

# Unveiling A Hidden Painting – Islam And North African Constitutions

By Koen De Feyter

## 1. Introduction

1. Islam does not allow a separation of the divine and the secular. The worldly leader is the religious leader. His duties include the fulfillment of both the believer's material and spiritual needs. All north African States have large Muslim majorities, but their regimes are not Islamic in a traditional sense; they are, on the contrary, secularized to a certain degree. How then do they come to terms with this apparent conflict with the religion of the majority of the population, which is also the religion of the State? How is this conflict dealt with in the framework of the fundamental texts on State organization?

2. This article first discusses some of the basic principles of traditional Islamic law:<sup>1</sup> its sources, its rules on the organization of the State and on the relationship between the ruler and the community. One needs to keep in mind that these principles were never fully implemented in practice, not even in the very early period, due to the considerable pragmatism (including a great deal of legal wizardry) of those applying them. However, this does not diminish their value from the point of view of present-day politics: when politicians refer to Islamic legal tradition, they refer to these rules in their original, theoretical form, not to practice. This text then introduces the constitutional texts under review. The bulk of the article is devoted to a comparative analysis of the influence of Islam on constitutional dispositions. Only three topics are dealt with: the role of Islam as a State religion and its consequences both for the legal system and the position of non-Muslim minorities; Islamic influence on the chosen form of government, particularly the position of the Head of State and the role of political parties; and finally, the resistance of Islam to competing ideologies in the determination of socio-economic options. These are not the only topics which could be researched. The text includes only casual references to human

<sup>1</sup> The text only deals with traditional Islamic law in a general way and does not contain specific references. However, the literature on the subject is vast. Apart from a direct consultation of Islamic sources of law, the main reference is to Lewis, B., Menage, V., Pellat, C., Schacht, J. (eds.), *The Encyclopedia of Islam*, Leiden, Brill/Luzac, 1971. At the date of submission of the article, the new version was half-way through publication. Another standard work is Ende, S., Steinbach, U., (eds.), *Der Islam in der Gegenwart*, München, Beck, 1984, 774 p. Specifically on Islamic public law, useful information is to be found in: Les Régimes Islamiques, *Pouvoirs*, 1980, nr. 12, 1-154, and in Mayer, A., Law and Religion in the Muslim Middle East, *American Journal of Comparative Law*, 1987, Vol. 35, no. 1, 127-184.

rights,<sup>2</sup> although there is an interesting debate on whether or not they are incorporated in Islamic legal tradition. A study of the role of the judiciary<sup>3</sup> reveals interesting data, as does a study of the notion of 'nationality' and the connected phenomena of nationalism and Panarabism.<sup>4</sup> Although the scope of this study is therefore limited, and the text fairly general even as it stands, a conclusion is attempted.

## 2.a. Traditional Islamic Law

4. *Fiqh* is the science of religious law in Islam, covering all aspects of religious, social and political life. Its purpose is to provide the theologian/scholar with technical means allowing the derivation of practical rules from the *Shari'a*. The *Shari'a* (the path to a waterhole) consists of God's word as revealed to the Prophet, (the *Quran*), and of customs, acts and words of the Prophet with normative value (expressing divine guidance), as sanctioned by tradition (the *Sunna*). Both these immediate sources of Islamic law contain only a small quantity of practical rules. *Fiqh* therefore developed two additional derived sources: *ijma'*, the consensus of the Muslim scholars on a specific point of law and *ijtihad*, individual reasoning.

5. According to Islamic belief, the *Quran* is of divine origin; it contains two sets of norms: those dealing with the relationship between God and the individual (of an intangible nature) and those dealing with societal life. The latter are usually formulated in an abstract or general way; they are therefore in need of further elaboration in order to be implemented. Few stipulations deal with the political sphere.

6. *Sunna* contains the accounts of what the Prophet said and did, collected after Muhammad's death, when the need for traditions (*hadith*) was first felt. Their divine origin is affirmed. In the course of time some of these accounts, the number of which increased with society's complexity, were contested. Thus, a text would only be recognized as authentic when fulfilling the requirement of *isnad*, the ability to prove a chain of authorities going back to the source of the tradition: Muhammad. In practice this meant that a list of witnesses had to be established, the first of whom had heard or seen the Prophet's words or acts.

7. For obvious reasons the body of rules resulting from *Quran* and *Sunna* remained limited. The *Quran*, however, stipulated that the community of believers as a whole could

2 See Abu-Salieh, Sami A. Aldeeb, La définition internationale des droits de l'homme en Islam, *Revue Générale de Droit International Public*, 1985, nr. 3, 625-718; Donnelly, J., Human rights and human dignity: an analytic critique of Non-Western conceptions of human rights, *American Political Science Review*, 1982, nr. 2, 302-316; Said, Abdul Aziz, Human rights in Islamic perspectives in: Pollis, A., Schwab, P., *Human Rights. Cultural and ideological perspectives*, London, Praeger, 1979, 86-100.

3 On *qadi* justice, see Makdissi, J., Legal logic and equity in Islamic law, *American Journal of Comparative Law*, 1985, nr. 1, 63-92. For a recent interesting country-study, see Abdul-Jalil, Musa Adam, From native courts to people's local courts: the politics of judicial administration in Sudan, *Verfassung und Recht in Übersee*, 1985, nr. 2, 139-151.

4 E.g. see Carre, O., L'influence de l'Occident sur les sociétés musulmanes: l'espace arabe, *Pouvoirs*, 1980, nr. 12, 33-45.

not be mistaken. Unanimity on a specific point of law was considered proof of the infallibility of a rule and became a generally valid way of ratifying customs derived from *Quran* and *Sunna*. In theory the consensus (*ijma'*) of the entire community of believers (*umma*) was required for a rule to acquire standing. In practice the consensus of those qualified in legal matters sufficed. Proof had to be shown that a certain generation of scholars had at a certain point in time agreed on a specific matter; this led, *inter alia*, to the recognition of the legal philosophy of the four orthodox *Sunni* schools still extant to this day: the Maliki, the Shafai, the Hanafi and the Hanbali, each determining the contents of the consensus according to their own system.

8. During the first two and a half centuries of Islam, individual reasoning (*ijtihad*) of prominent legal scholars intended to find a legal solution to a problem not provided for by either of the sources mentioned above, remained unchallenged. Shafi'i (8th century A.C., who is at the origin of the legal school named after him and the first to elaborate a detailed legal theory) opted for a more rigid, clearly defined system: he restricted individual reasoning to *qiyas* (the use of analogy): the application of rules from *Quran*, *Sunna* and *ijma'* in cases not provided for by the rule itself, but analogous to it. Still, the opinion of a single religious scholar, even when applying *qiyas*, remains fallible; only a general consensus leads to *ijma'*.

9. The State is the instrument used by God to enlarge his community; its purpose is the implementation of Islamic law. Since it expresses the will of God, the State is valuable in itself. The believer must defend it; only in an Islamic environment can he truly exist religiously and politically. The defence of the State is a Muslim's duty; the State's duty is the creation of a climate satisfying the believer's social and religious need.

10. The State is one, as is God. Separation of powers is a concept contrary to this unitary principle. Political power is exercised by a single ruler; a machinery to control the way power is exercised is absent. Man-made institutions (as collectivities, as opposed to the individual ruler) are not recognized: they have no legal existence. Representation prevents direct contact between the individual and the State; parliamentary assemblies are only introduced at a later date under foreign influence.

11. The *umma* is the community of those who believe and do good; it is an abstract concept not limited territorially or in time. A partition in political entities generated for geographic or historical reasons is acquiesced to, but national States consecrated by written Constitutions have no legal function in traditional Islamic law. No differentiation exists between members of the community; all are equal, but leadership is necessary for the community's defence. The community consequently acknowledges the authority of an individual exercising power. Sovereignty, however, belongs to God alone; therefore there is no actual delegation of authority by the community. The government's exercise of power is limited to the exercise of executive, administrative and judicial authority. There is no need for a legislator: all necessary legislation is provided in the *Shari'a*. The ruler derives his authority from God (who created the institution of government for Muhammad) but can only govern with the consensus of the *umma*. According to developed *Sunni* doctrine, qualifications required for leadership were the

following: Qurashite (Muhammad's tribe) descent, knowledge of the law as required for judgeship, probity as required for legal testimony, majority, physical fitness, capability of carrying out the political and military duties of the office.

