I. Introduction

The debate of rule of law concept(s) cannot be concerned with only the views put forward by the maîtres à penser of “Western” countries – at least for those rejecting a parochial “Eurocentric” bias. It is obvious that the attitude of “Western” intellectuals towards the “rule of law” is different from the attitude raised by “non-Western” (trained) partners, such as those who belong to the “Islamic World”. While “Westerners” belong to a historically unified tradition - even while it is open to different interpretations and outcomes -, “non-Westerners” look at the tradition “from outside” and compare it to their own (legal-) cultural forms (Costa / Zolo 2007: ix-xiii). Due to fact the term’s origin is “Western”, it requires a clarification as to the context in Islamic modeled states. That said, this article attempts to give an insight into the discourse of the rule of law in Islamic modeled states in general. The evolution of legal theory within current Muslim context cannot easily be equated with the general “Western” understanding of ‘rule of law’ due to inherently different historical and traditional Islamic influences, which is therefore why I use the term “Islamic modeled”. On the basis of the wide and especially complex field, it is, accordingly, neither possible to discuss all notions nor the entire spectrum of national views in the “Islamic World” (see the country reports on Afghanistan (Elliesie 2010b), Egypt (Elliesie 2010c), Sudan (Elliesie 2010d), Iran (Moschtaghi 2010)).

II. Shar’a and State Law

Like other believers, Muslims have always sought to experience their faith in terms of individual and collective conformity with its normative system, commonly known as ‘shar’a’, which is supposed to regulate Muslim daily life (An-Na’im 2010: 44). Accordingly, but generally speaking, Muslims in the so-called “Islamic World” believe ‘shar’a’ to be directly derived from the Qur’an and Sunna through a specific methodology (usul al-fiqh) that was developed by Muslim scholars in the eighth and ninth centuries (An-Na’im 2010: 44; Rohe 2009: 45; Schacht 1982: 59; Krawietz 2002; Mohammad 2002; Löschner 1971: 32). Paradoxically, that belief also underlies the ambiguous status of ‘shar’a’ in relation to state law (Hans 1960). On the one hand, the common perception of ‘shar’a’ makes it “more than state law” because of its comprehensive scope, from doctrinal matters of belief and religious rituals, ethical and social norms of behavior, to seemingly legal principles and rules. This comprehensive scope itself, on the other hand, means that ‘shar’a’ is also “less than law”, in the sense that its enforcement as law requires the intervention of legislative, judicial and administrative organs of the state. Yet, this sort of state action – a necessary product of mundane, human politics – is therefore not divine command as such (An-Na’im 2008: 319, 323).

III. The Islamic modeled State and the question of Sovereignty

Considering, however, the notion of “divine sovereignty”, which is popular among many Islamic thinkers and young intellectuals, the question how we should understand the proclamation al-hukmiyya il-Allh arises – a term roughly understood as “sovereignty (rulership) belongs to God”. Bernard Lewis, for example, maintains that

> “the Islamic state was in principle a theocracy, not in the Western sense of a state ruled by the Church and the clergy […] but in the more literal sense of a polity ruled by God […]”. (Lewis 1993: 89 ff.; quoted by Lipset 1994: 6)

This explanation paves the way for viewing the Islamic polity as a ‘despotical’ state, for God is hardly the sort of ruler who could be held to account for His actions, or who would need to consult with any of His subjects. Yet, the Tunisian Islamic thinker Rshid al-Ghannsh offers a more plausible explanation of “divine sovereignty”. Accordingly, he elucidates that

> “[t]hose who proclaim that sovereignty belongs to God do not mean to suggest that God rules over the affairs of the Muslim community directly, or through the clergy: For there is no clergy in Islam, and God cannot be perceived directly, nor does He dwell in a human being or an institution which can speak for Him. What the slogan ‘sovereignty belongs to God’ means is rule of law (hukm al-qanun), government by the people”. (Al-Ghannsh 1999: 155)

Moreover, ‘Azm Bishra, who claims that in times when social consciousness takes a religious form, calls for the application of ‘shar’a’ may express a democratic tendency, or at least an opposition to despotism, simply because ‘shar’a’ rule implies restrictions on the exercise of political power over and above the mere will of rulers (Bishra 1993: 83).

