". The rights of confessions do not negate the rights of individuals who enjoy complete freedom in their relationship with those confessions.

[30] The Arabic translation of this note is published in: Talal Al-Husseini, Civil Marriage, Right and Contract on Lebanese Territory, Dar Al-Saqi, Beirut, 2013, pp. 59-62.

[31] For example, Decision 146 dated November 18, 1938, amended this regulation and the Protestant denomination was added, only to become one of the recognized historical confessions, and it has the right, in turn, to apply its personal status laws to its followers.

- In addition to the historical confessions, the decision shall allow for the establishment of confessions affiliated with ordinary law, so that citizens may file before the government authority a request that includes their religious teachings, provided that they are also recognized by the law.

- The personal status of the denominations belonging to the ordinary law shall be subject to the civil law.

- The Decision recognizes the existence of Lebanese who do not belong to any confession, provided that their personal status is also subject to the civil law.

Decision 60 L.R. confirmed the State sovereignty in its relationship with the historical confessions that shall only exist by law upon the State's recognition thereof; and although they are free to determine their personal status, this does not become effective unless it is accompanied by a ratification from the legislator who makes sure that these rules do not contradict the State Constitution.

The decision also stems from a traditional liberal principle, whereby the individual takes precedence over the group to which he/she belongs. The individual exercises the freedom to move from one historical confession to another, and has the right to establish a new confession that is one of the confessions of ordinary Law, i.e., he/she can adopt a new set of religious beliefs and moral principles that are not upheld by the historical confessions. He/she has the right not to belong to any confession, knowing that this does not necessarily mean that an individual does not believe in any religion. Belonging to a particular religion is different from declaring one's affiliation, as an individual can embrace in his/her private life the principles of one of the religions, but at the same time refuse to openly declare this belief or regulate his/her relationship with the state through the confession of which he/she is a follower. For the State, sectarian affiliation is purely administrative, and does not concern an individual's belief or his moral premises, the correctness of his actions, and whether they are consistent with the teachings of his religion, which reflects one of the most important pillars of the civil state, i.e. the latter's neutrality and lack of preference for a particular belief at the expense of other beliefs.

The delegate of the High Commissioner "Laffond" sent an explanatory memorandum to President Emile Edde, on January 11, 1937, regarding confessions with common rights (i.e., the ordinary right). It read "the civil status records reflect, before government authorities, the confession to which a Syrian or

a Lebanese belongs as well as the applicable legal personal status", meaning that sectarian affiliation with the State is only an administrative matter. The memorandum adds that the ordinary right confessions consist of the Lebanese "who have entered their names in the civil status records as members of the new confessions, and these records mean that they are subject in terms of their personal status to the civil legal system"[32]. This is an explicit text stating that those who decide to establish a confession affiliated with the ordinary law have the right to register at the Civil Status Departments as followers of this new confession.

Decision 60 L.R., upon its issuing, did not trigger any upheaval. Problems however started in Damascus in 1939, when the High Commissioner asked the Syrian government to implement it. The latter agreed "hoping that this progress would be a step forward towards modern development akin of modern States, and towards earning public trust which the previous government failed to achieve[33]. Some of the opponents of the Syrian government have exploited this issue in order to achieve political gains, "they provoked public opinion accusing the government of adopting a regime contrary to the true religion"[34]. People took to the streets in most of the Syrian cities and the Association of Scholars in Damascus ferociously contested the content of the decision. To remedy the situation, a higher committee was formed to study the new sectarian system, consisting of senior Islamic religious authorities. It concluded by adopting a number of points, most notably: "Muslims are the majority in the country, they may not be treated similarly to any minority. It is not permissible to give Muslims the freedom to leave their religion or embrace another religion otherwise he/she shall deserve to die. Islam authorizes the marriage of a Muslim man to a non-Muslim woman, but forbids the marriage of a Muslim woman to a non-Muslim man[35]."

Thus, the Mandate authorities decided to step back. On March 30, 1939, the High Commissioner issued Decision No. 53/L.R. annulling the implementation of decision 60/L.R. on Muslims.

[32] The memorandum was published in the Judicial Journal, Seventeenth Year, September and October 1937, Issue No 9-10, p. 567-570.
[33] Youssef Al-Hakim, Syria under the French Mandate, Dar Al-Nahar Publishing, Beirut, 1991, p. 287.
[34] Op. Cit.
[35] Op. Cit., p. 289.

## THE LEGAL REPERCUSSIONS OF DECISION 60 L.R.

What were the repercussions of suspending the enforcement of Decision 60 L.R. for Muslims? How is this reflected in the latter's legal relationship with the Lebanese State?

The first point is related to the individual freedom guaranteed by the aforementioned Decision, as it allows the Lebanese to change their religion by moving from one historical confession to another. Does excluding Muslims from the Decision mean depriving citizens who administratively belong to Islam from changing their sectarian affiliation?

In fact, Decision 60 L.R. was not the first legal text to address the changing of religion. It is true that this decision clearly enshrined this point and fell within a general legislation related to the sectarian system, but Article 45 of Decision No. 2851 dated 12/1/1924 [36] of the Governor of the State of Greater Lebanon regarding the organization and registration of personal status documents dealt with the issue of changing religion, as he authorized it and considered it purely administrative. He only required that those who wish to change their religion should be alone with a cleric from the confession he/she wishes to leave. If he/she insists on the request, a request is sent to the Civil Status Office for registration amendment.

Thus, it becomes clear that changing the religion was applicable before Decision 60 LR. even if it was accidentally mentioned in a text related to the registration of personal status documents. Suspending the enforcement of the decision for Muslims does not affect Article 45 of Decision No. 2851. Even if we suppose that in the event of a conflict between two texts, the subsequent text shall prevail, we note that in 1951[37] a new law was issued regarding the registration of personal status documents. Article 41 thereof reads: "Every request to change one's confession or religion shall be sent to the Civil Status Registry for amendment. This request must be supported by a certificate from the head of the confession or religion to be espoused and shall carry the applicant's signature. The civil registrar shall contact the person and if the latter insists on the request, the presence of two witnesses shall be required. Once the change is confirmed, a comment is added on the request itself and the registration is corrected." Therefore, the 1951 law, which is a general and comprehensive law for all Lebanese, has re-established the freedom to change religion, making the legal process a merely administrative procedure

[36] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=172133
[37] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=197742

so that the role of the state is limited to ensuring the freedom of religion of an individual who intends to change his/her religion and reflect the change in the official records.

Another problem arising from the suspension of Decision 60 L.R. is the civil marriage of a Lebanese abroad. Article 25 of the decision stipulates: "If a marriage is concluded in a foreign country between a Syrian and a Lebanese or between a Syrian or a Lebanese and a foreigner, it shall be considered valid if celebrated according to the practices applicable in that foreign country. If the personal status law of the spouse does not accept the marriage, nor its effects, as it results from the law of marriage, marriage shall be governed by the civil law in Syria and Lebanon". It is the text governing the civil marriage of a Lebanese contracted abroad.

If this text applies to Christians and to civil mixed marriages abroad and is recognized by the Lebanese State, it does not however apply to civil marriages concluded abroad between Muslims belonging to the same confession. Article 18 of the Law[38] regulating the Sunni and Jaafari Shari'a Law issued on 7/16/1962 enshrined this exception, stipulating that Shari'a courts shall be prohibited from "examining the said cases and contracts for non-Lebanese Muslims in the countries where personal status is governed by the civil law unless one of the spouses is Lebanese, in which case the aforementioned lawsuits, transactions, and endowment issues, remain subject to the jurisdiction of the Sharia courts". Article 79 of the new Code of Civil Procedure issued in 1983 reiterated this exception for Muslims, stipulating the following: "Lebanese civil courts shall have jurisdiction over disputes arising from a marriage concluded in a foreign country between Lebanese citizens or between a Lebanese and a foreigner in the civil manner prescribed in the law of the country, and the provisions of the Sharia and Druze courts shall apply if both spouses are Muhammadans and at least one of them is Lebanese.

However, the most prominent difference that will be established by suspending the entry into force of the decision is the different legal relationship between the State and the Christian and Muslim confessions. Since the Ottoman era, Sharia courts have been part of the central apparatus of the State, which used to appoint judges, define their powers, and pay their salaries from the State treasury. This was not limited to the Sharia courts, but included the religious authorities that supervised the fatwas and religious institutions that were also appointed directly by the Ottoman Sultan. This situation continued during the French Mandate, and even expanded to include other Muslim confessions, while the matter

[38] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=244292

completely differed with the Christian confessions that were completely independent from the central apparatus of the state, as the courts of the latter are not part of the judicial system of the Lebanese state, and the Christian religious authorities (patriarchs, metropolitans and the clergy) are subject to their own system that defines their hierarchy and powers, which are matters derived from their beliefs and religious traditions.

Decision 60 L.R. by asking all historical confessions to submit the rules governing their courts and religious authorities, wanted basically to separate the Muslim confessions from the State similarly to the Christian confessions. Suspending the decision means continuing to consider the Islamic courts as part of the legal structure of the State, and confirming that the latter's intervention is necessary for the establishment of the religious authorities of Muslim confession. This will be done in stages, most notably:

- Granting the Sunni Mufti of Beirut the title of Mufti of the Republic under Decree No. 291[39] dated July 9, 1932.
- Legislative Decree No. 241 of November 4, 1942, on organizing the Sunni and Jaafari Sharia courts.
- Regulating the personal status of the Druze community by virtue of a law[40] issued on February 24, 1948.
- Legislative Decree No. 18 of November 13, 1955[41], on the organization of the Sunni community, the election of the Mufti of the Republic, and the powers of the Supreme Islamic Sharia Council.
- Organizing the Druze sectarian judiciary in accordance with the law enforced under Decree No. 3473[42] of March 5, 1960, and determining the method for electing the Sheikh Akl of the Druze community and his powers according to the law[43] issued on July 13, 1962.
- Law No. 72[44] dated December 19, 1967, related to organizing the affairs of the Shiite community in Lebanon, establishing the Supreme Shiite Islamic Council and defining its powers and the method of electing its members[45].

[39] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=179076
[40] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=258196
[41] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=244319
[42] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=243879
[43] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=180867

- Organizing the affairs of the Alawite Islamic community in Lebanon according to Law[46] No. 449 dated August 17, 1995, and establishing and organizing the Alawite Ja`fari Courts according to Law[47] No. 450 also dated August 17, 1995.

The Islamic confessions, unlike the Christian ones, need the legislative intervention of the State in order to establish their courts and organize the bodies that supervise their interests. They are also administratively affiliated to the Presidency of the Council of Ministers, receive their financial allocations from the treasury, and have credits in the annual State budget[48]. It is noted here that this intervention happened over a long period of time and was subject to volatile political considerations, knowing that these texts were amended more than once.

It also turns out that recognizing an Islamic confession does not systemically result in the establishment of a relevant legal body. The Alawite confession was recognized by Decision 60 L.R. since 1936. However, it did not actually become independent and had its own courts until 1995, while the Ismaili sect, also recognized since 1936, remains, until today, without a legal framework that organizes its courts and runs its interests, due to the State's failure to approve the necessary legislation that guarantees its independence.

## EXPANDING THE POWERS OF SECTARIAN REFERENCES AFTER INDEPENDENCE

After Lebanon's independence in 1943, the political authority expanded the powers of sectarian authorities, whether by allowing Christian to enact their own regulations, or by removing the legislative character of the laws applicable to Muslims and allowing the latter to amend those laws without Parliament's review. This paragraph details the State legal mechanism that expands the powers given to confessions, while maintaining the right to restore or amend these powers.

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[44] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=166931

[45] Michael Johnson is quoted saying that Imam Musa al-Sadr's establishment of the Supreme Shiite Council was encouraged by the Second Bureau (Army Intelligence) in order to limit the influence of the traditional Shiite leader Kamel al-Asaad, who is anti-Chahabi, and in order to prevent the increasing numbers of Shiites who migrated from the south to the suburbs of Beirut from engaging in the radical parties opposed to the Lebanese regime:
Michael Johnson, Class and Client in Beirut, Ithaca Press, London and Atlantic Highlands, 1986, p. 149.

[46] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=185017

[47] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=185015

[48] It should also be noted that after the election of the Mufti of the Republic, the President of the Supreme Islamic Shiite Council and the President of the Supreme Council, the President of the Republic issues a decree validating the election.

Decision 60/L.R. imposed on the historical Christian confessions (because the decision was suspended in relation to the Islamic confessions) for recognition "to submit to the government, for revision, the rules drawn from the texts according to which the confessions shall be administered." Article 5 reads as follows: "The law governing the confessions shall be ratified by a legislative decision that makes it enforceable and includes recognition of the confession in accordance with the provisions of Article 1 herein, provided that it does not include a text contrary to public security, morals, constitutions, sectarian rules, or the provisions of the present Decision." The sectarian personal status systems do not become effective once they are approved by the religious authorities. Rather, they require legislative ratification, that is, their approval in the Chamber of deputies by virtue of a law.

As a result of the foregoing, it is evident that the legal power of the sectarian legislations stems from the approval of the Chamber of deputies, which formally retains exclusive legislative power. The Constitution in Lebanon established a single and central legislative authority, and did not grant the sectarian authorities the authority to enact personal status laws. Unlike the federal states where constitution explicitly distributes the legislative power between the federal authority and other members of the union, the Lebanese constitution does not specify the presence of an authority authorized to legislate in the name of each confession. In fact, the current constitution does not enumerate confessions in Lebanon, but rather leaves that to the legislative authority, which, as we have seen, recognized the historical confessions by virtue of the High Commissioner Decision 60 L.R., who under the French Mandate has legislative power. Any amendment of this decision shall now only be through the adoption of a law in the House of Representatives.

The exclusivity of the legislative power, which is enshrined in Article 16[49] of the Constitution, inevitably leads us to Article 9 of the Constitution, which declares that the State "also guarantees to the people of different confessions respect for the personal status system and religious interests". Is there a contradiction between Article 16 and Article 9 of the Lebanese Constitution? Did the Constitution, by recognizing sectarian personal statuses, establish auxiliary legislative powers alongside the House of Representatives?

Article 9 speaks only of respect for religious personal status, meaning that it does not speak of a specific authority, nor does it establish sectarian institutions that have legislative powers. The Constitution,

[49] The legislative power shall be entrusted with one authority, Parliament.

when it enshrines the state's respect for sectarian personal status, is in fact addressing the Chamber of deputies and imposing thereon a clear constraint to ensure that its legislative authority does not lead to the abolition of the personal status of confessions. Article 9 of the Constitution refers to the content and not to the form of the legislation. In clearer terms, Article 9 does not grant sectarian authorities legislative powers, and it does not originally create those powers. Rather, it requires Parliament to respect the legislative content of sectarian personal status.

However, this constitutional exclusivity did not prevent the Chamber of deputies, for reasons unrelated to the law, from expanding the content of sectarian legislations and delegating its legislative powers to Christian and Islamic sectarian authorities. This was done following various methods that we must review for Christians and Jews first, and then for Muslims.

1. Strengthening the Powers of the Christian and Jewish Communities

The main change for Christians and Jews after 1943 was the Law[50] "Determining the Powers of Doctrinal References for Christian and Israeli Communities," which was promulgated on April 2, 1951, and significantly extended the competencies of these confessions to grant them the same powers as Islamic courts. This is what was expressly stated in the evaluation report of the Administration and Justice Committee. It read: "This bill gives confessional courts the powers granted by Legislative Decree No. 241 issued on November 4, 1942 amended by the law of December 4, 1946 for the Sunni and Ja`fari Shari'a courts with regard to marriage, its validity, annulment, filiation, the legality of children, adoption, alimony, guardianship of a minor, and other matters of personal status".

Therefore, this law adopted a trend opposite to Legislative Decree No. 6 issued by the government of Emile Edde in 1930, which curtailed the powers of spiritual courts. The Beirut Bar Association strongly objected to this law, calling for its abolition, limiting the powers of the various confessional courts, and expanding the power of civil courts. The BBA escalated its protest, declaring an open strike, while the Christian and Jewish religious authorities insisted in a meeting held in Bkerke on January 24, 1952, on maintaining this law as a consecration of historical rights and century-old traditions. Prime Minister Sami Solh announced in a session of Parliament on February 21, 1952 that the government sought "to address this issue by finding a solution that satisfies everyone. Both Muslims and Christians are attached to the applicable laws and to the powers granted to confessional courts. Lawyers should not have

[50] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=258197

hurried to strike and we hope that they will end the strike, because we cannot remain silent, and we hope that the government will not be forced to take measures to put an end to this strike."

The Bar Association's strike lasted for nearly three months, without the House of Representatives reversing its position. The opposition MP Abdullah Al-Hajj had alluded to the political goal that led President Bechara El-Khoury to agree to this law. He said in a session discussing the ministerial statement of the new government on February 19, 1952: "You undoubtedly know the power that clergy men have on the State. The lawyer's strike is against the clergy men who benefited from corruption, exerted pressure on the rules and produced the Law of April 2, thirteen days only before the April 15 elections. This law is said to be contrary to parliamentary procedures and was manned by clerics' power". This is a clear reference to the general parliamentary elections that took place in 1951 on April 15, when the goal of the political authority was to win the religious authorities prior to the elections.

The Chamber of deputies voted this single article law, without much discussion. By reviewing the report of the Administration and Justice Committee, it was found that the religious authorities had expressed their opinion on the articles of this law before it was approved. For example, the report mentions that "upon the request of the representative of the Evangelical community, it was decided to replace the phrase "the Protestant community" with the phrase "the Evangelical community" because this label applies to all Protestant denominations in Lebanon.

The expansion of the powers of the spiritual courts was accompanied by an important development introduced by the Law of April 2, 1951 regarding the relationship between confessions and the State. Article 33 read the following: "The confessions covered by this law must submit to the government their personal status law and the law of procedures of their spiritual courts within a period of one year from the date of enforcement of the present law, to be recognized within six months, provided they are consistent with the general law and the basic laws of the State and confessions. The application of the present law on religious denominations that fail to abide by the provisions of the present Article shall be suspended." In other words, the law has delegated to non-Muslims the powers to set their own legislation, granting them almost complete legal independence from the State.

However, Article 33 did not explicitly specify, in contrast with Decision 60/LR, how the government will recognize the rules that confessions will submit, that is, whether this must be done under a law approved by the Chamber of deputies or by a decree or decision issued by the government. But in any case, and despite the 1951 law granting wide powers to the Christian and Jewish confessions, namely

legislating in areas related to various aspects of personal status, it has nevertheless required, for these rules to apply, the approval of the government.

Indeed, the confessions included in the 1951 Law submitted their regulations to the government, but their recognition was not official, which prompted the Court of Cassation to issue a significant decision in 1965, reading: "Since personal status laws submitted within the designated timeframe, though not officially recognized yet, are not considered positive laws; the Court jurisprudence may consider them a set of internal rulings observed by confessions, which the courts can adopt as long as they do not violate the applicable positive laws and the principles of public order and as long as the official authorities have not taken any action to reverse them"[51]. There is no doubt that the decision to say that these regulations are considered valid "as long as the official authorities did not take any action to reverse them" is an explicit confirmation that they may be abolished by the State. The State Council also resolved this point in its decision, as it considered that it concluded from the laws "that the Lebanese legislator has authorized the recognized confessions to legislate in some of the areas of concern." But he insisted that sectarian regulations need legislative ratification in order to become effective. He added explicitly that "the contested regulations were not approved by the legislator, and therefore are still not valid[52]."

Thus, it becomes clear that the Laws that the Christians and Jews implement today have not been officially recognized by the State and are therefore either not approved as per the decision of the Shura Council, or are provisional pending a State official decision to recognize them.

2. Granting the Islamic sectarian authorities the powers to amend laws approved by the House of Representatives

After suspending the application of Decision 60/L.R. Muslims, alike Christians could no longer submit their rules to the State for recognition. Rather, the State had to regulate these denominations directly by issuing legislations that grant Muslims their institutions, courts, and administrative bodies. This is what happened gradually, with all Islamic denominations, save with the Ismailis, who remain without a legal framework regulating their internal affairs.

[51] Civil Court of Cassation Decision No 6, dated April 2, 1965. http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=61019&type=list

[52] Decision No 426 dated 5/3/2014. http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=83121&type=list

The first Islamic denomination to be regulated was the Sunni confession according to Legislative Decree No. 18 dated 13/1/1955, which is considered the basic text specifying the administrative apparatus by which Sunnis manage their affairs. The first article of this legislative decree stipulates the following: "Sunni Muslims are completely independent in their religious affairs and charitable endowments. They enact their legislations and rules in due respect of the noble Sharia, the laws and regulations derived therefrom, through competent representatives in the ways set forth in the following articles."

This legislative decree sparked widespread controversy in the Chamber of deputies, which formed a committee headed by Abdullah Al Yafi to study all the legislative decrees approved by the government. On May 13, 1955, the committee replied in the context of Legislative Decree No. 18, saying that "the government has exceeded its authority, or more correctly, it was not given the authority to legislate on this subject at all." Therefore, the committee recommended that this decree is not ratified "and considered null the provisions and measures taken on the basis thereof.[53]" Prime Minister Sami Solh responded to the committee, saying that the government did not exceed the mandate entrusted thereby by the House of Representatives, saying, "The overwhelming majority in the Islamic community was happy with this legislative decree, implemented its provisions, and acclaimed the government for issuing it."

But no one expected the State Council's to abolish Legislative Decree No. 18, as it included provisions related to the organization of fatwas and endowments "without the legislative authority's approval, which is invalid and a trespassing of jurisdiction as it is issued by a non-mandated person"[54] .

This decision triggered the condemnation of a large number of Sunni deputies, as it cancels all measures that had previously been taken pursuant to the aforementioned legislative decree that has been implemented since the moment of its issuance. In order to remedy the matter, the House of Representatives, upon the request of the new Prime Minister, Abdullah al-Yafi[55], passed a single article law on May 28, 1956 which reads: "The Supreme Sharia Islamic Council may reconsider all the provisions of the legislative decree and introduce the amendments it deems necessary. Its decisions, fatwas, organizational decrees related to the religious community and the management of its endowments shall be self-executing, provided that they do not conflict with the provisions of laws

[53] The report of the Committee was read before Parliament on May 26, 1955.
[54] Decision No 522 dated 9/11/1955
http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=65956&type=list
[55] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=175951

related to public order. In other words, this law revived Legislative Decree No. 18, ratifying all the measures that were taken based on it, and it also granted Sunni authorities the power to amend the legislative decree without referring to the Chamber of deputies, which granted it a legislative mandate.

The Prime Minister added, "Muslims, led by the Supreme Islamic Council, and in agreement with PM Sami al-Solh approved the article. And if we agree to this article, then I think that the honorable council shall have no objection thereto as it puts an end to the current confusion."[56]

MP Hamid Franjieh protested saying that Parliament is hereby relinquishing its legislative powers. Sami al-Solh responded by saying: "The authority we ask for the Islamic Council shall be limited to fatwas and endowments. The other confessions have powers that organize their internal affairs and enable them to make the necessary amendments. Therefore, Muslims must have the same rights, this is all we ask for. We ask that the Supreme Sharia Islamic Council has privileges equally with other confessions; the matter has been thoroughly examined."

MP Maroun Kanaan ended the discussion by saying: "A simple question, does this law give the Supreme Islamic Council more powers than the powers given to other confessions? If not, and if the stakeholders agree, then discussion end here and the voting must be finalized." Discussion ended and the law was voted unanimously.

The Supreme Islamic Sharia Council will over the years, pursuant to this law[57], amend Legislative Decree No. 18 more than once through decisions issued and published in the Official Gazette. The State[58] Council considered that these amendments stand as legislative texts and cannot be appealed. Irrespective the prohibition to appeal - the State Council considered that the legislative decrees issued by the government upon the mandate of the Chamber of deputies remain, prior to their ratification, administrative acts subject to appeal[59], which was also supposed to apply to the decisions of the Supreme Islamic Sharia Council - we note that the authority of the Supreme Islamic Sharia Council

[56] Parliament session dated April 17, 1956

[57] The State Council retracted its decision to annul the legislative decree after the promulgation of the Law on May 28, 1956, saying that the law "has approved the validity of Legislative Decree No. 18 which is now considered an enforceable law" (Decision No. 339 dated June 18, 1956).

[58] Decision No. 16 of 12/10/2006: http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=74988&type=list

[59] Decision No. 522 of November 9, 1955: http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=53450&type=list

stems from the law, which means that the Chamber of deputies has the right to amend it and withdraw this mandate if it decides to do so.

Regulating Muslims' affairs is not limited to the establishment of their own institutions and courts, but goes as far as defining the content applied by the relevant courts. Former Article 242 on Sunni and Jaafari Sharia courts issued under the Law dated 7/16/1962 stipulated the following: "The Sunni judge rulings shall be aligned with the Abu Hanifa school of thought, except in the cases stipulated in the Family Rights Law issued on Muharram 8, 1336 and October 25, 1933, so the Sunni judge applies the provisions of that law, and the Jaafari judge issues his ruling in accordance with the Jaafari school of thought in line with the provisions of the applicable family law. Therefore, the State, through its legislative authority, determines the nature of the texts applied by Islamic religious courts, though in general terms.

In 2011, the powers of the Supreme Islamic Sharia Council were expanded by amending Article 242 as follows: "The Sunni judge decisions shall be aligned with the provisions of the Supreme Islamic Sharia Council in the personal status of Sunni Muslims and the organization of religious community affairs (...) In the absence of any text, the Sunni judge shall refer to the Ottoman Family Rights Law issued on October 25, 1917, otherwise he shall rule according to the school of Imam Abu Hanifa and the relevant provisions of the family law".

This article is of paramount importance as it reveals the nature of the relationship between the State and confessions. This amendment granted the Supreme Islamic Sharia Council the power to legislate texts that a judge must implement. The Supreme Islamic Sharia Council was not able to amend Article 242, as it is not part of Legislative Decree No. 18, which the Council has the right to amend on its own, as previously explained. Rather, it is an article in a different law issued in 1962, and therefore the Chamber of deputies had to intervene and grant the Islamic Council the power to pass judgments that courts will apply, while this did not fall within its jurisdiction before 2011, which once again confirms that the legislative mandate of confessions finds its source in the law and not in the constitution.