12. Muhammad was appointed directly by God; the designation of his successor, the first caliph Abu Bakr, was the result of an electoral process. The community expresses its consent through the *bay'a*, the act of recognizing another person's authority. The *bay'a* is composed of two constituent elements: the community promises obedience and fidelity; the ruler promises to govern with pity and justice. Both parties are bound by this »contractual« relationship; the obligation undertaken by the community towards the ruler has religious overtones; it is personal and life-long. A possible dissolution of the contract in case of abuse of power by the ruler was a controversial issue; respect for an authority once established, was considered all-important.

13. The adaptation of *umma*, the abstract community, to a living electorate capable of appointing a ruler led to divergent interpretations. Was the electorate to be made up of the entire community or only of those considered knowledgeable enough to understand politics, the intellectual elite? In fact, the latter view prevailed. Only the elite appointed the ruler; only they were consulted by him. An important role was attributed to the *ulama*, the religious scholars. They exercised the monopoly of interpretation of sacred texts (the only recognized form of lawmaking). Interpretation was a scientific activity and remained outside the political sphere. As the ruler's governmental policy had to be in conformity with religious science, the *ulama* had considerable influence which they applied either by affording legitimacy to the ruler's decisions, or by criticising him. The ruler tried to reduce the *ulama* to the status of religious officers, *de facto* separating religious and secular spheres by attempting to withdraw matters concerning the relationship with his subjects from *ulama* influence. Political opposition against an established regime was not approved of from a theoretical point of view. Opposition could only disturb the internal peace of the community and threaten the unitary principle at the heart of the political system. There were no political parties; the Arabic term *hizb*, used from the twentieth century onwards to indicate political parties, had a primarily depreciatory connotation in the *Quran*, meaning group of dissidents, defending erroneous conceptions of the true faith.

14. As the principle of separation of powers was not recognized, the judiciary formed an integral part of the political structure. The ruler appointed judges. There were two branches of the judicial system: the *qadis* administered the *Shari'a*; their jurisdiction was limited to Muslims only. The *mazalim* were nonreligious administrative courts dealing with complaints originating from individuals against State officials; again, the judges represented the established political power.

## 2. b. North African Constitutions

15. For the purposes of this article, North Africa is taken to consist to the following States: Algeria, Egypt, Lybia, Mauritania, Morocco, (Sahara), Sudan and Tunisia.<sup>5</sup> All of these have Islamic majorities. Only four have regular written Constitutions which are in force: Algeria (1976, amended in 1977 and 1980), Egypt (1971, amended in 1980), Morocco (1972, amended in 1980), and Tunisia (1959, amended in 1965, 1967, 1969, 1975 and 1976). Sudan's 1973 Constitution was to be amended in order to be brought into conformity with the *Shari'a*, but was suspended after the coup ending Numeiry's regime. The Transitional Military Council adopted a Transitional Constitution on October 10, 1985. The drafting of a permanent Constitution was to be initiated after the April 1986 Assembly elections. In Mauritania, the Military Committee of National Salvation drafted and published a Constitution upon taking power in 1980, which was to be submitted to a referendum. No such referendum occurred and the State continued to be governed under the succinct Constitutional Charter published on July 10, 1978. This document was succeeded by an equally succinct »Constitutional Charter of the Military Committee of National Salvation« dated February 1985 and released in October of the same year. According to article 14 of this Constitutional Charter, it »will remain in force until the construction of democratic institutions«. Libya's »Declaration of the Establishment of the Authority of the People« (March 2, 1977) abrogated the State's provisional Constitution of December 11, 1969; article 2 of the document states that the Holy *Quran* is now the »law of the society (in Arabic: the *Shari'a*) in the Socialist People's Libyan Arab Jamahiriya. POLISARIO (Popular Front for the liberation of Saguit el Hamra and Rio de Oro) declared Western Sahara the Saharan Arab Democratic Republic on February 28, 1976; it issued a Constitution on August 26–30, 1976 (amended in 1982). Over sixty States had recognized the Republic by 1987, among them a majority of OAU members, but its legitimacy continues to be disputed by Morocco and her supporters and it is not a member of the United Nations.<sup>6</sup>

16. Although constitutionalism is alien to Islamic legal tradition,<sup>7</sup> each of these States promulgated Constitutions in the wake of their independence. The urge to draft a Constitution, a concept originally very much a Western tradition, is now a world-wide

5 The English translations of the constitutional texts are from two collections: Reyntjens, F. (ed.), *Constitutions Africae*, Brussel, Bruylant, 1987 (Algeria, Egypt and Libya) and Blaustein, A., Flanz, G. (eds.), *Constitutions of the countries of the world*, New York, Oceana, 1971 (Mauritania, Morocco, Sahara, Sudan and Tunisia). The Translations of the Egyptian Constitution (*E.C.*), of Lybia's »Declaration on the Establishment of the Authority of the People« and of the Moroccan Constitution (*M.C.*) are semi-official. The translations of the Algerian Constitution (*A.C.*), the Mauritanian Constitutional Charter, the Saharan Constitution (*Sa.C.*), the Sudanese Transitional Constitution (*Su.TC*) and the Tunisian Constitution (*T.C.*) are from a private source.

6 See, for more detailed information: Oeter, S., Die Entwicklung der Westsahara-Frage unter besonderer Berücksichtigung der völkerrechtlichen Anerkennung, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1986, nr. 1, 48–74.

7 The one element linking Islamic legal tradition and constitutionalism is the *bay'a*, when interpreted in such a way that it allows effective control of the ruler's exercise of power.

phenomenon, no longer linked to a liberal ideological environment. A Constitution may prove its usefulness regardless of the political ideology of the regime. It provides a measure of legitimacy to the emerging State and its government; it serves as a visiting-card on the international scene and renders explicit the aims and purposes of the political power.

17. Not all the texts under review claim that the political framework they establish is Islamic in nature. Libya's 1977 Declaration undoubtedly does by adopting the *Quran* as its fundamental text on the organization of the State, but the *Quran* remains virtually silent on forms of government; moreover by disavowing the *Sunna* as a valid source of Islamic law, Colonel Qadhafi left himself a wide margin of appreciation. The Moroccan Constitution equally, though not in the main text but in the preamble, qualifies the Kingdom as a sovereign Muslim State. The 1980 draft Mauritanian Constitution stated in its first article that Mauritania is an Islamic parliamentary Republic, indivisible, democratic and social. The 1985 Constitutional Charter does not contain a similar statement but, except for a reference to international or regional obligations, Islam is the only source of inspiration explicitly acknowledged (Mauritania has been an »Islamic republic« since it became autonomous in 1958). However, none of the four other States purport to establish an Islamic regime. In each of them Islam is the State religion (with the possible exception of the Sudan, see *supra*) and references to the Supreme Being are sometimes abundant (although limited to statements defining God as the ultimate source of legal authority [e. g. »In the name of God, the Beneficent and the Merciful«, the first verse of the *Quran*, at the beginning of a preamble] or to oath formulae taken by the Head of State or other dignitaries [e. g. »I swear by God All Mighty to safeguard . . . ; both examples taken from the Tunisian Constitution, preamble, para 1 and art. 42]). In the article dedicated to the political system, however, the adjective »Islamic« is conspicuously absent: Algeria is a Democratic People's Republic, one and indivisible and a socialist State (art. 1, *A. C.*); Egypt is a democratic, socialist State, based on the alliance of the working forces of the people (art. 1, *E. C.*); Tunisia is a free State, independent and sovereign; its religion is Islam, its language Arabic and its regime is the republic (art. 1, *T. C.*); Sudan is a democratic unitary Republic having sovereignty over all territories lying within its international boundaries (art. 2, *Su. TC*). In these States Islam is to function as a State religion in a political framework alien to it, rooted in an ideology (liberalism or socialism) emerging from the struggle for independence. The Constitutions express the opinion or the newly emerging regimes, stressing national sovereignty and equality, in a reaction against former colonial domination or, in a later phase, against governments they overthrew. These governments, once their position is established, often face opposition from Islamic movements, propagating a political system reflecting Islam and demanding amendments to the Constitution, or, more dramatically, alternative forms of government. As the glory of revolutionary successes slowly fades into oblivion the demands of the religious majority no longer putting up with the separation of religion and State, grow stronger.

