

Saïd Amir Arjomand (ed.).

Constitutional Politics in the Middle

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The book is a collection of essays contributing to comparative studies on the constitutional systems of Middle Eastern countries, with particular reference to Afghanistan, Iran, Iraq, and Turkey. While the first four essays – by Darling, Arjomand, Brown, and Mayer – provide a comparative and general analysis of their respective topics, the last four essays – by Shambayat, Bilgin, Rubin, and Arato – are country case studies. The authors are mostly scholars of political and social science; Linda Darling is a historian and Ann Elizabeth Mayer is the sole lawyer among the authors. The impressive list of authors includes internationally recognized experts. Although there are a number of publications on the constitutional law of most of the individual states examined here, the unique feature of this book is that it is one of

the first, or even the first, which describes the constitutional development in a large variety of Islamic, Middle Eastern countries in a broad comparative perspective, highlighting peculiarities, similarities, and problems of the different legal systems.

Linda Darling's essay, 'Islamic Empires, the Ottoman Empire and the Circle of Justice', focuses on the so-called 'circle of justice' as the main legitimizing doctrine of government in the Middle East since pre-Islamic ages. The concept of the 'circle of justice' is characterized by the formula: '[t]here can be no government without men, no men without money, no money without prosperity, and no prosperity without justice and good administration' (at 1). Darling presents a multitude of saliences and references to the 'circle' throughout the history of the Middle East from the early decades of the caliphs of the Islamic empire to the present day. Darling demonstrates how the concept of the 'circle' was fully integrated into Islamic concepts of government by the beginning of the 13th century. She thereby correctly argues that the modern image of autocratic rulers and downtrodden peasants must be modified, since the medieval rulers were well aware of their dependence on the peasants and their productive capacity, as embodied in the perception underlying the concept of the 'circle' (at 19). Darling furthermore argues that the concept became an instrument of critique of government and that today even Islamists refer to it to criticize their governments.

The merit of Darling's essay lies in her detailed evidence of the widespread perception in the Middle East concerning the state's role and responsibilities as embodied in the concept of the 'circle', and of how deeply embedded this perception is in the political culture. However, the essay lacks a discussion of how the Islamist movements managed to capture the notion of the 'circle' and to claim successfully that a government must be Islamic in order to be just and to fulfil the promise of social justice.

Arjomand's essay, 'Islam and Constitutionalism since the Nineteenth Century', contrasts the current perception of Islam, and

its relationship to the constitution, with the predominant perception of it at the beginning of the 20th century. While at the beginning of the century, the impact of Islam on constitutional law was regarded solely as negative (with the *shari'a* imposing limitations on the executive, but also on the legislative power and on the bill of rights), in the later part of the 20th century, constitutional doctrine led to constitutions being perceived as based on Islam itself. In these cases Islam is seen as an ideology. In such a system Islam and Islamic law appear as the basis of the constitution and the state rather than a limitation to them. These constitutions were devised, above all, as instruments to engineer social change in adherence to an Islamist ideology and, to a much lesser extent, as devices for the establishment of a political order. Arjomand demonstrates these developments, focusing mainly on the example of Iran, highlighting the manifold contradictions of the Iranian Constitution of 1979. Arjomand argues that the understanding of a constitution based on Islam and *shari'a* is especially problematic and necessarily leads to a multitude of contradictions between the *shari'a* and other constitutional principles. With regard to the Iranian Constitution, there is for instance a contradiction between the constitutional authority of the legislature and the *shari'a*. Moreover, there is a contradiction between the authority of the supreme jurist (*vali-ye faqih*) based on a new and revolutionary interpretation of the *shari'a* enshrined in the Iranian Constitution on the one hand and the traditional authority of the leading scholars of Islamic law (*marāḡe-e taqlid*)¹ in the

¹ According to the prevailing perception in the *ḡafari* school of law, the believers of this school are divided into two categories. First there are the ordinary believers who have no special expertise in Islamic law. Secondly, there are the so-called *moḡtaheds* who, after long years of study, have acquired the licence by their teachers, who have to be *moḡtaheds* themselves, to interpret the *shari'a* and to give rulings on questions of Islamic law. The first category of believers is not allowed to answer questions of Islamic law at all; rather they have to follow (*taqlid*) the rulings

ḡafari school of Shiite law² on the other.³ Due to these contradictions, Arjomand pleads for a return to the former understanding of the *shari'a* as a limiting and negative factor only. In the last section, the author compares the constitutional experience of Iran with that of Afghanistan.

