Islamic law and international human rights standards: Writing fiqh into the Bill of Rights in the Libyan Constitution

Chibli Mallat¹

‘International Democracy Standards in an Islamic Context’
Organised by Democracy Reporting International

Tripoli, Libya 23 June 2013


¹ Chairman, Right to Nonviolence. Presidential Professor of Middle Eastern Law and Politics, University of Utah; EU Jean Monnet Professor of European Law, Université Saint-Joseph, Lebanon.
I Method

There are several ways to deal with Islamic law in the constitution. One is to ignore it altogether, a practice that was common in 20th century Arab constitutionalism and continues today in Tunisia. It is the simplest approach. Just remove all divisive religious-legal references in the text, including Islamic law. Another is to make Islamic law a point of reference, either exclusively or with other sources, in an article or set of articles in the Constitution. This is what we have in the famous Article 2 of the Egyptian Constitution, which remains in the Constitution passed in 2012, and in Article 2 of the Iraqi Constitution of 2005.

I propose here a third method, hopefully innovative as well as scientific, that resolves the tension between classical law, fiqh, and its contemporary constitutional aggiornamento. This is a method that is more generally inscribed in the debate over Islamic law and democracy, including the important theme of our conference, reconciling minimal international standards of the human rights movements with the legacy of Middle Eastern and Islamic law.

In terms of political philosophy, the proposed solution is rooted less in a concept of the political as purely secular (leave your religion at home, here you are a religion-less citizen) than in the active search for a richer set of identity references, which I call Middle Eastern because they tend to be shared across the three monotheistic religions and their millions of adherents. We must keep in mind that Islamic law came late to the Middle East, and that a formidable continuum of local traditions can be attested back to Babylonian, Zoroastrian and Pharaonic times. Babylonian and other religions have long died, but Babylonian law hasn’t. Then there are the evidently different legal traditions of other religions, chiefly Christian and Jewish, the latter particularly

2 All references to constitutions can be found on the dedicated section of the Middle East Constitutional Forum on the Right to Nonviolence site, www.righttononviolence.org/mecf/, established and animated by Tobias Peyerl. The latest formulation of the Tunisian draft constitution does not mention Islamic law.

3 Article 2 of the Egyptian Constitution of 2012: ‘Islam is the religion of the state and Arabic its official language. Principles of Islamic Sharia are the principal source of legislation.’

Article 2.1 of the Iraqi Constitution of 2005: ‘Islam is the official religion of the State and is a foundation source of legislation:
A. No law may be enacted that contradicts the established provisions of Islam
B. No law may be enacted that contradicts the principles of democracy.
C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.’

4 Fiqh, shari’a, qanun, all mean law in Arabic. The scholarly discipline of Islamic law is known as fiqh, hence my preference to use it over other terms. Aggiornamento, Italian for putting up to date, refers to the national legislative and political efforts to modernize Italy upon unification in the last quarter of the 19th century.

5 It is current to use ‘best standards’ for what is actually the inclusion of minimal standards accepted in a bill of rights. ‘Best’ has a more ambitious feel.
important in Libya until Qaddafi and the Arab-Israeli conflict decimated its two-thousand year old Jewish community. And there are national traditions that build on the positive forms of constitutionalism in the legacy of the West and its iteration over two hundred years of Middle Eastern constitutionalism. This legacy is evident in all constitution-making in the Middle East revolution that is under way. Last and not least, there is the rich example formed by societies across the world. In the past, people always looked at other constitutional experiments for inspiration, ranging from the American and French constitutions in the 18th century, copycat models in more ways than one, to the attention given by the Libyan Constitution of 1951 to international human rights conventions. Why should experiments elsewhere be excluded a priori?

None of these traditions can be dispensed with in making good law in the region.

So the response to the reference to Islamic law is to make it non-exclusive, in an openness which matches its reality everywhere. Islamic law, Middle Eastern law, other religious laws (especially if the country has citizens who are not Muslim), national laws and international standards, they should all be considered seriously to inspire a constitution and to enrich later legislation. This corresponds to the reality of how 21st constitutionalism and legislative drafting work best.

This makes the emphasis different when we write a constitution. Silencing Islamic law altogether, as demanded by militant secularists, or drowning it in a series of other references, by sequencing it in the Egyptian and Libyan Civil Codes (Article 1) or juxtaposing it with international standards (Article 2, Iraqi Constitution of 2005), is less convincing than its effective use as an important part of the national and regional legacy of Middle Eastern law.