The same legal solution was adopted with the Shiite community. Article 31 of the law relating to the organization of the Shiite community issued in 1967 stipulated the following: "With the exception of the first, second, third, fourth and fifth articles of this law and with due regard to the provisions of Article twenty-six of the same, the legal and executive bodies shall collectively have the right to reconsider the provisions and change what they deem necessary. Their decision in this regard and in everything related

to the religious community and the management of its endowments shall be enforceable by itself, provided that it is approved by the General Assembly and that it does not conflict with the provisions of laws related to public order". It is noted that the legislative mandate granted here is not absolute, as was the case with the Sunnis, as it includes only the possibility of amending some articles of this law, not all of them.

If the Chamber of deputies decided to grant the Sunni and Shiite religious authorities an explicit legislative mandate, this did not prevent it however from withholding this authority from the Druze. The laws on the organization of the confession, old and new, were devoid of such a mandate, while Article 31 of the law relating to the organization of Alawis (1995) stipulated on such authorization, though in an ambiguous and indirect manner: "The Sharia and Executive Boards have the right together to reconsider the articles related to the proper conduct of work in order to achieve the main purpose of this law. Their decision in this regard and everything related to the Alawite Religious affairs and the management of its endowments shall be self-effective provided it has the approval of the General Assembly and does not conflict with the rules of public order.

## THE CIVIL NATURE OF THE LEBANESE STATE

By studying the legal structure of the Lebanese State that was established during the time of the French Mandate through the various amendments that were made in the post-independence phase, it becomes clear that Lebanon is now a civil state and this does not contradict the legal provisions that govern the sectarian civil status laws, nor ensure the participation of confessions in public institutions. Confessions, as it became clear to us, do not exist except through the State's recognition, which happened in stages, the most prominent of which was the High Commissioner's Decision No. 60/L.R. dated March 13, 1936, which recognized the so-called "historical confessions" as public right official institutions entrusted by the law with exclusive powers of personal status, and therefore, although they historically precede the Lebanese State, they are legally subsequent in their existence, i.e. they derive their authority from the state's recognition. This is evident in the legal structure of the Lebanese State, which recognizes the existence of Lebanese who do not belong to historical sects, and also recognizes the right of citizens to change their religion or even establish a new religion that falls within the so-called confessions of public right. The rights of confessions do not negate the rights of individuals who enjoy complete freedom in their relationship with those confessions.

Moreover, it is up to the Parliament to amend the list of recognized confessions, as happened with Law[60] No. 553 issued on July 24, 1996, which added the Coptic Orthodox Church to the list of recognized confessions under Decision No. 60/LR. Confessions, regardless of their religious beliefs, are social groups that arose in specific historical circumstances, which means that they are subject to historical factors; the number of their followers would increase or decline, or the existing relations between their members would develop as a result of certain circumstances and become more cohesive, or on the contrary completely dissolve to the extent of a social decay. Therefore, it is up to the State to adjust its relationship with the confessions according to the evolution of society, and this explains the Lebanese legal system's recognition of the State's right to recognize confessions and regulate their affairs, meaning that the state is civil in nature because it does not adopt the beliefs of this or that confession, and it does not aim to impose religious morals that this or that group preaches since religious beliefs and morals find their source in divine legislation, while the State in Lebanon considers confessions to be merely historical social entities, and does not care at all about the teachings of these confessions in terms of their take on existence, the nature of God, reward and punishment, as well as the various religious beliefs

The state's supremacy over the confessions is also evident in Article 5 of Decision 60 LR., stipulating that the sectarian systems should not conflict with public security and the State constitution. The Lebanese State accepts the existence of confessions as a social reality that must be dealt with, because the goal of any State is to find a legal framework that guarantees for individuals the right to exercise their basic rights, whether that is by perpetuating the sectarian affiliation of citizens or by acknowledging the existence of individuals who do not belong to historical confessions but prefer a personal and free decision, don't declare their religious beliefs and regulate their relationship with the State directly without going through the sectarian channel.

The Lebanese Constitution enshrined the nature of the civil state by declaring in Paragraph "d" of its Preamble that the people are sovereign and the source of authority, meaning that the State derives its legitimacy from the people and not from any metaphysical doctrine, which means that the authorities in

[60] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=184505
The preamble of the Law reads the following: "The said religious denomination has also presented its rules to the government in accordance with the provisions of Article 4 of Decision 60, and these rules are compatible with Article 5 of Decision 60/1936." However, this text does not explain how the government acknowledged the aforementioned sectarian denomination.

Lebanon are temporal and their legislations positive. The Lebanese legal system recognizes Parliament as the sole legislative authority. The existence of sectarian personal statuses does not contradict the civil state, because sectarian legislations do not impose themselves on the basis of transcendent religious legitimacy, they are only enforceable because so is authorized by the State Constitution and the laws. Indeed, as we mentioned previously, the Chamber of deputies has more than once amended the personal status regulations of the confessions, which confirms the permanent supremacy of the State over confessions.

The sovereignty of the people is also evident in Article 9 of the Constitution, which states that freedom of belief is absolute, meaning that a citizen in Lebanon is free to belong to any confession or to reject this affiliation regardless of the truth of his faith. Freedom of belief also includes the freedom to declare or not one's faith, or affiliation with a social historical group, the freedom to exercise one's faith in his/her private life.

These legal facts prove that the state in Lebanon, like any modern state, is civil, and the sectarian constitutional provisions do not contradict civility. However, this civil status remains incomplete in the absence of a civil personal status law that is applicable to those willing to follow it. Some have argued that such a law is a breach of Article 9 of the Constitution, which guarantees the respect for the personal status of confessions, and that any approval of a civil law needs a constitutional amendment.

Undoubtedly, this article is considered a cornerstone in the religious personal status system, as it explicitly recognizes the right of confessions to organize their affairs first, and to have their personal status recognized second. But the question is irrelevant in this case, since no one disputes this fact. Rather, the problem lies in knowing whether this recognition constitutes an absolute right for confessions that encompasses all the Lebanese and limits the authority of the State so that the latter loses its legislative powers. In other words, does the constitution's adoption of a sectarian personal status system exclude this field from the State's legislative authority?

To answer this question, it must be emphasized that sectarian autonomy as emphasized in the constitution must be respected and is by no means comprehensive and exclusive to prevent the existence of other civil legislation besides sectarian ones. Religious personal status is an option that is authorized in the constitution, as the failure to establish the independent personal status of confessions in a constitutional text would have inevitably led to all religious legislations being considered in violation of the constitutionally enshrined principle of equality because they are exceptional texts, and therefore it

was necessary to give this exception its constitutional value. Since the Constitution allows for this exception, this automatically means that the State is civil and that the legislative power of the latter cannot be touched or limited. This is clearly confirmed in the Constitution preface and in Article 95 which stipulates that the abolition of political sectarianism is a national goal. The abolition of political sectarianism is a principle of constitutional value meant to consolidate the civil state and ensure political equality between the Lebanese before Parliament and the Council of Ministers, regardless of their sectarian affiliation. The same applies to civil personal statuses. Once enacted, these statuses will establish the civil state and ensure equality between the Lebanese, in terms of their political representation before Parliament and the Cabinet, regardless of their confessional belonging. The same applies to enacting civil personal status laws which will enshrine the state civil status prior to its generalization on different levels. This matter does not need a constitutional amendment since civil legislation is the rule and the exception is the sectarian personal status.

The Chamber of deputies entrusted the recognized historical confessions with legislative powers in matters related to personal status and internal affairs. However, Article 5 of Decision 60 LR. requires that the personal status laws and trial procedures, to become effective, be accompanied by a law ratified by the House of Representatives. Therefore, respecting the right of the confessions to the application of their personal status does not violate the principle of the legislative supremacy of the state. This was explicitly confirmed by the Constitutional Council when it declared that Article 9 of the Constitution, although it gives "confessions autonomy in managing their religious affairs and interests, does not obscure the state's right to enact legislations that regulate the affairs of these confessions in accordance with the provisions of the Constitution." The State's right to legislate is one of the rights of sovereignty that derives its source from the people and is exercised by the State through its constitutional institutions (...) and the authority of legislation is an authentic and absolute authority, and the Constitution has limited it to one body which is the House of Representatives".[61]

If this decision allows the State, through the Chamber of deputies, to organize the historical confessions "without violating sectarian independence to manage their own affairs or stand in lieu of the State," [62] then it is logical to recognize the obvious right of the legislative authority to regulate this field which has nothing to do with confessions in the first place, i.e. the civil personal status of the Lebanese who do

[61] Decision No. 2 dated 8/6/2000: https://www.cc.gov.lb/node/2579
[62] Decision No. 2 dated 8/6/2000.

not belong to a confession, as recognized by Decision 60 L.R, or even the Lebanese who choose to voluntarily submit to civil legislation. Preventing the State from legislating in this field is a derogation from its sovereignty emanating from the people, meaning that the source of sovereignty is purely temporal, and therefore the State cannot deny its civil nature, and make the exceptional sectarian legislation the overriding principle that precedes it ontologically and that it must protect.

Moreover, the Constitutional Council considered that Article 9 of the Constitution, which recognizes sectarian autonomy, "includes the state's neutral stance on religions.[63]" Therefore, based on this neutrality, which justifies the role of the state, the Constitutional Council considered that the Chamber of deputies shall have full authority to legislate and "enact laws that regulate sectarian affaires, and the power to amend them, provided that their independence in managing their affairs is not compromised[64]." In the same decision, the Constitutional Council went on to differentiate between the sectarian administrative affairs and religious affairs. In other terms, administrative affairs are an organizational issue subject to the discretion of the House of Representatives, "which has the original and absolute authority to legislate everything related to the self-administration of confessions in application of Articles 9 and 10 of the Constitution provided the exercise of religious freedoms and rites is guaranteed".

## CONCLUSION

As a result of the foregoing, and based on everything mentioned in this study, we can emphasize the civil nature of the State in Lebanon, which is reflected in the following points:

- Sovereignty in Lebanon belongs to the Lebanese people, and the State's legislations are positive, as Parliament does not need to obtain the approval of religious authorities in order to exercise its legislative authority.
- Neutrality, which is reflected in the State not adopting any official religion, and its recognition of confessions is a legal procedure aimed at regulating the administrative relationship between citizens and the State while recognizing the religious freedom of individuals and giving them the

[63] Decision No. 1 dated 23/11/1999: https://www.cc.gov.lb/node/2576
[64] Decision No. 22 of August 19, 2019.

option to change their religion or establish a confession that embodies their view of existence and life, or even rejection of any confession or faith[65].

- The State has the right to organize the affairs of confessions and to supervise the institutions of the latter, but also to amend personal status laws[66] in accordance with the principle of the supremacy of the civil authority. The General Authority of the Court of Cassation considered that "the authority to settle cases between individuals is essentially the authority of the judiciary. The authority granted by the legislator under the Law of April 2, 1952 to the confessions is tantamount to a waiver by the State of some of its powers. This waiver must be understood exclusively and narrowly".[67] This is not evidenced by Article 95 of the Civil Procedure Code which gave the General Authority of the Court of Cassation, the authority to decide on requests to appoint a reference when there is a difference in jurisdiction between the judicial courts and the different sectarian courts, or between the sectarian courts themselves. It is the authority of the Court of Cassation to settle an opposition to a decision issued by a sectarian court "for violating fundamental formulas related to public order."

At the end of this legal historical review on the development of the personal status system in Lebanon, it becomes clear to us that limiting or expanding the scope of the personal statuses of confessions was mainly subject to volatile political considerations dictated by the interests of the authority. The strengthening of the powers of sectarian references that took place after independence was not for legal requirements because of the nature of the "sectarian state," but rather a policy pursued by the Lebanese regime, a policy that can be reversed and modified in accordance with the state's legislative sovereignty and the superiority of the civil authority in its relationship with the confessions.

We saw that the personal status system is not the same for all confessions. The Christian denominations are completely independent of the central State apparatus, as they approve their own legislation and

[65] The Legislation and Consultations Commission considered that "depriving any person of his/her right and freedom of not having his/her religion specified in the personal status records for any reason - namely the absence of a unified personal status law for all Lebanese, regardless of their religious affiliation - and thus rejecting the request to cancel the sectarian registration constitutes a violation of the Constitution and the Universal Declaration of Human Rights, bearing in mind that the consequences of a strike off are borne solely by the person concerned." (Consultation No. 276 dated 5/7/2007).

[66] For example, the law issued in 2017, amending the personal status law of the Druze issued in 1948, raising the age of custody from seven and nine years for boys and girls to 12 and 14 years, respectively.

[67] Decision No. 8 of January 23, 1998: http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=66257&type=list

organize their courts, while the Islamic ones need laws approved by the House of Representatives in order to establish their administrative institutions and courts. Thus, we note how the standards were reversed between the Ottoman era and today, as the Christian denominations were the ones subject to the system of millet that imposed the legislative intervention of the Ottoman State in order to organize their affairs, while today the Islamic denominations in Lebanon are the closest to the Ottoman millet system because they legally need the State to exist.

The difference also in the personal status system is not only related to how the relationship between the Christians and Muslims is organized in the state, but it also applies to its content. The personal status of Muslims is broader, as it includes issues of inheritance, while issues of inheritance and wills were removed from the jurisdiction of the Christian courts[68], pursuant to the Law of Inheritance for Non-Mohammedans issued on June 23, 1959, which subjected these issues to the jurisdiction of the civil courts[69]. The same applies to endowments, as the powers of Islamic courts are broader including endowments, both charity (religious) and family, while the powers of Christian courts are limited to charity endowments, family endowments falling within the jurisdiction of a special civil court as stipulated in Article 45 of the Family Endowments Law[70] dated March 10, 1947.

Thus, it becomes clear to us that the absence of a civil law for personal status is not caused by the nature of the State that prevents it for legal considerations, but is rather the result of a deliberate political decision that does not want to weaken the interests of sectarian references in order to achieve certain gains. The most prominent example of this is the position of Prime Minister Rafic Hariri, who in contravention of the constitution, refused to sign the decree referring to Parliament the draft civil personal status law proposed by President Elias Hrawi and approved by the Council of Ministers on March 18, 1998. The Mufti of the Republic had launched a violent campaign against the draft, considering that it violated the Qur'an and the Sunnah, and that no Muslim shall approve it as it leads to apostasy. Soon, the Christian religious authorities joined forces with the Mufti by refusing to approve the aforementioned law.

[68] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=244354

[69] The wills for non-Muslims was previously subject to the Law dated March 7, 1929 on wills for non-Muhammadans. Article 7 of the 1959 Law stipulated that the wills for Muslim Lebanese shall remain subject to the Islamic law and to their traditions.

[70] http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=167358

In summary, the State in Lebanon is civil in its nature and legal system and is based on the respect for freedom of belief and guarantees the personal status of the confessions, provided that this does not conflict with its constitution and public order. The barrier that prevents the State from enhancing the freedom of citizens by adopting an optional civil personal status law, or even by reforming sectarian personal statuses to promote equality between women and men, is primarily a political obstacle arising from the goals of the ruling cast in Lebanon.

# The Influence of Islamic Sharia on Arab Constitutions and Civil, Commercial and Family Legislation: Comparative Arab Experiences

Abdullah Abdul Karim Abdullah [*]

ABSTRACT

This research paper is an overview of some of the Islamic Sharia's influence on Arab constitutions and legislation based on a comparative approach to some Arab constitutional and legal frameworks with diverse backgrounds. The paper focuses on three models. The first model is the Arab Gulf model. The paper reviews and analyzes the extent to which the constitutional and legal frameworks in one of the Gulf states, namely Qatar, are influenced by Islamic Sharia. The second model is the Arab-African model, where the Islamic law's influence on constitutional and legal frameworks in Egypt is reviewed and analyzed. The third model is the unique Lebanese model, different from all other Arab countries since Lebanon is a country of multiple sects and different cultures. The paper will attempt to shed light on the specificity of the impact of Islamic Sharia on some legal rules in the Lebanese legal system.

The paper formulates a set of results and recommendations that shed light on the specificity of Islamic Sharia as a determinant of the state's legislative path according to the specific legislation philosophy espoused by each of these three states, although they are all "Arab countries."

The paper also highlights the role of Islamic Sharia by focusing on the its influence on Arab constitutions and legislation in the field of civil and commercial transactions and personal status.

Keywords: *Islamic Sharia, constitution, civil transactions, Qatari law, Egyptian law, Lebanese law, civil code*.

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## INTRODUCTION

Islamic Sharia plays an important role in the constitutions and laws of Arab countries. The majority of these countries adhere to Islam. This has marked the legislation in these countries in terms of the rules governing constitutional, civil, financial, commercial, economic, social, personal status, and other matters.

From a constitutional perspective, in the State of Qatar for example, Islamic Sharia is a major source of legislation, as stated in Article One of the Qatari Constitution.[1] In Egypt, according to the preamble of the Egyptian Constitution, the principles of Islamic Sharia represent the main source of legislation. This was further confirmed by Article Two of the Constitution which expressly stated that the principles of Islamic Sharia are the main source of legislation.[2] Meanwhile in Lebanon, there is no such source in the constitution due to the specific nature of the political and legal system of this country.[3]

[1] Text of the Qatari constitution: https://www.almeezan.qa/LawView.aspx?opt&LawID=2284&language=ar
[2] Text of the Egyptian constitution: https://www.sis.gov.eg/newvr/theconistitution.pdf
[3] Text of the Lebanese constitution: https://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf

From the perspective of ordinary legislation, Islamic Sharia is one of the sources of the legal rule in Arab legislation,[4] although its ranking varies for each legislation, according to the country[5].

Reference is made here to the definition of the sources of the legal rule in the texts[6] of the Unified Arab Civil Code (Guiding Model).This definition indicated that the provisions of the approved civil [7] code shall apply to all issues governed by these provisions in letter and spirit. In the absence of a text in this code, the provisions of Islamic jurisprudence that are most consistent with the texts of this code shall be applied without being restricted to a specific school of jurisprudence. In the absence of such provisions, the principles and purposes of Islamic law shall be applied, taking into account the custom, if any, under the conditions established by jurisprudence,[8] provided that the content and interpretation of the text are based on the rules of Islamic jurisprudence.[9]

In this context, it is worth reviewing some aspects of the Islamic Sharia's influence on Arab constitutions and legislation in the field of civil transactions. This is done by shedding light on some of the various Arab experiences to better understand the legal aspects of this influence in a way that contributes to the development of legal rules in force in different legal systems, in accordance with the philosophy of each legislation[10].

The problem arises about the extent to which Islamic Sharia is deemed a principal or backup source of legal rules in the studied countries, irrespective of whether or not the constitution stipulates for the Islamic Sharia's impact on these rules. This will appear by comparing constitutional texts and those

[4] Ali Najida, The Role of Islamic Sharia in Positive Law - A Comparative Study, research published in the Legal and Judicial Journal issued by the Legal and Judicial Studies Center - Ministry of Justice - State of Qatar, Issue One - Year Nine - June 2015, Ministry of Justice Publications, Doha - Qatar , 2015 p. 21

[5] See the impact of religion in Egyptian and Lebanese laws: Muhammad Hassan Qassem, Introduction to the Study of Law - Part 1 - Legal Rule, Al-Halabi Legal Publications, Beirut, 2008, p. 239ff., and the references referred therein

[6] Link to the Arab Civil Code http://www.lasportal.org/ar/legalnetwork/PublishingImages/Lists/TypicalArabLaws/AllItems/07.%20%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%20%D8%A7%D9%84%D9%85%D9%88%D8%AD%D8%AF.pdf

[7] The Unified Arab Civil Code was approved by the Council of Arab Ministers of Justice as a model law by virtue of Resolution No. 228-D12 dated November 19, 1996.

[8] Articles 87 and 88 of the (model) Unified Arab Civil Code

[9] See the most prominent principles in force in Islamic legislation that have affected some Arab civil laws: https://www.moj.gov.qa/ar/Departments/MOJ_InternationalDeptLibrary/%D8%A3%D8%A8%D8%AD%D8%A7%D8%AB/%D8%A3%D8%A8%D8%AD%D8%A7%D8%AB%20%D9%81%D9%8A%20%D8%A7%D9%84%D8%AA%D8%B9%D8%A7%D9%88%D9%86%20%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A/2.pdf?csrt=7715438922152691038

[10] Ali Najida, Introduction to Legal Sciences compared to the Provisions of Islamic Law, Dar Al-Fikr Al-Arabi and Cairo University Printing House, Cairo, 1990, p. 11

related thereto in the civil and commercial transactions and personal status laws in order to clarify the role of religion in laws.

The study will be based on a multi-dimensional approach due to the complexity of the subject and the necessities of the study. Analysis will applied as an existing approach in presenting the experiences of the countries under study. This is followed by comparison in light of the diversity of the experiences referred to, and description as a simplified way to present the legal aspects of the subject.

The subject will be studied under the following axes:

1. Islamic Sharia and the Qatari legal system
2. Islamic Sharia and the Egyptian legal system
3. Islamic Sharia and the Lebanese legal system

## 1. ISLAMIC SHARIA AND THE QATARI LEGAL SYSTEM

Islamic Sharia is reflected in Qatari legislation, starting with the Qatari constitution. The preamble to the constitution stressed the importance of the state's affiliation to Islam. Moreover, the constitution stipulated that Islam is the religion of the state and that Islamic Sharia is a major source of legislation in the state of Qatar.[11]

A constitutional text was also mentioned in the oath that the Emir of the state takes before assuming his powers.[12] This text placed respect for Islamic Sharia ahead of respect of the constitution and the law.[13] The same constitutional requirement was mentioned in the text on the heir apparent.[14] The same applies to the oath taken by a member of the Shura Council, where the member swears, before discharging his parliamentary functions, to respect Islamic Sharia, the Constitution, and the law,[15] on the grounds that the Islamic Sharia is a determinant of his supervisory and legislative work.[16] The situation is also the same for the Prime Minister and members of the Council of Ministers[17] who are subject to a constitutional obligation to take an oath stating that the executive authority shall respect Islamic Sharia in the performance of its work.[18]

Regarding the correlation between Islamic Sharia and civil transactions and the former's impact on said transactions, we find that they are based on Article 1 of the Qatari Civil Law entitled "Statutory Provisions." This Article is located in Subchapter 1 on the application of the law in Chapter 1 on the application of the law and temporal and spatial jurisdiction in the Introductory Part.[19] It states that

[11] Article 1 of the Qatari Constitution.
[12] Article 74 of the Qatari Constitution
[13] The text of the oath is as follows: "I swear by Almighty God to respect Sharia law, the Constitution and the law, protect the independence of the State, safeguard its territorial integrity, and defend the freedom and interests of its people." The Emir shall take this oath in a special session convened by the Shura Council.
[14] Article 10 of the Qatari Constitution reads as follows: "The Heir Apparent, on his appointment, shall take the following of oath: "I swear by Almighty God to respect Sharia law, the Constitution and the law, maintain the independence of the State and safeguard its territorial integrity, defend the freedom and interests of its people, and be loyal to the State and the Emir."
[15] Article 92 of the Qatari Constitution
[16] The text of the oath is as follows: "Prior to the discharge of their duties before the Shura Council and in an open session, the Members shall take the following oath: "I swear by the Almighty God to be loyal to the country and to the Emir, respect Sharia law, the Constitution and the law, and safeguard the interests of the people and perform my duties with honesty and integrity."
[17] Article 119 of the Qatari Constitution.
[18] The text of the oath is as follows: "Prior to assuming office, the Prime Minister and the Ministers shall take before the Emir the following oath: "I swear by Almighty God to be loyal to the country and to the Emir, respect Sharia Law, the Constitution and the law, fully safeguard the interests of the people, perform my duties faithfully, conscientiously, and with honor, and fully safeguard the territorial integrity and safety of the State."
[19] The Qatari Civil Law available on the following link: https://www.almeezan.qa/LawView.aspx?opt&LawID=2559&language=en#Section_8876

Islamic Sharia is the second basis of judicial ruling to be applied in the absence of legislative texts governing the issue dealt with. The legislative texts in this case, must be in line with the Islamic Sharia[20] in accordance with the constitutional texts referred to above.

When examining a civil dispute, the judge must apply the laws in force regarding the issue in question before him. Where there is no statutory provision, the Judge shall rule according to the relevant provision of the Islamic Sharia, if any. Otherwise, the Judge shall rule according to the customary practice. In the absence of such customary practices, the Judge shall rule in accordance with the rules of equity. [21] It is clear here that Islamic Sharia is an official backup source to be resorted to in the absence of a legislative text to rule on the dispute of a civil nature.[22] It is worth mentioning that the legislative text, if it exists, must be essentially consistent with the provisions of Islamic Sharia.[23]

We also find the impact of the principles contained in Islamic Sharia in some of the bases enshrined in the civil law. These include the rule that abuse of right is inadmissible and deemed an illegal use of the right. This was stipulated in the Qatari Civil Code. It provided that "The exercise of a right shall be unlawful in any of the following circumstances: If the desired interest by such use is unlawful; If such use is intended solely to cause damage to others; If the interests desired are disproportionate to the harm that will be suffered by others; or If such use may cause unusually gross damage to third parties.[24] An example of this is when a person builds in its on property a high wall that blocks his neighbor's air

[20] Ramadan Muhammad Abu Al-Saud and Muhammad Hussein Mansour, Introduction to the Law, Al-Halabi Legal Publications, Beirut - Lebanon, 2003, p. 160.

[21] Abdullah Abdullah, "The Legal Impact of Islamic Law in the Identity and Provisions of Qatari Legal System: Conceptual Frame and Legislative Directions," p. 455ff.

ABDULLAH, Abdullah. The Legal Impact of Islamic Law in the Identity and Provisions of Qatari Legal System: Conceptual Frame and Legislative Directions. Al-Jami'ah: Journal of Islamic Studies, [S.l.], v. 58, n. 2, p. 451-482, dec. 2020. ISSN 2338-557X. Available at: https://aljamiah.or.id/index.php/AJIS/article/view/58207. Date accessed: 03 sep. 2021. doi:https://doi.org/10.14421/ajis.2020.582.451-482.

[22] Muhammad Hussein Mansour, "The supremacy of Islamic Sharia on the constitution, legal hierarchy and the role of the Supreme Constitutional Court in monitoring the constitutionality of laws violating Sharia," a research published in the volume of the conference of the College of Law at Qatar University entitled 'The Qatari Civil Code in its First Decade,' held at Qatar University on 23-24/11/2014 on the occasion of the tenth anniversary of the enactment of the Qatari Civil Law, Publications of the College of Law at Qatar University, Doha, 2014, p. 21.

