

# **THE POSITION OF ISLAM IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND IRAQ**

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## 1 INTRODUCTION

### 1.1 Presentation of the subject

While most states in the West are either secular<sup>1</sup> or are moving towards a total or partial separation between state and religion, as the case is in Norway and the Nordic countries,<sup>2</sup> we are witnessing a tendency in the opposite direction in certain parts of the world. States, which at some point in the 20<sup>th</sup> century had more or less secular constitutions have adopted constitutions where religion is given considerable weight beyond merely having a formal role as the official religion.

The object of this paper is to examine the constitution of three such states: Afghanistan, Iran and Iraq. What role and function is religion, more specifically Islam, granted by the constitution of these states? The present constitutional position of Islam will be seen in light of the position it had according to the previous constitution.

### 1.2 Background

The second half of the 20<sup>th</sup> century and the beginning of the 21<sup>st</sup> century saw the rise of Islamic revivalism<sup>3</sup> in states that earlier in the century hosted reform movements leading to the adoption of constitutions that to a large degree could be described as secular. Egypt, Syria, Iran, Turkey, Sudan and Indonesia are examples of countries where this revivalism

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<sup>1</sup>The term "secular" is here used about states that in principle are neutral regarding religious doctrine and where religion not interferes with state affairs.

<sup>2</sup> See NOU 2006:2 and stortingsmelding nr.17(2007-2008) about the discussion on de-establishment or reorganization of the state church in Norway.

<sup>3</sup> "Islamic revivalism" describes the revival of Islam as a political ideology, not necessarily the revival of faith.

has been present.<sup>4</sup> This being said, a distinction must be made between Islamic revivalism as a political movement and Islamic revivalism in a constitutional context. The Islamic revival has not given rise to constitutional changes in all states where the political movement has been present. Some states, such as Turkey, Syria and Indonesia maintain their tradition of a secular constitution, while others, such as Iran have given Islam a near all-including role, thoroughly impregnated in the constitutional articles regarding the organization of the state.

Based on the relationship between the state and Islam, one can divide states with a predominantly Muslim population into different types: (i) Some states are self-proclaimed “Islamic Republic”, (ii) some states have made Islam the official religion, (iii) some states are officially secular but have governments which in practice intervene with religious matters, and (iv) some states are secular. Interestingly enough, Indonesia, with the largest Muslim population in the world is a secular state.<sup>5</sup>

Today, there are 22 states, from Sudan to Malaysia that *constitutionally* give Islam a role.<sup>6</sup> This role can evidently not fill the same functions in every state, even when the same wording is used. Differences in forms of government, economic organization, social system, traditions and the imprint of history make it evident that Islam cannot have the same function in every state. A second point that makes the picture more complex is that the vast spread of Muslim communities has led to various conceptions of Islam.<sup>7</sup> Moreover, the normative provisions in the constitution about what role Islam is intended to have do not necessarily correspond to its role in practice. Despite the differences, however, certain tendencies and similarities can be pointed out among a number of states.

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<sup>4</sup> See Marty&Appleby(1993) for some theories on the political/sociological reasons behind Islamic revivalism and revivalism in general.

<sup>5</sup> The wording in the Indonesian constitution regarding state religion is:”The State shall be based upon the belief in the One and Only God”.

<sup>6</sup> Barro(2005)p.1335.

<sup>7</sup> Milliot(1987)p.2.

### 1.3 Scope and delimitations

The place of Islam in the constitutions of Afghanistan, Iran and Iraq form the topic of this paper. The focus is on the legal aspect, more specifically on what role Islam has according to the constitutional provisions. Obviously, the law does not live an isolated existence separated from the rest of the society, and this applies perhaps even more so to constitutional norms. Both the creation and the effectiveness of a constitution depend on a wide range of factors. As Smith argues in “The Constitution between politics and law” the success of a constitution depends on the state of the constitutional culture in that society. The constitutional culture can be described as how the constitutional norms are perceived and practiced based on the greater socio-political landscape that encompasses constitutional norms.<sup>8</sup>

Acknowledging the importance of the constitutional culture in order to understand how constitutional provisions function, the scope of this paper does not allow for a full presentation of the constitutional culture of the three states. Moreover, the Afghan and Iraqi constitutions have been in force for a few years only. The practice of the constitutional arrangements is thereby very much limited and will not create a steady foundation for making generalizations. The paper will therefore focus primarily on a presentation of the constitutional norms as they are expressed in the constitutional texts.

Because of the extent of the topic I will also leave untreated issues which concern the symbolic position of Islam as for example the national flag and oaths, and issues which are only relevant for one of the states. This includes the role of Islam as an ideological basis for the military, as well as the role of Islam in the economy and foreign policy according to the Iranian constitution.

Finally, it is impossible to really understand the position of Islam in the constitution and legal order unless one at the same time considers the development of Islamic law. However, this goes beyond the scope of this paper, and I will therefore only touch upon the basic features of Islam and Islamic law.

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<sup>8</sup> Smith, Eivind(2003)p. 14-15.

## 1.4 A comparative approach

Dealing with three states, the subject will be addressed from a comparative perspective. Zweigert & Kötz describe “comparative law” as “*an intellectual activity with law as its object and comparison as its process*”<sup>9</sup>. My *object* will be the constitutions of Afghanistan, Iran and Iraq, both in their present form and in their past more or less secular form. Two constitutions from each state will thus be compared. Iran has only had two constitutions; the first constitution contained in two documents from 1906-1907<sup>10</sup> with later amendments, and the present constitution from 1979 with amendments from 1989. The constitutional record of Afghanistan and Iraq is, on the other hand, quite extensive. Afghanistan has had 7 and Iraq has had 8 constitutions.<sup>11</sup>

When deciding which past constitution to take into account I base my choice on two criteria: age and continuity. I have chosen the most recent constitution which was in use for a longer period of time. For Afghanistan this means the constitution of 1964,<sup>12</sup> and for Iraq the constitution of 1990.<sup>13</sup>

The comparative perspective will therefore have two dimensions; one in time and the other in space. An examination in time aims to display the constitutional development in each state while an examination in space aims at unfolding the different ways in which Islam plays a role in the constitutions of the three states. Moreover it can cast light over the

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<sup>9</sup> Zweigert & Kötz(1998)p.2.

<sup>10</sup> Also referred to as “the fundamental law of 1906 and the supplement to the fundamental law of 1907”. The numbering of the articles in both documents start with 1. In order to specify which article I am referring to I add in brackets “supplement” when the relevant article is from the document dated 1907.

<sup>11</sup> Gray(2007)p. 22.

<sup>12</sup> There are some inconsistencies as to the correct date of this constitution. Some sources say 1963. Most sources say 1964. In the following I refer to this constitution as the 1964 constitution.

In addition to fulfilling the criteria of age and continuity, the Afghan constitution of 1964 is of special importance because of its acceptance by broad segments of the community, and it formed the draft for the 2004 constitution. For details, see Deledda(2006)p. 156, and Gray(2007)p.23.

<sup>13</sup> The 1990 Iraqi constitution was officially called “interim constitution”. The same applies to all Iraqi constitutions from 1958 to 1990.



positive and negative consequences of the constitutional arrangements involving Islam in each state.

Beyond the fact that they belong to the same geographical area and to the same religion<sup>14</sup> the differences between Afghanistan, Iran and Iraq are more eminent than the similarities. However, they do share a somewhat common experience when it comes to constitutional movements, experience with secularism and Islamic revivalism. Furthermore, the birth certificates of their present constitution were issued after regime changes through either revolution or war.<sup>15</sup> For the scope of this paper, Afghanistan, Iran and Iraq are chosen because they are states that in recent times have experienced a constitutional de-secularization.

## 1.5 Sources

Studying constitutions in another language than the original presents a challenge and calls for extra caution. Words are fragile, and nuances and content may not be fully transferred or transferrable in a translation.

The official language of Iraq is Arabic and the official languages of Afghanistan are Dari and Pashtun, but the international presence during the constitution-making process lead to an extensive use of documents in English. I have used the English versions of the constitutions as they are presented on [www.oceanalaw.com](http://www.oceanalaw.com). As to the Iranian constitution I have used both the English version and the original version in Farsi.

On some occasions the translation to English from Farsi is inaccurate and leads to a complete change of the provision's meaning.<sup>16</sup> Furthermore, several words and

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<sup>14</sup> The majority of the population in all three countries belongs to the religion of Islam, though other religions are present, especially in Iran and Iraq. Afghanistan is most homogenic in this regard with the majority belonging to the Hanafi school of Sunni Islam. The Iraqi population is more complex, and Shia and Sunni Islam is represented more equally than any other state. Religion in Iran is dominated by the twelv imam branch of Shia Islam. See "Afghanistan", "Iran", "Iraq" in Encyclopedia Britannica.

<sup>15</sup> The 1978-79 Islamic revolution in Iran, the 2001 US/UK lead war in Afghanistan and the US/UK invasion of Iraq in 2003.

<sup>16</sup> See e.g. p.44 regarding article 14.

expressions, especially those taken from Islamic law, are left untranslated in the English version which instead applies the terms in Farsi, for example article 72<sup>17</sup> and the articles dealing with the “velayat-e faqih”.<sup>18</sup> It is thereby difficult to fully understand the content of several provisions for readers who are not familiar with Islamic law.

As the source for the previous constitutions of Afghanistan and Iraq I have used [www.confinder.richmond.edu](http://www.confinder.richmond.edu), while the source for the previous Iranian constitution both in Farsi and English<sup>19</sup> has been [www.fis-iran.org](http://www.fis-iran.org).

Dealing with the role of Islam in the constitution, some information regarding Islam and Islamic law has been necessary. I have based my account on these issues mainly on the book “Moghaddame” (translation to Farsi from Arabic) by Ibn-Khaldoun from the 14<sup>th</sup> century, and three more recent works: Joseph Schacht’s “Introduction to Islamic law”, Petrochevsky’s “Eslam dar Iran”(translation to Farsi from Russian) and Milliot’s “Introduction à l’étude du droit Musulman”.

The present constitutions of Afghanistan and Iraq are only a few years old. Nevertheless, they have been subject to global attention and to a wide range of studies due to the turbulent circumstances after which they were created and the controversies around their content and legitimacy.<sup>20</sup> Much is written from a political, historical or sociological perspective and not so much from a legal perspective, also when the subject deals with the question of the role of Islam in the constitution. Nathan Brown, Matthew Gray, Antonella Deledda, Ashely Deeks and Matthew Burton specifically address some of the issues related to Islam in the constitutions of Afghanistan and Iraq, but their main focus remains on the drafting process. The lack of primary sources from the drafting process of the Afghan and Iraqi constitutions, such as preparatory works, has prevented me from entering into a detailed analysis of questions that arise from some provisions. I have therefore used secondary sources, as the above mentioned articles which provide information about the background of some of the provisions.

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<sup>17</sup> See footnote 116.

<sup>18</sup> See e.g. articles 5,107-109.

<sup>19</sup> The English version of the Iranian constitution of 1906-07 does not contain later amendments.

<sup>20</sup> See Gray(2007)p.26-30, Deledda(2006)p.155-158, Deeks and Burton(2007)p.2-5.

Regarding the Iranian constitution, I have consulted the discussions in the Assembly for Revision of the Constitutional Draft,<sup>21</sup> for information about the intention of the drafters in connection with some of the provisions. For general information regarding the constitution I have applied Asghar Schirazi “The Constitution of Iran”.

Because of the limited sources and the lack of space my presentation will primarily cover the role of Islam as it can be read from the constitutional texts.

## **2 KEY NOTIONS**

### **2.1 The Constitution**

The word “Constitution” derives from the Latin “constitutio”, meaning the “act of settling” or referring to a “settled condition”, later used in the sense of “regulation” or “ordinance”.<sup>22</sup> In legal theory and political science the term “constitution” has been defined in various ways.<sup>23</sup> Common is the idea of the constitution being the norms that establish and regulate the main organs of the government, their powers and duties. Most constitutions also include a section on the rights of the people. These norms can be written or unwritten, gathered in one or several documents.