The essay is very interesting to read even for experts on the subject, and provides detailed insight into the constitutional development in Iran. Arjomand proves his thesis convincingly. However, it has to be emphasized that, since there is a contradiction between legislative sovereignty of parliament and the binding power of the unchanging *shari'a* (as a set of rules of supposedly divine origin), even a return to the former understanding of *shari'a* cannot provide a real solution to the constitutional crisis which Islamic states face. In his elaborations on the Afghan Constitution, Arjomand wrongly assumes that the Afghan Constitution provides ordi-

nary courts with the competence for judicial review of the compatibility of legislation with Islam. Article 121 of the Afghan Constitution (AC) gives the competence for judicial review of legislation to the Supreme Court, which encompasses review of the compatibility of laws with Islam.⁴ There is no equivalent competence for the ordinary courts.⁵

The essay, 'Bargaining and Imposing Constitutions', by Nathan J. Brown discusses the Afghan, Iranian, and Iraqi constitutional experiments as examples to demonstrate that neither liberal concepts of constitutional architecture nor local traditions provide a theoretical basis by which to grasp the clashes of interests between the different groups and the passion which arises during constitution-making in the Middle East. In his first section, Brown shows that liberal constitutionalist theories not only are alien to the intellectual traditions of the Middle East, but also fail to accommodate the interests of the different groups involved in the constitutional process and the necessity of bargaining between them. In what follows, he demonstrates how even local political traditions, whether based on Islamic, nationalist-socialist, or 'circle of justice' concepts, fail to acknowledge the role of group interests and political passion in constitution-making. In the last section, Brown identifies inclusiveness and publicity of the process as crucial factors for achieving a legitimate constitution, i.e. a constitution 'which most political actors will accept or embrace over a long period' (at 73). He also points out that while international involvement may

of a *moḡtahed*. Over the centuries it has become common even under the *moḡtaheds* to follow a handful of leading scholars among their ranks, which are regarded by their peers as the most accomplished experts of their day. These so-called Great-Ayatollahs (*Ayatollah al-Uzmā*) are also denoted as 'Sources of Emulation' (*marāḡe-e taqlid*). For further information please refer to M. Momen, *An Introduction to Shi'i Islam* (1985), at 203 *et seq.*

² This law school is the predominant school of Islamic law in Iran. Officially about 90% of the Iranian population adheres to it. According to Art. 12 of the Iranian Constitution, it is the 'eternal' religion of the state in Iran.

³ The contradiction between the role of supreme jurist and the traditional authority of the leading scholars of Islamic law (*marāḡe-e taqlid*) lies in the fact that while according to the constitution the supreme jurist is the highest authority in the state, from a religious perspective there might be other *moḡtaheds*, whose knowledge and therefore rank among the religious scholars is perceived as superior. Such a situation is highly problematic for a constitution which perceives itself as being based on Shiite law (cf. Art. 12 of the Constitution) and which aims at a unity of state and Shiite state religion.

⁴ Grote, 'Separation of Powers in the New Afghan Constitution', 64 *Heidelberg J Int'l L* (2004) 897, at 912; Moschtaghi, 'Organisation and Jurisdiction of the Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Bonn Agreement', 10 *Max Planck Yrbk UNL* (2006) 531, at 561.

⁵ Quite to the contrary, Art. 130 AC and Art. 14 of the Law of Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan unequivocally establish that courts are bound by law. The only exception to this rule is Art. 121 AC establishing the competence of the Supreme Court for judicial review of legislation.

be enormously helpful to sponsor and support the process of constitution-making, if it becomes intrusive it can easily undermine the legitimacy of the final document.

The essay sheds light on the role that group interests and the bargaining between them really play during constitution-making in the Middle East. Brown convincingly refutes the claim of uniformity of their societies often raised by Middle Eastern regimes and shows the path to more legitimate processes in the future should there be political will for reform.

The essay, 'The Respective Roles of Human Rights and Islam', by A. E. Mayer reviews constitutional developments in the Middle East in a comparative perspective in order to assess how the relationship between human rights and Islam has been devised in the different constitutional orders. Mayer first describes the aggravated and unresolved tension between those who advocate human rights universality and those who argue that Islamic criteria must outrank all other legal standards. Mayer contrasts the regulations of the Iranian Constitution concerning the role of human rights and Islam respectively with those of the Moroccan Constitution. She concludes that the constitution as a self-contained 'Islamic' system of rights, as is the case in the Iranian Constitution, correlates with policies undermining human rights, whereas constitutional references to international human rights law, as is the case in Morocco, may correlate with a transition to policies of strengthened human rights and freedom from 'Islamic restrictions' (at 84). Mayer continues by analysing Yemen's and Somalia's various post-independence constitutions. Whereas the former socialist constitutions of both Somalia and South Yemen had been relatively open to international human rights standards, the constitution of the united Yemeni state of 1994 and the constitution of the internationally unrecognized Somaliland strongly emphasize the role of Islam and the *shari'a* at the expense of human rights. However, since both also express their commitment to international human rights, both constitutions comprise conflicting regulations. In her final section,

