

Saïd A. Arjomand/Nathan J. Brown (eds.), **The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran**, State University of New York Press, Albany (New York), 2013, 90 \$, 338 pages. ISBN 978-1-4384-4597-7

*“Persecution is not an original feature in any religion; but it is always the strongly marked feature of all religions established by law.”*

*Thomas Paine, The Age of Reason*

The distinction between religion and religion established by law in the hands of a state is a distinction between faith and politics. Such politics, as Thomas Paine observed, often is or turns into politics of authoritarianism. The way in which such politics plays out in the context of two countries – Egypt and Iran – forms the subject of *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, edited by Saïd A. Arjomand and Nathan J. Brown.

Egypt and Iran make an interesting study because, leaving aside their differences, which the volume illustrates, they share some central similarities on this matter. The legal orders of both countries underwent significant changes in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, with the first half of the 20<sup>th</sup> century seeing state building and rapid modernization hand in hand with a reduced role of religion in the legal sphere. At the same time, and gaining strength in the second half of the 20<sup>th</sup> century, Islamic political movements in both societies began using religion as a mechanism for protest, and pushed for an increased role for Islam, not just in the political sphere but also in the legal order. In Iran, this culminated with the Islamic revolution in 1979, resulting in an Islamic ideological constitution. Therefore the contemporary interaction between politicized Islam and law in that country is not only justified by the legal order but the interaction has become legally required and forced. In Egypt on the other hand, this dynamic has mostly been played out in the political arena. Although significant, the legal changes in Egypt have been less fundamental and did not amount to a constitution with a comprehensive religious ideology. Instead it has been the Muslim Brotherhood that has championed the increased role of religion. Beginning as an illegal political movement, later turning into a political party, the Muslim Brotherhood became the ruling party in the years 2011-2013, producing a new but short-lived constitution. Against this turbulent landscape, it is no surprise that the issue of the relationship between the rule of law, Islam and constitutional politics has caught the eyes of scholars, resulting in works of diverse character and different normative conclusions and predicaments. The discussion in itself is not new, as it has been present within the two countries since the time of the adoption of their first constitutions, a cause of strong disagreement between liberals and anti-liberals, between seculars and fundamentalists. Rule of law is obviously something good, but there is still disagreement about whether this is achievable with the infusion of religion into law, or as some claim, that such infusion is actually desirable or even inevitable.

The latter claim is normally put forward through abstract theories about the compatibility of religion and the rule of law, in what has now come to be a vast body of scholarship. The volume at hand distinguishes itself by presenting the actual role that religion has played in the legal order of Egypt and Iran. This emphasis on a factual account is a welcome path, and should not be disregarded when normative theories are developed.

One should initially note that the three main notions of the volume's title, in their vagueness open up for a variety of interpretations. The choice of their interpretation together with that of methodology is in this volume left to each contributing author. The result is an engaging book, which despite the lack of a coherent structure succeeds in highlighting the influence of politicized religion on the rule of law.

Leaving aside the introduction, the book engages with the issue in 12 chapters organized country-wise, with the first five dealing with Iran and the next seven with Egypt. The comparison between the two countries is mostly left to the reader.

The chapters on Iran, through delving into legal history, institutional aspects, policies and material law, show the changing place of Islam in a country which so far has had two constitutions – one non-ideological constitution in force from 1906-07 until 1979, and one ideological in force since 1979.

In the first chapter Saïd A. Arjomand provides an overview of the relationship between the ideas of Islam and ideas of modernism over the 20<sup>th</sup> century by giving examples on how that relationship played out in the constitutions, in institutions and in the legal profession. The analysis sheds light over this interaction both before and after the Islamic revolution and its constitutional change. This historical overview helps us identify how and where Islam is instrumentalized, as we observe with Arjomand that the “(...) *substantive Islamicization of Iranian constitutional law under the Islamic Republic of Iran has been completely revolutionary and historically unprecedented*”(p. 49). This observation, together with the reasons given for it, elegantly rebuts the argument found in some scholarship and among some political agitators that claim that Islamic constitutionalism represents a more appropriate cultural “authenticity” than what is perceived to be “western” secular constitutionalism.

