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CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Western and Islamic Constitutionalism

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ABSTRACT

This essay aims to develop the comparison between Western constitutionalism and Islamic constitutionalism. In the Western tradition the term constitutionalism points to the limitation of government through law. There have been different models of constitutionalism, in particular the American and the French ones, that can be understood in the light of the two interpretive categories of *constitutional democracy* and *legislative democracy*, respectively. The developments of contemporary constitutionalism appear very complex, as today's constitutions are the reflection of the cultural, religious, social and political pluralism of current societies. Therefore, the centrality of *interpretation* is imposed, whose complexity derives from the fact that pluralistic constitutions merge *legal issues and moral issues* together. About Islamic constitutionalism some Islamic thinkers consider secularism a philosophy, while Islam is another form of philosophy, which has its own vision of human life, rights and duties. In this perspective it follows that it is reasonable to think that constitutionalism can be achieved differently in different societies depending on the conceptions of rights and duties that are accepted and shared.

Keywords: western constitutionalism, constitutional democracy, legislative democracy, islamic constitutionalism, secularism

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1. Ancient and Modern Constitutionalism

The term *constitutionalism* points to the existence of legal limits on government action: it expresses the idea of *government limited through law*. It is therefore through these limitations, looking at the ways in which they are set, that we get a criterion for distinguishing between *ancient* and *modern* constitutionalism.

In *Constitutionalism: Ancient and Modern*, Charles Howard McIlwain (1958) traces the turning point back to the age of revolutions in the late eighteenth century. The full extent of the historical-constitutional innovation introduced by the revolutionary process can be appreciated by looking at the words that Thomas Paine - one of the most important scholars who interpreted the American constitutionalism - used to analyze the American Revolution: "A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government" (Paine 1953 a, 87). As we can see, the concept of constitution, in Paine's thought, is that of a *constituent power* of the people, who are in this sense sovereign and lay down the principles that will limit government action.

This conception stands in contrast to that of British constitutionalism, which locates limits of government action in the *substantive principles embodied in the institutions that have been formed over the course of the history of the English people*.

This understanding of the constitution is aptly expressed, in its basic contours, in the words of Henry Saint John, 1st Viscount Bolingbroke, an exponent of the party of Tories:

> By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain

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> fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.

The constitution is thus identified with the common law tradition, and, on that basis, limits are placed on government action. Indeed, as Bolingbroke goes on to say: "In a word, and to bring this home to our own case, constitution is the rule by which our princes ought to govern at all times" (Bolingbroke 1754, 130).

Also speaking to the same effect, consistently with this constitutional tradition, was Edmund Burke - who belonged to the party of Whigs - in the stance that in the late eighteenth century he took against the French Revolution:

> If you are desirous of knowing the spirit of our constitution, and the policy which predominated in that great period which has secured it to this hour, pray look for both in our histories, in our records, in our acts of parliament […]. All the reformations we have hitherto made have proceeded upon the principle of reverence to antiquity […]. Our oldest reformation is that of Magna Charta of 1215 (Burke 2003, 27).

In the analysis offered by McIlwain, the two contrasting visions—Thomas Paine's and that of the British constitutionalists—reflect a distinction between a *modern* understanding of the word "constitution" and the *traditional* conception, "in which the word was applied only to substantive principles to be deduced from a nation's actual institutions and their development" (McIlwain 1958, 3).

On the modern conception, then, the constitution comes into being the moment a *constituent power* is established as the foundation on which rests the constitution itself; ancient constitutionalism, on the other hand, identifies the constitution with the authoritative and abiding principles that a people can look to as part of their own historical tradition.

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In reality, modern constitutionalism advanced along a dual track, on the one hand building on the experience of the American and French Revolutions of the late eighteenth century, and on the other solidifying the constitutional parliamentarianism that grew out of the British Civil Wars and the Glorious Revolution of the seventeenth century.

