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The 2014 Egyptian constitution: balancing leadership with civil rights (al-madaniyya)*

*by Maria Gloria Polimeno***

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Abstract

In 2013, in the aftermath of the military coup d'état, many 'Islamized' articles have been banned from the 2012 Egyptian constitution and almost one hundred firmly inclined towards the respect of human rights and the absolutim on freedom of belief have been added. This latter issue did cause pragmatisms on the freedom of worship and on the nature of the new leadership, which remains intrinsically unstated in the 2014 text. Essential questions concerning the conceptualization of citizenship and its extension (al-wataniyya,) as well as the pluralism of the concept of 'madaniyya' (as right to the city) still remain unanswered. Based on the critical discourse analysis and in person observations dating back to 2012, this article will attempt to address and understand to what extent by changing the meaning of wataniyya the future of Egypt can change accordingly.

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I. Introduction

The relationship between the state and society in Egypt has long been a controversial issue. The prevailing literature tends either to overestimate the strength of the Egyptian authorities or underestimate that of society, in a country which leaders have often been compared to the *Leviathan*.[1] The moment when the Arab uprisings broke out in the streets and squares, they attempted to overthrow this philosophical mythization, offering a social vision closer to the Lockian answer, in other words, the limitation of authorities in exercising the absolutism of their powers.[2] Two years later, in 2013, the counter revolution has sabotaged the socio-political expectations coming from the Egyptian middle and lower-class people, and for this reason, the 2014 constitutional provisions can be translated as a sort of paradigm shift, while reevaluating the Egyptian definition of government and the future of the urban relationships between the ruler and citizens.[3] The failure of the Islamist parties in running the country has often been blamed on their inability to be distanziated from irksome intepretations of the doctrinal sources. That has impacted on and hampered the possibility of putting in place more flexible policies.[4]

As a fundamental document regulating the aspects of governance published in 2014 attested, the Egyptian constitution raises many questions concerning the future of law, politics and the relationship of the ruler to the country and its social fabric. With regards to the content, in the body of the 2014 text, there are aspects engendering substantive weaknesses which structurally do not really differ from the 1971 or the formerly 'Islamized' 2012 amended texts. The 2014 document, as occurred with the 2012 text, approved under *al-Horria wa al-'Adala*, contains articles which could in the near future contribute to altering the shape of authoritarism, as the SCAF seeked to impose in the process of writing it. President Abdel Fattah al-Sisi has injected new zeal and energy into the military establishment, imposing his rule using unprecedented amounts of force, including mass arrests and death sentences, criminalising freedom of dissent, protest and speech. Nevertheless, Al-Sisi has gained considerable popularity leading Egypt's revolutionaries, including the 6 April Youth Movement, in order to seek new routes and tactics in light of the political failure in the 2012 elections.

In 2011, Egypt attempted to establish a moment of socio-political reformulation, which eventually came to a collapse one year later**.** The failure of the 2011-2012 turmoil in achieving social dignity and good governance, as part of civil expectations, could be considered as symptomatic for both the society's political weakness and the economic degradation which, since Morsi's ouster, has kept citizens from trusting the political counterpart, namely: the unstructured workers' movement. Social forces, with strong reference to those active in the settlement of *Mahalla El-Kubra* in the Gharbiyya governorate (next to *Shubra* and *Helwan* in Greater Cairo), in spite of having represented the driving force in the 2011 uprising, revealed an inability to foster a form of structured organization to officially enter the political realm in

[1] THOMAS HOBBES, Leviathan, London 2010.

[2] JOHN LOCKE, The second treatise on civil government, New York 1986, at 186.

[3] MICHAEL FOUCAULT, The Subject and Power, in: The Essential Foucault: selections from essential works of Foucault, 1954-1984, ed. Paul Rabinow & Nikolas S. Rose, New York 2003, 126-144.

[4] GILBERT ACHCAR, The Arab world: Absence of democracy, Le monde diplomatique, June 1997, available at <http://mondediplo.com/1997/06/arabdem>, last accessed 14 January 2015.

2012. This inability reinforced the heterogenity of the Islamist parties, which benefitted from the scarcity of political consciousness in civil and revolutionary actors to further pursue their campaign of mobilization. In addition, history confirms the Islamist existence as inscribed into the destiny of the enduring military state. Compromises between the Muslim Brotherhood and the military can be dated back to the 1990s and traced to the banking system. For example, Faisal bank and the Central Bank of Egypt have so far been involved as representatives of these financial dealings, and to a limited extent, could be accused of corruption, as these dealings are geared towards gaining more space within the economic and political arena. Now, the collapse of workers' movements in the 2012 elections could be explained through the 'myopic polarization' of the system that, historically, since the mid 1990s-2000s, has been impacting directly on the resurgence of the Islamists, as the only existing and structured political counterpart in the history of the country. In saying this, I agree with CIHAN TUĞAL, when he claims that in all predominantly Muslim countries, the states (along with the global hegemon, the United States) have participated in the constitution of Islamist social actors as 'those fighting for the sake of the poor' in the 20sand 30s. However, they turned into radical political players regionally at the end of the 1980s and the beginning of the 1990s when authoritarisms, or the military coup, shifted into a civil war, for instance with the case of Algeria, which foreclosed routes for a legal and pluralist representative government and inclusion in decision making.[5]

The main challenge for Al-Sisi today remains the maximization of the economic and financial efficiency as Egypt is running low on foreign currency. This implies that he is expected to intervene not only structurally in the state's apparatus; but also applicatively, despite that fact that economic and social pragmatisms govern the intra-society politics. The latter issue still today constitutes the main challenge of attempting to establish a procedural and pluralist form of *madaniyya*, here conceived as an extension of the right to the city.

Egypt has so far been called to introduce socio-economic reforms that have to perfectly match with people's demands; otherwise according to the thesis supported also by EL-MAHDI, the risk of fuelling another mass protest in the long-term is likely to increase.[6] The change is expected to take place from the reintroduction of 'the politically excluded' into the state discourse. If the latter scenario is revealed, it would counter the statement by SADOWSKY concerning the weakness of Arab societies to counter *vis a vis* the strongness of the state.[7] As a consequence, that would also require a re-analysis of Egyptian society illustrated by its historical inability to rebel against a post-modern totalitarian system, or *nizam al-kamil*. Arguably, a plaetoria of constitutional principles, such as the right of citizens to be considered active forces within society, remain core concerns. This is with regards to the effectiveness of state efforts in favour

[5] CIHAN TUĞAL, Transforming everyday life: Islamism and social movement theory, Theor Soc, No. 38 (2009), 423-458, available at <http://sociology.berkeley.edu/sites/default/files/faculty/tugal/Transforming%20everyday%20life,%20Islamism%20and%20social%20movement%20theory.pdf>, last accessed 30 January 2015, at 425.

[6] RABAB EL-MAHDI, Egypt, The moment of change, ed. Rabab El-Mahdi & Philip Marfleet, London 2009, at 36.

[7] YAHYA SADOWSKY, The new Orientalism and the Democracy Debate, Middle East Report No. 183 (1993), 14-21+40, at 15-17. In details, SADOWSKY is discussing what qualifies a civil society. She states that groups are common enough in all human societies, but those with a level of internal organization and assertiveness that enables them to challenge state power are rare. She also claims that for decades Western Scholars stated that for many years such groups were missing in the Orient (p. 15). The incompatibily between Islam as theocratic *nizam al-kamil* is also discussed in p. 17.

of *al-mujtama al-madaniyya* (civil society) promoted through social, political and religious pluralist inclusion (*taadddudiyya*), in order to safeguard the principle of *muwatana* (citizenship); a civil right accused of having been 'salafized' under the *al-Horria wa al-'Adala* party in 2012.

II. Comparing Civil Rights with Citizenship

Many concerns have also emerged in relation to the referendum, which was approved on the 14th and 15th of January 2014, with 98.1 % of votes in favour. The unexpected result officially legitimated Field Marshal Al-Sisi as candidate for the presidential elections that took place on the 26th and 28th May in 2014.[8] Doubtless, in the contexts of political transition and contemporary affairs, using the past to manage the present creates a long conflicted perspective in discussing events. Long-term predictions are unpredictable, but there is an interesting perspective about the debate of role of the military in 2013 and 2014, which should be reapproached as an examination of the power of the army's propaganda. Arguably, this 'propaganda' was sold to the masses, which eventually bought about the events of the 3rd of July 2013; effectively the time the coup took place. The success of the army, as seen in 2013, was due to the Islamist governments' civic astaticism, alongside the inability to fix the financial stagnancy and reduce the public debt generated by the economic liberalism. It was in 2012 that the electricity and gas crises, in terms of prices, increased in line with inflation. The persistent daily intermittency and black out in the usage legitimated the creation of a scapegoat by the revolutionaries and moderate forces, represented in 2012 by Abdel Fotuh, which focused on the risk of instability, derived from the possible election of the Islamists. However, this narrative was deconstructed by the army, which indirectly supported the game of compromise with *al-Ikhwan al-muslimin* (the Muslim Brotherhood). During the same year, in the 2012 turmoil, heavy clashes in *Madina Nasr* and *Abbassiyya* occurred in concomitance of the political transition. Harrassment in Tahrir, as well as black outs, occurred on a daily basis and exponentially increased, and was interpreted metaphorically by some Cairenes as symptomatic of a consistent sense of ostracization, reflecting the significantly increased support for the Islamists, especially the Salafis Hazem Saleh Abu Ismail. This dominant, highly pragmatic, schizophrenic relationship governing the triad of society, media and politics, reflected the consistent socio-political uncertainity within Cairo's social fabric, which was at that time split into a plaetoria of factions. However, the pragmatic scenario did not foreclose the roads for the weakened Muslim Brotherhood, which won the presidential elections through the support gained from the Salafis. It is not inappropriate to be reminded of the shape of governance in Egypt as an enduring orchestration, driven by the strong cyclic rhetorics of Islamization, Sharizatization, secularization, securitization and the search for a form of stability that in August 2014, after the military coup, brought the release of former NDP members. Thus, the election of Al-Sisi could be discussed from a social-strategic perspective. In detail, the lack of fundamental services in the country, part of the discourse on public and civil rights's crisis, alongside which *al-wataniyya* and *muwatana* discussed and which still today, are highly expected to be implemented on a spatial urban level. This aspect has been considered mandatory of the representation of the army's propaganda as guarantors of domestic 'stability'.

[8] The thesis on the boycotting remains the most accredited line of reasoning to the ballot box's results in January 2014.

From a historical comparative discourse analysis, after the action carried out by the Free Officers in 1952, Gamal Abdel Nasser imposed himself and the role of the army as a sovereign entity that would have provided suburban areas with access to basic needs. However, the inability to match such expectations in 1954 contributed to a shift in the role of the army to a military dictatorship. The neoliberalist policies that were rolled out further exacerbated the economic and social inequalities. This perspective of re-considering Egyptian politics should not be contaminated with the historical discourse on the 'military republic', as a vehicle for the political flagship of the country, inscribed into patron-clients relationships as a legitimate force for the strengthening of authoritarisms. If, on the one hand, this issue requires an in-depth analysis concerning the dynamics of legitimating the construction of a national hero during national or transnational political crises; on the other hand, it requires also looking at the relationship between Islamism and the deep state, or what is defined as 'patronage politics'.

The political agendas implemented by Sadat and Mubarak, both based on the apparent criminalization of suburban areas and the paradoxical promotion of state promoted Islam through Saudi television channels, contributed to the revival of fundamentalist-jihadist actions in their political return to the 'complex of martyrdom'. The historical perspective to reconsider Qutbian's theories after the 2013 *coup d'etat* discloses that the revolutionarism affecting Islamist fundamentalist movements is today unilaterally driven by political goals, expressed through constructivist dialectic. This constructivist approach which proclaims self-legitimacy today also engulfs a great majority of terrorist groups.

In contrast to the definition of Islamic-militant fundamentalism, which could be defined as a force acting against *reactive repressions*, the shared definition of terrorism should be first and foremost read through the lens of an organized and well-structured network of political contestation.[9] In addition, it aims to demonstrate through violence that secular inclined regimes cannot protect people nominally under their authority.[10] It is interesting to note that terrorist groups do not have the preponderance of military force necessary for a direct overthrow of the government, as in the Bolshevik revolution.[11]

The flaring up of 'Islamist' violence in Egypt in the wake of the 2013 coup and the fragmentation of the Islamist actors, as well as the formation of small sized jihadi groups (mainly based in the Sinai),which recently pledged allegiance to Da'aesh, today provides a key-reading on the essentiality of de-centering from social movements theory and reconsidering the importance of 'reflexive subjectivism', by which is meant the importance given to the power of people rather than to old structured political parties or movements. As for Egypt, the reflexivity of the youth's subjectivism impacted on the fate of the old structured Islamist parties and split the new generation of Islamists from old leaderships connected to old political *elites* in their actions as co-opted state agents. In order to have a deeper understanding of the juridical dynamics of *al-qiada* (leadership) and *muwatana* (here conceived as extension to the

[9] The discussion is addressed to the new Sinai based *jihadi* movement *Ansar Bait Al-Maqdis*, today turned into *Wilayat Sinai*, and *Ajnad Masr*, a small sized new formed terrorist group, not officially affiliated to *Al-Qaeda* but which is benefitting from the context of instability.

[10] THOMAS P. THORNTON, Terror as a Weapon of Political Agitation, in: Internal War, Problems and Approaches, ed. Harry Eckstein, New York 1964, at 71-99.

[11] Cf. DIANA E.H. RUSSELL, Rebellion, Revolution and Armed Force, A Comparative Study of fifteen Countries with Special Emphasis on Cuba and South Africa, New York 1974.

right to the city), it is worth taking a look into the Civil Law Code of the country and the problematization of the role addressed to *Shari'a*[12].

Similarly to the 2012 constitution, *Shari'a* in the 2014 text keeps its validity as a source of consultation. What differs between the two constitutions is not so much the approval or rejection of the *Shari'a* from a legitimation into the state's discourse and as symptom of an attitude to secularize the country; rather what does differ is the suppression of article 219 from the constitution, which modifies its conceptualization and limits of implementation in today's Egypt. The suppression of the article opens interesting debates, albeit from different perspectives, where the fulcrum of the analysis is embedded in the way *aqida*, *ibadaat* and what is defined as the 'civic reason', could be processed under what is apparently defined as the 'post-modernist' Islamic-Islamist framework, in which Islam has been constitutionalized. It is important to note that the Egyptian intra-state framework in the aftermath of the 2013 coup, did push more directly for the demands of the *Al-dawla al-madaniyya* (or civil society), which for really the first time appeared, in the 2014 approved constitution. However, after pressure from the 'ideologically independent' *Al-Azhar* institution and *Al-Nour*, the latter an offshoot of the Salafis *al-Dawla al-Salafiyya* party, the word *madaniyya* was no longer included in the article at the moment of approval, prior to the 2013 referendum.

It does follow that the 2014 constitution remains not of the civil state but of the civil government. This aspect can impose many limits from a domestic and international perspective, as it implies a strict direction of constitutionalism to the ruler and members of government, rather than to the character of the state.

Pressure exerted by the Copts in December 2013, which addressed the fragmented liberal and secular front, can be considered a further positive element before the introduction of the concept and principle of *muwatana* (citizenship) as prerogative for Muslims and religious minorities existing in the country.

The constitutional text was initially aimed at representing first of all, the main source of affiliation to the state and in terms of religious non-discrimination; a guarantee of complete freedom of belief; restoration of the ban on religion-based activity and political parties.[13]

[12] The term *muwatana* literally refers to citizenship. However, it is here used in Lefevbrian terms as 'right to the city'.

[13] URIS DAVIS, Jinsiyya versus Muwatana: the Question of Citizenship and the State in the Middle East, Arab Studies Quarterly, Vol. 17, Winter/Spring 1995, 19-26. In the Arab world there are three words to conceptualize the principle of citizenship: *Ra'wyyia* (archaic), *Jinsyyia* and *Muwatana* (nationality/citizenship). In the case of *Jinsyyia* it means the principle of nationality on the basis of a certificate, by differing from the implications given to the meaning of *Muwatana*. Article 1 of the 2014 draft constitution states: "The Arab Republic of Egypt is a sovereign state, united and indivisible; no (part of it) is dispensable, and its system is (a) democratic republic based on citizenship and the rule of law. (The Egyptian people) is part of the Arab nation and (works for) its integrity and unity (Egypt) is part of the Muslim world, belongs to the African continent, is proud of its Asian dimension, and contributes to building human civilization" (available at <http://www.memri.org/report/en/print7737.htm>, last accessed 6 February 2015). In 2007, the Mubarak regime added several amendments to the 1971 constitution, including an amendment to article 1 stating that the Egyptian regime was based on the principle of citizenship, a principle which stipulates that an individual's belonging to the state is based on citizenship (jinsyyia) – i.e. not religion – and that discrimination due to religion, faith, ethnicity, gender etc. is forbidden. While the 2012 constitution moved this citizenship clause to article 6, in the new constitution text it has been restored to its original place in article 1 to indicate its great importance. The new constitution replaces the 2012 constitution's definition of

Nevertheless, there exists a second narrative framing *Shari'a,* not as by-product of fossilization and astaticism to an interpretative religious archaism, rather, as a possible postmodernist approach embedding potentialities with regards to the possibility of enabling a form of integrating support to create a 'secular state' – a state system theoretically compatible with *Shari'a*. The conceptualization of the term 'secularization' does not embrace the religious, but rather, the social sphere.[14] However, challenges to the role played by *Shari'a* remain pragmatic given the strong and radical politicization of its use. The new 2014 constitution, if compared to the previous 2012 and 1971 amended texts, embeds the law system into the rhetoric over anti-Islamizing campaign and counter-terrorism strategies. It includes 40 new articles concerning the so-called 'identity clauses' regarding the status of religion. However, out of 247 articles, 100 taken from the 2012 text have been amended.[15]

It seems that the more the text assumes a civil and rationalist tone (more 'enlightened and tolerant', firmly anchored to human rights and gender equality), the more its effect could risk being turned into a boomerang, giving even more privileges to the military. Not surprisingly, the 2014 constitution allows the authority to prosecute civilians in military tribunals, and as a consequence, it is feared there may be a return to a 'less rigid militarization of the state'.

Concerning the role of the ruler, he is expected to act mainly from a 'right to the city' basis. This principle, in spite of its cruciality and fundamental importance, has remained pragmatic since the 1960s, following the Free Officers' action.

III. Questioning the Relationships between Shari'a and Liberal Rights

From a comparative critical discourse analysis, when reviewing the 2012 and 2014 constitution texts in terms of representative forces, the first juridical structural change which comes to light is the removal of *Majlis al-Shura Masri*. With regards to this, article 6 of the 2012 text stated as follows:

> *"The political system is based on the principles of democracy and shura (council), citizenship (under which all citizens are equal in rights and duties), multi-party pluralism, peaceful transfer of power, separation of powers and the balance between them, the rule of law, and respect for human rights and freedom; all as elaborated in the Constitution"*.[16]

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the Egyptian people as part of 'the Islamic nation (*umma*)' with a definition of Egypt as part of the Muslim world – thus removing the pan-Islamic approach from the constitution.

[14] See D. PARVAZ, Can Secularism survive in Egypt?, Al-Jazeera, 9 August 2013, available at <http://www.aljazeera.com/indepth/features/2013/08/201389204726720412.html>, last accessed 15 January 2015. In this case the statement by Adly Al-Mansour concerning the secularization of Egypt could be read in this sense or the secularization of the state by not rejecting.

[15] See 2014 constitution, Appendix, 17 onwards.

[16] Article 6 of the 2012 constitution, available at <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>, last accessed 6 February 2015.

Doctrinally conceived as anchored to the establishing of the Islamic state, the 'Upper Houses of the Egyptian Parliament' imply that the understanding of *Shari'a* should have been translated and adapted to contemporary life by avoiding the principle of *darura* (or the doctrine of necessity).[17] The *al-Horria wa al-'Adala* party, by contrast, kept the doctrinal principles of the Islamic jurisprudence stuck in irksome interpretations of the code, by depicting Islamism as strictly anchored to an out of date process, to which *Al-Nour* has deeply struggled to see article 219 from the 2012 constitution implemented in the 2013 draft .[18] A different reading and approach to the processing of *Majlis al-Shura*, defended in a different historical contextualization of the Egyptian alliances and leaders, would have probably brought a different conceptualization of the role addressed by the Houses of Parliament, as a possible integrating part of the institutionalized and constitutional asset of the country. The narrative is very controversial and based on structural and legal axioms.

Concerns persist while analyzing the 2014 enacted constitution as the outputs seem anchored to the 1971 amended text. In more detail, in the 2013 draft, approved in January 2014, article 5 was excluded; *Majlis al-Shura*. The choice fuelled criticisms with regards to the way of conceiving the meaning of 'democracy' as a pluralistic approach to citizenship, constitutionalism and inclusivism in the Arab region as a whole.[19] From a comparative discourse analysis, what is defined in Arabic as *Majlis al-Shura*, could be considered as a representative body compared to the parliament in 'democratic' western countries. Thus, it implicates that doctrinally, a procedural form of direct democracy was structurally inscribed into the Islamist democratically elected government.

The military's manoeuvre, while aiming to suppress any forms of civic association ''*ala- al-asas dinia*' (on religious principles), did not deter the Salafis circuit (Al-Nour) from interfering, with domestic politics exposing itself.[20] Since 1998, the Egyptian government had frozen out almost

[17] MUHAMMAD ASAD, Principles of State and Government in Islam, Berkeley/Los Angeles 1961, at 36. For a better understanding of the Caliphate see NOMAN HANIF, Hizb ut-Tahrir and its influence on the revival of a Caliphate in the Islamic world. Paper presented at the annual meeting of the ISA's 49th Annual Convention, Bridging Multiple Divides, San Francisco 2008.

[18] *Achcar*, supra Fn. 4.

[19] *Davis*, supra Fn. 13.

[20] From a comparative discourse analysis it is important to shed light on the same article as reported in the two different constitution drafts: the 1971 and the 2014. Article 5 in the 1971 constitution states: "The political system of the Arab Republic of Egypt is a multiparty one, within the framework of the basic elements and principles of the Egyptian society as stipulated in the Constitution." Please, note that the constitution text here considered refers to the text after the amendments ratified on May 22, 1980 Referendum. Full text available at <http://aceproject.org/ero-en/regions/mideast/EG /Egyptian%20Constitution%20-%20english.pdf>, last accessed 30 January 2015.
Article 5 in the 2014 constitution by contrast, reminds of the limits to the partisan and political multiplicity in Article 74 (Freedom to form political parties), where it is stated that all "citizens shall have the right to form political parties by notification as regulated by Law. No political activity may be practiced and no political parties may be formed on the basis of religion or discrimination based on sex, or origin, or on sectarian basis or geographic location. No activity that is hostile to democratic principles, secretive, or of military or quasi-military nature may be practiced." In article 5 the legitimacy of the partisan and political multiplicity and the respect for human rights and freedom is safeguarded. The article is in direct collision with article 4 (Sovereignty) in which is explained that it does belong to people alone, who safeguards their national unity (strong anchor to Nationalism) which is based on the principle of 'equality' justice and equal opportunity between citizens (the limitations imposed in article 4 are dichotomist to article 5 where the processing of 'freedom' and 'equal rights' remain very questionable).

sixteen legalised opposition parties.[21] Transferring citizens from an autocratic regime to a democratic order implies the firm respect of pluralism, as a pillar before the establishing of *al-mujtama al-madaniyya*, as a social goal advocated by the EU Foreign Policy's fanfare in the Mediterranean area.

Due to the highly subjective and pragmatic interpretations of the principles of Shari'a, the removal of *al-Majlis al-Shura* from the 2014 constitution was seen as a 'successful' de-Islamizing attempt, however, as stated here, article 4 and 5 in the 2014 text remain very questionable and dichotomist in terms of liberalism and democratization. These conceptualizations are thought to be impossible to be put into practice, as is claimed here, because of the form of doctrinal compatibility between Islam as a state religion and Islamism as expression of religion in social-politics.[22]

In introducing the concept of pluralism, it is worth shifting the axis of this analysis towards a further change which occurred in 2014: the acclamation for the absolutism given to the freedom of belief. A few words deserve to be spent on this issue. During the deliberations over the new constitution, representatives of the Coptic church and civil forces pressed for replacing 'Christians and Jews' with 'non-Muslims', so that it would have encompassed other religious minorities such as *Baha'i*, *Buddhists*, *Qadianis* (*Ahmadis*) and *Quranists*. However, the demand was rejected, following the objections by *Al-Azhar* and *Hizb al-Nour* (Al-Nour party). Article 235 in the 2014 constitution indeed states that, in its first session after the approval of the constitution, the parliament was expected to pass a law to organize the construction and renovation of churches, guaranteeing Christians the freedom to practice their religious rituals.

Before the ratifying of the 2012-2014 text, as reported by PURCELL next to BROWNLEE, freedom of belief and religious-sectarian clashes between Copts and Muslims have always been symptomatic of a political failure addressed by the former regimes, rather than a matter which needed to be constitutionally regulated.[23]

In 2007, under Papa Shneouda Copt, women were kidnapped and then forced to convert to Islam in order to be given as wives to Muslims. The demagogy of conversions aimed to construct a politically driven narrative around the Muslim Brotherhood, by eventually marginalizing 'political Islam' from any weak intromission into the political apparatus of the state. The demagogical approach, subsequently, legitimated the EU to further prioritize security and counter-terrorism as strategies in the Middle East region, even though scholars claim that there is still a lack of a clear definition of terrorism in the field of social science.

Absolutism, before freedom of belief, as stated in article 64 of the 2014 constitutional text, has to be carefully acclaimed.[24] Many concerns remain about the establishing of an interfaith state

[21] JOSHUA A. STACHER, Parties over: The Demise of Egypt's Opposition Parties, British Journal of Middle Eastern Studies, Vol. 31 (November 2004) Nr. 2, 215-233, at 217.
[22] See Appendix.
[23] MARK PURCELL, A Place for the Copts: imagined territory and spatial conflict in Egypt, Ecumene 5 (1998), pp. 432-451, at 435. For a comparative approach see JASON BROWNLEE, Violence against Copts in Egypt, Carnegie Endowment for International Peace, November 2013, available at <http://carnegieendowment.org/files/violence_against_copts3.pdf>, last accessed 21 January 2015.
[24] See Appendix.

in the future of Egypt. With regards to freedom of belief, while the 2012 constitution stated that such freedom was guaranteed, the 2014 constitution states that freedom of belief is absolute, restoring the word 'absolute' which appeared in the 1923 constitutional text. From a comparative approach, the article in the 2012 constitution guaranteeing freedom of worship and the establishment of houses of worship for monotheistic religions is the only unchanged aspect in the 2014 text. Hence, under the de-facto 2014 government, freedom of belief is processed as theoretically absolute, but freedom of worship will not be.[25]

IV. Public Civil Rights

1. Pluralism of Media System and State Authority: Challenges from Inside

For decades, state authority of media and press systems has had an impact on intra-state politics and freedom of speech. The emphasis is remarkable when applied to journalism. Since 1970, the Egyptian government's control of the public space and media has been filled with many contradictions, which have definitively blocked the formation of independent institutions and organizations working toward a civil society and an independent press. In contrast, the 1971 constitution 'protected' journalism's independence. However, over three decades; intellectuals, writers, journalists, revolutionaries and dissidents have been experiencing brutal torture and censorship on intellectual property and the free right to report.[26] There is no dedicated regime for the regulation of private broadcasting in Egypt.

As a consequence, many of the characteristics that are commonly associated with broadcast licensing and regulation – such as rules on diversity, public complaints systems, systems for allocating frequencies and rules on election coverage – are simply still not present in the country. There were proposals to introduce a broadcasting law in late 2008, however, these proposals never came to fruition.

The main reason for this could be linked to the fact that there are no private terrestrial broadcasters in Egypt. There are a number of Saudi private satellite television stations, all of which are based in the media public free zone. This is a special area to which special rules, including tax-free status, are applied.[27]

[25] MOHAMED SALMAWI explained to the daily Al-Masry Al-Youm on 18 September 2013: "Article 64 states that 'freedom of belief is absolute', which means that a person has the right to adopt any belief he wishes, as Islam states: 'For you is your religion, and for me is my religion' (Qur'an 109:6). Moreover, as stated by Salmawi Islam is devotion to God, grants man the right to not have any faith 'Whoever wills – let him believe; and whoever wills – let him disbelieve' (Qur'an 18:29). Faith is a heart matter, disclosed to Allah. Therefore, it is not the right of people to search for it." The constitution, according to Salmawi, does not forbid the adoption of any non-monotheistic faith or participation in its rituals. It does not forbid a Chinese tourist who believes in Buddhism or an Indian who believes in Hinduism from praying in their hotel room according to their beliefs. However and by contrast, Egyptian author and human rights activist Nawal Al-Sa'adawi dismissed the significance of this addition, saying that article 2 abnegates the article of absolute freedom of belief.

[26] VIRGINIA N. SHERRY, Behind Closed Doors: Torture and Detention in Egypt, New York 1992.

[27] TOBY MENDEL, Political and Media Transitions in Egypt, A Snapshot of Media Policy and Regulatory Environment, Internews, August 2011, available at <http://www1.umn.edu/humanrts/research/Egypt/Internews_Egypt_MediaLawReview_Aug11.pdf>, last accessed 21 January 2015, at 12-13.

Written press, due to it being dated back to the 1920s, encompasses over 600 newspapers and journals, most of them state-owned, like *Al-Ahram* (which remains the venerable state-owned flagship daily newspaper), *Al-Akhbar* and *Al-Gumhuriya*. It's worth bearing in mind that, in spite of the constitutional principles, under Sadat and Mubarak, journalists working for private newspapers were jailed, persecuted and tortured under the accusation of breaching the law prohibiting criticism of the President or state institutions.[28]

It was in 2005, after the parliamentental elections, that the media gave way to fair coverage of all the parties involved in the election. In 2006, *Al-Jazeera* journalists were again persecuted, detained and investigated with the accusation of harming the country's reputation.[29] In 2009 the Egyptian court suspended *al-Ibdaa* (creativity) due to the publication of the blasphemous poem by Hilmi Salem.[30] Broadcasting in Egypt is still today mainly authorized on a public basis, and concerning the case of private television channels and newspapers; until 2011 these were categorically prohibited.

The number of opposition and independent newspapers has grown rapidly over the past decade. *Al-Arabi* and *Rose El-Youssef*, however, remain the flagship of pro-government propaganda.[31] It is interesting to point out how the opposition newspapers generally devote more space to issues of corruption and human rights abuses than the state-owned newspapers. In spite of this, the opposition press has always been dependent on the government for newsprint and distribution. The dependency on the state, apart from the restrictions imposed by the emergency law, derives from poor facilities, limited financial resources, lack of advertising and small circulations. The opposition press, moreover, has always been denied access to government information sources; many of the requested interviews with governmental officials are denied, which, alongside a perceived lack of objectiveness in factual reporting standards, is thought to have eroded press credibility with the public.

According to REPORTERS WITHOUT BORDERS, Egypt, in terms of the freedom of the press index, was in 2008-2009 ranked 146 out of 173.[32] Ten years later, in 2013 – before the *coup d'état* – the rank slightly improved, jumping up eight positions.[33]

In 2011, further restrictions and controls on the freedom of the press worsened the political panorama with the sentencing of Maikel Nabil, accused of having insulted the SCAF for

[28] NAHED EL-TANTAWI & JULIE B. WIEST, Social Media in the Egyptian Revolution, Reconsidering resource mobilization theory, International Journal of Communication 5 (2011), 1207-1224, at 1212.

[29] FREEDOM HOUSE, Freedom of the Press 2007: A global survey of Media Independence, ed. Karin Deutsch Karlekar and Eleanor Marchant, 2007, available at <http://www.freedomhouse.org/sites/default/files/FOTP%202007%20Full%20Report.pdf>, last accessed 14 January 2015, at 1-2.

[30] *Al-Azhar*, which at the time was considered an independent religious institution (as also stated in the 2014 constitution) petitioned the courts, who ruled that 'freedom of the press'. Moreover, in the following years (2009-2011) Al-Azhar censored more than 196 texts. The incriminated paragraph was the following one (defended by Hilmi as accused to the dependency and passivity of Muslims): "God is not a policeman, grabbing perpetrators by their necks. He is a simple villager, feeding the duck, checking the cow's udder with his fingers, crying: There is plenty of milk".

[31] *Rose El-Youssef* represented for decades the mouthpiece for the Hosni Mubarak regime. In 2012 it adopted a tone more in line with the anti-Mubarak sentiment.

[32] REPORTERS WITHOUT BORDERS, Freedom of the Press Worldwide in 2008, Annual Report, available at <www.rsf.org/IMG/pdf/rapport_en-2.pdf>, last accessed 14 January 2015, at 149.

[33] REPORTERS WITHOUT BORDERS, supra Fn. 32.

undermining the revolution behind the statement claiming the co-optation between the army and the people, which is as historical as explicative of the domestic political excursus.[34]

In 2012, the Muslim Brotherhood guided government struggled to maintain a consistent policy on new deliberated media.[35] In relation to this, the most discussed event of suppression is the case of Bassem Youssef who accused the Islamists in *Al-Barnamagh* of menacing the fundamental pillars of freedom in the country, in light of the irksome applications of religion to the social level. Morsi's former government suspended the programme proving ruler's imposition on control on freedom of dissent, which in a presumed democratic inclined system should be conceived as the backbone of the state. The monopolization of intellectual and political freedom, as forms of dissent, is also what rescues 'democracy' from a quiet death.

Following this critique of the sabotage of freedoms in late 2012, the Salafist Hazem Abu Ismail publicly and deliberatively spurred direct intimidation and menace to journalists who would have blamed him, by inciting as a consequence *al-Hazemoon* (or a part of Salafis followers).[36] In an impartial comparative discourse analysis, the secularist front has not been alienated from the contextualization of violence over media channels. Al-Jazeera during 2012 was quite often accused of being bias towards the Muslim Brotherhood; this demagogy of intimidiation protrated on many occasions until being ostracized by Al-Sisi's in 2014 under the framework of the banning of the Muslim Brotherhood's satellite supporters.

In the aftermath of the 3rd of July 2013 coup, the *de-facto* government's policy, in terms of the freedom of the press, proved to be very discrepantic in promoting pluralism by suppressing every single factor indirectly linked to the implementation of a procedural form of civil society, and therefore, of pluralism and the concept of *madaniyya* (citizenship). After a distance of two years, the main focus of the post-Islamist campaign still grasps the arcane in questioning how little the media evolved during 2012 under Morsi's flash government. Morsi removed the entire leadership of the government, ran press syndicates and replaced it with Brotherhood appointees by posing many questions on the grade of 'auto(theo)cracy' (with an Islamic reference), which the party would have implemented in that transition. MARIZ TADROS questioned the issue by reminding us that the principle of religious equality synthetized in the '*lahum ma la'na wa aleikom ma aleina*', as stated by Hassan al Banna, came to be deposed by conservative leaders in modern times.[37] A further important question for Egypt in the post-uprising is what kind of changes need to be implemented to ensure that the Journalist Syndicate can, in the future, operate free of government control in a more ethically regulated system, and far from any political criminalization of the media and the press, as occurred in relation to the depiction of the unplanned areas in *Munira Gharbiyya*.[38] In article 48 of the 2012

[34] SHARIF A. KOUDDOUS, Jailed Egyptian Blogger on Hunger Strike Now in Critical Condition, Pulitzer Center, 8 September 2011, available at <http://pulitzercenter.org/reporting/egypt-cairo-maikel-nabil-sanad-jailed-trial-revolution>, last accessed 14 January 2015.

[35] MENDEL, supra Fn. 27, at 12.

[36] HEATHER MCROBIE, Egypt: A tale of two constitutions, Opendemocracy, 16 January 2014, available at <https://www.opendemocracy.net/5050/heather-mcrobie/egypt-tale-of-two-constitutions>, last accessed 14 January 2015.

[37] MARIZ TADROS, The Muslim Brotherhood in Contemporary Egypt. Democracy defined or confined?, London/New York 2012, at 7.

[38] MENDEL, supra Fn. 27, at 10-11.

amended constitution, the *Al-Horria wa al-'Adala* party insisted on the need to ensure independence for the press so that they can serve the community in their moral mission.[39]

Indeed, in 2012, Egypt saw an influx of private, but not independent, channels, owned by businessmen inclined to prove to the government their capacity for proving influence through power. Businessmen in 2014 supported the military in the second transition; therefore, the interest of such new channels in the future of the country is not to be actually independent but, once again, not to enter in conflict with the deep state's interests. Articles 71 and 72 in the 2014 constitution can be read as a replicated model, anchored to articles 48 and 49 in the former 2012 text, and to articles 209 and 210 in the 1971 constitution.[40] In all three aforementioned cases, independence is constitutionally safeguarded against control over the media, but episodes of journalists and reporters who faced charges and tortures remain hidden 'behind closed doors'.[41]

The issue of freedom of the press in the country remains a borderline aspect, which could impact the establishing of a pluralist civil society based on the fundamental right of freedom of thought. As occurred in 1967, the same media system has in 2013 been demagogically exploited by the state authority as a strategy aimed at exacerbating the negative depiction of Islamists parties. In the scholarly literature, the way limitations are imposed act as catalysing tools through which Al-Sisi has reshaped the nature of his post-modernist authority.[42]

Article 179 of the 2014 constitution established the National Council for Media, which is set to become the regulatory authority on the media in Egypt and whose composition will be later set by law. Nonetheless, it presents some problematic language amendments. While the 2012 text already had, for instance, the vague stipulation that the council was supposed to protect the values of society and its constructive traditions, the 2013-2014 text also includes protecting national unity and societal peace. The parameters of freedom are extended to the religion sphere and with regards to this, any issues concerning interfaith dialogue cannot be undervalued while examining the meaning of 'socio-political freedom'. Rather, this latter issue remains the most urgent, if not crucial, aspect about which the new government is being called to implement reforms. It is a challenging effort that could subsequently gather all the counterparts around the call for an effective pluralist idea of nation-state.

Now, the problem with this vague use of the language is that, while purely decorative if left alone, it could also open the door for potentially restrictive practices.[43]

[39] As stated by MCROBIE (supra Fn. 36): Article 210 of the 1971 constitution, in vigour until 2011, states that journalists have the right to obtain news and information, their activities are not subject to any authority other than the law (the regime).

[40] Article 71 of the 2014 constitution states: "It is prohibited to censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way", see Appendix.

[41] The reminding is both of the Al- Jazeera journalists currently detained in Cairo with the accusation of spreading terrorism and false news, harming national unity and social peace and using terrorism as a mean for their goals. Al-Jazeera Cairo bureau Chief Mohammed Fahmy is also accused of belonging to the Muslim Brotherhood.

[42] *Brownlee*, supra Fn. 23, at 4-6.

[43] BASSEM SABRY, 22 Key points in Egypt's New Draft Constitution, Al-Monitor, The Pulse of the Middle East, 23 August 2013, available at <http://www.al-monitor.com/pulse/originals/2013/08/egypt-draft-constitution-guide.html#>, last accessed 14 January 2015.

2. Conceptualizing the Juridical Meaning of Freedom

The uprisings produced a database of memories full of street art, as was personalized in Mohammed Mahmoud's street, and the walls leading to Tahrir Square. Once art turns into pop-nationalism, Egyptian artists's graffiti in downtown have become subject to contestation, and on many occasions, attempted to be removed by the state. Among the state's amendments on freedom of expression stands the one ratified by the Ministry of Local Development Labib in late 2013, which legitimated and authorized the criminalization of street art as a crime equal to dumping trash on the streets.[44]

Now, socially and politically, revolutionary graffiti has always driven the historical narration of the Egyptian neo-national identity during the days of uprising and the political transition in 2012. It is under this framework that the condemnation of street art by the *de-facto* government can be translated as a tactic to following the political failure, crack down on the Trotskyist revolutionary opposition known as *al-ishtirakiyyun al-thawriyyun:* a political block ideologically in opposition with the liberals or the secularists aligned on the National Salvation Front.[45]

Ostracizing popular culture, threatening artists and dissenters contravenes the principle of *parresia*, whose ethymological interpretation is embedded into the fundamental right to pluralism in the process of establishing a new political order.[46] The attempt of suppressing forms of neo-nationalism and identity self-reformulation, again, represents the Egyptian rhetoric over the principle of *taaddudiyya* (pluralism) and is reflected both in social and political terms as a form of fear captured by the regime before possible, even though at the present stage, remote attempts at an Islamist re-mobilization.[47]

V. Limits on Civilian Assessment and President's Authority

The discourse on the president's authority, the independence of the judiciary and *Al-Azhar* shows some positive and negative aspects. Under the 2014 constitution, the president's powers are not very different than those granted to him in the 2012 model. Some of them have been restricted even further than in the previous constitution, and only in a few cases, expanded. The 2014 constitution basically grants the president more leeway in appointing MPs compared to the 2012 constitution, which enabled him to appoint up to 10% of the *Shura council*, meaning up to 15 representatives.[48] The change implies that the president is given the authority to

[44] LINA KHATIB, Image Politics in the Middle East: The Role of the Visual in Political Struggle, London/New York 2013, at 17-25. The American University in Cairo has been accused of being politically involved in. On the same issue see SORAYA MORAYEF, Angels caught in a tightening noose, Opendemocracy, 13 November 2013, available at <https://www.opendemocracy.net/arab-awakening/soraya-morayef/angels-caught-in-tightening-noose>, last accessed 14 January 2015.

[45] KHATIB, supra Fn. 44.

[46] SUHAIR EL-QARRA, Arab Spring: Changes and Challenges, Freedom of expression, hate, speech, discrimination and social media, On the ongoing big public debate on freedom of expression, Lisbon Forum, Council of Europe 2012.

[47] The identification of the roots of this value in different cultural heritages is essential to understand the universality of this civil right. The international human rights law stresses on the states' responsibility in combating cultural, ethnic based violence, especially if the violence is disguised as a religious or a cultural practice, United Nation Human Right Commission 1989.

