

Secularisation through Legal Modernisation in the MENA-Region

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As the theory of multiple modernities began to question the uniform transformation and conversion of all modern societies,¹ several culturally specific definitions of secularism/*laïcité* by modernising elites were already prevalent in different nation states in the non-Western world. Although the Turkish constitution of 1928 was the first to set up a secular state and to explicitly define *laïcité*, as Talal Asad and others have noted, *de facto* secularisation in the form of control and definition of religion by the state had already been ongoing for the better part of a century.²

State-building, Constitutionalism and *de facto* Secularisation

Secularisation occurred in both the Middle East and North Africa, and was the inevitable result of state-building. We should note, however, that this secularisation was *de facto* and never *de jure*. The *de facto* secularisation in question acknowledged the distinction of the religious and political domains without any explicit delimitation of religion or any hint of the disestablishment of the official religion while shifting control of the administration of law and control of the judiciary from the religious to the political domain – that is from religious courts to the state. In fact, separating religion and the state or interfering with religion and the Islamic doctrine was far from the intention of the bureaucratic reformers of the third quarter of the 19th century who were responsible for the reception of modern constitutionalism in the Muslim world. On the contrary, they attempted

1 Shmuel N. Eisenstadt, *Comparative Civilizations and Multiple Modernities* (Leiden: Brill, 2003).

2 Talal Asad, *Thinking about Secularism and Law in Egypt* (Leiden: International Institute for the Study of Islam in the Modern World, 2001); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

Modern constitutionalism presented as compatible with and legitimised by Islam

Islamic law (*shari'a*) imposed a limitation upon autocratic monarchy

Constitutional government: pristine but forgotten form of Islamic government

to present modern constitutionalism as fully compatible with and legitimised by Islam. Early Muslim constitutionalism was represented in the writings of a group of Islamic modernists among the reformist bureaucrats, notably Khayr al-Din Pasha in Tunis and Namık Kemal in Istanbul, who participated in the drafting of the Tunisian constitution of 1861 and the Ottoman constitution of 1876. These early constitutionalists argued that representative, constitutional government captured the spirit of Islam. This argument was also forcefully made by the Iranian consul in Tbilisi, Yusof Khān Mustashār al-Dawla, in his short tract *Yak kalama* (“One Word”), published in 1871, but without any particularly Shi‘ite inflection.³ In this period, Ahmad b. Abi Diyāf, another Tunisian bureaucrat involved in drafting the Tunisian constitution, based his constitutionalist reading of Islamic history on his remarkable intuition that Islamic law (*shari'a*) imposed a limitation upon autocratic monarchy, or in his words, that “monarchy limited by law” (*qānun*) was indeed the normative form of government in Islam after the pristine Caliphate. This normative form was violated in some historical periods but was restored by the great Ottoman dynasty.⁴ Similar assertions were made by proponents of constitutionalism in Iran three decades later. One Iranian pamphleteer asserted that constitutional government had been founded by the Prophet Muhammad and was first demanded from the rulers of Europe by returning crusaders who had discovered it as the secret of the Muslims’ success. Similarly, a leading journalist in Iran claimed constitutional government to be the pristine form of government in Islam that had subsequently been forgotten by Muslims.⁵

This early constitutionalism, which could be considered implicitly Islamic or proto-Islamic, found its major embodiment in the Ottoman Fundamental Law (*kānun-e esāsi*) promulgated on December 23, 1876. Khayr al-Din al-Tunisi, the Suzerain of the Bey of Tunis, who had moved to the Sublime Porte in Istanbul to serve the Ottoman Sultan, was among those who drafted the Ottoman constitution.

3 Saïd Amir Arjomand, “The 1906–07 Iranian Constitution and Constitutional Debate on Islam,” *Journal of Persianate Studies* 5, no. 2 (2012).

