

## Egypt: Problems of Constitutionalism and Secularism

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The continuing political instability as evidenced by particularly severe clashes in Egypt between religious and secular sectors of society, army, revolutionary protesters, and political parties, raises important questions about the future of democratic rule in the Middle East. Given the electoral success of Islamic parties across the Middle East, and resistance by secular parts of society and state, this question has been at the forefront of international news coverage. A less frequently addressed question concerns the ability of constitutional rule to produce consensus and trust between the populations in North Africa and the state. This analysis attempts to show that the political gridlock in contemporary Egypt including the military coup is less about the exact phrasing in constitutions that may or may not guarantee individuals' protection from the state, i.e. the liberal meaning of constitutionalism. Rather, it is about the role that extra-constitutional institutions including Islam should play in providing for exactly the same protection, a question that is triggered by socio-economic crisis, mismanagement, and authoritarian tendencies among the political elite.

Through this analysis, I suggest that the political currents and the millions of citizens in the streets of Egypt are not simply manipulated bystanders. Instead, these demonstrators are a reflection of a deep crisis of trust in state institutions that has developed in contemporary Egypt and that has become stronger in the post-revolutionary period. The latter is because of the entrenched battles that the different state institutions have been involved in (i.e. parliament, executive, judiciary, military), which has weakened the credibility of secular protection of individuals by the state. Given the steady socio-economic decline that has partially resulted from these entrenched battles as well as revolutionary mobilization, the effect of the contemporary crisis could well strengthen the role of religion in the regimes to come. Ironically, even if millions of protesters were demonstrating against an Islamist-led government that resulted in the most recent military coup, the medium to long term effect could very well further weaken secular constitutionalism.

Since the Arab uprisings erupted in December 2010, constitutionalism received a substantial boost. By the summer of 2013, two new constitutions in Morocco and Egypt and one new constitutional draft in Tunisia had been introduced, and amendments to electoral laws have also significantly changed the prospects for constitutionalism in Algeria. While older constitutions appeared to be driven by authoritarian states' need to legitimize or legalize authoritarian rule by proclaiming the sanctity of the law (what constitutional lawyers call illiberal legality), it is no longer possible to analyze the new constitutions in Tunisia and Egypt exclusively from this angle. Instead, in the new space that the constitutional debate offered, principles of majoritarianism (the right of majorities to impose their views on minorities) and ideas of Islamic law (the right and usefulness of divinely inspired laws to apply regardless of any majorities, for the betterment of society as a whole) appeared to be in conflict with abstract references to the protection of individual rights through man-made, secular law. In turn, the institutions of the state are caught in these battles that are dominated by antagonistic political currents, a point that is nowhere better illustrated than in contemporary Egypt.

This debate is a structural one that has preoccupied constitutional lawyers since the publication of James Madison's and Alexander Hamilton's debates in *The Federalist* in the late 18<sup>th</sup> century. The first disputed principle is that of majority rule, which if unchecked would pose serious threats to minorities (Madison in Federal Paper 10), a second is that of the questionable power and necessity of human rights protection by a written declaration of such rights in amendments (Hamilton in Federal Paper 84), given that majorities can easily change these. In contemporary North Africa, the severity of these questions is all the more intensified by the region's recent history: In both Egypt and Tunisia political majorities, the Muslim Brotherhood and Ennahda, have been outlawed by laws that banned political parties based on religion. Similarly, severe human rights violations took place in spite of constitutional principles in both countries that allegedly protect individuals and political freedoms. In all countries of North Africa, illiberal legality was the norm, and the judicial system has been systematically used by authoritarian states in their attempt to secure their rule. Electoral majorities

have been excluded from rule, often disguised in implicit or explicit justifications based on the protection of minorities, secular or religious, and guaranteeing stability. In Egypt since the Arab spring, mismanagement and rule by force through the army has further made constitutionalism and individual citizenship rights a highly abstract source of trust. This history – together with important Islamic traditions – has had remarkable repercussions on how constitutional principles are formulated.