Mayer examines the Afghan and Iraqi Constitutions, both introduced in the wake of foreign intervention, and demonstrates that these texts also contain conflicting provisions regarding international human rights and Islamic law. Mayer concludes by arguing that in order for Middle Eastern constitutions to treat human rights and Islam with less ambiguity, the prevailing notion of how human rights relate to Islam will first have to evolve to a new phase where greater coherence and consistency are achievable.

Mayer's essay provides an excellent contribution to the very relevant question of the relationship between Islam and human rights. She provides a unique overview by broadening the perspective from a country-specific approach to a comparative perspective encompassing constitutional developments of several different Muslim countries. Her focus on Somalia's and Yemen's historic and present constitutional systems, which have scarcely been researched under this perspective, is particularly valuable for scholars of the topic. By demonstrating that Muslim states which have not been subject to Western intervention champion similar conflicting provisions in their constitutions to those of Afghanistan and Iraq, Mayer refutes scholars who argue that the provisions of the Afghan Constitution promoting human rights are mere concessions to Western pressure.

The essay, 'The Guardian of the Regime', by Hootan Shambayati explores the characteristics of the Turkish Constitutional Court by referring to related institutions of other countries. Shambayati argues that the Turkish Constitution of 1982 has led to the creation of a system of 'guardians', where elected and unelected institutions jointly exercise power. He argues that the 'guardians' are isolated from elected institutions and that their primary role is to protect the dominant ideology of the Kemalist elite. Shambayati goes on to elaborate on the peculiarities of the Turkish Constitutional Court and its history. Based on statistical data, he argues that the Court rather acts like a second house of parliament (at 106) and is much more concerned with the protection of the 'rights of the state' against the elected representatives of the people than

with the protection of the individual rights of the citizens (at 109). In his last section Shambayati explores the characteristics of the Iranian 'system of guardians' and compares it to the Turkish one.

The merits of Shambayati's essay lie in its wealth of statistical data on the Turkish Constitutional Court and on the general parallels he identifies between the Turkish and Iranian Constitutions. Although his thesis concerning parallels between both constitutions is generally convincing, his elaborations on the Iranian system are somewhat superficial and faulty, and therefore not all of the similarities he identifies are persuasive. In contrast to his perception, the Expediency Council (*maǧmu'e-ye tashkhis-e maslahat-e nezām*) has played practically no decisive role in advising the Revolutionary Leader (*rahbar*).⁶ Also, the Leader is not bound by advice eventually provided by the Expediency Council (cf. Article 110 No. 1 of the Iranian Constitution). Therefore, the parallels between this council and the Turkish Security Council seem to be rather remote.

Mehmet Fevzi Bilgin, in his essay 'Constitution, Legitimacy and Democracy in Turkey', examines how far the Turkish Constitution can be regarded as democratically legitimate. He argues that the case of Turkey offers the rare phenomenon of a society and institutions which strongly favour and cherish democratic ideas, but the constitution of which lacks democratic legitimacy. Bilgin states that the democratic credentials of a constitution manifest themselves in the process of constitution-making and in its content. He claims that a constitution may be created undemocratically, but that in order for it to be considered democratic, it must at least unequivocally embody democratic ideas and implement the principles of democracy. Bilgin then analyses the process of constitution-making in Turkey and reaches the conclusion that the Constitution of 1982 was created in an undemocratic process. He furthermore demonstrates that the Constitution is flawed, as it was drafted to

maintain the military sway over politics and therefore established large 'reserve domains' for the military to control the elected civilian government. He identifies the Turkish Constitution as an ideological constitution propagating a concept which he entitles 'statist republicanism' and which is characterised as a form of republicanism in which the different interests in society are subordinated to the general interest of the state, with the *res publica* embodied in the state and separated from the public constituting it (at 136). Therefore, he attests that the Constitution of 1982 seriously lacks democratic legitimacy. Although a multitude of constitutional amendments gradually lessened the undemocratic character of the original document to some extent, Bilgin perceives the continuing efforts to amend the constitution as further proof of the lack of democratic legitimation.

The findings of the essay, written from a political science perspective are convincing, and Bilgin's elaborations give thoughtful insight into Turkish constitutional history. Thus the essay offers important information for the current discussions on constitutional reform in Turkey.