The constitutional struggle of seventeenth-century England can be viewed in light of the classic distinction between *gubernaculum (government)* and *jurisdictio (jurisdiction)*, one that McIlwain recovers from the thirteenth-century English jurist Henry de Bracton (1216–1268) (McIlwain 1958, 84ff): *gubernaculum* (government) referred to the sovereign's discretionary and unchallengeable power; by contrast, *jurisdictio* (law) referred to the sovereign's obligation to act within the boundaries of the realm's customs, that is, in keeping with the principles of the common law. The constitutional struggle, then, was the conflict between those who saw the need to impose limits on sovereign power and those who took the opposite stance, rejecting any and all limits that had never been enforced.

The struggle ended with the Glorious Revolution of 1689, which established parliamentary sovereignty, limiting the powers of the monarchy under a system where king and Parliament would act as co-sovereigns. Thus, began modern constitutionalism in England, the most prominent feature of which is identified by McIlwain with the introduction of the idea that the king was accountable "to the law and to the people" in carrying out the activities of government. This accountability under the law meant that the king's official acts would no longer be "beyond the legal scrutiny of the courts or removed from the political control of the people's representatives in parliament," (McIlwain 1958, 124) an idea that became effective with the 1701 Act of Settlement, making judicial power independent of the king, in combination with the ability of Parliament to exert "a positive political control of government," guaranteeing "individual right against governmental will" (*ibidem*, 126).

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Through English constitutional history, then, two fundamental aspects of modern constitutionalism were forged: "the legal limits to arbitrary power and a complete political responsibility of government to the governed" (*ibidem*, 146). Modern constitutionalism would not become fully established until the end of the eighteenth century, when, as mentioned, the constitution came to be conceived as an act of the people that set the limits and manner in which government action must unfold.

2. Constitutional Models

The constitutionalism that came into being in seventeenth-century England established the principle of limited government, meaning a government of laws and not of men. The constitutionalism that emerged in the late eighteenth century with the American and French Revolutions recognized the centrality of constituent power and conceived of it as the foundation of constituted powers, but it did so giving rise to two different models in those two historical-constitutional contexts.

American constitutionalism was designed to enshrine guarantees for an already structured civil society. In France, on the other hand, it was meant to bring about a new society that would supersede the constitutional reality of the *Ancien Régime*. French constitutionalism introduced a program of social revolution, and it was the legislature that would play a central role in outlining this program, this in keeping with the principle set forth in Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen: *La Loi est l'expression de la volonté générale* ("The Law is the expression of the general will").

In the American experience, an already established civil society demanded that governmental power be subject to a set of clearly stated limits, very much in keeping with the ideas contained in Thomas Paine's

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1776 *Common Sense*.[1] The US Constitution of 1787, along with the 1791 Bill of Rights, was thus conceived as a technique for limiting the power of government through a set of protected rights enshrined in the constitution itself, and this established the principle of constitutional sovereignty, the idea of the constitution as the supreme law of the land (Article VI, Clause 2) (Fioravanti 1991, 74).

The difference between the two constitutional models can be stated thus: whereas in the American experience the constitution was conceived as a *contract*, in the French experience it was conceived as a *statutory enactment*, an act laying down a set of ground rules (Dogliani 1994, 200). At the foundation of the constitutional contract in the United States was a social contract of broad agreement around a set of widely shared moral principles in accordance with which the constitutional contract itself governed the exercise of political power. In France, on the other hand, it was a pre-existing political unit — the nation or the people — that served as the constitutional foundation, generating the constitutions that followed one another during the revolutionary decade from 1789 to 1799, which constitutions in turn established the organizing framework within which the political organs would function.

In the French reality the legislature was assigned the revolutionary role of proclaiming the natural rights of man that had been denied by the *Ancien Régime*. This central role of the legislature meant that rights would be guaranteed not through the constitution, as was the case in the American system, but through the law,[2] and this was a problematic guarantee, as it was based on *majority rule*.

[1] In Paine's vision, government was to be limited by the ends it was to promote through its own design: "Here then is the origin and rise of government, namely, a mode rendered necessary by the inability of moral virtue to govern the world; here too is the design and end of government, viz., freedom and security" (T. Paine 1953 b, 6).