Arjomand's observation is supported and expanded upon in the following chapter, where Mirjam Künkler in a sharp analysis of an institutional body, exposes the paradoxical roles of Islam under the Islamic Republic of Iran. Her analysis of The Special Court of the Clergy shows the response of a nominally Islamic Republic to clerical opposition that also claims to be Islamic. The analysis sheds light over the procedures of an institution that officially is established to investigate criminal transgressions of the clergy but which quickly became an instrument for the suppression of dissident clergy and a battlefield for political power struggles. In chapter 3, Silvia Tellenbach in a rich analysis traces the principle of legality in Iranian constitutional law and criminal law, and examines the way it is taught, interpreted and justified. The shift to an Islamic constitution did not change the formal presence of the principle of legality in law, but it did lead to fundamental changes in its content, interpretation and justifications. Tellenbach highlights the problematic consequences that

Islamicization of law and the constitutional framework has on the content of the principle of legality, particularly in criminal law. In chapter 4, through an analysis of the weak *de jure* and *de facto* position of the Iranian parliament, Farideh Farhi gives an insightful account of how the lack of true separation of powers impacts the rule of law. As she notes, the combination of major restrictions on political and party pluralism on the one hand, and on the other hand a constitutional framework which reduces parliament to a largely insignificant institution, results in an imbalanced state structure which impedes the enforcement of the rule of law. This chapter is followed by a perspicacious analysis provided by Kaveh Ehsani who in chapter 5 delves into the politics of property in the Islamic Republic of Iran. Demonstrating the instrumentalization of Islam for economic purposes, he shows not just the way it is used by key political actors but also how such politics is used to create a supportive middle class.

The chapters on Egypt testify to a context that differs greatly from that of Iran. The difference is not merely socio-cultural but it is equally a difference of law and of the institutional relationships in the legal and political order. In Egypt, the dynamics between the rule of law, Islam and constitutional politics have taken place against non-ideological constitutional frameworks, creating a less circumscribed space for such interplay, but perhaps also a more unpredictable space. In chapter 6, Nathalie Bernard-Maugiron discusses how non-democratic constitutional and legal changes undertaken under Hosni Mubarak reinforced state authoritarianism and at the same time were in part responsible for his overthrow. A selection of these constitutional changes is compiled and translated by Dina Bishara in chapter 7. Bernard-Maugiron also, quite pertinently, shows how the pattern of authoritarian legal change was continued as well after Mubarak's overthrow by the following competing powers, both by the Islamist side and by the military. The following chapter by Mustapha Kamel Al-Sayyid in considering the Egyptian judiciary argues that the rule of law is not sufficient for the protection of human rights. Pointing to the lack of institutional uniformity by the judiciary and the inconsistent application of the law in human rights cases, the author fears that the same inconsistency may have grave consequences under an Islamist government. Although his fear may be well-reasoned, one may ask whether framing the issue as skepticism of the rule of law is misplaced, and based on a rather thin conception of the rule of law. Rule of law includes, opposite to the content the author grants the notion, having a judiciary that does not decide based on their own ideological preference.

