Chapter 10
Constitutionalizing Islam in the Arab World

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The Jeffersonian ideal of a wall of separation between religion and politics is still a subject of contention in liberal societies; as this book makes clear, even those who accept it understand it in different ways. But what of Islamic government, a term that by its very name suggests a rejection of such a wall of separation?

Indeed, there is an oft-cited tension between liberal and Islamic forms of government. Liberal governments are said to be informed by a secular spirit that does not denigrate religion but seeks to relegate it to the private sphere. Mixing religion and politics is held to corrupt both. Islamic forms of government are viewed as based on the converse proposition: corruption comes from eliminating the connection between eternal truths and public affairs. And for much of Islamic history, the quest to understand eternal truths has generally taken legal form: what is right and wrong is a matter not simply for personal morality and practice, but should guide social and political authorities.

This generalization is certainly based on truth. Liberal polities do not exclude religion totally from public life, but they have devised a variety of formulas to institute some degree of separation. Yet there is considerable variation in implementing that separation. Not only is the Jeffersonian ideal understood differently; it is also applied differently. Many Europeans are at best uncomfortable by the consistency
with which American political leaders publicly speak of their personal faith and refer to God; many Americans are puzzled by the degree to which many European states offer financial support and legal protection to some religions and manage to turn matters of how Muslim women dress into protracted political crises.

And if liberal secular polities differ greatly on how to manage the relationship between religion and politics, so do those that seek to find a formula for basing a political system on Islam. For all the theoretical importance of Islamic law, most states in the Muslim world—including those that advance strong claims to Islamic legitimacy—base their legal systems on civil law models originating in the non-Muslim world. In most Muslim countries, training in a French law school would prepare most lawyers better than an education in a medieval Islamic school of law. In the Arab world, only a few states avoid restricting Islamic law to matters of personal status (marriage, divorce, and inheritance), and even then they apply Islamic law in institutional forms that few classical scholars would recognize. But other states—most notably Saudi Arabia—will not even countenance the existence of “laws” and “courts” that do not have an Islamic basis, insisting on calling them “regulations” and “committees” even when the legal content and adjudicative structures clearly resemble their civil law counterparts. And Iran claims to implement a form a theocracy known as the “guardianship of the jurist” that accords a very significant measure of authority and oversight responsibility to a religious scholar.

Some observers claim that Islamic states pursue an inherently contradictory strategy by seeking to base a constitutional order on Islam. If sovereignty rests with God, then how can a document written by humans serve as the basis for the political system? But this contradiction is more apparent than real: any constitution that provides possibilities for amendment acknowledges the existence of authority higher than itself. The problem is not that ultimate sovereignty might lie with God but that divine sovereignty can be taken to impose not simply general moral commands but also a specific code of law—the Islamic way or sharia.

In this chapter, I will present how Arab states have attempted to build constitutional systems that do not violate Islamic precepts. I will first show how and why the tensions involved in such an effort have only emerged relatively recently, first by exploring constitutional forms that sidestepped religious issues and then by examining the birth of comprehensive constitutions that made it more difficult to avoid the role of religion. I will then move to a more detailed consideration of the provisions for Islam in Arab constitutions. I will trace how the