4 Ahmad ibn Abi Diyaf, *Consult Them in the Matter. A Nineteenth-Century Islamic Argument for Constitutional Government* (Fayetteville: University of Arkansas Press, 2005), esp. 75.

5 Saïd Amir Arjomand, “Islamic Constitutionalism,” *Annual Review of Law and Social Science* 3 (2007).

This constitution was fully compatible with Islam as institutionalised in the Ottoman empire, incorporating both the notion of sovereignty (*saltanat*) and *shari'a-kānun* dualism. It declared the person of the Sultan as the sovereign and head of state to be sacrosanct and not answerable to parliament, and it entrusted the Sultan with “the enforcement of the ordinances of *shari'a* and state law (*kānun*)”. The Islamic features of this 19th-century constitutionalism, derived from the Sunni tradition, were championed by the Ottoman Sultan who also claimed to be the Caliph of all Muslims.

Ottoman Constitution of 1876: Sultan shall enforce ordinances of *shari'a* and state law

The explicit assumption of the legal modernisation entailed by state-building at the end of the 19th century, was the “translatability of the Islamic jurisprudence into legislation”. No secularity was thereby intended. Around the turn of the century, the codifications of the *shari'a* as a civil code by Muhammad Qadri Pasha – endorsed by the reformist Chief Mufti of Egypt, Muhammad 'Abduh (d. 1905) – followed the example and the legal methodology of the Ottoman *Mecelle*, the first *shari'a*-based modern code of law. The process culminated in the construction of the Egyptian Civil Code of 1948 under the direction of 'Abd al-Razzāq Ahmad al-Sanhuri, which recognised Islamic jurisprudence as a residual source of law⁶ and became the model for other independent Arab states, though not for Tunisia which was still under French rule.

Ottoman *Mecelle*: first *shari'a*-based modern code of law

Model character of the Egyptian Civil Code of 1948

Legal Modernisation in Iran

The secularisation involved in the legal modernisation was even more *de facto* and unacknowledged in Iran. The peculiarity of Iran as the only Muslim country where Shi'ite Islam was the established religion consisted in a firmly institutionalised clericalism based on the popular recognition with the high-ranking clerical jurists (*mojtaheds*) as the “Deputies of the Hidden Imam” who had their religious courts independently of the state. This peculiarity left an indelible mark on the character of Islamic constitutionalism in general as it developed in the 20th century.

Iranian peculiarity: religious courts with clerical jurists independently of the state

The pervasive assertion of the identity of constitutionalism and Islam often involved crude and misleading reductionism. The conflation of the two was seriously aggravated by a double entendre with

⁶ Enid Hill, *Al-Sanhuri and Islamic Law* (Cairo: American University of Cairo Press, 1987).

Confusion on the double meaning of *milla*: religious community and nation

the traditional and modern meanings of *milla* as “religious community”, and as the “nation”. This double meaning made the leaders of the Shi‘a appear to be the leaders of the Iranian nation as well. It caused, however, very serious confusion as a given expression, for example, “rights of the *mellat/melli* rights”, could be read as national [i.e. constitutional] rights by the one side and religious rights [i.e. as specified by the *shari‘a*] by the other, and unintentionally inscribed the religious leaders into the constitutionalist movement and the constitutional order.

Iranian Supplementary Fundamental Law of 1907: *shari‘a* limits government and legislation

The Iranian Supplementary Fundamental Law of 1907 introduced a distinctive feature not present in Ottoman (Sunni) constitutionalism and derived from the far greater differentiation of religious and political authority in Shi‘ite Islam. The law placed *shari‘a(t)* in the constitution as a *limitation* to government and legislation. Constitutional monarchy was thus to prevail in the political domain but its legislation by the representatives of the people could not infringe on the religious sphere and the sacred law. Neither in the Ottoman nor in the Iranian case, however, was there any presumption that *shari‘a* should be the basis of the constitution itself.