IV. The Islamic modeled State and Authority
That said, one is able to state in this specific context that the nature of religious authority is, or should be, inherently different from the nature of political authority and cannot be evaluated except within the free conscience of each believer. Whenever religious authority is claimed for state legislation or policy, it is really for the enforcement of the views or beliefs of the ruling elite. The ruling elites can only act from their own perspective, and are therefore subject to criticism and challenge from other perspectives. Since such views are always those of fallible human beings and never divine, they should not have higher religious authority than those of other human beings. Believers cannot express legitimate criticism if legislation and public policy are alleged to be sanctioned by divine command. In fact, ruling elites claim religious mandates precisely in order to insulate their actions against criticism and political change. Yet shari'a cannot be enforced by the state, because coercion negates the religious notion of compliance. For compliance with any Islamic precept to have religious value, it must be completely voluntary, done with the required personal pious intention (riyāḍ). Voluntary intent to comply cannot be ascribed to an act that is performed under the coercive authority of the state (An-Na'im 2008: 112). Hence, remarks by Rshid al-Ghannash, ‘Azm Bishra, and others (Al-Bishr 1996: 121) indicate that it may be possible to find elements of constitutionalism in Islam. These elements can be expressed by means of modern terms, such as “rule of law” (Bahlul 2007: 519) or (more or less) equivalents such as siyadät al-qnn in the Sudan and Egypt or ik绽放in qaṭr in Joschtaghi 2010). Those terms, as a principle enshrined in constitutions (Cf. Article 64 of the Egyptian Constitution), provide that e.g. “the sovereignty of law siyadat al-qnn is the root of the state’s power” (e.g. Elliesie 2010c: 3).

V. The Islamic modeled State and the Rule of Law

Accordingly, contemporary scholars of Islamic law have placed a strong emphasis on the notion that legal doctrine is in a state of constant flux and development. The premium placed on the historical development of doctrine has generated new ways of thinking about law and its place in Islamic societies (Hurvitz 2008: 360): The role of shari'a in the administration of justice probably worked well under the imperial states of the pre-colonial era, which had minimal involvement in the daily governance and administration of justice among local communities. However, the situation has significantly changed with the introduction of the European model of the state and conceptions of law as a result of colonialism (An-Na'im 2008: 319, 323). The legal order, in the modern sense, constructed in the late nineteenth century, augmented the authority of the central state even as it placed (sometimes feeble) limitations on specific individuals and office holders. Hence, the relationship of law to domination and authority could, generally, be considered more political than ideological in contemporary understanding. Legislation became the exclusive domain of the state (Brown 1997: 128). The current legislature enacts a huge number of legislative texts, and its courts are swamped with civil and criminal disputes, meaning that the people are somehow convinced that courts effectively apply national enacted law. Quite likely, this shows the paradoxical use of the concept of the rule of law in those countries: its respect may be deemed to protect individuals against the state’s arbitrariness, though it may also be used to build “a stronger, more effective, more centralized and more intrusive state” (Brown 1997: 237). This is exemplified by the relationship between law and morality. On one hand, to resort to moral (Islamic) principles allows individuals to challenge the state’s authority; on the other hand, however, it also enables the judiciary to construct a legal and officially sanctioned interpretation of such principles. In other words, morality constrains law, though it is lawyers who make morality legal. By so doing, the allegedly heteronomous status of morality is turned into a positive and legal rule. The rule of law is thus strengthened, given that people and the state must abide by legally and judicially defined rules. However, this is a “rule of lawyers’ law”: thus, it raises the issue as to the latter’s power to exercise a legislative function. Hence, in the context of many Islamic modeled countries, where politically sensitive issues are monopolized by the executive by creating a dichotomy opposing not law to morality but rather ordinary law to exceptional law, the challenge is no longer simply that of the rule of morality constrained law. Rather, the problem is also about the rule of hierarchical law, whereby cases are treated differently according to their political nature. The rule of law is thus turned into the rule of the ruler (Dupret 2007: 558).