[2] As Rousseau was early to state in the *Social Contract*, in a civil society "all rights are defined by law" (*tous les droits sont fixes par la loi*) (J.-J. Rousseau 1994, 73). Instead, in the history of British constitutionalism, jurisprudence is "the main instrument for developing the rules for the protection of liberties". It is judges and not legislators who build English

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3. Constitutionalism, Democracy, and the Protection of Rights

American and French constitutionalism can be understood in light of the two interpretive categories of *constitutional democracy* and *legislative democracy*, respectively (Bongiovanni and Gozzi 1997, 215 ff.). In the former, the superiority of the constitution over the legislature translates into a system of guarantees ultimately entrusted to the decisive role of the Supreme Court, with its power of judicial review: this principle was first put to words in 1788 by Alexander Hamilton in *Federalist* 78,[3] and then in the 1803 landmark case of *Marbury v. Madison*, in an opinion written by Chief Justice John Marshall, it became actual precedent.[4]

In France, by contrast, the primacy of the legislature ruled out any possibility of introducing judicial review of laws. This is borne out by the fact that nothing ever came of the project for a *jury constitutionnaire* that Emmanuel-Joseph Sieyès had put forward as early as 1795.

In the difference between these two ways of framing the relationship between the constitution and legislative power, then, we have a master criterion for interpreting the two models of constitutionalism. The same difference also points to *two different ways of guaranteeing rights* and *two different conceptions of rights*. In short, while the American model of constitutional democracy grows out of the Lockean liberal tradition in which rights trump state power, the French model bases rights on the

common law. "The subject of liberties, as elaborated by jurisprudence, and expressed in *common law* rules, is substantially unavailable to a political power" (M. Fioravanti 1991, 19).

[3] This is how Hamilton expressed the principle of judicial review: "By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing" (A. Hamilton 2022,346).

[4] From the opinion: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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authority of the legislature, foreshadowing a critical tension in contemporary democracies: that between the universalism of human rights and the majority principle expressed in the law.

In light of the foregoing analysis, we can arrive at a definition of the constitution as the body of rules governing the relations between the holders of political power and the rights of those subject to that power, and of constitutionalism as *the way in which to go about understanding the constitution*.

Over the course of the nineteenth century, the understanding of the constitution as the outcome of the people's constituent power gradually lost ground to the understanding of it as the outgrowth of the history and reality of a *nation*. A paradigm took hold that coupled *historicism* with *legal statism* by conceiving law as a body of norms that develop historically in the nation's consciousness and then find a legal statement in the state's statutory enactment, that is in the law of the State.

While in the United States rights were enshrined in the constitution — and namely in the 1791 Bill of Rights, that is the first ten amendments — in continental Europe rights found their basis in statutory law.

Over the course of the nineteenth century, Europe saw the establishment of the so-called *Rechtsstaat*, that is the state within the limits of the law: the state as an entity subject to the rule of law. It was a European paradigm.

This doctrine rejected the idea of natural rights and embraced that of rights as having their exclusive basis in posited law. On this doctrine, the law is an expression of the general will, that is, of the majority of the nation, and as such *it could change the constitution*. In this conception of the state, the legislative power belonged jointly to both the sovereign and the popular representation (Bähr 1864, 13), which contributed to the creation of a limited political power, as it prevented any possible arbitrariness. In this doctrine *the state limited itself through the law, not through the constitution.*

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4. The Age of Democracy and the Future of Constitutions. The Constitutions of Pluralism

In the late nineteenth and early twentieth centuries the *Rechtsstaat* model - the model of the liberal state - went into decline in the face of the rise of popular parties that could appeal to a plurality of values no longer lined up with those of the ruling class.[5] This was the age of democracy, in which the legislature was no longer the interpreter of the nation's law, but rather the expression of a collection of parties, classes, and interest groups. This made it necessary to reassert the supremacy of the constitution as a tool with which to limit the discretionary and even potentially arbitrary use of power by legislatures beholden to the shifting winds of majority sentiment.

In fact, in the wake of World War I, the unchecked power of parliaments raised concerns about that very prospect of majorities violating the constitution. But the necessary guardrails would not be put into place until after World War II. This was when Germany, for example, set up a system of judicial review (*richterliches Prüfungsrecht*) as a power entrusted exclusively to the Federal Constitutional Court (the *Bundesverfassungsgericht*). It is this shift that marks the primacy of the constitution over the legislature and stands as the basic framework for today's constitutional democracy. This is a paradigm shift to illustrate which we can go back to the German experience.