In a substantial sense one can therefore say that constitutions have existed as long as power has been exercised. However, “constitution” in a modern sense is a product of the nation state, and it is with this content I am using the term in the following. When speaking of “constitution” I seek to refer to the written set of documents for each state which is superior law and officially named “the constitution” or similar. Common for the

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<sup>21</sup> These discussions are gathered in 4 volumes of “Soorat-e Mashrooh-e Majlese Barresi-e Nahai-e Qanun-e Asasi Jomhoori Eslami Iran”.

<sup>22</sup> Cassel’s Latin Dictionary.

<sup>23</sup> Eivind Smith presents some of the main explanations of the term “constitution” and points at the conception of the constitution in a formal and substantial sense. See Smith(2008)p.63-73.

constitutions of Afghanistan, Iran and Iraq is that they are written and gathered in one document.

## 2.2 Islam and Islamic law

Islam, as all religions, is subject to a wide range of interpretations. The term “Islam”, based on a passage in the Quran and commonly accepted among Muslims, signifies “submission”, the submission of the believer to Allah.<sup>24</sup>

To be accepted as a Muslim, it is adequate to believe in three articles of faith.<sup>25</sup> These are the belief in (1)the unity of Allah, (2) Muhammad as his prophet, (3)the day of judgement. In Shia Islam two more articles are added: (4) the belief in the imams, and (5) the belief in the fairness of Allah (adl). The acceptance of these three or five articles constitutes the aspect of faith in Islam. In addition, several obligatory religious duties are added once a person is considered a Muslim.<sup>26</sup>

The main division in Islam is drawn between Sunni and Shia Islam, and implies some theological and legal differences.<sup>27</sup> The different branches which constitute the official religion in Afghanistan, Iran and Iraq will therefore lead to slightly various interpretations of the provisions applying the terms “Islamic law” and “provisions of Islam”.

The main schools within Sunni Islam are the four schools of Shafei, Hanbali, Hanafi and Maleki.<sup>28</sup> The two main sub branches within Shia Islam are the branches of twelve and seven imams.

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<sup>24</sup> Goldziher(1981)p.3-4.

Petrochevsky(1977)p.73.

<sup>25</sup>“Usul al-din”(basic principles of religion). Petrochevsky(1977)p. 279.

<sup>26</sup>“Frou al-din”(subordinated principles of religion). A person is still considered a Muslim despite failing to exercise these duties, as long as he confesses to the articles of faith. Ibid.

<sup>27</sup> Goldziher(1981)p.167.

<sup>28</sup> Milliot(1987)p.12-15.

In addition to the aspect of faith, Islam also contains a system of religious duties and a legal system.<sup>29</sup> The expression “provisions of Islam” which is applied by all three constitutions is a reference to provisions of the legal system of Islam; Islamic law. What characterizes Islamic law is its incorporation into the system of religious duties. One can therefore ask whether it makes sense to speak of Islamic law at all, or whether Islam and Islamic law are so intertwined that a distinction difficultly can be made.<sup>30</sup> For the sake of a clarified presentation I apply the term “Islamic law” when I refer to the legal aspect of Islam.

Islamic law, also called the *Sharia*,<sup>31</sup> is based on four main sources: (1)the Quran, (2)the Sunna of the prophet, (3)ijma and (4)qiyas.<sup>32</sup> Few rules have been precisely spelled out and they must therefore be deduced from their sources through a method of interpretation.<sup>33</sup>

Islamic legal science is called “fiqh”,<sup>34</sup> while the process of deducing new legal norms from the sources of law in order to deal with new circumstances which are not covered by the basic sources is called “ijtihad”.<sup>35</sup> Bernard Weiss compares ijtiḥād to what in Western jurisprudence is called “interpretation”.<sup>36</sup>

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<sup>29</sup> Some apply “Islam” only about the aspect of faith, while others apply it to also cover religious duties and the legal system.

<sup>30</sup> For this discussion see Arkoun(2003)p.18-39, Milliot(1987)p.2.

<sup>31</sup>The term “Sharia” signifies “law”, most commonly used about Islamic law. Al-Mawrid Arabic-English Dictionary.

<sup>32</sup> Quran is derived from Arabic ”Qar’a” which means “reading”. The Quran is the holy book of Muslims which according to their belief is given from Allah through the prophet Muhammad. The Quran consists of 114 chapters (sura) and 6206 verses (ayeh),(there are minor differences in various sources as to the number of verses in the Koran). The “Sunna” is used about the actions and sayings of the prophet. After the death of the prophet these were written down in books called hadith. “Ijma” refers to the consensus among Islamic jurists regarding a question of Islamic law. “Qiyas” is reasoning by analogy. Schacht(1991)p .114.

<sup>33</sup> Schacht(1991)p.200-203.

<sup>34</sup> Ibn-Khaldoun(1978)p.906 (vol2). The science of fiqh covers four themes:1)religious duties, 2)contracts, 3)unilateral obligations (e.g. testaments), 4)issues related to politics and the state.

<sup>35</sup> Ibid. p.929

<sup>36</sup> Weiss(1977-78)p.199-212.

Only certain Islamic jurists- mujtahids- are entitled to perform ijihad.<sup>37</sup> Given the increasing number of mujtahids who arrived at different and sometimes contradictory legal conclusions, Sunni Islam agreed to settle on four main mujtahids by the fourth century of Islam and thereby limit the performance of ijihad for the future.<sup>38</sup> The four mujtahids constitute the four major schools of Sunni Islam referred to above.<sup>39</sup> While the performance of ijihad became limited in Sunni Islam with the establishment of the four schools, ijihad has a wider scope in Shia Islam.<sup>40</sup> Specific reference is for example made in the Iranian constitution which states “*continuous ijihad*” as a necessary element in the system of the Islamic Republic.<sup>41</sup>

The question of ijihad is of importance in relation to constitutional provisions that require legislation to be in accordance with the provisions of Islam. If assuming that ijihad can be performed, the so-called provisions of Islam will be less static and the possibility to arrive at conclusions that can adapt to the present society will be open. If ijihad is assumed *not* to be possible, the legal order of the state must in principle be based upon the conclusions arrived at up until the fourth century of Islam. This being said, the importance of ijihad must not be exaggerated since the sources that are interpreted and from which the norms are derived themselves are given once and for all.

As a prolongation of the debate on ijihad, some Islamic scholars argue that Islamic law as an established system of law is unsuitable for today’s society, and claim that the only criteria should be that legislation does not run counter to the *values* in the Quran and the Sunna.<sup>42</sup>

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<sup>37</sup> Schacht(1991)p.71.

<sup>38</sup>According to Ibn-Khaldoun(1978)p.911(vol2). Schact applies the expression “*closing of the gates of ijihad*”. The gates were not entirely closed according to some scholars. See e.g Wael Hallaq(1984).

<sup>39</sup> Ibn-Khaldoun, p.929(vol2).

<sup>40</sup> Schacht(1991)p.69.

<sup>41</sup> Iranian constitution1979 article 2(6)a.

<sup>42</sup> Selvik&Shahibzadeh <http://foreninger.uio.no/babylon/Sharia%20og%20menneskerettigheter.pdf>

### 3 MAIN LINES IN THE CONSTITUTIONAL HISTORY WITH FOCUS ON THE ROLE OF ISLAM

The fairly recent constitutional history of Afghanistan, Iran and Iraq dates back to the first half of the 20<sup>th</sup> century. The first constitutions were adopted in 1906-07 (Iran), in 1923 (Afghanistan) and in 1925 (Iraq).<sup>43</sup> The primary objective behind the first Afghan and Iranian constitution was to convert the absolute monarchy into a constitutional monarchy, thereunder establishing a parliament and introducing the rule of law. These constitutions were quite revolutionary for their time and place, especially since they represented a significant break with the Islamic worldview regarding non-Muslims.<sup>44</sup>

The constitutional history of especially Afghanistan and Iran can in short be described as a struggle between on one hand the clergy and on the other hand the modern educated intelligentsia;<sup>45</sup> a struggle resulting in constitutional compromises between the influence and position of religion on one hand and democratic principles and secularism on the other.<sup>46</sup> Reading the *first* constitutions one can conclude that the compromise in all three states was in favour of secularism. With one constitution replacing the other the balance of the compromise has changed to varying degrees throughout the years. Today, if it is possible to speak of a compromise at all, one can at least say for sure that the legal status of religion outweighs that of secularism.

Since 1923, Afghanistan has had 7 constitutions including the present one, none of which were created under peaceful or stable circumstances.<sup>47</sup> This resulted in many short-lived constitutions, thereamong the constitutions of 1977, 1978, 1987 and 1990. During Taliban who practiced strict enforcement of Islamic law the country was without a constitution, in the conventional sense, since the existence of a constitution was considered

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<sup>43</sup> Gray(2007)p.22 and 24, Browne(1910)p.131 and 152.

<sup>44</sup>“Constitutional revolution” and “constitutional history of Afghanistan” in Encyclopedia Iranica, and Tsadik(2003)p.378.

<sup>45</sup> Encyclopedia Iranica “Constitutional History of Afghanistan), Browne(1910)p.30-130.

<sup>46</sup> For a detailed account see Browne(1910) “The Persian Revolution”.

<sup>47</sup>“Constitutional history of Afghanistan” in Encyclopedia Iranica.

un-Islamic.<sup>48</sup> The role of Islam in the previous constitutions was mainly limited to constituting the official religion. The constitution of 1990 which only lasted two years, granted a more substantial role to Islam through including it as a criteria for the position of the president, establishing it as a source of law, a guideline to the judiciary and as an element in the foreign policy of the state.<sup>49</sup>

The present constitution establishes for the first time Afghanistan as an Islamic Republic<sup>50</sup> and strengthens the constitutional role of Islam in a number of areas both qualitatively and quantitatively. The role of Islam was one of the controversial issues during the drafting process which started in December 2001, just after the international war against the Taliban regime started.

The first Iranian constitution of 1906-07 was the final product of a democratic political effort and a constitutional movement which resulted in what is known as the “constitutional revolution”. Largely based on the Belgian constitution of 1831,<sup>51</sup> the constitution was not un-Islamic, but there was no attempt to create an Islamic constitution and an Islamic state as was the aim of the Islamic revolution in 1979. The document from 1906 included only one reference to Islam which was in the oath of the members of the parliament.<sup>52</sup> Influence of Islam is more present in the document ratified in 1907. This document made Shia Islam and the branch of twelve imams the official religion, created a council of Islamic scholars to review legislation and required that the monarch and ministers to be Muslims.<sup>53</sup> In addition, the prohibition of censorship did not cover publications “*hurtful to the religion*” and the freedom of profession was limited to those not forbidden by Islamic law.<sup>54</sup>

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<sup>48</sup> Deledda(2006)p.155.

<sup>49</sup> Afghan constitution1990, articles 2,29,78,112,135.

<sup>50</sup> The constitution of 1990 which lasted for two years, described in article 1 the Republic of Afghanistan as an independent, indivisible and Islamic state.

<sup>51</sup>“Constitutional Revolution” (iii) in Encyclopedia Iranica.

<sup>52</sup> Iranian constitution1906-07 article 11.

<sup>53</sup>Iranian constitution1906-07 articles 1,2,18,20,27,39,58,71.

<sup>54</sup>Ibid. articles 18, 20.



The role of Islam in the present constitution can best be described through Khomeini's message to the Assembly for revision of the constitutional draft.<sup>55</sup> Among the issues in this message he stated that : *"this constitution and the other laws of the republic must be one hundred per cent Islamic. (...) Passing even one article which contradicts Islam will constitute a breach of the republic and the vote of the near absolute all Iranians"*.<sup>56</sup> Furthermore, there was an active use of religious sources during the drafting process. The Assembly for the revision of the Constitutional Draft discussed and consulted 332 Quranic verses and 128 hadiths.<sup>57</sup> In the end, a reference to Islam is found in most of the constitutional articles which altogether witness that Islamic law was one of the main sources of the constitution.