[48] Article 128 of the 2012 constitution.

appoint up to 5% of these delegates, meaning up to 23.[49] The expanding of the president's authority is meant to enable the ruler to ensure representation by weak groups with no reserved seats such as women, Copts, youths and workers. Limiting the president's authority is manifested in cancelling his exclusivity in appointing a defence minister in the coming years. Agreements made by the president regarding a ceasefire, alliance or sovereign, for the time being, requires approval by referendum (article 151), and not just by parliament, in contrast with the 2012 constitution. Article 159, rather, determines that if the president stands trial, the verdict given by the special court established for that purpose is final.[50]

Contrary to the 2012 constitution, the 2014 text does not require the president to appoint a deputy. The 2014 constitution highlights that if the president is temporarily unable to perform his duties, the prime minister will stand in for him, as detailed in article 160.[51] In addition, the 2014 amended text seems to enable the president to declare a state of emergency with the approval of parliament for six months and with the possibility of extending it to another six months, on referendum approval, as stated in article 154 of the 2012 constitution:

> *"If the vacancy of the presidential office occurs at the same time that a referendum or the election of either the House of Representatives or the Shura Council is being held, precedence shall be given to the presidential elections. The existing Parliament shall continue in place until the completion of the presidential elections".*[52]

Concerns, however, remain about the way this procedural form of pluralistic and shared decision-making will be applied.

It is deduced in article 154 of the 2014 constitution that the new constitution limits state of emergency to three months, where extensions to which must be eventually approved by the parliament.[53]

VI. Conclusions

One of the most worrisome aspects generated by the Arab uprisings is the way politics and the Islamist revival has been reshaped. As concerns the call for pluralism many gaps will remain un-bridged for many years to come. With regard to this, the *de jure* crack down of the *Al-Ikhwan al-Muslimin* is designated to remain at the core of this enduring controversial discussion.

Even though from a structural and legal perspective the 2014 constitution strictly limits president's powers; predictions and expectations concerning the definitive suppression of the Islamists as phenomenology in social-politics is unlikely to happen. The coercive suppression, rather, is misleading whilst examining not only the political stability of the Southern Mediterranean area, but also the history of Egypt's domestic politics. As for the restoration of the military guard, old state security agents have returned to their old ways and humiliating dissidents by leaking their private

[49] Article 102 of the 2014 constitution.
[50] Appendix.
[51] Appendix.
[52] Appendix.
[53] Appendix.

phone calls to the media. Crackdowns today keep targeting all representatives of social pluralism between who atheists or blasphemers. Most of the leaders of the 2011 original uprising are in prison or exile. Some have been silenced, and some seem still willing to accept the military repression as that necessary price for getting rid of *Al-Ikhwan al-Muslimin*, considered the biggest threat in the country. Such hardline tactics could reflect a military confidently in charge.

Al-Sisi today contemplates the cult for the personality in his celebration as national hero in a pragmatic nationalistic sentiment.[54] As for the directly political domains of parliament and political parties, Al-Sisi does not have the need, as did Nasser, to formulate a single party or to restore the old guard of the National Democratic Party, in spite of the release of many former NDP members as occurred in August 2014 and in December 2014, to crowd out opposition, including parliamentary elections, and to burnish his image. Al-Sisi is proving to be as talented as enormously manipulative and highly politicised officer who managed to rescue the military and the deep state more generally from potential destruction at the hands of revolutionary movements or *al-Ikhwan al-Muslimin*.

The danger Egypt could face is that Al-Sisi's ambitions and abuses, combined with the institutional interests of an overly large, inadequately trained and corrupt military, will lead to socio-political and economic backlashes.

[54] ROBERT SPRINGBORG, Abdul Fattah al-Sisi: New face of Egypt's old guard, BBC, 26 March 2014, available at <http://www.bbc.com/news/world-middle-east-26188023>, last accessed 21 January 2015.

VII. Appendix

Constitution of the Arab Republic of Egypt (2014)[55]

In the Name of Allah, Most Gracious, Most Merciful

This is Our Constitution, Egypt is the gift of the Nile for Egyptians and the gift of Egyptians to humanity.

With its unique location and history, Egypt is the Arab heart of the world. It is the meeting point of world civilizations and cultures and the crossroads of its maritime transportation and communications. It is the head of Africa on the Mediterranean and the estuary of its greatest river: the Nile.

This is Egypt, an immortal homeland for Egyptians, and a message of peace and love to all peoples.

In the outset of history, the dawn of human conscience arose adn shone forth in the hearts of our great ancestors, whose goodwill banded together to found the first central State that regulated and organized the life of Egyptians on the banks of the Nile. It is where they created amazing wonders of civilization, and where their hearts looked up to heavens before earth knew the three Abrahamic religions.

Egypt is the cradle of belief and the banner of glory of the revealed religions.

On its land, Prophet Moses - to whom Allah spoke - grew up and on Mount Sinai, the Revelation of Allah shone on his heart and Divine message descended.

On its land, Egyptians harbored in their bosoms Virgin Mary and her baby and offered thousands of martyrs in defense of the Church of Jesus, Peace Be Upon Him.

When the Seal of the Messengers Mohammad (Peace and Blessings Be Upon Him) was sent to all mankind to perfect the sublime morals, our hearts and minds were opened to the light of Islam, and we, labeled the best soldiers on Earth fighting for the cause of Allah, disseminated the message of truth and sciences of religion across the world.

This is Egypt, a homeland in which we live and in our souls it lives.

In modern age, minds were enlightened, humanity became mature, and nations and peoples progressed on the path of knowledge, raising the banners of freedom and equality. Mohamed Ali founded the modern Egyptian State with a national army as its pillar. Refaa, the Azharian, called for having the homeland "a place of happiness shared by all its people."

We, Egyptians, strived to keep up with the pace of advancement and offered up martyrs and made sacrifices in several uprisings and revolutions until our patriotic army stood up for the overwhelming will of the people in the "Jan 25 – June 30" Revolution that called for freedom, human dignity and social justice for all, and for Egypt to regain its independent will.

[55] The version in use in this appendix is the unofficial English translation, available at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>, last accessed 12 February 2015. The official Arabic 2014 constitution can be downloaded from <http://www.egypt.gov.eg/arabic/laws/download/Constitution_2014.pdf>, last accessed 12 February 2015.

This revolution is continuation of national struggle whose brightest symbols were Ahmed Oraby, Mostafa Kamel, and Mohamed Farid, and is a culmination of two great revolutions in our modern history:

The 1919 revolution that had rid Egypt and the Egyptians of the British protection, established the principle of citizenship and equality for all the people. Its leader, Saad Zaghloul, and his successor, Mosfata El-Nahhas, in adopting democracy asserted that "Right is above power and the nation is above government". During this revolution, Talaat Harb laid down the cornerstone of the national economy.

The July 23, 1952 revolution led by Gamal Abdel Nasser and embraced by the popular will rendered true the dream of generations for independence and evacuation of foreign forces. Egypt affirmed its Arab allegiance, opened up to its African continent and Muslim world, supported liberation movements across continents, and took firm steps on the path of development and social justice.

This revolution is an extension of the revolutionary march of Egyptian patriotism, and enhances the strong bond between the Egyptian people and their national army that assumed the duty and shouldered the responsibility of protecting the homeland, by virtue of which we achieved victory in our greatest battles including driving off the 1956 Tripartite Aggression to defeating our defeat through the glorious victory of October 1973 that gave President Sadat a special place in our recent history.

Compared to major revolutions in the history of mankind, the Jan 25 – June 30 Revolution is unique with its high density of popular participation - estimated to be in the tens of millions - and the prominent role of youth aspiring at a brighter future. It is also unique in that the masses transcended class and ideology divides to reach out to more expansive horizons, the people's will was defended by their army, and that it had the blessings of Al-Azhar and the Egyptian church. This Revolution is further unique because of its peacefulness and ambition to achieve freedom and social justice combined.

This revolution is both a sign and a good omen; a sign of a past that is still present and a good omen of a future at which all humanity aspires.

The world is about to turn the last few leaves of this era that has been torn up by conflicts of interest between the East and the West, and the North and the South; an era where disputes and wars erupted between classes and peoples, where dangers grew threatening the existence of mankind and life on Earth which Allah entrusted us to preserve. As humanity hopes to move from the age of maturity to the age of wisdom to build a new world where truth and justice prevail, and where freedoms and human rights are protected, we, Egyptians, believe that our revolution is a resumption of our contribution to drafting a new history for humanity.

We believe that we are capable of using the past as an inspiration, stirring up the present, and making our way to the future. We are capable of raising this homeland and rising with it.

We believe that every citizen is entitled to live in this homeland safe and secure, and that every citizen has the right to live at present and in the future.

We believe in democracy as a path, a future, and mode of living, political pluralism and the peaceful rotation of power. We affirm the right of the people to make and determine their future. The Egyptian people, is the sole source of authority. Freedom, human dignity, and

social justice are the rights of every citizen. We and our future generations are masters in a sovereign homeland that is master of its destiny.

We are now drafting a Constitution that embodies the dream of generations for a prosperous consolidated society and a just State that realizes the present and future ambitions for the individual and the community.

We are now drafting a Constitution that seeks the completion of building a modern democratic State having a civil government.

We are drafting a Constitution that prevents any corruption or tyranny and by which we heal the wounds of the past, from the days of the old Eloquent Peasant to the victims of negligence and the martyrs of the revolution in our present time, and relieve our people who have – for long – been suffering injustice.

We are drafting a Constitution that affirms that the principles of Islamic Sharia are the principal source of legislation, and that the reference for the interpretation of such principles lies in the body of the relevant Supreme Constitutional Court Rulings.[1]

We are drafting a Constitution that paves the way to the future for us, and which is consistent with the Universal Declaration of Human Rights which we participated in drafting and adopted..

We are drafting a Constitution that maintains our freedom and protects our nation against any peril that threatens it or our national unity.

We are drafting a Constitution that holds all of us equal in rights and duties without discrimination of any kind.

We the citizens, women and men, the Egyptian people, sovereigns in a sovereign homeland, this is the manifestation of our volition; this is the Constitution of our revolution.

This is our Constitution.

Part I The State

Article (1)

The Arab Republic of Egypt is a sovereign, united, indivisible State, where no part may be given up, having a democratic republican system that is based on citizenship and rule of law.

The Egyptian people are part of the Arab nation seeking to enhance its integration and unity. Egypt is part of the Islamic world, belongs to the African continent, cherishes its Asian dimension, and contributes to building human civilization.

Article (2)

Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation.

[1] The rulings are to be deposited in the minutes.

Article (3)

The principles of Christian and Jewish Sharia of Egyptian Christians and Jews are the main source of legislations that regulate their respective personal status, religious affairs, and selection of spiritual leaders.

Article (4)

Sovereignty belongs only to the people, who shall exercise and protect it. The people are the source of powers, and safeguard their national unity that is based on the principles of equality, justice and equal opportunities among all citizens, as stated in the Constitution.

Article (5)

The political system is based on political and partisan pluralism, peaceful rotation of power, separation and balance of powers, the inevitable correlation between powers and responsibilities, and respect for human rights and freedoms, as stated in the Constitution.

Article (6)

Nationality is a right to anyone born to an Egyptian father or an Egyptian mother, and legal recognition through official papers proving his/her personal data, is a right guaranteed and regulated by Law.

Requirements for acquiring nationality shall be specified by law.

Part II Basic Components of the Society
Chapter One
Social Components

Article (7)

Al-Azhar is an independent Islamic scientific institution, with exclusive competence over its own affairs. It is the main reference for religious sciences and Islamic affairs. It is responsible for calling to Islam, as well as, disseminating religious sciences and the Arabic language in Egypt and all over the world.

The State shall provide sufficient financial allocations thereto so that it can achieve its purposes.

Al-Azhar's Grand Sheikh is independent and may not be dismissed. The Law shall regulate the method of appointing the Grand Sheikh from amongst the members of Council of Senior Scholars.

Article (8)

Society is based on social solidarity.

The State shall achieve social justice and provide the means to achieve social interdependence, in order to ensure a decent life for all citizens, as regulated by Law.

Article (9)

The State shall ensure equal opportunities for all citizens without discrimination.

Article (10)

The family is the nucleus of society, and is founded on religion, morality, and patriotism. The State shall ensure its cohesion, stability and the establishment of its values.

Article (11)

The State shall ensure the achievement of equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution.

The State shall take the necessary measures to ensure the appropriate representation of women in the houses of representatives, as specified by Law. The State shall also guarantee women's right 8 of holding public and senior management offices in the State and their appointment in judicial bodies and authorities without discrimination.

The State shall protect women against all forms of violence and ensure enabling women to strike a balance between family duties and work requirements.

The State shall provide care to and protection of motherhood and childhood, female heads of families, and elderly and neediest women.

Article (12)

Work is a right, duty and honor guaranteed by the State. No citizen may be forced to work except as required by Law and for the purpose of performing a public service for a fixed period in return for a fair consideration, and without prejudice to the basic rights of those obliged to carry out such work.

Article (13)

The State shall protect workers' rights and strive to build balanced work relationships between both parties to the production process. It shall ensure means for collective negotiations, protect workers against work risks, guarantee the fulfillment of the requirements of security, safety and occupational health, and prohibit unfair dismissal, all as regulated by Law.

Article (14)

Public offices are a competence-based right for all citizens without bias or favoritism, and are deemed a mandate to serve the people. The State shall ensure the rights and protection of public servants and that they perform their respective duties in serving the interests of the people. They may not be dismissed without disciplinary procedures except in the cases specified by Law.

Article (15)

Peaceful strike is a right regulated by Law.

Article (16)

The State shall honor the martyrs of the nation; shall care for revolution-wounded persons, veterans and wounded warriors, families of those missing in war and its equivalents, and persons wounded in security operations, as well as their wives, children and parents; and shall strive to provide all of them with job opportunities, all as regulated by Law.

The State shall encourage the participation of the civil society organizations in achieving those objectives.

Article (17)

The State shall ensure that social insurance services are provided.

All citizens who do not benefit from the social insurance system have the right to social security, in a manner that ensures a decent life in the event of being incapable to provide for themselves and their families, as well as in cases of incapacity to work, old age or unemployment.

In accordance with Law, the State shall strive to provide suitable pensions to small farmers, agricultural workers and fishermen, and irregular labor.

The funds of social insurance and pensions are deemed private funds that enjoy all aspects and forms of protection afforded to public funds. Those funds along with their returns are the rights of their respective beneficiaries; they shall be safely invested, and shall be managed by an independent entity in accordance with the Law.

The State shall guarantee social insurance and pension funds.

Article (18)

Every citizen has the right to health and to comprehensive health care which complies with quality standards. The State shall maintain and support public health facilities that provide health services to the people, and shall enhance their efficiency and their equitable geographical distribution.

The State shall allocate a percentage of government spending to health equivalent to at least 3% of Gross National Product (GNP), which shall gradually increase to comply with international standards.

The State shall establish a comprehensive health insurance system covering all diseases for all Egyptians; and the Law shall regulate citizens' contribution to or exemption from its subscriptions based on their income rates.

Refusing to provide any form of medical treatment to any human in emergency or lifethreatening situations is a crime.

The State shall improve the conditions of physicians, nursing staff, and health sector workers.

All health facilities as well as health-related products, materials and means of advertisement shall be subject to State control. The State shall encourage the participation of private and nongovernmental sectors in providing health care services according to the Law.

Article (19)

Every citizen has the right to education. The goals of education are to build the Egyptian character, preserve the national identity, root the scientific method of thinking, develop talents 10 and promote innovation, establish cultural and spiritual values, and found the concepts of citizenship, tolerance and non-discrimination. The State shall observe the goals of education in the educational curricula and methods, and provide education in accordance with international quality standards.

Education is compulsory until the end of the secondary stage or its equivalent. The State shall provide free education in the various stages in the State's educational institutions according to the Law.

The State shall allocate a percentage of government spending to education equivalent to at least 4% of the Gross National Product (GNP), which shall gradually increase to comply with international standards.

The State shall supervise education to ensure that all public and private schools and institutes abide by its educational policies.

Article (20)

The State shall encourage and develop technical and technological education as well as vocational training, and expand all their types in accordance with international quality standards and in accordance with labor market needs.

Article (21)

The State shall guarantee the independence of universities and scientific and linguistic academies, and provide university education in accordance with international quality standards. It shall develop and ensure free provision of, university education in State universities and institutes according to the Law.

The State shall allocate a percentage of government spending to university education equivalent to at least 2% of the Gross National Product (GNP), which shall gradually increase to comply with international standards.

The State shall encourage the establishment of non-profit, non-governmental universities. The State shall guarantee the quality of education in private and non-governmental universities, ensure that they comply with international quality standards and the = build their own faculty members and researchers, and allocate a sufficient percentage of their returns to educational and research development.

Article (22)

Teachers, and faculty members and their assistants, are the main pillars of education. The State shall guarantee the development of their academic competencies and professional skills and shall care for their financial and moral rights in order to ensure the quality of education and achieve its goals.

Article (23)

The State shall ensure freedom of scientific research and encourage scientific research institutions as a mean to achieve national sovereignty and build a knowledge economy. The State shall sponsor researchers and inventors and allocate a percentage of government spending to scientific research equivalent to at least 1% of the Gross National Product (GNP), which shall gradually increase to comply with international standards.

The State shall ensure effective means of contribution by private and non-governmental sectors and the participation of Egyptian expatriates in the progress of scientific research.

Article (24)

Arabic Language, Religious Education and National History, in all its stages, are core subjects in public and private pre-university education. Universities shall teach human rights and professional values and ethics of the various academic disciplines.

Article (25)

The State shall develop a comprehensive plan to eradicate alphabetical and digital illiteracy among citizens of all ages. The State shall develop its implementation mechanisms with the participation of civil society organizations within a definite timeline.

Article (26)

The creation of civil titles is prohibited.

Chapter Two
Economic Components

Article (27)

The economic system aims at achieving prosperity through sustainable development and social justice so as to raise the real growth rate of the national economy and the standard of living, increase job opportunities, reduce unemployment rates and eliminate poverty.

The economic system shall adhere to transparency and good governance standards; enhance pillars of competitiveness, encourage investment, ensure balanced geographical, sectorial, and environmental growth, prohibit monopolistic practices, maintain financial and trade balances and a fair tax system, in the context of a regulated economy guaranteeing the various types of ownership and striking a balance between the interests of various stakeholders preserving the rights of workers and protecting consumers.

From a social perspective, the economic system shall ensure equal opportunities and fair distribution of development returns, reduce the differences among incomes and adhere to a 12 minimum wage and pension ensuring a decent life, as well as a maximum one in State agencies for every salaried employee according to the Law.

Article (28)

The productive, service and information related economic activities are key components of the economy. The State shall protect them and strive to increase their competiveness; provide investment-attracting environment, increase productivity, encourage exports, and regulate imports.

The State shall pay special attention to small, medium and micro enterprises in all fields, and shall regulate and rehabilitate the informal sector.

Article (29)

Agriculture is a basic component of the economy.

The State shall protect and expand agricultural land, and shall criminalize encroachments thereon. It shall develop rural areas; raise the standard of living of their population and protect them from environmental risks; and shall strive to on develop agricultural and animal production and encourage industries based thereon.

The State shall provide agricultural and animal production requirements, and shall buy basic agricultural crops at suitable prices generating profit margins for farmers in agreement with agricultural unions, syndicates and associations. The State shall also allocate a percentage of reclaimed lands to small farmers and youth graduates, and protect farmers and agricultural workers against exploitation. All the foregoing shall be as regulated by Law.

Article (30)

The State shall protect fish resources, as well as protect and support fishermen and empower them to carry out their work without jeopardizing ecosystems, as regulated by Law.

Article (31)

The security of cyberspace is an integral part of the economic system and national security. The State shall take the necessary measures to preserve it as regulated by Law.

Article (32)

The State's natural resources belong to the people. The State shall preserve and effectively exploit them, may not deplete them, and shall observe the rights of future generations to them.

The State shall make the best use of renewable energy sources, motivate investment therein, and encourage relevant scientific research. The State shall encourage the manufacture of raw materials and increase their added value as per economic feasibility.

Disposing of State's public properties is prohibited. Granting the right of exploitation of natural resources or public utility concessions shall be by virtue of a law for a period not exceeding thirty (30) years.

Granting the right of exploitation of quarries, small mines and slatterns, or granting public utility concession shall be based on a law for a period not exceeding fifteen (15) years.

The Law shall define provisions of disposing of the State's private properties as well as the regulating rules and procedures.

Article (33)

The State shall protect ownership with its three types: the public, the private and the cooperative.

Article (34)

Public properties are inviolable and may not be infringed upon. Protection thereof is a duty according to the Law.

Article (35)

Private properties shall be protected, and the right to inheritance thereto is secured. It is not permissible to impose guardianship thereon except in the cases defined by Law and by virtue of a court judgment. Expropriation shall be allowed only in the public interest and for its benefit, and against fair compensation to be paid in advance according to the Law.

Article (36)

The State shall motivate the private sector to undertake its social responsibility in serving the economy and society.

Article (37)

Cooperative ownership shall be protected. The State shall give due care to cooperatives, and the Law shall guarantee their protection, support and independence.

It is prohibited to dissolve cooperatives or their board of directors except by virtue of a court judgment.

Article (38)

The tax system, as well as other public liabilities, aim at developing State resources and achieving social justice and economic development.

Public taxes may not be created, altered, or cancelled except by a law; and exemption therefrom may only be made in the cases defined by the law. No person may be required to pay other taxes or fees except as provided for in the Law.

Multi sources shall be observed in imposing taxes. Progressive multi bracket taxes shall be imposed on incomes of individuals according to their respective financial capabilities. Taxation system shall ensure promoting labor-intensive economic activities and motivating their role in the economic, social and cultural development.

The State shall improve the taxation system and develop modern systems that guarantee efficiency, easiness and control in tax collection. The Law shall define the methods and tools of collecting taxes, charges and any other sovereign proceeds, and amounts thereof to be deposited into the State public treasury.

Tax payment is a duty and tax evasion is a crime.

Article (39)

Saving is a national duty protected and encouraged by the State that shall guarantee savings, as regulated by the law.

Article (40)

General confiscation of properties is prohibited.

Specific confiscation is impermissible except by virtue of a court judgment.

Article (41)

The State shall implement a population program aiming at striking a balance between population growth rates and available resources; and shall maximize investments in human resources and improve their characteristics in the framework of achieving sustainable development.

Article (42)

Workers shall have a share in the management and profits of enterprises according to the law, and shall develop production and implement the respective plans of their productive units. Preserving production tools is a national duty.

Workers shall be represented by 50% of the elected members of the boards of directors of public sector units. Their representation in the boards of directors of public enterprise sector companies shall be subject to the Law.

The Law shall regulate the representation of small farmers and craftsmen with a minimum representation percentage of 80% in the boards of directors of agricultural, industrial and handicraft cooperatives.

Article (43)

The State shall protect and develop the Suez Canal and preserve it as an international waterway owned by the State. The State shall also develop the Canal sector as a distinguished economic center.

Article (44)

The State shall protect the River Nile, preserve Egypt's historical rights thereto, rationalize and maximize its use, and refrain from wasting or polluting its water. The State shall also protect groundwater; adopt necessary means for ensuring water security; and support scientific research in that regard.

Every citizen is guaranteed the right to enjoy the River Nile. It is prohibited to trespass the riverbank reserve or harm the riverine environment. The State shall guarantee eliminating any trespass against the River Nile as regulated by Law.

Article (45)

The State shall protect its seas, shores, lakes, waterways and natural protectorates.

Trespassing, polluting or misusing any of them is prohibited. Every citizen is guaranteed the right of enjoying them. The State shall protect and develop the green space in the urban areas; preserve plant, animal and fish resources and protect those under the threat of extinction or danger; guarantee humane treatment of animals, all according to the law.

Article (46)

Every person has the right to a sound healthy environment. Environment protection is a national duty. The State shall take necessary measures to protect and ensure not to harm the environment; ensure a rational use of natural resources so as to achieve sustainable development; and guarantee the right of future generations thereto.

Chapter Three
Cultural Components

Article (47)

The State shall maintain the Egyptian cultural identity with its diversified branches of civilization.

Article (48)

Culture is a right to every citizen. The State shall secure and support this right and make available all types of cultural materials to all strata of the people, without any discrimination 16 based on financial capability, geographic location or others. The State shall give special attention to remote areas and the neediest groups.

The State shall encourage translation from and into Arabic.

Article (49)

The State shall protect and preserve monuments and give due care to monumental sites. It shall also maintain and restore them; recover stolen antiquities; and organize and supervise excavation operations.

Presenting monuments as gifts or exchanging them is prohibited.

Aggression against or trafficking in monuments is a crime that is not subject to prescription.

Article (50)

Egypt's civilization and cultural heritage, whether physical or moral, including all diversities and principal milestones – namely Ancient Egyptian, Coptic, and Islamic – is a national and human wealth. The State shall preserve and maintain this heritage as well as the contemporary cultural wealth, whether architectural, literary or artistic, with all diversities. Aggression against any of the foregoing is a crime punished by Law. The State shall pay special attention to protecting components of cultural pluralism in Egypt.

Part III
Public Rights, Freedoms & Duties

Article (51)

Dignity is the right of every human being and may not be violated. The State shall respect and protect human dignity.

Article (52)

Torture in all forms and types is a crime that is not subject to prescription.

Article (53)

All citizens are equal before the Law. They are equal in rights, freedoms and general duties, without discrimination based on religion, belief, sex, origin, race, color, language, disability, social class, political or geographic affiliation or any other reason.

Discrimination and incitement of hatred is a crime punished by Law.

The State shall take necessary measures for eliminating all forms of discrimination, and the Law shall regulate creating an independent commission for this purpose.

Article (54)

Personal freedom is a natural right, shall be protected and may not be infringed upon. Except for the case of being caught in *flagrante delicto*, it is not permissible to arrest, search, detain, or restrict the freedom of anyone in any way except by virtue of a reasoned judicial order that was required in the context of an investigation.

Every person whose freedom is restricted shall be immediately notified of the reasons therefore; shall be informed of his/her rights in writing; shall be immediately enabled to contact his/her relatives and lawyer; and shall be brought before the investigation authority within twenty four (24) hours as of the time of restricting his/her freedom.

Investigation may not start with the person unless his/her lawyer is present. A lawyer shall be seconded for persons who do not have one. Necessary assistance shall be rendered to people with disability according to procedures prescribed by Law.

Every person whose freedom is restricted, as well as others, shall have the right to file grievance before the court against this action. A decision shall be made on such grievance within one (1) week as of the date of action; otherwise, the person must be immediately released.

The Law shall regulate the provisions, duration, and causes of temporary detention, as well as the cases in which damages are due on the state to compensate a person for such temporary detention or for serving punishment thereafter cancelled pursuant to a final judgment reversing the judgment by virtue of which such punishment was imposed.

In all events, it is not permissible to present an accused for trial in crimes that may be punishable by imprisonment unless a lawyer is present by virtue of a power of attorney from the accused or by secondment by the court.

Article (55)

Every person who is either arrested, detained, or his freedom is restricted shall be treated in a manner that maintains his dignity. He/she may not be tortured, intimidated, coerced, or physically or morally harmed; and may not be seized or detained except in places designated for that purpose, which shall be adequate on human and health levels. The State shall cater for the needs of people with disability.

Violating any of the aforementioned is a crime punished by Law.

An accused has the right to remain silent. Every statement proved to be made by a detainee under any of the foregoing actions, or threat thereof, shall be disregarded and not be relied upon.

Article (56)

A prison is a place of correction and rehabilitation.

Prisons and places of detention shall be subject to judiciary supervision, where actions inconsistent with human dignity or which endanger human health shall be prohibited.

The Law shall regulate the provisions of reform and rehabilitation of convicted persons and facilitating decent lives after their release.

Article (57)

The right to privacy may not be violated, shall be protected and may not be infringed upon.

Postal, telegraphic and electronic correspondences, telephone calls, and other means of communication are inviolable, and their confidentiality is guaranteed. They may not be confiscated, revealed or monitored except by virtue of a reasoned judicial order, for a definite period, and only in the cases defined by Law.

The State shall protect citizens' right to use all forms of public means of communications. Interrupting or disconnecting them, or depriving the citizens from using them, arbitrarily, is impermissible. This shall be regulated by Law.

Article (58)

Privacy of homes is inviolable. Except for cases of danger or call for help, homes may not be entered, inspected, monitored or eavesdropped except by a reasoned judicial warrant specifying the place, the time and the purpose thereof. This is to be applied only in the cases and in the manner prescribed by Law. Upon entering or inspection, the residents of houses must be apprised and have access to the warrant issued in this regard.

Article (59)

Everyone has the right to a safe life. The State shall provide security and reassurance for its citizens and all those residing in its territory.

Article (60)

The human body is inviolable and any assault, deformation or mutilation committed against it shall be a crime punishable by Law. Organs trade shall be prohibited, and it is not permissible to perform any medical or scientific experiment thereon without a certified free consent according to established principles in medical sciences and as regulated by Law.

Article (61)

Tissue and organ donation is a gift for life. Every person shall have the right to donate his body organs either during his lifetime or after his death by virtue of consent or a certified will. The State shall develop a mechanism regulating the rules of organ donation and transplantation in accordance with the Law.

Article (62)

Freedom of movement, residence and emigration shall be guaranteed.

No citizen may be expelled from the State territory or prevented from returning thereto.

No citizen may be prevented from leaving the State territory, placed under house arrest or prevented from residing in a certain place except by a reasoned judicial order for a specified period of time and in the cases as defined by the Law.

Article (63)

All forms and types of arbitrary forced displacement of citizens shall be prohibited and shall be a crime that does not lapse by prescription.

Article (64)

Freedom of belief is absolute.

The freedom of practicing religious rituals and establishing worship places for the followers of Abrahamic religions is a right regulated by Law.

Article (65)

Freedom of thought and opinion is guaranteed.

Every person shall have the right to express his/her opinion verbally, in writing, through imagery, or by any other means of expression and publication.

Article (66)

Freedom of scientific research is guaranteed. The State is committed to sponsor researchers and inventors and to provide protection for and endeavor to apply their innovations.

Article (67)

Freedom of artistic and literary creativity is guaranteed. The State shall encourage arts and literature, sponsor creative artists and writers and protect their productions, and provide the means necessary for achieving this end.

No lawsuit may be initiated or filed to stop or confiscate any artistic, literary, or intellectual works, or against their creators except by the Public Prosecutor. No freedom restricting sanction may be inflicted for crimes committed because of the publicity of artistic, literary or intellectual product. As for crimes related to the incitement of violence, discrimination between citizens, or impingement of individual honor, the Law shall specify the penalties therefore.

In such cases, the court may obligate the sentenced to pay punitive compensation to the victim of the crime, in addition to the original compensations due to the victim for the damages incurred. All the foregoing shall be in accordance with the Law.

Article (68)

Information, data, statistics and official documents are the property of the People and the disclosure thereof from their various sources is a right guaranteed by the State for all citizens. The State is committed to provide and make them available to citizens in a transparent manner. The Law shall regulate the rules for obtaining them and terms for their availability and confidentiality; the rules for their deposit and storage; and the rules for and filing complaints against the refusal to provide them. The Law shall also impose penalties for withholding information or deliberately providing wrong information.

The State institutions shall deposit official documents with the National Library and Archives once they are no longer in use. The State institutions shall also protect, and secure such documents against loss or damage, as well as restoring and digitizing them using all modern means and instruments according to the Law.

Article (69)

The State shall protect all types of intellectual property rights in all fields, and establish a specialized agency to uphold such rights and their legal protection as regulated by Law.

Article (70)

Freedom of the press, printing and paper, visual, audio and electronic publication is guaranteed. Every Egyptian - whether being natural or legal, public or private person – shall have the right to own and issue newspapers and establish visual, audio and digital media outlets.

Newspapers may be issued once notification is given as regulated by Law. The Law shall regulate the procedures of establishing and owning visual and radio broadcast stations and online newspapers.

Article (71)

It is prohibited to censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way. By way of exception, they may be subject to limited censorship in times of war or general mobilization.

No freedom restricting penalty shall be imposed for publication or publicity crimes. As for crimes related to the incitement of violence, discrimination between citizens, or impingement of individual honor, the Law shall stipulate the penalties therefor.

Article (72)

The State shall ensure the independence of all State-owned press institutions and media outlets, in a manner ensuring their neutrality and presentation of all political and intellectual opinions and trends as well as social interests and also guaranteeing equality and equal opportunities in addressing public opinion.

Article (73)

Citizens shall have the right to organize public meetings, marches, demonstrations and all forms of peaceful protests, without carrying arms of any kind, by serving a notification as regulated by Law.

The right to peaceful and private assembly is guaranteed without need for prior notification. Security forces may not attend, monitor or eavesdrop on such meetings.

Article (74)

All citizens shall have the right to form political parties by notification as regulated by Law. No political activity may be practiced and no political parties may be formed on the basis of religion or discrimination based on sex, or origin, or on sectarian basis or geographic location. No activity that is hostile to democratic principles, secretive, or of military or quasi-military nature may be practiced.

Political parties may not be dissolved except by virtue of a court judgment.

Article (75)

All citizens shall have the right to form non-governmental associations and foundations on democratic basis, which shall acquire legal personality upon notification.

Such associations and foundations shall have the right to practice their activities freely, and administrative agencies may not interfere in their affairs or dissolve them, or dissolve their boards of directors or boards of trustees save by a court judgment.

The establishment or continuation of non-governmental associations and foundations, whose statutes or activities are secretive or conducted in secret or which are of military or quasi-military nature is prohibited as regulated by Law.

Article (76)

The establishment of syndicates and federations on democratic basis is a right guaranteed by Law. Syndicates and federations shall acquire legal personality, shall have the right to practice their activities freely, shall improve the level of efficiency among their members and defend their rights and interests.

The State shall guarantee the independence of all syndicates and federations and their boards of directors may only be dissolved by a court judgment.

No syndicate or federation may be established in the military or police agencies.

Article (77)

The Law shall regulate the establishment of professional syndicates and the administration thereof on a democratic basis, shall guarantee their independence and shall specify their resources and the manner of recording their members, and holding them accountable for their conduct in practicing their professional activities according to the codes of ethics and professional conduct.

No profession may have more than one syndicate for the regulation of its affairs. Receivership may not be imposed on any syndicate. Administrative bodies may not interfere in the affairs thereof. The board of directors of any syndicate may not be dissolved save by a court judgment. The opinion of the syndicate shall be sought on draft legislations pertaining to it.

Article (78)

The State shall ensure the citizens' right to adequate, safe and healthy housing in a manner which preserves human dignity and achieves social justice.

The State shall devise a national housing plan which upholds the environmental particularity and ensures the contribution of personal and collaborative initiatives in its implementation. The State shall also regulate the use of State lands and provide them with basic utilities within the framework of comprehensive urban planning which serves cities and villages and a population distribution strategy. This is to be applied in a manner serving the public interest, improving the quality of life for citizens and safeguards the rights of future generations.

The State shall also devise a comprehensive national plan to address the problem of unplanned slums, which includes re-planning, provision of infrastructure and utilities, and improvement of the quality of life and public health. In addition, the State shall guarantee the provision of resources necessary for implementing such plan within a specified period of time.

Article (79)

Each citizen has the right to healthy and sufficient food and clean water. The State shall ensure food resources to all citizens. The State shall also ensure sustainable food sovereignty and maintain agricultural biological diversity and types of local plants in order to safeguard the rights of future generations.

Article (80)

Anyone under the age of 18 shall be considered a child. Each child shall have the right to a name, identity documents, free compulsory vaccination, health and family or alternative care, basic nutrition, safe shelter, religious education, and emotional and cognitive development.

The State shall ensure the rights of children with disabilities, their rehabilitation and their integration in the society.

The State shall provide children with care and protection from all forms of violence, abuse, mistreatment and commercial and sexual exploitation.

Every child shall be entitled to acquire early education in a childhood center until the age of six. It is prohibited to employ children before the age of completing their preparatory education (six years of primary and three years of preparatory) or in jobs which subject them to danger.

The State shall also develop a judicial system for children that have been victims and or are witnesses. Children may not be held criminally accountable or detained save as provided in the Law and for the period of time specified therein. In such a case, they shall be provided with legal assistance and detained in appropriate locations separate from those allocated for the detention of adults.

The State shall endeavor to achieve the best interest of children in all measures taken against them.

Article (81)

The State shall guarantee the health, economic, social, cultural, entertainment, sporting and educational rights of persons with disabilities and dwarves, strive to provide them with job opportunities, allocate a percentage of job opportunities to them, and adapt public facilities and their surrounding environment to their special needs. The State shall also ensure their exercise of all political rights and integration with other citizens in compliance with the principles of equality, justice and equal opportunities.

Article (82)

The State shall guarantee the provision of care to the youth and youngsters shall endeavour to discover their talents; develop their cultural, scientific, psychological, physical and creative abilities, encourage their engagement in group and volunteer activities and enable them to participate in public life.

Article (83)

The State shall guarantee the health, economic, social, cultural and entertainment rights of the elderly people, provide them with appropriate pensions which ensure a decent life for them, and enable them to participate in public life. In its planning of public facilities, the State shall take into account the needs of the elderly. The State shall encourage civil society organizations to participate in taking care of the elderly people.

All the foregoing is to be applied as regulated by Law.

Article (84)

Everyone has the right to exercise sports. The State institutions and civil society shall endeavor to discover and sponsor the talented athletes and take the necessary measures to encourage the exercise of sports.

The Law shall regulate the affairs of sports and non-governmental sporting agencies in accordance with international standards and shall regulate the manner of settling sporting disputes.

Article (85)

Every individual shall have the right to address public authorities in writing and under his own signature. Public authorities may not be addressed in the name of any groups except for any entity having a legal personality.

Article (86)

Protecting national security is a duty. The responsibility of all parties to uphold national security is guaranteed by the Law.Defending the nation and the protection of its land are an honor and a sacred duty. Military service is mandatory according to the Law.

Article (87)

Participation of citizens in the public life is a national duty. Every citizen shall have the right to vote, run for elections, and express his/her opinion in referendums. The Law shall regulate the exercise of these rights. There may be exemption from the performance of this duty in certain cases to be specified by Law.

The State shall be responsible for entering the name of each citizen in the voters database without request therefrom provided he/she satisfies the conditions for voting. The State shall also purge this database on a periodic basis in pursuance of the Law. The State shall guarantee the safety, neutrality and integrity of referendum and election procedures. It is prohibited to use public funds, government agencies, public facilities, worship places, business sector institutions and non-governmental organizations and institutions for political purposes or election publicity.

Article (88)

The State shall safeguard the interests of Egyptians living abroad, protect them and protect their rights and freedoms, enable them to perform their public duties towards the State and society, and encourage their contribution to the development of the nation.

The Law shall regulate the participation of Egyptians living abroad in elections and referendums in a manner consistent with their particular circumstances, without being restricted by the provisions of voting, counting of ballots and announcing of results, set forth in this Constitution. This is without prejudice to providing guarantees to ensure the integrity and neutrality of the election and referendum process.

Article (89)

All forms of slavery, oppression, forced exploitation of human beings, sex trade, and other forms of human trafficking are prohibited and criminalized by Law.

Article (90)

The State shall encourage the charitable endowment system for the establishing and sponsoring of scientific, cultural, health, social institutions and others, and shall ensure the independence thereof. The affairs of such institutions shall be managed in accordance with the conditions set by the person who created the endowment, as regulated by Law.

Article (91)

The State may grant political asylum to any foreigner persecuted for defending the interests of people, human rights, peace or justice.

Extradition of political refugees is prohibited. All of the foregoing shall be according to the Law.

Article (92)

Inalienable rights and freedoms of citizens may not be suspended or reduced.

No law regulating the exercise of rights and freedoms may restrict such rights and freedoms in a manner prejudicing the substance and the essence thereof.

Article (93)

The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions.

Part IV
Rule of Law

Article (94)

The rule of law shall be the basis of governing in the State.

The State shall be governed by Law. The independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms.

Article (95)

Penalties are personal. There shall be no crime or punishment except pursuant to a law, and a penalty may only be inflicted by a court judgment. Penalty shall only be imposed for acts committed after the effective date of the law imposing it.

Article (96)

The accused person is presumed innocent until proven guilty in a fair legal trial in which the right to defend himself is guaranteed.

The law shall regulate the appeal of judgments passed on felonies.

The State shall provide protection to victims, witnesses, accused and informants as necessary and in accordance with the Law.

Article (97)

Litigation is a right that is safeguarded and an inalienable right for all. The State shall guarantee the accessibility of judicature for litigants and rapid adjudication on cases. It is prohibited to immunize any administrative act or decision from judicial review. No person may be tried except before the ordinary judge. Exceptional courts are prohibited.

Article (98)

The right of defense either in person or by proxy is guaranteed. The independence of the legal profession and the protection of its rights is a guarantee for the right of defense.

The law shall provide all means by which those who are financially unable can resort to justice and defend their rights.

Article (99)

Any violation of personal freedom, or the sanctity of the private life of citizens, or any other public rights and freedoms which are guaranteed by the Constitution and the Law is a crime. The criminal and civil lawsuit arising of such crime shall not abate by prescription. The affected party shall have the right to bring a direct criminal action.

The State shall guarantee fair compensation for the victims of such violations. The National Council for Human Rights may file a complaint with the Public Prosecution of any violation of these rights, and it may intervene in the civil lawsuit in favor of the affected party at its request. All of the foregoing is to be applied in the manner set forth by Law.

Article (100)

Court judgments shall be issued and enforced in the name of the People. The State shall guarantee the means of the enforcement thereof as regulated by Law. Refraining from or delay in the enforcement of such judgments by the competent public servants is a crime punishable by Law. In such a case, the party in favor of whom the judgment is passed shall have the right to bring a direct criminal action before the competent court.The Public Prosecution shall, at the request of the party in favor of whom the judgment is passed, initiate criminal action against the public servant refraining from executing the judgment or interrupting such execution.

Part V
The System of Government
Chapter One
The Legislative Power (House of Representatives)

Article (101)

In the manner stated in the Constitution, the House of Representatives is entrusted with the authority to enact legislations and approve the general policy of the State, the general plan of economic and social development and the State budget. It exercises oversight over the actions of the executive power.

Article (102)

The House of Representatives is composed of no less than four hundred and fifty members elected by direct secret public ballot.

A candidate for the membership of the House must be an Egyptian citizen, enjoying civil and political rights, a holder of at least the certificate of basic education, and should not be below 25 Gregorian years of age on the day of opening candidacy registration.

Other candidacy requirements, the electoral system, and division of electoral constituencies shall be defined by law in a manner which observes fair representation of the population and

governorates and equitable representation of voters. Elections based on the plurality voting system or proportional list, or a combination of both at whatsoever ratio may be adopted.

The President of the Republic may appoint no greater than 5% of the members, the method of nomination thereof shall be stipulated by Law.

Article (103)

A member of the House of Representatives shall devote him/herself on a full time basis for the tasks of membership and his/her post shall be reserved for him/her in accordance with the Law.