1. The Separation of Power Principle

Turning to the question of internal workings of government from a shari’a “a point of view”, the first thing to notice is that shari’a (as it has been understood and practiced until very recently) does not explicitly offer a doctrine of the “separation of powers”. This should come as no surprise, for the Western doctrine of the separation of powers itself has recent origins. Moreover, the Islamic traditional shari’a did not conceive of distinct governmental powers to be separated from each other, in the first place (Bahlul 2007: 531).

There is, of course, no reason why contemporary shari’a thinkers cannot take up the challenge to elaborate a position with respect to the separation of different branches of government. One may refer to Ab I-Hasan ‘Al al-Mawdd’s (972 - 1058 CE) political theory, which, in some ways, represents the “political sphere”, as conceived by traditional shari’a. In his Todw ad-dustur al-islam Ab I-Al al-Mawdd recognizes an existing but “unwritten” Islamic constitution, and in his al-Qnn al-islam wa-turuq tanřidhilī/ he explains various types of law (constitutional and other) which Islamic lawmakers need to design. Ab I-Al al-Mawdd paves the way for a discussion of the meaning and role of the parliament (“legislative assembly”) in the Islamic regime, because he takes the decisive step of espousing popular government, where people can freely elect their representatives. Adapting an ancient term to modern usage, Ab I-Al al-Mawdd often refers to the parliament as “those who loose and bind” (ahl al-hall wa-l-‘aqd). He raises the question of what position they have, whether they serve as mere consultants to the caliph, or whether the caliph is “bound” by their decision. His answer is that

“we have no choice but to make the executive power subject to the majority decision of the legislative council”. (Mawdd 1970: 38)

Seen as a general tendency in contemporary Islamic modeled states, especially in the Middle East, the subordination of all organs of the state to the executive authority is obvious, due to the fact that a series of new constitutions and basic laws were written, the extensive authority grants to the executive to rule by decrees (e.g. qant, marum, jamar-e taqrn, moqarran), the creation of a weak parliament, and the foundation of a series of mass political organizations to replace old, multiparty systems. Yet, regimes left the judicial structure alone. States of emergency and new constitutions granted regimes a fairly free hand in drafting legislation. Attempts by the courts to curb executive authority were often effectively forestalled.

In this context, Egypt is a striking example: One can detect an early move towards constitutional review when ‘Abd ar-Raqqz as-Sahr developed his brief tenure as an administrative judge to transform the Majlis ad-Dawla into a proto-constitutional court, anticipating developments in France which saw the equivalent Conseil d’État accepting to review administrative excesses in the light of higher princés generaux du droit. In its famous decision on 20 February 1948 the Egyptian Conseil d’Etat established that

“there is nothing in Egyptian law which prevents Egyptian courts from addressing the constitutionality of laws whether in the issuing of decrees or legislation or whether from the point of view of form and substance”.

After rejecting the argument by the government that such review would contradict the principle of the separation of powers, the Court concluded that
Thus, it is fairly obvious that an agency is needed in order to review laws and decrees within contemporary Islamic modeled states. A way to conceptualize this function is in terms of a third branch of government, a judicial branch, charged with the task reviewing legislation (Bahlul 2007: 534). Judicial review is a court’s power to review, and possibly nullify, laws and governmental acts that violate the constitution and higher norms. It is a way to assure that governmental actors respect the constitution and do not use powers granted to them by the constitution to seize illegitimate power. The international model of constitutional review is offered by the difference in the work of the U.S. Supreme Court and the French Conseil Constitutionnel. This model is exemplified in the Islamic modeled States in Middle East in the operation of al-Makhir ad-Dusturiyya al-‘Uly (Supreme Constitutional Court of Egypt) and the Shur-ye Negahbn-e Qnun-e Assr (Guardian Council of the Constitution) in Iran (Mallat 1997: 396).

