Introduction

Special Issue on Islamic Constitutionalism

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Received 17 April 2023 | Accepted 2 March 2024 | Published online 26 March 2024

It is with great pleasure that we introduce our most recent special issue in the Arab Law Quarterly, on the topic of Islamic constitutionalism. The subject is, of course, not a new one. To name but a few examples of scholarship in the field, there have been monumental edited volumes,1 notable historical studies,2 sociological and economic driven approaches,3 expansive country-specific analysis of high court decisions,4 and scholarship that examines the subject from the standpoint of Islamic legal theory and jurisprudence.5 That the work

published here is able to break new and exciting ground is therefore a testament to its quality and ingenuity.

The primary theme of these articles, and indeed of the special issue generally, is a bold challenge to existing paradigms, and, more broadly, a call for an expansion of horizons in relation to Islamic constitutionalism. None of the authors engages extensively in Islamic juristic thought, nor in analysis of high court opinions, to determine the congruity and consistency of the one with the other. Nor do any of the authors seek to establish a new model pursuant to which Islamic constitutionalism should operate. Work of this sort is quite valuable of course, and more of it may be forthcoming. Nevertheless, it is fair to say that there is enough of it to merit a turn in a different direction.

Instead, the authors in this volume suggest that there is altogether too much monolithic thinking and decontextualized analysis when it comes to the subject of Islamic constitutionalism. Over and over again, our authors emphasize the importance of local context and ordinary national politics in shaping and reshaping the debates over the role of Islam in the legal system generally, and within constitutions in particular. And over and over again, they decry the broad assumptions that underlie all too much scholarship in the field, where the decision to declare a state Islamic, to render Islamic law a source of legislation, or to invalidate all law in violation of Islam’s core tenets somehow necessitates an identical set of legal obligations across incredibly disparate Muslim nation-states.

Hence, in the first article in the issue, Martin Lau addresses the subject of sacred objects in law, and specifically, the evolution of the Qurʾan as one such object, whose consecration came to be mandated as a matter of law. Lau recounts the local, legislative debates that led to this outcome in two subnational units within Pakistan, such that the Qurʾan is now legally protected from its publication all the way through to disposal of damaged or deteriorated copies. He further shows how this has come to even include, in some cases, a prohibition against non-Muslims printing, publishing, or selling the Qurʾan.

In so doing, Lau uncovers a deep connection between the modern state and Islamic law that manifests itself in Islamic constitutionalism. After all, the extensive regulations relating to the proper handling and treatment of the Qurʾan are not the standard sort of legal Islamization efforts that one sees in Pakistan and elsewhere, whether in the form of Islamic personal status law or codification of the ḥudūd. Specifically, they are not framed or defended as attempts to give some sort of legal recognition to fiqh, even in a manipulated and highly distorted sort of way, as is often the case. Indeed, fiqh barely registers in Lau’s rich account. There is good reason for this — there is virtually no
fiqh dealing with these matters, certainly not in the specificity demanded by the advocates of the relevant legislation.

Rather, Lau points out, what appears to motivate the legislative drafters is an impulse to use the levers and the instruments of the modern administrative state to protect and promote Islam, and, in this particular case, its sacred objects, from degradation and desecration. In so doing, the drafters establish the role of the state in promoting Islam. This is the same sort of populist impulse that drives Islamic constitutionalism, which likewise seeks to elevate the role of Islam and likewise does so without a very thorough or stable grounding in fiqh. In this regard, it is worth noting that Pakistan witnessed a spate of Qur’an protection ordinances, both before and after Partition. Further, Pakistan is home to one of the world’s first constitutional repugnancy clauses, which prohibits the enactment of law repugnant to the “Injunctions of Islam as laid down in the Holy Quran and Sunnah.”

To use Lau’s more satisfying phrasing,

In analysing the legal developments that have fused the object and the text of the Qur’an into a legal entity that demands particular interpretations of Islam, [Lau’s] paper identifies an Islamic state doctrine that asks and expects the state to protect and promote Islamic law and religion in an increasing number of contexts and occasions, the protection of the Qur’an being only one of them.