[23] ABDULLAH, Abdullah. The Legal Impact of Islamic Law in the Identity and Provisions of Qatari Legal System: Conceptual Frame and Legislative Directions. Al-Jami'ah: Journal of Islamic Studies, [S.l.], v. 58, n. 2, p. 451-482, dec. 2020. ISSN 2338-557X. Available at: https://aljamiah.or.id/index.php/AJIS/article/view/58207 . Date accessed: 03 sep. 2021. doi:https://doi.org/10.14421/ajis.2020.582.451-482.

[24] Article 63 of the Qatari Civil Law

flow, light and view without this wall being needed by the builder. Another example would be the legal restrictions to the owner's powers in the exercise of the right of ownership.[25]

Perhaps such legal rules stem from some of the principles stipulated in Islamic Sharia, such as "*a greater harm is eliminated by means of a lesser harm*," "*harm is not eliminated by another harm*," and "*Unlawful things are to be prevented irrespective of benefit.*[26]"

Some of the legislative examples in civil law where the influence of Islamic Sharia is apparent include the rules governing tort liability. This influence appears clearly in the obligation of the wrongdoer stipulated in the civil law to compensate the victim for the fault on the grounds that "*any person who commits an act that causes damage to another party shall be liable to indemnify such damage*.s are " These legal rule[27] derived from basic principles related to transactions contained in Islamic Sharia, such as the principles that "*harm may neither be inflicted nor reciprocated*" and that "*harm must be eliminated*."

In terms of contracts, the *Pacta sunt servanda* (the contract is the law of the contractors) rule and the rules related to the eligibility to conclude contracts are the most prominent examples. These are basic rules in civil law and are at the same time derived from Islamic Sharia.[28] The Islamic Sharia's influence on civil transactions was most significant when the Qatari legislator stipulated in the civil law the annulment of the provision on benefit in the loan contract when it is greater than the amount agreed in the contract.[30]ns valid, despite this annulment.The contract, however, remai [29]

In commercial transactions, we find a clear influence by the principles of Islamic Sharia that prohibit commercial fraud. We can also find this influence in the relationship between traders and consumers. God Almighty has warned of punishment traders who commit fraud when taking measurements in their commercial activities for the purpose of selling with a great profit. God Almighty said in the Holy Quran, "*Woe to the defrauders who, when they take a measure from people, take it in full, but when they give by*

[25] Article 837 of the Qatari Civil Law

[26] Hassan al-Barawi, Islamic Sharia Influence on the Qatari Civil Law: Comparative study, research published in the International Review of Law, issued by the College of Law at Qatar University, p. 14, available on the following link: https://www.qscience.com/docserver/fulltext/irl/2013/3/irl.2013.cl.2.pdf?expires=1630387635&id=id&accname=guest&checksum=1ED6F82A33EF99B0583CF42EF1BFE68D

[27] Article 199 of the Qatari Civil Law

[28] Sayed Abdullah Ali Hassan, Legislative comparisons between civil positive laws and Islamic legislation: a comparative study between French jurisprudence and the doctrine of Imam Malik, study and investigation of the Center for Jurisprudence and Economic Studies, Dar Al Salam For Printing, Publishing, Distribution & Translation, Cairo, 2001, p. 100.

[29] Article 568 of the Qatari Civil Law

[30] Hassan al-Barawi, Ibid, p. 16.

*measure or weight to men, they cause loss. Do they not think that they shall be raised [to life again] for a Great Day, the day when mankind shall stand before the Lord of the Worlds?"*[31]

Likewise, the Consumer Protection Law in the state of Qatar was enacted to protect consumer rights and guarantee them in accordance with its provisions.It banned any person from concluding any [32] agreement or conducting any activity that prejudices such rights, in particular the following: the right to health and safety in the ordinary use of goods and services, the right to obtain correct data and information about the goods and services purchased, used or provided and the right to obtain knowledge related to protection of the consumer's legitimate rights and interests. This is in addition to the right to choose goods and services that meet conditions of quality and conform to specifications, the right to respect religious values, customs and traditions and the right to file lawsuits concerning anything that may violate, harm or restrict the consumer's rights. Furthermore, the law consecrated the consumer's right to fair compensation for any property or financial damages sustained by him as a result of the purchase or use of commodities and services. It provided that any agreement contrary to the aforesaid shall be deemed null and void.[33]

With respect to personal status related matters, the Qatari legislator enshrined a general principle in Qatari family law,of Islamic [35]vailing view in the Hanbali school of thoughtwhereby the pre[34] jurisprudence shall be applied with respect to matters not specifically provided for in this law[36], which in itself is based on the Islamic Sharia.[37]

[31] Holy Quran, Surah Al-Mutaffifin

[32] Law No. 8 of 2008 on Consumer Protection and the amendments thereto: https://www.almeezan.qa/LawView.aspx?opt&LawID=2647&language=en

[33] Legal regulation of consumer protection in Qatari law; A study on the Qatari Consumer Protection Law and related laws and the role of the Ministry of Trade and Industry and other institutional frameworks in enforcement protection, publications of the Ministry of Trade and Industry in the State of Qatar, Doha - Qatar, accepted for publication 2020.

[34] Law No. 22 of 2006 on the promulgation of the Family Law: https://www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=8706&lawId=2558&language=en

[35] Article 3 of the Qatari Family Law

[36] However, this solution is restricted, unless the court decides to adopt a school of thought other than the Hanbali school of thought for reasons mentioned in its ruling. Also, if there is no preponderant opinion in the Hanbali school of thought regarding an incident not specifically provided for in a text in the family law, the judge applies what he deems appropriate from the opinions of the four schools of thought, and if this is not possible, he applies the general doctrinal rules in Islamic Sharia.

[37] ABDULLAH, Abdullah. The Legal Impact of Islamic Law in the Identity and Provisions of Qatari Legal System: Conceptual Frame and Legislative Directions. Al-Jami'ah: Journal of Islamic Studies, [S.l.], v. 58, n. 2, p. 451-481A2, dec. 2020. ISSN 2338-557X. Available at: https://aljamiah.or.id/index.php/AJIS/article/view/58207. Date accessed: 03 sep. 2021. doi:https://doi.org/10.14421/ajis.2020.582.451-482.

## 2. ISLAMIC SHARIA AND THE EGYPTIAN LEGAL SYSTEM

The principles of Islamic Sharia are deemed the main source of legislation in Egypt, according to the preamble to the Egyptian Constitution. This means that these principles are the main determining factors of Egyptian laws, with the Supreme Constitutional Court being granted the authoritative power to supervise the extent of abidance by the foregoing, as this is stipulated by a constitutional text. The Islamic Sharia's constitutional importance for the Egyptian legal system was enshrined in a constitutional text in the first and second articles of the Egyptian constitution. These articles emphasized that Egypt is part of the Islamic nation, Islam is the state religion, and that the principles of Islamic Sharia are the principal source of legislation in Egypt. This falls within a tridimensional equation consecrating the legal position of Islamic Sharia in relation to Egyptian laws from a constitutional perspective.

In the field of civil law, it is important to refer to what was written by the Egyptian scholar Abdul Razzaq El-Sanhuri when talking about the Islamic Sharia's influence on the drafters of the Egyptian civil law.[38]

[38] Al-Sanhuri, may God have mercy on him, stated – with respect to the comment made by the Senate Committee assigned to revise the Egyptian Civil Law in its report on the draft civil law - as follows: "It also appeared to the Committee that the draft extensively relied on the Islamic Sharia as one of its sources. It made it a general source to which the judge shall refer in the absence of a provision in the legislation or customs. Furthermore, the draft made Islamic Sharia a special source for a significant group of its provisions. The prominent standing of Islamic jurisprudence among the international schools of jurisprudence is undeniable. It is all the more undeniable since it has been deemed, and still is, the common law governing several matters in Egypt. It is worth mentioning here that strengthening the correlation between the draft and the provisions of the Sharia preserves a spiritual heritage that is worthy of being safeguarded and benefited from. The Committee notes some provisions in the draft that were borrowed from the Islamic Sharia, such as the provisions related to the theory of abuse of right, the assignment of debt and the principle of unforeseen circumstances. All of these provisions include sufficient rules that attest to the evolution of Western codes. Of note, the Sharia jurists had understood the rulings that had been modernized and applied them to cases submitted during their eras, centuries before that these rulings occur to the minds of Western jurists or legislators. Furthermore, the draft borrowed from the Islamic Sharia a set of detailed provisions. It is sufficient to refer in this respect to matters related to the contracting session, lease of (Waqf) endowment property, Hikr contract (a special form of long-term or permanent lease contract), lease of agricultural land, destruction of crops in the leased property, termination of the lease on death of lessee and termination for an excuse. This is in addition to several other provisions in the current code that are borrowed from the Islamic Sharia and preserved as is in the draft. These concern matters such as disposition while on death bed, risk of loss or ghubn (lesion) in a purchase, planting on leased land and ownership of different stories in the same building or a party wall. Meanwhile, the provisions in the draft on eligibility, gift and pre-emption rights and the principle of no inheritance until after payment of debts, were also derived from the Islamic Shariaa and these provisions are important in practical life. Within the limits of this second source, the draft seemed to follow a straightforward approach that pleased the Committee, which saw in it an inclination to recognize the advantages of Islamic jurisprudence that Western scholars have realized a long time ago. Therefore, the countries of the East ought to confer to this jurisprudence the adequate standing and to express in practice their pride in it and their eagerness to ensure its sustainability. It goes without saying that it should be pointed out that this approach showed great care to preserve the sanctity of the past and exaggerated in agreeing with the traditional scholars who safeguarded the Islamic Fiqh

We find that the civil law is strongly influenced by the Islamic Sharia, starting with Article 1 of the Egyptian Civil Law.This article enjoins judges to issue their judgments in accordance with the letter [39] and spirit of the provisions of the law itself, failing that, in accordance with custom, and in the absence of custom, in accordance with the principles of Islamic Sharia. In the absence of the latter, judges will apply principles of natural law and rules of equity."[40]

(jurisprudence) thanks to their Ijtihad (Juristic deduction) and conferred flexibility to its rulings in such a way that it evolved to include what people are accustomed to in their transactions. The Committee does not see in referring to Islamic Sharia in this way any prejudice to the stability of transactions. Rather, it sees it as a catalyst for stability by closely examining the righteous traditions that transactors have been familiar with in the country for hundreds of years. Drafting works group 1, p. 131 - p. 132. Quoted from Abdul Razzaq Al-Sanhuri in his book: Al-Waseet in the Explanation of the Civil Law, Part One - The Theory of Obligation in General - Sources of Obligation, Arab Heritage Revival House, Beirut, p. 45.

[39] The texts of the Egyptian Civil Code are available on the following link :https://manshurat.org/node/69432

[40] See the comparative perspective in other Arab countries:

- Jordan: Jordanian Civil Code; Law No. 43 of 1976 (Art. 2: 1 - The provisions of this law apply to matters provided for in these texts in letter and spirit and where there is a text there is no room for interpretation. 3- If the court fails to find a text in this law, it shall rule according to the provisions of Islamic doctrine that are more most in line with the texts of this law, failing such provisions it shall rule based on the principles of Islamic Sharia. 3- Otherwise, the court shall rule according to the customary practice. In the absence of such customary practices, it shall rule in accordance with the rules of equity and custom is required to be general, ancient, constant and steady and not conflict with the provisions of law, public order or morals. If a customary practice is specific to a given country, it shall be applied in said country. 4- All this will be guided by what was admitted by the judiciary and jurisprudence, provided that it does not conflict with the foregoing). http://www.lob.gov.jo/AR/Pages/AdvancedSearch.aspx
- UAE: The Civil Transactions Law of the United Arab Emirates; Federal Law No. 5 of 1985 (Art. 1: Legislative provisions shall be applicable to all matters dealt therein, in letter and context. In presence of an absolutely unambiguous text, there is no room for personal interpretation. In the absence of a text in this Law, the judge shall adjudicate according to the Islamic Sharia taking into consideration the choice of the most appropriate solutions in the schools of Imam Malek and Imam Ahmad Ben Hanbal and, if not found there, then in the schools of Imam El Shafe'i and Imam Abou Hanifa, as the interest so requires. Where no such solution is found, the judge shall decide according to custom, provided it is not incompatible with public policy and morals. In case the custom is restricted to a specific Emirate, it shall be effective therein…). http://www.adjd.gov.ae/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/FooterResources/ADJDBooks/ADJDBooks/03092015/Fed.Civil.Transactions.Law.pdf
- Bahrain: Bahraini Civil Law: by virtue of Law No. 19 of 2001 (Art. 1.a- Provisions of laws govern all matters to which these provisions apply in letter and spirit. b-In the absence of a provision of a law that is applicable, the Judge will decide according to custom and in the absence of custom in accordance with the principles of Islamic Sharia that suit the conditions and circumstances of the country. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity). http://www.legalaffairs.gov.bh/Media/LegalPDF/L1901.pdf
- Tunisia: Code of Obligations and Contracts of 1906 and its amendments; There is no corresponding text in this regard: https://www.justice.gov.tn/fileadmin/medias/references_juridiques/codes_juridiques/COCArabe.pdf
- Algeria: Algerian Civil Code; Ordinance No. 58-75 of September 26, 1975, containing the amended and supplemented Civil Code (Art. 1: The law applies to all matters dealt with in its texts in letter and in spirit. In the absence of a legislative text, the judge shall rule in accordance with the principles of Islamic Sharia, and if not, according to custom. In the absence of custom, then by virtue of the principles of natural law the rules of equity). http://www.joradp.dz/TRV/ACivil.pdf
- Sudan: Civil Transactions Act of 1984 (Art. 3: Courts are guided in applying the provisions of this law and the interpretation of the words and phrases contained therein, as well as in cases of absence of texts, by the Sharia principles...). https://www.moj.gov.sd/sudanlaws/#/loading
- Syria: Syrian Civil Code; Legislative Decree No. 84 of 1949 (Article 1: 1 - Legislative texts apply to all issues addressed by these texts in their letter and spirit. 2 – In the absence of a legislative text that can be applied, the judge shall rule in accordance with the principles of Islamic Sharia. and if not, according to custom. In the absence of custom, then by virtue of

the principles of natural law the rules of equity).
http://www.parliament.gov.sy/arabic/index.php?node=5595&cat=12162&&

- Iraq: Iraqi Civil Code; Law No. 40 of 1951 (Art. 1: 1 - Legislative provisions shall apply to all maters covering these provisions in letter and spirit. 2 – In the absence of any applicable legislative provisions in the law, the court shall adjudicate according to custom and usage; in the absence of custom and usage in accordance with the principles of Islamic Sharia that are most consistent with the provisions of this law but without being bound by a particular school of thought; and otherwise in accordance with the law of equity. 3- The court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws of which are proximate to the laws of Iraq).
http://iraqld.hjc.iq/LoadLawBook.aspx?SC=120120013721926
- Oman: Royal Decree No. 29/2013 promulgating the Civil Transactions Law (Art. 1: The provisions of this Law shall apply to all matters dealt with by said provisions in letter and context and not regulated by special laws. If there is no provision in the present law, the court shall rule under the provisions of the Islamic Doctrine, if absent, then under the general principles of the Islamic Sharia, or else according to custom. Art. 2: The understanding, interpretation, construal, and signification of the provision shall be based on the rules and principles of the Islamic Doctrine).
https://mjla.gov.om/legislation/decrees/details.aspx?Id=613&type=L
- Palestine: Civil Law No. 4 of 2012 (Art. 1: 1- The provisions of this law apply to all matters dealt with in its letter and spirit. 2. If the judge does not find a legislative text that can be applied, he shall rule according to the principles of Islamic Sharia, and in the absence thereof according to custom, otherwise according to the principles of natural law and the rules of equity).
http://www.plc.ps/upload/law/law_plc/9b5a23f390f25788fc54653414f04875.pdf
- Kuwait: Kuwaiti Civil Code; Decree-Law No. 67 of 1980 regarding the promulgation of civil law (Art.1/1: 1 Legislative texts apply to the matters addressed by these texts in letter and spirit. 2 – In the absence of such legislative text, the judge shall rule according to the provisions of Islamic doctrine that are most in agreement with the situation and interests of the country, otherwise according to custom).
https://www.e.gov.kw/sites/kgoArabic/Forms/QanoonMadani.pdf
- Libya: Civil Code issued on November 28, 1953 AD. (Art. 1: Rules of Law 1- Provisions of law govern all matters to which these provisions apply in letter and spirit. 2- In the absence of applicable legal provisions, the judge shall pass judgments in accordance with the principles of Islamic Sharia. In the absence of Islamic legal precedent, he shall pass judgments according to the prevailing custom, and the absence of precedents in customary procedure, he shall pass judgments according to the principles of natural law and the rules of equity). Noting that this law was amended in 2016, then the amendment was rescinded and the original text before the amendment was reinstated, according to Law No. 1 of 2020 published in the Official Gazette No. 1 on 19/2/2020.
http://aladel.gov.ly/home/wp-content/uploads/2016/04/%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88-%D9%86-%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A.pdf
- Morocco: Law of Obligations and Contracts of 1913 and its amendments (no similar text appears)
https://adala.justice.gov.ma/production/legislation/ar/Nouveautes/%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%A7%D9%84%D8%A7%D9%84%D8%AA%D8%B2%D8%A7%D9%85%D8%A7%D8%AA%20%D9%88%D8%A7%D9%84%D8%B9%D9%82%D9%88%D8%AF.pdf
- Mauritania: Law of Obligations and Contracts No. 126 of 1989 (Art. 1179: For all issues not addressed by a text in the present law, reference may be made to the Maliki school of thought. In case of ambiguity in the French text, the Arabic text shall prevail). http://www.coursupreme.mr/docs/7Codedesobligationsetcontrats.pdf
- Yemen: Yemeni Civil Law; Republican Decree Law No. (14) for the year 2002 AD regarding civil law (Art. 1: This law, which is borrowed from the provisions of Islamic Sharia, applies to all transactions and matters addressed in its texts in letter and spirit. In the absence of an applicable text in this law, the Islamic Sharia principles from which this law was borrowed shall be referred to. In the absence of such principles, the judge shall rule in accordance with the Sharia permissible custom, and in the absence of such custom according to the principles of equity that are in accordance with all of the principles of Islamic Sharia. The Islamic Sharia scholars who with juristic deduction shall be consulted; and custom is required to be constant and not conflict with the provisions of Islamic Shariaa, public order or morals).
http://agoyemen.net/userimages/pdf/%C7%E1%DE%C7%E4%E6%E4%20%C7%E1%E3%CF%E4%ED.pdf

Perhaps this text carries an indication that Islamic Sharia is deemed an official backup source. The meaning here is that reference should be made to the general principles of Sharia with its universal rules and not to the doctrinal details subject to several opinions.[41]

We also find an explicit text in the Egyptian Civil Code indicating that the provisions of Islamic Sharia apply to the legal status of missing and absent persons in the absence of special legislative texts governing these categories.[42]

Whereas this was the case, it is the Islamic Sharia that is applied with regard to the legal status of the heirs in terms of their appointment, their shares, and the inheritance that devolves upon them.[43]

The same situation applies to the will, as it is governed by the provisions of Islamic Sharia and the laws issued in this regard.[44]

Moreover, the legislator borrowed the provisions of Islamic Sharia in ruling on sale made on deathbed and included it in the civil law.[45] It decided that the sale of a property made by a sick person on deathbed would not be valid if the sale value exceeds the price by one-third in view of the sale value at the time of death. The scope of invalidity is a difference exceeding the one third.[46] In case of a difference below the one third, the sale shall be effective against the heirs.

With regard to the provisions governing legal transactions carried out by a person on death bed, the Egyptian legislator borrowed the detailed provisions enshrined by the of Islamic Sharia, in particular regarding the will. The legislator indicated that the provisions of Islamic Sharia and the relevant laws shall apply to the will. It further noted that the provisions governing the will shall apply to any legal act of donation made by a person on death bed, considering such donation as falling within the scope of acts made after death. In this case, the heirs of this person must prove that the legal act was made by the inheritee while on death bed. [47]

[41] Muhammad Hassan Qassem, Ibid, p. 291.
[42] Article 32 of the Egyptian Civil Code
[43] Article 857/1 of the Egyptian Civil Code
[44] Article 915 of the Egyptian Civil Code
[45] Article 477/1 of the Egyptian Civil Code
[46] The sale in excess of one third shall not be effective against the heirs unless they accept the sale or unless the purchaser returns such excess to balance the estate to become two thirds.
[47] Articles 915, 916 and 917 of the Egyptian Civil law.

The same was followed by the legislator in the civil law regarding issues of eligibility, gift, preemption, ghubn (lesion), statute of limitations, abuse of right, emergency circumstances and provisions governing the contracting session.[48]

## 3. Islamic Sharia and the Lebanese legal system

The Lebanese legal system is unique. Lebanon is a multi-sectarian and multi-cultural country, which has affected constitutional, civil and commercial rules, as well as personal status and other rules that govern society. Two phases have marked this legal system and characterize the impact of religion on Lebanese laws in general. The first phase is the phase in which Lebanon was under the Ottoman Empire, and the second phase is the French Mandate era and beyond.[49]

During the Ottoman Empire, and before the issuance of the Ottoman laws, Islamic Sharia in Lebanon was the first source of all various legal rules. The Hanafi school of thought applied to various transactions as well as personal status matters, with the exception of non-Muslims in some issues related to their personal status such as marriage and divorce. Those were subject to their own religious laws. The situation remained the same until the laws enactment movement began in the middle of the nineteenth century in the Ottoman Empire. The scope of application of these Ottoman laws extended to Lebanon, where at that time, legislation became the main source of legal rules, provided that the role of Islamic Sharia was limited to ruling on transactions and other issues that were not addressed by the enacted laws. Moreover, the Islamic Sharia became the original source for personal status matters. It applied to Muslims in all their personal situations and to non-Muslims in matters not covered by their religious laws such as inheritance and wills.

However, during and after the French Mandate, the role of Islamic Sharia was limited to the personal status matters of Muslims. The legal rules that apply to Muslims themselves multiplied according to the multiplicity of their sects, with each sect having a separate special court and specific legal rules. Special

[48] See the following articles in the Egyptian Civil Code: Eligibility (Articles 44 and 45), gift (Article 486-504), preemption (Article 935-948), ghubn (lesion) (Article 129-130), statute of limitations (Article 374 and Article 968), abuse of right (Article 5), emergency circumstances (Article 147). / 2) and the provisions of the contracting session (Article 94).

[49] See in detail the influence of religion in Lebanese law: Muhammad Hassan Qassem, ibid, p. 246 ff, and the relevant references therein.

laws were issued to govern some personal status affairs for non-Muslims, such as the law of inheritance for non-Muslims, which made legislation the source of these rules instead of religion.[50]

In 1932, the Lebanese Code of Obligations and Contracts was issued to govern civil transactions. This code remains applicable to this date[51]. It is composed of several detailed sections.[52]

[50] Muhammad Hassan Qassem, Ibid.