The democracy that emerged in Germany after World War II elevated the Federal Constitutional Court to the role of "guardian of the constitution" (*der Hüter der Verfassung*) and made it a constitutional body within the process of political will-formation. With the development of a system of constitutional justice so understood it became possible to ensure that legality and legitimacy always coincide, so that no tension can arise between the two (Leibholz 1957, 11).

[5] It is essential here to go to S. Romano (1969). *Lo Stato moderno e la sua crisi* (1909) (Giuffrè).

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In German constitutional democracy, even the constitution came to be understood in a different way than it had been under the *Rechtsstaat* - that is the model of the state within the limits of the law (the state subject to the rule of law): no longer understood as the result of the nation's historical development, the constitution now came to be seen as the "legal positivizing of the fundamental values around which the life of the community is structured" (Böckenförde 1976, 81, my translation). These values consist of the principles of justice underpinning the basic rights, whose effective protection is a necessary condition for making effective the freedom of every individual (*ibidem*, 79).

In the constitutionalizing of basic rights and the primacy of the constitution over statutory law lies the essence of constitutional democracy. According to Dieter Grimm – an important German constitutionalist – the democratic-constitutional form of government is a form of state consisting of two levels of decision-making legality: there is the constituent legality of the principles enshrined in the democratically enacted constitution, and there is the legality of legislative enactment. The former (constituent) legality is based on a broader consensus than that of legislative enactment, where decisions are made by majority vote, and so they can be made by no more than a slim majority. When these two decision-making levels come into conflict, the conflict can only be resolved by recourse to the constitutional court. This two-level legality (*zweistufige Legalität*), Grimm concludes, "is synonymous with the constitution itself" (Grimm 1980, 706, my translation).

The primacy of the constitution over the powers of the state is built into the very structure of the two-level legality of constitutional democracy, where the constituent decision through which basic rights are enshrined in the constitution is removed from legislative discretion. In this sense, the constitutions of present-day democracies are *constitutions of protected rights (constitutions of rights' guarantee)*. But as such they are also *constitutions understood as guiding principles*: they are the basic norms

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whose principles the public authorities are to use as guides in upholding the constitution itself, which may include a principle of substantive equality to be achieved by protecting a suite of social rights (Fioravanti 1991, 142-47).

However, the story of contemporary constitutionalism is much more complex than that, for the constitutions that emerged out of this process were drafted against a background of pluralism, requiring buy-in from all parties (that is the consensus of all parties) despite the range of their different positions (Zagrebelsky 1996, 77). In this sense these constitutions can be described as *pluralistic constitutions (or constitutions of pluralism)*, ones reflecting a plurality of political ideologies. For example, folded into the Italian Constitution of 1947 are socialist, liberal, and Catholic ideologies, exemplifying the kind of compromise that was typical of postwar constitutions.

Contained in contemporary pluralistic constitutions are principles expressing the traditions and ideas behind each constitutional order. These principles purport to be

> universal, and they sit next to each other, expressing the different claims advanced by the different 'parties 'to the constitutional contract, but they are not underpinned by any rule of compatibility on which basis to resolve 'collisions 'among principles or strike a balance between them (*ibidem*, 78, my translation).

From that historical reality it follows that central to the practice of contemporary constitutionalism is the act of interpretation, an act through which "the constitutional past, taken as a source of values to be upheld, is brought into relation to a future that poses a problem to be solved in continuity with that past" (*ibidem*, 81, my translation). But that interpretive act is complex, the complexity stemming from the background pluralism it is meant to solve, and in particular from the fact that in a

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pluralistic constitution *the legal elements are merged with moral ones*. Which in turn means that the validity of any law — that is, its constitutionality, its conformity to the legal principles contained in the constitution — depends in good part on how certain complex moral questions are worked out, as when assessing whether a given law is consistent with the equality of all human beings (Dworkin 1977, 185).