Article (104)

As a condition for undertaking his/her duties, a House of Representatives member shall take the following oath: "I swear by The Almighty God to loyally uphold the republican system, respect the Constitution and the Law, fully uphold the interests of the People, and to safeguard the independence of the nation and the integrity and safety of ."

Article (105)

A House of Representatives member shall receive a remuneration determined by Law. In case the remuneration is changed, such change will only come into force at the commencement of the legislative term following the one during which the change was adopted.

Article (106)

The term of membership in the House of Representatives is five calendar years, commencing from the date of its first session.

Elections for a new House of Representatives shall be held during the sixty days preceding the end of the term of previous House.

Article (107)

The Court of Cassation shall have jurisdiction over the validity of membership in the House of Representatives. Appeals shall be submitted to the Court of Cassation within a period not exceeding thirty days from date on which the final election results are announced. Appeals shall be adjudicated within sixty days from the date of the receipt thereof.

In the event that a judgment declares a membership invalid, the invalidity of the membership shall be effective as of the date on which the court judgment is notified to the House.

Article (108)

In case a seat of a House of Representatives becomes vacant at least six months prior to the expiry of his tenure, the vacant position must be filled in accordance with Law within sixty days from the date on which the House reports the vacancy.

Article (109)

Throughout its membership tenure, no House of Representatives member may, whether in person or by proxy, buy, rent or lease any asset owned by the State or a public-law legal persons or a public sector company or a public enterprise sector company; sell to or barter with

the state any part of its own property or conclude a contract with the State as a vendor, supplier, contractor or otherwise as set out by Law. Any of such acts shall be void.

A member must submit a financial estate disclosure upon taking membership and at the end of membership and at the end of each year of membership.

In case a House of Representatives member receives cash or in-kind gift because of or in connection with his/her membership, title thereto shall devolve to the State public treasury.

All the foregoing shall be as regulated by Law.

Article (110)

Membership in the House of Representatives may only be dropped or cancelled if a member has lost confidence and esteem or ceases to satisfy any membership condition based on which he was elected or if he has violated the duties of membership.

The decision of cancellation must be issued by a majority of two-thirds of the members of the House of Representatives.

Article (111)

The House of Representatives shall accept resignation of its members, which must be submitted in writing. To be accepted, a resignation must not be submitted after the House has initiated procedures for cancelling the membership of the resigning member.

Article (112)

A House of Representatives member shall not be held accountable for any opinions expressed concerning the performance of his duty in the House or its committees.

Article (113)

Except in cases of *flagrante delicto*, it shall be prohibited to take any criminal action, under the Articles of felonies and misdemeanors, against a House of Representatives member without the prior permission from the House. In case the House of Representatives is not in session, a permission must be obtained from the House's Bureau, and the House must be notified at its first session.

In all cases, a decision should be taken on any motion for permission to take legal action against a House of Representatives member within thirty days; otherwise, the motion shall be deemed accepted.

Article (114)

The seat of the House of Representatives shall be in Cairo.

However, in exceptional circumstances, the House may hold its sessions elsewhere, at the request of the President of the Republic or one-third of the members of the House of Representatives.

Any meetings held otherwise and any resolutions passed thereby shall be void.

Article (115)

The President of the Republic shall invite the House of Representatives for its annual ordinary session before the first Thursday of October; failing such invitation, the House is required by the Constitution to meet on the stated day.

The ordinary session shall continue for at least nine months. The President of the Republic shall bring each session to close with the approval of the House. This shall not be permissible except after State's General Budget has been approved.

Article (116)

At the President of the Republic's request or upon a motion signed by at least one tenth of the House members, the House of Representatives may hold an extraordinary meeting to consider an urgent issue.

Article (117)

At the first meeting of its annual regular session, the House of Representatives shall elect, from among its members, a speaker and two deputies for the full legislative term. If the office of any of the aforementioned persons becomes vacant, a substitute shall be elected by the House. The House's internal regulations shall provide for the rules and procedures of election. If any of the aforementioned persons fails to fulfill the duties of his office, one-third of the House members may request to relieve him of his office. The relevant decision shall be issued by a majority of two-thirds of the members.

In all cases, neither the Speaker nor any of the two deputies may be elected for more than two consecutive legislative terms.

Article (118)

The House of Representatives shall set its own internal regulations of its work and the manner of exercising its authorities and maintaining order therein. Such internal regulations shall be issued by a law.

Article (119)

The House of Representatives shall be competent to maintain order therein and this duty shall be incumbent upon the Speaker of the House.

Article (120)

The sessions of the House of Representatives shall be held in public.

The House may hold a secret session at the request of the President of the Republic, the Prime Minister, the Speaker of the House, or at least twenty of the House members. By the majority of 33 its members, the House shall decide whether the discussion in question is to be conducted in a public or a secret session.

Article (121)

The meetings of the House and resolutions passed thereby shall not be deemed valid unless attended by the majority of its members.

In cases other than those requiring a special majority, resolutions shall be passed by the absolute majority of the members present. In case there is a tie of votes, the subject matter in deliberation shall be deemed rejected.

Laws shall be issued by the absolute majority of the members present, provided that such majority constitutes not less than one third of the House members.

The Laws deemed complementary to the Constitution shall be issued by a majority of of two thirds of the House members. Laws regulating presidential or parliamentary or municipal elections, political parties, the judiciary, related to judicial bodies and judicial organizations, and those regulating the rights and freedoms stipulated in the Constitution shall be deemed complementary to the Constitution.

Article (122)

The President of the Republic, the Cabinet, and every House member shall have the right to propose laws.

Every bill presented by the government or one tenth of the House members shall be referred to the competent specialized committees of the House for review and submission of a report to the House. A committee may seek the opinion of experts on the matter in question.

No bill presented by a member can be referred to the specialized committee unless it has been permitted by the committee responsible for proposals and approved by the House. If the committee responsible for proposals rejects a bill, it must provide a reasoned decision.

Any bill or proposed law rejected by the House may not be re-presented during the same legislative term.

(Article 123)

The President of the Republic has the right to issue laws or reject them.

If the President of the Republic objects to a draft law approved by the House of Representatives, he/she shall refer it back to the House of Representatives within thirty (30) days as of the date when the House of Representatives notified the President of such approval. If the President does not refer the draft law back to the House of Representatives within this period, the draft law shall be deemed a Law and shall be issued.

If the draft law is referred back to the House of Representatives within the aforementioned period and approved again by a majority of two-thirds of its members, it shall be deemed a Law and shall be issued.

Article (124)

The State budget shall include all of its revenues and expenditures without exception. The draft budget shall be submitted to the House of Representatives at least ninety (90) days before the beginning of the fiscal year; and shall not be effective unless approved thereby. Voting thereon shall be made on a section-by-section basis.

The House of Representatives may alter the expenditures stated in the draft budget, except for those allocated to honor a specific State liability.

Should such alteration result in an increase in total expenditures, the House of Representatives must reach an agreement with the Government on the means to procure sources of revenue so as to restore a balance between both. The State budget shall be issued by a law which may include an amendment of another existing law to the extent necessary to achieve such balance.

In all cases, the budget law may not include any provision that puts new burdens on citizens.

The Law shall specify the fiscal year, the method of preparing the State budget, and the provisions of the budgets of public bodies and organizations and their accounts.

The House of Representatives must approve the transfer of any funds from one section of the State budget to another, as well as any expenditure not included therein or in excess of its estimate. Such approval shall be issued by a law.

Article (125)

The final accounts of the State budget must be submitted to the House of Representatives within a period not exceeding six (6) months as of the end of the fiscal year. The annual report of the Central Auditing Organization (CAO) and the latter's notes on the final accounts shall be submitted therewith.

The final accounts shall be put to vote on a section-by-section basis and shall be issued by a law.

The House of Representatives has the right to ask CAO for any additional data or reports.

Article (126)

The Law shall regulate the basic rules for the collection of public funds and the procedures for their disbursement.

Article (127)

The executive power may not obtain a loan or funding or engage in a project that is not listed in the approved State budget which entails expenditure from the State treasury within a subsequent period, except with the approval of the House of Representatives.

Article (128)

The Law shall specify the rules for setting salaries, pensions, indemnities, subsidies, and bonuses which are paid from the State treasury; and shall set out the cases in which exception from such rules may be made, as well as, the authorities in charge of their application.

Article (129)

Every member of the House of Representatives may direct any question to the Prime Minister, or one of his/her deputies, or a minister, or one of his/her deputies on any matter that falls within their respective authorities; and the latter must respond to such question during the same annual session.

The member may withdraw the question at any time. A question may not be converted to an interrogation in the same session.

Article (130)

Every member of the House of Representatives may direct an interrogation to the Prime Minister, or one of his/her deputies or a minister or one of his/her deputies in order to hold them accountable for matters that fall within their respective authorities.

The House of Representatives shall discuss the interrogation at least seven (7) days after its submission, within a maximum of sixty (60) days, except in cases of urgency as determined by the House and agreed by the Government.

Article (131)

The House of Representatives may decide to withdraw confidence from the Prime Minister, or one of his/her deputies or a minister or one of his/her deputies.

Filing a motion of no confidence may not be made except after an interrogation and upon a proposal submitted by at least one-tenth of the members of the House of Representatives. The House of Representatives shall issue a decision after considering the interrogation. Withdrawal of confidence requires the affirmative vote of a majority of the House members.

In all cases, a no-confidence motion may not be filed in connection with an issue that has already been decided upon in the same annual session.

If the House of Representatives decides to withdraw confidence from the Prime Minister, or one of his/her deputies, or a minister or one of his/her deputies, with whom the Government has announced its solidarity with before voting, then that Government must resign. If the noconfidence resolution concerns a certain member of the Government, that member must resign.

Article (132)

At least 20 members of the House of Representatives may request the discussion of a public issue for the purpose of seeking a clarification on the Government's policy relating to such issue.

Article (133)

Any member of the House of Representatives may present a proposed recommendation on a public issue to the Prime Minister or one of his/her deputies, or a minister or one of his/her deputies.

Article (134)

Every member of the House of Representatives may submit an early day motion or urgent statement to the Prime Minister or one of his/her deputies, or a minister or one of his/her deputies in relation to urgent matters of public importance.

Article (135)

The House of Representatives may form a special fact-finding committee or entrust one of its existing committees with finding facts on a public matter or inspect the activities of an administrative body, public agency or public projects, for the purpose of finding facts on a specific issue, and inform the House of Representatives of the true financial, administrative or

economic status, or to conduct investigations on a past activity or otherwise. The House of Representatives shall decide what it deems appropriate in this regard.

In order to carry out its mission, such a committee may collect the evidence it deems necessary and may summon individuals to give statements. All bodies shall comply with the committee's requests and place at its disposal all the documents, evidence, or anything otherwise required.

In all cases, every member of the House of Representatives is entitled to obtain any data or information from the executive power which is related to its performance of his/her duties at the House of Representatives.

Article (136)

The Prime Minister and his deputies, and the ministers and their deputies may attend the sessions of either the House of Representatives or any of its committees. Their attendance shall be obligatory if requested by the House. They may seek assistance from senior officials of their choice.

They must be heard whenever they request to speak. They must answer questions relating to issues under discussion, without having the right to vote.

Article (137)

The President of the Republic may not dissolve the House of Representatives except in cases of necessity, by a reasoned decision and following a public referendum. The House of Representatives may not be dissolved for the same reason which caused the dissolution of the previous House.

The President of the Republic shall issue a decision to suspend the sessions of the House and hold a referendum on the dissolution within no more than twenty days. If the voters agree by majority of valid votes, the President of the Republic shall issue the decision of dissolution, and call for new elections within no more than thirty days from the date of the stated decision. The new House shall convene within the ten days following the announcement of final the results.

Article (138)

Every citizen may submit written proposals to the House of Representatives regarding public issues, and may also submit complaints to the House of Representatives to be referred to the competent ministers. If the House of Representatives so requests, the Minister must provide clarifications, and the concerned person shall be informed of the result.

Chapter Two
The Executive Power

Branch I
The President of the Republic

Article (139)

The President of the Republic is the head of State and the head of executive power. He shall care for the interests of the people, safeguard the independence of the nation and the territorial integrity and safety of its lands, abide by the provisions of the Constitution, and assume his authorities as prescribed therein.

Article (140)

The President of the Republic shall be elected for a period of four calendar years, commencing from the day following the termination of the term of his predecessor. The President may only be reelected once.

The procedures for electing the President of the Republic shall be initiated at least one hundred twenty days prior to the end of the presidential term. The result must be announced at least thirty days prior to the end of such term.

The President of the Republic may not hold any partisan position throughout his presidential term.

Article (141)

A presidential candidate must be an Egyptian born to Egyptian parents, and neither he or his parents or his spouse may have held any other nationality. He must enjoy civil and political rights, must have performed the military service or have been exempted therefrom by law, and shall not be less than forty calendar years of age on the day of commencing candidacy registration. Other requirements for candidacy shall be set out by Law.

Article (142)

To be accepted as a candidate for the presidency, candidates must receive the recommendation of at least twenty elected members of the House of Representatives, or support from at least twenty five thousand citizens enjoying the right to vote, in at least fifteen governorates, with a minimum of one thousand supporter from each governorate.

In all cases, no one can support more than one candidate as regulated by Law.

Article (143)

The President of the Republic shall be elected by direct secret ballot, with an absolute majority of valid votes.

Procedures for electing the President of the Republic are regulated by Law.

Article (144)

As a condition for assuming his duties, the President of the Republic shall take the following oath before the House of Representatives: "I swear by The Almighty God to loyally uphold the republican system, respect the Constitution and the Law, fully uphold the interests of the People and to safeguard the independence of the nation and the integrity and safety of its territories."

In case of the absence of the House of Representatives, the oath shall be taken before the General Assembly of the Supreme Constitutional Court.

Article (145)

The salary of the President of the Republic shall be determined by Law. The President may not receive any other salary or remuneration. No modification to the salary may come into effect during the presidential term during which it is approved. Throughout his presidential term, the President may not, whether in person or by proxy, be self-employed, engage in commercial, financial or industrial activity, buy, rent or lease any property owned by the state

or by a publiclaw legal person, or a public enterprise sector company, sell or barter any part of his own property with the State, or conclude a contract with the State as a vendor, supplier, contractor or otherwise as set out by Law. Any of such acts shall be void.

The President must submit a financial estate disclosure upon taking office, upon leaving it, and at the end of each year of service. Such financial estate disclosure is to be published in the Official Gazette.

Throughout the presidential term, the President of the Republic may not award himself any orders, decorations or medals.

In case the President of the Republic receives, in person or by proxy a cash or in-kind gift because of or in connection with the presidential office, title thereto shall devolve to the State public treasury.

Article (146)

The President of the Republic shall assign a Prime Minister to form the government and introduce his/her program to the House of Representatives. If his government does not win the confidence of the majority of the members of the House of Representatives within thirty days at the most, the President shall appoint a Prime Minister who is nominated by the party or the coalition that holds the majority or the highest number of seats in the House of Representatives. If the government of such prime minister fails to win the confidence of the majority of the members of the House of Representatives within thirty days, the House shall be deemed dissolved, and the President of the Republic shall call for the election of a new House of Representatives within sixty days from the date on which the dissolution is announced.

In all cases, the total periods for choice of government set forth in this Article shall not exceed sixty days.

In case the House of Representatives is dissolved, the Prime Minister shall present to the new House of Representatives the formation of his government and its program, at its first session.

In the event the government is chosen from the party or the coalition that holds the majority or the highest number of seats in the House of Representatives, the President of the Republic shall, in consultation with the Prime Minister, choose the Ministers of Defense, Interior, Foreign Affairs and Justice.

Article (147)

The President of the Republic may relieve the government from carrying out its duties, subject to the approval of the majority of the members of the House of Representatives.

The President of the Republic may conduct a cabinet reshuffle after consultation with the Prime Minister and approval of the House of Representatives by an absolute majority of the members present, which must not be less than one third of its members.

Article (148)

The President of the Republic may delegate some of his powers to the Prime Minister, his deputies, ministers, or governors. None of them may delegate such authorities to others. All of the foregoing shall be regulated by Law.

Article (149)

The President of the Republic may call the government to convene a meeting to consult on important issues, and the President shall preside over the meetings that he attends.

Article (150)

Jointly with the Cabinet, the President of the Republic shall set the State's General Policy and oversee its implementation as stated in the Constitution.

The President of the Republic may deliver a statement on the State's General Policy before the House of Representatives at the opening of its annual regular session.

The President may deliver other statements or address other messages to the House.

Article (151)

The President of the Republic shall represent the State in its foreign relations and conclude treaties and ratify them after the approval of the House of Representatives. Such treaties shall acquire the force of law following their publication in accordance with the provisions of the Constitution.

Voters must be called for referendum on the treaties related to making peace and alliance, and those related to the rights of sovereignty. Such treaties shall only be ratified after the announcement of their approval in the referendum.

In all cases, no treaty may be concluded which is contrary to the provisions of the Constitution or which results in ceding any part of state territories.

Article (152)

The President of the Republic is the Supreme Commander of the Armed Forces. The President shall not declare war, or send the armed forces to a combat mission outside the State borders, except after consultation with the National Defense Council and obtaining the approval of the House of Representatives by a majority of two-thirds of the members.

In case the House of Representatives has not been elected, the Supreme Council of the Armed Forces (SCAF) must be consulted and the approval of both the Cabinet and National Defense Council must be obtained.

Article (153)

The President of the Republic shall appoint and dismiss civil and military employees and political representatives and accredit political representatives of foreign States and bodies in accordance with the Law.

Article (154)

After consultation with the Cabinet, the President of the Republic may declare the state of emergency as regulated by Law. Such declaration must be presented to the House of Representatives within the following seven days to decide thereon as it deems fit.

If the declaration takes place while the House of Representatives is not in regular session, the House must be invited to convene immediately in order to consider such declaration.

In all cases, the declaration of the state of emergency must be approved by a majority of the members of the House of Representatives. The state of emergency shall be declared for a specified period not exceeding three months, which may only be extended for another similar period after obtaining the approval of two-thirds of the House members. In case the House of Representatives has not been elected, the matter shall be referred to the Cabinet for approval provided, however, that it is presented to the new House of Representatives at its first session.

The House of Representatives may not be dissolved while the state of emergency is in force.

Article (155)

After consultation with the Cabinet, the President of the Republic may issue a pardon or reduce a sentence.

General amnesty may only be granted by virtue of a law, ratified by the majority of the members of the House of Representatives.

Article (156)

In case an event which requires taking urgent measures, which cannot be delayed, occurs while the House of Representatives is not in session, the President of the Republic shall call the House for an urgent meeting to present the matter thereto. If the House of Representatives have not been elected, the President of the Republic may issue decrees having the force of law, provided that they are then presented to, discussed and approved by the new House of Representatives within fifteen days from the commencement of its session. If such decrees are neither presented nor discussed by the House, or if they are presented but not ratified thereby, their force of law shall retroactively be revoked without need for issuing a decision to that effect, unless the House confirms its effectiveness during the previous period or decides to settle the consequences thereof.

Article (157)

Without prejudice to the provisions of the Constitution, the President of the Republic may call for a referendum on issues relating to the supreme interests of the State.

In case a call for referendum involves more than one issue, voting must be made separately on each issue.

Article (158)

The President of the Republic may submit his resignation to the House of Representatives. If the House has not been elected, he shall submit the same to the General Assembly of the Supreme Constitutional Court.

Article (159)

Accusing the President of the Republic of violating the provisions of the Constitution, treason or any other felony must be based on a motion signed by at least the majority of the members of the House of Representatives. The indictment shall only be issued by the majority of two-thirds of the members of the House of Representatives and after carrying an investigation by the Prosecutor General. In case the Prosecutor General is prevented from same, he shall be replaced by one of his assistants.

As soon as this indictment is issued, the President of the Republic shall be stopped from carrying out his duties; this is considered as a temporary impediment precluding the President from performing his competences until a verdict is issued in the case.

The President of the Republic shall be tried before a special court headed by the President of the Supreme Judicial Council with the membership of the most senior deputy of the President of the Supreme Constitutional Court, the most senior deputy of the President of the State Council, and the two most senior Presidents of the Courts of Appeal; prosecution is to be carried out before such court by the Prosecutor General. In case one of the aforementioned persons is prevented from serving, he shall be replaced by the person following him in seniority. The court verdicts shall be final and not subject to appeal.

The Law shall regulate the investigation and trial procedures. In case of conviction, the President of the Republic shall be relieved of his post without prejudice to any other penalties.

Article (160)

In case the President of the Republic is temporarily prevented from assuming his powers, the Prime Minister shall act in his place.

If the President of the Republic's office becomes vacant due to his resignation, death, or permanent inability to work, the House of Representatives shall announce the vacancy. If such vacancy is attributable to any other reason, such announcement shall be made by a majority of at least two thirds of the members of House of Representatives. The House of Representatives shall then notify the National Electoral Commission, and the Speaker of the House of Representatives shall temporarily assume the powers of the President of Republic.

In case the House of Representatives has not been elected, the General Assembly of the Supreme Constitutional Court and its Chairman shall replace the House of Representatives and its Speaker with respect to the above.

In all events, a new President must be elected within a period not exceeding ninety (90) days as of the date of vacancy. In such a case, the presidential term shall start as of the date of announcement of the election results.

The interim President may not run for presidency or request any amendment to the Constitution or dissolve the House of Representatives or dismiss the Government.

Article (161)

The House of Representatives may propose to withdraw confidence from the President of the Republic and hold early presidential elections upon filing a reasoned motion to be signed by at least the majority of the members of the House of Representatives and upon approval of twothirds of its members. The motion may only be filed once for the same reason within the presidential term.

Upon approval of the proposal to withdraw confidence, the matter of withdrawing confidence from the President of the Republic and holding early presidential elections shall be put to public referendum to be called by the Prime Minister. If the majority approves the decision to withdraw confidence, the President of the Republic shall be relieved from his office, the office of the President of the Republic shall be deemed vacant, and early presidential elections shall be held within sixty (60) days as of the date of announcing the results of referendum. If the

result of the referendum is in the negative, the House of Representatives shall be deemed dissolved, and the President of the Republic shall call for election of a new House of Representatives within thirty (30) days as of the date of dissolution.

Article (162)

If the vacancy of the presidential office coincides with the holding of a referendum or the election of the House of Representatives, the presidential elections shall be given priority. The then existing House of Representatives shall remain in place until the completion of the presidential elections.

Branch II
The Government

Article (163)

The government is the supreme executive and administrative body of the State, and consists of the Prime Minister, his/her deputies, the Ministers, and their deputies.

The Prime Minister shall head the government, oversee its work, and direct the performance of its functions.

Article (164)

The Prime Minister shall be an Egyptian citizen born to Egyptian parents and neither he/she nor his/her spouse may hold the nationality of any other country, shall enjoy civil and political rights, shall have been drafted into or legally exempted from the military service, and shall be at least thirty five (35) Gregorian years of age at the time of appointment.

Anyone appointed as a member of the government shall be an Egyptian citizen, shall enjoy all civil and political rights, shall have been drafted into or legally exempted from the military service, and shall be at least thirty (30) Gregorian years of age at the time of appointment.

It is prohibited to combine between the membership of the government and the membership of the House of Representatives. . If a member of the House of Representatives is appointed to the government, the seat thereof in the House shall become vacant as at the date of this appointment.

Article (165)

As a condition for assuming their duties, the Prime Minister and members of government shall take the following oath before the President of the Republic: "I swear by Allah, the Almighty, to loyally uphold the republican system, to respect the Constitution and the law, to fully uphold the interest of the People, and to safeguard the independence of the nation and the integrity and safety of its territories."

Article (166)

The salary of the Prime Minister and the members of government shall be defined by Law, and they may not receive any other salary or remuneration, nor engage, throughout the term of their respective offices, whether in person or through an intermediary, in self-professions, or commercial, financial or industrial business activities. Further, they shall not buy or rent any property owned by the state or a public legal person or a public sector company, or a public

enterprise sector company, nor lease or sell any of their property to, or barter the same with the State, nor conclude a contract with the State as vendors, suppliers, contractors or otherwise. Any such actions shall be deemed null and void.

The Prime Minister and the members of government shall submit a financial estate disclosure upon taking office, upon leaving the same, and at the end of each year of service. The financial estate disclosure shall be published in the Official Gazette.

If the Prime Minister or any of the members of government receive cash or in-kind gifts, because of or in relation to their posts, the ownership thereof shall transfer to the State's treasury. The foregoing shall be regulated by Law.

Article (167)

The government shall particularly exercise the following functions:

1- To collaborate with the President of the Republic in developing the general policy of the State, and to supervise its implementation;
2- To maintain the security of the nation, and to protect the rights of citizens and the interest of the State;
3- To direct, coordinate and follow up on the work of the ministries and their affiliated public bodies and organizations;
4- To prepare draft bills and decrees;
5- To issue administrative decrees in accordance with the law, and to follow up on their implementation;
6- To develop the draft for the general plan of the State;
7- To prepare the draft annual budget of the State;
8- To conclude loan contracts and to grant the same in accordance with the provisions of the Constitution;
9- To implement the laws.

Article (168)

Within the framework of the State's general policy, the minister shall develop the Ministry's general policy in collaboration with the competent authorities, supervise the implementation thereof and provide guidance and oversight.

Top management posts in all ministries shall include a permanent undersecretary to ensure institutional stability and raising the level of efficient implementation of its policy.

Article (169)

Any member of the government may make a statement before the House of Representatives, or one of its committees, concerning any matters falling within his/her mandate.

The House or the committee shall discuss such statement and convey its opinion regarding it.

Article (170)

The Prime Minister shall issue the necessary regulations for the execution of laws, in a manner that shall not involve any disruption of, amendment to, or exemption from their execution, and shall have the right to delegate others in issuing them, unless the law designates who shall issue the required executive regulations.

Article (171)

Upon the approval of the Council of Ministries, the Prime Minister shall issue the decrees necessary for the creation and organization of public utilities and services.

Article (172)

Upon the approval of the Council of Ministries, the Prime Minister shall issue the disciplinary regulations.

Article (173)

The Prime Minister and the members of the government shall be subject to the general rules governing investigation and trial procedures, in case that they commit crimes while or by reason of exercising the functions of their posts. The end of their term of service shall not preclude the institution or resumption of prosecution against them.

In case that the Prime Minister or any of the members of the government is accused of treason, the provisions stipulated in Article 159 herein shall apply.

Article (174)

In case of resignation of the Prime Minister, the letter of resignation shall be submitted to the President of the Republic. If a minister offers resignation, it shall be submitted to the Prime Minister.

Branch III
The Local Administration

Article (175)

The State shall be divided into administrative units that enjoy legal personality. Such units shall include governorates, cities and villages. Other administrative units that have the legal personality may be established, if public interest so requires.

When establishing or abolishing local units or amending their boundaries, the economic and social conditions shall be taken into account. All the foregoing shall be regulated by Law.

Article (176)

The state shall ensure administrative, financial, and economic decentralization. The law shall regulate the methods of empowering administrative units to provide, improve, and well manage public facilities, and shall define the timeline for transferring powers and budgets to the local administration units.

Article (177)

The State shall ensure the fulfillment of the needs of local units in terms of scientific, technical, administrative and financial assistance, and the equitable distribution of facilities, services and resources, and shall bring development levels in these units to a common standard and achieve social justice between these units, as regulated by Law.

Article (178)

Local units shall have independent financial budgets.

The resources of local units shall include, in addition to the resources allocated to them by the State, taxes and duties of a local nature, whether primary or auxiliary. The same rules and procedures for the collection of public funds by the State shall apply to collection of such taxes and duties.

The foregoing shall be regulated by law.

Article (179)

The law shall regulate the manner in which governors and heads of other local administrative units are appointed or elected, and shall determine their competences.

Article (180)

Every local unit shall elect a local council by direct and secret ballot for a term of four years. A candidate shall be at lease twenty one (21) Gregorian years of age. The law shall regulate the other conditions for candidacy and procedures of election, provided that one quarter of the seats shall be allocated to youth under thirty five (35) years of age and one quarter shall be allocated for women, and that workers and farmers shall be represented by no less than 50 percent of the total number of seats, and these percentages shall include an appropriate representation of Christians and people with disability.

Local councils shall be competent to follow up the implementation of the development plan, f monitor of the different activities, exercise of oversight over the executive authorities using tools such as providing proposals, and submitting questions, briefing motions, interrogations and others, and to withdraw confidence from the heads of local units, as regulated by Law.

The law shall define the competences of other local councils, their financial sources, guarantees of their members, and the independence of such councils.

Article (181)

Local councils' resolutions that are issued within their respective mandates shall be final. They shall not be subject to the interference by the executive authority, except to prevent the council from overstepping its jurisdiction, or causing damage to the public interest or the interest of other local councils.

Any dispute pertaining to the jurisdiction of these local councils in villages, centers or towns shall be settled by the governorate-level local council. Disputes regarding the jurisdiction of governorate-level local councils shall be resolved, as a matter of urgency, by the General Assembly of the Legal Opinion and Legislation Departments of the State Council. The foregoing shall be regulated by Law.

Article (182)

Every local council shall develop its own budget and final accounts, as regulated by Law.

Article (183)

Local councils shall not be dissolved by virtue of a general administrative action.

The Law shall regulate the manner of dissolving and re-electing local councils.

Chapter Three
The Judiciary
Branch I
General Provisions

Article (184)

The Judiciary is an autonomous authority that carries out its tasks through courts of all types and degrees. Courts shall issue their rulings in accordance with the law, and the law shall define the jurisdiction of the courts. Interference in the affairs of the courts or in the lawsuits under their consideration shall constitute a crime that does not lapse by prescription.

Article (185)

Each judicial body or organization shall manage its own affairs, and shall have an independent budget, the components of which shall be fully examined by the House of Representatives. Upon its approval, this budget shall be included in the State budget under one budget line. Each judicial body or organization shall be consulted with regards to the bills regulating its affairs.

Article (186)

Judges are independent and immune to dismissal, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment and retirement shall be regulated by the law. The law shall further regulate their disciplinary accountability. They may not be fully or partly seconded except to the agencies determined by the law and to perform the tasks set forth therein. All the foregoing shall be in the manner that maintains the independence and impartiality of the judiciary and judges, and shall prevent conflicts of interest. The rights, duties and guarantees granted to them shall be specified by Law.

Article (187)

Court sessions shall be public, unless the court decides on its secrecy to safeguard public order or public morals. In all cases, court judgments shall be pronounced in publicly held sessions.

Branch II
The Judiciary & The Prosecution

Article (188)

The judiciary shall decide on all disputes and crimes, except those falling within the jurisdiction of other judicial bodies. It shall solely have the jurisdiction to settle disputes relating to its own 50 members. The affairs of the judiciary shall be managed by a Supreme Council, the structure and jurisdiction of which shall be regulated by Law.

Article (189)

The Public Prosecution is an integral part of the judiciary. It shall carry out the investigation and prosecution of criminal cases, except those excepted by the law. The law shall determine its other jurisdictions.

The Prosecutor General shall be in charge of the Public Prosecution. He shall be chosen by the Supreme Council of the Judiciary from among those ranked as Vice presidents of the Court of Cassation, or from those ranked as Presidents of the Courts of Appeal or from the Assistants to the Prosecutor General. He shall be appointed by virtue of a Presidential Decree for four years or for the remaining years until he reaches the age of retirement whichever is earlier, and this appointment shall be only once during his term of service.

Branch III
The State Council

Article (190)

The State Council is an autonomous judicial body, and it shall have the exclusive jurisdiction to settle administrative disputes and disputes relevant to the execution of all its rulings. It shall have jurisdiction over disciplinary suits and appeals, and the exclusive jurisdiction to provide advice regarding legal issues to the administrative bodies determined by the law. It shall also review and draft bills and decrees of legislative nature, and shall review draft contracts to which the state or any other public authority is a party. The law shall determine its other jurisdictions.

Chapter Four
The Supreme Constitutional Court

Article (191)

The Supreme Constitutional Court is an autonomous and independent judicial body having its headquarters in Cairo. However, in cases of emergency it may, upon the approval of its General Assembly, hold its sessions elsewhere in Egypt. It shall have an independent budget, which shall be fully examined by the House of Representatives. Upon its approval, this budget shall be included in the State budget under one budget line. The General Assembly of the court shall manage its affairs and it shall be consulted regarding bills relevant to its affairs.

Article (192)

The Supreme Constitutional Court shall be solely competent to decide on the constitutionality of laws and regulations, to interpret legislative provisions, and to adjudicate on disputes pertaining to the affairs of its members, on jurisdictional disputes between judicial bodies and entities that have judicial jurisdiction, on disputes pertaining to the implementation of two final contradictory judgments, one of which is rendered by a judicial body or an authority with judicial jurisdiction and the other is rendered by another , and on disputes pertaining to the execution of its judgments and decisions.

The law shall determine the Court's other competences and regulate the procedures that are to be followed before the Court.

Article (193)

The Court shall be composed of a President and a sufficient number of deputies to the President.

The Commissioners of the Supreme Constitutional Court shall have a President and a sufficient number of Commission presidents, advisors and assistant advisors.

The General Assembly of the Court shall elect its President from among the most senior three vice-presidents of the Court. It shall further choose the vice-presidents and the members of its Commissioners, and the appointment thereof shall be made by virtue of a decree by the President of the Republic. The foregoing shall be regulated by Law.

Article (194)

The President and the vice-presidents of the Supreme Constitutional Court, and the President and members of its Commissioners are independent and immune to dismissal, and are subject to no other authority but the law. The law shall set out the conditions they must meet. The Court shall be responsible for their disciplinary accountability, as stated by the law. All rights, duties and guarantees granted to other members of the judiciary shall apply to them.

Article (195)

The judgments and decisions issued by the Supreme Constitutional Court shall be published in the Official Gazette, and they shall be binding upon everyone and all of the State authorities. They shall have *Res judicata* vis-à-vis all of them.

The law shall regulate the consequences of a judgment rendering a text of law unconstitutional.

Chapter Five
Judicial Organizations

Article (196)

The State Lawsuits Authority is an independent judicial organization. It undertakes the legal representation of the State in lawsuits filed by or against the State, and of proposing amicable settlement of disputes at any stage of litigation. It shall further have technical oversight on the departments of legal affairs of the State administrative bodies with regard to cases handled thereby. It shall draft contracts referred thereto by administrative bodies and to which the State is party. The foregoing shall be regulated by Law.

Other competences of the Organization shall be defined by the law. Its members shall have all of the guarantees, rights and duties assigned to other members of the Judiciary. Their disciplinary accountability shall be regulated by the law.

Article (197)

The Administrative Prosecution is an independent judicial organization. It undertakes investigations into financial and administrative violations, and also those referred to it. Regarding these violations, the Administrative Prosecution shall have the authorities of the administrative body to impose disciplinary penalties. Challenges against the decision of the Prosecution shall be filed before the competent disciplinary court at the State Council. It shall further initiate actions, appeals, and disciplinary proceedings before the State Council courts. All the foregoing shall be regulated by Law.

Other competences of the Administrative Prosecution shall be defined by law. All guarantees, rights and duties assigned to other members of the Judiciary shall apply to its members. Their disciplinary accountability shall be regulated by the law.

Chapter Six
The Legal Profession

Article (198)

The legal profession is a free profession which participates with the Judicial Authority in the establishment of justice and the rule of law, and ensures the right to defense. It shall be practiced by independent attorneys, and attorneys of public authorities, public sector companies and public enterprise sector companies. All attorneys shall have, while performing their duties to uphold the right to defense before the courts, the guarantees and protection granted to them by the law. Such rights shall also be granted to them before investigation and inquiry authorities. Except in cases of flagrante delicto, the arrest or detention of attorneys while exercising their right to defense shall be prohibited. The foregoing shall be determined by the law.

Chapter Seven
Experts

Article (199)

Judicial experts, forensic medicine experts, and notary public's technical staff undertake their duties independently, and shall have the guarantees and protection required for them to perform their tasks, as regulated by the Law.

Chapter Eight
The Armed Forces & The Police
Branch I
The Armed Forces

Article (200)

The Armed Forces belong to the People, and their duty is to protect the country, and preserve its security and the integrity of its territories. Only the State shall be entitled to establish the Armed Forces. No individual, organization, entity, or group shall be allowed to create military or quasimilitary squadrons, groups or organizations.

The Armed Forces shall have a supreme council, as regulated by Law.

Article (201)

The Minister of Defense is the Commander in Chief of the Armed Forces, and shall be appointed from among its officers.

Article (202)

The Law regulates the military mass mobilization, and determines the conditions of the military service, promotion and retirement in the Armed Forces.

The judicial committees for officers and personnel of the Armed Forces shall be solely competent to adjudicate on all administrative disputes pertaining to decisions affecting them. The Law regulates the rules and procedures for challenging the decisions made by these committees.

Branch II
National Defense Council

Article (203)

National Defense Council shall be chaired by the President of the Republic and comprise the membership of the Prime Minister, the Speaker of the House of Representatives, the Minister of Defense, the Minister of Foreign Affairs, the Minister of Finance and the Minister of Interior, the Chief of the General Intelligence Service, the Chief of Staff of the Armed Forces as well as the Commanders of the Navy, the Air Forces and Air Defense, the Chief of Operations of the Armed Forces, and the Head of Military Intelligence.

The Council shall be competent to examine the matters pertaining to preserving the security and integrity of the country, and to discuss the budget of the Armed Forces, which shall be included in the State budget under one budget line. The opinion of the Council shall be obtained on the bills concerning the Armed Forces.

Other competences of the Council shall be specified by Law.

Upon discussing the budget, the Head of the Financial Affairs Department of the Armed Forces and the heads of the Planning and Budgeting Committee and the National Security Committee at the House of Representatives shall join the Council.

The President of the Republic may invite any person having relevant expertise to attend the Council's meetings without having the right to vote.

Branch III
Military Courts

Article (204)

The Military Court is an independent judicial body exclusively competent to adjudicate on all crimes pertaining to the Armed Forces, the officers and personnel thereof, and their equivalents, and on the crimes committed by the personnel of the General Intelligence while and by reason of performing their duties.

No civilian shall face trial before the Military Court, except for crimes that constitute a direct assault against military facilities or camps of the Armed Forces, or their equivalents, against military zones or border zones determined as military zones, against the Armed Forces' equipment, vehicles, weapons, ammunition, documents, military secrets, or its public funds, or against military factories; crimes pertaining to military service; or crimes that constitute a direct assault against the officers or personnel of the Armed Forces by reason of performing their duties.

The law shall define such crimes, and specify the other competences of the Military Court.

Members of the Military Court shall be independent and shall be immune to dismissal. They shall have all the guarantees, rights and duties stipulated for the members of other judicial bodies.

Branch IV
National Security Council

Article (205)

The National Security Council shall be chaired by the President of the Republic, and comprise the membership of the Prime Minister, the Speaker of the House of Representatives, the Minister of Defense, the Minister of Interior, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Justice, the Minister of Health, the Minister of Communication and the Minister of Education, the Chief of the General Intelligence Service, and the Head of the Committee of Defense and National Security at the House of Representatives.

The Council shall be responsible for adopting strategies for establishing the security of the country and facing disasters and crises of all kinds, shall take the necessary measures to contain them, to identify sources of threat to the Egyptian national security, inside the country or abroad, and to undertake the necessary actions to address them at both official and popular levels.

The Council may invite any person having relevant expertise to attend its meetings without having the right to vote.

The law shall determine the other competences of the Council and its regulations.

Branch V
The Police

Article (206)

The police force is a statutory civil body that is dedicated to the service of the People and its loyalty shall be to the People. It shall ensure safety and security of the citizens, preserve public order and morality. It shall comply with the duties set out in the Constitution and the law, and shall respect human rights and fundamental freedoms. The State shall guarantee that the staff of the Police force perform their duties, and the relevant guarantees shall be regulated by Law.

Article (207)

A supreme police council shall be formed from among the most senior officers of the police force and the Head of the Legal Opinion Department at the State Council. The Council shall be competent to assist the Minister of Interior in the organization of the Police force and management of the affairs of its staff members. The other competences of the Council shall be determined by Law. The Council shall be consulted in connection with any laws pertaining to the police force.

Chapter Nine
National Elections Commission

Article (208)

The National Elections Commission is an independent authority and shall be solely competent to administer referenda and elections of the president, the parliament and the local councils. Such administration shall include the development and updating of a database for voters, proposing the division of constituencies, determination of controls for promotion and funding of electoral campaigns, as well as electoral expenditure, the disclosure of such expenditure, the supervision of such controls, the facilitation of the procedures for out-of-country voting by expatriate Egyptians, and other procedures till the announcements of the results.

The foregoing shall be regulated by law.

Article (209)

The National Elections Commission shall be administered by a board composed of 10 members to be equally assigned on full time basis from among those ranked as Vice-presidents of the Court of Cassation, those ranked as Presidents of the Courts of Appeal, Vice-presidents of the State Council, the State Lawsuits Organization and the Administrative Prosecution. They shall be selected by the Supreme Judicial Council and special councils of the aforementioned judicial bodies and organizations, as the case may be, provided that they are not members thereof. They shall be appointed by virtue of a decree by the President of the Republic. They shall be assigned to work on a full time basis at the Commission for one term of six years. The Commission shall be chaired by the most senior judge at the Court of Cassation.

Half of the members of the Council shall be replaced every three years.

The Commission may seek the assistance of independent public figures, specialists, and those deemed to have relevant expertise in the field of elections. They shall not have the right to vote.

The Commission shall have a permanent executive body. The law shall determine the composition and constitution of such executive body, and the rights, duties and guarantees of its members in a way that achieves their neutrality, independence and integrity.

Article (210)

Voting and counting of votes in referenda and elections shall be administered by members of the Commission under the overall supervision of its Board. It may seek the help of members of judicial organizations.

The voting and counting of votes in elections and referenda which take place during the 10 years following the effective date of this Constitution shall be totally overseen by members of judicial bodies and organizations according to the Law.

The High Administrative Court shall be competent to adjudicate on challenges filed against the Commission's decisions pertaining to referenda, presidential and parliamentary elections, and the results thereof. Challenges against elections of local councils shall be filed before the Administrative Courts. Dates to file challenges against these decisions shall be specified by law, provided that challenges shall be finally decided within ten days from the date of recording the challenge.

Chapter Ten
Supreme Council for the Regulation of Media

Article (211)

The Supreme Council for the Regulation of Media is an independent entity that has a legal personality, and enjoys technical, financial and administrative independence, and has an independent budget.

The Council shall be competent to regulate the affairs of audio and visual media and regulate the printed and digital press, and other media means.