Iranian Civil Code of 1939 conform with Shi‘ite law

In Iran, the codification of civil law was done in the drafting committees of the Ministry of Justice in the late 1920s and early 1930s. The active participation of clerical jurists in codification was a very effective way of assuring the substantive conformity of the most important corpus of Iranian law, the Civil Code of 1939, with Shi‘ite law. It may come as a surprise to the reader that implementation of the Islamic penal code at the judge’s discretion had remained theoretically possible, though it was never carried out in practice by the lay judges of the Pahlavi era. Despite the absence of any explicit commitment to secularism, however, the judicial reforms of the 1920s and 1930s resulted in the far-reaching *de facto* secularisation of Iranian law. Religious courts of the *mojtaheds* were closed, and the law was applied by secular judges with law degrees from European universities and increasingly, as time went on, from the newly established University of Tehran.

Far-reaching *de facto* secularisation by judicial reform in the 1920s and 1930s

Due to continuity in the judiciary organisation after the fall of monarchy, the secularity of administration of law by state courts persisted. It is perhaps surprising to note that Shi‘ite jurisprudence continues to occupy a residual place in the legal order of the Islamic Re-

public of Iran.⁷ This is partly because the Shi'ite jurists of the first two phases of legal modernisation had already Islamicised much of modern Iranian law in substance while secularising the judiciary process and the administration of justice.⁸ But there is also a more paradoxical explanation. The attempt to require legislation to comply with Shi'ite jurisprudence in the first decade after the Islamic Revolution of 1979 created a constitutional crisis that was resolved by Khomeini with the establishment of an Expediency (*maslahat*) Council in 1988 that was empowered to overrule the provisions of Shi'ite jurisprudence on grounds of expediency of public interest (*maslahat*).⁹

De jure Secularisation in Turkey and Tunisia

Only in the cases of state-building in the Turkish Republic and in Tunisia after its independence in 1955 do we find *de facto* secularisation of the law accompanied by state secularism *de jure*. Like Mustafa Kemal Atatürk, the first President of independent Tunisia, Habib Bourghiba, was a staunch secularist moderniser. In the year after independence, 1956, his reformist Chief Mufti, Muhammad Fadhel Ben Achour (Fādīl b. 'Āshur) (d. 1971) produced the Tunisian Code of Personal Status (*ahwāl al-shakhsiyya*), which removed many of the *shari'a* restrictions regarding women. In contrast to the Turkish Family Law of 1927, which was simply an adaptation of the Swiss law, the Tunisian Code of Personal Status was reconciled with the *shari'a* sources with much greater latitude than had been given by the disciples of Muhammad 'Abduh in Egypt. It became a prime example for Islamic modernists elsewhere of *de facto* secularisation in the sense of the state control and definition of religion, just as Talal Asad defines secularisation. More importantly, it was a major step in substantive secularisation by releasing family law and the status of women from the jurisdiction of the *shari'a*: polygamy

Tunisian Code of Personal Status: major step in substantive secularisation

7 Saïd Amir Arjomand, "Shari'a and Constitution in Iran: A Historical Perspective," in *Shari'a. Islamic Law in the Contemporary Context*, ed. Abbas Amanat and Frank Griffel (Stanford: Stanford University Press, 2007).

8 Saïd Amir Arjomand, "The Shi'ite Jurists and Iranian Law and Constitutional Order in the Twentieth Century," in *The Rule of Law, Islam and Constitutional Politics in Egypt and Iran*, ed. Saïd Amir Arjomand and Nathan J. Brown (Albany: State University of New York Press, 2013).

9 Saïd Amir Arjomand, "Dual Leadership and Constitutional Developments after Khomeini," chap. 2 in *After Khomeini. Iran under His Successors* (Oxford: Oxford University Press, 2009).

was outlawed, as was divorce by repudiation; women were given the rights to work and to participate in the public sphere without spousal consent; and – in later amendments – were allowed also to marry foreigners while their Tunisian citizenship was extended to the offspring of such marriage.¹⁰

Shari'a as the or a Main Source of Legislation?