### 3. a. Islam as State Religion

18. The option for a State religion may be motivated by no more than a wish to pay tribute to the religious majority, as a token to its superiority. On the other hand, positive action of the State to defend and propagate the religion it adheres to may be seen as a correlate of its choice; if the latter is the case, other religions are merely to be condoned or overtly discouraged, depending on the position held by the dominant religion as interpreted by those in power. Consequently, the adoption of a State religion tends to promote discrimination against (and between) holders of other beliefs, unless extreme care is taken to guarantee freedom of religion at the same time. In a religiously homogeneous society the government's motive in adopting a State religion may be its mistrust of the religious leadership, a potentially powerful opposition force.<sup>8</sup>

19. In each of the States under review Islam is the State religion. Libya, by adopting the *Quran* as its fundamental text, subscribes to the position taken towards non-Muslims by Islamic law. Among non-believers, according to the *Quran*, the *Ahl Al Kitab*, the People of the Book, mainly the Jews and Christians, hold a privileged position. They are the possessors of the earlier revealed books and share a community of faith with Muslims. The Islamic State offers them hospitality and protection if they acknowledge allegiance and pay a particular tax called *jizya*. The contract thus concluded between the Muslim community and the other believers of the revealed heavenly scriptures is called *dhimma*. Infidels on the other hand do not enjoy any legal personality at all; Muslims are presumed to be perpetually at war with them (*jihad*). The legal status awarded to the People of the Book, is by no means equal to that of Muslims. They are not a part of the *umma*; therefore they have no political rights; the building of new places of worship is prohibited; *dhimmis* lack testimonial competence in cases involving Muslims; apostasy (Muslims' conversion to other religions) is subject to the death penalty. Whatever the policies applied in practice, from a legal point of view non-Muslims are only second-class citizens. Although most of these traditional distinctions are no longer sanctioned in contemporary laws outside the private sphere, they are the underlying causes of sectarian strife opposing Muslims to non-believers, especially in countries with strong non-Muslim minorities. Fundamentalist groups in both Egypt and the Sudan argue for the re-introduction of the death-penalty for apostasy. Their efforts were crowned with success in Sudan in the twilight days of the Numeiry regime: the leader of the Republican Brothers movement, Ustaz Mahmud Muhammad Taha, propagating a more moderate

8 Two recent United Nations Human Rights studies deal with intolerance and discrimination based on religion of belief: Elizabeth Odio Benito, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, prepared a study on 'the current dimensions of the problems of intolerance and of discrimination on the grounds of belief' (E/CN.4/sub2/1987/26) (August 31, 1986). The newly appointed special rapporteur of the UN Human Rights Commission, Angelo Vidal Almeida Ribeiro presented his first report on the implementation of the Declaration on the Elimination of All forms of intolerance and of discrimination based on religion or belief (E/CN.4/1987/35) (December 24, 1986) at the Commission's 1987 session. Both contain valuable information on the consequences of the adoption of a State religion.

version of Islam than the official one, was publicly hanged on charges of apostasy, an offence which had been unknown to the Sudanese criminal code, but which the presiding judge introduced by interpreting the new Judicial Sources of Law Act (see also note 17), on January 18, 1985. Bills introduced by fundamentalists in Egypt to reinstate the death penalty for apostasy have failed so far; nevertheless public uproar occurs whenever Muslims publicly denounce their faith: in July 1986 newspapers reported the arrest of sixteen citizens of Alexandria, former Muslims who converted to an evangelical sect preaching the approaching return of Christ. Officials denied that they were arrested because of their change of religion and maintained that they were disturbing the peace. Clearly cases like these have strong political overtones, the State assuming authority in religious matters because it feels directly threatened.<sup>9</sup>

20. A review of the constitutional provisions on the position of non-Muslim minorities demonstrates the different consequences drawn from the adoption of Islam as a State religion in the various countries under consideration.

In Tunisia, the State religion is Islam (art. 1, *T. C.*), but the Republic guarantees freedom of conscience and the free exercise of beliefs under the condition that the public order is not disturbed (art. 5, *T. C.*). The Tunisian government interprets the notion »State religion« in a minimalist way. The State professes neutrality towards the different beliefs,<sup>10</sup> while recognizing that the large majority of its population is Muslim. The Jewish minority, although an exposed group in recent years in times of economic hardship and social disturbances, suffers little discrimination; it has taken political responsibility at the national level and sporadically participated in government. Pressure from Islamic fundamentalist groups has been relatively limited when compared with other North African States but is on the rise.<sup>11</sup> Article 6 of the Moroccan Constitution contains a far more ambiguous statement: »Islam shall be the religion of the State which shall guarantee freedom of worship for all«. The article may imply that freedom of worship is to be interpreted according to Islamic traditions. Alternatively, it may mean that the State guarantees freedom of worship in its internationally recognized (e. g. as in the Universal Declaration of Human Rights) form. If the former is the case, freedom of religion may be limited in Morocco to religions acceptable to Islam. Declarations made by King Hassan II tend to support this interpretation. Government actively promotes Islam through religious foundations and the Islamic Affairs Ministry: the State does not profess neutrality. The 1976 Algerian Constitution strengthens the role of Islam when compared with its 1963 predecessor. The former Constitution added a clause to the article stipulating that Islam is the State religion (now limited to that single statement,

9 On the perennial problems facing the Coptic Orthodox church in Egypt when attempting to build new churches, see Ansari, H., Sectarian conflict in Egypt and the political expediency of religion, *Middle East Journal*, 1984, nr. 3, 397–418.

10 See the second report by Tunisia to the UN Committee on Human Rights in implementation of art. 40 of the International Covenant on Civil and Political Rights: CCPR/C/28/Add. 5 (May 8, 1985), 21–25.

11 See Tzschaschel, J., Tunesien im Übergang, *Europa Archiv*, 1986, 224–226.



art. 4, A. C.) guaranteeing the Republic's respect for the opinions and beliefs of all and freedom of worship. That clause is replaced in the 1976 text by a less explicit article (art. 53, A. C.) stating that freedom of conscience and opinion are inviolable. The Constitution no longer hints at the existence of other religions in Algeria: significantly, religion is omitted as a possible basis of discrimination to be prohibited (compare the present art. 39 with the former art. 10). The text does not conceal that one of the specific objectives of the cultural revolution is »the adoption of a life-style in harmony with Islamic morality and the principles of the socialist Revolution« (art. 19, A. C.). Consequently no draft constitutional amendment bill may modify the State religion (art. 195, A. C.). The urge to recognize Islam as a primary foundation of society has intensified during recent years.<sup>12</sup> The Mauritanian Constitutional Charter introduces Mauritania as a homogeneous Islamic society: according to the preamble, Islam is not only the religion of the State, but also of the people. Apart from a Christian minority composed mainly of foreigners the population, according to official figures, consists entirely of Muslims. Nevertheless black Mauritanian intellectuals have complained of discrimination between the Arab and African groups within the population and have urged a revaluation of African customs, which are not recognized under the *Shari'a*. The draft Constitution did not take into account any contradiction between Islam and »the principles consecrated by the Universal Declaration of Human Rights«; the preamble proclaimed the State's adherence to both. Should a conflict arise, there is little doubt which would prevail.

21. The Saharan, Mauritanian and Egyptian constitutional texts not only designate Islam as the State religion, but also recognize religion as a legal inspiration. The Saharan Constitution makes a simple statement: »Islam, the State religion, is the source of laws« (art. 3, Sa. C). Laws contradicting religion are therefore unconstitutional: the unity between State, law and religion is confirmed. The wording of the Mauritanian Constitutional Charter is even stronger: »The sole and unique source of law is the *Shari'a*« (preamble).<sup>13</sup> The Egyptian Constitution contains a similar, if far more controversial provision. Article 2 in its original 1971 wording disposed as follows: »Islam is the religion of the State and Arabic its official language. The principles of Islamic *Shari'a* are a main source of legislation«. The second sentence was added for the first time in Egypt's constitutional history by President Sadat in order to pacify Islamic militancy. Immediately disagreement emerged over its interpretation; reforms expected in application of the new text aroused considerable concern with the Coptic community; a personal conflict involved President Sadat and Pope Shenouda III when the latter condemned the government for violating the rights of the Coptic minority. In 1978 the People's Assembly set up a special commission in charge of studying measures to be

12 See Vandeveld, H., Quelques signes d'un glissement des notions de »peuple« et »citoyens« à celles de »Umma« et de »Mu'minin« en Algérie depuis l'indépendance, *Revue Algérienne*, 1982, 137-160.