[51] The Lebanese Code of Obligations and Contracts promulgated on 03/09/1932, published in the Lebanese Official Gazette under No. 2642, Publication Date: 04/11/1932, page 2, available electronically at the following link: http://77.42.251.205/LawView.aspx?opt=view&LawID=244226

[52] The Lebanese Code of Obligations and Contracts is divided as follows: The first section presents obligations in general. The First Book sets forth the types of obligations. It tackles in Title I civil obligations and natural obligations. Title II addresses obligations relating to several persons (multiple creditors or debtors). Title III addresses consecutive and non-consecutive obligations. Title IV addresses the positive and negative obligations. Title V addresses personal and in-kind obligations, and Title VI addresses obligations with multiple subjects which are the cumulative, alternative and optional obligations. Title VIII addresses divisible and indivisible obligations. Title VIII addresses initial and additional obligations. Title IX addresses conditional obligations and Title X addresses term obligations. The Second Book presents the sources of the obligations and the conditions for their validity. Title I contains general provisions and presents legal obligations. Title II addresses illicit acts (delicts and quasi-delicts), including the causes of liability arising from the delict or quasi-delict, such as the liability arising from the personal act, the liability arising from the act of others, the liability arising from the act of an animal, the liability arising from the inanimate objects, as well as the compensation associated with this liability and some related provisions. Title III, addresses illicit gain in the sense of unlawful enrichment, whether in terms of general provisions or in terms of the ruling on undue payment. Title IV is devoted to legal acts, whether those made by one party (Negotiorum gestio) or provisions related to contracts, which are the most important sources of commitment. The Lebanese legislator allocated a large space to this topic, which included the relevant general provisions, the basic elements of contracts or the conditions for their validity, represented in consent including the provisions on affirmation or acceptance, on determining the time of consent and the conclusion of the contract, in addition to the elements of subject and reason. This part also covers provisions on defects of consent represented by error, deception, fear, unfairness, incapacity and some general provisions on defects of consent, as well as the contract form, the effects of contracts and the mechanisms for suspending them including the annulment, cancellation and termination of the contract. The Third Book was allocated to the effects of obligations. Title I is allocated to the in-kind implementation of the obligation and Title II is allocated to the compensatory implementation, i.e. by paying the compensation for damages, whether according to the contract conditions or as determined by the court, the law or by virtue of an agreement, which is called the penal clause. Title III addresses the means granted to the creditor for the purpose of the execution of the obligation due thereto (right of imprisonment - direct action - indirect action - revocatory action). The Fourth Book is allocated to the transfer of obligations. Title I addresses the transfer of the debt of the creditor and Title II addresses the transfer of the debt of the debtor. The Fifth Book came under the title "Extinguishment of Obligations." Title I addresses the extinguishment of the obligation by its fulfillment. It determines the party obligated to fulfill the obligation to the party to whom this obligation is due, specifies the nature of the subject of the fulfillment, determines the place, time and expenses of fulfillment, the production of evidence thereof and the fulfillment effects (determining the fulfillment party – fulfillment associated with the replacement of the creditor) in addition to the fulfillment by transfer (check). Title II addresses the obligation extinguishment that confers to the creditor a benefit other than the one he/it was entitled to request, such as fulfillment by compensation, renewal of the obligation, the offsetting and the settlement through a consortium. Title III addresses extinguishment of the obligation for reasons to be assessed, regardless of any benefit to the creditor, and this includes the discharge of the debt, the impossibility of execution and the lapse of time causing the extinguishment of the obligation or leading to exoneration. The Sixth Book is allocated to evidence in terms of the rights of obligations. The Seventh Book addresses the rules of interpretation of legal acts. The Second Section of this code clarifies the rules related to some contracts. The First Book is allocated for sale. Title I thereof addresses the conditions of sale. Title II addresses the effects of the sale, and Title III explains some special types of sale, such as the sale with option to repurchase, forward buying, and the promise of sale or purchase. The Second Book is devoted to the barter contract. The Third Book is allocated to the deed of gift. Title I explains the nature of the gift and its creation; Title II tackles the persons who can donate and accept the gift; Title III addresses the effects of the gift; and Title IV explains the gift retraction and reduction. The Fourth Book is devoted to the rental contracts of objects. Title I includes general provisions related to the rules in force in all rents in addition to rules

Perhaps one of the most prominent articles of the Code of Obligations and Contracts is Article 1106. It contains an implicit reference that the Majallah el-Ahkam-i-Adliya (Mecelle) [or civil code in force in the Ottoman Empire and that remained applicable until the date of the issuance of the Code of Obligations and Contracts — in relation to civil transactions] shall remain applicable with respect to all matters that do not violate the provisions of the Lebanese Code of Obligations and Contracts. Perhaps this interpretation of the content of the provision of this article is consistent with the text of Article 4 of the Lebanese Code of Civil Procedure,[53] which sets the order of the sources that the judge must resort to in the event of obscurity or lacunae in the law. It states that "if the law is obscure, the judge shall interpret it in a manner consistent with its purpose and with other texts." In the absence of a law, the judge shall apply the general principles of law, most notably those included in the Mecelle, only in so far as they do not violate any of the texts of the Lebanese Code of Obligations and Contracts.[54]

Moreover, in the field of commercial transactions in the Lebanese law, we find that the Lebanese Code of Commerce indicates in Articles 2 and 3 thereof that in the absence of any applicable legal solution

related to the lease of real estate properties. Title II addresses the effects of renting objects and Title III addresses the termination of rent of objects. Title IV addresses the rental of agricultural land. The Fifth Book is devoted to the contract of service or employment contract and to the manufacturing contract (Istisna) or the contracting agreement. Title I includes general provisions. Title II addresses contract of service or employment contract and Title III addresses the manufacturing contract (Istisna) or the projects commitment contract. The Sixth Book is devoted to the topics of deposit and sequestration. Title I addresses the ordinary deposit and Title II addresses the appointment of a receiver. The Seventh Book is devoted to the loan contract. Title I addresses the commodate (commodatum), also known as loan for use; Title II the consumer loan, and Title III the interest-bearing loan. The Eighth Book is devoted to the agency contract. Title I presents the agency in general; Title II presents the effects of the agency between the client and the agent; Title III addresses the effects of the agency in relation to others, and the Title IV is devoted to the termination of the agency. The Ninth Book is devoted to companies. Title I addresses quasi—corporations and Title II addresses contract companies. The Tenth Book is devoted to contracts of gharar (uncertainty). Title I addresses the guarantee contract, Title II gambling and betting, and Title III lifetime income. The Eleventh Book is devoted to reconciliation. Title I addresses the conditions of reconciliation and Title II the effects of reconciliation. The Twelfth Book is devoted to guarantee contract. Title I addresses the conditions of the guarantee, Title II the effects of the guarantee, Title III the extinguishment of the guarantee, and Title IV guarantee of appearance. Perhaps the aim of reviewing the main divisions of the Lebanese Code of Obligations and Contracts is to show how the Lebanese law is influenced by the French law, without disregarding the fact that many of its legal ideas stemming from the Majallah el-Ahkam-i-Adliya (Mecelle/The civil code of the Ottoman Empire) are based on Islamic Sharia. The best evidence is the content of the last Article of the Lebanese Code of Obligations and Contract. Indeed, Article 1106 maintains the relationship with the Mecelle. It stipulated the abolition of all provisions of the Mecelle and other legislative texts that violate the Code of Obligations and Contracts or contradict its provisions. This means that the legal provisions contained in the Mecelle that do not violate the Code of Obligations and Contracts shall remain valid and applicable. This has been confirmed by many judicial rulings issued by the Lebanese judiciary (see: Civil Appeal No. : 111/2019 dated 09/07/2019- Civil Cassation No.: 18/2018 dated 19/02/2018- Civil Cassation No.: 46/2014 dated 29/04/2014- Civil Cassation No.: 13/2 014 dated 20/02/2014 -Civil Cassation No.: 28/2004 dated 27/05/2004). The judicial decisions referred to are available on the website of the Legal Informatics Center: http://77.42.251.205/RelatedRuling.aspx?Pid=1&LawID=244226&articleId=972540

[53] Lebanese Code of Civil Procedure http://77.42.251.205/LawView.aspx?opt=view&LawID=244565

[54] Article 4 of the Lebanese Code of Civil Procedure states as follows: "Article 4- A judge shall be liable for a denial of justice if he: 1- Refrains from ruling on the pretext of obscurity or lacunae in the law. 2- Delays the rendering of a judgment for no reason. If the law is obscure, the judge shall interpret it in a manner consistent with its purpose and with other texts. In the absence of a law, the judge shall apply the general principles of law, customs, and the principles of equity."

for commercial matters in the Code of Commerce, the provisions of the common law, which is the Code of Obligations of Contracts shall apply — including the text referred to concerning the Mecelle — only in so far as they are reconcilable with the principles proper to the commercial law. In the absence of any text in the Lebanese Code of Obligations and Contracts, the judge can draw upon previous judicial precedents for guidance as much as he may let himself inspired by the strictures of commercial equity and loyalty.[55]

Meanwhile, the Lebanese constitution is devoid of any reference to the Islamic Sharia or any other religious laws. In its preamble, it consecrated basic principles that emphasize the Arab identity of Lebanon and its membership in the League of Arab States. It noted that Lebanon is a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. It also emphasized respect for public freedoms, especially freedom of opinion and belief, and asserted that the people are the source of authority and sovereignty and they shall exercise these powers through the constitutional institutions. One of the most prominent features of the Lebanese constitution is that it did not set any religious law as a source of the legal rules. The preamble further stated that the abolition of political sectarianism is a basic national goal that must be achieved.[56]

It is worth mentioning that the Lebanese Constitution included an article that guaranteed the constitutionality of freedom of belief in an absolute manner, with the constitutional obligation to respect all religions and sects. The Constitution provided that the state shall guarantee the freedom to practice religious rites insofar as they do not disturb public order. It further provided that the state shall guarantee the respect of the personal status and religious interests of the population, regardless of the religious sect.[57] This means that the constitution referred to the existence of personal status regulations, which are based on the various divine laws, without stipulating whether or not they are considered a source of legal rules. The constitution also guaranteed respect for religious communities' rights to have their own schools in light of the regulations in force.[58]

The Lebanese constitution guaranteed to the heads of legally recognized sects - including Islamic sects - the right to refer to the Constitutional Council to ensure supervision of the constitutionality of laws related to personal status, freedom of belief, the practice of religious rites, and freedom of religious

[55] The Lebanese Commercial Law: http://77.42.251.205/LawView.aspx?opt=view&LawID=244586
[56] Preamble of the Lebanese Constitution: https://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf
[57] Article 9 of the Lebanese Constitution.
[58] Article 10 of the Lebanese Constitution.

education.[59] This may be interpreted to mean that Muslims will refer to the Islamic Sharia for personal status matters and the practice of their religious rites, under the guarantee of the constitution.

## CONCLUSION

This paper addressed the Islamic Sharia's influence on some Arab legislation and the following findings and conclusions were deduced:

1. The Islamic Sharia's position in relation to Arab legislation varies according to the identity of the applied legal system in light of the religion's impact on the constitution and transactions in each country. It also varies in terms of place and time.
2. Islamic Sharia occupies an important position for the Qatari and Egyptian laws from the constitutional and civil perspectives. This includes the Sharia's influence on civil and commercial transactions and personal status matters.
3. In Lebanon, the Islamic Sharia played a remarkable role in transactions and personal status matters in particular in the era of the Ottoman Empire. However, its legal position soon changed to the point of being limited to applying to personal status matters of Muslims. On the other hand, the Mecelle maintained its influence in the field of civil transactions in all matters not covered by the Lebanese Code of Obligations and Contracts or matters that do not violate the provisions thereof. It is worth keeping in mind that the rules of transactions in the Lebanese Code of Obligations and Contracts derived from French legislation may converge with the rules of transactions in Islamic Sharia, given the influence of Imam Malik's school of thought in Islamic Sharia on the French law.[60]

[59] Article 19 of the Lebanese Constitution.

[60] On the influence of Islamic Sharia on positive law in general, as well as the relationship with the French, see the following references:
- Abd El Razzaq El-Sanhori, Sources of Legal Rights in Islamic Jurisprudence: A Comparative Study of Western Jurisprudence, Volume 1-6, House of Arab Heritage Revival, Beirut, 1954.
- Subhi al-Mahmassani, The Legislative Situation in the Arab Countries, Past and Present, Dar Al-Ilm for Millions, Beirut, 1975.
- Sayed Abdullah Ali Hussein, Legislative comparisons between civil status laws and Islamic legislation, a comparison between French jurisprudence and the school of thought of Imam Malik bin Anas (May Allah Be Pleased With Him), a study and investigation by the Center for Jurisprudence and Economic Studies; Mohammad Ahmad Siraj, Ali Gomaa Ahmad and Ahmad Jaber Badran, Dar al-Salaam for printing, publishing, distribution and translation, Cairo, 2001 edition.
- Ahmed bin Sheikh Mohammad Al-Zarqa, explanation of jurisprudential rules, corrected and commented on by Mustafa Ahmed Al-Zarqa, 2nd Edition, Dar Al-Qalam Publications, Damascus - Syria, 1989.

The recommendations we reached are:

1- Perhaps one of the practical recommendations is to shed light on the modern jurisprudential and judicial trends in the countries where the legal position of Islamic Sharia in relation to the legal rules is being studied, whether these rules were inspired by the Sharia or referred to it. This should be done by integrating the reference to Islamic Sharia in the core of legal studies as well as judicial rulings when it is used as a source of the legal rule in the field of civil transactions as well as personal status matters in the Qatari and Egyptian judiciary. As for the Lebanese legal jurisprudence, as well as the Lebanese judiciary, it is recommended to clarify the provisions that are still in force from the Mecelle according to the Code of Obligations and Contracts by virtue of the text of Article 1106. The said article abolished the rules of the Mecelle that contravene or are inconsistent with the Lebanese Code of Obligations and Contracts, keeping all other provisions valid.

2- It is important for those studying the reciprocal relationship between Islamic Sharia and man-made laws to study the impact of Islamic Sharia on the legislation adopted in a certain period of time, such as the Mecelle. This will allow determining the provisions that are still in force from the Mecelle as an Islamic legal legacy that has an impact on some of the Arab legislative system. It is also important to try harmonizing the legislative solutions referred to by the Mecelle with the current situation, legal developments and legislative developments in more than one field.

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- Mohammad Kamal El-Din Imam, Maqasid al-Sharia (Purposes of the Sharia) and Comparative Law, research within the activities of the third scientific session entitled "Objectives of Sharia and Legal Sciences", publications of Al-Furqan Islamic Heritage Foundation, the Centre for the Study of the Philosophy of Islamic Law and the Center for Legal and Economic Studies, Faculty of Law, Alexandria University, Alexandria, 2011.
- Ben Khedda Hamza, The Influence of Maliki Fiqh on the French Civil Law, The Contract as a Model, PhD Thesis, Faculty of Law, University of Abu Bakr Belkaid, Tlemcen, Algeria. 2017.
- Abed Fayed Abdel-Fattah Fayed, the Fiqh of Imam Malik bin Anas, (May Allah Be Pleased With Him) and the French Civil Code of 1804, A New Vision, research published in the Algerian Journal of Comparative Law issued by the Faculty of Law, University of Abu Bakr Belqayd Tlemcen, Algeria, No. 5, 2018. p. 9.
- Mohammad Yahya Matar, The Influence of Islamic Fiqh on English Law, Publications of the Ministry of Endowments and Religious Affairs, the 13th session of "Symposium on Developing Jurisprudence Sciences" held in Muscat - Sultanate of Oman from 6 to 9 April, 2014, entitled "Common Human and interests-related Islamic Fiqh." Available at: https://nadwa.mara.gov.om/
- Mohamed Y. Mattar, Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards, Available at : https://harvardhrj.com/wp-content/uploads/sites/14/2013/05/V26-Mattar.pdf
- Mohamed Y. Mattar, Human Rights in Islamic Law, Specifically the Guarantee of Procedural Justice, 16 EUR. J.L. REFORM 274 (2014).Mohamed Y. Mattar Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between "Human Rights" and "Islamic Law" Be Reconciled in Future Legislative Enactments and Judicial Interpretations? Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2036&context=ilj
- Mohamed Y. Mattar, Combating Trafficking in Persons in accordance with the Principles of Islamic Law, Available at: https://www.unodc.org/documents/human-trafficking/Islamic_Law_TIP_E_ebook_18_March_2010_V0985841.pdf
- Mohamed Y. Mattar, Integrating the UNIDROIT Principles of International Commercial Contracts as a source of contract law in Arab Civil Codes, Uniform Law Review, Volume 22, Issue 1, March 2017, Pages 168–201, https://doi.org/10.1093/ulr/unx009

# The Impact of Religion on the Constitutional Policy in Morocco

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ABSTRACT

Taking a middle ground between states that have opted for religious neutrality and others that adopted Islamic law or Shariah as their main source of legislation, Morocco has chosen a third constitutional path that aims to alleviate tensions with regards to the religious character of the state, yet at the same time reveals that the carefully-worded provisions that promote religion in the Moroccan constitution are not simply an expression of identity, but rather a state policy largely backed by institutional resources. this paper presents arguments that shed light on the politics of constitutional processes, offering analysis at the intersection of constitutionality, politics and religion. It also takes interest in examining the complex relations between religion and the state in the existing Moroccan constitutional arrangements, taking into account the particular historical, cultural, political and legal contexts of Morocco.

Keywords: *Constitutional Process, Religion, Monarchy, Morocco*

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## INTRODUCTION

Nearly all constitutions in the world today include a reference to religion. Out of 194 constitutions currently in force, 186 mention the term "religion", while 114 constitutions, hence 58.7%, mention the terms "Allah/God", "divine," or other gods.[1] However, the challenge lies in developing constitutional innovations to deconstruct the relationship between the state and religion, which remains a source of many contradictions or tensions.

Regionally, the provisions that determine the Islamic character of a state appear in an obvious and discrepant way in the constitutions of most Arab and Islamic states. Their implementation often entails thorny issues in practice. These provisions often result from complicated constitutional trade-offs between political actors. Many ultimately form an unstable middle ground between blocs calling for establishing a constitutional system that is fully founded on the principles of Islam and forces that seek to maintain a secular character of the governing institutions and accept only moderate or limited commitments to Islam in the constitution and legal system.

Taking a middle ground between states that have opted for religious neutrality and others that adopted Islamic law or Shariah as their main source of legislation, Morocco has chosen a third constitutional path that aims to alleviate tensions with regards to the religious character of the state, yet at the same time reveals that the carefully-worded provisions that promote religion in the Moroccan constitution are not simply an expression of identity, but rather a state policy largely backed by institutional resources.

One of the decisive elements in the shaping of a constitution is its formative process. The monarchy, was careful to maintain its monopoly of power over the constitutional writing process and to ensure that the constitutional text closely reflected the political reality marked by its supremacy. Subsequently, the monarchy adopted what may be termed "a repetitive constitutional strategy[2]," whereby each promise of a new constitution not only invoked the bold will to implement reform, but also appealed to the basic instincts of politics. Ultimately, the constitutional process became subordinate to a broader monarchal policy.

The constitution-making process, just like any other political process, is shaped by balances of power and reflects conflict over power. Consequently, the development of the Moroccan Constitution is linked

[1] Asli Ü. Bali & Hanna Lerner, Constitutional Writing, Religion and Democracy, 1st Published, (Cambridge: Cambridge University Press, 2017), p. 6.

[2] Since its independence, Morocco has had six constitutions: in 1962, 1970, 1972, 1992, 1996 and 2011.

to ongoing political developments in which Islam seems to been relegated to a rather symbolic role, with a lesser role for Islamic law in public life and a ruling monarchy has been recreated and revived.

In this context, this paper shifts the focus from the legal text to the political context of the constitution and presents arguments that shed light on the politics of constitutional processes, offering analysis at the intersection of constitutionality, politics and religion. The paper also takes interest in examining the complex relations between religion and the state in the existing Moroccan constitutional arrangements, taking into account the particular historical, cultural, political and legal contexts of Morocco.

The paper tests existing hypotheses and creates new ones. It proposes an additional perspective of the theory of duality of the Moroccan constitutional structure. In addition to existing literature – which discusses the implicit constitution, as opposed to the explicit constitution,[3] and the top level of the constitution as opposed to the bottom level[4]– the paper seeks to distinguish between the political constitution and the legal constitution as two different domains through which the monarchy may activate the power of religion, which it controls.

The paper focuses on several key issues, namely: What is the place of religion in the Moroccan constitution? How does the constitution express the relationship between religion and the state? Is the state's interference, through its institutionalized system of "religious preferences," intended to protect religion, or exploit it to serve political ends? How are the state and religion entangled? Does the constitution explain the relationship between religion and the state, or is that beyond its scope? Which one exploits the other - religion or the state? Are there legal effects to the constitutional stipulation of Morocco's Islamic character? Or is the constitution's reference to religion only a protective reference? Does silence on the issue of Islamic Shariah reflect a fear of religion or an embodiment of the civil foundations of the state? Is attributing the religious power to the monarchy purely a regulatory competence or a matter of political control over religion? Does that entail any risks of theocratization? What are the political effects of constitutionalizing religion?

[3] See Michel Guibal, La suprématie constitutionnelle au Maroc, Revue Juridique et Politique Indépendance et Coopération, Number 3, ( July-Septembre 1978) ; Abdellatif Agnouch, *Contribution à l'étude des stratégies de légitimation du pouvoir autour de l'institution califienne, le Maroc des Idrissides à nos jours*, National thesis in Law, (Casablanca: Faculty of Law,1985) ; Mohamed Moatasem, The Moroccan Constitutional Political System, (Casablanca: Isis Publishing, 1992).

[4] See Rkia El Mosaddaq, *Jeu de Consensus et Développements Constitutionnel et Electoral au Maroc*, (Casablanca: Sochepress, 1995).

Systematically, in a constitutional discussions of religion and the state, one cannot assumes that constitutional drafting is "above politics". This paper adopts a sociopolitical approach that examines the processes of developing and implementing a constitution and that presents the constitutional process as a supreme policy set by the monarchy and accentuating its political concerns and capacities. The analysis will focus on the drafting process and its relationship with the outcomes, while discussing the constitutional provisions and their interpretations.

## PATTERN OF MOROCCAN CONSTITUTIONALITY: CONSTITUTION OF THE RULER AND HYBRID CONSTITUTIONAL SYSTEM

In Morocco's pre-colonial era, Islam was the sole basis for the rule of the sultan. Following independence, and the establishment of the Moroccan Kingdom, "Morocco witnessed a remarkable symbiotic relationship between two different systems of power"[5]: the traditional authority of the sultan as the religious leader of the state, and the king as the head of the modern state in Morocco. The former is a function of historical development imbued with a symbolic legitimacy rooted in Islam, while the latter is a by-product of the French colonial legacy in Morocco. [6]

While it was not imperative that the Moroccan monarchy would remain a key political institution in the post-colonial era in the country, its conscious labeling as a symbol of authentic political identity by the elite of the Moroccan Nationalist Movement in the 1940s and 1950s gave it space to recreate itself[7] through constitutional mechanisms that were instilled through a centralized process.

While an agreement between the Moroccan Nationalist Movement and late King Mohammed V on the constitution-making process was delayed – and the delay continued to the time of his successor – "this lost time constituted an opportunity for King Hassan II to tip the balance of power in his favor, as he became the actual and sole holder of the authority to establish the constitution."[8] This was especially true after the post-independence setting of the precedent and principle of royal appointment, whereby

[5] Mohamed Daadaoui, *Moroccan Monarchy and the Islamist Challenge Maintaining Makhzen Power*, 1st Published, (New York: Palgrave Macmillan, 2011), p. 41.

[6] Ibid, p. 47.

[7] David Mednicoff," The Comparative Endurance and Legacy of Morocco's Royal Nation", in: Milinda Banerjee, Charlotte Backerra, & Cathleen Sarti, (eds), *Transnational Histories of the 'Royal Nation,* (Switzerland: Palgrave Macmillan, 2017), p. 110.

[8] محمد باسك منار، "دستور سنة 2011 في المغرب: أيّ سياق؟ لأيّ مضمون؟"، سلسلة دراسات، المركز اربي للأبحاث ودراسة السياسات، (يناير 2014)، ص 5.

the King's father appointed the first government and the Interim National Consultative Assembly, which formed the core of the first Moroccan parliament. Thus, King Hassan II appointed a committee of French legal experts to draft a constitution under his personal tutelage.

As the concept of a constitution was in itself external to the Islamic and Arab culture and was imported from Europe, following a stage of Islamization of the constitution, the first constitution of independent Morocco was influenced by the French Constitution of 1958. King Hassan II "directed the traditional monarchy towards a path of parliamentary institution building, and the 1962 constitution established a bicameral parliament"[9] and a parallel government. That is, King Hassan II worked to concentrate powers in his hands by investing in the national and religious authorities and adapting his rule to "a constitutional structure that is able to accommodate, through its centralized and semi-presidential nature, a strong king, similar to the French president, who rules alongside a weaker prime minister. King Hassan II and his advisors added to a recognized European constitutional structure an Islamic national structure that merged western legal political forms with reinvented national-religious norms.[10]

King Hassan II decided that the model of a "rational parliamentary government", which General Charles De Gaulle imposed in France, after decades of short-term governments and the National Assembly system, was suitable for the country, especially given Moroccan elites' lack of parliamentary experience. Consequently, the powers of the head of state were expanded, especially those relating to his right to dissolve the parliament to promote "checks and balances," as were his prerogatives to take decisions in exceptional circumstances. [11]

And while the Moroccan constitution incorporates western governance structures, it retains traditional principles of the exercise of authority, mainly the principle of Shura [consultations]. King Hassan II understood Shura to denote non-binding advice, notwithstanding that democracy is synonymous to the rule of the binding majority. "The king compared the role of parliament to that of the Shura Council, which is a negotiation platform offering consultation and suggestions."[12] This meant that, in line with

[9] موريس دوفرجيه، المؤسسات السياسية والقانون الدستوري الأنظمة السياسية الكبرى، ترجمة جورج سعد، الطبعة الثانية، (بيروت: المؤسسة الجامعية للدراسات والنشر والتوزيع، 2014)، ص 338.

[10] Milinda Banerjee, p. 114.

[11] Thierry Le Roy, "Constitutionalism in the Maghreb between French Heritage and Islamic Concepts", in: Rainer Grote & Tilmann J. Röder, (eds), Constitutionalism in Islamic Countries Between Upheaval and Continuity, (New York: Oxford University Press, 2012), p. 117-118.

[12] Anouar Boukhars, Politics in Morocco Executive Monarchy and Enlightened Authoritarianism, 1st Published, (New York: Routledge, 2011), p. 44.

Islamic traditions, the parliament and elected local councils were only advisory branches of the monarchy.

Another Islamic principle that the Moroccan constitution sought to institutionalize was concept of "delegation." The judicial exercise of power is a constitutional reformulation of the traditional practice of delegation, whereby the divinely appointed caliph instills justice, and "the practice of delegation is a key Islamic law mechanism that allows for a transition from a religious system to a political mandate system." [13] Here, the powers that the king practiced under previous constitutions are delegated. That is, they are simply delegated rather than forfeited or permanently relinquished powers. The recipient of the delegated power, as per the delegation theory, therefore exercises these powers within the boundaries previously set by the delegating authority.[14] Alongside this horizontal and gradual delegation of powers, the King exercises another form of vertical delegation within the constitutional framework, through royal decrees (*dahirs*) that are signed in conjunction with the Prime Minister. These *dahirs*, which represent a constitutional exercise of monarchial power, are in themselves derivative of the King's divine authority. A *dahir* always begins with a religious opening greeting, an although it takes form of a law, it is practically treated as a sacred text and is immunized from all administrative or judicial challenges. Moreover, a *dahir* is considered sources for all legislation and laws, as it establishes the spirit of these legislation and the mandate to implement them.

The Moroccan constitutional system reserves to the monarchy the sole power of arbitration, which is a religious function in Islamic jurisprudence [fiqh] under the principle that "the ruler's judgment settles dispute." Arbitration is also a temporal function according to which the king is an arbitrator among constitutional institutions. Even though the pre-2011 constitutions did not directly provide for this function, it could be deduced in previous constitutions from two principles that characterized the Moroccan constitutional order. The principle of unity of power—typical of Islamic political tradition and thought and the principle of the separation of powers—which has its roots in Western liberal thought. The first affirms the unity of the political power and defines the channels through which it will spread; the second, more restricted, present especially at the level of constitutional sub-system, allows for a separation of the bodies and a collaboration among the political functions, but only […] within

[13] Mohamed Daadaoui, p. 63.

[14] أمحمد مالكي، "قراءة في الهندسة العامة للدستور المغربي الجديد (2011)"، تبين، العدد 4 (ربيع 2013)، ص 91.

significant limits .[15] This means that the first principle complies with the monistic monarchy rule, while the second principle applies to the pluralism of other institutions. This also means that separation of powers cannot be achieved at the royal institution level but only at the level of the lower institutions as expressed by King Hassan II. With that, the king's supremacy over these institutions ultimately allows him to be the arbitrator between them and to rule them.

The normalization of political parties with the constitution of 1962 meant that these parties had to settle for the demand of constitutional reform, sometimes explicitly and other times implicitly or discreetly. Still, "the royal institution consistently sought to monopolize the constitutional initiative and it considered everything related to the constitution a private [royal] matter."[16] Despite the relatively fast pace of constitutional change, which was imposed by the monarchy's quest to break political deadlocks by introducing new constitutions, the transition from a repealed constitution to an alternative one has never infringed on the constitutional identity underlined in the permanent constitution, which is an identity that merges French constitutional heritage with Moroccan national values and history of the Moroccan nation.