The Council shall bear the responsibility for guaranteeing and protecting the freedom of press and media as stipulated in the Constitution, safeguarding its independence, neutrality, plurality and diversity, preventing monopolistic practices, monitoring the legality of the sources of funding of press and media institutions and developing the controls and criteria necessary to ensure compliance by the press and media outlets with the professional and ethical standards, and national security needs as stated in the Law.

The law shall determine the composition and regulations of the Council, and the employment conditions for its staff. The Council shall be consulted with respect to the bills and regulations related to its scope of competence.

Article (212)

The National Press Organization is an independent organization that shall manage and develop state-owned press institutions and their assets, as well as ensure their modernization, independence, neutrality and their adherence to good professional, administrative and economic standards.

The law shall determine the composition and regulations of the Organization, and the employment conditions for its staff.

It shall be consulted with respect to the bills and regulations pertaining to its scope of work.

Article (213)

The National Media Organization is an independent organization that shall manage and develop state-owned visual, audio and digital media outlets and their assets, as well as ensure their development, independence, neutrality and their adherence to good professional, administrative and economic standards.

The law shall determine the composition and regulations of the Organization and the employment conditions for its staff.

It shall be consulted with respect to the bills and regulations pertaining to its scope of work.

Chapter Eleven
National Councils, Autonomous Organizations & Control Agencies
Branch I
National Councils

Article (214)

The law shall specify the independent national councils, including the National Council for Human Rights, the National Council for Women, the National Council for Childhood and Motherhood, and the National Council for Disabled Persons. The law shall state the composition, mandates, and guarantees for the independence and neutrality of their respective members. Each council shall have the right to report to the competent authorities any violations pertaining to their fields of work.

These councils shall have legal personalities and shall be technically, financially, and administratively independent. They shall be consulted with respect to the bills and regulations pertaining to their affairs and fields of work.

Branch II
Autonomous Organizations and Control Agencies

Article (215)

Autonomous Organizations and control agencies shall be specified by Law. These organizations and agencies shall have legal personality, and shall be technically, financially and administratively independent. They shall be consulted with respect to the bills and regulations that relate to their fields of work. These bodies and agencies shall include the Central Bank, the Egyptian Financial Supervisory Authority (EFSA), the Central Auditing Organization (CAO), and the Administrative Control Authority.

Article (216)

The formation of each individual autonomous organization or regulatory agency shall be enacted by a law defining its competences and regulations, and stipulating guarantees for its independence, the necessary protection for its members, and their employment conditions in a way that ensures their neutrality and independence.

The President of the Republic shall appoint the heads of such organizations and regulatory agencies, upon the approval of the House of Representatives by a majority of its members, for a one-time renewable term of four years. They shall not be dismissed, except in the cases stated in the law. The same prohibitions applicable to the Ministers shall apply to these heads.

Article (217)

Autonomous organizations and control agencies shall submit annual reports to the President of the Republic, the House of Representatives and the Prime Minister, immediately after their issuance.

The House of Representatives shall examine such reports and take the appropriate action within a period not exceeding four months from the date of receipt. The reports shall be made available to the public.

Autonomous organizations and control agencies shall notify the competent investigation authorities of any evidence discovered in relation to violations or crimes. They shall take the necessary measures with regards to these reports within a specified period of time. The foregoing shall be regulated by Law.

Article (218)

The State shall fight corruption, and the competent control agencies and organizations shall be identified by Law.

Competent control agencies and organizations shall coordinate their activities in combating corruption, enhancing the values of integrity and transparency in order to ensure the sound performance of public functions and preserve public funds, and shall develop and follow up execution of a national strategy to combat corruption in collaboration with other competent agencies and organizations, as regulated by Law.

Article (219)

The Central Auditing Organization shall be responsible for monitoring the funds of the State, the funds of the State public and independent legal persons and other authorities as specified by Law; s well as being responsible for monitoring the implementation of the State budget and independent budgets and for auditing its final accounts.

Article (220)

The Central Bank shall be responsible for developing and overseeing the implementation of monetary, credit, and banking polices, and for monitoring the performance of banks. It is solely entitled to issue banknotes. It shall maintain the integrity of the monetary and banking system, and the stability of prices within the framework of the State general economic policy, as regulated by Law.

Article (221)

The Egyptian Financial Supervisory Authority (EFSA) shall be responsible for monitoring and supervising financial non-banking markets and instruments including capital markets, futures exchanges, insurance activities, mortgage finance, financial leasing, and factoring and securitization, as regulated by Law.

Part VI
General & Transitional Provisions
Chapter One
General Provisions

Article (222)

The city of Cairo is the capital of the Arab Republic of Egypt.

Article (223)

The national flag of the Arab Republic of Egypt consists of three colors; black, white, and red with an eagle taken from the "Eagle of Salah El Din" in golden yellow. The emblem, decorations, insignia, seal and the national anthem shall be determined by Law.

Desecration of the Egyptian flag shall be a crime punishable under the law.

Article (224)

All the provisions stipulated by laws and regulations prior to the promulgation of this Constitution shall remain in force, and they may neither be amended nor repealed except in accordance with the regulations and procedures prescribed herein.

The state shall be obliged to issue laws executing the provisions of this Constitution.

Article (225)

Laws shall be published in the Official Gazette within 15 days from the date of their issuance, to be effective after 30 days from the day following the date of publication, unless the law specifies a different date.

Provisions of the laws shall only apply from the date of their entry into force. However, in articles pertaining to non-criminal and non-tax-related matters, the contrary may be provided

for in the law, upon approval by a majority of two thirds of the members of House of Representatives.

Article (226)

The amendment of one or more articles of the Constitution may be requested by the President of the Republic or one-fifth of the members of the House of Representatives. The request shall specify the articles requested to be amended and the reasons for such amendment.

In all cases, the House of Representatives shall discuss the amendment request within 30 days from the date of its receipt. The House shall issue its decision to accept the request in whole or in part by a majority of its members.

If the request is rejected, the same articles may not be requested to be amended again before the next legislative term.

If the amendment request is approved by the House, it shall discuss the text of the articles requested to be amended within 60 days from the date of approval. If approved by a two-thirds majority of the House's members, the amendment shall be put to a public referendum within 30 days from the date the approval is issued. The amendment shall be effective from the date on which the referendum's result and the approval of a valid majority of the participants in the referendum are announced.

In all cases, texts pertaining to the re-election of President of the Republic or the principles of freedom or equality stipulated in this Constitution may not be amended, unless the amendment brings more guarantees.

Article (227)

The Constitution and its preamble and all its provisions constitute an integral text and an indivisible whole, and its provisions constitute one coherent unit.

Chapter Two
Transitional Provisions

Article (228)

The High Electoral Committee and the Presidential Election Committee existing at the time this Constitution comes into force shall undertake the full supervision of the first parliamentary and presidential elections following the effective date of the Constitution. The funds of the two committees shall be transferred to the National Electoral Commission, immediately upon its formation.

Article (229)

The elections of the House of Representatives following the date on which this Constitution comes into effect shall take place in accordance with the provisions of Article 102 hereof.

Article (230)

Election of the President of the Republic or the House of Representatives shall take place as regulated by Law, provided that the first of either elections shall take place within a period not less than 30 days and not more than 90 days after the date on which this Constitution comes into effect.

In all cases, the following electoral procedures shall commence within a period not exceeding six months as of the date on which the Constitution comes into effect.

Article (231)

The presidential term following the effective date of this Constitution shall commence as of the date on which the final result of the election is announced.

Article (232)

The Interim President of the Republic shall continue to exercise presidential powers stipulated herein until the elected President of the Republic takes the constitutional oath.

Article (233)

If the Interim President of the Republic is rendered unable to exercise his powers by reason of a temporary impediment, the Prime Minister shall replace him.

If the Interim Presidential office becomes vacant due to resignation, death, permanent disability or any other reason, the most senior Vice-President of the Supreme Constitutional Court shall replace him with the same powers.

Article (234)

The Minister of Defense shall be appointed upon the approval of the Supreme Council of the Armed Forces. The provisions of this article shall remain in force for two full presidential terms starting from the date on which this Constitution comes into effect.

Article (235)

In its first legislative term following the effective date of this Constitution, the House of Representatives shall issue a law to regulate constructing and renovating churches, in a manner that guarantees the freedom to practice religious rituals for Christians.

Article (236)

The State shall guarantee setting and implementing a plan for the comprehensive economic and urban development of border and underprivileged areas, including Upper Egypt, Sinai, Matrouh, and Nubia. This shall be made with the participation of the residents of these areas in the development projects, and they shall be given a priority in benefiting therefrom, taking into account the cultural and environmental patterns of the local community, within ten years from the date that this Constitution comes into effect, as regulated by Law.

The State shall work on setting and implementing projects to bring back the residents of Nubia to their original territories and develop such territories within 10 years, as regulated by law.

Article (237)

The State shall fight all types and forms of terrorism, and track its funding sources as a threat to the nation and its citizens, within a specific timeframe while guaranteeing basic rights and freedoms.

The law shall regulate the provisions and procedures of fighting terrorism, and fair compensation for the damages resulting therefrom and because thereof.

Article (238)

The State guarantees gradual performance of its obligation to allocate the minimum government expenditure rates on education, higher education, health and scientific research that are stipulated in this Constitution as at the date on which it enters into effect, provided it is fully compliant in the State budget of the fiscal year 2016/2017.

The State shall provide compulsory education until the completion of the secondary stage in a gradual manner to be completed by school year 2016/2017.

Article (239)

The House of Representatives shall issue a law organizing the rules for assigning judges and members of judicial bodies and organizations, ensuring the cancellation of full and partial assignment to non-judicial bodies or committees with judicial jurisdiction, or for managing justice affairs or overseeing elections, within a period not exceeding five years from the date on which this Constitution comes into effect.

Article (240)

The State shall ensure providing financial and human resources necessary to appealing the judgments issued by criminal courts on felonies within 10 years from the date on which this Constitution comes into effect. The foregoing shall be regulated by Law.

Article (241)

In its first legislative term after the enforcement of this Constitution, the House of Representatives shall issue a law on transitional justice that ensures revealing the truth, accountability, proposing frameworks for national reconciliation, and compensating victims, in accordance with international standards.

Article (242)

The existing system of municipal administration shall continue to be in force until the system stipulated herein is gradually implemented within five years of the date of entry into force of this Constitution, without prejudice to Article 180 thereof.

Article (243)

The State shall endeavor that workers and farmers be appropriately represented in the first House of Representatives to be elected after this Constitution is approved, as regulated by law.

Article (244)

The State shall endeavor that youth, Christians, persons with disability and Egyptians living abroad be appropriately represented in the first House of Representatives to be elected after this Constitution is approved, as regulated by law.

Article (245)

The employees of the Shoura Council who are still in service on the date that this Constitution comes into force shall be transferred to the House of Representatives with the same job levels and seniority on that date. Their salaries, allowances, bonuses, and their other financial entitlements granted to them on an individual basis shall be maintained. All funds of the Shoura Council shall be transferred to the House of Representatives.

Article (246)

The Constitutional Declaration issued on July 5th, 2013, the Constitutional Declaration issued on July 8th, 2013, and any constitutional texts or provisions of the Constitution issued in 2012 but not covered by this constitutional document shall be deemed repealed as of the date that this Constitution comes into effect. Their consequential effects shall however remain in force.

Article (247)

This Constitution shall come into effect as at the date on which it is announced that the People have approved it in a referendum through a majority of valid votes of the participants.

At the Foot of the *Sultan*: The Dynamic Application of *Shariah* in Malaysia

*by Siti Zubaidah Ismail**

Table of Contents

Abstract

Malaysia is known as one of the 'moderate' Muslim countries in the world. Though Islam is enshrined in the Federal Constitution as the religion of the country, Islamic law does not fully govern the country. In fact, Islamic law is part of the national law, which accommodates civil, Islamic and indigenous laws. Civil laws are statutes of general application and civil courts are for all citizens. However, Muslims are also subjected to Islamic family law which governs all matters related to marriage and divorce and also the Shariah criminal offences law, below which, if violated, the offender can be tried in the state's Shariah courts. This article seeks to examine the historical background and the development of Islamic law administration in Malaysia. It focuses on the position of Islamic law within the constitutional framework which sets the separation of power between the state and federal governments. It then examines the institutional power, religious bodies, religious authority and the Shariah courts. Lastly, the paper will reflect on the success, challenges and issues of developing Islamic law after more than fifty years since the nation's independence.

I. Introduction

After more than fourteen centuries, Islam has become one of the fastest growing religions in the world. At the turn of the twenty-first century, there were approximately 1.3 billion Muslims worldwide and nearly sixty percent residing in Asia.[1] This has garnered the attention

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[1] MALISE RUTHVEN & AZIM NANJI, Historical Atlas of Islam, Cambridge 2004.

of academics to focus more on the study of Islam, Islamic law and Muslim society within Asia, once considered periphery to the centralised and 'normative' Islam of the Middle East and the Arab world.[2] Scholars writing about Muslim cultures, politics and Islamic law in the new millennium must now take into account the various ways in which Islam manifest itself outside of the popularised orientalist's depictions of desert bedouin and the harems of Persian royalty.

The advent of Islam began during the 7th century C.E. (652 A.H) with the Prophet Muhammad (*sallallahu alayhi wasallam*) who was both a religious and political leader and Islamic law was implemented in all realms of life. In modern times, the degree of religious implementation would be dependent on the nature of the state and its national legal system. Therefore, Muslim countries, that is, those with a predominantly Muslim population, proclaimed either Islam as their state religion or Islamic law as the main source of legislation[3] in order to give legal identity to the state. Currently, according to Glenn, Islamic law has become the world's third major legal tradition.[4] Many scholars like ANDERSON[5] and OTTO[6] reiterate that the national legal system of Muslim-majority countries can be broadly divided into three groups: (i) those that still consider the *Shariah* as the fundamental law and those laws pervade all areas of life (Saudi Arabia is one of the countries that has a strong orientation towards classical *Shariah)*; (ii) those that have abandoned the *Shariah* in their legal system but maintain the *waqf* (endowment) management, like Turkey, and (iii) those that have a hybrid system with *Shariah*-based and the civil laws operating in 'parallel'. The third group is the largest group of Muslim-dominated legal systems in the world today.

One of the countries in South East Asia that has become the epicenter for implementing Islamic law is Malaysia. As a member of the Organization of Islamic Conference (OIC), Malaysia enjoys positive global attention for being a reputable non-Arab Muslim country with a modern multi-ethnic society. Praised for embracing Islam in its administrative and political context, Islam is deemed to be fundamental yet moderate, progressive and fast developed. Anthropologist like PELETZ asserts that the Islamization process in Malaysia cannot be compared with "the conventional *areal foci* of Islamic studies – that is the Middle East and North Africa, as Malaysia, a religiously and ethnically diverse Muslim-majority country, in recent decades, has experienced stunning economic transformation and patterns of sustained growth that are probably second to none in the Muslim world."[7] The Islamization process in Malaysia, that is, the intensification of Islamic influence on social, cultural, economic and

[2] MICHAEL J. FEENER & TERENJIT SEVEA, Islamic Connections: Muslim Societies in South and Southeast Asia. Singapore 2009.

[3] For example in Pakistan Article 227 of the 1973 constitution of Pakistan requires all laws to be brought in conformity with the injunctions of the *Quran* and *Sunnah*. The new Egyptian constitution of 2014 provides in Article 3 that the principles of Islamic Sharia law shall be THE chief source of legislation. The Saudi Arabia constitution of 1992 provides in Article 1 that "the Quran and Sunna constitute the ultimate and main source of the legal and constitutional rules".

[4] PATRICK GLENN, Legal Traditions of the World: Sustainable Diversity in Law, Oxford 2010. For more on Islamic law, see ABDULLAH SAAD ALAREFI, Overview of Islamic Law, International Criminal Law Review, Vol. 9 Is. 4 (2009), 707-731.

[5] JAMES N. D. ANDERSON, Islamic Law in the Modern World, New York 1959, at 83.

[6] JAN MICHIEL OTTO (ed.), Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, Leiden 2010.

[7] MICHAEL G. PELETZ, Malaysia's Syariah Judiciary as Global Assemblage: Islamization, Corporatization, and Other Transformations in Context, Comparative Studies in Society and History Vol. 55, Is. 3, 2013, 603-633, at 605.

political relations,[8] can take place due to the fact that Islam enjoys the privilege status in the country's legal system. In the area of Islamic banking and finance, education, business and social matters, Malaysia is ahead of her counterparts and has become the flag bearer for incorporating Islam into mainstream society by having services and facilities compliant with *Shariah* or Islamic law. Lately dubbed as a 'hub' for the Islamic finance industry and *halal* businesses, Malaysia is raising Islam to the next level, or as described by MAZNAH MOHAMAD, "[as] being elevated as the *primus inter pares* of all other religions."[9] CHOUDHURY describes Malaysia as a country "where Islamic values and tradition are cherished and valued and simultaneously a highly successful modernizing process is going on".[10] Now, Islam has gone beyond institutional and ceremonial garb as it used to be in the previous decades. As far as the Islamic legal sector is concerned, HAMAYOTSU believes that it is commonly assumed that greater enforcement of Islamic law is the result of growing Islamism in civil society and/or the state.[11] This article seeks to examine the historical background and the development of Islamic law administration in Malaysia. It focuses on the position of Islamic law within the constitutional framework which sets the separation of power between the state and federal governments. It then examines the institutional power, religious bodies, religious authority and the *Shariah* courts. Lastly, the paper will reflect on the success, challenges and potential of developing Islamic law after more than fifty years since the nation's independence. The word *Shariah* that is used throughout this article refers to a code of laws and regulations that administer Islam and Islamic law within the context of Malaysian society. Previously, the words *Hukum Syarak* were used to differentiate between the divinely-inspired rules from the customary dictates.

II. Brief Historical Reflection: From English Law to the Creation of Statutory Islamic Law

A country's legal system is said to reflect its history, which in part is said to be one of syncretism. In 1938, ROSCOE POUND, an American legal scholar, observed that the history of a system of law is largely a history of borrowing and assimilation of materials from other legal systems from outside.[12] As we shall further see, the historical beginning of a codified Islamic law in the Malay Peninsular was brought about by the British administrators duplicating Islamic law in India, once a British colony (1661-1951).[13] Islam was brought to Southeast Asia and the Malay Archipelago in the 14th century, via trade and business through the port of Malacca, one of the earliest kingdoms in Malaysia. Even though there were many explanations and 'theorizing exercise' regarding the coming of Islam to the Malay world, all agreed that it

[8] JASON P. ABBOTT & SOPHIE GREGORIOS-PIPPAS, Islamization in Malaysia: Processes and Dynamics, Contemporary Politics Vol. 16, Is. 2 (2010), 135-151, at 136.

[9] MAZNAH MOHAMAD, The Evolution of Syariah and postcolonial modernity: embedding Malay authority through statutory law, available at <http://www.isa-sociology.org/publ/E-symposium/E-symposium-vol-1-2-2011/EBul-Aug2011-MaznahMohamad.pdf>, last visited 11 March 2015, 1-19, at 2.

[10] GOLAM WAHED CHOUDHURY, Islam and the Modern Muslim World, Kuala Lumpur 1993, at 163.

[11] KIKUE HAMAYOTSU, Once a Muslim, Always a Muslim: the Politics of State Enforcement of Syariah in Contemporary Malaysia, South East Asia Research, Vol. 20, No. 3, 2012, 399-421, at 399.

[12] ROSCOE POUND, The Formative Era of American law, Boston 1938.

[13] For further reading, ASAF ALI ASGHAR FYZEE, Muhammadan Law in India, Comparative Study in Society and History Vol. 5, Is. 4 (1963), 401-415.

was the role of the traders, merchants and the *sufis* that brought the change.[14] Islam had transformed Malay *adat* (customs) and Islamized their traditions, which were previously influenced by Hinduism and Hindu culture between seventh and 14th century.[15] Not only that, when talking about the sociological impact, AL-ATTAS viewed that through the efforts of s*ufis*, the highly intellectual and rationalistic Islamic religious spirit entered the receptive minds of the Malays of the archipelago and turned them away from all forms of mythology.[16] Eventually, Islamic practices in the realm of business and trade with the Arabs then merged under the administration of the *Sultan* or Malay rulers of Malacca, among others, through the formation of two legal codes, the Canon Laws of Malacca[17] and Maritime Laws,[18] which were compiled during the 13-year reign of Sultan Muzaffar Shah (1446–1459). Another evidence of this Islamization can be traced on the East Coast of the Malaysian Peninsular, where a stone carved with Islamic punishment provisions, dated from the year 1303, was found in the state of Terengganu. This stone, called *Batu Bersurat Terengganu*, is great evidence that the divinely-inspired punishments from the Quran and Hadith pertaining to adultery, fornication, theft and other capital crimes were codified and implemented during the glorious era of the Malay S*ultans* of Terengganu. However, the advent of Islam was put to a halt from the 15th century onwards when the Portuguese (1511–1640), and later the Dutch (1641–1785) and British (1786-1956) invaded the country. For over 400 years, the *Tanah Melayu* (Malay States) was colonized by the Portuguese, Dutch and British. During the colonization, trade and industry had increased the migration of workers from India and China and eventually transformed the country from a single-ethnic group into a multi-racial and multi-cultural nation. The colonial powers put little interest in the law-making process and instead concentrated more on administration. The British colonization in the 18th and 19th centuries changed the country's legal landscape by bringing in its own legal influence onto the Malay land. The Royal Charter of Justice was first introduced in the state of Penang in 1786, followed by the second and the third Charter of Justice applied in Malacca and Singapore which formed the Straits of Settlement. Later, when the British intervened in Perak and Selangor in 1874, Pahang in 1888, and Negeri Sembilan in 1889, the Federated Malay States were established. The British administrator formed treaties with the Malay S*ultans*, among them, through the *Raffles Memorandum to the Sultan of Johore 1873* and the *Pangkor Treaty 1874; S*ultans were thus only given autonomy to rule over the sphere of Malay *adat* (custom) and religion.[19] The treaties of

[14] Two theories fit into the variety of explanations regarding the coming of Islam to the Malay world. One, Islam was brought and preached by traders from Arabia, Persia and India. Two, the role of *sufists* from Bengal, India. See SAYYID QUDRATULLAH FATIMI, Islam comes to Malaysia, Singapore 1963; GEORGE E MORRISON, The coming of Islam to the East-Indies, Journal of the Malayan Branch of the Royal Asiatic Society, Vol. XXIV, Is. 1, 1951, 28-37; SYED MUHAMMAD NAQUIB AL-ATTAS, Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago, Kuala Lumpur 1967; SYED FARID ALATAS, Notes on Various Theories Regarding the Islamization of the Malay Archipelago, The Muslim World, Vol. 75, Is. 3-4, 1985, 162-175.

[15] See for details VIRGINIA MATHESON HOOKER, A Short History of Malaysia, Linking East and West. Crows West 2003, at 345.

[16] SYED MUHAMMAD NAQUIB AL-ATTAS, Some Aspects of Sufism as Understood and Practised among the Malays, Singapore 1963.

[17] Canon Laws of Malacca (*Hukum Kanun Melaka*) contained matters pertaining to criminal and civil offences, family law, the power of the ruler, rules on proper conduct, particularly with regard to sexual matters, laws regarding slavery and penalties for all offences. See more in LIAW YOCK FANG, Undang-Undang Melaka, The Hague 1976.

[18] Maritime Laws of Malacca (*Undang-Undang Laut Melaka*) consisted entirely of rules, regulations, procedures and codes of conduct to be used at sea, obeyed and respected by all. See for details LIAW YOCK FANG, supra n. 17.

[19] WAN ARFAH HAMZAH, A First look at the Malaysian legal system, Kuala Lumpur 2009, at 158.

protection between Malay rulers and the British administration included a clause prohibiting interference in matters relating to religion and Malay custom from the scope of the advice of the British resident/adviser.

Despite the clause, the British interfered with the administration and application of Islamic law.[20] The legislation passed by the state councils upon the direction of the British adviser included matters concerning Islam, such as the appointment and salaries of *qadi* (judges), the regulation of *zakat* (religious giving or tithes), the administration of *mosques* (Muslim places of worship), the registration of Muslim marriage and divorce, and the punishments imposed for certain offences against the Islamic religion. Thus, according to WAN ARFAH, Islam became just another subject for regulation, in the same manner as contracts, crimes, property and so forth.[21]

While the British involved themselves in the larger sphere of governance as a strategic move to possess more control over the colony, the S*ultan* was left to man those who transgressed the *Hukum Syarak*. Examples of the laws regulating Muslims were the *Order in Council of 1885* requiring Muhammadans (Muslims) to pray in mosques on Fridays, and the *Order in Council No. 1 1894* punishing adultery by Muhammadans (in Perak). Subsequently, the British administration introduced English statutory law and established the civil court system in the early 20th century. In most areas of law, the English-inspired codes were introduced. Consequently, whether directly or indirectly, the *Hukum Syarak* or *Shariah* that was neither written nor properly codified was phasing out and relegated to the area of personal law: matrimony, inheritance and religious offences, while the civil courts took over the power and functions of the *qadi* courts. It was to be expected that the *qadi* court was at its infant stage and therefore, not difficult to strategically re-construct to the extent of limiting its power and jurisdiction.

At that time, a pluralistic society had already existed and even Malay people consisted of various tribes with their own *adat*. While the British were keen on imposing English law as statutes for general application, and to get rid of the 'natural justice' practice among the local people: Malay, Chinese, and Hindus, the British could not simply take away the indigenous customs and diverse legal traditions. Therefore, customary laws and *Hukum Syarak* regarding firstly, matrimony, were drafted and enacted in statutory forms. Indian-inspired Islamic law was subsequently introduced and the first being the *Mohammedan Marriage Ordinance 1888* (*Ordinance No. 5, 1888*).

Even though the general principle was clear, that the British should not interfere with the custom of the people, the practical application was difficult. One area of law that created tensions was regarding land regulations. Policies put in place with regard to land registration and ownership – incorporating English rules and regulations to be embedded into the established practice of *adat* – were almost unacceptable. The practice of *adat* and *Hukum Syarak*, however, made the British realise that disputes on land cannot be settled through the civil court using English law, due to the prevailing influence of *Adat Perpatih*[22] and A*dat*

[20] AHMAD IBRAHIM, The Administration of Islamic Law in Malaysia, Kuala Lumpur 1996, at 35–6.

[21] WAN ARFAH HAMZAH, supra n. 19.

[22] Adat Perpatih are customary laws which originated from Minangkabau land in Sumatra, Indonesia. The system practices democracy in electing chiefs and king. Only males are eligible to be elected as leaders for each clan and tribes.

Temenggong[23] among the Malay-Muslim community. Tensions also arose as *Adat Perpateh* had many rules which were different from those prescribed by *Hukum Syarak*. Later, in most cases concerning land tenure and inheritance, *adat* prevailed and all cases were mediated and settled through a *Lembaga Adat*, or customary ruling council of the tribe.[24] The British administration who favoured *adat* over religion subsequently enacted *Customary Tenure Enactment 1909* and explicated the permission of registering female ownership and ignored the existing colonial land registration policies.[25] In the 1930s, the *Mohammedan (Offences) Enactment* was introduced in several states, sanctioning more offences in addition to penalties for failure to perform *Jumaat* (Friday congregational) prayer. Then there existed the list of separate enactments, namely *Muhammadan Law and Malay Custom (Determination) Enactment 1930, the Muhammadan Marriage and Divorce Registration Enactment 1931, the Muhammadan* (*Offences) Enactment 1938 and the Council of Religion and Malay Customs Enactment 1949*. That decade also witnessed the strengthening of colonial influence with the *Civil Law Ordinance of 1937* passed by the British ruler, applying the usage of English common law and the principles of equity, thus, marking its formal introduction to the whole Malay land. These laws were modeled on those used in India[26] and supplanted the Malay-Muslim law that had been the foundational law in the Malay states. The civil court system presided by British judges were established. Despite the acknowledgment that *Hukum Syarak* was the local law and that the courts must take judicial notice of it and declare its principles, the judge did not hesitate to apply common law and equity principles to fill the gaps, thus, regarding the Civil Law Enactment 1956, in practice, as the foundational law.[27] R. J. WILKINSON, a Colonial administrator and a historian, states that "there can be no doubt that Muslim law would have ended by becoming the law of Malaysia had not the British law stepped in to check it."[28]

After the Second World War, a transformation took place where the S*ultans* were losing power to new national ruling elites who were liberal in their perspective. Various enactments for Muslims remained within the purview of state rulers rather than the national federal government. Islam was under the purview of each individual state and hence each of the 13 states in Malaysia enacted their own legislations to govern Muslims and their affairs within the state boundaries. This was the era when the movement for nationalization took place with great vigour, and at the same time, was also the period of "statutory rationalization".[29] Rationalization exercises were performed to reform the Islamic law and involved an integration of these separate statutes into one major all-encompassing statute, namely *The Administration of Muslim Law Enactment 1952* (State of Selangor). This one enactment, with 172 sections, comprised all matters related to Islam: from *zakat* collection to the management of the *mosques*, from the *Mufti* (head jurist), to court procedures, and from matrimonial matters to *Shariah* offences. This move emphasised decentralization and at the same time, the federal

[23] Adat Temenggong came from the same cradle as Adat Perpatih but is based on matrilineal tradition.

[24] For further reading, see NOOR AISHA ABDUL RAHMAN, Colonial Image of Malay Adat Laws: A Critical Appraisal of Studies on Adat Laws in the Malay Peninsula During the Colonial Era and Some Continuities, Leiden 2006.

[25] MAZNAH MOHAMAD, supra n. 9.

[26] Some of these laws include the *Penal Code and Evidence Ordinance 1902, Civil Procedure Code 1918, Civil Law Enactment 1937, Contract Act 1950, Civil Law Act 1956, Defamation Act 1960, Criminal Procedure Code 1935* and *Employment Act 1950.*

[27] *Per* James Thorne, a British judge in *Ramah bte Taat v. Laton bte Malim Sutan* (1927) 6 FMSLR 128.

[28] RICHARD JAMES WILKINSON as quoted in WILLIAM R. ROFF, Patterns of Islamization in Malaysia, 1890s-1990s: Exemplars, Institutions and Vectors, Journal of Islamic Studies Vol. 9, Is. 2 (1998), 210-228, at 211.

[29] MAZNAH MOHAMAD, *supra* n. 9, at 9.

government would have little power to intervene in matters concerning Islam and the Muslims in each state. As a consequence, matters regarding Islam and Islamic law were affirmatively edged out from federal jurisdiction and put firmly under state jurisdiction under the Malay S*ultans* who were then made the constitutional monarchs. The pluralistic legal system had resulted in not only the distribution of legislative process between the federal and states government, but also between civil and Qadi courts, thus creating the so-called 'dual legal system'.

Although *Hukum Syarak* 'survived' the colonial era which ended in 1957, it firmly remained limited to personal law (family and property) and was then reconstructed to embrace several aspects of offences pertaining to religion and religious duty. Be it as it may, nothing was changed (as far as the law was concerned) when Malaysia achieved independence in 1957. The Federal Constitution was established and Islam was made the federal religion. However, Islamic law was not the federal law, as clearly sanctioned under the *Civil Law Ordinance 1937.* Then the *Civil Law Act 1956* stated that English common law and the principle of equity are the primary legal sources.

The Federal Constitution clearly divides the separation of power between the federal and state, by creating the Federal and State List. The State List under Ninth Schedule elaborates on the power regarding the administration of Islamic law, including:

> *Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.*

The last two decades of the twentieth century (1980s and 1990s) witnessed monumental changes where exclusive statutes were passed to replace the all-encompassing 'omnibus' Administration of Muslim Law Act/Enactment. Separate new statutes were enacted: *Islamic Family Law, Shariah Criminal Offences, Criminal Procedure in Shariah Courts, Civil Procedure, Islamic Evidence, and Administration of Islamic Law Enactment*. From 27 sections under the AMLA 1952, the *Shariah Criminal Offences Enactment* doubled to 52 sections. Laws for court procedures – civil and criminal – were also enacted to be used in the *Shariah* court and were modeled on the *Civil Procedure Code and Criminal Procedure Code* used in the civil court. The

Muslim Wills Enactment and *Waqf Enactment* were also enacted in Selangor (1999), while the *Zakat and Fitrah Enactment* (1993) and *Fatwa Enactment* (2004) were passed in Sabah.[30]

The *Shariah* court was soon reformed to replace what was once a *qadi* court and the justice system. It was put under the state power, that all Islamic law matters were governed and administered by states' religious council. To strengthen the uniformity of the law and administration between states, the federal government established federal institutions like *Jabatan Kehakiman Syariah Malaysia* or the *Shariah* Judiciary Department (JKSM), established in 1998) and very much earlier, *Jabatan Kemajuan Islam Malaysia* or the Department of Development of Islam (JAKIM), both under the Prime Minister's Department. The Shariah Section dealing with the advisory matters on Islam was established under the Attorney General's Chamber. While JAKIM coordinates matters including *zakat, waqf,* and *hajj* (pilgrimage to Mecca), JKSM coordinate the *Sharia* courts in the country.[31]

The creation of the federal agencies is in line with the status of Islam as the country's official religion. At the same time, states are given power, by virtue of List 2 of the Federal Constitution, to regulate and administer religious matters. In doing so, the state bodies like Islamic religious councils, religious departments with various divisions under it, *Mufti* office and S*hariah* court were established. Policies regarding Islamic matters are within the states' power, coordinated by several technical and legal committees under JAKIM. The expansion and standardization of Islamic law could not have happened if not for central coordination of the process. To note, there are fourteen states in Malaysia, which is why the standardization and consistency in regards to codified Islamic laws and its administration are needed.

III. Current Administration of Islam and Islamic Laws

1. Institutions and religious authority

In line with the Federal Constitution, the government established federal agencies in their effort to congregate matters pertaining to Islam and Muslim affairs.[32] As mentioned before, JAKIM was established under the Prime Minister's Department, responsible for the pilgrimage (*hajj*), endowment (*waqaf*), tithes (*zakat*) and so on. The office of *Mufti* exists in every state, thus having 14 *Muftis* altogether, sitting on the states' Fatwa Committee and come under one umbrella of the federal Fatwa Committee with JAKIM as the permanent secretariat. The *Mufti* shall advise the *Sultan* in all matters of *Hukum Syarak* and as far as authorities to be followed, the *Administration of Islamic Law Act 1993 of Federal Territory* provides that in issuing any *fatwa* (legal ruling), the *Mufti* shall ordinarily follow the accepted views of the *Mazhab Syafie*. However, it does not mean that he is absolutely restricted from referring to other Mazhabs like *Hanafi*, *Maliki* or *Hanbali* if the views from other Mazhabs are more suitable in resolving issues

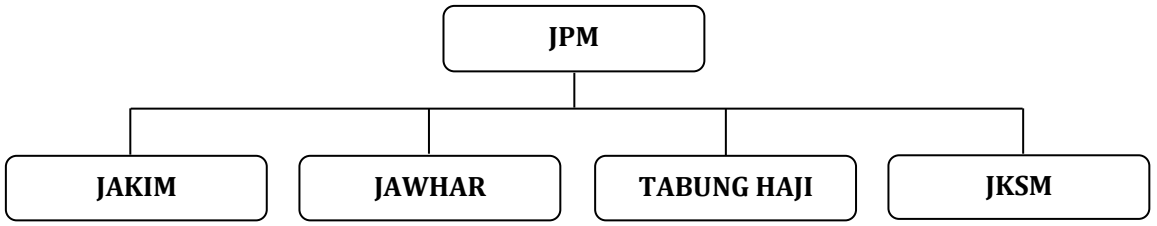
[30] This development has led to the existence of two separate systems of family and property laws: one for Muslims and one for non-Muslims.

[31] For further reading on the experience of the *shariah* court from the early setting, see MICHAEL GREGORY PELETZ, Islamic Modern: Religious Courts and Cultural Politics in Malaysia. Princeton 2002.

[32] For other religions, the affairs are manned by Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism. It is an interfaith organization in Malaysia established in 1983 and is composed primarily of five main faiths in the country.

that are in question.[33] The table below further explains the distribution of institutions between states and federal.

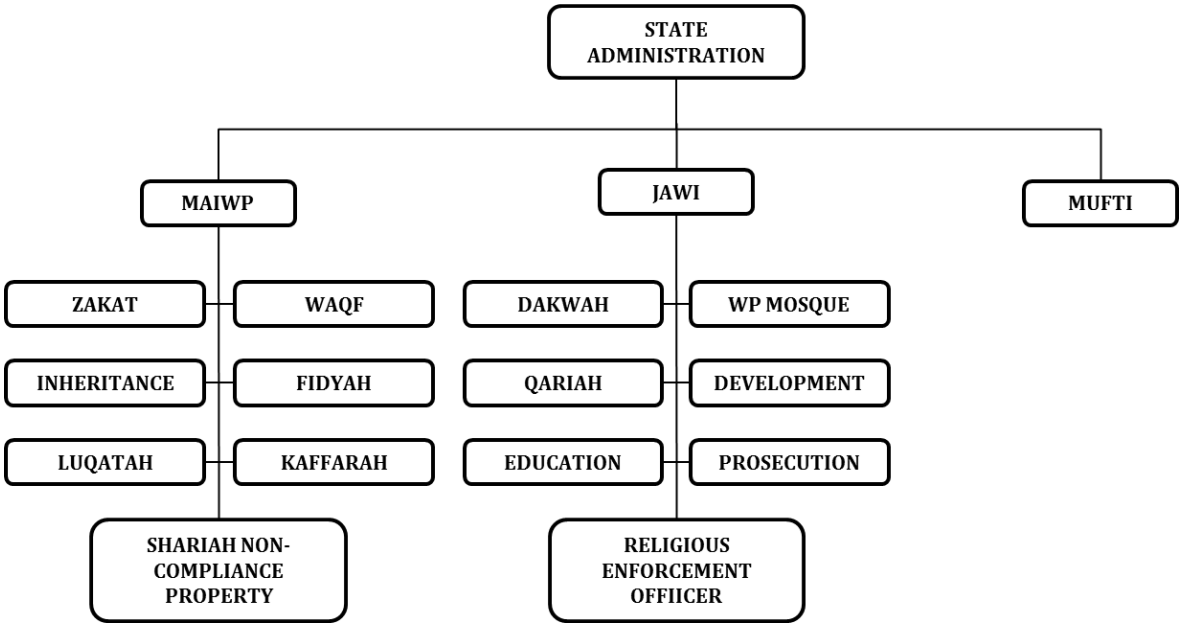
Table 1
FEDERAL-LEVEL ISLAMIC INSTITUTIONS



- JAKIM: Malaysia's Department of Development of Islam
- JAWHAR: Department of Waqf, Pilgrimage and Tithe
- TABUNG HAJI: Department of Hajj Fund Management
- JKSM: Department of Shariah Judiciary

[33] Section 39 of the *Adminstration of Islamic Law Act 1997* of Federal Territory provides that:
(1) In issuing any *fatwa* under section 31, or certifying any opinion under section 35, the *Mufti* shall ordinarily follow the accepted views (*qaul muktamad*) of the *Mazhab Syafie*.
(2) If the *Mufti* considers that following the qaul muktamad of the *Mazhab Syafie* will lead to a situation which is repugnant to public interests the *Mufti* may follow the *qaul muktamad* of the *Mazhab Hanafi*, *Maliki* or *Hanbali*.
(3) If the *Mufti* considers that none of the *qaul muktamad* of the four *Mazhabs* may be followed without leading to a situation which is repugnant to the public interest, the *Mufti* may then resolve the question according to his own judgement without being bound by the *qaul muktamad* of any of the four *Mazhabs*.

TABLE 2
STATE-LEVEL INSTITUTIONS
(FEDERAL TERRITORY MODEL)



- MAIWP: Majlis Agama Islam Wilayah Persekutuan-Federal Territories Religious Council
- JAWI: Religious Department of Federal Territory
- MUFTI: A scholar or expert appointed by the government and is qualified to issue authoritative legal opinions known as fatwa.
- ZAKAT: tithe
- WAQF: endowment
- DAKWAH: call for Islam
- FIDYAH: fine collected from those who fail to perform fasting due to certain reasons in Ramadhan
- QARIAH: border for mosque
- LUQATAH: property found with unidentified owner
- KAFFARAH: specific fine for specific violation of *ibadah*

2. Religious Enforcement and Prosecution Units

Apart from the agencies authorized to administer the Muslim affairs as mentioned above, the religious enforcement unit was also established and given power to enforce offences provided by the Shariah Criminal Offences Enactment. The power and procedures were outlined in the Shariah Criminal Procedure Enactment of each state. Federal Constitution describes that, among the power of the states is to ensure:

> *"[the] creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List."*

'Offences against the precepts of Islam' as mentioned above in List 2 (State List) of the Federal Constitution, led to the creation of the S*hariah* Criminal Offences Enactments. There are nearly 42 offences related to belief, institution, decency and miscellaneous offences. The offences that fall under the category of belief, generally related to wrongful activities of deviation. It is

defined as any religious act which deviates from the teaching of Islam and is not recognized by Islamic law according to any *madhhab* (sect). Wrongful worship is worshipping something other than God or reverence for anything in any manner contrary to the Islamic Law. Other offences under this category are teaching or expounding doctrines other than the beliefs and doctrines of Islam among Muslims. Other offences are like insulting, or bringing into contempt the religion of Islam, insulting al-Quran and Hadith, contempt of or defying religious authority or court order, giving opinion contrary to the *fatwa*, publishing religious materials contrary to Islamic law, failure to perform Friday prayer, disrespect to Ramadan, drinking intoxicating drinks, and gambling. Offences concerning decency or what are also popularly known as 'moral offences' draw the most attention. In fact, *Shariah* criminal offences in Malaysia are often characterized by moral cases, particularly the *khalwat* or close proximity[34] due to its frequency of trial in *Shariah* court.