The first Iraqi constitution was created under the British colonial period and therefore under very different circumstances than the two other states. The constitution established Islam as the official religion of the state and granted full religious liberty.<sup>58</sup> The courts were divided into three classes: civil, religious and special courts. The religious courts were divided into Sharia courts and spiritual councils of the communities. The jurisdiction of the religious courts was however limited to issues related to the personal status.<sup>59</sup> Though the constitution enshrines a wide range of rights for Iraqis it was not created under independence. It was first the later constitutions, created when Iraq became an independent nation-state that reflected the politics and interests of the state.<sup>60</sup> The constitution of 1925 required the head of state to be a Muslim and the short-lived constitution of 1964 made Islam the basic foundation of the constitution.<sup>61</sup> All other constitutions made only a symbolic reference to Islam as the official religion of the state.

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<sup>55</sup> 58 out of the total 78 representatives in this Assembly were from the clergy. See Discussions from the Assembly for revision of the constitutional draft, appendix,(vol4).

<sup>56</sup> My translation.Ibid p.319-320.

<sup>57</sup> Ibid. p.287-295 and p.297-306.

<sup>58</sup> Iraqi constitution1925 articles 13.

<sup>59</sup> Ibid. articles 69 and 75-79.

<sup>60</sup> Gray(2007)p.25.

<sup>61</sup> Brown [www.carnegieendowment.org/files/PO13.Brown.Final2.pdf](http://www.carnegieendowment.org/files/PO13.Brown.Final2.pdf)

## 4 THE PREAMBLE

### 4.1 The legal status of a constitutional preamble

It is common to find a preamble before the operational articles of a constitution or a treaty. If a preamble were to have the same status as the rest of the document it would have taken the form of one or several articles and it would not be separated from the rest of the text, though some issues are treated both in the preamble and in the constitutional articles. On the other hand, if it were to be without any significance it would not have been included in the constitution at all.

The question therefore arises as to what the legal significance of a constitutional preamble is.

In legal theory<sup>62</sup> it is assumed that the preamble of a constitution does not create independent constitutional norms regarding for example substantive rights and obligations. It may however have important functions which indirectly can affect the substance of such norms. The preamble has a symbolic aspect, stating the history and values of the nation and the aspirations and intentions of the authors of the constitution, thereby expressing the so-called “spirit” of the constitution. In this regard, the preamble can assist in the interpretation of the constitution and limit the range of issues which can be amended.

### 4.2 The role of Islam in the preamble

Already the preambles give a certain indication about a more significant role for Islam in the constitutions. While the preamble of the 1906-07 Iranian constitution gave a merely symbolic role to Islam and the preamble of the 1964 Afghan constitution did not mention religion at all, the role of Islam has been given a larger place in the preambles of the present constitutions.

Islam is by far most prominent in the preamble of the Iranian constitution. Covering four pages, the preamble impregnates Islam in the system of government, the army and the rights of the people, and establishes the religion as an ideology. Even though most of the

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<sup>62</sup> See for example Smith(2008)p.109.

constitutional articles mention Islam, the fully Islamic spirit of the constitution will lead to interpreting in light of Islam also those articles which do not contain a specific reference to the religion.

Less all-embracing is the role of Islam in the preamble of the Afghan constitution which nevertheless states the firm belief and adherence of the people of Afghanistan to “*the Holy religion of Islam*”. Unlike the previous preamble which urged the state and each individual to participate actively in the construction and improvement of the society, the present preamble is more passively colored and underlines the reliance of the people “*on His divine will*”. The following words “*adhering to the Holy religion of Islam*” suggests that actions must be within the frame of this religion”. This part of the spirit of the constitution has come to more concrete expression in several constitutional provisions thereamong the provision regarding Islam as a restraining principle on legislation in article 3.

Unlike the Afghan and Iranian constitutional preambles, the role of Islam in the preamble of the Iraqi constitution is symbolic. Beyond a historical reference to Iraq as the land of the companions of the prophets and imams there is no mention of Islam in the preamble which instead focuses on the recent history and challenges of the country. One can therefore ask whether Islam is part of the constitutional “spirit” of the Iraqi constitution which also is the only constitution among the three that allows for a constitutional change of the provisions regarding Islam.<sup>63</sup>

## **5 ISLAM AS THE OFFICIAL STATE RELIGION**

The official state religion is a religious creed, normally that of the majority, officially endorsed by the state through the constitution. The opposite of a state with an official religion is commonly described as a secular state. However, having an official state religion according to the constitution does not imply that the legal status of religion is similar in all states. The type and degree of state backing of the official religion varies, and can range

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<sup>63</sup> See chapter 7.3.

from symbolical or traditional endorsement and/or financial support allowing freedom for other faiths, to prohibiting other beliefs and persecuting followers of other sects. Likewise, the type and degree of limitations or regulations imposed on the *state* by the official religion differs. The official religion can for example to varying degrees interfere with state affairs and the controlling of the political power.

Afghanistan, Iran and Iraq all have a constitutional provision establishing Islam as the official state religion, yet its role in the constitution and the degree of state intervention with religion and religious interference with state affairs varies. Common for the constitutions of Afghanistan and Iran is a shift from Islam as the official religion, to Islam as the official religion of *the state*. Even though the official religion of *the state* suggests a closer relation between the official religion and state affairs it is not clear whether this change in wording is intended to have a substantial difference. For example, does the Iraqi constitution of 1990 also speak of Islam as the “*religion of the state*” without giving Islam a significant position in the constitution. It is nevertheless a fact that the present constitutions allow for an increased interaction between Islam and government.

The status of the official state religion will in the following be examined in two steps. First, by looking at the constitutional provision explicitly establishing the official religion. Does the constitution itself give any definitions or explanations on one content of the state religion? This is done under section 5.1.

Second, by regarding the constitution as a whole. The role of Islam as the official state religion will be examined in relation to some of the components of the state and in relation to legislation, education and civil liberties. This is done under chapters 6-9. On what areas is the official religion given preference or a different status?

## 5.1 Islam as the official state religion according to the text

The Afghan constitution of 1964, in article 2, described Islam as being the sacred religion of Afghanistan. It further specified that the Hanafi doctrine should be the basis for religious rites performed by the state. Since the constitution did not give any further explanation as to what these rites would be, for example if they are symbolic or if they have a substantial consequence, article 2 would not constitute a firm basis for a conclusion about the status of the official state religion.

The constitution of 2005 does not make an explicit reference to the Hanafi doctrine in Sunni Islam. Instead, article 2 simply establishes Islam as the official religion of the state. However, an interpretation of article 2 in light of article 130, which states that the Hanafi jurisprudence is to be pursued if there are no laws about a case that is before the courts, could indicate that the Hanafi school constitutes the official religion of the state.

Compared to the constitution of 1964, the wording in the present constitution goes further when it states that Islam is the religion of the Islamic Republic of Afghanistan. Not only is Islam the official state religion, but the state is an Islamic Republic. This suggests that religion has a more substantial role in the constitution than previously.

In Iran, article 1 in the constitution of 1906-07(supplement) described the official religion with the following wording: “*The official religion of Iran is Islam, according to the Ja’fari doctrine of the twelve imams, which faith the shah of Iran must profess and promote*”. The article has more the character of *describing* the religion rather than giving it a certain status.

The present constitution, in article 12, declares Islam, further specified as the Ja’fari doctrine of twelve imams as the official religion of the *state*. According to the same article this principle of the constitution is unchangeable. Islam thereby holds a supraconstitutional status in the current Iranian constitution.

The Iraqi constitution of 1990 established Islam as the religion of the state without giving further explanations. However, the lack of the presence of religion in the constitution would provide the explanation needed about the status of the religion which thereby could be described as symbolic.

The present constitution, in first part of article 2(1) declares Islam as the “*official religion of the state*”. The article continues by establishing a new (in Iraqi context) and decisive role for Islam as a “*foundation source of legislation*”. Furthermore, the same article contains an important status for Islam as a restraining principle on legislation.

<sup>64</sup>Including these two issues in the same article which states Islam as the official state

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<sup>64</sup> See chapter 7.

religion suggests a far stronger constitutional role for Islam than in the previous constitution.

## 6 THE OFFICIAL STATE RELIGION AND STATE BODIES

### 6.1 System of government

This section aims at presenting the relationship between the official state religion and some of the state bodies.

#### *Afghanistan- from constitutional monarchy to presidential Islamic republic*<sup>65</sup>

The system of government according to the constitution of 1964 was that of a constitutional monarchy. Sovereignty belonged with the nation,<sup>66</sup> personified by the monarch.<sup>67</sup> Though having an official religion,<sup>68</sup> the state was never *Islamic* and apart from the monarch, the constitution did not require any members of the government to belong to a specific religion.<sup>69</sup>

With article 1 in the constitution of 2004, Afghanistan is declared an Islamic Republic with a president elected directly by the people<sup>70</sup> as the head of state. The name of the state “The Islamic Republic of Afghanistan” is not simply a formal change, but a formal change with substantial consequences. The influence of religion in the present system of government has increased significantly. Islam has been made a criterion for being elected president and the wording in a number of provisions gives Islam a firmer position compared to the constitution of 1964.

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<sup>65</sup> Following a coup d’etat, Afghanistan was established as a republic already in 1973.

<sup>66</sup> Afghan constitution 1964 article 1.

<sup>67</sup> Ibid. article 6.

<sup>68</sup> Ibid. article 2.

<sup>69</sup> The monarch had to be a follower of the Hanafi school of Sunni Islam. *Ibid.* article 8.

<sup>70</sup> Afghan constitution 2004 articles 60-61.

National sovereignty is still with the nation, manifested through the elected representatives.<sup>71</sup>

### ***Iran- from constitutional monarchy to theocratic Islamic republic***

The constitution of 1906-07 laid the foundations for a constitutional monarchy. Articles 1 and 58 required that the monarch and the members of the cabinet confessed to Islam. However, though not being legally secular, the state was secular in practice and several of the constitutional provisions which gave Islam a position were little respected.<sup>72</sup> National sovereignty was with the people, as stated in article 26. The constitution states the people, not God, as the source of the position of the monarch.<sup>73</sup>

In the 11<sup>th</sup> century Mawardi, an Islamic theorist, described the features of the Islamic state in his book “*Al-Ahkam al-Sultanieh*”.<sup>74</sup> According to Mawardi, the political, military, judicial and theological powers in the Islamic state were concentrated in the hands of one person, the caliph.<sup>75</sup> About a millennium later, we can recognize the theories of Mawardi in the concept of “Velayat-e faqih”<sup>76</sup> as the system of government in the Iranian constitution of 1979.<sup>77</sup> Only this time, instead of the title “caliphate” the title “velayat-e faqih” is applied. The position is personified in the “Vali-e faqih”, who the constitution also refers to as “the leader”, “spiritual leader” or “supreme”. The institution of the velayat-e faqih implies a break with the principle of division of power since all branches of

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<sup>71</sup> Afghan constitution 2004 article 4.

<sup>72</sup> This was the case with for example the organ established to determine the compatibility of laws with Islam. See Schacht (1991) p. 110.

<sup>73</sup> Iranian constitution 1906-07 (supplement) article 35.

<sup>74</sup> Petrochevsky (1977) p. 158

<sup>75</sup> L.c.

<sup>76</sup> The term “velayat-e faqih” derives from a controversial theory in Shia Islam which holds that an Islamic jurist (faqih) shall hold guardianship over those who are in need of it.

<sup>77</sup> Iranian constitution 1979 articles 5 and 107.

government are under the absolute authority of the person holding the post of the vali-e faqih.<sup>78</sup>

Finally, the present constitution eliminates the sovereignty of the people and places it instead under God.<sup>79</sup>

### ***Iraq- from presidential republic to federal parliamentary republic***

The constitution of 1990 established Iraq as a presidential republic, based on socialist ideology.<sup>80</sup> The role of Islam in the constitution was limited to a formal role as the official state religion as expressed in article 4 and did therefore not interfere with the system of government or government positions.

Even though Islam has been given important and substantial roles in the present constitution it does not interfere with the executive branch. Meanwhile, it does occupy a new and strong position in the legislative and judicial branch.<sup>81</sup> Unlike the constitution of 1990 which stated that the people were the source of national sovereignty,<sup>82</sup> the present constitution does not contain an explicit provision regarding the source of national sovereignty. Article 13 which speaks of the supremacy of the constitution read in light of article 5 which states the people as the source of law could however lead to the same, but weaker, conclusion as in the 1990 constitution.