### Islam and constitutionalism

To understand the support for, and controversial nature of Islamic *sharia* law in legislation, it is interesting to consider the role that religion has played for state power and the rule of law in Islamic history. On one hand, Islam has been used in what Ayubi called the historical Arabo-Islamic state as a justification for state power, leading to the appropriation of religion by the state and not to a competition between religion and state as evidenced in Medieval Europe (Ayubi 1991: 1-26). On the other, it has historically also been a limitation on secular state power and a major source of resistance against unpopular or unjust rule (Brown 1997: 11). Uprisings and seizures of state power have often been mobilized in the name of Islam. From the Fatimids in Tunisia to the Almohads in Morocco, Medieval Islamic history is full of examples where orthodox splinter groups captured state power because of un-Islamic ways of life that city dwellers and rulers enjoyed in urban areas. Ibn Khaldun's theory of state power elaborated in his *Al Muqadimmah* (1377) is essentially a theory that explains the importance of keeping sacred law in the city as a limitation on state power, lest the risk of being ousted by more orthodox solidarity groups based on tribalism. More contemporary examples include on one hand, the capture of Riyadh and the later conquest of Eastern Arabia, the Najd, by an alliance of Saudi tribesmen, a militia called Ikhwan as well as Wahhabi ultra-orthodox Sunni clerics in the early 20<sup>th</sup> century. The 1979 Iranian revolution's alliance of Shi'a clerics and secular opposition groups also elevated Islamic principles to a central benchmark against which state abuse was evaluated. This benchmark coined the term westoxification as a synonym of the shah's secular and authoritarian policies. In all these cases, Islamic principles and law, *sharia* and Islamic morals, were used as a critique of state power. This indicates that while in the historical Arabo-Islamic state, Islam may have been used as a justification of state power, it has also been used as the central principle that could be called upon to protect the population against (unjust) rule. This rendered it a powerful legal-political tool for opponents of the state as much as for rulers.

With such historical experiences and concepts of law, it is not surprising that the constitutional changes and the political parties primarily empowered in the Arab post-revolutionary phase have had an important Islamic dimension. Egypt's Freedom and Justice Party (FJP) has been an emanation of the powerful Muslim Brotherhood. It must be pointed out though that in Egypt and Morocco prior to the uprisings, *sharia* law was already directly applied to family matters in family courts, and that in Egypt, it was alleged in the previous constitution that *sharia* law was the principle of all laws. Yet, Egyptian religious scholars of the Al Azhar University, one of Sunni Islam's most prestigious centres of Islamic learning, had little if any impact on the formulation of law

prior to the February 2011 revolution. In contrast, in Morocco *sharia* has been at least formally applied through the King's unique religious title as Amir Al Muminin – the Commander of the Faithful - in the name of which all legislation has been signed. Consequently in the case of Egypt, it appears clear that another more casual reference to Islam as a source of legislation as in the previous constitution would have little support, if *sharia's* role is perceived to be that of protecting society as a whole from authoritarian state power. In the case of Morocco, assuming that the King has religious legitimacy as Amir Al Muminin (a view that is contested by some more radical Islamic groups inside the country), Islamic law's role through Amir Al Muminin of protecting groups and individuals from state legislation had been confirmed after the constitutional changes of July 2011.

### Constitutionalism and Islam in Egypt

In Egypt, the constitutional writers that were appointed after the first set of free and fair parliamentary elections in November and December 2011 chose to give some authority to Al Azhar. As aforementioned, it had not enjoyed any meaningful authority under the previous regime. The members of the Constituent Assembly, controversially dominated by members of the Muslim Brotherhood and re-elected once, endowed Al Azhar with the authority to be consulted in matters related to Islamic *sharia*. Article 4 of the new constitutional text used the cautious passive tense (“to be consulted”) yet does not make it clear how the institution would be called upon, and if it could initiate its own consultation by judging what matters are related to Islamic *sharia* and which ones are not. This cautious attitude reflects the need to effectively make laws and regulations with respect to economic, social, and electoral needs, yet also elected politicians' distrust concerning unelected religious scholars' ability to arbitrate political matters effectively. This distrust may be particularly critical given Sunni Islam's lack of universally recognized clerical hierarchy and authority that would be comparable with that of the Catholic Church or Shi'a Islamic clerical institutions. While the Muslim Brotherhood's party, the FJP, may have initially believed that Islamic *sharia* to be a self-explanatory restrictive concept limited to family matters and questions of morality only, Al Azhar has in fact moved to interpret its authority and that of its Body of Senior Scholar more widely, and not restrictively as that of a rubber stamp for conservative politicians from the FJP. Issues such as Islamic bonds, *sukuk*, the legality of IMF loans that collect interest, as well as status reports on women by the UN Commission on the Status of Women have led to intense conflicts between Al Azhar and the FJP. As Al Ali explains the structural dilemma, “the constitution has led to the creation of an autonomous force that can speak authoritatively for Islam that is neither majoritarian or fully in tune with Islamist political forces.” (Al Ali and Brown, 2013). In this struggle between Al Azhar and the politically majoritarian FJP, the ultra-conservative Salafists and their representatives in the parliament, Al Nour Party, tended to support the Al Azhar University against -what can be called the secularization of Islam by the FJP. After all, they were still inclined to view Islam as the only source of loyalty for devout Muslims. Commenting on criticisms by the Muslim Brotherhood concerning the embarrassing call for the killing of opposition leaders that emanated from the religious TV