13 The Constitutional Charter also contains explicit references to Islamic criminal law: no amnesty (art. 3) or pardon (art. 12) is allowed for crimes listed in the *Quran* (the *hudud* and *qesas* crimes).

taken in order to implement the *Shari'a*. *Codifying the Shari'a* proved a hazardous undertaking, given the differences of opinion between *Sunni* schools. The Commission preferred to adapt the existing legal system to a somewhat summarized *Shari'a* (a mainstream version on which a consensus might be reached), upon a decision of the Supreme Constitutional Court, in July 1976, deciding a case accordingly. In order to do so, it established seven committees each specialized in different fields of law; frequent consultations with the religious Al Azhar University occurred.<sup>14</sup> Higher Courts took the view that awaiting reform the *Shari'a* could not be implemented directly even when a law conflicted with it. They interpreted article 2 as establishing a guideline for the legislator, not as an instrument enabling judges to set aside existing law. In September 1980 the text of article 2 was amended: the principles of Islamic *Shari'a* were now said to be the main source of legislation. The amendment did not tie down the legislator; the text still indicates that other sources may be used as well, although it does suggest a pre-eminence of Islamic law whenever it takes an explicit point of view on a given topic. Underlying the discussion is a disagreement in Egyptian society about the desirability of implementing the *Shari'a* in a modern context, one side arguing that as a legal system it was conceived for a society where social and economic conditions were perfect and, since they are not in Egypt today, implementation now would lead to social injustice; the other side arguing that the only way to achieve such conditions is by starting to implement the *Shari'a* as soon as possible. A full-scale parliamentary debate on the immediate implementation of the *Shari'a* was organised in May 1985 but proved inconclusive, the President of the Assembly referring the issue back to the parliamentary commission which was to continue studying how Egypt's legal system could be conformed with the *Shari'a* in a scientific and gradual manner.<sup>15</sup> The most virulent Islamic groups, who refuse to sit in the People's Assembly, protested against this decision. The Mubarak regime certainly advocates a restrictive interpretation of article 2. It clearly fears Islam for its possible revolutionary force (the fundamentalist group responsible for the murder of President Sadat illustrates the point), while at the same time relying on it as a means of legitimation.

22. The Sudan stands apart from other States reviewed here due to her very particular population structure. Although the majority of the population are Muslims, nearly all of these live in the northern part of the State; in the south the majority are Animists and Christians. The 1973 Constitution reflected that situation in a peculiar way. After providing for freedom of belief, prayer and Performance of religious practices (art. 47, 1972 *Su. C.*), the text apparently designated Islam and Christianity equally as State religions; equality with a difference, however, was what was achieved. Article 16 stated that 'Christianity is the religion in the Democratic Republic of the Sudan, being professed by a large number of its citizens who are guided by Christianity and the State shall endeavor

14 See El Mahdi, A., De l'influence du droit musulman sur le droit positif en Egypte, *Revue Juridique et Politique*, 1984, nr. 2, 76-80.

15 See X., Mosque and State in Egypt, *Third World Quarterly*, 1985, nr. 4, XI-XVI.

our to express its values' (art. 16, para b, 1972 *Su. C.*). Islam was also 'the religion' in the Sudan, but not just Muslims were to be guided by it: '... and the society shall be guided by Islam being the religion of the majority of the people and the State shall endeavour to express its values' (art. 16, para a, 1972 *Su. C.*). Although the State's obligation towards both religions was expressed in identical terms, the context in which this obligation was to be fulfilled, was distinctly Islamic. The article did more than simply acknowledge a factual situation; article 9 left no doubt: 'Islamic law and custom shall be main sources of legislation'. Non-Muslims were only offered the guarantee that their personal matters would be governed by their personal law. The Constitution therefore tended to establish a predominance of Islamic values, a tendency only to be confirmed during the following years. In 1977 a law revision committee was set up 'to revise the laws of the Sudan so as to conform them to the *Shari'a* rules and principles'.<sup>16</sup> In September 1983 President Numeiry definitively tipped the scales by issuing a presidential decree replacing the previous secular criminal code by a Islamic one (including penalties such as amputation and flogging). Every few weeks new laws implementing the *Shari'a* were passed, while the civil war in the south flared up. The President planned to declare Sudan an Islamic Republic in September 1984, but his plans to amend the Constitution conformingly were rebutted by the Assembly in June 1984. In April 1985 President Numeiry was ousted in a military coup. The Transitional Military Council adopted a Transitional Constitution in October, stressing that the role of religion within the State was ultimately to be determined by the civilian government to which they were to resign power one year later. The text therefore contains no reference to a State religion, while at the same time providing for 'freedom of faith and the right to perform religious rites within the limits of morality, public order and health as required by law' (art. 18, *Su. TC*). Again Islamic morality is what is meant, allowing for more than the universally accepted restrictions to this right. Such an interpretation is confirmed when art. 18 is read in conjunction with art. 4, retaking the former article 9 on Islamic *Shari'a* and custom as main sources of legislation. Elections to choose the 264 members of a new Assembly took place in April 1986; balloting was postponed in 37 constituencies in the South because of the on-going war. The leader of the Umma Party, Sadiq al Mahdi (a representative of the Ansar religious order) became the head of the new civilian government. He expressed his point of view on the role of religion as follows: 'As a Muslim in a State with a Muslim majority I want a Muslim State – but with guarantees for the rights of non-Muslims . . . We wish to establish Islam as the source of law in Sudan because Sudan has a Muslim majority',<sup>17</sup> and somewhat cryptically: '... we are talking now about an alternative legal code, a legal code that will treat all citizens as equal under universally-applicable laws, but which are not universally applicable; that is to say they have got particular Islamic sources, they will be conditioned, and limited in a regional sense, so that they will not apply to

16 See Tier, A. M., Freedom of religion under the Sudan Constitution and laws, *Journal of African Law*, 1982, nr. 2, 148–151.

17 *Newsweek*, May 19, 1986.

people who do not accept their authenticity'.<sup>18</sup> He denounced the cruel penalties established by Numeiry as un-Islamic. Colonel John Gareng, leader of the southern Sudan People's Liberation Army insists on the abrogation of *Shari'a* law and the establishment of a secular Constitution.<sup>19</sup>

One solution to maintain Islam as a State religion and source of law while at the same time guaranteeing the rights of non-Muslims was suggested by the Sudanese scholar Mahmud Muhammad Taha.<sup>20</sup> His point of departure was the historical context the rules in the *Quran* originated from: Muhammad's position towards non-Muslims was influenced by what he experienced as the intransigence of the Jewish community in Medina; his original position when residing in Mecca was much more liberal. In traditional Islamic law the earlier texts are deemed to be overruled by those stemming from Medinan times. Mahmud Muhammad Taha proposed to reverse the process of abrogation and to revive the original texts thereby developing a modern *Shari'a* compatible with actual standards of human rights (dropping for instance the notion of *jihad* which does not appear in the Mecca texts). The political feasibility of so radical a reform was disproven by the facts, but demonstrates the continuing concern for non-Muslim communities by at least a part of Islamic thought.

### 3.b. Form of Government

23. Traditional Islamic law is not able to fulfill all the technical requirements involved in drafting modern Constitutions. Its influence is restricted to the level of principles. Even when a Constitution is intended to be Islamic in nature, the impact of religion is diluted due to the alien nature of the instrumental framework necessary to purvey it. None of the Constitutions under review is purely Islamic: most of them provide institutions exercising the legislative function. However, unity is the principal concern of Islam as a political ideology. An undisputed ruler preserves internal peace. The exercise of power and the community itself are undivided. A modern political system in line with Islam features a strongly personalized regime supported by a unified political movement ratifying the regime's actions by expressing the consensus (*ijma'*), their common goal being the creation of a society serving the needs of the Islamic community. The following paragraphs examine the position and tasks of the Head of State and the role of political parties.

18 *The Courier*, nr. 101, January-February 1987, 12.