## **6.2 Executive power**

The official state religion is decisive in the constitutional provisions regarding the highest executive powers in Afghanistan and Iran.<sup>83</sup> It is among the criteria in both constitutions that the president be a Muslim.<sup>84</sup> Both the Afghan and the Iranian president

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<sup>78</sup> Ibid. articles 57 and 110.

<sup>79</sup> Iranian constitution 1979 articles 2(1) and 56.

<sup>80</sup> Iraqi constitution 1990 article 1.

<sup>81</sup> See chapter 6.3 and 7.

<sup>82</sup> Iraqi constitution 1990 article 2.

<sup>83</sup> The constitution of Iraq does not contain similar provisions.

<sup>84</sup> Afghan constitution 2004 article 62(1) number 1, Iranian constitution 1979 article 115 (1)(2).



are directly elected by the people,<sup>85</sup> even though the content of the presidential post is completely different in the two constitutions- the Afghan president holds vast executive powers,<sup>86</sup> while the most important executive powers in Iran are with the leader (vali-e faqih) thus making the powers of the president considerably limited.<sup>87</sup>

Also the previous constitutions of both states required that the head of state- the monarch- had to confess to the religion of Islam.<sup>88</sup> There is however a difference between the hereditary position of a monarch and that of the popularly elected president. Stating Islam as a criterion in order to become a presidential candidate implies the exclusion of non-Muslim citizens from participation in the political life of the state at this level. In the Afghan constitution this provision leads to a contradiction with the constitutional provisions on equality and non-discrimination in articles 22 and 33, as well as with the provision pointing to the UN charter and the Universal Declaration of Human Rights in article 7. In the Iranian constitution, the exclusion of non-Muslims leads to a contradiction with article 3(8) which states as a goal the “*participation of the entire people in determining their political, economic, social and cultural destiny*”.

As mentioned, the main executive powers according to the Iranian constitution are granted to the leader- the Vali-e faqih.<sup>89</sup> Applied as a system of government this means that the state must be lead by an Islamic jurist possessing the criteria required in article 109. The powers of the Vali-e faqih are absolute and cover all areas of government.<sup>90</sup>

The vali-e faqih is elected by the Assembly of Experts.<sup>91</sup> It follows from article 108 that the law which regulates the qualifications of the experts and the organization of this body originally was not a regular law passed by parliament. This law is drawn up by the Islamic scholars of the Guardian Council and approved by the leader. Later changes are left

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<sup>85</sup> Afghan constitution2004 article 61, Iranian constitution1979 articles 114 and 117.

<sup>86</sup> Afghan constitution2004 article 64.

<sup>87</sup> The power of the president is negatively delimited and covers matters which are not directly under the leader. Iranian constitution1979 article 113.

<sup>88</sup> Afghan constitution1964 article 8, Iranian constitution1906-07(supplement) article 1.

<sup>89</sup> Iranian constitution1979 articles 5,57,107,109,110.

<sup>90</sup> Ibid. article 110.

<sup>91</sup> Iranian constitution1979 article107.

to the Assembly of Experts itself to make. Today the Assembly of Experts consists of 86 clerics.<sup>92</sup>

### 6.3 The justice system

Islam interferes in the justice system on two main areas: (1) in the composition of the courts, and (2) in the judgments.

#### 6.3.1 The courts

The position of Islam differs in the constitutions of the three states regarding the composition of courts. Neither in the Iranian constitution of 1906-07,<sup>93</sup> the Afghan constitution of 1964, nor in the Iraqi constitution of 1990 was Islam an issue on this matter. Islam is on the other hand very much present in the present constitution of both states as part of the qualifications for supreme court judges. Expertise in Islamic jurisprudence as well as in law is mandatory for judges of the Iraqi Federal Supreme Court,<sup>94</sup> while the Afghan constitution establishes education in Islamic jurisprudence as an alternative education next to education in legal studies.<sup>95</sup> Based on the wording of the Afghan provision, a person can thereby become a supreme court judge without education in law.

The degree of interference is far greater in the Iranian constitution. Here, Islam is not only a part of the qualifications for judges of the courts, but the courts themselves must “*be formed in accordance with the criteria of Islam*”.<sup>96</sup>

According to the preamble, the judicial system must be based on Islamic justice and the judges must have “*meticulous knowledge of the Islamic laws*”. Furthermore, it is required in

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<sup>92</sup> [http://www.iranchamber.com/government/articles/structure\\_of\\_power.php](http://www.iranchamber.com/government/articles/structure_of_power.php)

<sup>93</sup> Originally the Iranian constitution established two types of courts- one civil court and one religious court to deal with matters of personal status. Religious courts were abolished in 1936. See “constitutional revolution” in Encyclopedia Iranica.

<sup>94</sup> Iraqi constitution 2005 article 89(2).

<sup>95</sup> Afghan constitution 2004 article 118 (1) number 3.

<sup>96</sup> Iranian constitution 1979 article 61.

that the head of the judiciary,<sup>97</sup> the prosecutor-general and the chief of the supreme court are a “mujtahid”.<sup>98</sup>

Also the qualifications of ordinary judges must according to article 163 be “*in accordance with the criteria of fiqh*”. According to fiqh, besides fulfilling certain moral criteria, the judge must be a Muslim and a man.<sup>99</sup> “*Islamic criteria*” is furthermore the basis upon which jury selection, the powers of the jury and the definition of which actions that constitute political offences shall be determined.<sup>100</sup>

### 6.3.2 The judgements

Considering the fact that courts are bound to apply and interpret the law when they render their judgements, the role of Islam in this area will be closely related to its role in legislation where it operates as a restraining principle. I will in the following look at three ways in which Islam can interfere with judgements: (i) by being the source to fall back to in absence of other laws, (ii) by hindering judgements that would be in conflict with Islam and (iii) by leading to un-unified judgements in the area of personal status.

#### (i) Islam as the source to fall back to in absence of other laws

Both the Afghan and the Iranian constitution contain provisions that make it mandatory for the courts to apply Islamic law in the absence of other laws.<sup>101</sup> This is even included in the oath of the Supreme Court judges of Afghanistan.<sup>102</sup> By having a stricter and more detailed wording, these arrangements differ from what is found in their previous constitutions. According to the Afghan constitution of 1964, only the *basic* principles of Islamic law should be followed in the case of lack of the laws of the state.<sup>103</sup> The limitation that followed by the word “basic” is not continued in the present constitution, which in

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<sup>97</sup> The head of the judiciary is part of the executive branch, article 157.

<sup>98</sup> Iranian constitution 1979 articles 157 and 162.

<sup>99</sup> Schacht (1991) p. 125 and 188.

<sup>100</sup> Iranian constitution 1979 article 168.

<sup>101</sup> Afghan constitution 1964 article 130, Iranian constitution 1979 article 167.

<sup>102</sup> Afghan constitution 2004 article 119.

<sup>103</sup> Afghan constitution 1964 articles 102 and 69.

article 130 only states that Hanafi jurisprudence shall be pursued. The exclusion of the word “basic” will therefore lead to a broader application of Islamic jurisprudence in judgements under the present constitution.

ii) Islam as a limitation on judgements

The Afghan and Iraqi constitutions contain no explicit provision regarding the use of Islamic law in judgements. Nevertheless, the restraining principle<sup>104</sup> could theoretically imply that the courts are obliged to refrain from applying laws that would lead to judgements contradicting the provisions of Islam. This rule is expressed in article 170 in the Iranian constitution. Such provision or solution would imply a further strengthening of the restraining principle since not only laws but also judgements will be in accordance with Islamic law.

iii) Judgements in the area of personal status

All three constitutions have provisions which can lead to judgements that can go in various directions depending on the religious background of the persons involved in the case. These provisions concern the area of personal status which is an area of law dealing with rights and obligations related to three main areas: marriage, divorce and inheritance.<sup>105</sup> Historically this has been the area of law which, though regulated by the state, has been most closely tied to Islamic law and most resistant to secularization<sup>106</sup> and where Islamic law in many cases is the only source of law.<sup>107</sup>

The area of personal status is also one of the areas where the treatment of the citizens who do not belong to the official state religion can lead to breach of principles of equality and non-discrimination.<sup>108</sup>

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<sup>104</sup> Afghan constitution 2004 article 2, Iraqi constitution 2005 article 2(1). See chapter 7.1.

<sup>105</sup> Deeks & Burton (2007) p. 18.

<sup>106</sup> L.c.

<sup>107</sup> L.c.

<sup>108</sup> See chapter 9.1.1.

Afghanistan,<sup>109</sup> Iran and Iraq explicitly distinguish between Muslims and Non-Muslims or Muslims from other schools of Islamic law in matters of personal status.

If the person involved in the case belongs to another branch of Islam than the official religion the courts are bound to apply Islamic law according to that branch. This is the case for Shia Muslims according to article 131 in the Afghan constitution, and for the five schools of Sunni Islam according to article 12 in the Iranian constitution. The provision in the Iranian constitution stating that Zoroastrian, Jewish and Christian Iranians are “*free to act according to their own canon in matters of personal affairs*”<sup>110</sup> is neither using the expression “personal status” nor is it directly related to the courts. Based on the wording one can therefore conclude that the personal status of followers of other religions either is regulated by the Islamic jurisprudence for the official religion or by a special law. In any case, since there is no positive provision given regarding the personal status of non-Muslims, article 170 will constitute a frame for what decisions the courts may arrive at. Since the courts cannot arrive at decisions that will be in conflict with Islamic law judgements regarding the personal status of non-Muslims must necessarily be within the frame of Islamic law.<sup>111</sup>

The Iraqi constitutional provision regarding personal status is not designed in the same manner as the two other constitutions. Article 39 simply states that “*Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs or choices. This shall be regulated by law*”. First of all, this article does not make the same distinction between followers of the official religion and others as is done by the Afghan and Iranian constitutions. Second, since it is not directed towards the courts it is not clear what the freedom consists of and what actions are covered by “*commitment*”. Given that the issue is going to be regulated by law the answer and further definition of the constitutional right may lay in the subsequent law.

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<sup>109</sup> The Afghan constitution only distinguishes between followers of the Hanafi and Shia branch. There are no provisions regarding non-Muslims or followers of other schools within Islam.

<sup>110</sup> Iranian constitution 1979 article 14.

<sup>111</sup> This can typically be a problem in relation to child custody which according to Islamic law is the right of the father. See Milliot (1987) p.419-422.

## 6.4 Legislative power

Islam, and thereby the official state religion can interfere with the legislative power on two main areas: (1) In the composition of the legislative body, and (2) In legislation. I will return to the role of Islam in legislation under chapter 7. First, I will look at the position of Islam in the first area. Since Islam has been given no role in the composition of the legislative power according to the constitutions of Afghanistan and Iraq I will in the following only consider the constitutional arrangements in the Iranian constitution.

Apart from the change in name, from the National Consultative Assembly to the Islamic Consultative Assembly, the constitution does not contain any explicit provision regarding the role of Islam in the composition of the legislative power, and leaves it to ordinary law to establish the qualifications of the members of parliament.<sup>112</sup> However, the preamble's emphasis on Islam in institutions of the government and in the society indicates that Islam is a criterion for members of parliament. This is supported by article 64 which states that "*the Zoroastrians and Jews will each elect one representative; Assyrian and Chaldean Christians will jointly elect one representative; and Armenian Christians in the north and those in the south of the country will each elect one representative*". Since four seats are reserved for representatives of certain non-Muslim groups one can presume that the other seats are reserved for Muslim representatives. Furthermore, article 67 states that the oath of the members of parliament shall be sworn by the Quran, while the members of the religious minorities swear by their own sacred books. The constitution therefore seems to assume that members of the Assembly must be Muslims. Asghar Schirazi describes this as an "*erosion of parliament's representative function*"<sup>113</sup> and states that the restrictions on the eligibility of political candidates not only includes commitment to Islam or a religious

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<sup>112</sup> Iranian constitution 1979 article 62(2).