station al Hafez in March 2013, the director Abdel Rasheed declared that such views were aired because the station's purpose were non-political in that "we are tied to God, we serve Allah" (BBC News, 30 April, 2013).

From this situation, issues such as a new apostate law that the FJP introduced in parliament served to give the FJP regime the Islamic window-dressing it required to serve its constituency, while in reality it has been trying to tame Al Azhar as much as possible. Consequently, President Mohamed Morsi of the FJP may have been accused of establishing Islamic morality and control over the state and society, as well as uncompromising attitudes towards his political opponents, in reality he sought to create an independent state legislature that could control Islam's role in the legislative process.

### **July 2013: The Unholy Alliance and the End of Secular Constitutionalism**

One year after his investiture as the first freely elected president of Egypt, Mohamed Morsi's removal from power by a military coup following unprecedented protests raises serious questions concerning the future of secular constitutionalism. The president's democratic election did not endow him with legitimacy in the eyes of the millions Egyptians who demonstrated against his presidency and welcomed his removal on July 3. The army's welcomed suspension of the constitution further illustrates that neither the legitimacy of elected majorities nor the credibility of constitutional protection gained meaningful trust among the general public. While the protesters and the secular opposition ostensibly support liberal democracy, it appears equally clear that a significant amount of trust is being endowed in extra-constitutional institutions, in this case the army. This has led to proposals to dissolve Muslim Brotherhood and its political party FJP, as well as the arrest of Muslim Brotherhood officials including Egypt's first elected president Mohamed Morsi. What deserves special attention is the fact that Abdul Fatah Al Sisi, the Defense Minister leading the coup, also made reference to Al Azhar as the institution that would approve any new constitution that the new leaders wish to enact. The army clearly believes in the legitimate inclusion of religious institutions in the state apparatus for the creation of trust. This was most clearly demonstrated by al Sisi's inclusion of the Grand Imam of Al Azhar Ahmed el Tayeb, together with Coptic Pope Tawadros II, opposition leader Mohamed El Baradei, Al Nour officials and 'rebel' Tamarad leaders in the decision leading to, and announcement of Morsi's removal (The Guardian, 3 July 2013). With this move, it appears that it is the use of force and religious legitimacy that has ultimately imposed itself as major sources of trust, at the detriment to rule of law and protection of individual rights qua democratic election and electoral bargaining. In this author's opinion, this shows the difficulties that the Egyptian transition from authoritarian rule is currently undergoing; the abstract reference to constitutionalism is being eroded by historically grounded references to Islamic law that have imposed standards of protection and control beyond majoritarianism and constitutional rights, i.e. man-made law. These standards co-exist with more liberal fears about majoritarianism especially those with authoritarian tendencies. In this case, army, religious leaders, and 'secular' opposition formed an

unholy alliance, supported by the more radical Salafi group al Nour, against the FJP presidency.

### **Conclusion**

Given the protagonists role in the current conflict – army, Muslim Brotherhood, and the judiciary, with members of the ancient regime holding prominent positions both inside the judiciary and the army – an orderly, constitutional, transition based on mutual trust started to appear impossible ever since the constitution was adopted by majority vote in December 2012 (Sater, 2013). Consequently, the role of Islamic supervision and extra-constitutional sources of trust, such as those enjoyed by the army, is likely to increase rather than decrease. From this perspective, the current crisis that may have emanated from a critique of religion in politics by opposition groups may be increasing the demand for Al Azhar's role in politics, rather than decreasing it. Ironically, the Muslim Brotherhood's more recent history may illustrate that they have quite clearly supported at least some secular demands, such as the control of religious institutions by the state. The army's need for legitimacy, after having delegitimized constitutionalism by coup de force, may in the short to medium turn further increase Islamic forms of control into public life – whether in the form of authoritarian legitimacy as in the case of Sudan, or in the form of clerical authority as in the case of Iran.

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