Every legal strand is included, and it is then left to the legislators and the judges to make the effort needed to include the most appropriate and most enriching tradition in the laws they later pass or interpret respectively as legislator or judge.

This is the easy part.

---

6 Even this reference was circumscribed in Article 189 and Art.191 of the 1951 original text to refugees and foreigners. South Africa’s constitution includes an open adoption of international law (section 232: ‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’

7 The judge, in the absence of a clear disposition of the Code, must find an answer to the case before him using ‘custom, Islamic law principles, natural law and the principles of justice’, in that order (Art 1, Egyptian Civil Code). The Libyan Civil Code puts Islamic law principles first.
The more challenging question is how to effectively operate the constitutional aggiornamento of these laws, especially Islamic law because of the formidable baggage that it brings to the Middle East over the past millennium and a half. It is too easy to project Islamic law as the source for future legislation in the Article 2 model. To take Islamic law seriously is to integrate it in the constitution we are making now. How does a constitution take Islamic law seriously as a prominent feature in the region’s constitutional landscape and specifically in our subject today, to the bill of rights we prepare for our constitutions?

In constitution-drafting, the way I propose going about it is profoundly different from the way of traditional constitutionalism in the Middle East. In the fundamental text to be adopted by the Middle East revolutionaries, the interminable debate over ‘the’ and ‘a’ for the Islamic principles or sources of legislation is trivial. If we are serious about Islamic law, we need to incorporate it in the constitutional text itself.

Rather than worry about the general reference in the constitution to some set of rules left to apply at a later time, the immediate question for the Islamic legal tradition across the Middle East is how we can put it at work to obtain the best constitutional text we wish to adopt as a break with the authoritarian past. If we want to include the Islamic legal tradition in the constitution, why postpone the debate by way of Article 2 to later legislation? We might as well start with what Islamic law can offer to the constitution we are writing presently.

The language of Islamic law, fiqh, provides a uniquely rich legacy of rights and duties into the legal corpus. My contention is that a purposeful revival of this tradition would better address the problem by starting the discussion between the national tradition, including principally Islamic law, and various comparative and international law models for the enumeration of fundamental rights, which is what we are doing in this conference. Such adaptation will eventually be completed by the constitutional courts, but one can start immediately with the very drafting of a constitution’s bill of rights.

Let me first say what I will not do. Some constitution-drafters follow an exercise developed in a number of ‘Islamic human rights documents’, where a common list of rights culled from various international and domestic declarations is dressed up with caveats stipulating compliance with Islamic law. This is easily done, but it has failed to impress the imagination of the very people it
was addressed to, or to those observing these texts from outside the faith. For a more universal community of human rights defenders, caveats are rightly denounced as onerous conditions that empty the right from its meaning. Such texts and the considerable efforts that accompany them to devise Islamic reservations to universal rights written in the West are a dead end.

The way advocated here is very different. It goes from the legal corpus, in a methodological conclusion drawn from the experience of civil code drafting in the past two hundred years. The answer to why the Civil Code of the Ottoman Empire was never questioned over its Islamic authenticity and why the Egyptian Civil Code continues to be questioned to date despite the repeated, and genuine efforts made by Sanhuri to say that it was Islamic, is a matter of style, not a matter of substance.

This is also true in constitution-drafting, and, to my knowledge, the work done in the Majalla on civil law was never attempted for the constitution. The effort is more one of style commanding substance, as I will presently illustrate it in the Bill of Rights section of the constitution concerning freedom of religion.

II Illustration

The clause on religious freedom in the Qur’an generally translates as “No compulsion in religion, la ikrah fil-din.” The paraphrase of the Arabic is that religion is a choice that cannot be forced or compelled on anyone, and that each person may adopt a religion or reject it as she chooses. It is the citizen’s decision to adhere to, and practise, the religion she prefers. There is no place in life for any compulsion, any duress, in matters of religion. Freedom of religion is absolute. The formulation is short, neat, precise and absolute. Four words: “No compulsion in religion”.