3. *Shariah* courts

Since Malaysia has a dual court system, the constitution distributes jurisdiction for both civil and Shariah courts. Shariah court does not come under the federal court structure, instead it is in a separate hierarchy, or, as put by WU MIN AUN, is 'derivative and dependent'. The power is based on states and administered according to certain jurisdiction and power over persons professing the religion of Islam only. Since 1990s, there is a three-tier court system comprising of Lower Court, High Court and Appeal Court in each state. Legislation as mentioned before pertaining to the administration of the court, procedural and substantive laws were passed by the State's Assembly. Due to this dual-court system, whenever there was a conflict of law and jurisdiction in certain cases and the litigants brought the cases to the High Court, the decision of the Civil High Court would prevail over the previous decision of the *Shariah* court. However, in 1988, an amendment was made to the Federal Constitution and article 121 (1A) of the Federal Constitution was passed declaring that the Civil High Court will have no jurisdiction in respect of any matter within the jurisdiction of the Shariah courts. The plain words of Article 121 (1A) mean that the civil courts should not interfere in matters which fall 'within' the jurisdiction of the Syariah courts. This is to avoid any occurrence of overstepping the boundary of jurisdiction. Before the amendment was made to the Article 121, the parties unsatisfied with the decision of the Syariah court brought their cases to the civil court and it was very unfortunate to evident the decisions made by former being overturned by the latter. So this change was made to prevent litigants from appealing Shariah court's decision to the High Court. The problem will not arise if the subject matter in question clearly belongs to one or the other jurisdiction. The entangling problem arises when both have jurisdiction or when the division of power is ambiguous like for example the issue of custody of a child when one of the parents embraced Islam.[35] The problem of conflict is yet to be solved.

[34] SITI ZUBAIDAH ISMAIL, The Legal Dimension of Khalwat in Malaysia, Pertanika Journal of Social Science and Humanities 2015 (forthcoming).

[35] For example the case of *Myriam v Arif* [1971] 1 LNS 88.

IV. New Issue of *Hudud* Law

The Federal Constitution allows the State legislative body to create and punish offences by persons professing the religion of Islam against its most foundational precepts. However, the power of the state to enforce Islamic criminal law is limited by the words "except in regard to matters included in the Federal list" or "dealt with by federal law", for example homicide, theft, rape, kidnapping and so on. Should there be redundancy, inconsistency or conflict with the federal law – for example, with provisions under the Penal Code, which is the prime statute of criminal law– the state law would be *ultra vires* and null and void. Capital punishment, for example life sentence, mandatory death punishment and 20 lashes are those listed under the Federal List of the Federal Constitution. Only the federal law can provide such punishment for serious crimes and consequently, offences related to life and body, namely *qisas and diyat* (retaliation and bloodmoney) involving a death sentence do not fall under the jurisdiction of the *Shariah* court. The Civil High Court is the one that has the power to try homicide cases which has its provision under the Penal Code of Malaysia (Act 574).

Therefore, jurisdiction for *hudud* punishment to the extent of amputation of one hand for theft (*sariqah*) or hands for highway robbery (*hirabah*), and the death sentence for rebellion and treason (*bughah*) would fall under the civil court's jurisdiction. However, the existing punishments for those offences under the Penal Code are not in accordance with *hudud* principles, as the originality of the Penal Code was modeled from the Indian Penal Code. Understandably, in the context of this country, the *Shariah* criminal law is the law limited to the category of *taazir* (secondary) crime and punishment, and not in its 'ideal' form as connoted by the classical *fiqh* (jurisprudence) of *hudud*, *qisas* and *taazir* as mentioned above.

When the state government of Kelantan drafted and passed the *Kelantan Hudud Bill 1993* at the state's legislative council, containing offences and punishment beyond the state's jurisdiction, it caused a national uproar. Many claimed that this draft of *hudud* law was designed to suit the political strategy of the Islamic Party (PAS) in their effort to portray a perfect Islamization process in Kelantan. To PAS politicians, Malaysian Islam is not complete without the *hudud* law and this is at once an opportunity for them to challenge the Islamization policy of UMNO, the ruling party which now controls the federal government. Be it as it may, the provisions pertaining to *hudud* with capital punishment cannot simply be implemented because of the limited jurisdiction in sentencing as dictated by the *Shariah Court (Criminal Jurisdiction) Act 1984* (The 1984 Act). This Act clearly spells out that the state's *Shariah* court cannot impose punishment more than three years imprisonment or fine not more than five thousand *Ringgit* or six lashes. Given the *hudud* punishment concerning a hundred lashes (for adultery), stoning (for a married adulterer), limb amputation (for serious theft) and other capital punishment, the *Shariah* court cannot legitimize it.

V. Conclusion

After 57 years of independence, and as the historical overview has demonstrated, the Islamic law, or to be precise, *Shariah* law in Malaysia has come a long way to establish the dynamic implementation of codified Islamic law. In the modern context, the actualization of Islamic laws is determined by legislations, validated through a parliamentary process. Therefore, the administration of Islam must stay in the mainstream at the federal level, while the capacity at the state level must be empowered, the administration must be improved and most importantly is that the cooperation between federal and state governments must be enhanced and strengthened to bring the practice of Islam and Islamic law to the highest level possible. Despite the fact that the dual federal and state jurisdictions will remain, it is hoped that bureaucratic hindrances can be relaxed and the strong cooperation between the state and federal governments, can, to some extent, give leeway to enhance the position of Islamic law in the country. With all these 'positive attributes', Malaysia, as put by AZIZ and BAHARUDDIN, is seen by many countries as a model to be emulated.[36]

[36] AZMI AZIZ & SHAMSUL AMRI BAHARUDDIN, The Religious, the Plural, the Secular and the Modern, Inter-Asia Cultural Studies (2004), 341-356.

Interfaith Marriages and Muslim Communities in Scotland: A Hybrid Legal Solution?[1]

*by Gianluca P. Parolin**

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Abstract

Legal provisions on interfaith marriages offer a privileged observation point on the interaction of different legal systems in a context of migrations, minorities, and law and religion. Even within the Muslim communities in Scotland, predominantly South Asian, multiple and fluid identities compete and seek different arrangements within a legal system that refuses to consider elements of Islamic law as law, or relevant to law. Impediments to marriage by disparity of faith can be a good case in point, and open up the debate on the boundaries of competing definitions of law.

This paper explores the adaptation and transmigration of Islamic regulations on interfaith marriages among the Muslim communities in Scotland. Islamic impediments to marriage by disparity of faith have somehow guaranteed the religious endogamic principle in Muslim-majority contexts; what happens when borders are crossed and South Asian communities find themselves in a Scottish context?

In order to follow this adaptation and transmigration, we need to embark on a journey through time and space. I suggest to depart from the single rule on interfaith marriages produced by modernity (I), follow a leisurely meander along the modern/classical divide (II), tour the welcoming highlands of Scots law (III), and observe how our modern rule has taken root in quite a distinct environment (IV), before landing with some super-hybrid final considerations (V).

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[1] This paper is based on the findings of a research project, undertaken in Scotland in the summer of 2010 within a fellowship scheme of the British Academy and Economic and Social Research Council, titled: "Invisible Barriers to Citizenship? Islamic Inter-Faith Marriages in Europe: The Case of Scotland". I feel truly indebted to the faculty and staff of the University of Edinburgh where I was based during the research, in particular Jo Shaw, Lisa Pilgram, and Elspeth Reid in the School of Law, Marilyn Booth of the Islamic and Middle Eastern Studies Center, and Hugh Goddard of the Waleed bin Talal Centre for the Study of Islam in the Contemporary World. I am also especially thankful to David Carey-Miller of the University of Aberdeen.

I. 'Modern' law and its single rule

A modern articulation of the regulations on interfaith marriages in Islam would probably read: "Interfaith marriages are prohibited, except in the case of a Muslim male marrying a Scriptural female (*kitābīyah*)."

Such an abridgement can serve as a good example of a larger legal phenomenon that affected classical Islamic law in its encounter with modernity. As WAEL HALLAQ aptly described it, modernizing the law in the age of nation-states meant to remold Islamic legal tradition into the structures of codification. The style and mentality of a single rule to be applied uniformly dispensed with what he called the "*ijtihād*ic plurality"[2] that both allowed for fluidity in the creation of the law, and for flexibility in its application.

This operation not only detached the single rule from the traditional dynamics of Islamic law production, but it also abstracted the product of legal reasoning. The abstraction consisted in selecting what had to be included in the abstract, single rule (a practice alien to classical Islamic jurisprudence) and severing this selection from the legal context and considerations that surrounded it (and were often conducive to such regulations). As a result of the abstraction, a change in the context or surrounding considerations (the relevance of which became a matter of contention) no longer has an immediate effect on the re-articulation of the rule.

The single rule produced by the modernizing effort had yet to pass the courtroom test, as has been pointed out with regard to the use of discretionary powers by judges.[3] The rule on interfaith marriages, however, has rarely been included in the family law codes of Muslim-majority countries. Judicial discretion had then to be channeled through the '*šarʿī* postulate' (a residual provision usually incorporated in modern codifications to direct the judge to resort to Islamic law in case of legislative gaps or interpretive dilemmas). Tunisian law and courtroom practice is quite instructive on the rule on interfaith marriages in this respect. In Tunisian law there is neither a provision banning interfaith marriages nor a *šarʿī* postulate, yet in 1966 the Court of Cassation voided a marriage of a Muslim woman to a non-Muslim man declaring it "an unpardonable crime"[4] and state authorities followed suit in 1973 by prohibiting the registration of such marriages.[5] There seem to be signs now of a timid change of heart by the Tunisian judiciary, but the overruling has not yet ossified.

II. Selection and abstraction in a single rule

The 'modern', single rule on interfaith marriages seems to be consonant with the classical theory and its interpretation of the relevant Qurʾānic verses, yet its brevity and abstraction

[2] WAEL B. HALLAQ, Sharīʿa: Theory, Practice, Transformations, Cambridge 2009, at 449.

[3] NAHDA YOUNIS SHEHADA, Justice Without Drama: Enacting Family Law in Gaza City Sharīʿa Court, Maastricht 2005; LYNN WELCHMAN, Beyond the Code: Muslim Family Law and the Shariʾa Judiciary in the Palestinian West Bank, The Hague 2000; LYNN WELCHMAN, Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy, Amsterdam 2007.

[4] HAFIDHA CHEKIR, Le statut des femmes entre les textes et les résistances: le cas de la Tunisie, Tunis 2000, at 286, cit. in WELCHMAN 2007, supra n. 3, at 47.

[5] WELCHMAN 2007, supra n. 3, at 47.

from the background considerations on which the rule depends sensibly limit the possibilities of legal change and modulated application.

The 'modern', single rule ("Interfaith marriages are prohibited, except in the case of a Muslim male marrying a Scriptural female (*kitābīyah*)") appears to be a combination of the prohibition of interfaith marriages based on Q. 2:221 and the exception of permitted marriages with Scriptural women based on Q. 5:5.

Q. 2:221, also known as the verse of interdiction, reads:[6]

> Do not marry unbelieving women (idolaters), until they believe: A slave woman who believes is better than an unbelieving woman, even though she allures you. Nor marry (your girls) to unbelievers until they believe: A man slave who believes is better than an unbeliever, even though he allures you.

This verse, considered an early Medinan revelation and traditionally interpreted as referring to polytheist Arabs (*mušrikāt* and *mušrikīn*) was later read in conjunction with Q. 5:5 as a general prohibition of interfaith marriages - Yusuf Ali's translation of *mušrikāt* and *mušrikīn* as 'unbelieving women and men' somehow captures this late reading while sidelining the etymon *širk*, which is the act of associating to God other Gods.

Q. 5:5, also known as the verse of permission, reads:

> This day are (all) things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time,— when ye give them their due dowers, and desire chastity, not lewdness, nor secret intrigues.

This verse, almost unanimously dated after the verse of interdiction (Q. 2:221) and traditionally connected to Muhammad's 'Last Pilgrimage' (*ḥağğ al-widāʿ*), raises two main interpretative problems: one related to the definition of *muḥṣanāt* (YUSUF ALI's 'chaste women'), and the other to the gendering of the permission.

Qurʾānic interpretation of *muḥṣanāt* varies. Some read it as requiring the status of liberty, some chastity (defined here as lack of promiscuity and observance of ritual purity), and some both. However, none of these readings made it to the single rule. One could speculate that the disappearance of slavery on the one side, and the unwillingness or inability to verify compliance with chastity regulations on the other side, both played a role in the operation of (de-)selection and abstraction to the single rule.

Interpretation of the gendering of the permission, however, slightly varies according to the different theoretical approaches of the four *maḏāhib* (legal schools) of Sunni Islam.[7] I will only consider here the Ḥanafī perspective, as most Muslims in Scotland follow this school.

[6] For the purposes of this article, the rendering of Qur'ānic meanings is that of 'ABDALLĀH YŪSUF ALI.

A general remark is in order. Jurists seem to feel the need to provide further arguments to the gendering, rather than merely considering the Qurʾānic verse.

Jurists tend first to conflate the unequal position of spouses in marriage and the hierarchy of religions in articulating their arguments in favor of the gendering. A patriarchal reading of gender roles in marriage – which probably reaches its apex when the Ḥanafī jurist AL-SARAḤSĪ (d. 1096) equates it to enslavement (*riqq*) in his reference work *al-Mabsūṭ* – sets the stage for an outright refusal of subjecting a Muslim woman to the authority of a non-Muslim man. An *ad absurdum* argument takes it a step further: had the marriage of a Muslim woman to a non-Muslim man not been completely prohibited, the extreme lack of wedding adequacy (*kafāʾah*) – itself strongly gendered – would nonetheless afford grounds for dissolution of such marriage by the judge (*fasḫ*).

The gendering is also supported by an argument advanced by modern jurists on the basis of the combined reading of Q. 2:221 and 5:5 – an inescapable outcome of articulating the regulations on interfaith marriages in the modern, single rule. Modern jurists argue that the fact that Q. 2:221 repeats the prohibition verbatim for females (*mušrikāt*) and males (*mušrikīn*), whereas Q. 5:5 only mentions permission for females (*muḥṣanāt*) is a clear indication in favor of the gendering. This argument seems at best tenuous as the categories of *širk* and *iḥṣān*-cum-*ahl-al-kitāb* do not overlap, and Q. 5:5 is not traditionally framed as an instance of abrogation (*nasḫ*) of Q. 2:221. It becomes an issue of particularization (*taḫṣīṣ*) only in the minority view that the Christian woman (by saying that Jesus is God, or that he is one of three) commits *širk*, yet she is exempted from the prohibition of Q. 2:221 because she belongs to those who were given the Book of Q. 5:5 (*al-muḥṣanāt min al-laḏīna ʾūtū al-kitāb*).

The gendering of the permission is also connected by some modern jurists to the issue of filiation. Since the child is Muslim because the father is Muslim, marriage of a Muslim woman to a non-Muslim man is deemed inconceivable as it would produce non-Muslim offspring to a Muslim mother. This patriarchal reading of membership in the Muslim community by paternal descent only (thus generating a gendered (religious) endogamic rule for the Muslim woman) collides with the de-gendered rule of attribution to the child of religious affiliation according to a hierarchy of religions (the child will follow the religion of whichever parent belongs to the higher religion).[8] This latter rule is the one applied in Islamic law to the interfaith marriages between non-Muslims.

Beyond the Qurʾānic texts, classical Islamic law scholars further interconnect interfaith marriages with a broader contextual distinction of the territory where Islamic law applies (*dār al-islām*) and where it does not (*dār al-ḥarb*). Scholars differently qualify the marriage of a Muslim male with a Scriptural female (*kitābīyah*) that lives as a protected person in the *dār al-islām* (*ḏimmīyah*) from the one with a *kitābīyah* that lives in the *dār al-ḥarb* (*kitābīyah ḥarbīyah*). Mālikī and Šāfiʿī jurists, for instance, employ different degrees of reprehensibility (*karāhīyah*), whereas Ḥanbalī jurists do not attach any further qualification to that of permissibility (*ibāḥah*)

[7] For an outstanding overview of the gender bias in *tafsir* and *fiqh* literature on interfaith marriages, see: LEENA AZZAM, The Gendered Perception of Interfaith Marriages in Islamic Legal Discourse, LLM Thesis, The American University in Cairo 2015.

[8] IBN AL-QAYYIM says that *kitābī*s are superior to *mağūsī*s, and within *kitābī*s Christians are superior to Jews. Therefore, the child of a *kitābī(yah)* with a *mağūsī(yah)* is considered a *kitābī*, and the child of a Christian with a Jew is considered a Christian. IBN AL-QAYYIM, Aḥkām ahl al-ḏimmah, Dammām 1997, 2: 771.

of Q. 5:5. Ḥanafī jurists are the ones that show the most hostile attitude towards marriages in the *dār al-ḥarb* with a *kitābīyah ḥarbīyah* qualifying the marriage either as reprehensible (*makrūh*) and imposing further restrictions (like avoiding generating offspring through ʿ*azl*), or sheerly as forbidden (*ḥarām*) in open conflict to the un-contextualized permission of Q. 5:5.[9]

The 'classical' regulation of interfaith marriages was the logical outcome of a particular worldview in which the discourse of the dominant political elite placed the other (the woman, the non-Muslim) in a hierarchically subordinated position, and it served the purpose of maintaining that peculiar power-balance. The crystallization that led to what was to be known as classical Islamic law took place during the later Abbasid caliphate (through the 13th century AD), and just as the patriarchal approach of the jurists of the Abbasid times affected and keeps affecting the consideration of the woman in the law and her role in it,[10] so it does for the non-Muslim.[11] Modernity has a mixed record on the de-patriarchalization of Islamic law, as it has in more than one respect confirmed and strengthened the *Weltanschauung* of the jurists and the elites they originated from in the late Abbasid caliphate.[12]

The 'modern', single rule – while apparently solidly based on the mere Qurʾānic verses and discarding all the scholarly interpretations – is rather the product of a selection and abstraction that favored the patriarchal reading of classical jurists while avoiding all problematic references to their background considerations. The modern selection and abstraction, therefore, secures the patriarchal reading from critique or review. Gendered permission based on unequal relations between spouses and adverse qualification based on the hostility of the legal environment are the two areas in which the rule on interfaith marriages can be put to test in the Scottish context. If Scots law does not discriminate on the basis of gender or religious affiliation, do Islamic law impediments to marriage by disparity of faith still stand unaffected or can Muslim communities in Scotland reconsider them?

Before considering the Scottish context, let me mention here in passing that interfaith relationships and marriages that do not conform to our 'modern', single rule are likely to exacerbate social conflict even in a Muslim-majority setting. In Egypt, a heated debate on interfaith marriages followed the sectarian clashes of April 2011 in Imbābah (a lower-class Cairo neighborhood) between Muslims and Copts, which often occur over allegations of (a) love relationships beyond the 'modern', single rule, (b) conversions and reconversions to avoid application of confessional family law, or (c) construction of new churches. A few days after the clashes, on 3 May 2011, ʿAmr Ḥamzāwī, a political science professor championing liberalism in the country, appeared on the tv talk show *al-Qāhirah al-yawm* and, while explaining the key concepts of liberalism/democracy, on the freedom of choice he mentioned the necessity of introducing a two-track system in family law matters, in order to allow the citizen to freely choose between religious or civil marriage (civil marriage not being currently available in Egypt). The host, ʿAmr Adīb, interjected to ask Ḥamzāwī whether he was suggesting that a Christian (man) could marry a Muslim (woman). Ḥamzāwī replied that in

[9] IBN AL-QAYYIM, supra n. 8, at 2: 809.

[10] LEILA AHMED, Women and Gender in Islam: Historical Roots of a Modern Debate, New Haven 1992.

[11] YOHANAN FRIEDMANN, Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition, Cambridge 2003.

[12] LAMA ABU-ODEH, Modernizing Muslim Family Law: The Case of Egypt, Vanderbilt Journal of Transnational Law (37/2004), 1043-1146.

order to be in accordance with his principles, the principles of liberalism/democracy, he believed that an option had to be offered to the citizen, regardless of whether the majority of Egyptian society agreed or not. This was picked up and heavily criticized on the web and in the media. In particular, videos were extracted and circulated on the web under the titling: "Ḥamzāwī invites Muslim women to marry Christian men". Ḥamzāwī accurately denied that he was 'inviting' Muslim women to marry Christian men, but in his response to a column by ᶜUmar Ṭāhir[13] he added to his previous televised statement that such an option needs to be available "within limits that do not contravene confessional laws" (*fī ḥudūd lā tuḫālif al-šarāʾiʿ al-dīnīyah*).[14] This episode shows once more how delicate and sensitive the issue of the 'modern', single rule is, and seems to suggest that the latter has left the sheer realm of law proper to be assumed as an element of identity.

III. The Scottish context

Scots law has always maintained a less holistic conception of marriage than the one found at common law. However, until 1920 husbands had extensive rights over their wives' property, first of property and administration then of administration only after 1881. In 1920, the Married Woman's Property (Scotland) Act 1920 provided for the general principle that marriage shall not of itself affect the respective rights of the spouses in relation to their property and their legal capacity.[15] This principle is now to be found in sect. 24 of the Family Law (Scotland) Act 1985. The previous year, however, another bill was passed which is of even higher significance to the present study: Law Reform (Husband and Wife) (Scotland) 1984.

The 1984 Law Reform established the prohibition of actions of adherence, whereby no spouse can be entitled to apply for a decree from any court in Scotland ordaining the other spouse to adhere (i.e., to live together and be sexually faithful to each other, sect. 2(1)). The reform also abolished curatory after marriage (sect. 3), the husband's right to choose the matrimonial home (sect. 4), and defined ante-nuptial onerous agreements (except gifts, sect. 5), husband's liability for wife's debts incurred before marriage by reason only of being her husband (sect. 6), the *praepositura* (sect. 7),[16] and husband's liability for wife's judicial expenses when neither a party nor *dominus litis* (sect. 8).[17]

Equal relations between spouses seem to have been the main goal and achievement of the Law Reform (Husband and Wife) (Scotland) 1984. From the absence in contemporary Scots Law of any reference to the legal entitlement of either spouse to force any decision on the other one

[13] ᶜUMAR ṬĀHIR, Ḥamzāwī wa-l-mutasalfanūn wa-l-muta'aqbaṭūn, al-Miṣrī al-yawm (Cairo, May 9, 2011), available at <http://www.almasryalyoum.com/news/details/207122>, last accessed April 29.

[14] ᶜAMR ḤAMZĀWĪ, al-Zawāğ al-madanī, al-Šurūq (Cairo, May 11, 2011). The column, no longer available on the Shorouknews.com portal, is still available at <http://www.ahl-alquran.com/arabic/show_news.php?main_id=17498>, last accessed April 29.

[15] LILIAN EDWARDS & ANNE M. O. GRIFFITHS, Family Law, Edinburgh 2006, at 349.

[16] *Praepositura* in Scots Law was "the right of a wife to incur debts on behalf of her husband for food and household requirements, 'the managership of a married woman in domestic matters … entitling her to pledge her husband's credit for necessaries' (Sc. 1946 A. D. Gibb *Legal Terms* 66)" in Dictionary of the Scots Language, Edinburgh 2004, available at <http://www.dsl.ac.uk/entry/snd/praepositura>, last accessed April 29.

[17] A *dominus litis* is a party with a direct interest in the subject matter of the litigation (Sc. 1853 Session Cases (1853–54) 23).

may infer that any act involving, for instance, unreasonable impediment to practice one's religion will be deemed unlawful and treated as such irrespective of marriage between the two.

The non-Muslim husband cannot therefore legally interfere with his Muslim wife's religious practices under Scots law. The possibility of the husband to force his wife to neglect her religious duties is one of the main concerns often articulated as an argument to justify the gendered single rule. Whereas this may be plausible, even legally recognised, in jurisdictions where the husband retains powers over the wife, as in most of the legal systems where most non-Scottish Muslims in Scotland originate from, this would not be legally justifiable in Scotland.

Moreover, confessions in Scotland are not hierarchically ranked, and even the Church of Scotland has long challenged its own status as established church under UK law – a battle fought in the name of independence in matters spiritual and eventually won with the passing of the Church of Scotland Act 1921 by the Westminster Parliament. Muslim communities in Scotland are therefore entitled to the same rights as other confessions. They are neither hierarchically superior nor inferior to any other.

What legal arrangements does the Scottish legal system offer to its Muslim communities in matters of family law? The system adopts quite a liberal stance on the ways in which a marriage can be solemnized, but it then regulates the effects of marriage and its termination under general Scots law. However, Scottish courts also try to accommodate even elements traditionally classified as elements that affect the validity of a Muslim marriage (such as the *mahr* or dower) by recourse to the existing available legal categories of Scots law (be them within the law of marriage, liberalities, or other).

The Scottish legal system provides a hybrid solution for the law of marriage (religious or civil), according to the Marriage (Scotland) Act 1977.[18] The marriage may be solemnized by an authorized registrar (civil),[19] or by an approved celebrant (religious)[20] according to different forms, but it will be uniformly regulated by Scots law.

The solemnization of a religious marriage in Scotland is quite open to religious bodies that are not the 'traditional' or prescribed ones. Marriage can be solemnized by (i) a minister of the Church of Scotland,[21] (ii) a minister, clergyman, pastor or priest of a religious body prescribed by regulations made by the Secretary of State, or who, not being one of the foregoing, is recognized by a religious body so prescribed as entitled to solemnize marriages on its behalf,[22] (iii) a person who is registered under section 9 of the 1977 Act (defining the conditions for registration, basic requirements to qualify as celebrant, and a minimum appropriate form for the marriage ceremony),[23] or (iv) is temporarily authorized under section 12 of this Act.[24]

[18] As amended by the Marriage (Scotland) Act 2002. Marriage has also been partially reformed by the Family Law (Scotland) Act 2006.
[19] Sect. 8(1)(b) Marriage (Scotland) Act 1977.
[20] Sect. 8(1)(a) Marriage (Scotland) Act 1977.
[21] Sect. 8(1)(a)(i) Marriage (Scotland) Act 1977.
[22] Sect. 8(1)(a)(ii) Marriage (Scotland) Act 1977.
[23] Sect. 8(1)(a)(iii) Marriage (Scotland) Act 1977.
[24] Sect. 8(1)(a)(iv) Marriage (Scotland) Act 1977.

Some Muslim clerics in Scotland did register under sect. 9 of the 1977 Act, and can therefore solemnize marriages. The requirement of an appropriate form for the marriage ceremony is satisfied if it includes, and is in no way inconsistent with (a) a declaration by the parties, in the presence of each other, the celebrant and two witnesses, that they accept each other as husband and wife; and (b) a declaration by the celebrant, after the declaration just mentioned, that the parties are then husband and wife.[25] Islamic law does not stipulate for the conclusion of a valid marriage either a celebrant (even if in practice the presence of a religious figure is often sought), or the declaration of such celebrant that the parties are husband and wife. Yet, both requirements could be easily accommodated in the conclusion of an Islamic marriage.

Registering under sect. 9 of the 1977 Act, however, will prevent a Muslim cleric from solemnizing an Islamic marriage without a marriage schedule, since that would be considered an offence in Scotland.[26]

Upon verification of lack of legal impediments, a marriage schedule is issued by a district registrar including date and place of the solemnization.[27] If an approved celebrant solemnizes a marriage without a marriage schedule ((a)in respect of the marriage, (b) issued in accordance with this act, (c) being available to him at the time of the marriage ceremony), he shall be guilty of an offence and shall be liable of (i) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 2 years or to both; (ii) on summary conviction, to a fine not exceeding Level 3 on the standard scale (GBP 1,000)[28] or to imprisonment for a term not exceeding 3 months or to both.[29]

If Muslim clerics want to be free to perform un-registered *nikāḥ* (the most common term for Islamic marriage used in Scotland by South Asian Muslims and Muslims of South Asian descent), then they cannot be registered and solemnize marriages to be valid under Scots Law.

The only other open option of an irregular marriage at common law, the marriage by cohabitation with habit and repute, has been recently abolished in 2006.[30] The abolishment is prospective, and does not affect marriages by cohabitation with habit and repute that ended before the commencement of the law (4 May 2006), those that began before but ended after the commencement, and those that began before and continue after commencement.[31] The Court of Session, Scotland's supreme civil court, in an Outer House decision in 2005 granted a declarator of marriage by cohabitation with habit and repute even to a pursuer who had apparently refused to enter into an un-registered *nikāḥ* with the defender, but was yet considered his wife at common law. From the proceedings it is difficult to conclude whether the Court would have reached the same decision, had the pursuer accepted to contract a *nikāḥ*, or rather the Court granted the declarator precisely because she refused to do so. Among the arguments brought to justify her repeated refusals of the *nikāḥ* marriage proposals, the pursuer mentioned that "she felt that she would be trapped if she were to convert to Islam" [18], but the

[25] Sect. 9(3) Marriage (Scotland) Act 1977.
[26] Sect. 24(1)(c) Marriage (Scotland) Act 1977.
[27] Sect. 6 Marriage (Scotland) Act 1977.
[28] Sect. 289G, Criminal Procedure (Scotland) Act 1975, as substituted by the Criminal Justice Act 1991.
[29] Sect. 24(1) Marriage (Scotland) Act 1977.
[30] Sect. 3 of the Family Law (Scotland) Act 2006.
[31] EDWARDS & GRIFFITHS, supra n. 15, at 341.

defender maintained that "he would not have required the pursuer to convert to Islam before he married her. He wanted to get married whether she was willing to convert or not. He was even willing to become a Sunni Muslim or, as he put it, to take a Christian oath just to be married to her" [30].[32] Even though the defender's affiliation is not known, both parties' account is consistent with the outright rejection of interfaith marriages in Ǧaʿfarī law (the main Shiʿi *maḏhab*).

Does Scots law set impediments to marriage by disparity of faith for the validity of marriage? In its early days Roman Catholic canon law was the law that regulated marriages in Scotland. Early Roman Catholic canon law itself was an adaptation of the Roman law of marriage, which through the lack of *connubium* recognized a number of what we would now call impediments to marriage based on status (mainly citizenship, social class, freedom). It is here worthwhile to underscore that also Islamic law classifies some impediments to marriage under the heading of lack of wedding adequacy (or status: *kafāʾah*). During the early Middle Ages, canon law rejected all the status-based impediments of Roman law, including the late Roman law impediment by disparity of cult between Christians and Jews. In the late Middle Ages, however, marriages between Christians and Jews were declared null according to canon law, just as some marriages between Christians and 'heretics' (canonists held different opinions on the ones that should have been considered valid and those null). Quite unsurprisingly, the Reformation in Scotland disregarded all the status-based impediments of late medieval canon law, including those by disparity of cult, and there has been no turnaround on the point ever since. Other impediments to marriage have been debated in Scots law ever since the 1560 Reformation (e.g.: impotency, relationship, and identity of sex), but not the ones based on status (even if some of the Scotsmen I interviewed referred to the fact that conversions to Catholicism or marriages with Catholics were socially looked down on through the early 20th century).[33]

Scottish courts (just like courts elsewhere in non-Muslim contexts) are developing an interesting case law trying to accommodate requests from Muslim parties on elements of the Islamic marriage such as the dower (*mahr*); but it is clear that the logic applied is that of subsuming new facts (the *mahr*) into existing legal categories (variably a nuptial gift, an ante-nuptial marriage contract, a sheer act of liberality..).[34] Parties try, for instance, to induce courts in framing *mahr* in one or the other category in order to achieve their goals rather than considering it within its own legal environment, as a recent study has shown.[35] And the legal profession assists; John Fotheringham, child and family law specialist in a large Scottish law firm, wittingly framed it as: "Scottish solicitors can serve their Muslim clients by being sensitively and creatively aware of what can be done within existing structures of Scots law".[36]

[32] Sheikh v. Sheikh [2005] CSOH, 25.

[33] For a thorough analysis of impediments to marriage in Scots law in a historical and comparative perspective, see JOHN RANDALL TRAHAN, Impediments to Marriage in Scotland and Louisiana: an Historical-Comparative Investigation, in: Vernon Palmer & Elspeth Reid (Eds.), Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland, Edinburgh Studies in Law, Edinburgh 2009, 173-207.

[34] RUBYA MEHDI & JØRGEN S. NIELSEN (Eds.), Embedding Mahr (Islamic Dower) in the European Legal System, Copenhagen 2011.

[35] PASCALE FOURNIER, Muslim Marriage in Western Courts: Lost in Transplantation, Farnham 2010.

[36] JOHN FOTHERINGHAM, When Muslims look to Shari'ah principles, the law of Scotland can be quite accommodating, The Scotsman, Edinburgh, August 24 2008, available at <http://news.scotsman.com/scotland/John--Fotheringham--When.4422319.jp>, last accessed April 29.

Recourse to expert advice is at times requested, at times rejected by courts,[37] allowing for even wider freedom in the framing of the different elements of Muslim marriage. For example, the English Court of Appeal[38] and the Scottish Court of Session[39] recently took two conflicting decisions on the validity of a Muslim marriage by telephone based on the same expert advice.

The strategy of Western courts to accommodate elements of Muslim marriage within the 'acceptable' framework of existing legal categories unavoidably produces a piecemeal, super-hybrid outcome that is neither the classical solution, nor the modern one.

Can Islamic impediments to marriage by disparity of faith be recognized by Scottish courts within Scots law? Since Scots law no longer recognizes impediments based on status (including by disparity of cult), it is unlikely to see a case filed in front of a Scottish court for an interfaith marriage that does not conform to our 'modern', single rule. It is hence moot to delve into standing requirements for such a dispute. The only case in which an Islamic impediment to marriage by disparity of faith is likely to appear in front of a Scottish court is the case of the wife who converts to Islam and wants to terminate her marriage with her non-Muslim husband. One such case could be framed in quite a varied number of ways, but all revolving around the grounds for divorce and the ensuing financial provisions. A group of contemporary Islamic scholars is advancing a partially different view from the single-rule approach to the consequences of the conversion to Islam of a woman who is in wedlock with a non-Muslim man, and the debate it may generate needs to be analyzed a bit further.

The discussion on the accommodation of voluntary jurisdictions in the various forms of Muslim arbitration tribunals (MATs) or Šarīʿah councils in Scotland is of secondary importance for matters of impediments to marriage.[40] Even in an unlikely request of an opinion on such an issue, the body would most probably be able to issue only an advisory opinion, not an award final and binding on parties.[41]

IV. The single rule in Scotland

One of the main objectives of the research project was to investigate the interplay between the 'modern', single rule on interfaith marriages in Islamic law and the Scottish legal context. The abstraction of the single rule has de-contextualized the regulations on interfaith marriages; is the rule now immune from the context, or would a re-contextualization affect its content (and application)?

Interviews were conducted to that end with a diversified range of figures from Muslim communities in different regions of Scotland. Qualitative methods were applied, considering the extremely narrow research question of the possible re-contextualization by Muslim

[37] Cfr. WERNER MENSKI, Law, religion and culture in multicultural Britain, in: Rubya Mehdi, Hanne Peterson, Erik R. Sand and Gordon R. Woodman (Eds.), Law and Religion in Multicultural Societies, Copenhagen 2008, 43-62, at 45.
[38] EWCA Civ 198 [2009] 2 WLR 185.
[39] MRA v. NRK [2011] CSOH, 101.
[40] See the AHRC/ESRC-sponsored report on religious courts and bodies in England and Wales: GILLIAN DOUGLAS ET AL., Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts, Cardiff University, June 2011, available at <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf>, last accessed April 29.
[41] Sect. 11 ff. Arbitration (Scotland) Act 2010.

communities in Scotland of the legal impediments to marriage by disparity of faith in Islamic law. The research covered major cities with large Muslim communities as well smaller urban centers (namely Glasgow, Edinburgh, Aberdeen, Dundee and Inverness), and included active participants in the legal debates with the Muslim communities (mainly scholars, local imams, women active in faith-based NGOs, and community leaders).

The data seem to suggest that there is a language divide that affects the debate. On the one hand, those who speak Arabic – either because it is the language they use or because they received religious training – are aware and participate in a debate on interfaith marriages from a very specific angle, that of the so-called *islām al-zawǧah* case. This is the case of the conversion to Islam of a woman who is married to a non-Muslim (who does not convert, neither wishes to do so); will she be requested to divorce her husband when embracing Islam? Or, else, be instructed to refuse conjugal relations with her husband, based on some reports of Muḥammad's injunction on his daughter Zaynab regarding her marriage to Abū al-ʿĀṣ? The debate is open, and scholars are divided on the answers to give to such questions. On the other hand, non-Arabic speakers (the majority of Muslims in Scotland) seem to be less involved in the debate and more inclined to perpetuate the single rule developed by modernity on grounds of its supposedly higher traditional legitimacy.

The language divide can be explained in terms of ability to participate in the wider rather than in the local debate, and the absence of a debate that could be properly considered local. The peculiarities of the Scottish context thus become quite irrelevant, as even the Arabic-speakers depend on the larger Muslim communities in England or overseas.

Effects of the conversion to Islam of a woman married to a non-Muslim (*islām al-zawǧah*) have attracted the attention of a group of Muslim scholars who intend to develop a 'new' body of Islamic law based on the special conditions of Muslim communities who live as minorities (especially in the West). However, these attempts to develop 'new' rules tailored on the needs of Muslim living in non-Muslim majority contexts seem to have met with tepid reception so far. Arabic being the main language used for this 'jurisprudence for minorities' (*fiqh al-aqallīyāt*), it should come to no surprise that references to the debate on the *islām al-zawǧah* case were made exclusively by Arabic-speaking members of the Muslim communities in Scotland.

It is worth mentioning here that advocates and supporters of *fiqh al-aqallīyāt* engaged directly with the classical Islamic regulations on interfaith marriages in the second issue of *al-Mağallah al-ʿilmīyah* of the European Council for Fatwa and Research (ECFR) in 2003; the issue was entirely dedicated to the status of the marriage of a woman who converts to Islam while her husband does not. Among the contributors featured most of the well-established (and sometime discussed) Muslim legal scholars, from ʿABDALLĀH AL-ǦUDAYʿ to ʿABDALLĀH AL-ZUBAYR, from FAYṢAL MAWLAWĪ to MUḤAMMAD ABŪ FĀRIS, from NIHĀT ʿABD AL-QUDDŪS to YŪSUF AL-QARAḌĀWĪ.[42] The grounds for re-consideration of the *islām al-zawǧah* case mentioned in the general presentation of the issue could even warrant a re-consideration of the classical regulations on interfaith marriages beyond the *islām al-zawǧah* case.[43]

[42] See the discussion in: DINA TAHA, Muslim Minorities in the West: Between Fiqh of Minorities and Integration, in Electronic Journal of Islamic and Middle Eastern Law (1/2013), 1-36, at 25-28.

[43] FAYṢAL MAWLAWĪ, Taqdīm, al-Mağallah al-ʿilmīyah (2/2003), 9-10.

In its final decision, however, the ECFR adopted quite a conservative reading while recognizing to the woman who converted to Islam after consummation of marriage the right to wait (for an indefinite period of time) for the conversion of the husband.[44] The line closes with the unclear stipulation that, when the husband converts, there will be no need for a renewal of the marriage. Relations between the spouses during this indefinite period during which the woman waits for the conversion of her husband is addressed further down in the decision, where the opening statement leaves no room to doubt that all schools agree that the wife cannot remain with her husband after the termination of the waiting period (*ʿiddah*). The Council, however, also mentions a minority view that the wife can remain with her husband with full marriage rights and duties, provided he does not prejudice her in her religion and she harbors hopes that he will eventually convert. Not unsurprisingly, the issue of the religious affiliation of the offspring is not addressed.

Indeed, according to the ECFR *fatwá*, if the wife wishes to maintain her marriage after her conversion to Islam (against the consensus of Muslim scholars to the contrary), she either has to suspend conjugal relations with her husband until his conversion (in line with Zaynab's episode), or follow the other minority view of full marriage rights and duties. This view finds support in two traditions, the first attributed to ʿUmar and the second to ʿAlī – ʿAlī's decision in this latter tradition is based on the consideration that the husband enjoys protection (literally: *ʿahd*, a contract, short for: *ʿahd al-ḏimmah*, contract of protection), i.e. he is a *ḏimmī*. A condition that certainly does not hold in Scotland.

V. A Hybrid Legal Solution?

It is rare to find another area of Islamic law where the consensus of scholars seems to be more widespread than on interfaith marriages. Despite the inconsistent practice of the early days of Islam,[45] during the 3rd century AH (9th AD) an articulated system of impediments to marriage by disparity of faith somehow stabilized around a series of considerations revolving around certain arrangements of unequal relations between spouses, a hierarchized system of religious communities, and an horizon of territories ruled by Islamic law and others not. Modernity uprooted such a system from its environment, and transformed it into a single rule through selection and abstraction. The end-result is a rigid formulation unable to interact either with the legal environment that produced the system (and hence grasping its own gist), or with the different conditions that an unknown and not-necessarily-unfriendly legal environment may offer.

The hybridity of the modern single rule is therefore magnified by its application in a context like the Scottish one, where the law guarantees equality of spouses, religious communities are not ordered in ranks, and Islamic law does not govern the system. If one argued from a conservative standpoint that, based on the last remark (i.e.: Islamic law does not govern the Scottish legal system), the legal category of *dār al-ḥarb* should apply, then all the provisions regarding interfaith marriages in the *dār al-ḥarb* should apply (not the ones developed for the *dār al-islām*).

[44] Qarār 3/8, ECFR, 8th Ordinary Session, Sevilla 18-22 July 2001, in al-Mağallah al-ʿilmīyah (2/2003), 445-446.
[45] FRIEDMANN, supra n. 11.

This selective approach to the classical regulations generates a super-hybrid solution that is neither the classical, nor a new one (in fact it is, but it is not purported as such). The authority of the super-hybrid solution seems to be strengthened by the oblivion of the contextualization-cum-localization of the classical solutions; regulations for a *šarīʿah*-ruled context are extended to a non-*šarīʿah*-ruled one – disregarding the provisions set out for the latter context. One could speculate that this 'extension' of the regulations developed for a *šarīʿah*-ruled context mirrors a certain conception of the migratory phenomena that might change as newer generations progressively lessen their ties with the 'homelands' of their ancestors.

Impediments to marriage by disparity of faith fall out of the purview of contemporary legal systems – so adamantly committed to the principle of territoriality of the law, and its professed religious-blindness. These restrictions fall in a blind spot of Scots law and court system, but it would amount to mystification to discard them as irrelevant to law, especially when reasoning in terms of multiculturalism[46] and citizenship theories.[47]

When introducing the distinction between multiculturalism and plural monoculturalism, AMARTYA SEN points precisely at a case of rejection of an interfaith relationship for an immigrants' daughter and considers it an overt act of separateness embedded in plural monoculturalism rather than multiculturalism.[48] Our single rule seems to prove also SUSAN MOLLER OKIN's point,[49] if the patriarchal roots of both the modern articulation and the classical crystallization are not revisited. The bases for the gendered, hierarchical single rule appear much less monolithic when stripped of the patriarchal readings of the classical jurists of the 13th century AD and those of the abridging jurists belonging to the new elites of the modern nation-states.