19 *International Herald Tribune*, April 22, 1986.

20 See El Naiem, Abdullahi Ahmed, A modern approach to human rights in Islam: foundations and implications for Africa in Welch, C., Meltzer, I. (eds.), *Human rights and development in Africa*, Albany, State University of New York Press, 1984, 75-89. Members of the political movement the writer adheres to were severely persecuted during the last period of Numeiry reign. Their mentor was publicly hanged four months prior to the fall of the regime. Muhammad Taha's daughter and one of his co-defendants filed a suit seeking the unconstitutionality of the trial procedures. On November 19, 1986 the Supreme Court ruled in their favour. See, for more details: *ICJ Review*, December 1986, nr. 37, 16.

24. In Morocco the King carries the title of *Amir al Muimin*, Commander of the Faithful, a title born by the ancient caliphs. The King's task is to ensure that 'Islam and the Constitution' are respected (art. 19, *M.C.*). He alone determines the guidelines for action in 'the various sectors of national activity' (art. 59, *M.C.*). In order to accomplish this task, he requires the full co-operation of the People's Representatives. The role of political parties consists of 'assisting (him) in the organization and representation of the citizens' (art. 3, *M.C.*). Consequently members of the Chamber of Representatives are inviolable when exercising their functions unless they express views challenging the Monarchy or the Muslim faith or constituting a breach of respect due to the King (art. 37, *M.C.*). The State's monarchic system and the provisions relating to the Muslim religion may not be revised (art. 101, *M.C.*). All these provisions clearly establish the King as a traditional Islamic ruler. The absolute loyalty to the Monarch (the religious and worldly leader) takes the edge off the unique stipulation prohibiting the single party political system (art. 2, *M.C.*). Political parties are to represent the divergencies within Moroccan society (the Monarchy is 'democratic' . . .) and the prohibition of a single party is to prevent an elite (. . . and 'social') from monopolizing power, but in fact political parties are only allowed to disagree over the correct implementation of the policies determined by the Ruler, their disputes reinforcing the latter's position. The constitutional entrenchment of multipartyism is thus less of a deviation from traditional Islamic law than might be thought. A duty of obedience to the King, enwrapped in religion, has a strong unifying effect, once again metamorphosing the political spectrum, however diverse (political parties vary from the centre right to the left), into the *umma*, the community of believers.<sup>21</sup> Far more difficult to reconcile with Islamic tradition is the principle of hereditary succession to the throne, enounced in art. 20, *M.C.* Sunnism from very early on rejected doctrines propagating a right to the leadership of the Muslim communities on the basis of blood relations with the Prophet; instead the institution of *bay'a* was developed. It is difficult to see how the community is to recognize the new leader's authority, if it is not consulted as is the case when the throne automatically passes on to the Monarch's eldest son, independently from the latter's qualifications for leadership. The principle of hereditary succession undermines the participatory aspects of traditional Islamic rule.

25. Socialism, not Islam is the first priority of the Algerian Constitution, but the text carefully avoids to contradict traditional law and includes several conciliatory references to Islam. The presidential candidate has to hold Islamic beliefs (art. 107, *A.C.*). He is nominated by the political bureau of the single party (the National Liberation Front); the nomination is then confirmed by the Party congress; finally voters either reject or ratify the nomination of the single candidate (art. 105, *A.C.*). The presidential oath

21 See Camau's reflections on the use of the term '*umma*' in Art. 2: Camau, M., L'évolution du droit constitutionnel au Maroc depuis l'indépendance in *Jahrbuch des öffentlichen Rechts*, 1972, 442. See also Bendouron, O., La monarchie théocratique au Maroc, *Revue de droit international et de droit comparé*, 1987, n 1-2, 88-108.

includes a promise to respect and glorify the Islamic religion (art. 110, *A.C.*). The President's task is to determine the nation's general policy, internally and externally, and to direct and execute that policy (art. 111, para 6, *A.C.*). The role of the Head of State would hardly differ if Algeria were an Islamic State. In addition the text adheres to the principle of the single party (art. 94, *A.C.*). This vanguard grouping of the most conscious citizens »is inspired by patriotic and socialist ideas« (art. 95, *A.C.*), but unity is abundantly stressed: the Party institutions will demonstrate unity of doctrine and conviction and cohesion in action. Elected political institutions rest on the principles of collectiveness of deliberation, majority decisions and unity in execution (art. 99, *A.C.*). At the top of the entire political edifice, the President embodies the unity of the political leadership of Party and State (art. 111, para 2, *A.C.*) again gathering the entire nation around him. From a formal point of view, the organization set up by the Constitution is in accordance with Islam, although its content is far more influenced by socialism. According to the official position no contradictions follow, since Islam and socialism are held to be fully compatible.

26. Socialism fell out of favour in Tunisia, although the dominant party still retains the notion in its denomination: the Socialist Destourian Party (*PSD*). The party is dominant in the sense that it has disposed of an overwhelming legislative majority since independence and has curbed activities of rival political parties. Strong opposition has only come from Tunisia's leading union, the Tunisian National Labour Union (*UGTT*).

The figure of President Bourguiba has grown into a national symbol, as appreciated by Tunisia's Constitution which apart from attributing extensive powers to the President mentions him by name and appoints him »President of the Republic for life« (art. 39, *T.C.*). The population, in its devotion to its leader, is far more influenced by Islam than the regime, arguably the most secular of those under scrutiny. The Constitution pays lipservice to the State religion, e.g. by proclaiming the people's will to remain faithful to the teachings of Islam (preamble), but the text attaches greater value to the republican system of which no alteration is allowed (art. 72, *T.C.*, Islam not being mentioned in that article). The true test for the regime will come when the party structure is forced to survive without Bourguiba; only then will it become clear whether the regime has succeeded in its attempt to »interpret the *Quran* in accordance with modern standards«.<sup>22</sup>

27. The Egyptian Constitution does not explicitly require the Head of State to be a Muslim, but that he would not be is wholly unlikely given the multiple references to Islam in other parts of the text and the large Muslim majority among the population.

22 A declaration made by Mr. Ben Massoud at the UN Human Rights Committee. See *Annuaire du Comité des Droits de l'Homme 1977-1978*, Vol. 1, New York, Nations Unies, 1986, 113. (The deposition of President Bourguiba on the basis of Art. 57 of the Constitution on November 7, 1987 by, then, Prime Minister Ben Ali, who later succeeded him as president, brought about that test for the party structure. Although it may be too early for final conclusions, the reorganization of the Destourien Party involving the appointment of a new politburo consisting of supporters of the new president promises a Course of modernization. Fighting Islamic fundamentalism, the new government might allow the Islamic party (MTI) under fixed rules only. *The editors.*)

The Constitution establishes a strong presidential regime: the President dominates the entire scope of political activity. He shares legislative initiative with the members of the People's Assembly (art. 109, *E.C.*), but the legislative process is very complicated when a bill is initiated by a member of parliament. As a result the large majority of bills are elaborated by the services of the President and by the government, which he controls. The role of the government is one of co-ordination and implementation of presidential policies. Consequently, Egypt has a tradition of personalized leadership, the popularity and authority of State intervention relying heavily on the charisma of the leader. The individual personality and convictions of the President are all-important, but regardless of their differences over economic and foreign policies, Egypt's subsequent Presidents after the 1952 Revolution have continuously referred to Islam. Nasser sought to found socialism in Islam when declaring that Islam was a socialist religion; Sadat made abundant use of religious terminology during his public appearances: his historic speech to the Israeli *Knesset* (November 20, 1977) is a case in point.<sup>23</sup> President Mubarak, whose style is far less flamboyant, has deliberately avoided conflicts over religion by attempting to postpone a full-scale debate over the *Shari'a*. On the other hand he has tried to recover Egypt's leading position in the Islamic world. Egypt's Islamic identity has never been questioned by any of her Heads of State; it has been the one returning element in their policies.