That is, within the basic constitutional structure and established provisions in the Moroccan constitution, certain clauses are considered eternal, namely those relating to the monarchial system and to Islam. And while the constitution does not outline detailed provisions related to religion, as it does with the monarchial system, it takes an approach of sanctifying these basic elements of the country's constitutional culture by declaring them unamendable….and seeks to protect these basic values that are derived from the country's national history and contexts of constitution making ." [17]

The unamendability of certain constitutional clauses entrenches parts of the constitution whereby there is no longer a legal option to introduce any change. Prohibiting such amendment consequently reduces the "cost" of future options, as it limits the options of redrafting a full constitution. From a patriarchal perspective, including these guarantees and enshrining them as pre-commitments limit the future ability to enact innovations or design values that may contradict these long-established ones, even if they are of the same hierarchal level.

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[15] Francesco Biagi, "The Separation and Distribution of Powers Under the New Moroccan Constitution", in: Rainer Grote & Tilmann J. Röder, (eds), *Constitutionalism, Human Rights, And Islam After Arab Spring*, (New York: Oxford University Press, 2016), p. 505.

[16] محمد باسك منار، ص 7.

[17] Valentina Rita Scotti , "Unamendable Constitutional Provisions and the European Common Constitutional Heritage: A Comparison Among Three Waves of Constitutionalism", in: Richard Albert and Bertil Emrah Oder, (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies*, (Switzerland: Springer, 2018), p. 386.

The transfer of unamendable provisions from one constitution to another entrenches them as part of country's constitutional heritage. Meanwhile, it also restricts the exercise of democracy, relegating it into mere necrocracy, or what Thomas Jefferson called "the rule of the dead over the living," especially at the level of the ineffectiveness and perpetuation of authoritarianism.

King Mohammed VI adopted similar constitutional arrangements to those of King Hassan II, who carefully crafted constitutional provisions to perpetuate his rule and entrench his powers and render them indisputable, as a time when he struggled in the face of a strong opposition that complicated his quest for authoritarian rule. Although his powers seemed secure, and although he generally refrained from abusing his authority as his father did, King Mohammed VI nonetheless refused to relinquish his powers. In this spirit, he framed his drafting of a new constitutional initiative as a sign of political change and interest in people's concerns, but without any official acknowledgment that these reforms were in reaction to anger in the streets that was inspired by the February 20 Movement. Consequently, the top to bottom approach to constitutional change focused on warding off the opposition rather than democratization.

It is noteworthy that the first constitution during his rule, "unlike past constitutions, was the outcome of deliberations with Moroccan advisors, but it retained its past focus on linking the contemporary power to the semi-sacred traditional situation of the monarchy."[18] King Mohammed VI appointed nineteen constitutional experts, most of whom were advisors or became advisors after the constitutional process, to draft a constitution that bolsters his rule without any significant democratic changes to the kingdom's political institutions.[19] It also appears that he had an intuitive hunch (…) that constitutional processes are most beneficial for democracy if the path was open to everyone early on.[20]

King Mohammed VI did not specifically respond to the demand of the elected constituent assembly. He appointed instead a consultative committee to review the constitution[21], thus delaying the redemption of the "original sin" of imposing a constitution from the top at the early stages of the first constitutional drafting process during his father's rule. Perhaps this was triggered by his fear that a participatory constitutional process might turn into a democracy that undermines his hegemony. Moreover, this constitution-making process might have been viewed as democratic enough but the participation was

[18] David Mednicoff, p. 121.

[19] Todd A. Eisenstadt, A. Carl Levan, & Tofigh Maboudi, (eds), *Constituents before Assembly Participation, Deliberation, and Representation in the Crafting of New Constitutions*, 1st Published, (New York: Cambridge University Press, 2017), p.1.

[20] Ibid, p. 54.

[21] أسندت رئاسة اللجنة إلى الفقيه والخبير الدستوري الأستاذ عبد اللطيف المنوني.

not effective throughout all its stages, whether at the level of meetings, discussions, or ratification. This participation can broadly be characterized as elitist – imposed from top to bottom – and the constitutional drafting happened behind closed doors and resulted in a document that Moroccans could only accept or refuse [but not amend]. Constitutional change, therefore, was in no way synonymous with democratization.

Drafting the constitution was not the only task entrusted to the commission of Abdelatif Menouni (head of the Consultative Commission for Constitutional Reforms - CCRC). In fact, one of its key objectives, within the framework of its performance of its primary function, was to introduce legitimacy to the new constitution drafting process by inviting and encouraging as many constitutional proposals by political, trade, and civil bodies…[22] The King also created a political follow-up mechanism [*mécanisme de suivi*], comprising secretaries of political parties and union central committees participating in parliament, tasked with follow-up and consultations on drafting the constitution. This mechanism was also aimed at enhancing the appearance of constitutional participation. In reality, however, it had no real influence over the constitutional process, and its coordinator was none other than the King's own advisor, Mohammed Moatassim.[23]

This inadequacy of the constitutional partnership revealed the limited extent of the participatory approach that was introduced as a means of legitimizing the work of the constitutional committee and soliciting political endorsement, both from the follow up mechanism as well as from abroad. "The decision-makers often discussed adopting texts that they drafted based on global benchmarks, and even requested advisory support from the Venice Commission[24], although Morocco did not ask for a specific opinion regarding the constitution, unlike Tunisia."[25]

Even the referendum on the new constitution, which was counting on garnering public endorsement, followed the same reasoning which governed constitutional and political life for over half a century. "In the middle of the referendum campaign, the Ministry of Endowments and Islamic Affairs imposed a unified Friday sermon on all mosques and called on believers to vote "yes" on the draft constitution, in response to the calls of "Amir al-Mu'minin" [Commander of the Faithful, that is, the King] and in

[22] محمد باسك منار، ص 10-9.
[23] Ibid, p. 11.
[24] The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice - is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice on constitution building to its member states and also helps to ensure the dissemination and consolidation of a common constitutional heritage.
[25] Valentina Rita Scotti, p. 382.

obedience to God's words 'O ye who believe, obey God and his Messenger and those charged with authority among you.' [26]

Consequently, any reference to the direct referendum powers is undermined by the notion of the constitution of *wali al-amr* (guardian of the people or holder of authority) that directly correlates to a set of traditional rights that the Sultan holds based on his religious status. In fact, this identification of the ruler with the constitution continues to prevent the constitution from being sufficiently participatory.

The religious identification of the constitution and the supremacy of the issuing authority that has the power to impose it accompanied the public debate about implementing the constitution. The slogan "democratic dictation of the constitution" was widely used by political actors and journalists. The term *tanzil* [revelation in Islam] literally means a top-down dictation consistent with the superiority of the constitution but having a religious essence because its deep connotations refer to the revelation of the Quran to the Prophet and to how its principles should be implemented on the city and its people." [27]

In general, while constitutions express concepts and arrangements as political compromises reflecting a balance of powers at the time of agreement[28], Morocco issued a series of top-down constitutions that reflect gradual balances in tough political matters that were not negotiated as part of a participatory process. [29] Perhaps this top-down strategy in using constitutions was a safety valve to ward off sociopolitical pressure and was more effective in curtailing the flare-ups of enmity towards the ruling regime.[30] However, it linked the drafting of constitutions to the promotion of a hybrid system of governance that reflected an ambiguous relationship between institutions and authority. On the one hand, "constitutional fundamentalism" secured a re-Islamization of the old state, gave the authority's rituals an official character, and revived old traditional systems. On the other hand, constitutional modernization allowed integrating these old systems into the fabric of modern political institutions. Consequently, the elaboration of the constitution gradually evolved from codifying the authoritarian rule to disguising it with democratic features. All this happened in the framework of amplified and

[26] محمد باسك منار، ص 14.

[27] Abdelaziz Lamghari, *Développements Constitutionnels Récents au Maroc, (juillet-décembre 2011)*, (Strasburg: Commission Européenne Pour La démocratie Par Le Droit -Commision de Venis-, 02-02-2012), p. 2. https://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)002-f

[28] Markus Böckenförde, Nora Hedling, & Winluck Wahiu, (eds), *A Practical Guide to Constitution Building*, (Sweden: International Institute for Democracy and Electoral Assistance, 2011), p. 2.

[29] David mednicoff, "The Politics of Sacred Paralysis Islam in Recent Moroccan and North African Constitutions", in: Asli Ü. Bali & Hanna Lerner, (eds), *Constitutional Writing…*, Op Cit, p. 319.

[30] Ibid, 335.

revised copies of the original constitution that reflect the ongoing success in dividing constitutional sustainability over stages, despite the crises, setbacks, or failures of some of these nascent constitutions.

## LEGAL CONSTITUTION: SACRED PARALYSIS OF RELIGION IN THE LEGAL SYSTEM

All Moroccan constitutions maintained the same general language regarding Islam. The preamble states that Morocco is an Islamic state, and Article 3 of the last constitution states that "Islam is the religion of the state." This formulation is generally inaccurate, since the state is essentially a political institution, whereas the notion of religiosity applies to individuals rather than institutions. Moreover, would this formulation imply that Morocco is a theocratic state? Most likely not, as Morocco is defined as a "constitutional, democratic and social monarchy, which indicates that the foundations of the state are secular."[31] However, the notion of "civil nature"- non religious or secular - applies to individuals in charge of exercising power more than it applies to the nature of the state itself. Thus, the power exercised by the civil authorities or natural persons can implement Shariah fully. [32]

In an attempt to clarify these ambiguities, and based on the standpoint that the religious authority binds the believer, it is necessary to question the constitution regarding the established form of protection for religion and the extent to which the Islamic authority compels the state to Islamize the law. To begin with, the existence and practice of religion not only requires legal recognition, but also active protection, especially in communities where religion is a special trait for the diverse social components and generates competing demands with legal implications[33], notably the protection of religious freedom and practice. Koppelman notes that "for religion to be protected, it must be defined".[34] An individual might want to define religion to find out what the protected freedoms are.[35] This is especially true in cases like the Moroccan constitution, where it is stated that "Islam is the religion of the state" and at the same time that "the state guarantees to all the free exercise of religious beliefs."

[31] Ann Elizabeth Mayer, "Revisiting Jefferson's Wall from a Contemporary Middle-Eastern Perspective", in: Robert Fatton, Jr. & R. K. Ramazani, (eds), *Religion, State, and Society Jefferson's Wall of Separation in Comparative Perspective*, 1st Published, (New York: Palgrave Macmillan, 2009), p. 181.
[32] Ferhat Horchni, Islam and the Constitutional State Are They in Contradiction?, in: Rainer Grote & Tilmann J. Röder, (eds), *Constitutionalism, human rights*,…Op Cit, p. 204.
[33] Francois Venter, Constitutionalism and Religion, (Cheltenham: Edward Elgar Publishing Limited, 2015), p. 180.
[34] Cited in : Frank B. Cross, *Constitutions and Religious Freedom*, 1st Published, (New York: Cambridge University Press, 2015), p. 2.
[35] Ibid, p. 1.

Religious freedom suggests religious diversity, which is not the case in Morocco. Even in its acknowledgment of non-Muslim components (a small percentage of Jews), the constitution describes them as "affluents" of Moroccan identity, i.e. as holders of a religious identity rather than a religious minority. Even if considered as such, these affluents need tolerance that is left to the Muslim majority's will to coexist more than religious freedom governed by special laws enacted by the state, which is the case in "the majoritarian model of the democratic state [that] deprives religious minorities of their legal independence, and insists on subjugating all citizens to a single legal system, which often reflects the doctrinal and behavioral values of the ruling majority." [36]

The broadest organization for religious freedom is a constitutional declaration that explicitly provides for freedom of belief. [37] Since the recognition of the right to religious freedom lies close to the core of the constitutional and political attitude of the society and the state towards religion,[38] the protection of religious practice indicated in the Moroccan constitution does not amount to guaranteeing freedom of belief or conscience. Restricting religious freedom in this sense corresponds to the existence of a dominant religion, and it is an objective issue in all countries of the world, where "ignoring the religion of the majority among a certain people is a form of abuse".[39] Therefore, the phenomenon of religious conversion is prohibited. But, the prohibition of religious conversion does not extend to religious disaffiliation "in which the religious factor can be considered a superstructure, in comparison with an infrastructure that operates completely in its absence."[40]

Whilte in the past, it might have been common for one religious group to oppress another, a more recent phenomenon is the oppression of religious groups by non-religious autocrats .[41] Governments may permit the legal presence of religious groups, but they also have the power to restrict religious freedoms by banning certain religious practices.[42] Many restrictions on religious freedoms are implemented even on religious citizens, such as restricting the activities of non-political religious organizations and their access to worship places (in cases of *I'tikaf* [dwelling in a mosque for several days]) and prohibiting holding group prayers in public places (beaches, for instance). These are examples of restrictions imposed on the religious Justice and Spirituality Association on multiple

[36] لؤي صافي، العقيدة والسياسة معالم عامة نظرية للدولة الإسلامية، الطبعة الأولى، (فرجينيا: المعهد العالمي للفكر الاسلامي، 1996)، ص 172.
[37] أنطوني جيل، الأصول السياسية للحرية الدينية، ترجمة محمد محمود التوبة، الطبعة الأول، (بيروت: الشبكة العربية للأبحاث والنشر، 2014)، ص 34.
[38] François Venter, p. 109.
[39] الطبعة الاولى، (لبنان: منشورات ضفاف، 2013)، إسماعيل الشطة، الإسلاميون وحكم الدولة الحديثة، ص62.
[40] مارسيل غوشيه، الدين في الديمقراطية،ترجمة شفيق محسن، الطبعة الأولى، (لبنان: المنظمة العربية للترجمة، 2007)، ص157.
[41] Frank B. Cross, p. 7.
[42] أنطوني جيل، ص 39.

occasions. Therefore, religious freedom is a governmental, organizational, and political matter that can infringe on many causes beyond the personal right to belief,[43] including on religious education and media, whereas "democratic rule could provide an adequate space for religious freedom."[44] Yet, while democracy is critical for the protection of religious freedom, it is not the result of constitutional inspiration. Even in the absence of such inspiration, the democratic rule strongly entrenches religious freedom. [45]

In general, the provision in the Moroccan constitution that "the state guarantees to all the free exercise of religious beliefs," which was coupled with the provision that "Islam is the religion of the state" as indicated above, is subject to the interpretation that it does not apply to religion in general, but strictly to Islam. Moreover, the constitution protects a certain version of Islam, which is "moderate Islam." It bans any forms of religious extremism. This restriction also applies to political life, as parties are not allowed to be founded on a religious basis, and they cannot seek to violate Islam.

And as Islam is a religion that is not only concerned with believers' faith, but also "with the various aspects of their personal, social or even political lives which are affected by it"[46], and its effects might extend to law creation, where as "the law is described as moral, in reference to the principles espoused by individuals and governing their behavior,"[47] the reality of the constitutional formulation also entails the problematic glossing over of the controversy of the constitution's position towards the Islamic Shariah. One of the key aspects to understanding the relationship between religion and the constitution is the extent to which the constitution requires the law to abide by religion, and the question here is with regards to the role of religious principles in shaping the law.[48] In the Islamic context, "to implement Shariah, hence to confine the sources of legislation to Shariah, creates a constitutional dilemma. That is, the dilemma of trying to restrict the powers of the ruler using limitations that are based on reason and *turath* (heritage) at the same time."[49]

In this framework, Morocco settled for a moderate version of an Islamic constitution. "The constitutional clauses and related strategies worked to create a symbolic link to Islam (…) and to steer

[43] Ibid, p. 32
[44] Frank B. Cross, p. 8.
[45] Ibid, p. 184.
[46] Francois Venter, p. 3.
[47] لؤي صافي، ص 159.
[48] Markus Böckenförde, Nora Hedling, & Winluck Wahiu p. 6
[49] خلدون حسن النقيب، "محنة الدستور في الوطن العربي: العلمانية والأصولية وأزمة الحرية"، في: الدستور في الوطن العربي عوامل الثبات وأسس التغيير، الطبعة الأولى، (لبنان: مركز دراسات الوحدة العربية، 2006)، ص 33.

the country away from the implementation of Shariah towards more universal legal standards."[50] Although the constitution declares the Islamic nature of the state, it [the constitution], rather than the Shariah, remains the supreme source of the law. This means that "the legislation's compliance with the Shariah is not explicitly required, but at the same time, the Shariah might inspire laws without facing any constitutional obstacles." [51]

Consequently, the constitution only allows limited implementation of Shariah in the country in civil affairs. "The bill to codify Shariah stopped at the *Mudawana* [Personal Status Code, or the Family Code] and did not go beyond it, as it was incapable of deriving other Islamized laws that were needed following independence, mainly the Penal Code." [52]

The obstruction of the codification of Shariah into to law was linked to "many circumstances and justifications, including the influence of foreign experts who remained present after the end of colonialism, the ideological stance towards the Shariah by certain secular elites that rose to power in Arab countries after colonialism, fear of the [Islamization] project, and concern about legal stability". [53] In addition, this obstruction also possibly stemmed from a desire to avoid existential questions that might lead to unresolvable contradictions [with respect to the nature of the state].[54]

The launch and halt of [Shariah] codification with the Personal Status Code was not a coincidence but rather a political strategy to mobilize religion on the side of the system of rule.

The Personal Status Code was issued two years after Morocco's independence "to respond to the demands of the Nationalist Movement and to apply one of its attractive slogans, which is restoring respect for the Islamic Shariah and its courts that were deeply marginalized and neglected by colonialism."[55] This step was a major response in the pre-constitutional era. However, the spirit of this code failed to consecrate the slogan of codifying Shariah in the first constitution that was later. This raises the hypothesis that the political wager prevailed over the codification process more than the legal commitment to one of the Shariah texts.

In former colonies, colonial leaders often used religion to set legal boundaries for citizens in the areas under their control. Consequently, the colonial legacy and legal heritage of an independent state

[50] David Mednicoff, The Politics of Sacred Paralysis…, p. 326.
[51] Rainer Grote & Tilmann J. Röder, Constitutionalism in Islamic Countries…, p. 115.
[52] محمد جبرون، مفهوم الدولة الاسلامية أزمة الأسس وحتمية الحداثة، الطبعة الأولى، (بيروت: المركز العربي للأبحاث ودراسة السياسات، 2016)، ص 328.
[53] Ibid, p. 329.
[54] Rainer Grote & Tilmann J. Röder, Ibid.
[55] علال الفاسي، مدخل في النظرية العامة لدراسة الفقه الإسلامي، ط2، (الرباط: منشورات مؤسسة علال الفاسي، 2002)، ص 168-169.

consecrate the entrenchment of religion in law.[56] While the French Protectorate marginalized Shariah courts that implemented Islamic Shariah by removing Amazigh tribesmen from under their mandate and subjecting them to the customary law based on what was historically dubbed "the Berber Dahir," which was betting on dividing Moroccans in the face of colonialism, the Moroccan regime tried to implement the same strategy of "divide and conquer." To do so, the regime allied itself with the villages' tribal system against the urban elites of the national movement, which expressed strong opposition in front of late King Mohammed V in the negotiations about the prospective system of rule on Independence Day. With respect to personal status codification, some of these urban elites even expressed "interest in introducing changes, but no follow up confrontations ever resulted. Moroccan voices calling for change were mostly affiliated with the Independence Party [Istiqlal] present in cities. The party was weakened by the alliance between the monarchy and the tribe during the national struggle and the independence period. Voices calling for change remained unheard, as the monarchy chose to retain an Islamist Family Code, in line with its personal interests,"[57] in a brief text that was enacted in 1957-1958. The text did not change the legal status of women, as it was broadly introduced to ratify and institutionalize the model of the extended patriarchal family, which is the foundation of the tribal system.

This legal victory was a result of any direct action by the tribes. Rather, it was the choice of a strong monarchy that preferred to maintain the status quo in the Family Code. The post-independence Family Code in Morocco was an indicated to the notable figures in rural areas that the monarchy had chosen a law that conformed to their view of the world. It also reflected the monarchy's resolve to protect social cohesion based on kinship. By actively maintaining a Family Code that recognized patriarchal ties, the monarchy avoided disturbing the tribal order of Moroccan society and nurtured its alliance with it.[58] Therefore, the Family Code in independent Morocco should be interpreted as a victory of the patriarchal view of the extended family, which is perpetuated by solidarity among its members who are bound by blood ties. It should also be interpreted as a continuation of women's subordination to men under the law. This notion of kinship was especially popular in rural areas, where the monarchy found valuable allies and strong political support ahead of and following independence.[59]

[56] Asli Ü. Bali & Hanna Lerner, p. 8.
[57] Mounira m. Charrad, States and Women's Rights The Making of Postcolonial Tunisia, Algeria, and Morocco, (London: University of California Press, 2001), p. 158.
[58] Ibid, p. 168.
[59] Ibid, p. 167.

This Personal Status Code, which has become enforceable since that date demonstrate that even the amendments that have been introduced by King Mohammed VI in 2004 were based on political factors, including domestic and foreign pressure, rather than a consideration of Islamic *fiqh* or its compatibility with changing circumstances.

The recent amendments to the Code in particular achieved several local and international political goals; it cemented the image of King Mohammed VI as a democratic reformist, bolstered the relationship between the monarchy and women's associations, and resolved the decade-old ongoing dispute between religious elites and leftists.[60]

The timing of the amendments, which was passed immediately after terrorist attacks that shook Morocco in 2003 and placed moral pressure on Islamist forces, allowed the ratification of a more liberal Family Code. "The king pressed for reform in the face of a strong Islamist opposition, which insisted that the enhanced rights of women were inconsistent with the Islamic Shariah".[61] The state's espousal of the Maliki jurisprudence pragmatically allowed it "to protect its legal system from the challenges posed by the advocates of implementing the Islamic Shariah"[62] by arguing that the practices of Muslim society could be a source of law and actually calling for granting legitimacy to existent religious practices as long as they did not contradict sacred texts[63], based on the notion of public interest in Maliki jurisprudence.

The reform of the Family Code reflected a moderate image of the Moroccan monarchy to foreign countries, amid concerns about US invasion of the Middle East and North Africa (MENA) region in the context of the international war on terrorism, following the September 11, 2001 attacks. Some substantial amendments to the law took inspiration from the human rights language of the 1996 Constitution, which for the first time integrated in its preamble a commitment to "human rights as they are universally recognized."

[60] Ann Marie Wainscott, Bureaucratizing Islam Morocco and the War on Terror, 1st Published, (New York: Cambridge University Press, 2017), p. 145.
[61] Ann Elizabeth Mayer, "The Respective Roles of Human Rights and Islam: An Unresolved Conundrum for Middle Eastern Constitutions", in: Said Amir Arjomand (ed), C*onsitutional Politics in The Middle East, With special reference to Turkey, Iraq, Iran and Afghanistan*, (Oxford: Hart Publishing, 2008), p. 84.
[62] Ann Marie Wainscott, p. 73.
[63] Ibid, p. 75.

However, - in comparison -the Moroccan case represents a strikingly different trend, as it provides an illustration of how the recognition of the international human rights law in the constitution is linked to favorable human rights' trends, without provisions requiring respect for the Islamic Shariah. [64]

Adopting a constitutional reference for the international human rights law might be linked to a transition to policies that promote human rights and liberate them from Islamic restrictions.[65] Western parties would contest the implementation of Shariah by demanding abidance by international treaties and laws. Actually, the sovereign right of a state to choose its legislative system is not absolute, as it is bound by the principle of immediate submission to international law from the moment the state is created. A state cannot become a sovereign member unless it abides by international law.[66] Nevertheless, the reference to an external benchmark in the constitution does not mean that the international human rights law is followed to the letter in the religious arena. Although the universality of human rights has been underscored, some traditional rules of Islamic Shariah still exercise their influence. [67] Morocco's ratification of international treaties under previous constitutions remained linked to reservations concerning provisions that contradict the Islamic religion. Meanwhile, the 2011 constitution explicitly stipulates that international conventions do not have primacy over the internal law, except within the scope of the provisions of the constitution, the laws of the Kingdom and its established national identity, including the state religious identity.

It becomes clear, therefore, that the Islamic frame of reference in the Moroccan constitution does not have an independent presence, but it is determined according to the *fatwa* mechanism emanating from the religious power of the king. The jurisprudential role of arbitration that the king assumed in the issue of women can be activated in other controversial issues sparking societal polarization, such as abortion, capital punishment, heritage, personal freedoms, etc. In these fields, the king cannot allow any infringement on the sanctity of religion to serve the narrow political ends of the ruling elites. For that reason, he personally assumes this role rather than delegating it to the legislative or governmental apparatus, or even to the constitutional judiciary, as "it seems that the political class is unwilling, or perhaps not mature enough, to give the judges – or even constitutional judges – the power to determine

[64] Ann Elizabeth Mayer, p. 83.
[65] Ibid, p. 84.
[66] إسماعيل الشطة، ص 67.
[67] Ann Elizabeth Mayer, Revisiting Jefferson's Wall..., p. 183.

what matters in the Shariah should be subject to dynamic interpretation and how they should be interpreted and adapted to the other sources of law and legislations."[68]

The constitutional clauses related to Islam are carefully designed to "reduce potential pressure on the Islamization of the law and cope with curbing the actual effect of Shariah." [69] The prevalence of Islam in the Moroccan constitution is not tied to a reference to Islamic standards (Shariah or fiqh). Islam, being the religion of the state, is initially a national frame of reference. In fact, Islam in its "moderate version" is among the unifying components of the state. Contrary to situations in which the religious legitimacy of the president lies in the supreme nature of defining the Islamic standard as a legal reference,[70] in Morocco's constitutional system, the executive role of the president is inclined to arbitration. Meanwhile, his role as a higher religious authority is practiced in a strong and comprehensive manner.

The restriction of religion ability to widely shape the legal system is a "sacred one." Only the king in his religious capacity can intervene to create space for religion in law, thus isolating legislative options that could draw on the Islamic Shariah. As a consequence, the Islamist Justice and Development party finds itself incapable, from its position as leader of the government, of translating its Islamic slogans into a legislative project that would replace its religious-moral rhetoric. At the same time, the absence of constitutional provisions that mandate the implementation of Shariah does not prevent a parliamentary majority from proposing draft laws that are inspired by Islamic Shariah, therefore the Party continues to fight its "Islamic identity" battles in parliament even if simply to salvage its public image [as an Islamist party]. In reality, this approach has been convenient escape from proposing Islamic legislation – with the exception of passing the cooperative banks law (which is an alias for Islamic financial institutions) after difficult negotiations, and without surpassing the hurdle of having to coexist with the traditional banking law, which is built on interest-yielding transactions [that are forbidden by Islam].