As previously noted, the 1906–07 Iranian constitution had settled the issue of *shari'a* in relation to state law by making it a *limitation* to government and legislation. There was no presumption that *shari'a* should be the basis of the constitution itself. This very presumption emerged and spread in the second half of the 20th century. In November 1949, the founder of the Syrian Muslim Brotherhood Mustafa al-Sibā'i was elected to the Syrian Constituent Assembly, which was to write a constitution for the newly independent Syrian nation state. As a member of the drafting committee, al-Sibā'i passed an article declaring Islam the state religion (*din al-dawla*). The article had to be withdrawn in the face of fierce opposition from Christians and secularists. However, it was replaced by another article requiring Islam as the religion of the President of the Republic while declaring “Islamic jurisprudence (*fiqh*) the main source of legislation”. Although al-Sibā'i claimed that this made the Syrian constitution of 1950 “a model constitution for a Muslim state”, its implications were far from clear at the time, and the *Syrian League of 'Ulama* in fact rejected it.¹¹ Whether inadvertently or by design, the article makes *shari'a* no longer a limitation to legislation but its source.

Far more influential than the short-lived 1950 Syrian constitution was the declaration of God's sovereignty in the so-called Objectives Resolution included in the 1956 constitution of the Islamic Republic of Pakistan. This declaration became the cornerstone for the construction of an ideological constitution purporting to be based on the Qur'an and Islamic *shari'a*. It ushered in a wave of ideological constitution-making in the Muslim world and most notably in Iran after the Islamic Revolution of 1979, where Islam increasingly appeared

Syrian constitution of 1950: Islamic jurisprudence (*fiqh*) the main source of legislation

Ideological constitution-making in the Muslim world after 1979

10 Lilia Labidi, “Tunisian Women in the ‘Arab Spring’: The Singularity of Article 46 in the 2014 Constitution,” *Al-Raida Journal*, Issue 143–44 (2013–14).

11 Thomas Pierret, *Religion and State in Syria. The Sunni Ulama from Coup to Revolution* (New York: Cambridge University Press, 2013), 174–75.

as the *basis* of the constitution and the state rather than a *limitation* to them.

The Syrian 1950 Constitution nevertheless grafted a novel ideological element destined to become a staple in Islamic constitution-making – namely, the declaration of *shari‘a* as the main source of legislation. The Kuwaiti constitution of 1962 (the country’s second) adopted much of the Ottoman constitution of 1876, but it also elaborated the formula of the 1950 Syrian constitution by declaring the principles of *shari‘a* “a main source of legislation” (Article 2). Egypt eagerly followed this method of incorporating Islam as the alleged basis of legislation in Muslim authoritarian regimes,¹² and made it Article 2 of its constitution of 1971, thus adding Islam to the syncretic socialist-liberal-nationalist ideological foundations. In 1980, the Egyptian government once more pre-emptively amended the same Article 2, changing “a” to “the” to read in translation: “the principles of Islamic *shari‘a* are the chief source of legislation (*mabādi al-shari‘a al-islamiyya al-masdar al-ra‘si li’l-tashri‘*).”¹³

The Islamic Revolution of 1979 in Iran rejected the characteristically Shi‘ite distinction of the religious and political spheres in the 1979 Constitution of the Islamic Republic of Iran and its 1989 amendments, by subjugating the Iranian state and its modernised constitutional order on the basis of Ayatollah Ruhollah Khomeini’s theory of the Mandate of the Jurist (*velāyat-e faqih*) on rule, just as the Ottoman Sultan had done as the Caliph – amounted to the Sunnification of Shi‘ism.¹⁴ The 1979 Constitution also went much further than the Shi‘ite jurists of the 1930s in the substantive Islamicisation of Iranian law by repealing the last Shah’s family law, which had been enacted after the Civil Code and was at odds with the provisions of Shi‘ite jurisprudence, and by introducing the penal code of *shari‘a* (*hodud* and *diyāt*), which had been in abeyance for centuries, as statutory law. The defence of the traditional Shi‘ite distinction of religion

Islamic Revolution of 1979: Sunnification of Shi‘ism

12 The word for “legislation” itself is derived from *shari‘a* in Arabic, unlike the Persian word which stems from *qānun*.