From this historical underpinning, we turn next to Russell Powell’s fascinating empirical account of constitutionalism in Muslim countries. This account informs Powell’s subsequent complex and highly nuanced comparative description of the respective constitutional histories of Turkey and Ireland, two states which profess neutrality toward religion and yet were once deeply entwined with two different faith traditions. Written in part as a retort to Gutmann and Voigt’s empirical analysis of Muslim-majority countries, the empirical section of the paper focuses on the 48 predominantly Muslim countries in the world. It notes that of these states, only about half list Islam as their official religion (a fact which is also true mutatis mutandis of thirteen predominantly Christian...
states and two Buddhist states). Moreover, of these, only sixteen assert that Islamic jurisprudence is a source of law.

Powell points out some of the methodological problems associated with using the status of a state religion as a variable in any sort of empirical analysis related to law and the state. Indeed, the 43 states that list some religion as a state religion are very diverse, and the reasons they adopt a state religion vary greatly. In many cases, the choice is more about symbol, or the establishment of a form of national solidarity, than it is about the role of religion in the legal and political system. Moreover, there is great diversity in religious practice and views of what a given religion requires, and this counsels caution in attributing much by way of legal or political outcome to the establishment of a state religion alone. Powell adroitly indicates that this rather obvious point is commonly understood and internalized in the case of Christianity — there are not, after all, very many scholars who believe that the condition of women in Denmark is much worse than in the United States because the former formally establishes Christianity as state religion where the latter does not. Yet, to quote Powell, ‘[s]ome empirical scholarship attempts to apply conclusions associated with Islamic identity to all Muslims using broad generalizations that are far less likely to be used for Christians. This sort of exceptionalism opens the door to spurious and unreliable conclusions that relate the role of Islam in constitutionalism with law more generally.’

Powell thus issues a bold challenge to empirical scholarship that treats Islam as exceptional and monolithic even as it claims data driven neutrality. This challenge is then extended by his comparative description of Ireland and Turkey. By any reasonable measure, Turkey moved away from recognizing Islam as state religion much earlier, even as it has a deep Muslim identity and a number of civil service organizations that call for a much more prominent role for Islam in law and public life. By contrast, Ireland began as a secular republic imposed by the British, and over the course of the 20th century moved distinctly toward enshrining Catholic teachings and legal rules, only retreating from this position in the past twenty years. Like Turkey, Ireland also has a deep religious identity and a broad panoply of civil service organizations that favor a more prominent role for Catholicism. The narrative rarely plays out as described by Powell, however. Instead, the common conventional tale is of White, European Ireland moving toward secularism while Muslim Turkey hurtles headlong toward a form of medieval religious rule. This is telling of some of the assumptions underlying much work relating to the role of Islam in modern constitutions, whether empirical or otherwise.

Like Powell, Muhammad Waseem challenges traditional monolithic paradigms, though in his case the challenge lies to scholarship about specifically Islamic constitutionalism. He notes that the insistence on using fiqh as the
yardstick by which Islam is adjudged, and ignoring national context, results in a dramatic simplification of the actual Muslim legal experience, across vast folds of time and space. Specifically, in the contemporary era, it reduces evaluation of dozens of Muslim majority states to a unidimensional measure relating to how closely the state happens to adhere to classical fiqh. In place of this dramatic reduction, Waseem addresses Islamic constitutionalism within specific national contexts, and specifically focuses on political contestation and compromise within them. As with Lau, his model is Pakistan.

Waseem points out that the question of Islamic constitutionalism arose within a common law legal system and legal institutions inherited from British India. Yet at the same time, the very idea of Pakistan as a Muslim state independent of Hindu dominated India led to immediate contestation over the future legal form of the state — either as one grounded in a traditional conception of Islamic law, or one that more or less adopted the existing legal system, imbued with a distinctly Muslim identity. From Jinnah through Zulfiqar Ali Bhutto, the model was very much along the lines of the latter, but there was repeated contestation and compromise that led to the recognition of Islam as a legal and constitutional matter — witness, for example, the Qur’an protection laws and regulations deftly described by Lau.