<sup>113</sup> Schirazi (1997) p.86.

profession, but also excludes people who had held posts in the previous regime and people opposed to the concept of velayat-e faqih.<sup>114</sup>

## **7 THE OFFICIAL STATE RELIGION AND LEGISLATION**

### **7.1 The official state religion as a restraining principle on legislation**

In various wordings the constitutions of the three states contain a restraining principle<sup>115</sup> based on Islam<sup>116</sup> which thereby constitutes a norm for what laws parliament can enact. The general content of this principle is that no laws shall contradict Islamic law.

While a restraining principle could be found also in the previous Afghan and Iranian constitutions it was introduced for the first time in Iraq by the constitution of 2005.

In the present constitutions, the restraining principle is found in article 3 of the Afghan constitution, article 72 in the Iranian constitution<sup>117</sup> and in article 2(1) in the Iraqi constitution.

Such provisions lead to the question of whether secularism is precluded. Part of the answer lays in the interpretation of the provision that inevitably gives rise to several complex questions: (1) What is the criteria in the restraining principle, (2) How to interpret the restraining principle, and (3) The harmonization with other constitutional provisions.

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<sup>114</sup>Schirazi(1997)p.87.

<sup>115</sup>None of the constitutions apply the term “principle”. The term is ambiguous and can refer to a generally known truth or belief guiding an activity, a rule, a maxim, or a superior general standard for behavior and thinking. See *Filosofleksikon* (1996) and *Philosophical terminology*(1987). I am using the term as a superior general standard which legislation must be in accordance with.

<sup>116</sup> One of the controversies during the drafting process of the Afghan and Iraqi constitution was centered on the inclusion of such principle which is also referred to as a “repugnancy clause”. See Deledda(2006)p.158-160, Deeks&Burton(2007)p.5-7, Gray(2007)p. 26-30.

<sup>117</sup>The principle is also expressed in the preamble and article 2(2)(4) of the Iranian constitution.

### 7.1.1 The criteria in the restraining principle

Because of the important consequences that the restraining principle can lead to, the wording of the principle is worth presenting. The Afghan version of the principle states that “*no law shall contravene the tenets and provisions of the holy religion of Islam*”.<sup>118</sup> Almost similar is the Iraqi version stating that “*no law that contradicts the established provisions of Islam may be established*”,<sup>119</sup> while the Iranian version states in article 4 that all laws “*must be based on Islamic criteria*”, and in article 72 that the parliament “*cannot enact laws contrary to the usul and ahkam of the official religion*”.<sup>120</sup>

The criteria are thereby differently formulated in the three constitutions. The criterion is less strictly formulated in the Iraqi constitution since the provision speaks only of the “*established*” provisions and not of the provisions in general, like the Afghan constitution. The restraining principle is furthermore granted a broader scope in the present Afghan constitution. While the constitution of 1964 limited the scope of the restraining principle through the words “*basic principles*”, the formulation of the principle in the present constitution has left out the word “*basic*”. Accordingly, all laws must today be in accordance with Islamic law and not only in accordance with its basic principles.

The Iranian constitution speaks of the principles and rulings of Islam and continues in this regard the provision found in the constitution of 1906-07 which stated that no law must “*be at variance with the sacred principles of Islam or the laws established by His Holiness the Best of Mankind*”.<sup>121</sup>

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<sup>119</sup> Iraqi constitution 2005 article 2(1)A.

<sup>120</sup> Iranian constitution 1979 article 72. “Usul and ahkam” means principles and rulings.

<sup>121</sup> Iranian constitution 1906-07 article 2(supplement). “His Holiness the Best of Mankind” refers to the prophet Muhammad and thereby to the sunna of the prophet as a source of Islamic law.



### 7.1.2 Interpretation of the restraining principle

As discussed in chapter 2.2, “Islam” , “Islamic law” and “provisions of Islam” can themselves present definition problems. In addition there is no agreement as to what constitutes “basic” or “established” provisions of Islam. Vague and ambiguous criteria in the restraining principle can have two opposite consequences. The principle can either become too weak to have any substantial impact or it can be extensively stretched.

I will in the following look to the rest of the constitution in order to see if guidelines are provided regarding the interpretation of these terms.

#### i) Provisions of Islam

Both the Afghan and the Iraqi constitution speak of the “provisions of Islam”, while the Iranian constitution speaks of the “principles and rulings of Islam”. All three expressions are a reference to Islamic law.

In addition the Afghan constitution applies the word “tenets” of Islam. It is not clear what “tenets” refers to in this context. If intended to have a different meaning than “provisions” the scope of the principle would reach beyond Islamic law. The provision can be read in two ways. First of all, one can interpret “tenets and provisions” together, as jointly denoting what constitutes Islamic law. Secod, one can interpret “tenets” as referring to the non-legal part of Islam. Such interpretation would include Islam’s aspects of faith into the restraining principle. It is however difficult to imagine the practical consequence of this interpretation since the aspects of faith to a large degree are covered by Islamic law and thereby by the “provisions of Islam”.

Though both the Afghan and the Iraqi constitution speak of provisions of Islam, the scope of the restraining principle is more limited according to the Iraqi constitution through its use of the word “established”. However, the expression “established provisions of Islam” does give rise to questions of interpretation. How extensively agreed upon must the provisions of Islam be before they can be considered as “established” and thereby be used to set limitations on legislation?

Considering the almost equal representation of Sunni and Shia Islam among the Iraqi population, there is also a question of whether the provisions must be agreed upon

within both Sunni *and* Shia Islam, or whether it is sufficient with an agreement by one branch. The first alternative constitutes a less strict restraining principle since the provisions agreed upon by both Sunni and Shia Islam will be fewer than those agreed upon by one branch only. On matters that fall under personal status<sup>122</sup> the solution according to article 39 is that legislation in this area depends on each branch of Islam. Therefore it is only required agreement within one branch regarding what constitutes the established provisions.

ii) Islam

There are various branches within Islam, each with their own provisions constituting Islamic law which in some areas may differ from the other branches.<sup>123</sup> The “provisions of Islam” or “Islamic criteria” will therefore not have the same content in all three constitutions. Accordingly the frame constituted by the restraining principle will differ in the three states.

The restraining principle in the Iranian constitution refers to the “*principles and rulings of the official religion of the country*”. Article 12 establishes Shia Islam and the branch of the 12 Imams as the official state religion. It is thereby not Islamic law in its general form that constitutes the criteria in the restraining principle but Islamic law according to the specific branch of Shia Islam.

The criteria in the restraining principle according to the Afghan and Iraqi constitutions are on the other hand simply “provisions of Islam”. Since neither of the provisions specify what is meant by “Islam” one must search for guidelines in the other constitutional articles. As with the Iranian constitution, one guideline can be found in the constitutional provision about the official religion.

Neither the Afghan nor the Iraqi constitutions mention any specific branch of Islam in the provision that establishes the official state religion.<sup>124</sup> However, if assuming that the Hanafi doctrine constitutes the official religion of Afghanistan, as discussed under section 5.1, one could also draw the conclusion that “Islam” in article 3 shall be interpreted as

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<sup>122</sup> See chapter 9.1.1.

<sup>123</sup> See chapter 2.2

<sup>124</sup> Afghan constitution2004 article2, Iraqi constitution2005 article2(1).

Islamic law according to the Hanafi school of Sunni Islam. This would mean a further specification of the restraining principle in article 3. Since the Iraqi constitution does not give similar guidelines it remains far from clear what provisions will or will not be deemed to constitute the “established provisions of Islam” in this context.

### 7.1.3 Harmonization with other constitutional provisions

In addition to a restraining principle based on Islam, the present Afghan and Iraqi constitutions also contain provisions about the respect for democratic principles and certain freedoms. Similar provisions are not found in the Iranian constitution, though also this constitution contains some articles which can be in tension with the restraining principle. The relationship between the restraint based on Islam and provisions on so-called “democratic principles” and other freedoms will be examined in this section. This relationship will have much to say about the reach of Islam as a restraining principle.

The tension has its clearest form in the Iraqi constitution which in the same article where the restraining principle based on Islam is found also contains two other restraining principles :”(B)*No law that contradicts the principles of democracy may be enacted.* (C) *No law that contradicts the rights and basic freedoms stipulated in this constitution may be enacted*”.<sup>125</sup>

In other words, the Iraqi constitution contains three restraining principles. There are thereby three sets of principles that Iraqi legislation cannot run counter. The first is based on Islam, the second on democracy and the third in the rights and basic freedoms stipulated in the constitution itself.<sup>126</sup>

As with the wording in the restraining principle based on Islam, also the language in the two other principles presents definition problems. This applies mostly to the principle contained in article 2(1) B. Exactly what is “*democracy*” and which of its “*principles*” are we speaking of?

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<sup>125</sup> Iraqi constitution 2005 article 2.

<sup>126</sup> The two other principles were included as a compromise to counterbalance the first principle. See Deeks & Burton (2007) p. 14.

From a semantic angle, the term “democracy” is derived from Greek and means “popular government”.<sup>127</sup> “Democracy” would thereby denote a form of government. “Principles of democracy” would in this context assumingly be for example free elections and popular sovereignty. However, today the use of “democracy” has expanded to cover a far broader area than what it initially involved. Concepts such as division of power and accountability of government are frequently referred to under “democracy”. Several political and social freedoms are likewise represented under “democracy” as an umbrella term, for example freedom of expression and association, freedom of the press and of political parties, due process of law and human rights. Considering that the Iraqi constitution is written in 2005, an era where the term “democracy” covers most extensively one cannot rule out the possibility that the term is intended to include more than simply popular government. Moreover, this finds support in the preamble that speaks of among others a democratic system with respect to the rules of law, the establishment of justice and equality and the rights and concerns of women. However, some of these rights and freedoms will be covered by the restraining principle in article 2(1)C which speaks of “*the rights and freedoms stipulated in this constitution*”.

Despite of this, or rather because of this, “democracy” remains a vague term with blurry borders. The reach of the restraining principle will therefore be correspondingly uncertain.

The content of the third restraining principle is more defined, since one simply needs to look at the constitution to find out which rights and freedoms it stipulates. These would be the rights and liberties listed in chapter one (articles 14-44), which also covers several rights that would fall under the so-called “principles of democracy”. Nevertheless, also the third restraining principle contains a definition problem represented by the use of the word “basic”, in the context that only the basic freedoms of the constitution can set a limitation to legislation. Which of the freedoms that are to be considered as “basic” remain indefinite.

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<sup>127</sup> Filosofileksikon(1996).

As seen above, all three restraining principles contain vague criteria which contribute to an unpredictable process of harmonization which in turn makes it difficult to predict the reach of Islam as a restraining principle. A harmonization must however necessarily be made. In this regard it is worth noting that the language used in article 2 assumes that there is no conflict between the established provisions of Islam, the principles of democracy and the rights and basic freedoms protected by the constitution.

In areas where the three principles overlap there will be no problem of legislation since no tension occurs. An example here is the right to bring a lawsuit before the court. Neither will there be any tension in areas where one or several of the principles are silent, for example laws on the environment.

The questions arise when two or all three of the principles go in opposite directions or are mutually exclusive. Since the constitution does not give any guidance on how to solve this problem, alternative ways of harmonization can be imagined.

i) Common denominator

One alternative is to find the common denominator of the three principles. This would mean that a law can only be enacted in the circumstance that it is in accordance with Islam, principles of democracy and the rights and basic freedoms stipulated in the constitution. This alternative would imply a considerable limitation of the field of legislation, since the area of the common denominator necessarily would be narrow. If the three principles were meant to overlap, there would be no need to formulate them as three individual principles. Finding a common denominator is not a real question of harmonization. Neither does the limited area left for legislation through this alternative represent an applicable or realistic alternative.

ii) Limitation of the reach of Islam as a restraining principle

A second alternative way of harmonization is to limit the reach of Islam as a restraining principle. This would mean that “the established provisions of Islam” must be understood within the frame set up by the “principles of democracy” and the “rights and basic freedoms “of the constitution. The two last principles would then be applied fully, while

the restraining principle based on Islam is accordingly limited. This will typically be the case regarding legislation on equal treatment. According to most schools within Islamic law, a woman is regarded half a man.<sup>128</sup> Inheritance laws that grant equal status to men and women would thereby mean a limitation on the reach of Islam as a restraining principle, while the two other principles are applied fully.