2. Judicial Review

To begin with, one has to pinpoint that the constitutional clauses whereupon Islam is the religion of the state and/or shar’a the principal source or a principal source of legislation (in more detail Johansen 2004: 883; Naeeem 2008: 79) is a powerful one. Its power depends not in its repetition in several articles of the constitution but on the adherence of the legislature to it and its implementation by the judiciary. Still, the statement must be accompanied by the possibility of judicial review. As the judiciary applies shar’a to national legislation, it must confront potential conflicts between the sovereignty of man and sovereignty of God. These conflicts are, of course, by no means new. Every day, Muslims make decisions based not only on their personal needs and desires, but also on the dictates of the Islamic shar’ – on the dictates of God and the prophet Muhammad. In the application of shar’a and the exercise of judicial review in a state founded on shar’a, the government should (formally) ensure that the dictates of God triumph over the desires of man (Schneider 2008: 154; Sherif 2005: 159). This leads to the question of whose interpretation of the shar’a is authoritative in a state structure that purports to base itself on Islamic shar’a.

In Iran, as opposed to Egypt, this question was addressed, though not always in ways that satisfied constitutionalists in the “Western” sense: Khomeini’s answer to the question was based on the personal authority of the leader (Moschtagni 2010: 2; Shambayati 2008: 299; Momen 1985: 196; Tellenbach 1985: 159 et seqq.); that solution might have been adequate for many Iranians, but it is considered to be hardly “constitutional”. Post Khomeini Iran has moved away from that solution but yet to establish a clear alternative. The ambitious attempt to erect a legal and political system wholly on the basis of shar’a has fallen short without any clear principle articulated to replace it. In Egypt, on the other hand, the absence of attention to clear procedural details on the interpretation and role the Islamic shar’a has left the executive and legislative authorities wide latitude where shar’a provides unclear or multiple answers (Elliesie 2009a: 154). However, legislation incompatible with an unalterable principle of Islamic shar’a is, by way of methodology, invalid (Brown 1999: 496, 505; Lombardi 2008: 234 et seqq.).

VI. Conclusion

In conclusion, the precise content of the normative system of shar’a has been, and will continue to be, the product of human understanding (Al-Tabar 1971: 48 et seqq., 66) in its specific historical context (An-Na’im 2010: 44). Although shar’a laws are of divine provenance, the actual construction of the law is human activity, and its results represent the law of God as humanly understood. The ratio legis (hlkm tastrhiyya) of a norm and its logical conclusion is a subjective understanding. Hence, at the time when one argues that norms in Qur’n and Sunna are the understanding of justice at the time of the norm’s origin, then, one is able to exchange the perception of justice in the modern sense. One has to consider that law in the Islamic context does not descend from heaven ready-made, it is the human understanding of the law – the human dft – that must be normative for society (Weiss 1998: 116; An-Na’im 2010: 45). According to Assem Hefny and Mashhood Baderin, Islamic set regulations and provisions pertaining to mundane matters are, in time and place, alterable. Attention should be paid to the doctrine of al-‘illa wa-l-mama’ whereby causes differ in time and place for which reason outcomes vary as well (Hefny 2010: 81 et seq.; Baderin 2010: 141). Hence, a generalization of the rule of law concept in respective countries should be avoided. Rather, one has to see it from a different angle; namely, that of the specific national legal understanding against the background of the dichotomy between its particular traditional influence of (Islamic) legal theory and contemporary law in action, i.e. legal reality.

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