13 Nathan J. Brown, *Constitutions in a Nonconstitutional World* (Albany: State University of New York Press, 2002), 30, 56, 82–84.

14 Important aspects of this Sunnification are the justification of the Supreme Jurists’ orders as “governmental ordinances” (*ahkām-e hokumati*) and the adoption of the Sunni principle of *maslaha[t]* (expediency of public interest) for the creation of the Expediency Council. See Arjomand, *After Khomeini*.

Defence of the Shi'ite
distinction of religion
and politics by dissidents

from the political domain was left to the increasingly vocal dissidents, both clerical and lay.¹⁵

Constitutional Developments after the Arab Spring

The diametrically opposite constitutional development took place after the Arab revolution of 2011 in Tunisia. The Islamic *Annahda* under the effective leadership of Rachid Ghannouchi did not seek to revoke the Code of Personal Status, and in fact agreed to a generous quota of one third of the seats of the Constituent Assembly being reserved for women. It is interesting that it was Yadh Ben Achour (‘Iyād b. ‘Āshur), son of the former Chief Mufti, who contributed to the secularisation and the Islamist discourse during the 2011 revolution by dropping the requirement to have *shari‘a* as a source of law and playing a major role in bringing about the historic power-sharing compromise between *Annahda* and the second- and third-largest political parties represented in the Constituent Assembly as they sought to create a new constitution based on democratic consensus.¹⁶ He had been a judge of the Constitutional Court of Tunisia, set up in 2002, and became President of the Higher Political Reform Commission of Tunisia when it was set up in March 2011, shortly after the revolution. The Commission passed the electoral law on parity between women and men by requiring alternation between men and women on electoral lists – an unprecedented move in the Arab world.¹⁷ As such, Yadh Ben Achour was one of the key architects of the 2014 Constitution of Tunisia. To achieve consensus, the *Annahda* government agreed not to mention *shari‘a* at all. The formula of making *shari‘a* “a” or “the” source of legislation was abandoned (after having been proposed) by the *Annahda* government during the post-2011 constitutional negotiations in order to produce a consensus constitution. In the end, the

2014 Constitution of
Tunisia does not even
mention *shari‘a*

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- 15 Saïd Amir Arjomand, “Persianate Islam and the Secularity of Kingship,” in *Companion to the Study of Secularity*, ed. HCAS “Multiple Secularities – Beyond the West, Beyond Modernities” (Leipzig University, 2019). www.multiple-secularities.de/publications/companion/css_arjomand_persianatekingship.pdf.
- 16 Jean-Pierre Filiu, “The First Year of the Tunisian Revolution,” in *The Arab Revolution of 2011. A Comparative Perspective*, ed. Saïd Amir Arjomand (Albany: State University of New York Press, 2014).
- 17 Lilia Labidi, “The Arab Uprising in Tunisia: Parity, Elections, and the Struggle for Women’s Rights,” in *The Arab Springs. Catalysts, Dynamics and Trajectories*, ed. Fahed Al-Sumait, Nele Lenze, and Michael C. Hudson (Lanham: Rowman and Littlefield, 2015), 181.

constitution of 2014 made no reference whatsoever to *shari'a*. There was however a last-minute insertion into Article 106, which prohibited partisan instrumentalisation of religion and committed the state “to protect the sacred and prevent it from being attacked.”

Conclusion

Let me conclude by returning to the culturally specific patterns of multiple secularities as an important component of the idea of multiple modernities. The distinctiveness of the Islamicate pattern of secularity in the Middle East and North Africa is due to the centrality of Islamic law at the core of the religious sphere. Within this Islamicate frame, we can explain and contrast the developmental paths of secularisation in Iran and Tunisia.