However, since the content of the two other principles are not precisely established, it is difficult to assess the degree of limitation of the first principle. Nevertheless, this interpretation will typically be necessary in order to implement the conventions on human rights, rights of the children and alike. For example the right to change religion in article 18 of the UN Covenant on Civil and Political Rights will lead to a breach of Islamic law where apostasy from Islam is considered a crime.<sup>129</sup> The implementation of this convention will therefore lead to a restricted interpretation of Islam as the restraining principle.

iii) Limitation of the reach of the two other principles

This alternative would imply the opposite of alternative ii. The restraining principle based on Islam is to be applied fully, while the two other principles are limited in order not to conflict with the established provisions of Islam. In this case, the frame around legislation will be made up from the established provisions of Islam, which would constitute the fundamental source of law. To use the same example as above, the inheritance law would in this case lead to a less advantageous position for women. Another example would be a criminal law forbidding the sentencing of children/minors for committed crimes. According to Islamic law majority is declared at the age of 15 for boys and 9 for girls.<sup>130</sup> Forbidding the sentencing of children would lead to a contradiction with the restraining principle, while it would be in accordance with principles of democracy and provisions on personal liberty. Such harmonization would imply that the two other principles are limited to the degree that they do not contradict provisions of Islam.

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<sup>128</sup> Schacht(1991)p.126.

<sup>129</sup> Schacht(1991)p.118.

<sup>130</sup> Schacht(1991)p.124. The various branches of Islam operate with different ages.

Unlike the Iraqi constitution which has three principles of restraint, the Afghan constitution only contains one clearly formulated restraining principle which is based on Islam. The constitution does however make several references to human rights charters and to democracy<sup>131</sup> and chapter 2 of the constitution which covers the fundamental rights and duties of citizens will make necessary an equal harmonization process as with the Iraqi constitution.

As the Iraqi constitution, the Afghan constitution is silent regarding how to deal with inconsistencies and seems to assume that there is no tension between the tenets and provisions of Islam and human rights charters and fundamental rights.

However, the fact that the only clearly formulated restraining principle regards Islam without similarly formulated principles regarding human rights or democracy, could suggest that Islam as a restraining principle is more far-reaching in the Afghan constitution.

#### 7.1.4 Review procedures

Another side of the question of Islam as a restraining principle is the question of the authority to give binding decisions on whether or not a law is in accordance with the established provisions of Islam. In other words, the authority to perform the interpretation above mentioned. I refer to this act in the following as “review procedures”. As a complement to the previous sections under 7.1 and 6.3, I will in this section look at the constitutional provisions on the procedures for review: Who performs it and how is it to be performed?

Among the constitutions of the three states, only the Iranian constitution establishes a specific organ for the determination of the conformity of laws with Islamic law.<sup>132</sup> According to articles 72 and 91 this power is with the Guardian Council<sup>133</sup> composed of 6

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<sup>131</sup> In addition to the preamble, see for example articles 6 and 7. Article 58 establishes an “Independent Human Rights Commission of Afghanistan” which has as its primary task to monitor respect for human rights.

<sup>132</sup> Also the constitution of 1906-07 established a body composed of Islamic jurists with the authority to perform judicial review. Though the provision formally remained in force, the organ stopped its function after only a few years in practice. Schacht(1991)p.110.

<sup>133</sup> Other functions of the Guardian Council are to determine the compatibility of laws with the constitution and to supervise all elections, article 99.

Islamic jurists and 6 regular jurists. The review of the laws takes place prior to a law's enforcement since all legislation passed by parliament must be sent to the Guardian Council for review.<sup>134</sup> The determination rests with the majority vote of the six members who are Islamic jurists (faqih).<sup>135</sup> The vote of the members who are regular jurists is therefore irrelevant in these cases.<sup>136</sup> To further ensure that no law that contradicts Islamic law is applied the constitution in article 170 also allows for a review *after* the enforcement of the law by prohibiting ordinary courts from executing laws in conflict with Islamic laws. According to the same article "everyone" has the right to demand the annulment of such laws.

Furthermore, the Iranian constitution establishes in article 112 an "Exigency council"<sup>137</sup> composed of members chosen by the leader, which holds the power to make a final decision in disputed cases between the parliament and the Guardian Council. In cases where the Guardian Council decides that a law is in conflict with Islamic law, the Exigency Council has the authority to overrule their decision if it decides that the law will be in the regime's interest.

A specific organ for the determination of the compatibility of laws with Islamic law is not established in the Afghan and Iraqi constitutions where the task rests with the courts. The Iraqi constitution states in article 90(2) that the interpretation of the constitutional provisions rests with the Federal Supreme Court. It is thereby the Federal Supreme Court that has the power to interpret the content of the restraining principle. Since there is no positive provision stating that the review must be performed prior to enforcement, it seems certain that the review has to take place after the law is in force on the basis of individual cases before the court. Review performed by regular courts is also the case in Afghanistan according to article 130. In addition, the Afghan constitution arranges for a second way in which judicial review can be performed. According to article 121, if requested by the

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<sup>134</sup> Iranian constitution 1979 article 94.

<sup>135</sup> The Guardian Council consists of 12 members: 6 Islamic jurists and 6 ordinary jurists. Article 91.

<sup>136</sup> On the other hand, the determination of a law's compatibility with the *constitution* requires an absolute majority among the 12 members. Article 96.

<sup>137</sup> Also referred to as the "Assessment Council", see e.g. Schirazi (1997) p.64.



government or by the courts, the Supreme Court must review laws for their compliance with the constitution.

As seen above, the power to interpret the restraining principle and ultimately the power to determine the role of Islam in legislation stays either with the courts as in Afghanistan and Iraq, or with a specific organ in addition to the regular courts as in Iran. The latter constitutional arrangement which provides for a control prior to the enforcement of laws implies that the review constitutes a necessary step in the legislation process. Without prior review, the restraining principle will have less practical value since there will be no control on legislation. According to the constitutions of Afghanistan and Iraq parliament will thereby have a greater role in determining the place of Islam in the legal order while jurists and judges decide what to read out of Islamic law.

The position of the body or person who is designated to perform the review procedure is therefore decisive. A strict interpretation of the provisions of Islam will lead to less adaptability to change through rigid norms that are not up to date with the present society, while a liberal interpretation can provide for a higher degree of flexibility. If the authority to perform the review stays with another organ than parliament, the legislation passed and approved by the representatives of the people can thereby be obstructed by someone non-democratically elected. Assuming, for example, that the majority of the representatives of parliament are progressive in mind and that this also reflects the popular stance, the legislation democratically approved can thereby possibly be hindered if the composition of the body that performs the review is conservative. In this case, one can ask how democratic the legislation process is and whether one can speak of true popular sovereignty.

## 7.2 The official state religion as a source of legislation

Closely connected to the question of Islam as a restraining principle, is the question of Islam as source of legislation, either as *the* source of legislation or as one of many sources of legislation. The drafting process of the Iraqi constitution shows that there were

serious disagreements on whether to use the indefinite article “a” or the definite article “the” about Islam as source for legislation.<sup>138</sup>

Of the constitutions of the three states, the Iranian and Iraqi constitutions make explicit reference to the role of Islam as source of legislation.<sup>139</sup> The Iranian constitution states in article 2(1) number 2 that “*divine revelation*” has a “*fundamental role in setting forth the laws*”, and article 4 which states that all “*laws and regulations must be based on islamic criteria*”.”Islamic criteria” is by itself a vague criteria. However, read in light of article 72 which contains the restraining principle, Islamic criteria would imply the “*principles and rulings of the official religion of the country*”.<sup>140</sup>

According to article 2(1) in the Iraqi constitution Islam is “*a fundamental source of legislation*”.<sup>141</sup> The wording in the Iraqi constitution is interesting because the words “a” and “*fundamental*” can give contradictory signals. On one hand, the use of “a” would suggest that Islam is one of many sources. On the other hand, although there can be several fundamental sources, the word “*fundamental*” signals that the weight of Islam as a source is considerable.

Though not having similar provision as the Iranian and Iraqi constitutions regarding the role of Islam as source of legislation, the restraining principle in the Afghan constitution can lead to a similar norm. In fact, the restraining principle in all three constitutions will affect the role of Islam as source of legislation. As discussed above, the role of Islam as a restraining principle is significant and will in practice lead to establishing Islam as at least *a* source of legislation. A strict interpretation of the restraining principle will accordingly establish Islam as *the* source of legislation. Islam as *the* or *a* source of legislation will therefore very much depend on how the restraining principle is interpreted and applied in practice.

If the harmonization of the restraining principles in the Iraqi constitution concludes that the restraining principle based on Islam is to be applied fully, it would accordingly be

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<sup>138</sup> See Deeks&Burton(2007)p.7.

<sup>139</sup> Iraqi constitution2005 article 2(1).Iranian constitution1979, the preamble and articles2(2) and 4.

<sup>140</sup> Iranian constitution1979 article 72.

natural to conclude that Islam is “*the*” fundamental source of legislation. This would however lead to an inconsistency between articles 2(1) and 5. The wording in article 5 is: “*The law is sovereign. The people are the source of its authority and its legitimacy(...)*”. “Law” can both mean the laws passed by parliament or it can denote the legal order in a more general sense. In either case the people will be the source of legislation. They would therefore have the authority to pass any law, both laws in accordance with Islam and laws which are not. In this case, the law is law because it is derived from the right source which is the people. However, if article 2(1) is understood as establishing Islam as *the* fundamental source of legislation the law is no longer law because it originates from the will of the people, but from divine authority. In this case, it is difficult to see how sovereignty is with the people.

On the other hand, if the restraining principle based on Islam is to be understood within the frame of the principles of democracy it would be natural to conclude that Islam is one of many sources, thereamong principles of democracy.

### 7.3 The official state religion and constitutional change

Not only does the constitution set the norms for the constitutional order of the state, but one of its important features is its ability to change with changing conditions. This section looks at the role of Islam as the official religion when it comes to constitutional change. There will thus be an examination of the material bounds for constitutional amendments, not the procedural norms for it.

Islam constitutes a material bound for constitutional amendments in both the Afghan and Iranian constitution. The Iraqi constitution does not contain material bounds at all, but it is procedurally more difficult to change the articles containing the official state religion and the restraining principle.<sup>142</sup>

Article 12 in the Iranian constitution states that the official religion of the state remains “*eternally immutable*”. Moreover, article 177 which directly concerns

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<sup>142</sup> The Iraqi constitution establishes three types of procedures depending on the subject for the amendment. For issues that fall under article 122(2), thereamong the official state religion and the restraining principle, a more thorough procedure is required.

constitutional amendments states more broadly that the constitutional articles “*related to the Islamic character of the political system; the basis of the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran(...)* the wilayat al-amr; the Imamate of Ummah(...)*official religion of Iran(Islam) and the school(twelve Ja’fari)are unalterable*”. Similar provision is found in article 149 in the Afghan constitution which states that “*the principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended*”.<sup>143</sup>

The use of the verb “amending” in the Afghan constitution can be interpreted in two ways. Firstly, “amended” can be interpreted as added, thereby establishing the mentioned principles regarding Islam as a maximum. In this case, new principles that fortify or increase the role of Islam and the Islamic Republic cannot be added. This interpretation would prevent a further strengthening of the role of Islam in the Afghan constitution. Second, “amended” can be interpreted as “modified” or changed in the sense of reducing. This would mean that a further islamization of the constitution is possible, since the relevant provisions would operate only as a minimum with regard to the role of Islam. In any case, both interpretations mean that the present status of Islam in the constitution cannot be reduced. In the first case, the role of Islam remains static, while the possibility for an increased role remains open in the latter case.

Similar question of interpretation does arise from the provision in the Iranian constitution. Since the constitution of 1979 already includes Islam in most of its articles, it would be difficult to interpret “unalterable” as anything else than referring to the impossibility of a weakening of the role of Islam.