President Sadat established a multi-party system by gradually braking down Nasser's Arab Socialist Union.<sup>24</sup> In 1978 he formed his own government party, the National Democratic Party, which is still the dominant party today. Since 1977 (Law no.40 (27. 7. 1977) Egyptians enjoy the right to form political parties. The establishment of a political party is subject to several conditions (art. 4, para I, Law no.40), one of which is that the principles, objectives and programs of the party may not contradict »the principles of the *Shari'a* as one of the principal sources of legislation« (wording taken from the original art. 2 of the 1971 Constitution). Although different political views are allowed, they should not endanger the preservation of the community; differences of opinion may not lead to a secession from the *umma*. The electoral law (art. 4, para III, Law no.40) also prohibits the foundation of a party which would discriminate on the basis of race, origins, religion or beliefs. A political party allowing only Muslims (or Christians) as members, is therefore illegal. The stipulation aimed at preventing religious strife and at excluding radical Islamic groups from participation in government. They themselves, however, refuse to take part in the legislative process, since they do not wish to contribute to a State which they consider un-Islamic.<sup>25</sup> This leads to the paradoxical situation that a law intended to preserve the observation of the *Shari'a* in political

23 See Salem-Babikian, N., The sacred and the profane: Sadat's speech to the Knesset, *Middle East Journal*, Winter 1980, 13-24 where the author successfully demonstrates how the use of religious themes served as a means to legitimize the peace initiative in both Western and Arab eyes.

24 See Glagow, R., Die Wiedereinführung des Parteiensystems in Ägypten, *Orient*, 1976, nr. 4, 58-82.

25 See X., Mosque and State in Egypt, *Third World Quarterly*, 1985, nr. 4, XI-XVI.

life, leads to the exclusion of those political groups supporting its implementation to the fullest degree. Another striking example of the confusion over the role of Islam in Egypt's political system is the debate on the Shoura Assembly.<sup>26</sup> The Shoura Assembly is a consultative body created in 1980 when the Constitution was amended. Historically it is a successor to the Central Committee of the Arab Socialist Union, a body convened twice a year to discuss general domestic and foreign policy (this explains the reference in art. 194, *E.C.* to the preservation of the principles of the 1952 (and 1971) revolutions). The denomination »*shoura*« refers directly to Islamic law. In medieval times the *qadi* exercised justice as a single judge, but he was allowed and sometimes instructed to consult qualified jurists, whose role was purely consultative. These jurists were known as the »*shoura*«. Although the testing of the compliance of modern legislation with the *Shari'a* is not specifically mentioned as one of the Shoura Assembly's tasks (see art. 195, *E.C.*), the denomination suggests otherwise. The choice of the name was deliberate: Sadat hoped to gain support for his initiative from both liberal forces, who regarded the Shoura Assembly as a western-style second chamber or Senate and moderate Islamic forces, who hoped the Shoura Assembly would further the implementation of the *Shari'a*. In practice the role of the Shoura Assembly remains limited due to the overwhelming dominance of the National Democratic Party.

28. »The Libyan Revolution of Mu'ammār Qaddafi is perhaps the most exemplary contemporary case of the politics of charismatic leadership«.<sup>27</sup> Although he abandoned formal political leadership in 1979, Qadhafi's personality has dominated Libyan politics since the 1969 coup. The »Declaration of the Establishment of the People's Authority« (2. 3. 1977) acknowledges his role when in the preambular part of the document, the Libyan people »... affirm the march of the Revolution, under the leadership of the revolutionary thinker and the teacher-leader Colonel Mu'ammār Qadhafi, towards the complete popular authority ...«. The emphasis on the enlightened guidance expected from the leader is reminiscent of the traditional relationship between the *umma* and the ruler. So too is the call for direct democracy, highlighted in art. 3 of the Declaration: »The popular direct authority is the basis of the political system in Socialist People's Libyan Arab Jamahiriya. The authority is for the people who alone should have the authority«. No barrier must separate the people from the Divine Law directing them. There is no need for political parties since they only serve to divide what was once united. Consequently the entire people are members of the basic people's congresses forming the bottom, but in principle most important (authority originates in them), level of the political structure. Due to its under-population direct democracy is less impractical in Libya than in most other States.<sup>28</sup> At the same time, efforts to stimulate popular

26 See also Rycx, J. F., Blanchi, G., *Références à l'Islam dans le droit positif en pays arabes*, *Pouvoirs*, 1980, nr. 12, 69–70.

27 Hinnebusch, R., Charisma, revolution and State foundation: Qaddafi and Libya, *Third World Quarterly*, 1984, nr. 1, 59.

28 For a case-study, see Mason, J. P., Qadhafi's revolution and change in a Libyan oasis community, *Middle East Journal*, 1982, nr. 3, 319–335.



participation do not endanger the leader's broad powers, since he remains outside the political structure. It is noteworthy that the standing of the political body at the national level, the General People's Congress, which meets once a year to finalize the proposals of the basic people's congresses (constituting the popular consensus) is that of a mere drafting committee, as required by traditional Islam where the need for a legislator is not acknowledged. Does this mean that Libya is an Islamic State in the traditional sense? No affirmative answer can be given due to Qadhafi's equation of the *Quran* with the *Shari'a*, as illustrated in article 2 of the Declaration. Qadhafi acknowledges no other (even Islamic) sources of law than the *Quran* itself. His political philosophy is in line with the general principles of the *Quran*, but he reserves the right to interpret these principles to himself, much to the dislike of the religious authorities. Qadhafi's approach differs from that of the Heads of States in the neighbouring countries in that he has sought to found the chosen form of government solely in the *Quran* (and has refused all forms of mimicry of foreign political systems) by revising and adapting it to his won wishes.<sup>29</sup>

29. Mauritania has opted for a system of virtual one-party-rule since her independence. After the military take-over in 1978 civilian political activities have been very limited; numerous personal conflicts within the armed forces over the presidency have dominated the political scene.<sup>30</sup> All powers are exercised by the Military Committee of National Salvation, ruling by means of ordinances, with the President remaining the central figure.

Under Numeiry Sudan gradually drifted towards a single-party system. In 1972 he created his own political party, the Sudan Socialist Union, which remained the only recognized party until his downfall. The Transitional Military Council allowed the establishment of political parties after the coup d'état and multi-partyism was embodied in the Transitional Constitution, on the condition that parties »abide by the democratic ideals and means set out in this Constitution« (art. 7, *Su TD.*). More than forty parties were set up and recognized. The April 1986 elections led to the formation of a coalition government of the Umma and Democratic Union parties (both originated in ancient religious brotherhoods and are moderately Islamic when compared with the last phase of the Numeiry regime). Fundamentalists as well as communists are now represented in the official political spectrum, an achievement unequalled in Sudan's history. However, political representation of the South still remains an unsolved problem.<sup>31</sup> The Transitional Constitution provides for a collective Head of State, consisting of a President and four members (art. 76, *Su. TC.*).

29 See also Bleuchot, H., Monastiri, T., *Le régime politique libyen et l'Islam, Pouvoirs*, 1980, nr. 12, 131–134.

30 See Sigler, J., Tarantino, M., Mauritania in Blaustein, A., Flanz, G. (eds.), *Constitutions of the countries of the world*, New York, Oceana, June 1986, 4–5.

31 See Tzschaschel, J., Neuorientierung in Sudan, *Europa-Archiv*, 1985, Nr. 2, 625–632.

### 3. c. The State and Material Welfare

30. »In their economic activity, all persons have a right to the benefits of nature and to all its resources. These benefits were accorded by God für the well-being of humanity in its entirety« (art. XVa of the Universal Islamic Declaration of Human Rights, as published by the Islamic Council on September 19, 1981). In Islam all is owned by God. No individual right to property exists, only an individual right of use. The purpose of the latter right is to secure the individual's right to life. A Muslim must enjoy the use of a minimum of material goods in order to be able to devote his life to God. Accumulation of wealth distracts from the observance of religious duties and is detrimental to the community. Although differences in income and capital are allowed, they may never generate social classes splitting up the community. Therefore the poor, those who cannot meet their basic needs, have a claim to a portion of the goods owned by those who are prosperous. Correspondingly, the rich have a duty to surrender a part of their wealth to the poor. In Islam, rights and duties are intertwined. Hence an individual can only claim a right of use of goods upon the fulfillment of his obligation to share. »(The individual) is part and parcel of society, and the fulfillment of his obligations and those of the other members of society constitutes the reservoir of social rights which are then shared by all.«<sup>32</sup> The penalty for evading such a duty, however, is not confiscation, but corporal punishment; the right of use of the »surplus« is left intact.<sup>33</sup> It is the State's duty to watch over the distribution of resources within society, as it is responsible for creating an environment satisfying the believer's needs. The Treasury of the State (*bait-al-mal*) administers the *zakat*, a tax payable by all Muslims for charitable purposes. The payment of this tax (a fixed percentage on income and capital) is among the five fundamental duties (the pillars of Islam) prescribed for each Muslim. The *zakat* is a duty to each fellow-Muslim, but also a duty towards God, who will amply reimburse the loan in the hereafter. The *Quran* establishes in detail who are the recipients of the amounts thus gathered: first and foremost they are the poor and needy. Interestingly, ownership from the moment of payment onwards vests in the recipients, not in the Treasury, which simply withholds the amounts until distribution. A similar social function is attached to other portions of the State revenues; their expenditure is not left to the discretion of the ruler, but determined by religious requirements.<sup>34</sup>