In chapter 9, Nathan J. Brown traces the place of Islam in the constitutional history of Egypt and he demonstrates the various state and non-state bodies that all are "Islamic" but that disagree on matters of politics, law and religion, and who consequently compete for power. Given these observations it is difficult to agree with his concluding optimism, that there might be a way out of this without changing the legal framework. This optimism is not shared by Bruce K. Rutherford who in the following chapter looks into how the strategy of rule *by* law under President Mubarak affected and shaped the ideology of the Muslim Brotherhood. In an insightful analysis, Rutherford argues that the moderation of the Muslim Brotherhood is not necessarily an ideological change but can be understood as a strategy of

organizational survival within the constraints of rule by law. In chapter 11, Jakob Skovgaard-Petersen searches for Egypt's *'Ulama* in the Egyptian legal order over the 20<sup>th</sup> century, and in the Muslim Brotherhood's attitude to al-Azhar. In the volume's final chapter, Nathan J. Brown sums up the events following the revolution of February 2011, ending once more on a positive note about the possibilities for genuine change in the direction of strengthened rule of law. One can perhaps forgive this optimism, given that the volume was published in 2013, at a time where there were indications that the military intended to withdraw. The events since, however, do not entirely confirm such an outcome.

Together, the chapters provide a rich analysis of the *symptoms* of authoritarianism resulting from politicized religion. Less attention is given to the roots of the problem, particularly through a legal analysis of the constitutional framework that enables the instrumentalization of religion in both the legal order and in state policies. Those chapters that analyze law and legal aspects, primarily do so from the perspective of political science, and not from that of law. It is in this connection interesting to note that the contributions to the volume are largely by non-legal scholars (with the exception of Silvia Tellenbach and Nathalie Bernard-Maugiron). This is not a weakness but something that the reader should have in mind. Nevertheless, attention to the legal roots of the problem would not only point the reader to where to go for changing the status quo, but it would equally highlight the implications of a non-ideological versus an ideological constitution.

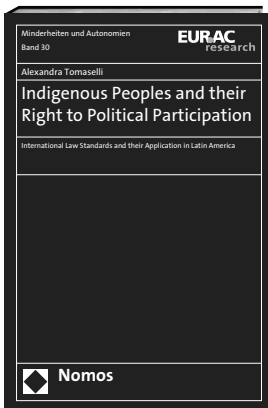
The volume leads us nevertheless to conclude that in the language of politics, religion is a great abstract concept. It is an idea that can be invoked to justify noble projects as well as projects that are not so noble. Therefore, religion makes a helpful tool in the hands of a variety of actors who all may claim to be true agents of religion and servants of both divine and popular will. This is not, however, the only perspective on the dynamics between religion, law and politics. Another perspective is to see the role of religion in law and politics as part of the cultural and historical heritage of a society. These two perspectives do not preclude each other, but in drawing the conclusions it is worth keeping them apart. What is important is to recognize and identify when religion is the first and when it is the latter. This is a banal point, but it is one that sometimes is lost in scholarship that deals with Islam and the rule of law. The strength of the volume is that its approach covers both perspectives, with an emphasis on the political instrumentalization of Islam, and thus expands our view on how reference to the same concept covers multiple roles, intentions and functions, sometimes in direct conflict with one another.

Which leads to a larger question, for the most part scanted in the volume: Can we expect there to be rule of law in a context where religion is instrumentalized in law, in government policies and in constitutional politics? Some of the chapters of the volume have an optimistic view on this. But together, the chapters provide us with enough material to conclude with a negative answer. Although largely descriptive, the volume's rich content will be significant for any normative position, such as the question of how to ensure the rule of law in the two countries. As such, it should be of interest not just for students and academics, or practitioners and politicians involved in constitutional design and constitution

making. More importantly, this is a book that should be of interest for the Egyptian and Iranian people who are the ones bearing the costs of the weak rule of law and who are the ultimate decision-makers in improving their legal systems.

Azin Tadjini, Geneva

## The Right of Indigenous Peoples to Political Participation



**Indigenous Peoples and their Right to Political Participation**  
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Dieses Buch schlägt ein umfassendes Recht auf politische Partizipation für indigene Völker vor, geht der Frage der Anerkennung im Völkerrecht nach und untersucht seine Anwendung in Bolivien und Chile – zwei Fallstudien in Lateinamerika, die unterschiedlich und dennoch ähnlicher als erwartet sind.



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