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<sup>143</sup> The wording in the constitution of 1964 was “*adherence to the basic principles of Islam, constitutional monarch in accordance with the provisions of this Constitution, and the values embodied in article 8, shall not be subject to amendment*”.

## 8 THE OFFICIAL STATE RELIGION AND EDUCATION

The experience of Afghanistan during Taliban, where religious schools<sup>144</sup> were used to promote extremism, shows that the education has great impact on the mindset of children who later move out into the wider community. The constitutional provisions regarding Islam in the educational curriculum serve as a guideline on what kind of ideas the state seeks to develop in its population.

The right to education is guaranteed by the constitutions of all three states,<sup>145</sup> but only the Afghan and Iranian constitutions state that the curriculum must be based on Islam. This was neither the case in the Iranian constitution of 1906-07 nor in the Afghan constitution of 1964 which both were mainly aiming at establishing education as a right.<sup>146</sup>

According to article 45 in the present Afghan constitution, the educational curricula must among other things be “*based on the tenets of the sacred religion of Islam*”. Moreover, the state “*shall develop religious subjects curricula for schools on the basis of existing Islamic sects in Afghanistan*”.

The Iranian constitution lists in article 3(3) free education as one of the goals in order to attain the objectives in article 2 which establishes the Islamic Republic as a system. In addition, article 16 makes the teaching of Arabic compulsory in school based on the reason that the language of the Quran and Islamic texts are in Arabic.

In Iran, the establishment of schools based on other religions is a right granted only to followers of the schools within Sunni Islam and to Christians, Zoroastrians and Jews.<sup>147</sup> According to article 45 in the Afghan constitution, similar right is given only to existing Islamic sects.

Based strictly on the language of the constitutional provisions it is difficult to conclude how schools will apply Islam in their curricula. However, the step from not

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<sup>144</sup>Jones(2007)p.32.

<sup>145</sup>Afghan constitution2005 articles 17, 43 and 45, Iranian constitution1979 articles 3(3) and 30, Iraqi constitution1990 article 34.

<sup>146</sup> Afghan constitution1964 article 34, Iranian constitution1906-07 article19.

<sup>147</sup> Iranian constitution1979 articles 12-13.

mentioning religion to stating it as the foundation for education implies giving Islam a far more established role in the system of education.

## 9 THE OFFICIAL STATE RELIGION AND CIVIL LIBERTIES

### 9.1 Religious liberty

One way to examine the status of Islam as the official religion is to see it in relation to constitutional provisions regarding groups that belong to another or to no religion. This may give an indication on how absolute the status of the official state religion is and to what degree it represents a restraint on the practice of other beliefs. Religious liberty includes not only freedom of belief, but also the right to express the beliefs as well as the right to assembly.

All three constitutions contain provisions which to various degrees allows for religious liberty for followers of other faiths than that of the official religion.

Religious liberty for non-Muslims is expressed most clearly and unlimited in the Iraqi constitution, article 2(2). This article must be read in light of article 41 which explains the content of the expression “*full religious rights*” as used in article 2, and specifies that all religions and sects freely can practice their religious rites and manage religious endowments, affairs and institutions. Unlike the Afghan and Iranian constitutions, religious liberty according to the Iraqi constitution also includes the right to change religion *from* Islam. Article 7 specifically bans accusation of apostasy.<sup>148</sup>

The Afghan constitution contains a similar provision as what that of the Iraqi constitution, with the addition of an important limitation. According to article 2 followers of other faiths are free in the exercise and performance of their religious rituals if these are “*within the bounds of law*”. Even though the constitution seems to grant full religious

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<sup>148</sup> The Arabic version of the constitution is more explicit regarding the ban on apostasy by applying the word “*takfir*” rather than the English “*infidel*”. See Brown(2005).

<http://www.carnegieendowment.org/files/FinalDraftSept16.pdf>

freedom, the reference to the limits imposed by ordinary law without identifying any principles or guidelines represents a weak protection of religious liberty. As a comparison, religious liberty in the constitution of 1964 was limited by “*laws for public decency and public peace*”.<sup>149</sup> The lack of similar specification gives religious liberty a more unpredictable status under the present constitution. In order to further specify what kind of laws that can be used as a limitation one can however involve article 24 in the interpretation of article 2. Article 24 which describes liberty as a “*natural right*” states that only laws regarding other peoples’ freedoms and the public interest can impose a limitation to liberty. In light of this provision, therefore, the “*bounds of law*” in article 2 can only refer to laws regarding public interest and other peoples’ freedoms. Nevertheless, “*public interest*” is still less defined than the wording from the constitution of 1964.

The most categorized classification of citizens based on their religious belonging is found in the Iranian constitution which divides Iranians into three categories. The first category is those who belong to the official state religion. The second category consists of other Islamic schools, both Sunni and Shia. This group is given a relatively high status by the constitution which in article 12 states that the followers of these schools are “*free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status and related litigation in courts of law. In regions of the country where Muslims following any of these schools of fiqh constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school of fiqh, without infringing upon the rights of the followers of the other schools*”.

The third category consists of non-Islamic religions. This category can be divided into two sub-categories: the “*only recognized*” religious minorities<sup>150</sup> and the non-recognized religious minorities.<sup>151</sup> According to article 13, the *only* recognized religious minorities are the Zoroastrians, the Jewish and the Christians. This group does not enjoy the same status as the second category, but is “*free to perform religious rites and*

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<sup>149</sup> Afghan constitution 1964 article 2.

<sup>150</sup> Iranian constitution 1979 article 13.

<sup>151</sup> Ibid. articles 13-14.

*ceremonies and to act according to their own canon in matters of personal affairs and religious education*". Other religious minorities than these three are referred to as "non-Muslims".<sup>152</sup> The use of the word "only" in article 13 indicates that religious minorities from other groups are not recognized. The only direct reference to the latter is made in article 14, which unlike the articles related to the other religious groups does not state the group as the subject, but rather deals with it as the object. The subject is instead the Muslim population, and the article is more concerned with how Muslims should treat non-Muslims.

There is thereby a constitutional lack of state obligation in relation to respecting the rights of non-Muslims other than the Zoroastrians, the Jewish and the Christians.

In this connection, there is an inaccuracy in the English translation that can be misleading. The English translation applies, in article 14, the term "human rights", in the context that "*all Muslims are dutybound to treat non-Muslims in conformity with ethical norms and principles of Islamic justice and equity and to respect their human rights*". The use of the term "human rights" would suggest that also this third category of religious groups would have the liberty to perform religious rites and enjoy religious freedom in accordance with the Universal Declaration of Human Rights<sup>153</sup> and the common perception of human rights.<sup>154</sup> In this regard, the wording "only recognized" in article 14 would have no meaning. Followers of other religions cannot at the same time be excluded from the recognized religious groups *and* have their human rights, which include freedom of religion and the exercise thereof, respected. Evidently, "human rights" in this context must have a different meaning. The original version of the constitution in Farsi, applies the words "hooghogh-e ensani", which although word by word can be translated into human rights, does not have the same content.<sup>155</sup> When referring to what is commonly understood as

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<sup>152</sup> Ibid. article 14.

<sup>153</sup> Universal Declaration of Human Rights, article 2 and 18.

<sup>154</sup> "Human rights" is not a precise term and its content depends on which convention one refers to. However, there is a somewhat common perception as to what constitute some of the basic principles of human rights.

<sup>155</sup> The French translation applies the following wording: "*respecter leurs droits en tant qu'êtres humains*". This is an unofficial translation from

[http://www.jurispolis.com/dt/mat/dr\\_ir\\_constit1979/dt\\_ir\\_constit1979\\_index.htm](http://www.jurispolis.com/dt/mat/dr_ir_constit1979/dt_ir_constit1979_index.htm)



human rights, for example in the context of the Universal Declaration of Human Rights”, the correct and standard term in Farsi is “hooghogh-e bashar”. In order to understand what the constitution means through the use of “hooghogh-e ensani” a brief look at Islamic law can prove helpful.

According to Islam the world is divided in two: 1) places under the government of Islam (dar al-Islam =house of Islam), and 2) places under non-Islamic governments (dar al-harb = house of war). Islamic attitude towards non-Muslims is the law of war. They must be converted or subjugated, otherwise they must be killed. A treaty of surrender (dhimma) forms the legal basis for the treatment of non-Muslims who are subject to it. Under such treaties, Muslims undertake to safeguard the life and property of the non-Muslims, in other words respect their “human”(living) rights.<sup>156</sup> Historically such treaties were concluded only with the people of the book, which means Jews, Christians and Zoroastrians. Other non-Muslims were unprotected by law, unless given a temporary safe-conduct.

Against this background, the wording in article 13 does not imply respecting the human rights of the religious minorities, but respecting their human rights in an Islamic context which means that their lives and property must be respected. The discussions from the Assembly for revision of the constitutional draft also support the conception that “human rights” are understood in an Islamic context. According to the president of the assembly, there was no need to refer to the human rights since “*the rights of these groups were determined 1400 years ago in the quranic verses*”.<sup>157</sup>

This inaccuracy in the English translation has led to a perception among some people that the Iranian constitution guarantees the human rights of non-Muslims.<sup>158</sup> The Iranian constitution does not even in any place guarantee the human rights of Muslims, let alone non-Muslims.

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<sup>156</sup> Schacht(1991)p.130-131.

<sup>157</sup> Discussions in the Assembly for revision of the constitutional draft, p.1781-1784(vol3).

<sup>158</sup> This assumption is made by for example Behdad&Sohrabi(2006)p. 76.

### 9.1.1 Personal status

Historically, Islamic law made a clear distinction between the legal position of Muslims and non-Muslims, also on issues that fell outside of what is today considered “personal status”.<sup>159</sup> Non-Muslims were exempt from specifically Muslim duties and could follow the rules of their own religions with regard to what was lawful for them.<sup>160</sup>

The Iranian and Iraqi constitutions leave it to each religious community to act according to their own religion regarding issues that fall under the personal status.<sup>161</sup> Aside from this, personal status is differently organized in the three states.

The Iranian constitution acknowledges only the right of Muslims (from all branches), Jews, Christians and Zoroastrians in connection to personal status.<sup>162</sup> However, as seen under chapter 6.3.2 only the Muslim schools are given official status related to litigation in this field. The constitution is silent regarding how litigation related to personal status of non-Muslims is treated.

The Iraqi constitution on the other hand is general and states that “*Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices(...)*”. However, it does not specify that the courts have to apply religion-specific regulations in case of litigation in the area of personal status. Prior to 1959, matters of personal status were under the jurisdiction of religious courts, with each minority having its own court which only considered these issues. With the personal status law of 1959, still in force, the personal status is unified for Shia and Sunni. Litigation in this field would accordingly go before the regular courts. Jews and Christians kept their separate systems.<sup>163</sup>

The Afghan constitution does not contain a positive provision regarding personal status. It follows, however, from article 131 that Shia Muslims have a certain position in relation to personal status. In the case of lack of law or clarification in the constitution the

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<sup>159</sup> Schacht(1991)p.131.

<sup>160</sup> L.c.

<sup>161</sup>Iranian constitution1979 articles 12-13, Iraqi constitution2005 article 39.

<sup>162</sup>Iranian constitution1979 articles 12-13.

<sup>163</sup> Brown(2005) ”Debating Islam in Post-Baathist Iraq” p.5.

courts must “*rule according to laws of this sect*”. Moreover, the recent and controversial law passed regarding the status of Shia women<sup>164</sup> illustrates that this branch of Islam has the right to legislate according to their own provisions on matters of personal status. In Afghanistan, personal status therefore has a side to legislation which thereby on this area is not applicable to all citizens in general.

## 9.2 Freedom of expression and assembly

Religious freedom and freedom from religion are connected to freedom of expression. The first two liberties would have little value if the law did not protect the right to express the beliefs. Freedom of expression is the freedom of verbal speech and any act of seeking, imparting and receiving ideas and information, regardless of the medium used.<sup>165</sup> No state allows for an absolute right to freedom of expression, but the right is commonly subject to limitations, for example on certain types of racist speeches.