31. The implementation in an industrial society of economic regulations thought out in medieval times but to which dogmatic value is attached, has necessitated imaginative interpretation. States with Muslim majorities have »interpreted« Islam by incorporating

32 As quoted by Bassiouni, C., Sources of Islamic law and the protection of human rights in the Islamic criminal justice system in Bassiouni, C. (d.), *The Islamic Criminal Justice System*, London, Oceana, 1982, 13–14.

33 See Schacht, J., Islamic law in contemporary States, *American Journal of Comparative Law*, 1959, no. 2, 140–147.

34 See »*bayt-al-mal*« in *The Encyclopedia of Islam*, Vol. I, Leiden, Brill/Luzac, 1971, 1141–1148. See also Shalaby, A., *Islam, Belief, legislation, morals*, Cairo, The Renaissance bookshop, 397–413.

elements from liberal and socialist economic theory. This they have not found difficult to do. A State opting for an open-market economy stresses Islam's respect for private property. Saudi Arabia, a truly Islamic State, encourages the growth of the free enterprise sector and the attraction of foreign capital, be it under the condition of some Saudi participation.<sup>35</sup> In such a system the needs of the poor are to be alleviated mainly through the personal commitment and religious zeal of the well-to-do. Out of the fusion of Islam and socialism in the 1960's grew the notion »Arab« or »Islamic« socialism. This particular brand of socialism was anti-Marxist, Marxism being an atheist ideology (during the heyday of Arab socialism communist parties were often persecuted) and respected some forms of private property, while at the same time nationalizing the vital sectors of the economy. It acknowledged socio-economic differences, but strove to bring about an Islamic-style community by eliminating excesses. At the same time State intervention and planning and a single-party political system were considered necessary instruments.

The attempted symbiosis of Islam with both liberalism and socialism proved very difficult. Islam itself hampered a methodical implementation of these theories in accordance with strictly economic necessities only. The popular mistrust of foreign influence has constituted another obstacle. Liberal regimes left the privileged position of the ruling families untouched. Socialist regimes lacked an ideologically geared administration and were swamped by bureaucracy.<sup>36</sup> Authoritarian rule, propagating the interests of the elite in power, was the inevitable consequence.<sup>37</sup> The disillusionment with modern ideologies is well illustrated in an article by Hassan Hanafi, an Egyptian professor in philosophy, who assesses Egypt's history since independence as an example of the failure of successive attempts at implementing contemporary ideologies and consequently predicts a return to purely Islamic values.<sup>38</sup> A return to Islamic tradition has certainly materialized in Northern Africa in recent years, be it only partially at government level. Due to the scarcity of *Shari'a* provisions and the relatively unconcerned adoption of alien economic theories in the past, an immaculate Islamic economic policy, cleansed from all foreign influences, simply has not yet emerged and, one might add, the drawing up of such a theory constitutes a highly ambitious task.<sup>39</sup>

35 See Seaman, B. W., Islamic law and modern government: Saudi Arabia supplements the *Shari'a* to regulate development, *Columbia Journal of Transnational Law*, 1980, no. 3, 413-418.

36 See for comparative purposes Rahman, F., Islam and the new Constitution of Pakistan, *Journal of African and Asian Studies*, July-October 1973, no. 3-4, 190-204.

37 On the transition from democratic towards authoritarian versions of radical ideologies in the Third World see Johnson, S., Ottaway, M., Marxism-Leninism and Islamic fundamentalism, *Cultures et Développement*, 1984, nr. 1, 53-72.

38 Hanafi, H., Origine du conservatisme contemporain et de l'intégrisme musulman, *Bulletin du centre de documentation et d'études juridiques, économiques et sociales*. Le Caire, June 1980, nr. 11, 3-12.

39 See also Dekmejian, R., The anatomy of Islamic revival: legitimacy crisis, ethnic conflict and the search of Islamic alternatives, *Middle East Journal*, Winter 1980, 1-12, and Kuran, The Economic System in Contemporary Islamic Thought: Interpretation and assessment, *International Journal of Middle Eastern Studies*, 1986, vol. 18, 135.

32. A closer look at the constitutional provisions on the classification and contents of ownership reveals the predominance of adopted ideologies. Clearly the practical value of constitutional dispositions particularly in the field of economic regulation is limited: they reflect the long-term options; shortterm policies (often formulated under popular or international financial pressure) may differ considerably: the constitutional articles are then applied with the utmost pragmatism. The Algerian Constitution is nevertheless very explicit: socialism is the irreversible choice of the people (art. 10 *A.C.*); the means of production are collectivized and state property is, in line with the general conception of ownership in socialist countries, »the highest form of social property« (art. 13, *A.C.*). Personal ownership is limited to goods owned for personal or family use (art. 16, *A.C.*). The Algerian Constitution deviates from the traditional socialist model in its treatment of the remaining private ownership of the means of production. According to orthodox socialism this form of ownership constitutes a historical remnant to be liquidated progressively. The Algerian Constitution states that »non-exploitative private property is an integral part of the new social organization« (art. 16, *A.C.*). The text stresses the purposiveness of this type of ownership: private property, specifically in the area of economic activity, must serve the development of the country and must have a social usefulness. Under Chadli Benjedid, private initiative in the economic sector has been encouraged. The survival of the concept of private property, even in a State so radically reorganized in accordance with socialist principles, can be ascribed to Islam. As will be shown, the emphasis on the purposiveness of private property is a recurring feature of the constitutions underreview, whether socialist or liberal. The Egyptian Constitution organizes ownership in a similar way: it distinguishes three forms: public, co-operative and private. Public ownership is the »vanguard of progress« (art. 30, *E.C.*); co-operative ownership is reserved for agriculture and handicrafts; both of them represent different ways of collectivization. Again, the role of private ownership is permanent: it is represented by the »unexploiting capital« (art. 32, *E.C.*), having a social function in the service of the national economy within the framework of the development plan. In practice Sadat liberalized the economy a few years after the adoption of the constitution by launching his open-door-policy. The change in economic policy was reflected when the Constitution was amended in 1980 only in article 4, dealing with the economic foundation of the State. In the original article the »socialist system« was to »eliminate the gaps between the classes«. In the new article the adjective »democratic« was added to »socialist system« and the reference to classes was dropped; the system now is »conducive to the liquidation of income differences«. Mubarak continued the policies of his predecessor; the departure from socialism was consolidated. Sadat's option for liberal economic policies was not motivated by Islam: the move was intended as an overture to the West, the language of Islam being confined to rhetorics. According to the Saharan Constitution, the achievement of socialism and the implementation of social justice is one of the State objectives. The text distinguishes between two kinds of ownership: national and private (art. 8, *Sa. C.*), the former belonging to the people and the latter being guaranteed »as long as it does not involve exploitation«. Under Numeiry, Sudan also opted for

a socialist way to development. By comparison, Colonel Qadhafi's economic theory is more novel and will be the subject of a separate paragraph, but he borrowed generously from socialism as well. The majority of North African governments have at one stage or another experimented with socialism, but the results were not always assessed positively. In the 1980's they have therefore corrected their initial course, allowing more private initiative without necessarily abandoning their fundamental options. The result is a policy in line with a leftist interpretation of Islamic economic theory, although the policies were seldom propagated as such.