The interaction between state law and confessional law generates conflicts precisely when the two systems refuse to give the same appreciation to a certain element. It is in those circumstances that the socio-legal arrangement model can be put to test. If a Muslim cleric registered as a celebrant under Scots law refuses to marry a Muslim woman to a non-Muslim man, it is dubious whether Scottish authorities would (and could) intervene. Could they revoke the authorization based on the application of a gender-discriminatory wedding practice? On what evidence? The broad wording of sect. 10(1)(d)(iii or iv) of the Marriage (Scotland) Act 1977 would seem to allow the removal of such a celebrant's name from the register. Would (and could) the same Scottish authorities prevent the same celebrant from marrying a Muslim man to a non-Muslim woman in compliance with classical Islamic (Ḥanafī) law? The hypothesis seems quite remote since it would entail enforcement of a religious discrimination practice. Today even more than in the past, and on lesser and lesser grounds, the victim of the 'modern', single rule is the Muslim woman, who is forced to choose between her faith and her prospective or current partner.

[46] CHARLES TAYLOR, Multiculturalism and "The Politics of Recognition": An Essay, Princeton 1992; BHIKHU C. PAREKH, Rethinking Multiculturalism: Cultural Diversity and Political Theory, Cambridge 2000; SUSAN MOLLER OKIN, Is multiculturalism bad for women?, Princeton 1999.

[47] WILL KYMLICKA, Multicultural Citizenship: A Liberal Theory of Minority Rights, Oxford 1995.

[48] AMARTYA SEN, Identity and Violence: The Illusion of Destiny, New York 2007, at 157.

[49] OKIN, supra n. 46.

In reverse order, the same conflict between state law and confessional law can be observed in the current debate in Egypt over the second marriage of the Copt. The Coptic (Orthodox) Church allows for divorce in a very limited number of cases, but Egyptian state courts divorce Copts with much more liberality, considering divorce a constitutional right of the citizen according to the Islamic understanding of marriage and divorce. If state courts manage to force the termination of all legal consequences of the marriage, they cannot force the Church to acknowledge the termination of the marriage. The issue is further complicated by the absence of a non-confessional family law system by which the state-divorced Copt can actually lead a life without further, harsh legal consequences. The Supreme Administrative Court has tried to force the Church to remarry the court-divorced Copt, but to no avail so far. Here again the legal confrontation seems to have escalated to the point where the Coptic canon law rule has turned into a symbol of identity (and resistance).

The strong claim to authenticity advanced in favor of the modern, single rule on interfaith marriages needs to be revisited in light of the latter's super-hybrid nature. Considering the context in which the various considerations of classical law were articulated, the dynamics of selection and abstraction that unfolded with modernity, and the conditions of the new contexts in which these rules are to be applied challenges the simplistic claim to authenticity and opens new avenues for re-engagement with the issues – including discussions on interfaith marriage regulations, which are conventionally dismissed as barred by the overwhelming consensus reached on their final arrangement.

Conflict over *Waqf* property in Jerusalem: Disputed jurisdictions between civil and *Shari'a* courts

*by Haitam Suleiman**

Table of Contents

Abstract

Recent revisionist academic legal historians have relocated the Israeli national story within a colonial and postcolonial narrative, and in a global context indigenous groups dispossessed from their communal and ancestral lands are increasingly re-asserting claims to that land through legal and human rights challenges, deploying international human rights law relating to rights to property and minority rights. Waqf property (held in charitable trust for religious purposes) is an important element in Muslim societies, and has been subject to large-scale transfer to Jewish control since the creation of the state of Israel in 1948 ('redeemed' for the Jewish people). The role of successive Absentee Property Laws in this confiscation derives from Ottoman land tenure, as modified during the British League of Nations Mandate over Palestine, and subsequently. The Israeli legal system has, devised and utilised various modalities and mechanisms to systematically confiscate Palestinian land in general and more specifically the waqf, while also re-establishing shari'a courts and replacing the shari'a court of appeal in Jerusalem. Mutawallis (managers of waqf) have to undertake 'forum shopping' for search for the most suitable court (between Israeli civil and shari'a courts and the Palestinian shari'a court) to get and enforce a favourable judgment, but the new structures leave Palestinians with no legal authority over the administration of the waqf system. Recent legal disputes over the status of certain mosques and cemeteries (as waqf properties), and the special situation of waqf property in Jerusalem Old City are examined as sites of Palestinian resistance.

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I. Introduction: legal pluralism & disputes over *waqf* property

This article explores the conflict over land in Israel/Palestine, within a context of postcolonial legal pluralism, with particular reference to Islamic property held for religious charitable purposes (the *waqf*). Israel/Palestine inherits several legal traditions, offering often conflicting sources of legitimacy: Islamic, as applied by the Ottoman empire until 1918, and more recently by Jordan in the West Bank and Egypt in Gaza; British colonial, under the League of Nations Mandate (1923-48); and post-1948 Israeli, with borrowings from United States and European jurisdictions. British colonialism's role in building the Israeli state has been re-asserted by Shamir:

> *"Too little attention has also been given to the basic fact that the British, aided by all their colonial experience elsewhere, created and installed a functioning state in Palestine: a rather advanced web of administrative apparatuses and governmental departments, a sound infrastructure and, of course, a fully-developed, ready-to-use legal system".*[1]

English-language literature on *waqf* in Israel/Palestine is limited, and relevant legislation and court rulings are often unpublished, or unavailable in English. This article is able to draw upon field research undertaken by a Palestinian Arab living in Israel, Haitam Suleiman, with Arabic, Hebrew and English language competence, and aware of nuances of language, even body language, and cultural background. Interviewees may have sought to mislead, where questions dealt with controversial and sensitive issues, and officials may withhold information, while the field-work was risky and interrupted by the current conflict.

II. The Revival of *waqf*

Waqf [pl. *awqaf*] in Arabic means hold, confinement or prohibition, and in Islamic *shari'a* law is a juridical institution for the reservation of property for religious purposes. A *waqf* is established by a living man or woman (the *waqif* = founder), who holds a certain revenue-producing property and makes the (principal), inalienable in perpetuity, prohibited from sale, gift and inheritance. The property is placed under the stewardship of a fiduciary (*wali* or *mutawalli*) who assures that the revenues pass to the intended beneficiaries (*mustahiqeen)*.[2] Under *Shari'a* law, while *sadaqa* (charity) should reach only the poor and needy, *waqf* can be directed to both poor and rich; *Sadaqa* may be owned, sold, or granted, but the *waqf* is perpetual, with no intervention in ownership, and is confined to fixed property, or things that have sustainable reserved revenues. There are three basic kinds of *waqf.* The first, the *Khairy* or charitable *waqf*, directs property revenues towards philanthropic goals. The second, the *Ahli* or family *waqf*, benefits family members, with the endower choosing what individuals and what lines of descent benefit; administrators are family members, and the revenue-bearing assets

[1] RONEN SHAMIR, The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine, Cambridge 2000, at 11.

[2] SIRAJ SAIT & HILARY LIM, Land, Law and Islam: Property and Human Rights in the Muslim World, London 2006. See also, MUSTAFA AHMAD ZARGA, Ahkam al-awqaf, [Awqaf Rulings], Dar 'Ammar 1998.

circulated indefinitely.[3] Finally, the *Mushtarak* or joint *waqf*, divided the revenues between philanthropy and family.

Interestedly, given the contested state of *waqf* in Israel, the very first *waqf* was created by a Jewish convert to Islam who bequeathed his wealth to the Prophet for the benefit of the poor and needy. The juridical form of the *waqf* took shape in succeeding centuries and the jurist Abu Yusuf (d. 798) asserted that a *waqf* was valid only if irrevocable and made in perpetuity.[4] Its perpetuity element distinguishes the *waqf* from the trusts and foundations found in Western legal systems, but it apparently influenced the early English trusts during the time of the crusades, when there was much population movement between Europe and the Holy Lands, including the Franciscan Friars. The University of Oxford in its early years may have been influenced by the *waqf*, with the 1264 Statutes of Merton College (significant in the founding of the college system) showing Islamic influences.[5]

A*wqaf* flourished with the establishment of Muslim-ruled states, offering a means of diverting resources from consumption, and investing them in productive assets to provide either usufruct or revenues for future consumption by individuals or groups of individuals.[6] *Awqaf* served many functions. They provided educational institutions with buildings, teaching materials, staff salaries, and scholarships for poor students, derived from the revenues of orchards and rental buildings, and independent of the state. They provided health services, public kitchens, orphanages, environmental protection and animal care. *Awqaf* stimulated economic activity, providing shops at low rent, public water fountains, and accommodation for commercial caravans. A range of public goods now provided by government agencies in the past came through private *waqf*, which have been called the most important and universal economic institution of Islamic society with reflective influance on the tax structure of the state, the redistribution of wealth in society and the urban fabric of Islamic cities.[7] The *waqf* was an urban institution that shaped the civic space of Ottoman cities,[8] while *waqf* property was estimated at over a third of the agricultural land in Turkey, Morocco, Egypt and Syria. In Recent times modern states in the Middle East however nationalized vast *waqf* properties, while new municipal government services increasingly supplanted the *waqf*. Legislation brought *waqf* under greater regulation or absolute prohibition, and contributed to the prevalence of secular law over *shari'a* principles, resulting in the stagnation of *waqf*. The family *waqf* was restricted, and some states forbade new creations, with the stipulations of *waqf* founders no longer treated as 'sacred and inviolable'. The state claimed that the *waqf* was no longer serving its original purposes, and it could administer them better. The eclipse of *waqf* has left a vacuum in the arena of public services; students, the sick, homeless, travellers, the

[3] TIMUR KURAN, The Provision of Public Goods under Islamic Law: Origins, Contributions, and Limitation of the Waqf System, Law and Society Review, vol. 35, no. 4 (2001) 841-897, at 856.

[4] PETER C. HENNIGAN, The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse, London 2004.

[5] MONICA M. GAUDIOSI, The influence of the Islamic Law of Waqf on the Development of the Trust in England: the Case of Merton College, 136 University of Pennsylvania Law Review (1988) 1231-1261.

[6] MONZER KAHF, Financing the Development of Awqaf Property, Seminar Paper, IRTI, Kuala Lumpur, Malaysia, March 2-4, 1998.

[7] FRANCIS EDWARD PETERS, Jerusalem and Mecca: The Typology of the Holy City in the Near East, New York 1986.

[8] RICHARD VAN LEEUWEN, Waqfs and Urban Structures: The Case of Ottoman Damascus, Studies in Islamic Law and Society, vol. 11, Leiden 1999.

poor and prisoners are only some of the vulnerable who have lost the protection of the *waqf*. The *waqf* is, however, showing signs of reinvigoration, with *Awqaf* properties occupying a growing share of the societal wealth of Muslim countries and those with significant Muslim minorities. Since the oil crisis of the 1970s Islamic banking has developed new tools of finance, and *waqf* has emerged as a non-profit 'third' sector, distinct from the profit-based private sector and the official public sector. Its institutional protections are making it again a main actor in the social and economic life of Muslims.[9]

III. *Waqf* in Palestine/Israel: special status

As the *waqf* in main is a form of property or a land, therefore its legal influence should be attributed to the conflict over the land, 'generally', in the Middle East. The literature indicates that the *waqf* properties as the land in general were influenced by different and various means, mechanisms and law from those who ruled Palestine in the last two centuries. Before one proceeds to discuss the law of *waqf* in Palestine it is necessary to understand first the history of the legal system in Palestine followed by discussing the land laws in Palestine as this will help to comprehend the entire legal issues related to *waqf* law. Palestine is regarded a special case with a different status at all levels. The legal position in Palestine is simultaneously both one of the most complicated and most rare situations. The legal system in Palestine emerged in unsteady circumstances due to the several powers that ruled Palestine through history. The partition of Palestine led to the creation of complex and different law systems in the West Bank, Gaza Strip and Jerusalem in addition to the parts of the country which were occupied in 1948. The legal system in Palestine was based on the principles of the Islamic *shari'a* law until the end of the Ottoman rule in 1917. The British Mandate followed and remodelled the legal system, along with the Ottoman law-making the British introduced the principles of the Anglo-Saxon system, which is based on Common Law. While the West Bank with eastern Jerusalem inclusive was under the rule of the Hashemite Kingdom of Jordan in 1948, and the Jordanian legal system, which is influenced by many other systems prevailed. The Gaza Strip was under the Egyptian administration where the joint legal system of the former British Mandate prevailed. Later the Israeli occupation imposed its military law on the West Bank and the Gaza Strip after the 1967 war and put eastern Jerusalem subject to the local law of the Israeli occupier after annexing it in 1980. After the Oslo Accord, the Palestinian Authority was found and the jurisdiction of the new authority was agreed upon. The Palestinian legislators then started to unifying and harmonizing the diverse legal systems prevailing in the Palestinian territories. Since 1994 unifying legislation has been enacted for both the West Bank and Gaza Strip.[10]

Most *waqf* properties in Israel was expropriated under the Absentee property Law, and it is one of the most sensitive and complicated issues in the Palestinian-Israeli conflict. Israel claims 93 per cent of its territory as public domain for the Jewish faith, and the process has isolated and contained the surviving Arab communities within Israel, while the rest of the Palestinian people have been displaced to peripheral locations (Gaza, the West Bank), which Israel has

[9] MONZER KAHF, Towards the Revival of Awqaf: A Few Fiqhi Issues to Reconsider, Presented at the Harvard Forum on Islamic Finance and Economics, October 1, 1999. See also, SAIT & LIM, *supra* n. 2.

[10] HAITAM SULEIMAN & ROBERT HOME, 'God is an Absentee, too': The Treatment of Waqf (Islamic Trust) Land in Israel/Palestine, Journal of Legal Pluralism and Unofficial Law, (41:59; 2009), 49-65.

held under military occupation since 1967 and also has control of most of the land. During the period 1918-48 land dominated the efforts of the British Mandate. Among the first actions of the occupying British were to close the Ottoman land registers, prohibit all land transactions until a new registry was installed, and transfer much jurisdiction in land matters from Islamic *shari'a* courts to new secular land courts. The British colonial regime therefore had occupied the Palestinian legal systems.[11]

The British established a Supreme Muslim Council in 1921, with a president and four members, to manage *Shari'a* affairs in Palestine. Its *waqf* activities from 1921 to 1936 were impressive:[12]

- Twenty-one new mosques and three minarets built, and 313 mosques repaired (notably the *Al Aqsa* mosque in Jerusalem).
- 224 new properties built, and 300 repaired, including shops, houses, and the *waqf* building (originally the Palace Hotel in Jerusalem, after 1948 used as Government offices).
- draining swamps, planting trees on *waqf* lands, and enlarging *waqf* lands by the purchase of about 25,000 dunums.
- maintaining schools and scholarships for Muslim students to universities in Egypt, Syria, and Europe.
- establishing a Moslem orphanage, training midwives.

In 1948 *waqf* land was estimated to comprise a sixth of the country, but estimates are unreliable, and the Israeli government does not disclose (and may not hold) data on the extent of *waqf*. In 1980 the Custodian of Absentee Property estimated that about 70 percent of the land of the state of Israel might potentially have two claimants - an Arab and a Jew holding respectively a British Mandate and an Israeli deed to the same property.[13]

The concept of absentee was recognised in Ottoman law, which distinguished different categories of absenteeism, and absentee property was theoretically held in suspense or trust.[14] After 1948 Israel applied the term to the Palestinians displaced from Israel (usually over relatively short distances, into Arab-controlled territory).[15] The new Israeli state reformulated regulations devised in 1939 by the British for wartime conditions, as the 1949 Emergency Regulations on Property of Absentees. A Custodian of Absentee Property was instituted, similar to the preceding Mandate Custodian of Enemy Property. The first Emergency Regulation (Absentees' Property) Law 1948 was contained in the Absentees Property Law 1950. Absentee land could be restored in only very restricted circumstances: if the absentee could prove that it was 'for fear that the enemies of Israel might cause him or her harm' or 'otherwise

[11] JOHN STRAWSON, Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-determination, Penn State International Law Review vol. 20 (2002) 363-384.
[12] MICHAEL DUMPER, Islam and Israel: Muslim Religious Endowments and the Jewish State, Washington DC 1994.
[13] DUMPER, *supra* n. 12.
[14] FREDERIC M. GOADBY & MOSES J. DOUKHAN, The Land Law of Palestine, Tel Aviv 1935.
[15] SULEIMAN & HOME, *supra* n. 10.

than by reason of fear of military operations'. The APL caused the confiscation of two million dunams and given to the custodian, who later transferred the land to the development authority. After the establishment of Israel in 1948, state-owned lands previously in the possession of British Mandatory Authorities, and the property abandoned by Arab refugees passed into the control of the new Israeli administration. Waqf ownership passed from Muslim hands to the Custodian, who on behalf of the state could convey the properties to Jewish hands, disregarding shari'a law. Israel did not distinguish between waqf property and any other land, and the Custodian of Absentee claimed waqf property on the ground that the Supreme Muslim Council became an 'absentee' because most of its members were refugees. Thus the Custodian was a conduit through which land passed to the Israeli Development Authority, and later the Land Authority, as a means of 'laundering' confiscated Palestinian land. The Absentee Law 1950 prohibited the shari'a court from their rights to supervise the awqaf properties. The Israeli high court held that the custodian was neither a trustee over the 'absent' property or for the original owners of the properties, nor responsible for their management, and the absentee was not entitled to take legal action against the custodian.[16] The five Ottoman tenure types, which were as follows:

- *Mulk land* (fully-owned urban freehold property). The 7 per cent of the land of Israel still in private ownership is mostly former *mulk* land, mostly located within Arab villages.

- *Miri* land. This had heritable use rights, and could revert to the state if not cultivated after three years (*mahlul*), and then be auctioned to anyone prepared to cultivate it. *Miri* land represented most of the cultivable land and, where not forfeited by the refugees of 1948, was mostly acquired by the Israeli state through various means, particularly strict application of the three-year rule. Any land shown by aerial photography as not cultivated for a sufficient period was forfeited, not back to the village but to the state, by means of an official declaration in words: 'I hereby declare that the area specified in the appendix is government property', the appendix being a rough boundary line on the aerial photo. This declaration was sent to the village head and posted on the land (usually left under a stone), or made orally. The onus of proof for any counter-claim then fell to any prior owner, who had 45 days to commission a cadastral survey and lodge an appeal, but many owners would be unaware of the declaration, and few could afford to mount a defence, especially when they had little hope of success in court.[17]

- State land required for public purposes (in Turkish *matruka*, meaning withdrawn) and registered with the state or local authority. This included military bases, roads, forest land and public open spaces within villages.

- Dead land (*mawat*), i.e. uncultivated, unirrigated and vacant land, needing government consent to bring into cultivation. Islamic law defined 'dead land' as sufficiently far from an inhabited place (a distance regarded as in practice a mile and a half) that a human voice could not be heard. *Mawat* included the Negev desert and the 3000 sq.km. of

[16] Court Case of Civil Appeal 58/54 Mahmud Habab v. Custodian of Absentee Property, (1956) 10 PD 912.
[17] SANDY KEDAR, The Legal Transformation of Ethnic Geography: Israel Law and The Palestinian Landholder 1948-1967, New York University Journal of International Law and Politics, vol. 33, no. 4 (2001) 945-949.

mountain and desert east of Hebron, Jerusalem & Nablus. Article 6 of the Mandate made it and *matruka* land available for Jewish settlement.

- *Waqf* land, held in trust for Muslim religious and charitable purposes. This was confiscated by the state of Israel after 1948, when it comprised a sixth of the count.

A significant law in the confiscation of Palestinian lands, including *waqf* land, was another modification of Mandate emergency regulations (a term carefully retained in its title: the Emergency Regulations (Cultivation of Waste Lands) Law, amended in 1951. This law derived legitimacy not only from Mandate law but also the Ottoman land code, which had provided for special commissions to record abandoned villages and reclassify vacant land lying idle and 'exposed to the sun' (*shamsieh*) as state domain. Much of the land abandoned by the Palestinians in 1948 was not recorded in the Ottoman or Mandate land registers, as many did not register their land for fear of tax collectors and military conscription. While much urban property was held freehold (*mulk* in the Ottoman system), agricultural land was classed as *Miri,* in which formal and ultimate ownership was held by the State, and which if uncultivated for three years could be reclaimed by the state. The Palestinians' culture of the sacred *waqf* is reflected in their treatment of *waqf* plots, often olive groves, cultivated by community volunteers, who would afterwards meticulously clean from their clothes traces of the sacred *waqf* soil. The 1951 Law, however, empowered the Ministry of Agriculture to declare lands as 'waste' lands (Article 2) and to take control of 'uncultivated' lands (Article 4). Such land could thus be confiscated without having to confirm the absentee status of owners.

Another important law was the so-called 1965 amendment, described by Israeli scholars as a 'reform' of the *waqf* in Israel: the Absentees' Property (Amendment No. 3) (Release and Use of Endowment Property) Law 1965). In 1956 the Board of Trustees of the Muslim *waqf*, which by then was made up of collaborators appointed by the government, who would sell or exchange land with the ILA unaccountable to the Muslim community, leading to violence within the community, including assassinations. The 1965 amendment represented a further stage in the confiscation of any remaining Muslim *awqaf*. Authorising the transfer of *waqf* property to the Custodian, denying the conditions that were attached when the property was endowed, and ensuring that property confiscated from the *waqf* would not be returned, regardless of whether the m*utawalli* or the beneficiary is 'absentee'. The law empowered the Custodian to pass the property to the Development Authority or to board of trustees, ostensibly to prevent its neglect, but in practice to sell it for development, contradicting the fundamental perpetual characteristic of *waqf* land. The Law freed the remaining *waqf* from restrictions under *shari'a* law, and restricted the political use of funds generated from those *awqaf*. The amendment granted the state a further tool to transfer the remaining *waqf* properties from Muslim hands to the Jewish community through the use of Muslim 'state appointees' to a board of trustees. The board fulfilled the wishes of the government that appointed them and they did not acquire either any independence from the government or gain any credibility from the Muslim community. Section 4 of the 1965 amended law puts all Muslim sacred places at risk, since the custodian was authorised to sell them, and has no obligation to protect them. The effect of a succession of Absentee Property Laws has precluded Muslims from protecting and maintaining their sacred places, many mosques and cemeteries were subsequently transferred by the custodian to the development authority, which sold on to Jewish investment companies,

and in the end many mosques and cemeteries were converted into museums, cafes, restaurants or even synagogues. The remaining mosques which have not been sold are deserted, and cannot be maintained and used by Muslims who are denied access to them.

IV. *Waqf* land in Jerusalem: special status

The situation with *waqf* property is particularly complicated in Jerusalem, because of its special status under international law. Waqf represents some 90 percent of property within the Old City (both Islamic and Christian).[18] During the Mandate the Palestinians used *waqf* properties as a buffer against the sale of land to the Jews. Jordan continues to exercise its sovereignty and law over *waqf* institutions in Jerusalem through the Ministry of Waqf in Amman, and, while Jordanian law became obsolete with the establishment of the Palestinian Authority (PA) in the West Bank and Gaza, it still forms the legal basis for some institutions in Jerusalem where the PA is not allowed to function.[19] Jordanian control allowed the decline of *waqf* until 1967: only 16 new *awqf* were founded in Jerusalem during the 19 years of Jordanian rule, compared with 90 under the first 23 years of Israeli occupation (1967-1990), giving the *waqf* a central position in Palestinian society.[20] Many Jerusalem residents rent from *waqf* institutions. Since 1967 rents agreed under Jordanian rule are not recognised by Israeli law, and have not increased in line with inflation, resulting in dilapidation of much *waqf* property in the Old City. Israel maintained the sovereignty of Muslim institutions and the *Waqf* in East Jerusalem (including the Old City) remains under the relevant authorities in Jordan. Individual *waqf* property is recorded in the *Shari'a* Court in Jerusalem and in the Department of Islamic *Awaqf*, but the extent of *waqf* property in the Old City is not publicly available. Cases decided by the *Shari'a* Court in East Jerusalem on rent or tenancy issues could only be enforced by the civil courts, which are Israeli and so not recognised by the *Shari'a* Court. The *mutawalli* of family *waqf* cannot resolve *waqf* property disputes, because a Palestinian court decision cannot be enforced, while they refuse to take action in the Israeli *shari'a* court because this would be recognizing its jurisdiction over Jerusalem. As a result of this 'void in legal authority', the family *waqf* managers and the Administration have had to rely on moral and community pressure to enforce decisions. Investment in property and establishing new *awqaf* were neglected as a result of the uncertainty and the ambiguity, leading to property blight in Jerusalem particularly in the Old City.[21] The Tenancy Protection Act of 1954 provides that a tenant cannot be evicted either for non-payment of rent, alterations, or sub-letting if resident for more than fifteen years. Additionally most leases allow a tenant to sub-let with *mutawalli* having no control over the sub-letting but still responsible for upkeep. Rent increases were linked to the cost of living index, but only for rents charged in Israeli shekels, while most properties in the Old City are charged in Jordanian dinars, tenants can avoid rent increases with support from Israeli courts. Therefore, some landlords had changed rents to Israeli shekels, seen as more stable than Jordanian, but deflation of the Israeli currency devalued these rents, while Israeli law prohibits

[18] SAMER BAGAEEN, Evaluating the Effects of Ownership and Use on the Condition of Property in the Old City of Jerusalem, Housing Studies, vol. 21, no. 1 (2006) 135-150.
[19] YITZHAK REITER, Islamic Institutions in Jerusalem: Palestinian Muslim Administration under Jordanian and Israeli Rule, The Hague/London/Boston 1997, at 27-28.
[20] YITZHAK REITER, Islamic Endowments in Jerusalem under British Mandate, London/Portland 1996.
[21] DUMPER, *supra* n. 12.

lease revisions or eviction of tenants.[22] Commercial and cultural activities could flourish with Palestinians avoiding the full control of Israel, but investment and development were neglected because of legal uncertainties and ambiguities, as the field-work revealed. The Israeli district court issued an initial decision allowing itself the right to review cases related to Islamic *Waqf* property in Jerusalem but with the potential to be applied all over Palestine.

1. The battle in courts

In *1951* the Ministry of Religious Affairs and the Custodian agreed that the ministry would be directly responsible for the management of sacred places, despite the fact that they are considered as 'absentee' properties, approved by the government in 1952.[23]

The *Protection of Holy Places Law* 1967 (Article 1) states that:

> "The Holy Places shall be protected from destruction and any other violation and from anything likely to violate the freedom of access of the members of different religions to the places sacred to them or their feelings with regard to those places".

This guarantee was inserted to neutralize international public opinion, but there was no clear definition of 'sacred place' in the Israeli legal system. Adjudication is still governed by a 1924 Mandate law, upheld by the Israel Supreme Court, with matters relating to religious rights in the Holy Places (including disputes between denominations of the same religion, and between religions) decided by the government, and not adjudicated in the courts. About a third of Muslim *waqf* property, principally mosques and graveyards still in use, was not expropriated after 1948, but various approaches have been deployed to obtain the rest. More confiscations of mosques and cemeteries are occurring, contrary to Islamic law. In the beginning of the 1990's, the Islamic Movement in Israel started to survey the *waqf* properties, intending to protect and develop them, and to prevent attempts by Israeli authorities to change their status and sell them off through the state-appointed trustees. Among the disputes over *waqf* properties was that involving the Muslim cemetery of Haifa, *(Jamia' al-estiqlal)* used since the Mandate. In 1993 the *shari'a* court in Haifa confirmed an agreement between two *mutawallis* of the in Haifa and an Israeli company regarding a deal to develop the site, but some months later one of the signatory *mutawallis* applied to the *shari'a* court to cancel the agreement, since the same *qadi* Zaki Midlij who permitted the agreement disowned it. The *mutawalli* then applied to the High Court, relying on an additional statement of *qadi* Midlij, in which he claimed he had been coerced under armed threat from the company's lawyer. The police questioned the *qadi,* who was convicted and resigned as a *qadi* of the *shari'a* court of appeal. The two parties agreed to transfer the case to the civil court in Haifa, where it is still pending. The Adalah organisation petitioned the Supreme Court in the name of Muslim religious leaders to demand legal recognition for the Muslim Holy Places in Israel. A special committee was formed in 2000, to investigate the situation of Arab holy sites, with representation from the Ministry of Religious Affairs, the Ministry of National Infrastructures, the Israel Lands Administration, and the

[22] Information from Field-work interviews undertaken by the present writer in 2008.

[23] SHMUEL BERKOVITS, "How dreadful is this Place!" Holiness, Politics, and Justice in Jerusalem and the Holy Places in Israel, Carta Jerusalem 2006.

Regional Committee for Arab Local Councils. The committee prepared a plan for abandoned non-Jewish holy sites, compiling a list of 53 Muslim holy sites and 58 abandoned Muslim cemeteries, but the Ministry of Religious Affairs did not implement the committee's recommendations.

In *Bhmr 1931/97* the Israeli civil court held that a mosque should be considered as a sacred place only if the property itself is sacred (the use in itself being insufficient). In Islamic law, however, a *shari'a* court *qadi* can confirm the sacred element: mosques and graveyards remained sacred, even without a roof. The *qadi* of the *shari'a* Court of Appeal Ahmed *Natur* issued a *marsoom qadai* (legal decree) attempting a tougher line, legally binding on all *shari'a qadis*. With the Muslim *waqf* places, and the sacred specifically, gradually losing their status, with abuse of *waqf* properties increasingly common, has become a routine practice, with attempts to use the *shari'a* courts to release them. The *qadi*'s *marsoom* was for the 'public benefit' of Muslims in accordance with Islamic law, and he criticised the Israeli state for confiscating *awqaf* properties. He proposed procedural steps to protect the remaining *awqaf* from abolition, *Qadi* Natour states that the *shari'a qadis* are not allowed to deliver any *fatwa* which may permit the use of sacred *waqf* properties or any other *awqaf*, for other purposes than declared in the *waqfiya*. Even if the *qadi* tries to rely upon *shari'a* judgments, they may violate basic principles. Mosques are sacred even when closed or deserted, 'as long as one prayer was performed there'. The *qadi* cannot issue or confirm agreements on *waqf* property where affecting sale, rent, or substitution. *Shari'a* courts appointing *mutawallis* should call them to account every six months, with reports kept in an official register available to the public (this procedure important as before many *fatwas* and approvals went inadequately documented). The *shari'a* courts should dismiss *mutawalli* who misappropriate their position and made no action to protect the *waqf*. The *shari'a* courts are not allowed to appoint *mutawallis* without permission of the *shari'a* court of appeal, choosing only those who have good character, history and no criminal record. The Israeli Minister of Religious Affairs, however, by letter of 3 June 1996 rejected the *marsoom, c*laiming that *qadi Natour* is not authorised to issue it. *Qadi Natour* challenged the minister as improperly intervening in the judicial system, arguing that the *shari'a* Court of Appeal had jurisdiction.

The case of the Beer el-Sabe 'big mosque' first mosque in the Naqab (Negev), it was founded in 1906, Arab Bedouin sheikhs contributing half of the funding. After 1948 the mosque was confiscated and used as a court and prison until 1953, then as a museum until 1991, but has since been neglected and unprotected, surrounded by restaurants and bars, a municipal building and a public garden. In 2005, the Supreme Court of Israel sat to adjudicate on a petition submitted by ADALAH.[24] In 2002, a request was made for the re-opening of the Big Mosque in Beer el-Sabe (Beer Sheva) to allow Muslim residents and visitors of Beer el-Sabe to pray in it. At the time Beer el-Sabe had some 259 synagogues for 180,000 Jewish residents (one for every 700), while the 5,000 Muslims had no mosque, not to mention the 150,000 Muslims in the surrounding Naqab. The petition was submitted by ADALAH on behalf of the Association for Support and Defence of Bedouin Rights in Israel, the Islamic Committee in the Naqab, 23 Palestinian citizens of Israel, against the Municipality of Beer el-Sabe the Development

[24] ADALAH, The Legal Centre for Arab Minority Rights in Israel, available at http://www.adalah.org/en/content/view/6677, last accessed 1 August 2015.

Authority, the Ministry of Religious Affairs, and the Minister of Science. ADALAH argued that free access to the mosque was protected by the right to freedom of religion. The Israeli police force claimed that reinstating the mosque would create inter-community conflict, and, the municipality argued, would bring the ownership of all Muslim religious sites into dispute, even the Temple Mount and Jerusalem. ADALAH argued that maintaining the *status quo* would continue discrimination against Muslims, violating the right of freedom of worship. ADALAH added that there was no presence or representation of any Muslims from Beer el-Sabe or elsewhere on the Committee, and that, as it was formed by and constituted of members of various governmental offices, who are essentially a party to the dispute with an interest in maintaining the *status quo*, the Committee's recommendations were neither just nor objective [25]. Justices Procaccia, Hayut and Jubran ordered that the parties review their positions and within sixty days reach an agreement to change the mosque to a cultural and social centre for use by the Muslim community of Beer el-Sabe, *except for the purpose of praying*. In 2009 the Supreme Court upholds the previous decisions to disallowing Muslims to use the building as a mosque. In the case of *2289/81* involving the *waqf Alestiqlal* cemetery *in Haifa,* the Muslim community in Haifa petitioned in the district court to prevent the *mutawallis* transferring the bones of the Muslim dead elsewhere, and to develop the site. The court claimed that it had no jurisdiction, but referred the case to the *shari'a* court, which allowed the transfer, asserting that the sacredness of a cemetery lapses after 36 years of abandonment, contrary to most Islamic scholarship. Similar approaches have been adopted in other cases. In *232/76 (Shukri v Sharia Court- Bagats)*, the court upheld and reiterated the *Alistiqlal* judgment. The *qadi* Tawfiq Asaliya in 1969 stated that after 36 years the status of the *Salma* cemetery in Jaffa changed to 'outworn', but he reversed that decision in 1991, now claiming that 'the sacredness of grave-yards is eternal and this entitlement cannot be nullified as it belongs to Allah', so no-one should destroy graves there. The *Ijzim* cemetery raised similar issues recently, with demonstrations on site. In 1949, a Jewish settlement was built on the lands of the Palestinian village *Ijzim,* whose inhabitants fled after the 1948 war. In 2002 Jewish developers bought land there which included a graveyard of Muslim and Christian Palestinians. In 2004, (the '*Al-Aqsa* institution for the development of *waqf* properties) applied to the Israeli Supreme Court to stop construction work because of the destruction of Muslim graves. The appeal relied upon the 2004 fatwa of *qadi* Ahmed Natour, stating that:

> *"the sacredness of grave-yards is eternal and no one is permitted to remove it... insulting graves and the cemetery for the purpose of building a residential area as in this case is forbidden.... the landscape of the grave-yard (even though it was not used for long time) is still considered as waqf and it cannot be confiscated, nor it can be used for other purposes" (translated from Arabic).*[26]

The developers disputed that the land was a cemetery, arguing that the grave-yard recognised by the authorities was at some distance, and that local Muslims did not regard it as such, but admitted that graves had been discovered on the site, which the Ministry of Religious Affairs barred from removal. In 2009 the Supreme Court rejected the petition and allowed construction to continue. The Maamano-Allah Graveyard in West Jerusalem has been another recent

[25] ADALAH, *supra* n. 24.

[26] Available at http://www.iaqsa.com/, last accessed 10 August 2015.

contested case. Dating from at least the 13th century, with Muslim tradition holding that companions of the Prophet Muhammad are buried there, the cemetery was declared absentee property in 1955 (with no publicity in Arabic as required under Israeli law), and over the next 30 years, the municipality of Jerusalem gradually acquired ownership, with objections being filed but over-ruled. In 2004 the Simon Wiesenthal Centre began constructing a Museum of Tolerance on part of the cemetery, with a much-publicized ground-breaking ceremony attended by California Governor Arnold Schwarzenegger, the Israeli President and Vice Prime Minister, the Mayor of Jerusalem, and dignitaries and guests from around the world. The Centre aims to 'fortify the value of tolerance between peoples and between man to man'. When work uncovered human graves, the Al-Aqsa institution petitioned the Supreme Court for a provisional injunction preventing construction, and the dispute was brought to the shari'a and civil courts, who issued conflicting judgments. In 2009 the Israeli Supreme Court confirmed that three Muslim cemeteries (MaamanoAllah, Ijzim & Alberwa) are confiscated to Jewish developers, against Palestinian objections.

V. Conclusion

Whilst investigating the reasons for the *waqf's* decline, a great many participants have shared the view that there is a prevalent difficulty with regard to the enforcement of *shari'a* courts' judgments and this has caused a very real problem; as one interviewee (*mutawalli* of *durri waqf* in Jerusalem) observed "if you have a rent problem with a tenant, and you take a legal action against him, the court decision hardly can be enforced." Another example, a conflict of laws exists at least in Jerusalem district, where both the Israeli and Jordanian laws are applied. Moreover, one *shari'a qadi* pointed out "that there is a problem with court jurisdiction. He cited an example, where his *shari'a* court should have decided in disputes on *waqf* cases, however, his decision was not accepted and the case was raised to the civil courts." As a result of the difficulty with regard to jurisdiction and enforcement, there is confusion for the *mutawallis* who want to take legal action to protect the *waqf*. As one *mutawalli* added *"you have to search for the proper court, so that you will be able to enforce the court decision. Often you need to choose between shari'a court (either the Palestinian or the Israeli) or civil courts (Israeli)."*[27]

Furthermore, the results show that Israel through its land policy is still confiscating *waqf* properties, and preventing access to them. Some recent cases emphasises this point (i.e. *Maamanollah* & *Ijzim* cemeteries). The field-work revealed; contemporary techniques of management were commonly developed to improve the efficiency of collecting revenue, i.e. a family *mutawalli* of a huge *waqf* in Jerusalem is using a highly sophisticated computer program to divide the profits over the beneficiaries. By contrast one *mutawalli* observes *"the corruption and maladministration led to conversion of some awqaf to privately owned property, this is of course due to the absence of enforcement by the legal system that brings into account waqf players who misappropriate their position."* The field-work indicates that there is absence of definite figures on the extent of *awqaf* in Israel. The Israeli government is still holding the records which show the extent and quantity of *awqaf* at least inside Israel. The results from previous studies are based on insufficient data. It is noted that there was contradictory results. Moreover, the literature reveals that the historic role of the *waqf* is considered by Israel as a threat to its physical

[27] The present writer interviewed *Mutawalli* (*waqf* manager) in 2008.

integrity. This assertion according to the field-work remains valid despite the physical occupation over the Palestinian community and the completion of its administrative and legal system. The results show that Israel still fully controls the *waqf* properties. There are different degrees of control; Israel controls *waqf* administration, in terms of payments of their salaries and appointment and the incumbents always have to demonstrate their loyalty to the Israeli state. The State has also re-established *shari'a* courts and replaced the *shari'a* court of appeal in Jerusalem. Such a new structure has left the *Muslim qadis* and officials with no legal authority over the administration of the *waqf* system; they were given only an advisory insignificant role. The Ministry for Religious Affairs established a department to be responsible for the Palestinian religious community. Other communities in Israel were given a greater autonomy over the administration of their religious affairs, for instance the Absentee law exempted some of church properties from confiscation as for the Greek Orthodox Patriarchate was not considered an absentee as defined by the legislation, though in fact the patriarchate is located in Jordanian Jerusalem. The Druze were nevertheless given a relative independence over it *waqf* properties, the 1962 Druze Religious Courts Law had authority over personal status and endowment properties.

The main piece of legislation that has influenced the *awqaf* is the Absentee Law 1950 which gave rise to the confiscation of almost all *waqf* properties in Israel. The Third Amendment of the Absentee Property Law in 1965 described as a 'reform' of the *waqf* in Israel, has in fact, effectively implemented the priorities of the Israeli policy and completed its objective, namely, controlling the entire *waqf* system in Israel. The Amendment has freed the remaining *waqf* from the restrictions of *shari'a* law, i.e. sale; also, it restricted the political use of funds generated from those *awqaf*. Furthermore, the amendment granted the state a further tool to transfer the remaining *waqf* properties from Muslim hands to the Jewish community through the use of Muslim 'state's appointees' board of trustees. The results show that due to the 1965 'reform' many mosques and cemeteries were sold contrary to principles of *shari'a* law.

A modern, positivist ideology of law and the state supported the colonists/colonialists in dispossessing the colonised, and trapped the indigenous Palestinians in a world of manipulated bureaucracy. The state of Israel came into existence in 1948 as the inheritor of a body of non-Jewish law derived from Ottoman law, as 'enriched' by British Mandate law. The court may intervene and issue a decision, potentially making all *waqf* property vulnerable to confiscation. Having driven out most of the Palestinians, it then modified the Mandate institution of the Custodian of Enemy Property, designed to hold such property in trust pending the end of hostilities, into the Custodian of Absentee Property, drawing upon the legal concept of 'absentee' in the Ottoman Land Code. The new state already had state and waste land transferred to it by the outgoing Mandate administration, and used its powers against absentee property to confiscate large tracts of land, both *miri* (or cultivated) land, taking over uncultivated or abandoned land under Ottoman provisions. It treated *waqf* land as little different from other absentee property, disregarding the perpetuity element conferred under *shari'a* law, although 'holy' and 'sacred' places were placed under special protection, and there were particular arrangements for the Old City of Jerusalem. For the Palestinians *waqf* property during the Mandate period had been used as a buffer against Jewish land acquisition, but this protection was gradually eroded. Palestinian attempts since the 1990s to revive *waqf* status and protect mosques and cemeteries from confiscation and change of use have generally been

denied in Israeli courts, while *shari'a* court judgments over-ruled. As expressed by the director of *Awqaf* in Jerusalem, petitioning the Israeli court is 'like walking into a dark tunnel. Nobody can tell what is waiting for him at the other end'. While the *waqf* has successfully functioned for long periods under different conditions; its modern decline seems predictable. The legal system in Israel is a fundamental component and its exceedingly overregulated rules alongside with obstacles of enforcement procedures, made any different outcome unfeasible to achieve without retaining *waqf's* autonomy and independence. Beyond doubts, the decline is due to absence of *shari'a* law that can embrace success, development and reform of the *waqf* system.