General Zia’s coup changed the dynamics of this contestation, largely by enshrining the role of Islam within Pakistan’s politics. Ultimately, to use Waseem’s delightful phrasing, the state ended up ‘creating its own rival in the form of political Islam. …’ Swaths of the citizenry no longer felt any national connection to the state, many of the Islam inspired laws from the Hudood Ordinances to the harsh punishments associated with blasphemy seemed decidedly incompatible with a constitutional democratic state, and mobs came to prove more powerful than courts when it came to the enforcement of these sections of the legal system. As a result, in contemporary Pakistan, in Waseem’s recounting, ‘religion has assumed the character of a sub-system in the larger state system.’

The ultimate point, of course, is that this very rich description of Islamic constitutionalism in Pakistan is deeply context specific. The areas of contestation, compromise, and the evolving place of Islam in the legal and constitutional framework as a result of such contestation and compromise are well nigh incomprehensible stripped of this context. As such, any attempt to evaluate how ‘Islamic’ Pakistan might be as a state, or the extent to which its constitution requires adherence to Islam, merely by reference to its conformity to fiqh, would be so simplistic as to be misleading.

The final paper in the series, by Professors Ali, Kazmi, and Kunnummal, takes this intriguing line of inquiry one step further and enriches it with a more elaborate theoretical framing, suggesting that the very conception of Islamic
constitutionalism is reductive and flawed. After all, if Waseem’s highly persuasive points respecting the importance of context are taken seriously, then precisely what is the point of talking about Islamic constitutionalism at all, as opposed to, say, the role of Islam in the constitution of the nation state of Pakistan? This is the point that Ali, Kazmi, and Kunnummal make in the bold, ambitious, and certain to be impactful closing piece of this special issue.

The authors specifically take the position that using the term ‘Islamic’ to describe various constitutions and forms of constitutionalism across disparate Muslim majority states is reductive and problematic. As the authors point out, there is no consistent, or even coherent, conception of what the term ‘Islamic’ is supposed to mean that is independent of local context. Indeed, the authors’ examination of constitutional case law offers such a striking diversity of practice that if there is some core consensus of what Islam requires in constitutional structure and practice, it is difficult to discern what that is.

Given this, the authors challenge the rather broad deployment of the term ‘Islamic constitutionalism’ in the scholarly literature without explanation or qualification as to context. As the authors indicate, this would be unthinkable in the case of other adjectives, such as ‘Asian’ or ‘Western’ constitutionalism, and it only reinforces a false impression of Islamic monolith, where the mere use of the term necessitates a reasonably certain and well defined set of commitments.

Finally, the authors make an additional, intriguing claim respecting precisely why it is that the term ‘Islamic’ is repeatedly used to define constitutional structures, not only by Western scholars, who might be dismissed as contemporary Orientalists, but indeed by Islamic movements themselves, many of whom are virulently hostile to the West. Specifically, they indicate, there is much political expediency in relying upon Islam and Islamic law as the ostensible basis for advancing a preferred policy. This intriguing claim is entirely consistent with the authors’ broader effort, which is to show how deeply contextual the role of Islam is in any given state. As contextual, one might say, as all national politics tend to be.

Thus, the challenge to orthodoxy and the emphasis on context is richly interwoven throughout the pieces. Lau’s deep historical engagement with Qur’an protection demonstrates how deeply local so much Islamic politics tends to be. Powell’s bold critiques of empirical work relating to Islamic constitutionalism and his subsequent description of the Irish and Turkish constitutional experiments exposes strong biases and assumptions of Islamic monolith, hiding just behind the supposedly neutral data. Waseem’s rich portrayal of the role of political contestation and compromise in Pakistan’s constitutional story is so context-specific that it is impossible to imagine as part of a pan-national
narrative involving ‘Islamic constitutionalism’ at all. And, finally, as denouement, there is the pathbreaking claim by Ali, Kazmi and Kunnummal that there really might not be a such thing as ‘Islamic’ constitutionalism in the final analysis.

We at *Arab Law Quarterly* are truly delighted and honored to have had the opportunity to produce this special issue, and we invite our readers on what we believe will be a rich and rewarding scholarly journey.