The Iranian constitution contains no general provision regarding freedom of expression, which neither did the constitution of 1906-07. The only articles related to this right are in connection with publications and the press and the state radio and television. Freedom of expression through these media is limited to expressions which are in accordance with “*Islamic criteria*” and which are not “*detrimental to the fundamental principles of Islam*”.<sup>166</sup>

The Afghan and Iraqi constitutions grant freedom of expression in article 34 and 36 respectively. Though speeches against Islam are not explicitly forbidden, the Afghan constitution could theoretically impose such a limitation with the words “*in accordance with provisions of this constitution*”. Since the constitution establishes that no law can

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<sup>164</sup> See [http://news.bbc.co.uk/2/hi/south\\_asia/7977293.stm](http://news.bbc.co.uk/2/hi/south_asia/7977293.stm). The law is not yet made public and there are therefore no certain sources regarding its content. The law implies that the Shia Muslim population has its own family law. See [http://www.rfi.fr/anglais/actu/articles/112/article\\_3387.asp](http://www.rfi.fr/anglais/actu/articles/112/article_3387.asp).

<sup>165</sup> This is the definition used in the Universal Declaration, article 19.

<sup>166</sup> Iranian constitution 1979 articles 175(1) and 24.

contradict Islamic law, and Islamic law bans declarations against Islam<sup>167</sup>, such statements can fall under the “*provisions of this constitution*”.

The right to form political parties contains on the other hand a strict limitation in article 35 of the Afghan constitution, which had no precedence in the constitution of 1964. According to this article, the charter and manifesto of political parties “*shall not contravene the Holy religion of Islam and principles and values enshrined in this constitution*”. This provision presents thus a limitation on the freedom of expression in the context of political parties. The present constitutional arrangement in this matter represents a further strengthening of the role of Islam since similar limitation was not contained in the constitution of 1964.<sup>168</sup>

The right to assembly and to form associations is regulated in article 35 in the Afghan constitution and article 37 in the Iraqi constitution, which both grants the freedom but leaves it to ordinary law to regulate the boundaries of these freedoms. The reference to ordinary law could in practice therefore impose the same limitations as what is stated in the Iranian constitution. The Iranian constitution, in article 26, poses an explicit ban on associations and political parties which violate “*the criteria of Islam, or the basis of the Islamic Republic*”. Moreover, public gatherings and marches are in article 27 limited to those not detrimental to the “*fundamental principles of Islam*”.

### 9.3 Equality and non-discrimination

States with an official religion guarantee the equal treatment of their citizens to different degrees. The official religion can be the ground upon which freedoms of people from other religions are limited or it may give certain privileges and rights to those belonging to the official religion. Since discrimination can be based on grounds other than religion, I delimit this section to the role of Islam in provisions which can lead to a non-equal treatment of followers of other religions, and of men and women.

The present constitutions of all the three states contain an article guaranteeing the non-discrimination and equal treatment of the citizens. In the Afghan constitution, this

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<sup>167</sup> See Schacht(1991)p.187.

<sup>168</sup> Afghan constitution1964 article 32.

provision is found in article 22 that forbids “*any kind of discrimination and distinction*”, and which explicitly establishes gender equality. The Iraqi constitution expresses this principle in three articles: Article 14 concerns equality before the law, and lists specifically religion as one of the grounds upon which discrimination cannot be based. Article 16 guarantees equal opportunities “*for all Iraqis*”, while article 20 is directed towards political rights and participation in public affairs.

Unlike the Iraqi constitution, the Iranian constitution does not mention religion in the listing concerning grounds for discrimination in article 19. There is therefore no positive provision guaranteeing equal treatment on this basis. Characteristic for article 20 which concerns equality before the law and article 21 which is directed towards women is their limitation to “*conformity with Islamic criteria*”. Since gender equality is not recognized in Islamic law this provision will more likely guarantee the un-equal treatment of men and women since this is what would more in line with “*conformity with Islamic criteria*”.<sup>169</sup> From the discussions in the Assembly for revision of the constitutional draft<sup>170</sup> it is furthermore evident that providing gender equality was not the intention of the drafters. In fact, a number of members argued for the removal of this provision based on the fact that there was no such thing as gender equality in Islamic law. Based on the contradiction that follows from the wording “Islamic criteria” and the intention of the drafters, one can conclude that article 21 does not guarantee equal treatment of men and women.

In the case of all three states, one can ask whether the restraining principle in practice will lead to a breach of the constitutional provisions regarding gender equality. The recent law passed in Afghanistan can provide as an example.<sup>171</sup> The law limits the rights of women through among other things requiring the permission of the husband for leaving the house. Such a law illustrates the contradiction between the restraining principle in article 3, the provision on gender equality in article 22 and the respect for international

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<sup>169</sup> See Schacht(1991)p.126-127 on the legal position of women in Islamic law.

<sup>170</sup> Discussions in the Assembly for revision of the constitutional draft, volume1 p.691-694.

<sup>171</sup> See footnote 158.

human rights in article 7. So far, this case shows that the two last articles are limited by the restraining principle. It remains to see how the case eventually will be resolved in court.

Even though the Iraqi and Afghan constitutions contain provisions that guarantee the equal treatment of the citizens based on religion, there are other provisions that to some extent undermine these and that in practice lead to a distinction based on religion. This is the case with article 45 in the Afghan constitution that establishes a unified educational curriculum based on Islam and article 35 which forbids political parties that have charters which contravene Islam. In addition, as seen under chapter 6, the official state religion operates as a restraint for holding certain positions. The position as president is in the Afghan constitution reserved for Muslim Afghans, while members of the Federal Supreme Court of Iraq necessarily must be experts in Islamic jurisprudence,<sup>172</sup> thereby excluding non-Muslim citizens from these positions. Even though a non-Muslim can be an expert in Islamic jurisprudence, he will not have the right to issue binding judgements regarding Muslims according to Islamic law.<sup>173</sup> Considering the constitutional provision in both the Afghan and Iraqi constitution regarding the application of Islamic law in the absence of other laws, the rulings of the court must be made by a Muslim judge.

The present constitutions of these states thereby present a stronger position of Islam since neither the Afghan constitution of 1964 nor the Iraqi constitution of 1990 contained similar provisions. In not making any distinction based on religion these previous constitutions could be described as secular since the official religion did not operate as a criterion for certain positions or for certain rights.

Provisions that imply different treatment of followers of the official religion and others are much more frequent in the Iranian constitution. The position of the leader, the president, head of the judiciary and judges are all reserved for Muslims.<sup>174</sup> Furthermore, does the army, as stated in article 144, require commitment to Islamic ideology. Article 26, limits the formation of political parties to those that do not violate the criteria of Islam, and goes farther than the Afghan constitution by also including the formation of non-political

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<sup>172</sup> Afghan constitution2004 article 62(1), Iraqi constitution2005 article 89(2).

<sup>173</sup> Schacht(1991)p.125 and 133.

<sup>174</sup> Iranian constitution1979 articles 109,115,157, 163.

parties and associations and the right to public gatherings and marches.<sup>175</sup> The right to choose profession is moreover limited to professions that are not contrary to Islam.<sup>176</sup>

At first glance, such provisions seem to be in contradiction with article 20 which speaks of the right of all citizens to “*enjoy all human, political, economic, social and cultural rights, in conformity with Islamic criteria*”. As discussed earlier, the criteria of Islam operates as a limitation to the enjoyment of the listed rights.

## **10 THE ISLAMIC STATE- some paradoxes**

The present Afghan and Iranian constitutions declare the state to be an “*Islamic Republic*”.<sup>177</sup> Since a “republic” is a way in which a state is governed, Islamic Republics are sometimes referred to as “Islamic states”. As we have seen, the role of Islam differs in the constitutions and the two states will therefore be two different Islamic states. Iran gives for example far greater place to Islam as an ideological foundation for the state.

However, they share the fact that they have very little in common with the Islamic state as it has existed through the history of Islam. The only form of government which had full approval in Islam was the institution of the caliphate over the Muslim Ummah,<sup>178</sup> lead by the caliph as the successor of Muhammad and with all powers concentrated in his position.

Today, there are no competitors to democracy as a theory of government. Against this background, both Afghanistan and Iran as Islamic states have adopted ideas and institutions which were unknown to or prohibited by the Islamic state as it existed historically. Division

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<sup>175</sup> Ibid. article 27.

<sup>176</sup> Ibid. article 28.

<sup>177</sup> Afghan constitution 2004 article 1, Iranian constitution 1979 article 1 and preamble.

<sup>178</sup> Muslim Ummah means the Muslim community, used about the unified Islamic world without respect to state borders. Milliot(1987)p.25.

of power, parliament, elections and even a constitution<sup>179</sup> are examples of practices and concepts which seem to co-exist with the Islamic state of today while they would be contradictory to the rule of the caliph. On the outset, the Islamic state seems to have accepted the compatibility of Islamic law and state with democracy through the use of these concepts. This phenomenon can be regarded either as a possible adaptation or as an impossible paradox. In any case, one cannot but question how there can be speak of true democracy when the Islamic state acknowledges divine sovereignty rather than popular sovereignty. The role of the Exigency Council in the Iranian constitution as well as the seemingly arbitrary way to decide what parts of Islam which can or cannot be contradicted illustrate that it is not primarily Islam as religion and legal system that constitute the Islamic state, but the role of Islam as a political tool.

## 11 FINAL REMARKS

I have in this paper attempted to give an overview of the place of Islam in the constitutions of three states at two different periods in time. Being the most important document in the organization of the state,<sup>180</sup> the constitution is closely linked to politics. I have tried to avoid entering into the latter area and rather focus on the constitution as a solely legal document. In these final remarks I will however include a few issues of a political dimension.

After a period of evolution in direction of secularization in Afghanistan, Iran and Iraq, the process has been reversed and religion holds a more significant position in the present constitutions than it did even in the very first constitutional documents of these states.

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<sup>179</sup> Based on the orthodox Islamic doctrine that man-made laws are forbidden Saudi Arabia has no constitution.

<sup>180</sup> Though not necessarily followed up in practice.



Aside from an increased position of Islam in general, its role in the constitutional arrangements of Afghanistan, Iran and Iraq varies to a large degree. Even though all three constitutions establish Islam as the official state religion its content is far from the same. The most moderate position of Islam is found in the Iraqi constitution which nevertheless in Iraqi context is the most Islamic constitution so far. The intervention on the state by Islam reaches its ultimate level in the Iranian constitution, which through the concept of the *velayat-e faqih* in many ways resembles the historical Islamic caliphate.

Islam has been given a supra-constitutional position in the Afghan and Iranian constitutions through eliminating the possibility for a reduced role of Islam in the constitution. The only way in which secularism can be introduced or the role of Islam reduced in these two states is therefore by a new constitution, and not through constitutional amendments.

Despite aspirations for an Islamic state, these states of today have to face the needs, expectations and challenges in their present societies which differ from those of the historical Islamic state. The result is constitutions which are full of contradictions and paradoxes, where provisions of Islam go in one direction and respect for equality in another. The constitutions are more in favour of “*Islamizing modernity rather than modernizing Islam*”.<sup>181</sup>

The application of “provisions of Islam” as a standard makes the constitution difficult to apply since this standard does not have an established content. The classical system of Islamic law, developed by Islamic jurists, was not a unitary system. There was no counterpart to the Papacy in the Roman Catholic Church that could define orthodoxy for the entire community of believers.<sup>182</sup> The provisions of Islam will thereby only have the content that the state- through the organ authorized to review the provisions- chooses to assign them. As a standard, the provisions of Islam will therefore not be very suitable in the constitution given their unstable and unpredictable nature.

The fortified position of Islam as a criterion for holding certain posts and government positions is worrisome and surprising given the recent date of the adoption of

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<sup>181</sup> The expression is borrowed from Arkoun(2009) 19<sup>th</sup> Conference of Latinity.

<sup>182</sup> Mayer(1987)p.154.

the constitutions and the international presence during the drafting of two of them. In an increasingly globalized world, such provisions witness a lack of plurality consciousness and lead to the exclusion of parts of the population from the decision-making process. Against this background, one can ask whether the notion of democracy is fully applicable.

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