The Moroccan and Tunisian Constitutions and the Sudanese Transitional Constitution remain more to the right of the political spectrum. The dispositions on ownership are dealt with not under the heading »economic organization« but in a human rights framework as is customary in liberal constitutions. The starting point is the individual right to property. The Tunisian Constitution only adds that the right is exercised within the limits established by law (art. 14, *T.C.*); the Moroccan Constitution is more elaborate: it states that the law may limit the scope and exercise of the right if the requirements of the planned economy of the Nation so dictate (art. 15, *M.C.*). Other provisions on economic policies (except those dealing with institutions) are absent. The Sudanese Transitional Constitution purposively lacks all references to socialism. The adjective »socialist« was dropped in the article stipulating the nature of the Republic (compare art. 2, *Su. TC* with art. 1, 1972 *Su. C.*). The State now endeavours to implement social justice in the economic field and to secure the progressive development through sound economic planning (art. 13, *Su. TC*), while guaranteeing the private right of ownership (art. 25, *Su. TC*).

33. In 1978 Colonel Qadhafi initiated a new phase of the Libyan revolution by publishing the second volume of his Green Book: »The Solution of the Economic Problem: Socialism«. The 1977 Declaration had only referred succinctly to economic matters in the preambular part by declaring »(the people's) adherence to socialism as a means to achieve ownership for the people«. The Green Book propagates a return to a natural law which defined relationships before the emergence of classes, forms of government and man-made law. Such a statement can be interpreted as a reference to primitive communism,<sup>40</sup> but it also coincides perfectly with traditional Islamic theory on the assumption that the »natural law« is of divine origin. Although the Green Book, Part II, contains not a single reference to the *Quran*, Qadhafi has always maintained that Islam was the only authentic ideology for the nation, and that his interpretation of it was the only possible one in order to achieve the central goal of social justice today. He acknowledges two forms of ownership of the means of production: private and socialist. Private ownership is restricted to what is needed for the fulfillment of individual basic needs. In order to fulfill these needs, three things are required: a house, a vehicle and an income. Evidently

40 See Hajjar, S. G., The Marxist origins of Qadhafi's thought, *Journal of Modern African Studies*, 1982, nr. 3, 361-375.

they are not to be employed for commercial purposes (including the hiring of labour), but only for strictly personal use. Land and all that is beyond the satisfaction of needs remains the property of all members of the society. What distinguishes Libya from most of the other north African States is that this ideological framework was put into practice in a radical way: government policy has profoundly influenced all aspects of daily life. Land was nationalized, houses were taken from landlords and handed over to tenants, private commercial activities were now run by the State and workers' collectives. Qadhafi's socio-economic reforms overstep the limits set by Islam in their disrespect of the individual right of use of goods. He ran into conflict with the traditional religious representatives, the *ulama*, even at an international level<sup>41</sup> and prohibited national religious leaders to make public statements about State affairs. There is little doubt that the curtailing of their influence had been one of his objectives from the outset. Nevertheless Islam has not outplayed its role in the revolution. Qadhafi's perspicacity is demonstrated by his highlighting of the originality of his ideas, even when they can in actual fact be traced back to a religious or an ideological source. He avoids labelling the societal model which is to be the outcome of the revolution as Marxist or Islamic or as anything else but »Qadhafist«. Instead he advertises himself as a devout Muslim (the private dimension of religion) and stresses the crucial role of the concept of social justice (echoes of Rousseau, primitive communism and the *Quran*). Thus he appears as a reformer of both socialism and Islam and above all as an »original thinker«. He remains elusive and difficult to tackle at the ideological level. The product of the revolution, the system he developed, is intimately linked to his own personality and its viability depends on his personal survival as a political leader.

#### 4. Conclusion

34. This article has looked at the influence of Islam on the organization of the State in North Africa through eight constitutional or quasi-constitutional texts. This line of approach is paradoxical. Islamic legal tradition has no need for Constitutions, but a newly emerging State apparently has. In the process of drafting a fundamental text, States with large Muslim majorities feel the need to refer to Islam. They acknowledge religion as a source of inspiration and thus intend to conform to the requirements set by Islam, which does not suffer a separation of religion and State. In order to make Islamic concepts manageable however, they have to be translated into constitutional language; they have to be moulded into a form which is in essence un-Islamic. The problem of conciliation of religious and secular concepts is inherent in the drafting process. A constitutional analysis cannot but look at Islam through a filter.

Islamic law is all-encompassing, but, in fact, in many areas, offers only principles, not directly applicable rules. This is especially true in the socio-economic field and, to a

41 See Reissner, J., Libyen und Saudi-Arabien in Ende, S., Steinbach, U. (eds.), *Der Islam in der Gegenwart*, München, Beck, 1984, 335–337.

lesser degree, in the field of the relationship between ruler and individual. Constitutions however deal extensively with these matters and thus require elements which traditional Islamic law cannot offer. All the States under review, with the possible exception of Libya, have solved the problem not by interpreting Islam, but by resorting to secular ideologies which were known to the intellectual elites in power, trained in foreign countries or by foreign teachers and developing an new North African constitutional culture. Their enthusiasm for foreign ideologies is not always shared by the majority of the population, and this leads to continuing conflict. The separation of State and religion is pursued at governmental level, since the ruling group wishes to determine its own policies and wants to curtail the influence of non-government-supportive religious groups threatening their authority. But a secular State policy is unacceptable to the religious establishment and fundamentalist groups who together have a firm grip on a large segment of the population. It is therefore nearly impossible for governments to advocate such a policy publicly. No Head of State can afford to appear to ignore Islam when formulating his policy. Nor is it necessarily useful to do so. Islam has a strong legitimizing effect. It can support personalized presidential regimes, requires charismatic leadership. The call for unity serves the group in power well. A careful balance has to be struck. As a result, there is not a single Islamic State in the traditional sense in North Africa, and yet Islam is the only persistently acceptable ideology. As such Islam deeply affects concepts borrowed from foreign ideologies and attaches its particular flavour to notions such as »non-discrimination«, »participatory government« or »social justice«. The options open to a government are not unlike those faced by an art expert who, when studying a nineteenth- or twentieth-century painting suddenly discovers a second, more ancient layer beneath the upper one. At first the fresh colours and the audacity of the modern design bedazzle him, but his respect of and craving for authenticity overwhelm him. He then has to decide whether or not to remove the upper layer. If he brings himself to remove it, he uncovers a medieval painting of considerable historical value, but on which time has left its mark. Only by mustering all his scientific skills will he be able to remedy the damage, and the result, however authentic, will also be partly new. If he decides to remedy the damage, he has to reconstruct the paint used in the original. This he can only achieve by applying all his scientific talent, and the result, however authentic, will also be partly new. None of these options are self-evident; the future outlook of North Africa's political landscape hinges on their determination.

## ABSTRACTS

### **The Ombudsman Experiment in the Kingdom of Swaziland: A Comment**

*By Joseph R. A. Ayee*

The Ombudsman institution, one of the most important and inexpensive means for the redress of grievances of individuals against official abuse and misuse of power, has been experimented within the Kingdom of Swaziland for three years. The institution was abolished in June 1987. The article examines some of the constraints that hampered the smooth operation of the Ombudsman office and which led to its subsequent demise. The article argues that the abolition of the institution is unfortunate, since it is one of the time-honoured institution for the redress of individual grievances in any polity.

### **Unveiling A Hidden Painting: Islam And North African Constitutions**

*By Koen De Feyter*

Islam, as a religion, is also a determinant ideology for political, economic and social activity; overarching all human affairs, it does not permit the separation, within a body politic, of the spiritual and the temporal. The instrument of God's will, the person of the Islamic ruler is aided, but not controlled or instituted in his office, by the people whose affairs he is to govern.

This pristine essence of Islamic doctrine has, however, been difficult to reconcile with the conditions of modern, often post-colonial, statehood in the Islamic world.

The article outlines some of the fundamental principles of Islamic religion with respect to the organisation and the conduct of government and the position of religious minorities. Subsequently, the constitutions of seven states with overwhelming Muslim majorities (Algeria, Egypt, Libya, Mauritania, Morocco, Sudan and Tunisia) are analysed in detail to elucidate how these modern polities have dealt, in different ways, with the delicate task of allying the divinely guided autarchy of the Islamic ruler with notions of Western-inspired constitutionalism. The survey shows that the caparison of such Islamic constitutions cloaks a system of government still profoundly informed by the tenets of the ancient faith.