Islamic law is far more central to the religious domain than theology in the Islamicate civilisation. Correct observation of ritual and practical rules matters much more than the profession of specific beliefs and doctrinal tenets, and one speaks of pious behaviour as orthopraxy rather than orthodoxy. As orthopraxy is compliance with *shari'a*, the primary measure of secularisation is the shrinkage of the areas of life regulated by *shari'a*. Family law and the legal status of women were among the most important substantive areas of social life traditionally covered by *shari'a*. An important measure of secularisation in Tunisia thus resulted from the removal of traditional Islamic jurisprudence from the regulation of the status of women with the 1956 Tunisian Code of Personal Status that has remained in force. Electoral and other laws after 2011 have further enhanced the status of women independent of *shari'a*, culminating in Article 146 of the 2014 Constitution that committed the state to protect “the achieved rights of women” and “to achieve parity between women and men in elected bodies.” The Tunisian state took the first step toward fulfilling this commitment by acceding fully to CEDAW and lifting its previous (*shari'a*-derived) reservations in April 2014.¹⁸ In post-revolutionary Iran, by contrast, we find considerable de-secularisation as a result of the establishment of a Shi'ite theocratic republic after 1979, though this is *de facto* somewhat offset by a similar shrinkage of *shari'a* as a result of electoral and other statutory laws in the Islamic Republic

Primary measure of secularisation: shrinkage of the areas of life regulated by *shari'a*

Tunisia: legal enhancement of women's rights independent of *shari'a*

Iran: considerable de-secularisation

18 Labidi, “Tunisian Women,” 77–78.

and, interestingly, also by some of the statutory enactments of the Expediency Council such as the introduction of alimony and the appointment of women as theoretically subordinate judges in family courts, which are not provided for in Shi'ite jurisprudence.¹⁹

**De facto secularisation
of Islamic law by
codification of law**

A final comment may also be in order on the distinction I have made between *de facto* secularisation and secularism *de jure*. The codification of law – that is, the conversion of Islamic jurisprudence into statutory law enforced by the state in the 19th century involved far-reaching secularisation without any substantive or *de jure* secularisation of law. *Shari'a* ceased to function as what Weber called a “jurists’ law” interpreted by clerical judges and was codified as state law, or law of the land, to be applied by judges of the ministries of justice modelled on the European system of civil law with little or no leeway for interpretation by judges as in the old Muslim system or for that matter in the common law systems of England and the United States. The judiciary became an organ of the state and was transferred from the religious sphere into that of state administration and was as such secularised *de facto*.

The nostalgia for a lost golden age caused by the shrinkage of *shari'a* from the modernised legal sphere in the 20th century in the Muslim world generally goes a long way to explaining the emergence, in the 1970s, of the Islamist ideological notion of the Islamic State whose primary function was allegedly the execution of *shari'a*. The Islamic Revolution of 1979 in Iran to realise this utopian notion of the Islamic state resulted in the creation of a theocratic republic and thus the abrogation of the traditional Shi'ite distinction of the political and the religious spheres and their historical de-differentiation. The Tunisian revolution of 2011, by contrast, did not alter the trend toward progressive secularisation set in motion by the Tunisian constitution of 1861, but instead reinforced it. This contrast notwithstanding, in Iran too the process of *de facto* secularisation, set in motion by the judiciary reforms which converted Shi'ite jurisprudence into state law, has continued despite the Islamic revolutionary hiatus. This process is somewhat comparable to that seen in Tunisia.

19 Alimony is justified as compensation for past unpaid labour. The verdicts of the female subordinate judges are countersigned by a male judge not involved in the particular case. Justification on the grounds of *maslahat* or public interest was added as a new principle to Shi'ite jurisprudence by Imam Khomeini and endorsed in constitutional law.

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