The Moroccan system is unique in that it is able to limit the Shariah implementation realm, as pointed out by Mohamed Mouaqit, as it works in a way that is inversely proportional to the centrality of The Command of the Faithful (Imarate al-Mu'minin). That is, while the symbolic value of Shariah is particularly strong, its implementation is less important on the political front," as if the strength of the former is compensatory for the weakness of the latter." Morocco is a case of excessive admiration for the monarchy instead of the Shariah. It is the strength of the king that strengthens or weakens the

[68] Rainer Grote and Tilmann J. Röder, p. 117.
[69] David Mednicoff, p. 327.
[70] Baudouin Dupret, "The Relationship between Constitutions, Politics, and Islam A Comparative Analysis of the North African Countries", in: *Rainer Grote and Tilmann J. Röder, (eds), Constitutionalism*,…, Op Cit, p. 242.

Shariah's implementation depending on whether he wants to take advantage of it, or, contrarily, contain it. When it comes to nationalizing the legal system through the Islamization of its resources or when it comes to defeating leftist political forces, the direction is to pragmatically use this resource. On the other hand, when faced with the need to curb the Islamic wave, then the inclination is to restrict the implementation of Shariah through the use of the Islamic leadership card.[71]

## POLITICAL CONSTITUTION: CONTROLLING RELIGION AND EXCESSIVE ADMIRATION OF THE MONARCHY

The idea of religion trumping politics in the Islamic Arab world goes against historical trends, as states controlled and generally dominated the observance of religion.[72]

Contrary to what we saw in the previous section with respect to the relegation of religion to the private realm when it comes to the normative value of Islam, it will soon become clear that religion continues to play a unique and powerful socio-political role in shaping the legitimacy and political performance of the Moroccan regime.

In contrast to the strategy of separating religion from politics when it comes to other political actors, we find that the political standing of the monarchy is shaped by the politicization of religion rather than its inhibition. Along with his religious authority, the King of Morocco is the ruler of a state before all else, and "as[political] authority is always concentrated in the hands of individuals driven by politics and not religion, we find that religion serves politics and not the other way around."[73]

The 1962 Constitution, which declared the King as Amir al-Mu'minin (Commander of the Faithful), affirms the permanent authority of a monarchy that is largely accepted in the political arena in Morocco.[74] The moments of political crisis that erupted a few years after the declaration of this initial constitution allowed for testing the efficiency of this religious character. For example, in response to the failed coup attempt, King Hassan II rushed to remind his constituents of his Prophet lineage and his

[71] Ibid, p. 243.
[72] William B. Quand, "Religion and Politics in the Middle East and North Africa", in: Robert Fatton, Jr. & R. K. Ramazani, (eds), *Religion, State, and Society*…, p. 155.
[73] Robert Fatton, Jr. & R. K. Ramazani, (eds.), Religion State and Society…, Op Cit, p. 10.
[74] Mohamed Daadaoui, p. 52.

position as Amir al-Mu'minin. "Hassan's efforts to imbue his throne with quasi-religious neo-papal legitimacy only increased after the 1971 and 1972 coup attempts.[75]

Following constitutions further perpetuated Article 19 that drew the structure of the King's religious authority built upon a long tradition which has been called the political theory of Sunni realism. "This provision skillfully takes up one of the core concerns of Muslims, the risk of fitnah, or disunity, in the Muslim community as a result of unchecked partisanship and fierce party competition, and transforms it into a constitutional mandate to constrain, if the need arises, political pluralism and multiparty competition in order to protect religious tranquility."[76] The 2011 Constitution of Morocco, which bans any kind of (party) political activity which is likely to create divisions in the community along religious fault lines or to disturb the Muslim religion and which gives the ruler the necessary powers to enforce the vision of a peaceful and tolerant Islam espoused by it, is rooted firmly in this tradition.[77]

The adoption in Article 19 of personalization rather than institutionalization, whereby it speaks of the King rather than the monarchy and the Commander of the Faithful rather than the Command of the Faithful, in effect merges the roles of Amir al-Mu'minin and the King, since "the Command of the Faithful with its religious burden channels all of the person of the King towards the state, thus establishing the relationship between the two institutions, or more correctly the two definitions, which is a relationship of mixing and merging in decision-making and implementation."[78] The proof of this is that the royal *dahirs* would be issued based on Article 19, pointing out the merger of the religious and political powers of the king. This article was even used in passing laws in the era of Mohammed VI, despite the legislative branch being specifically defined in the constitution. This was also used to establish a number of institutions, such as "The Royal Institute for Amazigh Culture, The Communications High Commission, The Justice and Reconciliation Commission, the Consultative Council for Human Rights, The Grievances Court, and the Consultative Council for Family Law Reform."[79] More specifically, contrary to the initiative of the Abdul-Rahman al-Yucefi cabinet in 2000, the King declared "the establishment of the Grievances Court institution based on Article 19 of the 1996 constitution, taking into account that the monarchy in its role of Command of the Faithful,

[75] Milinda Banerjee, Charlotte Backerra& Cathleen Sarti, p. 115.

[76] Rainer Grote and Tilmann J. Röder, "The Constitutional Legacy of the Arab Spring", in: Rainer Grote and Tilmann J. Röder, (eds), *Constitutionalism, Human Rights*, Op Cit, p. 914.

[77] Ibid, P. 916.

[78] أحمد الخمليشي، "علاقة الدين بالدولة ومؤسسة امارة المؤمنين في المغرب"، في: الدين والدولة في الوطن العربي، الطبعة الأولى، (بيروت: مركز دراسات الوحدة العربية، الطبعة الأولى، بيروت، 2013)، ص382 .

[79] محمد كولفرني، "الربيع العربي والإصلاح الدستوري بالمغرب: قراءة من منظور الفاعلين"، سياسات عربية، العدد 22 (سبتمبر 2016)، ص 51.

considers these affairs to be among those that have to do with the ruler caring for his constituents, and thus there cannot be a mediator between him and them."[80] Therefore, the above-mentioned supremacy of the Imarate al-Mu'minin, the Command of the Faithful, over the parliament and government allows for "concluding that the constitutional monarchy was just a cover for Imarate al-Mu'minin, not only because it is the original authority and is deeply-rooted in history and conscience, but more importantly because its jurisdiction covers all institutions created by the constitution and thus infiltrates them and supersedes them,"[81] since its jurisdiction is unspecified.

With the monarchy established beyond the bounds of the constitution, the institution of Imarate al-Mu'minin encompasses powers above what is merely written in the constitution. Specific symbolic events were established by King Hassan II with the goal of establishing a personal dimension for the authority enjoyed by the monarchy, whereas the King heads the annual pledge of allegiance rituals in which the political, military, and administrative elites officially renew their loyalty pledge to the throne, as well as the Hassanite religious lessons – those conducted in the presence of the King and under his supervision – during Ramadan and the sacrificial ritual in the name of the Moroccan nation on Eid al-Adha. These practices serve to emphasize the King's lineage as a descendant from Prophet Muhammed and, more importantly, "by adopting these rituals and this symbolism, King Hassan II sought to establish a connection with the pious common Moroccans."[82] In this context, the religious councils - that is the regional scholar councils - become major institutions in establishing the religious legitimacy of the monarchy. By organizing religious affairs and seasonal events, these councils put the religious crowd at the disposal of politics and strengthen the hegemony of the *makhzen* [state] over the religious rhetoric.[83]

Imarate al-Mu'minin, with its religious symbolism and historical legacy, has helped end sedition and maintain stability at crucial times, as well as keep away the specter of dogmatic and ideological alignments.[84] This was demonstrated in the two instances of mediation of the King as Amir al-Mu'minin, first by Hassan II in the case of the Personal Status Code reform in 1993 and the second by Mohammad VI in 2003 in issuing the Family Code that replaced the previous one after its amendment.

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[80] محمد الغالي، "دستور المملكة المغربية لسنة 2011 في ضوء الربيع العربي جدلية الثابت والمتحول"، تبين، العدد 4 (ربيع 2013)، ص 115.

[81] عبد العزيز غوردو، الحكامة الجيدة في النظام الدستوري المغربي، الطبعة الأولى، (لندن: منشورات اي بوك، 2015)، ص 44.

[82] Michael Willis, *Politics and Power in the Maghreb Algeria, Tunisia and Morocco from Independence to the Arab Spring*, (New York: Oxford University Press, 2014), p. 56.

[83] Mohamed Daadaoui, p. 53.

[84] أحمد الخمليشي، ص 403.

Also, the Islamic dimension has strategically "provided insulation from, and enabled the regime to justify forceful tactics against anti-state Islamist political activity which has increasingly marked Arab politics in the last decades".[85] That's because the official role of the king as Amir al-Mu'minin gave the monarchy a religious and legal authority that actually undermined the religious and opposition rhetoric of the Islamic factions, since it is much easier to levy accusations of extreme secularism or ignoring Islam against heads of states and regimes that do not possess a clear religious dimension. At the same time, it was more difficult for these accusations to stick on a descendent of the Prophet and a monarchy that often donned the tradition of religious imagery and symbolism.[86]

While the Leftist opposition would shame the regime for using religion in politics, it would turn to enacting Imarate al-Mu'minin in order to confront the dangers of extremism. "Ironically, secularists supported the religious legitimacy of the King as a bulwark against Islamists; in turn many Islamists saw themselves closer to the King than to secularists."[87]

Competition between secularists and Islamists to have the religious authority of the monarchy on their side has allowed the regime to ward off an opposition coalition and to pressure it to fully establish democracy, and at the same time it enabled the monarchy to avoid the kinds of repressive religious policies that were adopted by Islamic regimes in other places. "In fact, one can affirm (somewhat strongly) that the king fundamentally offers Moroccans a deal: show respect for the sacred status of the monarchy and its official moderate Islam in return for life under a regime that is flexible and capable of introducing some democratic reforms,"[88] which in no way may change the core of the monarchy's authority founded on the sacred religious authority of Imarate al-Mu'minin.

The changes that took place in Morocco since the start of the reign of Mohammad VI might show that the traditional practices of the political regime have lost some of their influence, while the monarchy as a modern institution has gained power and strengthened its authority without having to resort to a political gamble by activating Article 19 too often "as a reserve text to confront unpredicted developments from the constitution's side,"[89] as imagined and applied occasionally by Hassan II. However, the mixing between the historical and religious powers of the king as per this article does not

[85] Milinda Banerjee, Charlotte Backerra, & Cathleen Sarti, p. 119.
[86] Michael Willis, p. 178.
[87] Paola Rivetti & Rosita Di Peri, (eds), *Continuity and Change before and after the Arab Uprisings*, 1st Published, (London: Routledge, 2016), p. 24.
[88] Ann Elizabeth Mayer, p. 185.
[89] Abdeltif Menouni, "Le Recours à L'article 19: Une Nouvelle Lecture de La Constitution?", Revue Juridique Politique et Economique du Maroc, Numéro 15, (1er semestre 1984), p. 4.

seem to have completely ended with the latest constitutional reforms, at least from a practical point of view. Even if it was formally shaken up, it continues objectively, so long as the new constitution is a constitution of continuity and not a rupture constitution, in maintaining the bet on its deterrence of potential challenges to the actual political authority of the king. This was demonstrated earlier with the King's declaration of his decision to revise the constitution, where "the March 9 speech confirmed Imarate al-Mu'minin as one of the vessels of reform."[90] Therefore, the reform drafts presented by the political parties, even when they mentioned rewriting Article 19, did not touch the role of Amir al-Mu'minin in the amendment, but rather focused on the King's constitutional role.

At first, it seems that the novel constitution distinguished "between the religious legitimacy of the king, as mentioned in Article 41, and his constitutional legitimacy as king of the country and head of the state, which is what Article 42 addresses. This situation, as intended by its phrasing and as can be concluded by any reader of the Moroccan constitution, aims to separate the religious role from the political or civil one."[91] However, these two articles which replaced the former Article 19 by placing the title of Amir al-Mu'minin first, give precedence to the role of Imarate al-Mu'minin over the constitutional monarch, whose scope was reduced. Also, the separation between the realms of Imarate al-Mu'minin and the head of state only came to address the confusion between the religious and civil authorities of the king, and as such did not impact his authorities in a way that embodies any separation of powers. Imarate al-Mu'minin continued to have an undefined mandate and jurisdiction, whereby the king retain absolute discretion in organizing the religious realm, which is done through *dahirs* that do not require co-signers. Imarate al-Mu'minin was even strengthened further with new religious powers through the heading of the Higher Scholar Council, a constitutional religious institution with specific jurisdiction over the issuance of fatwas, an arrangement that can foreseeably prevent religious scholars from restricting actions of the executive branch – as they had done at times throughout the history of the Moroccan Empire. Under the new arrangement, when the Higher Council issues an opinion *(fatwa)* on a legal matter, it would be required to submit the *fatwa* to the king for ratification as the head the Council.

In addition to Article 19, which addresses Imarate al-Mu'minin, "Article 41 worked to combine and frame the king's religious authorities without defining their relationship with the civil political roles that impact citizens' lives,"[92] which opens the door for the possibility of conflating the two roles. "Article 41 also highlights the importance of the king to the Islamic identity of Moroccans by reminding them that

[90] Valentina Rita Scotti, p. 52.
[91] أمحمد مالكي، ص 95.
[92] محمد الغالي، ص 116.

the monarchy in Morocco is an institution that is deeply rooted in the Islamic history of the country and closely tied to it. Thus, one cannot imagine the elimination of the monarchy or its reduction to an un-influential kind of symbolic institution like the constitutional monarchies in Europe, or even to destroy the overall Islamic character of Moroccan society."[93]

The continuity of fundamentals of the constitution remains clear, as even foregoing the king's sanctity of persona failed to result in any tangible effects. The new constitution rather reinvented this sanctity by reverting back to an old phrasing with ancient roots. Article 46 thereof specified that "the person of the King is inviolable, and respect is due Him." implying thereby the king's right to obedience that amplifies his re-sanctification. "In fairness, other democracies such as Denmark have made their king sacrosanct, but in those monarchies the monarch reigns but do not reign." [94]

Therefore, this new phrasing may seem ordinary, but in fact it comes to support and strengthen the monarch's supremacy as a political actor, even over the nation's sovereign representatives at a time when the constitution claims that parliamentarianism is one of the attributes of the ruling regime in Morocco. "The restraints and intentional ambiguities of the constitution effectively deter representatives from engaging in activities or debates that might be construed as" [95] voting against the will of the king."

The conclusion is that the religious legitimacy that is concentrated constitutionally in the institution of Imarate al-Mu'minin has worked for Hassan II under the pretext that, "when the monarch's political absolutism cannot be supported by the constitution, it will be justified by divine right."[96] For Mohammad VI, it has become an insurance system against political risks, whereby "As a theory of the relationship between constitutions and political risk, it may extend to a much broader range of circumstances—i.e., to situations in which constitutional actors are seeking to protect themselves against a broad range of risks, including […] the risk of loss of political power."[97]

It remains to be mentioned in the end, that Imarate al-Mu'minin, while concerned with the competing forces inside the country, may also command external influences. While "comparing the position of the Moroccan King with that of the early Islamic rulers is not a possibility in a world that has been fragmented into various nation states, because the religious authority of the king is only recognized

[93] Rainer Grote and Tilmann J. Röder, p. 915.
[94] ينص الفصل 46 من الدستور على أن "شخص الملك لا تنتهك حرمته، للملك واجب التوقير والاحترام".
[95] Ibid.
[96] Ibid, P. 56.
[97] Rosalind Dixon & Tom Ginsburg, "The forms and limits of constitutions as political insurance", International Journal of Constitutional Law, Volume 15, Issue 4, (October 2017), p. 7.

within Moroccan territories,"[98] nationalizing religion and the state's official oversight over it within an Islamic political bureaucratic framework transcends political pragmatism and serves as an attempt to restructure the state's relationship to Islam in a manner that sends external messages.

While the theology supported by the Moroccan state is "safe" in that it discourages adherence to Salafism, Shi'ism, or Wahhabism, it not a particularly vibrant theology. Rather, it recycles long-held Moroccan religious identities to serve the interests of the state.[99]

The assertion of the Sunni identity of Morocco is understood as a not-so-subtle message to Iran to refrain from spreading Shi'ism within Moroccan borders, which was a reason for expelling the Iranian Ambassador to Morocco in 2009. The state's encouragement of Sufism, in addition to being an effort to inhibit political activity, is another effective method to combat the spread of Salafism.

Moreover, the king started, from his position as Morocco's foreign policymaker and as Amir al-Mu'minin, to practice "spiritual diplomacy" with Africa countries, not only to preserve existing relations, but also to strengthen Morocco's stance in the Sahrawi dispute[100]. In addition, the King was able, through his position as head of al-Quds Committee[101], to compete with Saudi Arabia and Iran as religious authorities. The conflict between these two allows Morocco to present itself as a third religious pole. This is not to say that the king aspires to lead the Islamic world. To the contrary, he is well-aware, as above-noted, that the theory of one ruler commanding the loyalty of all Muslims, which was appropriate for the conditions at the time of the early caliphates when there was a single Muslim community, is not suitable for the modern Islamic world that is divided into national states, and accordingly there is no one broadly recognized Muslim leader, even if he was a descendant of the Prophet Mohammad (pbuh).

[98] Ann Elizabeth Mayer, p. 181.

[99] Ann Marie Wainscott, p. 94.

[100] With the support of Algeria, the secessionist Polisario Front contested Morocco's sovereignty over its southern Saharan provinces.

[101] The Al-Quds Committee was established on the recommendation of the Sixth Conference of Foreign Ministers of the Member Countries of the Organization of the Islamic Conference held in Jeddah in 1975. The Tenth Conference held in Fez decided to assign its presidency to the King of Morocco, Hassan II at the time, and after his death, his son, King Mohammed VI assumed its presidency.

## CONCLUSION

The repetitive constitutional strategy of the Moroccan monarchy, that is, the redrafting of the constitutional document rather than having it permanently written, has greatly served in reflecting a top-down constitutional approach for different situations and political balances in order to support the legitimacy of the political regime and its control. Meanwhile, the ruling regime still maintains some traditional authority characteristics in the constitution, whereby the constitutional laws merge nationalism, Islam and the monarchy and adopt a concept of civil state that sees it as part of a wider political notion of a monarchy combining local traditional legitimacy and features of Western democratic theory. Although the Moroccan constitution has succeeded in avoiding potential pitfalls in the way that constitutions frame religion, it does not draw clear lines between religion and the state, and does not hide the tension between the two. On the contrary, the ambiguity of the relationship between them in the constitution may reignite constitutional debates, including effort put forth in this paper.

Morocco has succeeded in merging aspects of Islam in its constitutional framework without challenging the ultimate sovereignty of the constitution itself. The constitution worked to craft legal language that maintain the symbolic power of Islam without weakening the sovereign authority of the monarchy. Religion is bound by the constitution while the monarchy is above it.

Successive Moroccan constitutions perpetuate Islam as a trademark for the monarchy. They do not just place the monarchy at the center of the political authority, but tie it to Islam as well. Despite that, the inflated Islamic role of the monarchy did not imply that the country's policies reflected a theocratic regression by the regime. The goal was to create legitimacy and submission without a costly use of violence.

This political view of the constitution drives the dominance of the political path over a legal one in the constitutional interpretation of the relationship between religion and state, and allows the constitution to draw an authority that is independent from the standard Islamic jurisprudence, thus preventing the "Shariafication" of the laws. The constitutional text on religion does not grant it legislative authority in return for protection from critique and revision.

It is true that the absence of constitutional empowerment of Islamic Shariah is due to practical challenges, but the issue remains political at its core. The constitution allows religion, through legal and judicial venues, to enter the private realm, but without explicitly recognizing religious freedoms.

Meanwhile, it seems that the biggest evidence countering the thesis that religion falls within the private sphere, is its political effect which forms the chemical makeup of the monarchy's power. Therefore, the state's ultimate wager is to control the public aspect of religion rather than its individual aspect.

# The Legal Framework for Transitional Justice: Comparative Arab Experiences

Tarteel Darwish [*]

ABSTRACT

This paper revolves around the role of transitional justice that seeks to establish democratic and constitutional institutions, in light of the flagrant and dangerous violations of human rights that the Arab world is witnessing, especially in Syria and Tunisia. Moreover, it analyses the role of transitional justice in the transition from an authoritarian society to a democratic one in Arab countries – a case in point are Syria and Tunisia.

Keywords: *Transitional Justice, Syria, Tunisia.*

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## INTRODUCTION

Every society that emerges from a state of conflict and strife needs a transitional phase to address the effects of the past and reposition both society and state by establishing accountability and transitional justice and defining a new path for the state. Therefore, transitional justice is one of the means of settling internal conflicts in order to rebuild the state on sound foundations.

The philosophy of transitional justice is based on a saying by Archbishop Desmond Tutu[1] of South Africa: "How to transform human mistakes into human justice." Transitional justice is the sole and most appropriate option to solve the problems of the past and remedy the abuses that have affected human dignity and humanity as well as to acknowledge said violations and seek to prevent recurrences.[2]

Transitional justice is based on documenting the grave violations of human rights and other forms of abuse of power. It also seeks to reveal the truth, to hold those responsible for these violations and abuses accountable, and to purge state institutions of those who were involved in committing such crimes. Transitional justice aims to accomplish this as it promotes the reform of institutions with the goal of preventing the recurrence of said violations and, offering effective redress and compensation to victims. All this would ultimately result in national reconciliation and transitioning to democracy and social peace within a framework of national accord.[3]

Transitional justice, as a term, consists of two compound words, transition and transformation, from a specific ruling system to a democratic regime. The first word refers to the transition from a state of tyranny to a state of effective political participation by citizens, whereby the second means going on a path that includes the greatest degree of democracy[4] while also referring to the set of procedures, measures, mechanisms, or processes that a state resorts to in this period in order to achieve this hoped-for transition. It aims to get over the pains of the past, overcome societal divisions, and build trust

[1] Based on a graffiti that was on the wall of the house of Desmond Tutu, the former South African Archbishop of Cape Town. Tutu was the 1984 Nobel Peace Prize winner and one of the most prominent anti-apartheid activists in South Africa. He was chosen to chair the Truth and Reconciliation Commission to investigate past human rights violations perpetrated by both pro- and anti-apartheid groups in South Africa.

[2] International Center for Transitional Justice, What is Transitional Justice?, accessed on 22/05/2021 https://www.ictj.org/about/transitional-justice

[3] Adel Majed, "al'edalah alenteqaliyah waledarah alnajeha lemarhalet ma ba'ed althawrat", Mejalat alseyasah ldawliyah, No. 192, April 2013, p. 10.

[4] Ali Al-Kuwari, "lemaza entaqala alakheren ela ldymoqrateyah wata'akhar l'arab, derasah moqaraneh ledewel l'erebiyah m' dewal okhra", Centre for Arab Unity Studies, Democracy Studies in Arab Countries Project, Beirut, 2009, p. 27.

between the people and those in a position of authority, leading to national accord and national reconciliation[5].

As a matter of fact, the historical roots of transitional justice go back to the period following World War I, to a time when the international community seriously began to appreciate the value of achieving transitional justice, in light of the gross violations of the laws and customs of war and the rules of international humanitarian law[6].

The widespread and serious violations of human rights in the decades that followed the end of World War II contributed to the growing interest in the concept of transitional justice and its mechanisms. In parallel, with political transformations from authoritarian regimes to democratic regimes in South and Central America, some manifestations of transitional justice emerged as a result of increasing popular pressure and movements[7].

Transitional justice has been defined at several levels. At the international level, the United Nations gave it great attention and defined it as what: "Covers the full range of processes and mechanisms associated with society's attempts to come to terms with a legacy of widespread past abuses in order to ensure accountability, justice and reconciliation. It may also include both judicial and non-judicial mechanisms,

[5] Ali Al-Qahwaji, "al'edalah lenteqaleyah men menzewr lmolahaqat ljena'eyah", Kuwait International Law School Journal, Issue 4, Year 1, December 2013, p. 237.

[6] The use of the term "International Humanitarian Law" is attributed to the jurist Max Hober, the former president of the International Committee of the Red Cross. International humanitarian law is defined as a set of rules of international law that aims, in situations of armed conflict, to protect people who suffer the scourge of said conflict, and in a broader framework, to protect objects not directly related to hostilities. See: International Humanitarian Law, A Guide to National Implementation, prepared by select specialists and experts, Publications of the International Committee of the Red Cross in Cairo, 2006, p. 17.

[7] Transitional justice after World War II revolved around the idea of criminalization and the international trials resulting from it, such as the Nuremberg and Tokyo trials. The second stage of the development of transitional justice came after the collapse of the Soviet Union and during the various political changes that took place in eastern European countries. During this stage, was adopted a local or national concept of social justice that was linked to the official structures of the state and thus bypassed the idea of trials and included other mechanisms such as truth and compensation commissions. Thus, transitional justice became a national dialogue between perpetrators and victims. As for the third stage of transitional justice, it emerged during the transitional periods that followed the rule of military and totalitarian dictatorships in Latin American and South African countries and in some other African countries, as there was international consensus on the need for transitional justice measures to deal with human rights violations. This coincided with the objectives of countries and donor bodies for developing countries that demanded that the rule of law be implemented. In other words, the third stage of transitional justice linked democratic transition and justice with a comprehensive reassessment to bring a society in the transitional phase to another phase where democracy is considered one of the primary goals. The establishment of the tribunals and courts for Yugoslavia, Sierra Leone and Rwanda is the greatest reflection of achieving the goals of transitional justice. See: Omar Abdel Hafeez Shanan, "al'edalah alenteqaleyah walmasaleh alweteniyah - almefaheym waltetbyqat", Dar Elgamaa Elgadida, Alexandria, 2015, pp. 93-94.

with varying levels of (or non-existent) international participation, as well as individual trials, compensation, fact-finding, constitutional reforms, examination of personal record for abuse, dismissal or a combination of these."[8] Then, the UN set international standards governing its implementation and later pledged to provide support to countries that seek to implement transitional justice mechanisms.