Barnett R. Rubin's essay, 'Crafting a Constitution for Afghanistan', focuses on the making of the present Afghan Constitution. Rubin sheds light on the conflicting interests of the different ethnic groups during the process of constitution-making and elaborates in detail on the debates over presidentialism and the role of Islam. He highlights the imminent contradictions to the final text concerning the role of Islamic law and human rights. Rubin predicts future conflict between the commitment to human rights enshrined in the Constitution and the obligation of the legislator not to pass any laws at variance to the belief and provisions of Islam. His rather pessimistic stance on the outcome of this conflict is due to the fact that the Supreme Court, an institution renowned as a stronghold of the religious establishment, is competent for judicial review concerning, *inter alia*, the compatibility of legislation with Islamic criteria. As a positive aspect of the Afghan constitution, Rubin emphasizes its acknowledgement of the diversity of

⁶ W. Buchta, *Who Rules Iran – The Structure of Power in the Islamic Republic* (2000), at 61 *et seq.*

Afghanistan. Rubin concludes that, given the difficult circumstances, Afghanistan is fortunate to have arrived at such a positive result. He welcomes constitutional reform in the future once there has been relevant progress in state building since, although he perceives the present presidential system as adequate for the current phase of development, a revision of the constitution may be necessary in five to 10 years.

Rubin's essay gives great insight into the constitutional process in Afghanistan and gives detailed information on the most important conflicts and debates accompanying constitution-making in Afghanistan. Rubin convincingly points out that most of these conflicts have not been resolved permanently by the text. Another point of great interest is that the essay supplies important arguments as to why the constitution should rightfully not be regarded as immune to change in the future and gives interesting estimations by a real expert on the topic for future amendments to the Afghan constitution.

The essay, 'From Interim to Permanent Constitution in Iraq', by Andrew Arato focuses on the process of constitution-making in Iraq and identifies its faults and deficits. The author emphasizes three elements as particularly problematic: first, the external impositions by the US administration especially regarding the unrealistic timeline; secondly, the nearly complete exclusion of Iraqi Sunnis from the negotiations and bargaining; and finally the attempts of the USA to bind the sovereign constituent power of the Iraqi people. As a remedy for the present situation resulting from the faulty political process, Arato advises the setting up of a timetable for the withdrawal of the coalition forces in order to pressurize the dominant Shiite political groups to take their promise seriously and include the Iraqi Sunnis via renegotiation of the constitution into a future constitutional arrangement.

The essay gives a very good overview of the history of the proceedings leading to the present Iraqi Constitution of 2005, and especially of the conflicting interests of the different groups involved and of the faults of the process. The author's findings and perception about the future constitutional develop-

ment, as well as his pessimism concerning the future relationship between Islamic law and human rights in the Iraqi legal system, are all very convincing and based on thoroughly researched material.

It is natural for the quality of the essays to vary in such a compilation of essays, and overall the book is a valuable contribution to research into the constitutions of the region. Even though the book lacks a common overarching topic for all of its essays apart from constitutional politics in the region, the compilation of the essays is generally fitting. It is however striking that the last two essays on Afghanistan (Rubin) and Iraq (Arato), unlike the others, rather stick to an empirical, descriptive, and country-specific approach, and therefore seem perhaps out of place in a compilation focusing more on comparative and theoretical issues. This is however compensated for by the excellent quality of these two essays. In sum, not only does the compilation give great insight into constitutional development in the region, but it also provides innovative parallels between various constitutional systems, which have scarcely been noticed (the essays by Mayer and Shambayati) hitherto. Therefore, it is highly advisable for anyone working on the public and constitutional law of the region to read this book. Although some of the essays seem either cursory (Shambayati with regard to Iran) or too extensive (Darling), these points are forgiveable in a work with pioneer qualities.

Individual Contributions

Saïd Amir Arjomand, Introduction;

Linda T Darling, Islamic Empires, the Ottoman Empire and the Circle of Justice;

Saïd Amir Arjomand, Islam and Constitutionalism since the Nineteenth Century: the Significance and Peculiarities of Iran;

Nathan J Brown, Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghani and Iraqi Constitutional Experiments;

Ann Elizabeth Mayer, The Respective Roles of Human Rights and Islam: an Unresolved Conundrum for Middle Eastern Constitutions;

Hootan Shambayati, The Guardian of the Regime: the Turkish Constitutional Court in Comparative Perspective;

Mehmet Fevzi Bilgin, Constitution, Legitimacy and Democracy in Turkey;

Barnett R Rubin, Crafting a Constitution for Afghanistan;

Andrew Arato, From Interim to 'Permanent' Constitution in Iraq

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