Book Review: Lena Maria Möller, Die Golfstaaten auf dem Weg zu einem modernen Recht für die Familie? Zur Kodifikation des Personalstatuts in Bahrain, Katar und den Vereinigten Arabischen Emiraten

*von Eveline Schneider Kayasseh**

„Kann es ein modernes Recht für die Familie in islamischen Ländern (...) überhaupt geben?", fragt LENA MARIA MÖLLER eingangs ihrer Dissertation „Die Golfstaaten auf dem Weg zu einem modernen Recht für die Familie?". Eine berechtigte Frage vor dem Hintergrund, dass der Rechtsbereich ‚Familie' infolge seiner Regelungsdichte in den Primärquellen des Islam der eigentliche Kernbereich des islamischen Rechts ist, was seine Fortentwicklung traditionell erschwert hat.[1] Aus diesem Umstand fliesst die relativ kurze Geschichte der Kodifikation des Familienrechts in der muslimisch geprägten Welt, wofür Bahrain, Katar und die Vereinigte Arabische Emirate (VAE) fast schon exemplarisch stehen: Die drei Golfmonarchien, allesamt ehemalige britische Protektorate, haben ihre Personalstatute erst nach der Jahrtausendwende kodifiziert.

MÖLLERS Arbeit will eine regionale Lücke im Forschungsstand der Familienrechte islamischer Länder schliessen und aufzeigen, inwieweit die neuen Kodifikationen aktuellen Regelungserfordernissen genügen. Kern der Arbeit sind laut der Autorin die kodifizierten Personalstatute der drei ausgewählten Golfstaaten und deren gerichtliche Anwendung – unter Berücksichtigung etwaiger Rechtsfortbildung – rechtsvergleichend zu untersuchen. Verschiedene Aspekte machen das Studienobjekt besonders attraktiv: So etwa die zeitliche Nähe der Kodifikationen (VAE 2005; Katar 2006; Bahrain 2009), die Tatsache, dass der Islam den Charakter einer ‚Staatsreligion' geniesst, die Dualität von säkularem und religiösem Recht, aber auch die Unterschiede hinsichtlich Konfession und dominierenden Rechtsschulen. So ist im sunnitischen Katar die hanbalitische Schule vorherrschend, während in den beiden einflussreichsten Emiraten der VAE – Abu Dhabi und Dubai – die Malikiten die Mehrheit stellen. In Bahrain leben demgegenüber hauptsächlich Zwölferschiiten.

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[1] Statt vieler zur Thematik des Familienrechts als Kernbereich des islamischen Rechts: BÜCHLER ANDREA, Das Islamische Familienrecht: Eine Annäherung, Bern 2003, 15; ROHE MATHIAS, Islamic Law in Past and Present, Leiden 2015, 100ff., 263ff.

Nach einem kondensierten Einführungsteil zum klassischen Islamischen Recht und dem Stellenwert bzw. Verständnis des islamischen Familienrechts innerhalb desselben wendet MÖLLER sich der Historie und Aktualität von Kodifikationsidee und Kodifikation in Europa und im arabisch islamischen Raum zu, wobei sie prägnant und konzise die beiden Kodifikationswellen[2] auf dem Gebiet des islamischen Familienrechts nachzeichnet. Die Autorin äussert sich zum einen zu Übernahme und Grenzen des Kodifikationsideentransfers. Zum andern streicht sie im Lichte der hohen Regelungsdichte in den islamischen Primärquellen und identitätsschaffenden Charakters des Familien- und Erbrechts die Bedeutung des innerarabischen Rechtstransfers in diesen Rechtsgebieten heraus. MÖLLER konstatiert, dass die europäische Rechtssystematik im arabisch-islamischen Rechtsbereich hauptsächlich im Bereich der Formalie (Stichwort ‚Gesetzbuch') rezipiert worden sei, während das islamische Recht im Bereich familienrechtlicher Normen „vorrangiger Bezugspunkt" blieb.[3]

Im zweiten Kapitel setzt MÖLLER die Familienrechtskodifikationen Bahrains, Katars und der VAE in den rechtshistorischen und rechtspolitischen Kontext. Die Autorin zeichnet die Entwicklung vom Perlenfischerei- ins Petrolzeitalter nach, zeigt auf, wie die Golfstaaten sukzessive unter britisches Protektorat kamen und tribale Scheiche zu dynastischen Herrschern aufstiegen, und verfolgt den Weg in die Unabhängigkeit nach dem Ende der britischen Schutzherrschaft anno 1971 sowie die Rentierpolitik im Spannungsfeld von Persistenz und Wandel. Ein weiterer Kapitelschwerpunkt liegt auf der politischen und gesellschaftlichen Stellung der Frauen. Die Autorin zeigt vor dem Hintergrund des grundlegenden ökonomischen Wandels im 20. Jahrhundert auf, wie sich die Situation der weiblichen Bevölkerung in den drei untersuchten Golfmonarchien entwickelt hat. Sie kommt unter anderem zum Ergebnis, dass die Bildungschancen junger Golfaraberinnen mit denen von jungen Männern vergleichbar sind, derweil strukturelle, religio-kulturelle und sozio-ökonomische Randbedingungen – Stichwort ‚Re-Islamisierung' – einer vollständigen Integration der weiblichen Arbeitskraft jedoch nach wie vor entgegenstehen.

Darauffolgend befasst sich MÖLLER mit der Entwicklung der Rechtssysteme in den Golfstaaten. Den Ausgangspunkt bildet ein wenig systematisiertes, praxisorientiertes, auf tribalem Gewohnheitsrecht und unkodifiziertem klassischem islamischem Recht beruhendes Rechtswesen, das in schriftlichen Quellen kaum dokumentiert ist. Das vornehmlich als ‚hybrid' beschriebene Rechts- und Gerichtssystem erfuhr durch den Zuzug von Arbeitsmigranten in die Handelszentren am Golf eine grundlegende Änderung, indem durch die Pluralisierung der Bevölkerung ein Bedarf an objektivierten Rechtsregeln für die Streitschlichtung zwischen Personen ohne tribale Bindungen offenbar wurde. Dies führte zur Vorherrschaft des islamischen Rechts und der Schaffung von Scharia-Gerichten.

Parallel dazu übte die britische Protektoratsmacht bis zur Unabhängigkeit der Golfmonarchien 1971 (Kuwait 1961) extraterritoriale Jurisdiktion aus. Nach der Unabhängigkeit erwies sich die Schaffung einer nichtreligiösen Gerichtsbarkeit, die die Zuständigkeit der Scharia-Gerichte beschränkte, sowie die nationalstaatliche Kodifikation des Rechts als vordringlich. Da eigene Juristen fehlten, zogen die Herrscher ausländische Rechtsanwender bei. Dies führte nicht nur

[2] Siehe MÖLLER LENA MARIA, Die Golfstaaten auf dem Weg zu einem modernen Recht für die Familie?, Diss., Tübingen 2015, 40.

[3] MÖLLER, *supra* n. 2, 42f.

zu einem verzögerten Kodifikationsprozess, sondern auch zu einer gewissen ‚Arabisierung' von Gesetz und Rechtsprechung. Zum einen blieb auch nach den umfangreichen Reformbestrebungen ein gewisser Grad an Dualität innerhalb der Rechtssysteme, indem nebst den zivilen Gerichten auch Scharia-Kammern, beziehungsweise im Fall von Bahrain: Scharia-Gerichte, weiterbestanden. Zum anderen gründete die Rechtsprechung aufgrund des Fehlens von Kodifikationen im Bereich des Familien- und Erbrechts weiterhin auf die einschlägigen Rechtswerke der jeweils vorherrschenden Rechtsschulen.

MÖLLER nimmt dies im dritten Kapitel zum Ausgangspunkt, die Kodifikationsbestrebungen und -debatten in den drei Golfmonarchien nachzuzeichnen. Die Autorin setzt einen Schwerpunkt in Bahrain, wo sich die Zivilgesellschaft bereits in den 1980er Jahren aktiv um die Kodifikation des Personalstatuts bemühte. Sodann bespricht sie die Auswirkungen der Ratifikation supranationaler Verträge – namentlich die UN-Kinder- und Frauenrechtskonventionen – für die Kodifikationsprozesse in den drei Golfstaaten und den Verlauf der Gesetzgebungsprozesse.

In Kapitel Vier untersucht MÖLLER den Regelungsumfang der in den Jahren 2005 (VAE), 2006 (Katar) und 2009 (Bahrain) erlassenen Kodifikationen auf dem Gebiet des Ehe-, Scheidungs- und Kindschaftsrechts. Der Hauptfokus liegt auf der Frage, ob die jüngst erlassenen Familiengesetzbücher den gesellschaftlichen Regelungserfordernissen Rechnung tragen. Unter dem wichtigen Hinweis auf die eingeschränkte Unabhängigkeit der Justiz[4] geht die Autorin auf die gerichtliche Anwendung der Gesetzbücher und richterliche Rechtsfortbildung ein, wobei sich die Untersuchung der Rechtspraxis im Familienrecht hauptsächlich auf höchstrichterliche Urteile der Familiengerichte Katars und der VAE stützt.[5] Die Auswertung fokussiert auf die Anwendung von Bestimmungen, die den Gerichten Ermessensspielraum gewähren sowie auf Lückenfüllung, die unter Rückgriff auf das klassische islamische Recht zu erfolgen hat. Überdies untersucht MÖLLER das Zusammenspiel der Gesetzesnovellen und setzt sie ins Verhältnis zueinander und wertet die andauernden öffentlichen Debatten über die Kodifikationen im Hinblick auf Erreichtes und weiteren Reformbedarf aus.

Hinsichtlich Inhalt, Aufbau und Struktur weisen die drei Gesetzbücher, die sich am Maskat Dokument orientieren konnten, signifikante Ähnlichkeiten auf. Unterschiede ergeben sich zum einen im sachlichen Anwendungsbereich, indem das Familiengesetzbuch Bahrains einzig das Ehe- und Scheidungsrecht sowie die Personensorge regelt, während die Kodifikationen Katars und der VAE als umfassende Regelungen des Familien- und Erbrechts zu betrachten sind. Bezüglich dem persönlichen Anwendungsbereich ist zum anderen die konfessionelle Spaltung der Gesetzbücher Bahrains und Katars hervorzuheben: Die bahrainische Kodifikation findet ausschliesslich auf den sunnitisch-malikitischen Bevölkerungsteil, das Personalstatut Katars auf die Anhänger der hanbalitisch-sunnitischen Rechtsschule Anwendung. Das Personalstatut der VAE gilt demgegenüber prinzipiell für alle emiratischen Staatsbürger.

[4] Details bei MÖLLER, *supra* n. 2, 123. Ein Aspekt ist die – vornehmlich in Katar und den VAE – überwiegend ausländisch-arabische Richterschaft, deren Aufenthaltsrecht im Land in direktem Zusammenhang mit der beruflichen Tätigkeit steht.

[5] Die Quellenlage hinsichtlich gerichtlicher Entscheidungen ist in den drei Golfstaaten nach wie vor relativ dünn. So veröffentlicht etwa das Oberste Berufungsgericht der Scharia-Gerichte Bahrains seine Gerichtsentscheidungen nicht. Siehe MÖLLER, *supra* n. 2, 122; siehe ferner: SCHNEIDER KAYASSEH EVELINE/BROZZO PATRICK, Chapter 7: Legal Systems Influenced by Religion, in: MÜLLER-CHEN MARKUS/WIDMER CORINNE/MÜLLER CHRISTOPH, Comparative Private Law, Zürich/St. Gallen 2015, 351-426, 391.

Inhaltlich sind, so führt MÖLLER aus, drei Tendenzen erkennbar: die Übernahme islamischer Rechtsfiguren ohne nennenswerte Veränderungen; Regelungen, die als Ergebnis innerisamischen und/oder –arabischen Rechtstransfers zu bewerten sind sowie innovative Regelungen. In einem ersten Schritt zeigt MÖLLER anhand von diversen Rechtsinstituten auf, dass zahlreiche Aspekte des Ehe- und Ehescheidungsrechts aller drei Golfstaaten nur zaghaft reformiert wurden und nach wie vor vornehmlich auf klassisch-islamischen Rechtsfiguren beruhen; ähnliches gilt für das Kindschaftsrecht.

Im Folgenden sollen einige Beispiele veranschaulicht werden: Das Eherecht beruht weiterhin auf dem traditionellen Verständnis der Geschlechterrollen. Ähnliches gilt für das Scheidungsrecht. Allerdings wurde dort der Zugang der Ehefrau zur Scheidung infolge einer ‚Schädigung' von der Rechtsprechung insofern erleichtert, als die obersten Gerichte Katars und der VAE den Begriff der Schädigung weit auslegen. Die Scheidung aufgrund von Schädigung kann übrigens, wie MÖLLER aufzeigt, in Bahrain und Katar lediglich von der Ehefrau, in den VAE indes auch vom Ehemann beantragt werden. Dieser hat im Übrigen weiterhin ein nahezu uneingeschränktes Recht auf Verstossung. Gleichwohl haben die zögerlichen Reformen – von MÖLLER anhand von Beispielen illustriert – bereits Auswirkungen auf die Rechtspraxis des Eherechts gezeitigt.

Im darauffolgenden Abschnitt wendet sich MÖLLER den Regelungen rechtsvergleichender Prägung zu. Diese sind vornehmlich im Bereich der Formalisierung familienrechtlicher Vorgänge und der damit verbundenen staatlichen Kontrolle des Personenstandes zu finden. Hervorzuheben aus diesem Abschnitt sind: Die Einführung der grundsätzlichen Eheregistrierungspflicht, die Kodifikation der khul'-Scheidung nach ägyptischem Vorbild, die Einführung einer Entschädigung für die verstossene Ehefrau wie auch die Möglichkeit beider Ehegatten, die Ehe ohne Angabe von Gründen und unter finanzieller Entschädigung an den schuldlosen Ehegatten aufzulösen.

Auf diese Themen folgen die innovativen Regelungen in den drei neuen Kodifikationen. Im Scheidungsrecht ist dies die ‚angemessene Abfindung', welche die scheidungswillige emiratische Ehefrau ihrem Gatten im Rahmen einer khul'-Scheidung schuldet. Die Autorin zeigt anhand der emiratischen Rechtsprechung auf, wie die Gerichte diesen unbestimmten Rechtsbegriff auslegen. Im Kindschaftsrecht eruiert MÖLLER Innovationen in drei Bereichen: Erstens, eine Stärkung väterlicher Rechte hinsichtlich der Personensorge in Katar und den VAE; zweitens die Tendenz, das Kindeswohl als Maxime des Kindesrechts anzuerkennen, indem es im Bereich des Sorgerechts Vorrangstellung geniesst und vor allem in Katar und den VAE eine Entscheidung ermöglicht, die dem Umständen des jeweiligen Falles Rechnung trägt; sowie drittens, eine Diskriminierung geschiedener nichtmuslimischer Mütter beim Sorgerecht, was als Rückschritt gegenüber den Regelungen des klassisch-islamischen Kindschaftsrechts zu werten ist.

Abschliessend fasst MÖLLER die Ergebnisse ihrer Studie zusammen und bewertet die Rezeption der familienrechtlichen Reformen innerhalb der Bevölkerung anhand der öffentlichen Debatten. Diese lassen, so etwa hinsichtlich der andauernd langwierigen Gerichtsverfahren, Reformbedarf erkennen. Konsequenterweise werden weitere

Reformschritte vonnöten sein. Doch der „erste, schwerste Schritt“[6] in Richtung eines modernen Rechts für die Familie ist getan.

Resümierend lässt sich festhalten, dass MÖLLER ihr Forschungsziel auf hohem wissenschaftlichem Niveau erreicht hat, indem ihre Dissertation die jüngsten familienrechtlichen Kodifikationen in der islamischen Welt fundiert analysiert und kritisch bespricht.

[6] So MÖLLER, *supra* n. 2, 214.

A Comparative Critique of Regulating the Personal and the Passive Personality Principles in the Iranian Penal System

by Hassan Poorbafrani and Masoud Zamani***

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Abstract

A brief examination of various criminal jurisprudences in the world reveals that nationality is taken as one of the main bases for extending the judicial jurisdiction of states. In such cases, the jurisdictional bases for prosecution are in turn the personal and the passive personality principles. Yet, despite their widespread acceptance, regulating these two jurisdictional bases has not proven to be an easy task, if only for the encroachments that a wholesale resort to the jurisdictional bases in question may make into the sovereignty of other states. In this regard, the Iranian experience marks out many of the difficulties that law-makers around the world may face, when purporting to legislate on the bases for exercising extra-territorial jurisdiction. Another reason for viewing the Iranian encounter with the personal and the passive personality principles as a case of special interest is the mode in which the Iranian legislature has sought to adjust the application of the jurisdictional bases in question against the requirements of sharia law. By taking these factors into consideration, this essay will map out the successes and failures of the Iranian legislature in conceiving these two jurisdictional bases in the 2013 Code.

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I. Introduction

A brief examination of various criminal jurisprudences in the world reveals that nationality is taken as one of the main bases for extending the judicial jurisdiction of states. In principle, the criminal laws of states cannot be applied to a criminal act committed outside their territory. However, a state can reserve for itself the right to assert jurisdiction over a criminal case if its nationals happen to be either the perpetrator of an offence committed abroad or its victims.[1] In such cases, the jurisdictional bases for prosecution are in turn the personal and the passive personality principles. Yet, despite their widespread acceptance, regulating these two jurisdictional bases has not proven to be an easy task. Two issues are at stake here. On one hand, states have sought to recognize the personal and the passive personality principles in their penal codes so as to not tighten their freedom, when they are required to exercise jurisdiction either for keeping their public order or protecting their nationals. On the other hand, it remains true that exercising jurisdiction on the basis of either the personal or the passive personal principle is an exception to the main base of jurisdiction, that is, the territorial principle.[2] Therefore, drawing precise boundaries for the jurisdictional bases in question becomes a paramount task for law-makers and judges around the world.

The experience of the Islamic Republic of Iran (hereinafter Iran) in regulating the personal and the passive personality principles is very intriguing. Of these two jurisdictional bases, the personal principle used to be considered as the only acceptable ground for prosecuting crimes committed outside Iran. However, the exercise of the personal principle in Iran has undergone some radical transformations in recent years. For example, in the Amended General Penal Code of 1973 (hereinafter the 1973 Code), some primary preconditions had been set out for the application of the personal principle. Yet, after the Islamic Revolution of 1979, except for the presence of the accused in Iran, the preconditions for the exercise of the personal principle were entirely lifted in the course of the three penal bills of 1982, and the Islamic Penal Code of 1991 (hereinafter the 1991 Code).[3] In the most recent penal legislation passed by the Iranian Parliament in 2013, another precondition that had been removed in the previous criminal legislations was redeemed to govern the exercise of the personal principle. This was the prohibition of double jeopardy (*infra*).

Another development in the Islamic Penal Code of 2013 (hereinafter the 2013 Code)[4] is that the passive personality principle has for the first time found a place in the Iranian criminal laws. As will be seen later in this essay, there is a broad spectrum of opinions as to the utility of this

[1] As will be seen later, however, the Anglo-American legal systems have taken a much more nuanced position towards these jurisdictional bases, and do not tend to employ them save for the cases of exceptional nature. HALLEVY GABRIEL, A Modern Treatise on the Principle of Legality in Criminal Law, London 2010, at 124.

[2] *See generally* STRAUSS ANDREW L., Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts, Harvard International Law Journal 1995, Vol. 36, at 373.

[3] An unofficial English translation of the 1991 Code is available at http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/3200-islamic-penal-code-of-the-islamic-republic-of-iran-book-one-and-book-two.htm, last accessed 28 December 2015.

[4] An unofficial English translation of the 2013 Code is available at http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.htm, last accessed 28 December 2015.

jurisdictional base.[5] However, it is important that the exercise of the passive personality principle shall not be done in an unbridled manner, if only for the encroachments that it may make into the sovereignty of other states. Rather, the application of the passive personality principle must be accompanied by some important constraints. It is this dimension of the passive personality principle that renders its regulation particularly difficult.

In this regard, the Iranian experience marks out many of the difficulties that law-makers around the world may face, when purporting to legislate on the bases for exercising extra-territorial jurisdiction. Another reason for viewing the Iranian encounter with the personal and the passive personality principles as a case of special interest is the mode in which the Iranian legislature has sought to adjust the application of the jurisdictional bases in question against the requirements of sharia law. By taking these factors into consideration and by invoking the conception of the personal and the passive personality principles in the criminal codes of some other states, this essay will map out the successes and failures of the Iranian legislature in conceiving these two jurisdictional bases in the 2013 Code. At the end, it will be concluded that notwithstanding following some progressive milestones, the Iranian legislature is yet to draw precise boundaries for the application of the personal and the passive personality principles, and thus, the conception of these two jurisdictional bases in the 2013 Code is yet to meet the modern standards of penal legislation.

II. Definition and Classification of Crimes in the Iranian Penal System

Before we take on the issues of jurisdiction in the Iranian penal system, it is necessary for us to provide a brief introduction to the definitions and classification of offences in the Iranian legal system. The importance of this introduction can better be grasped when one considers that the classification of offences in the Iranian penal system on some occasions runs hand-in-hand with the application of the personal and the passive personality principles. This is a by-product of the important role that sharia plays in conceptualizing different types of offences in the Iranian penal system. In the Islamic law tradition, crimes are generally classified on the basis of the punishments prescribed for them.[6] In the aftermath of the Islamic Revolution of 1979, legislations on criminal law in Iran have consistently followed this pattern for the classification of offences.[7] Therefore, the offences enumerated in the 2013 Code have been classified in the following order:

1. Crimes punishable by hadd (hodood)

Article 15 of the 2013 Code has provided a definition for the concept of hadd: "[h]add is a punishment for which the grounds for, type, amount and conditions of execution are specified in holy Sharia". The hadd crimes are usually considered the most serious religious offences in

[5] For an international law view of the passive personality principle, *see* RYNGAERT CEDRIC, Jurisdiction in International Law, Oxford 2015, at 110.

[6] TELLENBACH SILVIA, Iran, in: HELLER KEVIN/DUBBER MARKUS D. (Eds.), The Handbook of Comparative Criminal Law, Stanford 2011, 320-351, at 321.

[7] RAHAMI MOHSEN, Development of Criminal Punishment in the Iranian Post-Revolutionary Penal Code', European Journal of Crime, Criminal Law and Criminal Justice 2005, Vol. 13, 585-602, at 588–589.

the Islamic criminal justice doctrine.[8] As is evident from the text of Article 15, hadd crimes are enumerated in the Islamic sacred texts (regarding which and whose authority, there are some differences between schools of thought in Islam).

Hadd crimes are largely specified in Book II of the Islamic Penal Code. Such crimes as unlawful sexual intercourse (Article 221), sodomy (Article 233), false accusation of unlawful sexual intercourse against someone else (Article 245), pandering (Article 242), swearing at the prophet (Article 262), consumption of intoxicants (Article 264), theft (Article 267) and corruption on earth (Article 286) are among the most severe hadd crimes. Apart from the crimes specified in the 2013 Code, the Iranian legislature in Article 220 has left the door open for judges to refer to the Islamic books on fiqh (Islamic jurisprudence) to identify other hadd crimes that may have escaped criminalization in the 2013 Code. Needless to say, given the vital importance of the principle of legality in the sphere of criminal law, this is not an acceptable mode of criminal legislation. However, this must be blamed on Article 167 of the Constitution of the Islamic Republic of Iran, which states:

> "The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatawa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment."[9]

Many different interpretations of this Article have been produced by the legal scholarship in Iran, whose consideration goes beyond the limited space of this essay.[10] However, in short, it must be said that such provisions as Article 220 cannot but be viewed as incompatible with the principle of legality, and as such, signify an area in which the Iranian legislature has fallen short of creating a balance between sharia instructions and the modern imperatives of criminal law.

2. Crimes punishable by qisas

The definition of qisas as provided in Article 16 of the 2013 Code is as follows: "[q]isas is the main punishment for intentional bodily crimes against life, limbs, and abilities which shall be applied in accordance with Book One of this law". Therefore, the punishment of qisas is rendered when at issue is the infliction of an intentional bodily injury. When it comes to crimes punishable by qisas, two types of crime must be distinguished: crimes punishable by qisas of limb, and those punishable by qisas of life. As regards the latter, the only crime punishable by qisas of life is murder; this literally means the death penalty, whilst 'qisas of limb' refers to the retributive infliction of bodily harm on the body of a convict who has committed a crime punishable by qisas of limb.

[8] PETERS RUDOLPH, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century, Cambridge 2005, at 53.

[9] An official English translation of the Constitution of the Islamic Republic of Iran is available at http://www.iranonline.com/iran/iran-info/government/constitution.html, last accessed 28 December 2015.

[10] For a summary of these debates, *see* TELLENBACH SILVIA, Islamic Criminal Law, in: DUBBER MARKUS D./HÖRNLE TATJANA, The Oxford Handbook of Criminal Law, Oxford 2014, 248-268, at 264.

3. Crimes punishable by diya (diyat)

The same crimes susceptible to punishment by qisas can become liable to diyat if done in an unintentional manner. In Article 17, diyat is defined as follows: "[d]iya, whether fixed or unfixed, is monetary amount under holy Sharia which is determined by law and shall be paid for unintentional bodily crimes against life, limbs and abilities or for intentional crimes when for whatever reason qisas is not applicable".

4. Crimes punishable by ta'zir (ta'zirat)

Generally, any crime not subsumed within the rubric of one of the categories mentioned above must be categorized as a ta'zirat crime (or a crime punishable by ta'zirat). As discerned above, crimes that come under the ambit of hadd, qisas and diyat are very limited in number, and normally signify wrongdoings specified in the sacred religious texts. Article 18 of the 2013 Code defines ta'zirat as:

> "a punishment which does not fall under the categories of hadd, qisas, or diyat and is determined by law for commission of prohibited acts under Sharia or violation of state rules. The type, amount, conditions of execution as well as mitigation, suspension, cancellation and other relevant rules of ta'zir crimes shall be determined by law."

Therefore, criminalization of acts punishable by ta'zirat has less to do with the instructions of the holy sources than with the requirements of public order. As a result, this group of crimes can be said to have been created at the discretion of authorities. That said, to raise the satisfaction of the Assembly of Guardians tasked with approving legislations passed by the Iranian legislature on the basis of their compatibility with sharia law, the authors of the Islamic Penal Code made a distinction between two types of ta'zirat: ta'zirat prescribed by sharia law, and ta'zirat not prescribed by sharia law. The former consists of a very limited number of acts admonished and stigmatized in sharia law, such as sexual intercourse with one's spouse during the fasting hours of Ramadan, for which there is no fixed punishment in sharia law.[11] Due to their insignificance and impractical nature, we shall not elaborate on ta'zirat prescribed by sharia law. Having provided a brief introduction to the categorization of offences in the 2013 Code, it is time to embark on the main focus of this essay, and analyse the way in which the personal and the passive personality principles are conceived in the Iranian penal system.

III. The Personal Principle: Definition and Limitations

In the context of criminal law, the personal principle can be defined as extending the judicial jurisdiction of states vis-à-vis crimes committed outside their sovereign territory by nationals (active nationality principle).[12] Articles 6 and 7 of the 2013 Code have accepted this basic definition, and have specified that subject to some limitations, discussed later in this essay, an Iranian national charged with committing a crime abroad can be prosecuted and punished in

[11] The Advisory Opinion of the General Legal Bureau of the Islamic Republic of Iran, No. 45, 28/05/92 available only in Persian.

[12] RYNGAERT, *supra* n. 5, at 102.

Iran. Not all states take nationality as the only basis for proceeding with the personal principle. Some states such as Finland, Denmark, Island, Liberia, Norway and Sweden go as far as subjecting their residents to the personal principle, too.[13]

According to Iranian laws, in order for the personal principle to apply, an offender must hold Iranian nationality at the time of committing a crime. Therefore, acquiring or abandoning Iranian nationality in the aftermath of committing a crime would not influence the application of the personal principle.[14] This is while the penal laws of some states have seen no problem in establishing jurisdiction over their nationals for crimes committed by them before their naturalization or even after removal of their nationality.[15] Article 113-6 of the French Penal Code takes a rather similar approach and stipulates that the personal principle applies "even if the offender has acquired French nationality after the commission of the offence of which he is accused".[16] Section 2 of Article 7 of the German Criminal Code is also very similar to its French counterpart.[17]

The personal principle is meant to fill the gaps that might otherwise have emerged from an exclusive reliance on the territorial principle. As a result, the application of the personal principle must be adjusted against the backdrop of the territorial principle, and the way this is achieved, is left to the subjective discretion of each state. Accordingly, some states have reserved a broader periphery of preconditions for applying the personal principle, and some have given more freedom to prosecutors and judges to prosecute and try an accused on the basis of the personal principle. All in all, it must be borne in mind that when it comes to the exercise of the personal principle in different jurisdictions, there is no uniform rule engraved in stone. Nonetheless, we briefly mention some of the general rules that, especially in states following the civil law tradition, are more often than not taken to govern the exercise of the personal principle.

1. Seriousness of Crimes

There has been a continuous debate among legal scholars as to whether or not the application of the personal principle must be confined to serious crimes. It has been said that applying the personal principle to non-serious crimes will only lead to the time and resources of the prosecuting state being wasted.[18] This is particularly true when one takes note of the fact that such necessities as the collection of evidence are much more costly in cases concerning the personal principle. It is thus that in some states such as the UK, the application of the personal

[13] MALANCZUK PETER, Akehurst's Modern Introduction to International Law, London 1997, at 111.

[14] KHALEGHI ALI, Tahavolāt Qanūn Jadid Jazāy Islāmi Dar Mvured Qalamrū Makāni Qavānin Jazāyi (in Persian), [English: The Developments of the New Penal Code vis-à-vis the Territorial Scope of Criminal Laws], Journal of Criminal Law and Criminology Studies 2012, Vol. 1, 8-38, at 12. For the Romanization of Persian and Arabic words the authors used the Library of Congress transcription scheme.

[15] FAZEL MUHAMMAD, Almabādi Al'āmeh fi Tashri' Aljazāyi (in Arabic), [English: General Principles of Penal Legislation], Damascus 1976, at 136.

[16] An official English translation of the French Penal Code is available at http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations, last accessed 28 December 2015.

[17] An official English translation of the German Criminal Code is available at http://germanlawarchive.iuscomp.org/?p=752, last accessed 28 December 2015.

[18] WATSON GEOFFREY R., Offenders Abroad: the Case for Nationality-Based Criminal Jurisdiction, Yale Journal of International Law 1992, Vol. 17, 41-84, at 70.

principle is confined to a limited number of crimes such as treason, murder and bigamy.[19] In the United States too, there has been a strong reluctance to exercise the personal principle save for crimes of such serious nature as treason.[20] Article 113-6 of the French Penal Code implicitly excludes the personal principle from governing the cases of petty offences. Nonetheless, the French Penal Code has expanded the scope of the personal principle to govern misdemeanours. This extensive reading of the personal principle may seem liable to criticism. However, the prosecutorial discretion (*infra*) in France to determine whether to proceed with cases concerning the personal principle may compensate for this loose configuration of the personal principle.

2. Double Criminality

The act for prosecuting for which the personal principle is invoked must have been criminalized both in the *lex loci delicti* (the law of the place of commission of the crime) and in the place of its prosecution and trial. Absent this requirement, the personal principle cannot be relied upon in that, in such cases, neither the public order of where the crime is committed nor that of the perpetrator's state of origin will be affected. In fact, if we accept that the rationale behind exercising the personal principle is to prevent criminals from escaping punishment, it would then be absurd to prosecute and try a person for an act not criminalized in the place it is committed.[21] As a result, the principle of double criminality has found widespread acceptance as a precondition for applying the personal principle.[22]

The principle of double criminality also figures in the penal codes of many states. For example, Article 7 of the Swiss Criminal Code,[23] Section 12 of Norway's General Penal Code[24] and Section 7 of the German Criminal Code point to the application of the personal principle only when the act committed outside their territory is criminalized therein. The French Penal Code accepts this precondition only with regard to misdemeanours. Accordingly, when it comes to felonies, the French Penal Code applies in an "exclusive and unconditional"[25] manner. On the first encounter, this formulation of Article 113-6 may seem rather strange in its partial deviation from the principle of double criminality. Yet, this provision reveals an important fact, that double criminality cannot be considered an absolute principle.[26] On some occasions, states would rather give priority to their own penal laws, not least because they may consider their own formulations as regards the questions of criminalization and penalization better positioned to meet the requirements of their own public morals. That said, however, it cannot

[19] MALANCZUK, *supra* n. 13, at 111.
[20] WATSON, *supra* n. 18, at 40.
[21] FAZEL, *supra* n. 15, at 138.
[22] MULLAN GRAINNE, The Concept of Double Criminality in the Context of Extra Territorial Crimes, Criminal Law Review 1997, 17-29.
[23] An unofficial English translation of the Swiss Criminal Code is available at https://www.admin.ch/opc/en/classified-compilation/19370083/201501010000/311.0.pdf, last accessed 28 December 2015.
[24] An official English translation of Norway's Penal Code is available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf, last accessed 28 December 2015.
[25] TRIPONEL ANNA, Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad, in: MORRIS ANDREW P./ESTREICHER SAMUEL (Eds.), Global Labor and Employment Law for the Practicing Lawyer, The Hague 2010, 59-158, at 102.
[26] For a detailed discussion of the French law in this regard, *see* STEFANI GASTON/LEVASSEUR GEORGES/BOULOC BERNARD, Droit pénal général, Paris 2000, at 154.

be denied that the French conception of the personal principle is excessively broad, and therefore, open to criticism.

3. The Prohibition of Double Jeopardy (ne bis in idem)

For the purposes of applying the personal principle, observing the prohibition of double jeopardy is of utmost importance. It is fair to say that today the prohibition of double jeopardy has become more of a human rights principle than a principle of criminal law. So much so, that many human rights instruments have echoed this principle in one way or another.[27] For example, Article 14(7) of the ICCPR states that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and procedure of each country".[28] Of course, it must be noted that the principle of double jeopardy does not prohibit the resumption of a trial or a retrial ordered by a court of higher hierarchy.[29]

4. The Return of the Accused to his Country of Origin

Some states such as Iran view the presence of the accused in their territory as a precondition for exercising jurisdiction on the basis of the personal principle. This does not hold true for the French Penal Code, which permits trials in absentia in cases concerning the personal principle. Proceeding with prosecutions and trials without the presence of the accused definitely flies against the human rights requirement of fair trial. Notably, the use of trials in absentia is mostly allowed in countries that follow the civil law tradition.[30]

5. Victim's Complaint

Article 113-8 of the French Penal Code stipulates that the prosecution of misdemeanours under Article 113-7 can only be initiated "at the behest of the public prosecutor [which] must be preceded by a complaint made by the victim, or his successor, or by an official accusation made by the authority where the offence was committed". This precondition can significantly prevent an overload of prosecutions. This is notwithstanding the fact that in some penal systems such as Iran, most offences are considered public crimes, whose prosecution is not necessarily triggered by a private complaint.

As was seen above, according to Article 113-8, "the behest of the public prosecutor" is a must for the prosecution of misdemeanours on the basis of the personal principle. To the extent that the authors of this essay have examined the penal codes of other states, it seems that the French Penal Code is rather unique in employing the element of prosecutorial discretion as a precondition for proceeding with the prosecution of misdemeanours.

[27] For a discussion of different dimensions to the prohibition of double jeopardy, *see* CRYER ROBERT ET AL., An Introduction to International Criminal Law and Procedure, New York 2010, at 80–82.

[28] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, at 171.

[29] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

[30] Prisoners Abroad (Factsheet), Trials in Absentia (2007) at 9.

The prosecutorial discretion in proceeding with the cases of misdemeanours committed abroad can preclude the unnecessary cases from being raised in the French penal system, and at the same time, this precondition can compensate for the lack of the condition of the presence of the accused in the French territory. For in such cases, the prosecutor can decide not to initiate prosecution following its discretionary determination that the presence of the accused is necessary in order for prosecution to take place.

IV. Examining the Development of the Personal Principle in the Penal System of Iran

Prior to the Islamic Revolution, Article 3(H) of the 1973 Code had set out five preconditions for the application of the personal principle in criminal courts: 1) the personal principle applies to offences for which the maximum punishment exceeds one year; 2) the act must be punishable under the laws of the country where it is committed; 3) the accused must not have been tried and exonerated in the country where he committed his crime, or in the case of his conviction, he has not either in part or in total served his sentence; 4) according to the laws of Iran, or the country in which the offence has been committed, there must be no cause for waiving the prosecution or abolishing the punishment for the accused. To these preconditions must be added the presence of the accused within the sovereign borders of Iran mentioned at the beginning of Article 3(H). It goes without saying that the content of Article 3(H) signified a restrictive formulation for the application of the personal principle, which was extremely compatible with the general principles of criminal law, such as the prohibition of double jeopardy and double criminality. However, in the aftermath of the Islamic Revolution of 1979, this standard configuration was replaced by a very expansive version of the personal principle. Accordingly, Article 7 of the 1991 Code stated that "[i]n addition to the cases mentioned in articles 5 and 6, any Iranian who commits a crime outside Iran and is found in Iran shall be punished in accordance with the criminal laws of the Islamic Republic of Iran". As can be seen, of all the preconditions stipulated in the 1973 Code, the only one that found a place in the 1991 Code was the presence of the accused. This loose formulation of the application of the personal principle was criticized by some Iranian scholars.[31] The result was that in 2013, the Iranian legislature revised the standards governing the personal principle, and imposed other prerequisites upon its application. According to Article 7 of the 2013 Code:

> "any Iranian national who commits a crime outside Iran and is found in, or extradited to, Iran shall be prosecuted and punished in accordance with the laws of the Islamic Republic of Iran, provided that:
>
> a) The committed conduct is deemed an offense under the law of the Islamic Republic of Iran.

[31] POORBAFRANI HASSAN, Barresi Tatbiqi Onsor Tab'iat Dar Tos'h Qalamrū Makāni Hoqūq Jazā (in Persian) [English: A Comparative Study of the Role of Nationality in Expanding the Territorial Scope of Criminal Codes], in: SAFAEI SEYED HUSSAIN (Ed.), *Tā'molāti Dar Hoqūq Tatbiqi* (in Persian) [English: General Thoughts on Comparative Law], Tehran 2007, 345-360, at 350.

b) If the committed crime is punishable by ta'zir, the accused person is not tried and acquitted in the place of the commission of the crime, or in the case of conviction the punishment is not, wholly or partly, carried out against him.

c) According to Iranian laws there is no basis for removal or discontinuation of prosecution or discontinuation or cancellation of execution of the punishment."

At first blush, when compared to the 1991 Code, it seems that three other prerequisites have been added to that of the presence of the accused in the 2013 Code, namely, the prohibition of double jeopardy, double criminality and the existence of a legal basis for initiating a prosecution according to Iranian laws. Nevertheless, a closer examination of Article 7 reveals that it is only the precondition of double jeopardy that comes to govern the application of the personal principle in the criminal jurisprudence of Iran. This calls for an illustration of these three preconditions as they appear in the 2013 Code.

1. The Precondition of Double Criminality

As a general rule, when penal codes of different states mention the term 'offence', they mean the particular mode in which it is defined, characterized and criminalized by their own national laws. This is because the domestic penal codes mean to protect the functioning values of the country in which they operate. The Iranian Penal Codes are no exception in this regard. Thus, the concept of 'crime' in the clause 'any Iranian national who commits a crime outside Iran' as manifested at the beginning of Article 7 generally refers to an act recognized as such in the context of the Iranian national laws. The problem is that this standard reading of Article 7 renders redundant the precondition imposed by Article 7(a): "the committed conduct is deemed an offense under the law of the Islamic Republic of Iran". Obviously, it is neither reasonable nor acceptable to prosecute and try a person for an act not deemed an offence within the jurisdiction of Iran. Reasonably, the criminal laws of many states support the principle of double criminality, which implies that prosecuting an act requires its criminalization where it is committed as well as where it stands trial. Therefore, Article 7(a) states the obvious, and as such, no weight can be assigned to its content.

However, one may say that it is possible to interpret Article 7 in a different way, and it can be argued that its opening phrase epitomizes the criminality of an act in the place where it is committed. If read in this light, Article 7(a) can no longer be considered redundant and becomes an implicit articulation of the principle of double criminality. In other words, if an Iranian national commits a criminal act in a foreign jurisdiction, the Iranian courts can have jurisdiction over trying the accused, provided that his act is deemed to be criminal in Iran. However, it seems that this interpretation is also ridden with serious problems. Firstly, if one pays attention to Article 8(b) of the 2013 Code, the natural conclusion is that the Iranian law-makers had not committed Article 7(a) to hint at the principle of double criminality. According to Article 8(b), "[i]n the case of crimes punishable by ta'zir, the committed conduct is deemed an offense under the law of the Islamic Republic of Iran and the law of the place of the commission".

The Assembly of Guardians, whose task is to monitor the compatibility of the parliamentary enactments with sharia law and to provide interpretative guidelines for the state's laws, has discerned that the general application of Article 8(b) contradicts the Islamic prescriptions on punishments,[32] although it has not identified such contradiction for Article 7(a). Secondly, it would be generally very bizarre if one were to interpret the phrase 'the committed conduct' in Article 7(a) to mean an act criminalized in the penal laws of foreign states. As mentioned above, this is not an acceptable form of authoring or interpreting penal codes.

In any case, it seems that selecting each of the interpretations discussed above can create unresolvable problems. If choosing the first interpretation, one cannot fail to arrive at the conclusion that Article 7(a) is redundant in its entirety. At the same time, the second interpretation signifies a deviation from the standard way in which the penal codes of different states are authored. Yet, it must be noted that the second interpretation accommodates the standards of international criminal law in a better fashion. Therefore, it seems necessary to amend Article 7(a), and rewrite it in a way that resembles Article 8(b), and this will be discussed below.

2. The Principle of Double Jeopardy

The inclusion of double jeopardy is the only uncontroversial development built into the 2013 Code as regards the personal principle.[33] Double jeopardy has become an important safeguard for protecting the rights of individuals in the field of international human rights.[34] According to this principle, respecting fairness and justice requires that an accused be held judicially responsible for an illegal action only once. Article 7(b) posits that "[i]f the committed crime is punishable by ta'zir, the accused person is not tried and acquitted in the place of the commission of the crime, or in the case of conviction the punishment is not, wholly or partly, carried out against him". As a result, if an Iranian national commits a crime outside Iran, and is subjected to trial and punishment there, he cannot be tried and punished in Iran again. However, if he has not served punishment either in part or in total, it is possible to bring him before an Iranian court on another occasion. Obviously, in a scenario where the sentence of a convict is only partly carried out, it will not be the Iranian judiciary's responsibility to carry out the unexecuted part of the sentence. Rather, in these cases, the Iranian judiciary must establish a new trial for the accused to be tried in accordance with Iranian criminal laws. This is because, save for some exceptional cases such as the international agreements on the transfer of persons sentenced to terms of imprisonment in foreign countries, states do not execute the sentences of those convicted in foreign jurisdictions.[35] However, an Iranian judge can reduce the punishment of those who have served part of their sentence abroad by invoking the diminutive factors of punishment articulated in Article 22 of the Islamic Penal Code of 2013.