Transitional justice has been defined also at the national level through laws set by some countries that have called for democracy. For example, the draft Transitional Justice Law in Libya defined it in Article 1, which states[9] that: "Transitional justice: A set of legislative, judicial, administrative, and social procedures designed to address the incidents that occurred in Libya under the former regime and the government's violation of human rights and fundamental freedoms, and to achieve amicable reconciliation between social groups."

Our study thus revolves around the role of transitional justice that seeks to establish democratic and constitutional institutions, in light of the flagrant and dangerous violations of human rights that the Arab world is witnessing, especially in Syria and Tunisia. Our main question is as follows: Will transitional justice be able to achieve its goals, especially as the committed violations are against an entire society?

Moreover, in order to highlight the role of transitional justice in the transition from an authoritarian society to a democratic one in Arab countries – a case in point are Syria and Tunisia – we raise the below set of questions:

1. How effective are transitional justice mechanisms?
2. What is the relationship between transitional justice and human rights?
3. What is the role of internal turmoil in consolidating what transitional justice means?
4. What are the scopes of democratic change during the transitional period? What are the concepts that are comparable to the term "transitional justice"?

[8] Paper on Transitional Justice in Tunisia, published on 03/03/2014, http://ar.jurispedia.org/index.php accessed on 18/05/2021.

[9] National Transitional Council, Libya, Article 1 of Law No. 17 of 2012, on establishing the rules of reconciliation and transitional justice. Tunisian law also gave the following definition: "Transitional Justice shall mean an integrated process of mechanisms and methods used to understand and deal with past human rights violations by revealing their truths, and holding those responsible accountable, providing reparations for the victims and restituting them in order to achieve national reconciliation…" See Part One of Organic Law No. 53 of December 24 on Establishing and Organizing Transitional Justice.

5. How can criminal protection provided by domestic and international justice be applied once at the transitional justice stage?
6. Based on the experiences of Arab countries, to what extent is transitional justice able to address past crimes?

These are the questions we will be answering through this study that we have divided into two parts:

1. The Legal System of Transitional Justice
2. Transitional Justice: between regulation and implementation

## THE LEGAL SYSTEM OF TRANSITIONAL JUSTICE

Often, countries face internal turmoil that could destabilize security and stability. Such turmoil may be expressed peacefully through demonstrations or work strikes. The constitution regulates these behaviors and confers legitimacy on them, provided that they adhere to the procedures established by the state's legislation in force.

However, the situation changes when these demonstrations turn violent and become driven by organized groups that act against the ruling authority, but without this violence rising to the level of armed conflict, which prompts the authority to use force to end these confrontations. The inevitable consequence of this is a weak rule of law and massive violations of human rights such as the human right to life, and the prohibition of slavery, inhuman, cruel and degrading treatment in addition to torture.[10]

The Secretary-General of the League of Arab States, Dr. Nabil Elaraby, described: "2014 as the worst year for the Arab nation," and James Clapper, U.S. Director of National Intelligence, described it as "the bloodiest year in 45 years." This assessment is based on the events of the Arab Spring that resulted in the outbreak of sectarian wars within single countries and across borders. It is additionally based on the fact that the year 2014 saw the dismantling of the central authority of states and the taking over of armed non-state actors such as terrorist organizations and armed militias. This is the result of the accumulation of what happened in the previous decades. The witnessed results are thus the culmination

[10] Omar Abdel Hafeez Shanan, op. cit., p. 58.

of the policies pursued by most Arab governments for decades: policies of political and social exclusion, restrictions on civil and political liberties, distorted economic development, dependence on rentier sectors, and the continued economic vulnerability to other states. This has resulted in dependency, the widening gap in the distribution of income and wealth between the rich and the poor, and the continued deterioration in education, health and other basic needs, with the consequent decline of social capital in these countries. Therefore, the Arab Spring's bloody events were all but surprising.[11]

Furthermore, revolutions and armed conflicts have resulted in the collapse of regimes in some countries, as was the case in Egypt[12] and Libya[13]. This situation prompted countries to find joint mechanisms aimed at uncovering the facts, compensating the victims, making reparations and establishing a bright future away from the mistakes of the past. Given the aforementioned, and with the aim of highlighting the legal system of transitional justice, we will address the "pillars of transitional justice" in the first section and then proceed to discuss the "mechanisms for achieving the goals of transitional justice" in the second section of this study.

## Section 1: Pillars of Transitional Justice

Transitional justice is defined as: a set of judicial and non-judicial mechanisms- "political, economic, social"- that a particular society uses to achieve justice in a transitional period with the aim of moving from the stage of conflict to the stage of consensus.[14]

[11] Ibrahim Naser Eddine et al., "hal l'omah al'erbiyah 2014-2015, ale'esar: mn taghayyor alnizam ela tafkyk aldowal", Gamal Abdel Nasser Cultural Endowment, Centre for Arab Unity Studies, Beirut, 1st Edition, 2015, pp. 17-18.

[12] In Egypt, popular pressure after the 2011 revolution resulted in the arrest of the President of the Arab Republic of Egypt, Mohamed Hosni Mubarak. Despite the emergence of clear aspects of transitional justice in Egypt, the reality indicates that measures related to transitional justice such as truth-seeking and reparations for victims were not at the required level. In addition to that, criminal accountability for those responsible for violations in Egypt was not on countries' agendas after the election of Field Marshal Abdel Fattah el-Sisi to the Egyptian presidency for the year 2012: Transitional Justice in Egypt - State Repression and Polarized Politics Thwart Hopes, ICTJ, article published on 27/09/2015, accessed on 20/05/2021. https://www.ictj.org/news/state-repression-polarized-politics-thwart-hopes-justice-egypt

[13] Some believe that what happened in Libya was a civil war, and that the ruling authority, with the help of external intervention, has worked to mislead society in order to consolidate its interests: "The civil war in Libya is artificial and not inevitable. The Libyan crisis is the result of the leadership's failure to transition, not the result of tribalism, or the lack of modernity, or the absence of a national identity." An Introductory Study on the Status, Challenges and Prospects of the Libyan Economy, Part II of a Baseline Study for the Libya Socioeconomic Dialogue Project, United Nations – ESCWA, 2020, p. 9.

[14] Sabri Mohamed Khalil, The Concept of Transitional Justice, Al Rakoba newspaper, Sudan, 2013. Accessed on 20/05/2021. http://www.alrakoba.net/articles-action-show-id-43019.htm

Based on this definition as well as on country experiences in the field of transitional justice, transitional justice may be considered to be founded on five main pillars, which are:

Accountability, truth, reparation, institutional reform, and reconciliation. The order according to which these components are enumerated is not a reflection of the priority of one component over another but rather a methodological necessity. We will discuss below each of these components in some detail.

## 1) Truth

Truth is necessary and important for several reasons, the most important of which is to help the collective awareness get to the truth regarding the violations that took place, prevent their recurrence in the future, and end the state of fragmentation and controversy over these violations between the different social factions. Habitually, during transitional stages, the need to understand what happened and why it happened arises, especially since the information blackout practiced by tyrannical and repressive regimes conceals their human rights atrocities and violations, in terms of dimensions, components, size and areas.[15]

When talking about the truth, one must be aware that it is not absolute and that it has many forms and shapes as well as various components. The most prominent of these is the factual or forensic truth that is presented to the judiciary with all the arguments, evidence, witnesses and legal basis it requires. There are also the testimonies that reflect the reality of individual suffering in the midst of human rights violations. The transitional justice approach seeks to reveal the truth by bringing together these components - as much as possible, investigating and listening to the victims and their families, and enabling the community to know what happened by providing parties with the possibility to express themselves through creativity, writing, media, journalism, hearings and others. Among the non-judicial mechanisms that have noticeably emerged in the last two decades of the past century are truth commissions. This

[15] See: United Nations, GUIDANCE NOTE OF THE SECRETARY-GENERAL, "United Nations Approach to Transitional Justice", March 2010, p.4. (UN.DOC.12-38576)
Also see: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, General Assembly Official Records, A/HRC/21/46, p. 5, paragraph 14, August 9 2012, accessed on 19/05/2021, available on the United Nations official website:
http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx

mechanism was first used in South America and then spread to many parts of the world with the establishment of more than thirty truth commissions that have achieved varying degrees of success.[16]

## 2) Trials

Amnesty and forgiveness are of importance and necessity in any society that has suffered from the scourge of conflict, repression and persecution. However, this does not eliminate the need for conducting fair and legal trials. Indeed, the role of these trials does not only lie in human rights, but also in strengthening the principle of accountability in a transitional phase to turn the page on the past and start a constructive phase with new foundations. The national judicial system or the international hybrid criminal tribunals are considered the originators and implementers of these principles and foundations, on the basis of domestic legislation and international laws in case the national judiciary is unable to assist in this. Hence, it is possible to benefit and cooperate at the international level through the establishment of hybrid tribunals in the event of the collapse of the local judiciary, or in the event that it is unable to prosecute those accused of crimes related to human rights and the international humanitarian law. In this regard, transitional justice requires ensuring the independence and impartiality of the judiciary, provided that the investigation and trial take place in accordance with legal procedures, and that multiple trials for the same crime are prevented. Securing protection for witnesses and protecting trial procedures are also required. In these trials, what is known as the statute of limitations does not apply, and charges against the perpetrators are not dropped; there is no justification for obeying orders when it comes to military personnel, and no one, including the head of state, enjoys protection and immunity from prosecution.[17]

[16] Historically, by examining global experiences in this field, we find that Latin American countries have formed many commissions. In Bolivia, the National Commission of Inquiry into Disappearances was established in 1982. Argentina established in 1983 the National Commission on the Disappearance of Persons. Chile followed suit in 1990-1991 by establishing the National Commission for Truth and Reconciliation and the National Corporation for Reparations and Reconciliation. A commission on human rights violations was established in El Salvador in 1994, followed by Peru in 2001 and Paraguay in 2003 with the formation of truth and justice bodies. On the African continent, what is noteworthy are the experiences of Rwanda in 1990, South Africa in 1995 and Sierra Leone in 2000. The events of East Timor in the Asian continent pushed to establish the Commission for Reception, Truth, and Reconciliation in 2002. Chile's experience is considered the first indication of international solidarity with the victims, when in 1975 the United Nations General Assembly confirmed practices of torture, ill-treatment and arbitrary detention. Omar Abdel Hafeez Shanan, op. cit., pp. 113-114.

[17] Omar Abdel Hafeez Shanan, op. cit., p. 116.

The abovementioned trials are about taking penal measures against the perpetrators of human rights violations, in accordance with the requirements of international law and the obligations that each country has taken upon itself through its accession to a number of conventions and treaties that signatory countries have ratified. However, country experiences demonstrate that this obligation remains dependent in one way or another on the presence of a political will, of identified priorities for democratic transition, and of the criteria necessary for the judiciary to fully and impartially play its role. This explains the divergence in the priorities of many country experiences, including Chile and Argentina.[18]

The application of the principle of accountability undoubtedly takes into account the political assessment of the country's situation and the objectives envisaged at each stage, but that does not mean that the state is to abandon its obligations in this regard. There is no doubt that the law has its limits; whenever human rights violations occur on a large scale – as was the case in former Yugoslavia or in Rwanda – it is impossible to identify and prosecute everyone. While international criminal law can hold some accountable when it comes to international crimes, there are limits to what can be achieved. Nevertheless, criminal accountability remains an option that has its motives and objectives in the steps taken to address past violations. These are mainly: Helping to deter the perpetration of new violations, overtly and officially condemning crimes, and reflecting the state's involvement in building respect for the law, in addition to building confidence in the state's policy and institutions.

[18] The importance of the Argentinean experience in transitional justice is due to two reasons: The first is that the Argentinean experience is one of the first experiences in the world in the field of implementing transitional justice, as it can be said that the term transitional justice was born in Argentina. The second reason is that the Argentinean experience has faced great obstacles and resistance in order to achieve its purpose. Trials of military figures and personnel accused of committing human rights violations had begun, but Argentina faced obstacles mainly the fact that: "Some leaders of the Argentinean army follow the policy of hiding evidence and documents, that some leaders in the Argentinean army use terrorist methods inside the country such as bombings, and that some army leaders threaten to plunge the country in a civil war, as long as trials for members of the army continue." Jubeiry Yassin, "al'edalah alentiqalyah fy mythaq almsalha alwataniyah aljza'ery", Dar Elgamaa Elgadida, Alexandria, 2019, p. 325 ff. As for Chile, the seizure of power by the army led by General Augusto Pinochet on September 11, 1973 and its overthrow of the Popular Unity coalition government led by Salvador Allende put an end to a democratic experience that did not enjoy the United States' blessing. The US was thus involved in this bloody coup that left in its wake, in only 3 months, 1220 casualties. As a result of the popular resistance against the regime, the ruling military authority was forced to hold a plebiscite to transition to civilian rule. After the 1989 elections that resulted in the Christian Democrats' win and Patricio Aylwin's accession to the presidency, the process of transition to a new regime began while the presence of the military authority remained in power for several years and failed to consolidate civilian rule. The Chilean experience in democratic transition was carried out gradually and with moderation until the military authority was stripped of its vast powers without any more casualties. The transition phase was a bridge to a more stable and representative phase of the popular will that insisted on knowing the truth, especially the repercussions of the bloody military coup the likes of which no country in the continent has ever seen in terms of the suppression of liberties, assassinations, and torture in the name of freedom and democracy. In April 1990, following a presidential decree, a commission was established under the name "National Commission for Truth and Reconciliation": Jubeiry Yassin, op. cit., pp. 329-330.

Additionally, it has been noted from past country experiences that there are many challenges that prevent the full-scale implementation of prosecutions, such as lengthy litigations in some cases, as well as litigation costs and requirements in terms of evidence and witnesses. Despite the magnitude of the challenges that face the principle of accountability, prosecutions should not be removed from the agenda. Rather, they should be included in the strategy of rehabilitation and enhanced institutional reform in order to transition to what guarantees justice delivery.

### 3) Reparation

The concept of reparation extends to more than just material compensation to the victims. It also becomes an acknowledgment of the responsibility of the state towards human rights violations, and that the resulting damages must be compensated in accordance with the relevant requirements of international law. Additionally, it is part of the rehabilitation that takes into account the repercussions of what the victims have been exposed to, their professional and financial conditions, their property, and the repercussions of these incidents on their families.

Reparation comes at different levels and has different forms, such as: individual reparation for victims and their families, and it includes compensation, treatment, reintegration and health care; collective reparation which concerns groups and regions that may have endured special conditions in terms of policies of repression, extermination or general marginalization as a result of political positions or their support of a political party and not another; and finally, reparation based on gender, which aims to address the special situation of women victims of violations.[19]

### 4) Institutional Reform

Countries newly emerging from the cycle of conflict or repressive rule often need to reform institutions, laws and policies, in order to avoid a return to authoritarian rule and to prevent the recurrence of human rights violations in the future. However, the field of institutional reform is vast and complex, and it is constrained by the existing political climate, available resources, and the need to formulate a project with realistic objectives.

[19] United Nations, Security Council, Report of the Secretary-General on The rule of law and transitional justice in conflict and post-conflict societies, (New York: Report number S/2004/616, August 23, 2004), p. 6.
Also see: Office of the United Nations High Commissioner for Human Rights, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: Reparations programmes, United Nations Publications, New York and Geneva, 2006, p. 6.

In fact, efforts to achieve institutional reform must be carried out gradually and in proportion to the size of local capabilities and in accordance with the existing political conditions since this process may affect sensitive agencies of the state such as the judiciary, police and army.[20]

The process of institutional reform and the process of rebuilding the state are mechanisms of transitional justice, especially if these institutions bear a large part of the responsibility for the spread of corruption and violations in society. It has been noted that the majority of countries that seek to implement transitional justice suffer from the collapse of both civil and military state institutions.[21]

Institutional reform is fundamental for democratic transition, given that wars, civil wars and authoritarian regimes have devastating repercussions on state institutions and workers. In such settings, everyone is to follow a systematic policy of oppression and subjugation. This usually leads to the violation and abuse of the law, lack of oversight, fulfillment of personal agendas, bribery, etc.

This is why the transition stages necessitate institutional reform as one of the main entry points to ensure the non-recurrence of the violations that have taken place and to provide protective constitutional and legal guarantees in case that happens. This reform comprises several areas, most notably constitutional reform and law review. Reform also takes place by assuring the independence and advancement of the judiciary, subjecting security and law enforcement institutions to oversight, providing good governance conditions based on transparency and accountability, and training state employees working in the judiciary, security and law enforcement, army and media.

### 5) Reconciliation

Reconciliation does not mean burying the truth and turning the page without reading it. Rather, it is a goal that is achieved through all the elements and pillars of transitional justice, such as revealing the truth, having a public debate or discussion, reforming institutions, providing reparations, and so on. Reconciliation does not mean oblivion, for it is necessary to preserve the memory of what has happened so that people can learn from their mistakes and prevent the same actions from recurring. There are many ways - political, legal or other - to reach reconciliation. Creating mechanisms for dialogue,

[20] United Nations Record, General Assembly Official Records, Record number A/HRC/30/42, p. 11-23.

[21] Samar Muhammad Hussein Abu Al-Saud, "dewr almahkamah alkhasah lesyeraleyawn fey tehqeyq al'edalah alentiqaliyah", presented by: Ibrahim Nasr Al-Din, Elmaktb Elarabe Llmaref, Cairo, 1st Edition, 2015, pp. 33-34.

establishing a common ground between the parties, and laying the foundations for a common societal project that ought to be defended by society itself are all means of achieving reconciliation.[22]

Thus, one can conclude that applying said pillars requires several mechanisms. This will be discussed in detail in the second section of this requirement under the title "Mechanisms for Achieving the Goals of Transitional Justice."

## Section 2: Mechanisms for Achieving the Goals of Transitional Justice

Transitional justice is a relative concept that changes with time and place. Accordingly, the mechanisms that new regimes resort to in order to confront the legacy of the past change, especially since the experience in the field of transitional justice differs from one country to another.[23]

In its 2010 guidance note entitled "United Nations Approach to Transitional Justice" [24], the United Nations adopted a definition of the concept of transitional justice. For the United Nations, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. It also consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations.

Truth commissions, institutional reforms and compensation programs are among the most prominent transitional justice mechanisms that seek to examine the root causes of conflicts and relevant human rights violations. They enable transitional justice to achieve its goals of preventing future violations, building social peace and promoting national reconciliation.[25]

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[22] The real use of the term "national reconciliation" emerged towards the end of the last quarter of the 20th century in countries of South America as well as in some African countries such as Algeria and South Africa before it was used in the Middle East. National reconciliation is defined as a process, the aim of which is to shift towards democracy and attempt to build a state where principles of humanity are respected and human rights are not violated. Report on transitional justice and national reconciliation in Egypt, Ibn Khaldun Center for Development Studies, Cairo, 2013, pp. 7-8.

[23] Some experiences have relied mainly on mechanisms of accountability and retribution, and they are characterized by punitive justice, which was carried out in Rwanda, former Yugoslavia, East Timor and Iraq. Other experiences have relied on revealing the truth, forgiveness and reconciliation, as was the case in South Africa and the Kingdom of Morocco; they were intricately tied to restorative justice. Adel Majed, "m'eayeyr tetbeyq al'edalah lenteqaleyah fey l'ealem l'ereby", selselat esdarat l'edalah lenteqaleyah fey l'ealem l'ereby, Nass Printing Company, 2nd Edition, 2013, pp. 44-45.

[24] United Nations, Guidance Note Of The Secretary-General, "United Nations Approach to Transitional Justice", March 2010, p.4. (UN.DOC.12-38576)

[25] Maher Jamil Abu Khawat, "lejnat teqasey alheqa'eq wal'edalah lenteqaleyah", Dar Alnahda, Cairo, 2014, p. 122.

## Truth/Fact-finding Commissions[26]

The Office of the United Nations High Commissioner for Human Rights defined truth commissions as: "These commissions—officially sanctioned, temporary, non-judicial investigative bodies—are granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report."[27]

Truth commissions are considered among the most important mechanisms used to achieve the goals of transitional justice. That is because revealing the truth is essential and necessary to help collective awareness establish the truth about the violations that took place and to avoid their recurrence. The commissions work on documenting an important stage of society's history to circumvent its forgery or its rewriting in the future.[28]

National commissions of inquiry have been established at the local level in more than forty countries during the past decades. Before the outbreak of the Arab Spring revolutions at the end of 2010, the world had known more than forty such experiences, five of which were African and one Arab. Between 1974 and 2004, twenty-five truth commissions were established.[29]

There is a set of characteristics that truth commissions must have. A truth commission shall be an investigative body, be formally established by the state, enjoy some form of independence from the state, have specific authority under the relevant law and operate within a specific timeframe. It is a non-judicial body and shall focus on past events. The jurisdiction of these commissions shall also be limited to investigating serious violations of human rights or international humanitarian law. The law establishing said commissions determines the violations that their work will cover and the respective timeframe. These commissions ought to give priority to victims and their suffering and to conclude their work with a report and recommendations.

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[26] The term "fact-finding" is mentioned in the second paragraph of the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, UN General Assembly, 1991; it stipulates that: "For the purpose of the present Declaration, fact-finding means any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security."

[27] See: Office of the United Nations High Commissioner for Human Rights, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES *Truth commissions,* United Nations Publications, New York and Geneva, 2006, p. 1.
Also see: The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General, Document number: S/2004/616, para. 50, p. 17.

[28] Omar Abdel Hafeez Shanan, op. cit., p. 113.

[29] Ahmed Shawky Benyoub, "al'edalah alantiqalyah btownis- ausos nazaryah, tatbyqat 'emaliyah wtasaworat mostaqbaliyah", presented by: Amin Al-Ghali, Al-Kawakibi Democracy Transition Center, 2013-2014, p. 10.

The mechanism of truth commissions has been able to help support the process of democratic transition in various experiences by comprehensively addressing serious violations of human rights. This is done with the assurance that these commissions do not stop at trials, but rather expand their scope to reveal the truth of what happened and create a dynamic for dialogue and public debate with the participation of victims and various political, civil and union parties, in addition to workers in state institutions and others. Throughout this very process, mechanisms were developed as support and have gained great importance, most notably the public hearings in which testimonies about what happened are presented; countries such as Peru, South Africa and Morocco have experienced this.[30]

Some commissions were given special powers such as the "conditional" amnesty that the Truth and Reconciliation Commission of South Africa had the power to grant, or the capacity to determine and award compensation that the Equity and Reconciliation Commission of Morocco enjoyed.

It must be noted that the reports issued by truth commissions usually include recommendations for reform and non-recurrence, and thus serve as a road map on the agenda of all state institutions and political actors. The formation of these commissions requires necessary procedural conditions to ensure their credibility and efficiency. Therefore, what is required is looking closely into its components, resources, political independence and areas of expertise. These are issues and problems that allow country experiences to take away the most effective practices in line with the objectives of the commissions' establishment.

As a complementary step to the previous stages, institutional reform comes to ensure the success of the democratic transition process. It is not permissible to subject to accountability and to compensate the victims drawing upon the same institutions that had been linked to the violations or upon the

[30] As examples, we mention some of the investigation commissions in chronological order: The Commission of Inquiry into the Disappearances of People in Uganda (1974), the National Commission of Inquiry Into Disappearances in Bolivia (1982), the National Commission on the Disappearance of Persons in Argentina (1983), the Presidential Committee on Human Rights in the Philippines (1986), the International Commission of Investigation on Human Rights Violations in Rwanda (1990), the National Commission for Truth and Reconciliation in Chile (1990), the National Corporation for Reparations and Reconciliation in Chile (1991), the Commission on the Truth for El Salvador (1991), the Truth and Reconciliation Commission of South Africa (1995), the Truth and Reconciliation Commission for Sierra Leone (2000), the Peruvian Truth and Reconciliation Commission (2001), the Commission for Reception, Truth and Reconciliation in East Timor (2002), the National Reconciliation Commission in Ghana (2002), the Truth and Justice Commission in Paraguay (2003), the Truth and Reconciliation Commission for Serbia (2004) and the Equity and Reconciliation Commission of Morocco (2004). For more details see:
Priscilla B. Hayner, Truth Commissions: A Schematic Overview, International Review of the Red Cross (IRRC), Vol. 88, No. 862, June- 2006, pp. 295-310.
2nd ed., Unspeakable Truths Transitional Justice and the Challenge of Truth Commission, Priscilla B. Hayner- 2011, pp.239-240., Routledge, New York & London.

representatives of institutions who contributed to the violations or were involved in committing crimes. This requires fundamental changes to be made in these institutions, or at least carrying out purging campaigns against personnel whose involvement in committing crimes and violations under the previous regimes shall be proven.[31]

As for compensation, it is useful to note that it aims to bring justice to the victims. Thus, the term justice must be understood broadly by incorporating the elements of recognizing the victims and restoring their dignity, rebuilding trust between them, the citizens and state institutions, and establishing the value of social solidarity.[32]

Compensation for victims of human rights violations may take a material form, such as granting monthly salaries to the families of the victims, and it may be moral, such as an apology and psychological rehabilitation.

## TRANSITIONAL JUSTICE: BETWEEN REGULATION AND IMPLEMENTATION

As a matter of fact, there are many concepts that are similar to that of transitional justice, such as peacebuilding[33], peacekeeping[34] and national reconciliation[35].

[31] Omar Abdel Hafeez Shanan, op. cit., p. 119.

[32] Ibid., p. 118.

[33] The concept of peacebuilding is a set of activities or actions related to creating the necessary conditions for achieving sustainable peace in conflict societies and identifying and supporting structures that contribute to strengthening and consolidating social peace in order to avoid a return to a conflict situation: Ayman Shabana, "dawr l'omam lmetahedah fey bena' essalam fey afreyqya - derasat halat mewzembeyq wleybeyrya", Ph.D. Thesis, University of Cairo, Institute of African Research and Studies, 2009, p. 22.
This concept was developed in Lebanon with the UNDP Peace Building Project aimed to address the underlying causes of conflict in Lebanon and sought to create "safe spaces" for local identity groups to discuss their concerns openly and enhance mutual understanding of the different "other". Stakeholders were equipped to contribute to peace building, community dialogue and ensure an effective bottom-up impact of efforts. There are also initiatives to strengthen civil peace in Lebanon, focused on strengthening dialogue, trust- and consensus building, enhancing and nurturing partnerships between civil society and local government actors. Focus was also directed towards strengthening initiatives that promote collective memory and integrate peace building concepts into formal and non-formal educational channels. UNDP.
https://www.lb.undp.org/content/lebanon/en/home/projects/TheUNDPPeaceBuildingProject.html

[34] Today's multidimensional peacekeeping operations are called upon not only to maintain peace and security, but also to facilitate the political process, protect civilians, assist in the disarmament, demobilization and reintegration of former combatants; support the organization of elections, protect and promote human rights and assist in restoring the rule of law. UN Website. https://peacekeeping.un.org/en/what-is-peacekeeping

However, what brings these concepts and transitional justice together is the quest to establish democratic and constitutional institutions that aim at the non-return of tyranny and the violation of human rights.