The equivalent expression of the principle in international and domestic bills of rights can be

---

9 For instance Ann Elizabeth Mayer, Islam and Human Rights: Tradition and politics, Boulder: Westview Press 5th ed. 2013. Examples of such texts include various list of rights in constitutions like the one in Iran or the Cairo Declaration of Human Rights (1990), and, in a germane way for the rights of women, the caveats of Muslim authoritarian governments like Iran and Saudi Arabia to CEDAW (entered into force 1981).
10 Argument developed in my Introduction to Middle Eastern law, Oxford: OUP, pb ed. 2009, chapter 8 on civil law, 244-99.
11 Qur’an ii (baqara), 256.
found in countless documents. Let us take four examples from famous constitutional texts:

The French Declaration of the Rights of Man of 1789 states in Article 10 that “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.” The formulation amalgamates freedom of opinion and freedom of religion, and is constrained by the exception of public order.

The American text was adopted contemporaneously in the First Amendment, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” It reads as an injunction addressed to the legislature to keep away from religion when making a law.

The Universal Declaration of Human Rights (1949) is more specific. It states in Article 18 that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Finally in our selection, Chapter 2, Section 15 of the South African Constitution on ‘Freedom of religion, belief and opinion,’ is far more prolix:

“Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

1. Religious observances may be conducted at state or state-aided institutions, provided that
   a. those observances follow rules made by the appropriate public authorities;
   b. they are conducted on an equitable basis; and
   c. attendance at them is free and voluntary.

2. a. This section does not prevent legislation recognising

12 “Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l’ordre public établi par la Loi.”
i. marriages concluded under any tradition, or a system of religious, personal or family law; or

ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.”

Examples can be multiplied. The point should be clear by now. None of these texts has a Middle Eastern or Islamic feel, but there is no particular reason to choose one of these formulations over the four-word Qur’anic injunction, *la ikrah fil-din*, no duress in religion. The style is different. The substance is the same. What the constitutional rendering loses in terms of precision when the formulation is short, it gains in terms of mnemonic referencing, elegance, pith, and, as importantly, in terms of identity and culture. No duress in matters religious means no duress whatsoever, from the state, any other constitutional agent, another citizen, or the public at large. A robust interpretation of the phrase “No duress in religion” can cogently and forcefully convey the constitutional request that there is freedom “to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance,” as in Article 18 of the Universal Declaration of Human Rights, or indeed any other expression that the other documents convey.

Taken alone, this verse as constitutional article may sound too bare, and too contrived. As a matter of widely documented fact, some legal traditions constrained the Qur’anic principle of absolute freedom of religion—“No duress means no duress”—with a number of practices that range from forced collective conversion since the Islamic conquests, to the prevention of the *ridda*—one cannot opt out of Islam—, to the punishment of those who are accused of rejecting, denying or ignoring Islamic law in derivative principles, for instance by drinking wine, committing adultery or wearing a veil. Such readings may have been a dominant interpretation at some points in history, they are interpretations that run contrary to the plain text of the Qur’an. If anything, the more recent legal tradition of the modern Middle East supports the opposite trend, with individuals being left free to practise their religion, change it, and honour the

---

13 There is of course another counter-tradition which I call a humanist interpretation, ranging from Sufi *tafsir* (Ibn ‘Arabi) to luminaries like Mutanabbi and Abu al-‘Ala’ al-Ma’arri. For the revival of this tradition, see my *Philosophy of Nonviolence*, forthcoming 2014, Part one, chapter 2.
obligations they choose to be important in the faith. There is no sense in forcing the constitutional drafter of the 21st century to adopt a contrived, regressive interpretation of the plain Qur’anic text.

This makes that particular section of constitution-drafting uniquely exciting. To couch a universal human rights principle in a language which the Middle Eastern, -- here the Libyan citizen, is more familiar with, surely has a natural allure. Even more alluring perhaps is the work that would go, in proper constitution-making, in the discovery and reading of the tradition in a mode that makes it universal. Rather than any of these—a mere translation of a Western bill of rights even if dubbed ‘universal’, or a bill of rights full of caveats that empty it from any meaning, in the first case Islamic law considered an enemy of progress, in the second case transformed into the exclusive reference for progress—a bill of rights constructed on the wealth of Middle Eastern law, including Islamic fiqh, takes our minds beyond the lazy postponement of the Article 2 template.

This is hard work, but worth the aspirations of the Middle East nonviolent revolution, and from Libya, where violence prevailed, a potentially major contribution to the universalism of Islamic law.