[32] The interpretive guidelines of the Assembly of Guardians is available at http://www.shora-gc.ir/Portal/Home/, last accessed 28 December 2015.

[33] RAHMDEL MANSOUR, The "*ne bis in idem*" rule in Iranian Criminal Law, Journal of Financial Crimes 2004, Vol. 11, 277-281, at 277.

[34] KIRBY MICHAEL, Carroll, Double Jeopardy and International Human Rights Law, Criminal Law Journal 2003, Vol. 27, 231-276, at 269.

[35] CRYER, *supra* n. 27, at 105.

However, the principle of double jeopardy in the Iranian courts is respected only insofar as its application relates to ta'zirat, whose specific cases and punishments are not prescribed in sharia law. Hence, when at issue are offences of the kind susceptible to such types of punishments as hodood, qisas and diyat, and ta'zirat prescribed by sharia law, Article 7(2) cannot generally be applied. This means, for example, if an Iranian national accused of murder is tried and punished in England, he can be subjected to another trial and punishment in Iran for the same crime upon his return to Iran, since his crime is punishable by qisas. Needless to say, this cannot be deemed acceptable either from the vantage point of penal law standards or those of international human rights law. However, this unacceptable delimitation of the prohibition of double jeopardy signifies a more serious problem within the genus of criminal laws in Iran. That is to say, in the wake of the Islamic Revolution of 1979, a constant preoccupation of the legislature in Iran has been to strike a balance between the modern standards of penal law codification and the imperatives of Islamic criminal law. Yet on many occasions, this balance has easily been lost, and as a result, shallow rules have emerged.[36] The blame cannot here be solely put on the Iranian legislature, because the Parliament is compelled to pass laws that meet the Islamic standards as identified by the Guardian Council. More often than not, the Guardian Council applies a strict scrutiny test to the parliamentary drafts, and in the case of detecting an area of incompatibility, returns the said drafts to the Parliament for reconsideration. The Guardian Council exercised a controversially harsh standard of review to the 2013 Code.[37]

3. The Existence of a Legal Basis for Prosecution

As was mentioned above, Article 7(c) stated that "[a]ccording to Iranian laws there is no basis for removal or discontinuation of prosecution or discontinuation or cancellation of execution of the punishment". Much in the same way as Article 7(a), this section also states the obvious, and its inclusion in the 2013 Code seems to have served no purpose. Obviously, the criminal courts in Iran are bound to follow the Iranian penal laws, and there is no need to emphasize this simple fact of prosecution and criminal adjudication any further. Interestingly, unlike Article 7(a), it is impossible to devise a reading of Article 7(c) that would give meaning and utility to its content.

This unusual way of legislating the issue of personal jurisdiction is very telling in that it shows that the question of prerequisites for the application of personal jurisdiction in Iran has long been neglected, and now that the Iranian law-makers have come to address this issue, they have created conceptual chaos in formulating the contours of the personal principle. Furthermore, the 2013 Code has clearly not established sufficient preconditions for the application of the personal principle. For example, the Code in question has not made any distinction between different types of offences for the purposes of applying the personal

[36] In the larger context of the Iranian criminal justice system, some Iranian scholars have argued that reaching a balanced position with regard to both sharia law and modern standards of criminal justice is an impossible project, since these two regimes are incompatible in nature. In this regard, SANEI writes: "we have a constructed image of sharia law, and have not but entrapped ourselves within the walls of this image, which we have mistaken for the sharia proper", SANE'I P., Hoqūq Jazāye Omūmi (in Persian) [English: General Criminal Law], Tehran 2003, at 22.

[37] TAVANA MOHAMMAD H., Three Decades of Islamic Criminal Law Legislation in Iran: Legislative History Analysis with Emphasis on the Amendments of the 2013 Islamic Penal Code, Electronic Journal of Islamic and Middle Eastern Law 2014, Vol. 2, 24-38, at 29.

principle. The principle of double criminality is totally neglected, and the prohibition of double jeopardy has only been partly accepted. Unfortunately, the authors of the 2013 Code did not avail themselves to other states' experience of criminal legislation, and chose not to include the two preconditions of victim's complaint and the behest of the public prosecutor as they appear in the French Penal Code. Importantly, these two preconditions do not seem to have been at odds with the dictates of sharia law.

V. The Passive Personality Principle: Definition and Limitations

The application of the passive personality principle also results in an extension of the legislative and jurisdiction of states vis-à-vis crimes committed outside their sovereign territory. The judicial invocation of this principle has not been devoid of criticism.[38] However, notwithstanding these criticisms, the passive personality principle has secured a place in the criminal laws of many states such as France, Germany, Brazil, Greece, Turkey and Mexico.[39] Notably, most of the preconditions and limitations governing the exercise of the personal principle also usually come to regulate the application of the passive personality principle.

As was said above, the application of the passive personality principle cannot be done in an unfettered manner. For example, Section 5 of the Criminal Code of Finland has limited the application of the passive personality principle to offences "punishable by imprisonment for more than six months".[40] Section 7 of the German Criminal Code puts an emphasis on the prerequisite of the double criminality for applying the passive personality principle, and the French Penal Code has excluded petty offences from the application of the passive personality principle, and confines the exercise of this jurisdictional base to felonies and misdemeanours punishable by imprisonment. Apart from the exclusion of petty offences, Articles 113-8 and 113-9 have added other preconditions for the exercise of the passive personality principle in France. Article 113-8 holds that

> "[i]n the cases set out under articles 113-6 and 113-7, the prosecution of misdemeanors may only be instigated at the behest of the public prosecutor. It must be preceded by a complaint made by the victim or his successor, or by an official accusation made by the authority of the country where the offence was committed."

As was remarked earlier in this essay, this procedural precondition bestows a prosecutorial discretion upon the public prosecutor by which to block the entry of unnecessary and insignificant cases into the French criminal justice system on the basis of either the personal or the passive personality principle.

[38] The *Lotus Case* (1927), PCIJ, Ser A, No.10.

[39] SØRENSEN MAX, Manual of Public International Law, New York 1968, at 368.

[40] An unofficial English translation of the Penal Code of Finland is available at http://www.refworld.org/docid/3ae6b5614.html, last accessed 28 December 2015.

Also, Article 113-9 refers to the principle of double jeopardy and prohibits the prosecution and punishment of those already tried and sentenced in foreign jurisdictions, and finally, in a similar manner to the practice of personal jurisdiction, the French Penal Code has not viewed the presence of an accused person in the French territory as a must for exercising the passive personality principle. However, as was discussed earlier, this deficiency can be compensated by the prosecutorial discretion in initiating a prosecution. Notwithstanding the prosecutorial discretion, the French conception of the passive personality principle has been criticized for providing "jurisdiction to the broadest extent possible under the passive personality principle".[41] Of course, this criticism seems justified when one considers that the requirement of double criminality is also absent in Article 113-9. In the United States, one sees a much narrower construction of the passive personality principle. Before the 1970s, the passive personality principle had been granted no place in the criminal laws of the United States.[42] However, subsequent to joining treaties on terrorism, some new laws were enacted to incorporate the passive personality principle into the criminal jurisprudence of the United States.[43] Undoubtedly, the formulation of the passive personality principle in the United States signifies the narrow end of the spectrum when compared to the manner conceived in the French Penal Code.

1. The Passive Personality Principle in the 2013 Code

The 2013 Code must be considered the first textual base in the context of the Iranian criminal laws to give effect to the passive personality principle. According to Article 8 of this code:

> "When a non-Iranian person outside Iran commits a crime other than those mentioned in previous articles against an Iranian person or the Iranian State and is found in, or extradited to, Iran, his crime shall be dealt with in accordance with the criminal laws of the Islamic Republic of Iran, provided that:
>
> a) in the case of crimes punishable by ta'zir, the accused person is not tried and acquitted in the place of commission of the crime, or in the case of conviction, the punishment is not, wholly or partly, carried out against him;
>
> b) in the case of crimes punishable by ta'zir, the committed conduct is deemed an offence under the law of the Islamic Republic of Iran and the law of the place of the commission."

The following will scrutinize the strengths and flaws of the conception of the passive personality in the Islamic Penal Code of 2013.

[41] MCCARTHY JOHN G., The Passive Personality Principle and Its Use in Combating Terrorism, Fordham International Law Journal 1989, Vol. 13, 298-327, at 314.
[42] LOWENFELD ANDREAS F., U.S. Law Enforcement Abroad: The Constitution and International Law, American Journal of International Law 1989, Vol. 83, 880-893, at 887.
[43] WATSON GEOFFREY R., The Passive Personality Principle, Texas International Law Journal 1993, Vol. 28, 1-46, at 3.

Unlike the chaotic formulation of the personality principle, the passive personality principle in Article 8 of the 2013 Code takes a more coherent shape. As a result, the limitations reserved for the application of the passive personality principle make a much clearer appearance in Article 8. As is clear from the text of Article 8, these limitations are: 1) the prohibition of trials in absentia; 2) the prohibition of double jeopardy; and 3) the requirement of double criminality. Especially with regard to the requirement of double criminality in Article 8, the drafters of the 2013 Code have employed a precise language pre-empting any misunderstanding of this requirement, which, as was examined above, is missing in Article 7(a).

Another strength of Article 8 lies in its use of the opening phrase "a non-Iranian person". Two important points immediately come to mind as regards this choice of language. Firstly, the invocation of the term 'person' instead of 'individual' reveals that other types of legal entities (such as corporations) can also be deemed to be responsible for committing offences, thereby being brought before a trial on the basis of the passive personality principle. The second point is that the reach of the passive personality principle cannot be stretched to include Iranian offenders committing offences outside the Iranian borders, as this must come under the ambit of the personality principle. Excluding the Iranian nationals from the scope of Article 8 must be commended, since if an Iranian national falls victim to the crimes of another Iranian outside the sovereign borders of Iran, the personal principle can better protect the rights of the Iranian victim, not least because there are fewer constraints put on the exercise of the personal principle. Of course, this is not a general formula, and based on their particular conception of jurisdictional bases, states can choose to apply the passive personality principle when both the offender and the victim hold their nationality.

Of particular relevance in this regard is the way the French Penal Code has conceived the passive personality principle. According to the French Penal Code, the passive personality principle applies to the cases where both victims and offenders in extra-territorial scenarios are French. However, it has rightly been argued that the French Penal Code takes too generous an approach towards the passive personality principle.[44] Also, Article 8 employs the term "an Iranian person" to describe the victims of crimes committed abroad subject to the passive personality principle, which moves one to conclude that the application of this jurisdictional base is not confined to natural persons. Rather, the application of the passive personality principle must cover other legal entities as well. This is a more precise description of the victims of crimes committed abroad in comparison to the penal codes of other states. For example, Article 7(1) of the German Penal Code states that "German criminal law shall apply to offences committed abroad against a German, if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction". Here, one can rightly ask if the term 'a German' encompasses legal entities as well as natural persons.

A similar issue has come to the surface with regard to Article 7 of the Swiss Criminal Code, where the application of the passive personality principle is conditioned upon the victims being 'Swiss'. In both Switzerland and Germany, a lengthy debate has ensued over whether corporate entities must be considered as being within the meaning of 'German' or 'Swiss' for

[44] For a more detailed analysis of the French law in this regard, *see* CAFRITZ ERIC/TENE OMER, Article 113-7 of the French Penal Code: The Passive Personality Principle, Columbia Journal of Transnational Law 2003, Vol. 41, 285-599, at 587–588.

the purposes of exercising the passive personality principle.[45] This is while the drafters of the 2013 Code have avoided the hassle of this question by coining a clear terminology.

2. Flaws of Article 8

On close scrutiny, one can also detect some flaws in the text of Article 8, for example, where it speaks of committing a crime "against the Iranian state", since one wonders to what end this phrase has found an expression in Article 8. The unfortunate appearance of this phrase is both redundant and harmful, since if it means to allude to the protective principle, Article 5 of the code in question had already done that job, and there was no need to repeat this principle in a place dedicated to another jurisdictional base. This misplacement of the phrase "against the Iranian state" is also harmful, because it may confuse one as to the application of the protective principle. The exercise of the protective principle is not normally governed by as many constraints as the personal and the passive personality principles. Indeed, states prefer to save a free reign for themselves when it comes to prosecuting crimes giving rise to the protective principle. This is due to the fact that the protective principle targets crimes endangering the vital interests of states, which in turn, moves these entities to make no compromise on the exercise of this principle.[46] As a result, the sudden use of the phrase "against the Iranian state" may mislead one to conclude that the exercise of the protective principle is limited by the same preconditions as those governing the passive personality principle.

Another weakness of Article 8 is its peculiar invocation of the prohibition of double jeopardy. While stating the prohibition of double jeopardy, Article 8(a) puts the condition of the accused not having been tried and acquitted *in the place of commission of the crime*. Here, one may legitimately ask: what if an accused is tried and acquitted in a forum other than the place of commission of the crime? Of course, the scope of the prohibition of double jeopardy cannot be considered as limited such as to only govern situations where an accused is tried in the place where his alleged crimes are committed. Suppose a French citizen commits a crime against an Iranian national in France and he is tried for that same crime in Lebanon, and serves his punishment wholly or partly therein. Given this, would it be reasonable for an Iranian court to proceed with his trial and conviction by invoking Article 8(a) and on the basis that he is not tried, convicted or acquitted in France. This would vigorously slap common sense, and fly against any known principle of fairness and justice in the sphere of penal law. Yet, an overzealous textual reading of Article 8(a) leaves the door open for prosecuting those already convicted or acquitted in the judicial forums of countries other than the place of commission of crimes.

Another defect of the conception of the passive personality principle in Article 8 lies in reserving such limitations as the prohibition of double jeopardy and the principle of double criminality only "for crimes punishable by ta'zir". Therefore, these preconditions cannot regulate the exercise of the passive personality principle for crimes punishable by hodood, qisas and diyat. Of course, this unfortunate jurisdictional expansion has far-reaching implications, being not only confined to the passive personality principle in Iran, but also

[45] ECHLE REGULA, The Passive Personality Principle and the General Principle of *Ne Bis In Idem*, Utrecht Law Review 2013, Vol. 9, 56-67, at 61.

[46] CASSESE ANTONIO (Ed.), The Oxford Companion to International Criminal Justice, Oxford 2009, at 274.

governing the application of the personal principle as well. From the perspective of the general principles of penal law, such an approach is utterly unacceptable, and violates the most elementary principles of fair trial as recognized in the domains of penal law and international human rights law. What is more, the drafters of the 2013 Code have excluded ta'zir offences prescribed by sharia law from the limitations set out in Article 8. As was explained above, such deviations from the international standards of criminal justice take their cue from law-makers' failure to strike a balance between the modern imperatives of criminal justice and those of sharia law.

VI. Conclusion

It is not uncommon for states (especially those belonging to the civil law tradition) to resort to the personal and the passive personality principles to exercise extra-territorial jurisdiction over crimes committed outside their sovereign borders. However, an unhinged practice of these two jurisdictional bases can clash with the principle of sovereignty, and at the same time, undermine the highly respected maxims of criminal law. Therefore, any nationality-based claim to jurisdiction must be predicated upon meeting some pre-determined requirements. For better or worse, due to the diverse approach of states to these requirements, it is not always easy to stipulate a uniform list for them. Yet, such prohibitive principles such as double criminality and double jeopardy can be taken as a minimum yardstick for constraining the exercise of the personal and the passive personality principles. Against this background, the Iranian encounter with the personal and the passive personality principles as manifested in the 2013 Code is neither a success nor a complete failure. It is not a failure because compared to its predecessors, the 2013 Code at least on the surface acknowledges the existence of some preconditions governing the personal principle, and for the first time in the aftermath of the 1979 Revolution, purports to regulate the passive personality principle. Nonetheless, the formulation these two jurisdictional bases are configured in the 2013 Code is punctuated by some conspicuous fallacies.

It was seen above that as regards to the personal principle, Article 7 had been formulated in so strange a form as to render all preconditions other than the prohibition of double jeopardy totally meaningless. This is while the appearance of Article 7 moves one to think that the Iranian law-makers had actually intended to set out some other preconditions for the exercise of the personal principle. However, the chaotic conceptual architecture of Article 7 fails to drive its intended result home.

Furthermore, the preconditions governing the personal and the passive personality principles are entirely lifted when it comes to the crimes punishable by hodood, qisas and diyat. It is true that when compared to the crimes punishable by ta'zirat, these categories of crimes signify a much smaller group. Still, it is not acceptable for the 2013 Code to ignore some of the most primary rules of criminal justice, such as the precondition of double jeopardy. As was argued above, extra-territorial jurisdiction represents an area in which the legislature is yet to render compatible the dictates of sharia law with the modern standards of criminal justice.

Legislation and Case Law: Provisional Profit in Iran's Banking System: Same Meat, Different Gravy

*by Ehsan Allagheband Hosseini**

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Abstract

The foundation of an Islamic country and the implementation of Islamic laws were the primary goals of the Iranian Islamic Revolution of 1979. Many laws and regulations were changed and revised in order to conform to Shari'ah law. Therefore, one of the most critical laws adopted after the Revolution and rooted in Shari'ah law, which strictly forbids riba (interest), is the Riba-Free Banking Act of 1983. After three decades, a case can be made that it is has not been entirely successful in eliminating riba from Iran's banking system. While all Iranian banks allegedly follow the prohibition of riba, in practice they cannot afford to fully adopt the Islamic doctrine in this manner. With practical work experience in a financial institution in Iran, I thoroughly understand the distance between theory and the reality of the riba-free banking system in Iran. Specifically, with study and review of term investment deposit accounts, we argue that post-revolutionary changes in the banking system of Iran did not result in the so-called elimination of riba from Iran's financial structure. Iranian banks continue to pay a fixed and predetermined interest in the form of a new phrase: provisional profit.

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I. Introduction

Foundation of an entirely functional Islamic country and the implementation of Islamic laws were the primary goals of the Iranian Islamic Revolution of 1979. Precipitant process of Islamization of Iran started right after the fall of the Shah of Persia. Necessary measures were taken to build an Islamic country. Many laws and regulations were changed and revised in order to conform and harmonize with Shari'ah law. Shari'ah law provides directions for all spheres of Muslim life including daily affairs, matrimony, rituals, politics, and family obligations and, of course, provides instructions for financial activities as well. Therefore, Shari'ah plays an indispensable role in the governance of banking activities in the Islamic Republic of Iran. One of the most important and critical laws adopted after the Revolution that was rooted in Shari'ah law, forbidding *riba* (interest) is the *Riba*-Free Banking Act of 1983. The Act is drawn up so as to ensure that the banking system of Iran complies with Shari'ah rules. After three decades of its adoption, a case can be made that it is not entirely successful in eliminating *riba* from the Iran's banking system. While all of the banks and financial institutions in Iran allegedly follow the prohibition of *riba*, in practice they cannot afford to fully adopt the Islamic doctrine in this manner. With actual work experience in a financial institution in Iran, I thoroughly understand the distance between theory and practice of the *riba*-free banking system in Iran. Specifically, with the study and review of the term investment deposit accounts, we argue that post-revolutionary changes in the banking system of Iran did not result in the so-called elimination of *riba* from the country's financial structure. Iranian banks continue to pay a fixed and predetermined interest known by a new phrase: 'provisional profit'.

In the first part of this paper, we briefly define *riba* and its prohibition in Islam and expound on the *Riba*-Free Banking Act of the Islamic Republic of Iran. Muslim and non-Muslim scholars have written *ad nauseam* in this regard, and different aspects of *riba* and Islamic banking have been described in detail.[1] However, the fact that Iran's banking system continues to follow interest-based banking and how it found a way to circumvent the Act has never been studied. Accordingly in the second part of this paper, we exclusively study term investment deposit accounts.

II. Riba

The word *riba* means 'increase' as interpreted by Imam Razi. It corresponds to the word 'interest' as defined by Webster's New World Dictionary.[2] In both cases, increase refers to the amount beyond what is owed.[3] In Arabic language, *riba*, is also known as 'usury', which means excess or addition, an effortless profit, the 'premium' that must be paid by the borrower to the

[1] For further study, see: THOMAS ABDULKADER, Interest in Islamic Economics: Understanding Riba, London/New York 2006; RAHMAN FAZLUR, Riba and Interest, Islamic Studies 1964, Vol. 3, No. 1, 1-43; AHMAD ZIAUDDIN, The Theory of Riba, Islamic Studies 1978, Vol. 17, No. 4, 171-185.

[2] As defined by Webster's New World Dictionary, interest means: "a charge for borrowed money generally a percentage of the amount borrowed".

[3] SIDDIEQ NOORZOY M., Islamic Laws on Riba (Interest) and Their Economic Implications, International Journal of Middle East Studies 1982, Vol. 14, No. 1, 3-17, at 3.

lender along with the principal amount as a condition for the loan or for an extension of its maturity, a tool of oppression, and a means to unjustly take the money of others by exploiting their needs and circumstances.[4] Prohibition of *riba* is one of the core subjects and distinctive features of Islamic beliefs and is widely reflected in the Holy Qurʾan and Hadiths.[5] The prohibition of *riba* is mentioned in four different chapters (Sura) in the Holy Qurʾan. These are Sura Al-Baqara (Chapter 2: verses 275 – 280), Sura Al-Imran (Chapter 2: verses 130 – 132), Al-Nisa (Chapter 4: verse 161), and Al- Rum (Chapter 30: verse 39). To avoid rehash, we mention just two important verses in this context:[6]

> "And if you do not [abandon what remains of usury], then be informed of a war from Allah and His apostle. And if you repent, then you will have your principal, neither harming others, nor suffering harm."[7]

> "And for their taking usury though they had been forbidden from it and for eating up the wealth of the people wrongfully. And We have prepared for the faithless among them a painful punishment."[8]

There are also many Hadiths on the prohibition of *riba*.

> "The Prophet said: *riba* has seventy segments, the least serious being equivalent to a man committing adultery with his own mother."[9]

> "The Prophet said: the receiver and the payer of *riba*, the one who records it and the witness to the transaction, they are all alike in guilt of this sin."[10]

By studying the Holy Qurʾan and Hadiths, we note that the attitude of Islam toward *riba* is far harsher than for other sins such as adultery, alcohol consumption, gambling, cruelty, and murder[11] in so far as it is considered blasphemy and receivers of *riba* have been declared to be at war against Allah and Mohammad (His Messenger). The Holy Qurʾan provides no explanation as to why *riba* is prohibited, and different reasons have been purported by Islamic scholars and jurisprudence throughout history. In this paper, the reason behind the prohibition of *riba* is not discussed.

[4] BOTIS SORINA, Shari'ah Concepts in Islamic Banking, Bulletin of the Transilvania University of Braşov, Series V: Economic Sciences 2013, Vol. 6 (55) No. 2, 139-146.
[5] A collection of traditions containing sayings of the prophet Muhammad, which constitute a major source of guidance for Muslims apart from the Qurʾan.
[6] The verses are from The Holy Qurʾan: Translation and Commentary (1934) by Abdullah Yusuf Ali.
[7] Sura Al-Baqara, Chapter 2: Verse 278.
[8] Sura Al-Nisa, Chapter 4: Verse 161.
[9] AL-AAMILI SHAIKH AL-HUR, تفصيلُ وسائل الشيعه الى تَحصيل مسائل الشريعه (Wasā'il al-Shīʿa), Qom 1993, Vol. 18, at 122.
[10] AL-AAMILI, *supra* n. 9, at 126.
[11] HUSSAYN TABATABAEI MUHAMMAD (Allameh Tabatabaei), تفسير الميزان (Tafsir al-Mizan), Qom 1417 AH, Vol. 2, at 628.

III. Riba-Free Banking Act of the Islamic Republic of Iran

Gradually, after the Islamic Revolution of 1979 and the nationalization of Iranian banks,[12] reception of any kind of interest faded away from Iran's financial system. With the adoption of Iran's Riba-Free Banking Act in 1983, for the first time in modem history, the Islamization of the banking system was implemented in the financial sector of the economy as a whole.[13] As Ayatollah H. Rafsanjani expressed, "this Act was adopted to found a system of *riba*-free banking in the Muslim world."[14] However, after three decades, the major question still looms large as to whether this Act has been able to go beyond the idea of Islamic banking and implement Islamic principles in Iran's banking system. In this paper, we argue that the Riba-Free Banking Act has failed to fulfill its duty in practice and *riba* emerged in Iran's banking system, with a new face called provisional profit. Later, using empirical examples of term investment deposits and the provisions currently being used by the banks and financial institutions in Iran, we argue that this so-called provisional profit is *riba* in the context of Islamic finance.

The first chapter of the Riba-Free Banking Act expresses the goals and duties of the banking system of the Islamic Republic of Iran. Sections 8 and 9 of Art. 2 of this chapter relate directly to our discussion. They state that:

> "[…]
>
> 8. [Banks have the duties of] Opening of various Gharz-al-hasaneh (current and savings) accounts and accepting Term Investment Deposits and issuance of relevant certificates, as required by the Act and the regulations.
>
> 9. [Banks have the duties of] Granting of loans and credits free of *riba* charges in accordance with the Act and the regulations."

These two sections of Art. 2 perfectly describe and define the core functions of banks as financial intermediaries in Iran's financial system. Religious philosophy aside, from a functionalist perspective, there is no difference between Iranian banking and conventional banking. In both systems, banks raise funds by opening different types of accounts and taking deposits and grant these funds to those who need them. The difference lies within the implementation of these functions. In contrast to conventional banking, when performing their roles, Iranian banks must follow the Islamic principle on the prohibition of interest and Qur'anic injunctions against *riba.* Obviously, prohibition of *riba* has a major effect on both classic functions of banks. In the next section, we closely study the concept of term investment deposits as a common tool for the mobilization of monetary resources and examine how Iranian banks cope with the Islamic principle in practice.

[12] Nationalization of Banks Act approval by Revolutionary Council dated June 1979.
[13] VALIBEIGI MEHRDAD, Banking and Credit Rationing Under the Islamic Republic of Iran, Iranian Studies 1992, Vol. 25, No. 3/4 , 51-65, at 56.
[14] KASHANI MAHMOOD, چالشهای قانون بانکداری ایران (Problems in the Iran's Banking Law), Legal Research Journal 2005, Vol. 42, 11-68, at 23.

IV. Term Investment Deposits

Art. 3 of the Riba-Free Banking Act authorizes Iranian banks to accept deposits under each of the following titles: (A) Gharz-al-hasaneh Deposits: 1-current and 2-savings and (B) term investment deposits. According to this article, term investment deposits, for which the bank enjoys the power of attorney for their utilization, shall be used in Mosharka, Mozarebeh, hire-purchase, installment transactions, Mozara-ah, Mosaqat, direct investment, forward dealings, and Joaalah transactions. Art. 5 states that the profit from said transactions (the ennealogy Islamic contracts), proportional to the duration and amount of the investment deposit, should be divided among the owners after deduction of the bank's expenses and fees.

Thus, on the basis of the above provisions of this Act, Iranian banks, under the terms of the agency contract, act as agents of the depositors to invest the deposited funds in said transactions (the ennealogy Islamic contracts). Upon completion of the contract period and final calculation, the profits (losses) are shared between the agent (the bank) and the entrepreneur. Therefore, the bank's profits and consequently the profits of their client (the depositor) are not at all assured or secured. For example, when opening a long-term investment deposit with Saman Bank (a famous privately owned Iranian bank), under the conditions of the long-term investment deposit account:

> "Saman Bank as the agent of the long-term investment depositor, with full power of substitution, in accordance with the Riba-Free Banking Act can invest the depositor's funds. The profit of said investment after the deduction of the bank's fees, conforming to the relevant regulations and rules and proportional to the duration and amount of the investment deposit, shall be paid to the depositor or his substitute."

Further, according to the conditions for long-term investment deposit account stipulated by Bank Maskan (an Iranian government-owned bank):

> "Bank Maskan, on behalf of and as an agent of the depositor, use the deposited funds in accordance with the Riba-Free Banking Act and the profit, conforming to the relevant regulations and rules, will be paid, with the right of compromise, proportional to the duration and amount of the deposited fund."

All Iranian banks and financial institutions have the same clause in their agency contracts with more or less similar wording.

Most Islamic contracts are based on profit-and-loss-sharing (PLS) and not on a lender-borrower relationship, and Islamic law demands that the provider of funds should share the risk with the entrepreneur if he wishes to earn a profit.[15] There are no guarantees that there will always be a profit in most of the said contracts. The PLS scheme is inherently risky while bank investment depositors are generally ordinary, risk-averse people who desire a fixed, decent, and risk-free income from their investment deposits. However, in Islamic banking, investment

[15] ROY DELWIN A., Islamic Banking, Middle Eastern Studies 1991, Vol. 27, No. 3, 427-456, at 431.

depositors are treated as if they are shareholders and are thus entitled to a share of the profits or losses made by the bank[16] as their agent. In addition to the high-risk nature of these transactions, this method of banking demands that profit (or loss) should be divided at the end of the Islamic contract period between the bank and the entrepreneur. In other words, Iranian investment depositors face two risks; first of all, there is no guarantee that any profit will be made. Second, let us assume for the sake of argument that the bank makes a profit. In such case, there is still no immediate profit payment to the investment depositors. The assumed profit is paid at the end of the contract period. These two high-risk features of Islamic banking, without a doubt, increase uncertainty and change the savings behavior of the Iranian people. Lack of motivation to invest money in term investment deposits would result in liquidity crisis, which would place banks in a poorer position.

Islamic law forbids fixed or predetermined returns on financial transactions, not an uncertain rate of return represented by profit.[17] Therefore, Iranian banks needed to design an investment deposit model in which the existence of predetermined interest is ruled out but still attractive and secure enough for Iranian citizens to invest. To solve the motivation problem and create sufficient assurance among investors, Iran's banking system adopted the strategy of provisional profit payments. Provisional profit is a predetermined and fixed amount of money paid prior to the expiration of the ennealogy Islamic contract period and calculation of final profit (or loss).[18] Paying this predetermined and fixed profit (i.e., provisional profit), with the current terms and conditions, makes the Iranian banking system equivalent to an interest-based banking system.

1. Provisional Profit in Iran's Banking System

According to Art. 4 of the Riba-Free Banking Act, banks may undertake and/or insure the principals of term investment deposits. However, no single article in the said Act or its regulations points to provisional profit payments. Art. 10 of the Implementing Regulations of the Act passed on December 18, 1983 by the Cabinet prohibits the payment of any kind of predetermined profit to Term Investment Depositors. To highlight the importance of this rule, even the Implementing Guideline of the Act, passed by the Money and Credit Council on February 27, 1983, expresses this dictum. Art. 14 states:

> "The banks cannot *declare* and/or *pay* any predetermined profit to Term Investment Deposit accounts."[19]

Despite this explicit stipulation in Art. 14, Art. 21 of the same Implementing Guideline surprisingly uses the phrase provisional profit for the first time in the history of banking in Iran. This article authorizes banks to pay provisional profit in specified circumstances. As discussed above, after the expiration of the agency contract period, the final and actual profits

[16] KHAN MOHSIN S./MIRAKHOR ABBAS, Islamic Banking: Experiences in the Islamic Republic of Iran and Pakistan, Economic Development and Cultural Change 1998, Vol. 38, No. 2, 353-375, at 355.
[17] KHAN/MIRAKHOR, *supra* n. 16, at 354.
[18] JALILI HOSSEIN MIR, مسائل بانکداری بدون بهره در تجربه ایران (Interest-free Banking Experience in Iran), Research and Economic Policy 2002, Vol. 22, 127-152, at 128.
[19] Emphasis added by the author.

(losses) are shared between the bank and the entrepreneur. According to this article, however, if the client, prior to the expiration of the contract period, decides to dissolve the agency contract, "the profit will be calculated on a provisional basis, and the final and actual profit will be paid at the end of the fiscal year." Therefore, payment of any kind of provisional profit is evidently supposed to be a simple solution in cases of dissolution. This exceptional solution should not be generalized and extended whatsoever.

It has been proven many times throughout human history that *Necessitas non habet legem*, and certainly Iran's banking system cannot change this hard-set rule. On January 15, 1992, Iran's banking system took a giant leap toward interest-based banking. The Money and Credit Council, at its 758th session, in order to create a safe and secure investment environment, decreed that: "[T]he granting of any kind of benefits and profits such as guaranteed profit, *provisional profit*, […] are clear examples of banking, monetary and credit activities that banks and credit institutions who are authorized by the Central Bank of the Islamic Republic of Iran are permitted to do."[20] Although the Money and Credit Council, as one of the pillars of the Central Bank, is "in a position to consider and decide on the general policy of the Central Bank of the Islamic Republic of Iran and to supervise the monetary and banking affairs of the country"[21] it unquestionably cannot enact a regulation that violates the letter or the spirit of the Riba-Free Banking Act. Enactment of such regulation is a blatant violation of Islamic banking, which is formed on the basis of necessity. In consonance with the said regulation, Iranian banks explicitly and impudently undertake to pay a monthly provisional profit to depositors. For example, Saman Bank's agreement states: "The share of long-term investment profits, according to relevant regulations, is calculated provisionally and will be paid on a monthly basis to the depositor's account. The final settlement in respect of the actual profit shall be made at the end of each fiscal year."

In past years, the Money and Credit Council has determined various rates for provisional profit. The provisional profit rate is always a function of the inflation rate. Currently, under a directive of the Money and Credit Council dated June 24, 2014,[22] the provisional profit rate is as follows:

Maximum Provisional Profit Rate of Investment Deposit Accounts in Iran's Banking System	
Type of Deposit Accounts	**Percentage of Annual Provisional Profit**
Short-Term Deposit Investment Account	10.0
Short-Term Deposit Investment Account (Three Months to Less than Six Months)	14.0

[20] Emphasis added by the author.
[21] Article 18 of the Monetary and Banking Act of Iran, adopted on July 9th 1971 and revised on January 11, 2014.
[22] Central Bank of the Islamic Republic of Iran, Press Release, available at http://www.cbi.ir/showitem/11923.aspx, last accessed on 28 December 2015.

Short-Term Deposit Investment Account (Six Months to less than Nine Months)	16.0
Short-Term Deposit Investment Account (Nine Months to Less than One Year)	18.0
Long-Term Deposit Investment Account (One Year)	22.0

2. Legal Nature of Provisional Profit under Shari'ah Principles

As discussed above, until the expiration or dissolution of the agency contract, depositors are not entitled to receive any kind of profits (losses). So the main question is how to justify the legal nature of provisional profit under Shari'ah's financial principles.

Basically, the concept of provisional profit is that a bank pays a fixed and predetermined profit to a depositor provided that after the final calculation and determination of each party's share (the bank as the agent and the entrepreneur), if the amount paid as provisional profit is less than the actual and final profit, the bank will pay the differential amount to the depositor. However, if the actual and final profit is less than the provisional profit, the depositor must return the differential amount to the bank. Contrary to interest-based banking, where the interest immediately becomes the lender's property without any element of consideration or conditions, the ownership of provisional profit does not unconditionally pass to the depositor and the depositor is obliged to return the differential amount to the bank. This conditional transfer of ownership means provisional profit is more like a loan. By way of explanation, when opening a term investment deposit account, two contractual relationships are formed between the bank and the customer. Based on the first explicit relationship, under the agency contract, the customer appoints the bank as his representative for investment. Under the second relationship, the bank loans a monthly fixed and predetermined amount of money to the depositor. This regular payment in the form of an implicit loan contract creates sufficient incentive among depositors to keep their fund in deposit accounts. After determining the agent's (the bank's) share of the final profit on the investment, the bank—after deducting of expenses and fees—gives the final profit to the principal (the depositor).

On the other hand, the depositor must also pay off his loan to the bank. Consequently, when two parties are indebted to one another at the same time, their debts are annulled by a set-off to the extent of the amount owed by both parties. To that extent, the parties are released from their mutual debts.[23] Finally, if, after the set-off, one party still owes money to the other, the debtor must settle his account.

As long as the Iranian banks are committed to the theoretical principals of this approach (as described above), the elements of insecurity and instability will be the main hallmarks that

[23] The Civil Code of the Islamic Republic of Iran (1935), Art. 295.

distinguish provisional profit in Islamic banking from interest in conventional banking. Insecurity and instability mean that depositors have no assurance that any profit will be made and the rate of profit remains unknown. Theoretically, it is possible that after the final calculations, depositors who participate in investment may lose all their funds and hence must restore the total amount of provisional profit to the bank. As a result, "the cost of being a Muslim"[24] can be extraordinary high for ordinary Iranian citizens.

3. Provisional Profit in Practice

The current and actual practice of Iranian banks in light of the provisional profit payment scheme is paradoxical to the Islamic injunction against *riba*. The difference between 'provisional profit' and 'interest' is not supposed to be a mere technicality or choice of vocabulary. There is a profound conceptual difference between these two approaches. The elements of insecurity and instability mentioned above are the key fundamental distinction. If these indispensable elements are detached from the scheme, we will only have a rhetorical dichotomy or, in the words of Mr. DELWIN A. ROY, "[a] cosmetic operation that may show an Islamic bank's inability to perform in a truly Islamic manner."[25]

Practical procedures of Iranian banks in the years following the adoption of the provisional profit scheme absolutely eliminated the elements of insecurity and instability. Performance of the banking system in Iran over the last 23 years, especially the method of calculating final and actual profit, has created and shaped a surety and certainty in society that provisional profit is indeed actual profit. During these years, there has not been a single case of withdrawal of extra profit from depositors. Oddly enough, not a single case in which actual profit is less than provisional profit is on record. It has been consistently proven that the most skilled financial and investment experts make mistakes in predicting the investment environment but surprisingly, Iranian banks have always been profitable and paid provisional profit as the minimum final and actual profit. Undoubtedly, the reason for this is to keep customers satisfied and avoid losing funds. However, this practice of Iranian banks has caused depositors not to consider provisional profit as a temporary loan.

The result is that the crucial elements of insecurity and instability are separated and detached from the scheme. Provisional profit is calculated based on the simple above-mentioned rate formula and is paid on a monthly basis to depositors. Depositors have no obligations or responsibilities to banks. They regularly receive their provisional profit, and Iranian banks set provisional profit rates and treat them as the final profit rates at the end of the fiscal year. Many people are not even aware of the provisional profit structure. As far as they are concerned, they like to receive a monthly fixed and risk-free income from their investment. In the current banking system of Iran, provisional profit has the same meaning and function as interest in conventional banking. As one of Iran's current Parliament members said: "Provisional profit is just an estimated figure so the depositors know the ballpark figure of the profit they are going to make. Of course, after auditing, the actual profit should be announced

[24] ABDUL-RAHMAN YAHIA, The Art of Islamic Banking and Finance: Tools and Techniques for Community-Based Banking, New Jersey 2010, at 199.
[25] ROY, *supra* n. 15, at 431.

and the final profit rate will necessarily vary from the provisional profit rate."[26] The current scheme, regardless of the name chosen for it, contains a fixed predetermined risk-free rate of return on investment and definitely does not differ in essence and nature from the interest-based system.

V. Solution

In accordance with the Act and regulations, funds obtained by banks from investment deposits can be used through ennealogy Islamic contracts. These ennealogy contracts can be simply divided into two categories: The first category is based on the PLS scheme and includes Mosharka, Mozarebeh, Mozara-ah, Mosaqat, Joaalah, direct investment, and forward dealings. In this category, entrepreneurs are not guarantee a predetermined and fixed profit, and financing operations are based on an unknown rate of return derived from the PLS. The second category consists of hire-purchase contracts and Installment Transactions. As defined in Art. 47 of the Implementing Regulations, a hire-purchase contract is a lease contract in which the bank purchases goods for their clients and under the conditions stipulated in the contract, ownership gradually passes to the tenant with the payment of installments. The same scenario is true in the case of installment transactions. The rent in hire-purchase contracts and sales prices in installment transactions are determined by taking the bank's cost and profit into account. Thus, contrary to the first category, the rate of return is clear and defined at the initial stage.

The difference between the bank's profits in the first category and profits in the latter category is quite obvious. In the first category, banks *are expected* to make a profit. There is no guarantee that such profit will be made, as profits may be much greater than the expected sum. This is the nature of the PLS scheme. However, in the second category, the bank's profits are guaranteed and the entrepreneur must pay the guaranteed profit, which means there is no risk.

To fully adapt to Shari'ah principles and solve the *riba* dilemma, the Iranian banking system should design two types of accounts. The first type should be based on the PLS scheme (the first category of contracts as mentioned above). There is no predetermined and fixed profit for this type of account so it is suitable for those who wish to take more risk to make more profit. On the other hand, the second type is a risk-free account. This type of account is based on the second category of contracts. These contracts have a fixed rate of return and are fully be functional in the framework of Shari'ah principles and the Act as they are not based on the PLS scheme. For this type of account, banks are not participating in a risky business with an unknown rate of return. However, determination of a fixed profit rate is not prohibited in these accounts. Thus, Iranian Banks can pay a fixed and definite profit at specified intervals to depositors. This is precisely why the problem of provisional profit payments is avoided in these accounts. Without a doubt, the amount of profit in this type of account is reduced compared to the amount in the first type of account. However, to build a fully Islamic financial system, Muslims must pay the price and cannot have the best of both worlds.

[26] Islamic Consultative Assembly News Agency, available at http://www.icana.ir/Fa/News/255195, last accessed 28 December 2015.

VI. Concluding Remarks

Islamic banking has always tried to provide an alternative to conventional banking systems. They both have the same function in societies. In other words, all roads lead to Rome. However, the Islamic banking road has its own characteristics and requirements. The Islamic injunction against *riba* has major effects and outcomes on the deposit side of Islamic banking activities. The post-revolutionary financial system of Iran, as a front runner of Islamic banking, has tried to design a risk-free Islamic investment deposit account based on the PLS scheme in which depositors can receive profits on a monthly basis, which is quite similar to interest-based banking. Thereupon, Iranian banks came up with the provisional profit payment scheme. The current scheme totally changes the structure of PLS and makes it a risk-free and safe business. The contemporary practice of provisional profit is contrary to the principles of Shari'ah. It is easy to infer that Iranian banks have tried to prevent a cash-flow problem.

The Act should be amended. To honor Islamic values, the financial system of Iran needs to incorporate two types of accounts: one based on the PLS scheme, where depositors share profits and losses in proportion to their fund contributions, and the other one based on the hire-purchase contract and installment transactions with a fixed rate of return, where depositors receive risk-free, fixed, and definite monthly profits.