Since human rights and freedoms revolve around the protection provided by transitional justice mechanisms, which we discussed earlier, it was necessary put forth a general obligation to protect these rights in both the national and international legal system, especially with regards to fundamental rights that may not be infringed, even in a state of war and emergency.

There is no doubt that the principles of amnesty and tolerance are important in any society that has suffered from the scourge of conflict, oppression and persecution. However, this does not negate the necessity to conduct fair trials in order to reinforce the principle of accountability and to be able to build a new phase on new foundations, so that the national judicial system or the mixed criminal courts are considered the official bodies implementing these foundations and principles.[36]

In order for the transition from the phase of authoritarianism to the phase of democracy to happen through the basic means and mechanisms of transitional justice, it must first be stipulated in the constitution and the laws regulating it in order for this very transition to enjoy legislative protection. This is what we will discuss in the first section under the title "Transitional Justice: Legislative Aspect", in which we shed light on the Tunisian and Syrian country experiences. Then, we move on to talk about criminal prosecutions, which are considered among the most difficult transitional justice procedures given the grave violations of human rights that took place under the previous regimes, and accordingly, we will address "Transitional Justice: Penal Aspect" in the second section.

## Section 1: Transitional Justice: The Legislative Aspect

The concept of transitional justice is presented whenever a change occurs within a society, and it aims to establish mechanisms that operate according to an integrative vision to foster the transition from dictatorship regimes, financial corruption and political tyranny to emerging democracy, with the purpose of confronting the legacy of past human rights violations and preventing their recurrence.

[35] National reconciliation is the result of conflicts and disputes between the state and its citizens, whereby ending the conflict is based on involving all political actors and pushing for the elimination of its motives. Omar Abdel Hafeez Shanan, op. cit., pp. 98-99.

[36] Ibid., p. 116.

Revolution is one of the most prominent factors influencing transitional justice and its means of achieving democracy. It is a political change whose scope is time-limited yet may extend into the future. Revolution aims to replace an existing regime whose ties to society have been severed with another one, since due to these weakened ties, the regime has lost the legitimacy to stay in power. The revolution may be limited to replacing one set of rulers with another, and some faces with others, without paying attention to the frame of reference they derived from and whose provisions they have applied. This replacement, in addition to abandoning corrupt symbols of governance, may lead deeper, to focusing on the mental roots and behavioral traditions that produced those symbols and generated this regime, which later became a reason for the revolution.[37]

As for the Tunisian experience, transitional justice came in the context of a spontaneous revolutionary movement that raised the slogan of overthrowing the regime and not the state. It also demanded accountability and trial, but did not call for revenge. Said movement rushed to elect a National Constituent Assembly to draft a new constitution, and in the midst of all this, the term transitional justice emerged as a popular demand and a central slogan.

The first chapter of the draft Truth and Dignity law presented to the National Constituent Assembly in Tunisia defined transitional justice as: "an integrated process of mechanisms and methods used to understand and deal with past human rights violations by revealing their truths, and holding those responsible accountable, providing reparations for the victims and restituting them in order to achieve national reconciliation, preserve and document the collective memory, guarantee the non-recurrence of such violations and transition from an authoritarian state to a democratic system which contributes to consolidating the system of human rights."[38]

It seems clear that this definition has summarized the general transitional justice process, which includes the basic pillars required to support those persecuted and oppressed under the previous regime: Calling for those responsible for human rights violations to be held accountable; revealing the truth through special truth commissions; providing material and/or moral reparations for those affected and restituting them; seeking to ensure the non-recurrence of abuse by reforming institutions and isolating the people who caused these violations; working on a reconciliation that is confirmed by the rebuilding

[37] Mustafa Filali, "althewrah altewneseyah walbena' ldymeqratey, althewrah walenteqal ldymeqratey fey lwatan l'ereby nahew khetat tereyq", Centre for Arab Unity Studies, Swedish Institute Alexandria, 1st Edition, 2012, p. 316.

[38] Organic Law No. 53 of 2013 on Establishing and Organizing Transitional Justice, December 24, 2013, Official Gazette No. 105 of December 31, 2013, p. 4335.

of social ties between the aggressors asking for forgiveness on the one hand, and the victims who are supposed to accept the apology on the other.

Indeed, a decree-law relating to amnesty[39] was issued in Tunisia, and it stipulated in its first article the erasure of crimes and violations committed by opponents as long as they were imprisoned or prosecuted for crimes as a result of their political or trade union activities, provided that the crimes were committed before January 14, 2011. The second article of the decree-law also indicated that "all those who will be subject to amnesty in accordance with this decree-law will be entitled to be reinstated in their jobs and to claim compensation." However, the decree-law did not specify the type of damage nor the mechanism for compensation for these damages.

As for reparation, it was referred to in Decree No. 40/2011[40]. It was decided that material compensation is to be in the form of monthly pensions, free transport, education and treatment, in addition to extra financial compensation that is for the benefit of the families of the martyrs and the injured.[41] Additionally, the National Pension and Social Providence Fund was designated to disburse pensions. For this purpose, the fund is annually assigned a grant from the state equal to the amount of the granted pensions, in accordance with Article 12 of the aforementioned decree.

On the other hand, moral compensation by the state will be by erecting a monument to commemorate the January 14, 2011 revolution that includes a list of the revolution's martyrs; by creating a museum for the revolution and its events to draw lessons and defend national memory; by asking local communities to assign the names of the martyrs to roads, streets and public squares; by working to commemorate the Tunisian revolution annually in an official capacity and with popular events in order to perpetuate the ideals related to it; and by including educational material about the revolution in school programs' history books.[42]

[39] Decree No. 1/2011 of February 19, 2011 relating to the general amnesty in Tunisia, Official Gazette No. 12, dated February 22, 2011, p. 179 ff.: Amnesty is granted to any person who, before January 14, 2011, has been convicted or prosecuted by the courts for attacking the internal security of the State, carrying out terrorist acts and money laundering, violating the provisions relating to non-recognized political parties, violating the provisions relating to defamation and insults against individuals, and violating the provisions relating to public meetings, processions, demonstrations and gatherings as well as union activities… (Article 1) This results in the amnestied being "entitled to be reinstated in their jobs and to claim compensation" (Article 2).

[40] Decree No. 40/2011 dated 19/05/2011 on the reparation for the damage caused by the unrest and popular movements that the country witnessed.

[41] Articles 8 through 10 of the aforementioned Decree No. 40/2011.

[42] Articles 1 through 5 of the aforementioned Decree No. 40/2011.

After the issuance of Framework Decree No. 220 of 2011 related to anti-corruption, the National Anti-Corruption Commission was established, which was enabled to detect areas of corruption in the public and private sectors and to receive and investigate complaints about cases of corruption as well as refer them to the concerned authorities. This commission can handle corruption cases, but it requires the implementation of the aforementioned decree. Property and funds of many businessmen have been confiscated, and criminal proceedings, whose activities are yet to be carried out, have been initiated against them. Precautionary measures, in the form of travel bans[43], have been taken against these businessmen. A truth commission was also formed to look into issues of bribery and corruption[44], which in turn refers such files to the judiciary. Additionally, a decree was immediately issued regarding the confiscation of funds, movable and real estate property, and the rights acquired after October 7, 1987, which belonged to the former President of the Tunisian Republic, Zine El Abidine Ben Haj Hamda Ben Haj Hassen Ben Ali and his wife Leïla Bent Mohamed Ben Rahuma El Trabelsi, to the other persons that appeared on the list attached to this decree and whoever may be proven to have acquired movable or real estate property or rights as a result of their relationship with the abovementioned persons.

The first parliamentary elections held under the new Tunisian constitution of 2014 resulted in the "Nidaa Tounes [Tunisia's Call]" party coming to power, ending the tripartite alliance led by the moderate Islamist Ennahda [Renaissance] party.

As for Syria[45], the ruling authority tried to carry out some superficial reforms, including lifting the state of emergency and ending the work of the State Security Court after popular demands for change and

[43] Abdel Sattar Ben Moussa, "mesar l'edalah lenteqaleyah fey tewnes, l'edalah lenteqaliyah fey lsyaqat l'erebiyah", Arab Organization for Human Rights, 1st Edition, 2014, p. 150.

[44] Decree No. 13/2011 dated 14/03/2011 on confiscation, Official Gazette No. 18, dated 18/03/2011.

[45] The conflict began with a popular revolution following a new violation by the ruling authority. It started with the arrest of a number of school students in Daraa because of graffiti on the wall. This was the spark for the outbreak of the revolution: the children were arrested by the security services and were, while under custody, subjected to human rights violations. All appeals for their release fell on deaf ears. The scope of the revolution expanded to include many Syrian regions, and the regime met it with repression through the security services and those associated with them, then through the army that entered the villages and cities to support the security services in their repression of those protesting. This stage was characterized by massive violations of human rights, including arrests, disappearances, killings under torture, shooting protesters and other violations that later turned the demonstrations into an armed conflict, which the regime tried to suppress by all means. Such means included besieging and starving cities and villages, bombing them with planes and all kinds of weapons, which led to hundreds of thousands of victims and millions of displaced people and refugees. It also led to the emergence of radical movements and to foreign intervention: Reports of the United Nations Human Rights Council Independent International Commission of Inquiry on the Syrian Arab Republic https://www.ohchr.org/AR/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx

after the need of Syrian citizens to regain freedom and rebuild their society arose. However, all this only occurred after the regime followed - during the period between the Baathist coup of March 8 and the popular revolution of March 15, 2011 - several methods to detain any possible democratic development in Syria. It also occurred after the ruling authority's success in establishing an authoritarian regime through focused policies that serve its interests and reinforce its separation from society. This was in addition to establishing authoritarian societal structures based on defining the roles and positions of classes and social forces and making them pass through its channels in order to allow it to have both negative and positive control over the political sphere, divide the society and hold its major keys and axes[46]. After popular demands for change and the need of the Syrian citizens to regain their freedom and rebuild their society, the ruling authority attempted to enact some theoretical reforms like lifting the state of emergency. Also, the Court of National Security was suspended. The regime compensated for all that through the enactment of the anti-terrorism law and the establishment of a special court for terrorism cases that would be an alternative tool for suppressing protesters and opponents. Likewise, a new constitution was approved; one of its most prominent contributions was repealing Article 8, which stated that the Baath Party is the leading party in the society and the state. Nevertheless, this new constitution preserved the absolute powers of the president and kept rights and freedoms at the mercy of laws that the president could tailor to his will. Moreover, during this period, many laws and decrees targeting the Syrian citizens' freedoms and money were issued. They were tools that fostered the recurrence of violations. Despite all this, Syrian President Bashar al-Assad secured a fourth term in the presidential elections after obtaining 95.1% of the votes.[47]

The Syrian reality today, after a war and armed conflict that began in 2011 and whose effects are still unfolding as we write this, is that 13 million Syrians have been displaced since the start of the conflict, with 6,300,000 having sought refuge in neighboring countries and about a million and more in Europe[48]. After the serious human rights violations committed by all fighting parties in Syria, transitional justice becomes only a means to rebuild Syria democratically.

[46] Michel Kilo, "alentefadah lsh'ebeyah wenata'ejha leslaheyah (halat sowriyah), lthewrah walenteqal ldymeqratey fey lwaten l'ereby, nahew khetat taryeq", Centre for Arab Unity Studies, Swedish Institute Alexandria, 1st Edition, Beirut, 2012, p. 501 ff.

[47] The Syrian presidential elections were held on 26/05/2021, and the result was announced on 28/05/2021.

[48] As the Syrian crisis enters its tenth year, the Syrian people continue to experience acute tragedy. Every second Syrian man, woman and child has been forcibly displaced since the start of the conflict in March 2011 – often, more than once. Today, Syrians are the largest refugee population in the world. United Nations High Commissioner for Refugees Website: https://www.unhcr.org/news/press/2020/3/5e67ade92d6/9-years-tragedy-resilience-solidarity-world-must-forget-displaced-syrians.html

Although the path and outcome of the political solution in Syria is not clear, the international resolutions on Syria, especially Security Council Resolution No. 2254 of 2015 spoke of a political transition to establish a credible and non-sectarian governance, and of elections to be held pursuant to a new constitution. As part of the constitutional process, the Constitutional Committee was established, and it held its first meeting on October 30, 2019.

Despite the absence of the term *transitional justice* from the Security Council resolution, and due to talk of a political transition to a credible government and the drafting of a new constitution, the reality necessarily translates to the emergence of a new constitution that will open the door to the transition from a totalitarian regime to a democratic one. To this end, the new constitution must include in its text the foundations that set up a regime which guarantees the non-recurrence of violations and establishes the rule of law and human rights.

Peace is not achieved by ending the war but by establishing justice, and since justice requires addressing the great legacy of violations in a way that guarantees a just and sustainable peace, the new constitution, in order to bring peace to the Syrians, must respond to their aspirations. The most prominent aspiration is addressing the causes of conflict and dismantling the totalitarian regime, thus paving the way for the beginning of a new era founded on the respect for human rights.[49]

Justice is not established in the legislative aspect only but must also be applied. This prompts us to study the criminal procedures taken against perpetrators during the transitional period from the authoritarian

[49] The problem remains that the inclusion of transitional justice in the constitution requires several factors that have not been available so far in the Syrian context. The Syrian regime continues with its violations and tyranny without admitting guilt and without a political will for real change. Part of the armed opposition has adopted the regime's tactics in committing violations. Therefore, there are fears of them agreeing on solutions that go beyond the issue of transitional justice.
The international community is also searching for a solution to the conflict in Syria in light of a Russian division and veto that impedes any progress made towards accountability. This explains the reserved tone of international resolutions when it comes to telling the truth regarding the causes behind the conflict.
Another problem is the design of the political solution. After Resolution 2254, the Special Envoy put forward the idea of the four baskets, and after the Sochi conference, the constitution became the entry point to the political process. Therefore, working on the constitution in light of the halt in the political process and the regime's intransigence poses a danger to the possibility of producing an appropriate constitution for Syrians.
Therefore, civil society, the true bearer of the will for change and the launch of the transitional justice process, and in particular human rights organizations, must exert pressure at all local and international levels to prevent the production of a constitution that does not recognize the Syrians' pain.
See "Transitional justice and the Constitution" (a research paper by Syrian lawyers in cooperation with the legal experts team). Accessed on: 25/05/2021.
https://freesyrianlawyers.com/index.php/ar/

to the just and democratic regime. Thus, we will address the topic of "Transitional Justice: Penal Aspect" in the second section of this study.

## Section 2: Transitional Justice: The Penal Aspect

Criminal justice is characterized by a degree of strictness and discipline regarding legal texts when it comes to dealing with perpetrators, regardless of the nature of their crimes and their positions. However, transitional justice, which is associated with transformation and the desire to enter a new political stage, is often characterized by dealing with the legacy of the past with a degree of flexibility, wishing to strengthen the paths to development and democracy[50]. Transitional justice is used to address past abuses through mechanisms and procedures that may be considered exceptional in most cases. Therefore, these mechanisms and procedures should only be employed during the transition phase without exception: once obligations are fulfilled, recourse to these tools is discontinued.[51]

In fact, based on the committed crimes and violations and the pain they have caused to the victims and their families, it is fair to track down, prosecute and punish those accused of committing those crimes so that these violations do not recur.

There may appear a contradiction between achieving criminal justice as previously explained and achieving national reconciliation between members of society themselves, between them and society's institutions, and between them and the state. This is due to the existence of some basic and recognized criminal law principles in modern criminal laws and international treaties that must, and must not, be respected, such as the principle *nullum crimen sine lege*, the principle of non-retroactivity, the principle of fair trial, the principle of the presumption of innocence, the principle of legality, the principle of certainty of conviction, the principle of extradition, the limitations and controls of amnesty, and other principles. These are specific and categorical principles whose concepts have strict definitions in criminal law. However, this contradiction is apparent but not necessarily real, given the possibility of adapting these principles to what is appropriate to the conditions and objectives of the transitional phase. In other words, these strict principles can mitigated, formulated and interpreted in proportion to

[50] Idris Lakrini, "al'edalah lanteqaleyah wa'atharha fey ltahawol aldymeqratey: moqarabeh lenamadej 'ealemiyah fey daw' lherak l'ereby", research published in the book "atewar ltareykh lenteqaley ma'al lthewrat l'erebiyah", 1st Edition, Arab Center for Research and Policy Studies, Beirut, November 2015, p. 513.

[51] Adel Majed, op. cit., p. 154.

the circumstances of said phase without sacrificing them or deviating from them in an absolute way, so that real criminal justice can be achieved on the one hand, and real national reconciliation on the other.[52]

Proceeding from the individual's right to legal recourse, Article 8 of the Universal Declaration of Human Rights[53] stipulates that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

With the development of the rules of customary international law, it has become possible to establish the criminal responsibility of individuals for grave violations of human rights, whether they are officials or not, in accordance with the principle of individual criminal responsibility established by Article 25 of the Statute of the International Criminal Court[54]. However, since Syria has not signed the Rome Statute of the International Criminal Court, the latter can only investigate war crimes committed in Syria if the case is referred to it by the United Nations Security Council.

Accordingly, the UN Security Council unanimously adopted 5 resolutions related to Syria:

- Resolutions 2042 and 2043 of April 2012, relating to the possibility of sending an advance team of 30 unarmed international observers, with the possibility of raising the number of observers to 250 by a new resolution.

- Resolution 2118 regarding Syrian chemical weapons, which was linked to the final communiqué of the Geneva I Conference on Syria.

- Resolution 2139 of February 22, 2014, to Ease Aid Delivery to Syrians, which was submitted by the Hashemite Kingdom of Jordan, Luxembourg and Australia after lengthy discussions. It was considered the strongest resolution adopted by the Security Council on the Syrian issue, expressing grave alarm at the significant and rapid deterioration of the humanitarian situation in Syria, in particular the dire situation of hundreds of thousands of civilians trapped in besieged areas, most of whom are besieged by the Syrian armed forces and some by opposition groups. The resolution also pointed out that the situation would continue to deteriorate in the absence

[52] Ali Al-Qahwaji, op. cit., p. 238.
[53] United Nations General Assembly Resolution 217 A(III) of 10 December 1948.
[54] Adel Majed, op. cit., pp. 146-147.

of a political solution and that the latter represents the only sustainable opportunity to resolve the situation in Syria peacefully.[55]

- Resolution 2170[56], the last resolution issued by the UN Security Council regarding Syria, which emphasized the need to separate civilians from the conflict and that a political solution is the only solution.

Building peace in Syria requires understanding the roots of tyranny and conflict, analyzing the causes that led to all the violations that occurred, identifying the institutions responsible, the violators, and the errors and shortcomings in the state authorities and institutions, as well as understanding the effects of tyranny and conflict on Syrians and other related social, cultural, economic and political effects. Consequently, a transitional justice program commensurate with the nature and gravity of violations must be designed; a program that, in addition to revealing the truth, establishing accountability and providing reparation, guarantees social justice and the rights of marginalized groups and strengthens the rule of law. This program must also attach great importance to reforming institutions, especially those that have a long history of human rights violations, through legislation and regulations, in addition to restructuring, and to vetting employees.

Any transgression of the concepts and mechanisms of transitional justice would rekindle violations and conflict. Therefore, the political process aimed at establishing peace requires taking into account the necessity of implementing transitional justice mechanisms, just as achieving peace requires the presence of a Syrian political will, a societal will, and a collective awareness.

Determining the criminal responsibility of the perpetrators of violations and abuses moves slowly, on a case-by-case basis handled by civil or military courts according to law. Military courts are specialized in hearing cases involving internal or external state security or the maintenance of order and in which agents of the Internal Security Forces on duty are a party.[57]

Article 8 of the Organic Law on Establishing and Organizing Transitional Justice in Tunisia focuses on prosecuting perpetrators of violations by Specialized judicial Chambers for deliberate killing, torture,

[55] Ibrahim Naser Eddine et al., "hal l'omah al'erbiyah 2014-2015, ale'esar: mn taghayyor alnizam ela tafkyk aldowal", Gamal Abdel Nasser Cultural Endowment, Centre for Arab Unity Studies, Beirut, 1st Edition, 2015, pp. 531-532.

[56] Resolution 2170 of August 15, 2014, prohibiting the recruitment and financing of terrorists. The resolution named the "Islamic State in Iraq and the Levant (ISIL, also known as ISIS) and Al-Nusra Front" when referring to terrorist groups.

[57] Art. 22, paragraph 1 of Law No. 70 dated August 6, 1982, fixing the general organic law of the internal security forces after it was revised by Decree No. 69 dated July 29, 2011.

enforced disappearance, and other crimes, whereas military courts have jurisdiction to hear cases related to police conduct. These cases were referred with the possibility of appeal being included in their rulings as a potential amendment. The Constituent Assembly worked to enact Organic Law No. 17 of 2014, which revised the aforementioned Transitional Justice organic law and granted jurisdiction in such cases to the Specialized Chambers. The same law instructed the Attorney General to refer such cases to the said Chambers to ensure follow-up and prevent some cases from being illegally closed. In addition to issues related to human rights violations as defined by law, these Chambers specialize in cases related to violations committed during the revolution.[58]

## CONCLUSION

The importance of this research stems from the creative role that transitional justice can play in countries that have emerged from conflicts and wars. It also stems from the urgent need to take all transitional justice steps so that countries can be built on sound foundations to ensure a better future under a democratic rule far from human rights violations. Experience has shown that the success of mechanisms related to transitional justice requires the availability of a specific and clear strategy to enable transitional justice to achieve its goals, as well as the development or amendment of existing legislation in a manner befitting the expected role of the institutions concerned with these procedures.

Transitional justice is thus a way to advance on the path of democracy, especially if we identify the mistakes that were committed and then work to overcome them and prevent the recurrence of tragedies and violations.

However, new laws proposed in the transitional justice phase can pose obstacles not only with regard to the path adopted by transitional justice, but also with regard to the possibility of achieving human rights goals and the extent to which these rights can be protected from violations and abuses.

The anti-terrorism law[59] passed by the Assembly of the People's Representatives in Tunisia in 2015 raises concerns seeing as it adopted a broad interpretation of terrorism[60]. This opens the door to the

[58] Jubeiry Yassin, "al'edalah alentiqalyah fy mythaq almsalha alwataniyah aljza'ery", a comparative study, Dar Elgamaa Elgadida, Alexandria, 2019, pp. 355-356.

[59] Organic Law No. 26 dated 07/08/2015 concerning the fight against terrorism and the prevention of money laundering, Official Gazette No. 63 dated 07/08/2015, p. 2163 ff.

exploitation of this definition, to misinterpret and abuse it, and thus to misapply it, in addition to other disadvantages found in this law. They vary from placing restrictions on freedom, to allowing detention for a period of up to two weeks before trial without respecting the right of the suspect to assign a defense attorney or even the right to have access to his family, and to allowing trials to be conducted in secret. The most dangerous point in this law is the provision of the death penalty[61], which has become a refused form of punishment in the contemporary international community.

As for the recorded results of transitional justice, we can draw the following conclusions:

1- Transitional justice is based on overcoming the tragedies of the past and moving towards building a future based on a democratic regime, and this can only be implemented by restoring the rights of the victims of violations, especially since these rights are imprescriptible.

2- Investigation commissions must present themselves as an independent body that is not affiliated with the ruling authority, so that they can document violations in a way that leads to revealing the truth.

3- Reconciliation, which is a cornerstone of transitional justice, does not mean closing and forgetting about certain files on the pretext of restoring the social bond, but rather opening them, revealing the truth, recognizing violations, and seeking to declare and restore rights, as well as compensating the victims.

4- Acknowledging responsibility for past crimes would enhance the citizen's confidence in the ruling authority. This would positively reflect on the democratic path to be taken towards transitional justice.

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[60] Terrorism was defined under the aforementioned Law 26/2015 in Article 5 - Section 1 of Part 1: General Provisions as follows: "Is considered to have committed the terrorist crimes stipulated in this law anyone who incites others, by any means, to commit these crimes. He shall be punished with half the sanctions prescribed for these crimes. All this is considered when this person's act, by its nature or context, creates a risk of these crimes taking place… Is considered to have committed the terrorist crimes stipulated in this law anyone who intends to commit them, if his determination is accompanied by any preparatory act for later implementation."
Article 13 - Section 2 also stipulates that: "Is considered to have committed terrorist crimes anyone who intentionally, by any means, while seeking to implement an individual or collective project, commits one of the acts specified in Articles 14 to 36 with the act's aim being, by nature or context, to spread terror among the population or to compel a state or an international organization to act differently or abandon one of their tasks."

[61] Anyone who commits the act referred to in the first image, or commit the actions referred to in the rest of the images and cause the death of a person, shall be punished with the death penalty and a fine of two hundred thousand dinars: Article 14 - Section 2, related to terrorist crimes and their related penalties.

Based on these results, we will present some recommendations to avoid the mistakes that afflicted the experiences of some Arab countries and prevented transitional justice from achieving its goals:

1- Work to separate the trials from political rivalries and to depoliticize them.

2- Develop strategic plans to prosecute the perpetrators in order to ensure the country's ability to transition to a just democratic regime.

3- Work to raise citizens' awareness through educational programs about their rights and duties during the transitional period, while involving the civil society in the formulation of these programs.

4- Train lawyers in the skills necessary to understand the technical approach to the committed crimes and violations, especially as the techniques of investigation and prosecution of crimes directed at the whole community differ from those related to ordinary crimes.

5- Seek to protect witnesses before and after giving their testimony.

6- On the one hand, take away lessons from the experiences of countries that were able to transition to democracy and succeeded in restoring peace and guaranteeing security to their people who suffered from attacks and violations, thus considering them as experiences worthy of research and study. On the other hand, draw lessons from the experiences of Arab countries that failed to move from the authoritarian regime to a democratic one.