The question of the relation between law and morality in contemporary constitutionalism is addressed by Robert Alexy – a German philosopher of law – from a perspective that attempts to make sense of the trends in today's legal systems. As Alexy argues, if a legal system incorporates principles,[6] it follows that there must be a connection between law and morality.[7] The incorporation of principles into the constitutional system expands the function of the judge, who will no longer be a mere executor of the law, but will exercise the function of balancing the principles on which the law is founded. The principles represent the vehicle through which the equitable role of the judge is affirmed in relation to the protection of fundamental rights. What this also means is that contemporary constitutionalism, as Alexy construes it, can be described as an attempt to strike a balance between the will of the majority as expressed by the legislature and judicial decision-making geared toward protecting individual rights.[8]

5. Change in the Functions of the Constitution

In reflecting on the future of the constitution, other authors highlight the increasing weakness of the constitution as it sheds the ability to act as a

[6] Alexy characterizes principles as belonging to the deontological sphere of duty and values as belonging to the axiological sphere of the good. But in doing so he equates the two, arguing that principles and values are the same thing and that a theory of values can be reformulated as a theory of principles. See R. Alexy 1985, 510 and 125ff. Translated into English as *A Theory of Constitutional Rights*, trans. Julian Rivers, 2002.
[7] In this regard, see the reconstruction of Alexy's thought in G. Bongiovanni 1998, 37ff.
[8] *Ibidem*, 46.

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standard in light of which to govern politics by settling the disputes around which the political process cannot find any consensus (Grimm 1996, 129).

In the age of the *Rechtsstaat* (the state governed by law) the constitution was entrusted with the function of guaranteeing individual freedoms. But under that model, the public power governed by the constitution was a unitary power.

With the rise of democracies in the twentieth century, the state found itself having to take on new roles, particularly that of attending to the basic needs of the population. At the constitutional level, this meant *writing social rights into the constitution*, as happened with the Weimar Constitution of 1919 (Arts. 157ff.).

At the same time, new actors emerged. These were mainly interest groups, and while they were not organs of the state — a matter with which the constitution was concerned — they did influence the state's decision-making. Modern constitutions were written assuming a distinction between state and society, but then that distinction fell away: society and social groups were now part and parcel of public power, such that it was no longer tenable to intervene on the basis of a constitution exclusively concerned with the powers of the state (*ibidem*, 159). The constitution thus lost its cohesive function as a tool of social and political integration (Frankenberg 2000, 1). In the face of these profound transformations of the state and of society, will a different conception of the constitution take hold, or will the constitution be reduced to a partial order incapable of taking in the totality of the spheres of state activity? (Grimm 1996, 163).

6. Constitutionalism, Democracy, and Rights

The transformations that constitutionalism underwent in contemporary age run parallel to the changing understanding of rights in the experience of present-day democracies. Rights in the modern age can be described as having gone through three phases as follows, each identified in light of the

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foundation on which they have been understood to rest. We thus have (1) a *naturalistic-rationalistic* conception of rights in the seventeenth and eighteenth centuries; (2) a *positivistic and legalistic* conception of rights in the nineteenth century; and (3) a *constitutional* conception of rights in the twentieth century. In the first phase, rights were understood to have their foundation in *natural law*, in turn understood as a law of reason; in the second phase this natural law was replaced with the state's *posited law*; and then in the third phase this legal-positivistic foundation was in its own turn replaced with the democratic *constitution*, seen as a more solid and secure foundation for rights than the legislative foundation, once it was appreciated how liable the latter was to change with the changing mood of the legislative majority of the moment.

The Weimar Constitution of 1919 is of fundamental importance to the theory of democracy and rights, as it enshrines a list of *social* rights alongside the traditional rights to liberty, the former understood as a necessary condition for a genuine exercise of latter. The new social rights were meant to address the reality of individuals who are no longer isolated but enter into in associative forms. In this connection the labor lawyer Hugo Sinzheimer, who was among the drafters of the Weimar Constitution, set the individualistic understanding of rights characteristic of the liberal tradition against an understanding that might be described as communitarian *avant la lettre*, where individuals are considered not in isolation but as embedded in a social reality. On this doctrine of social law, a principle of *solidarity* is therefore asserted against the liberal conception of rights, understood as a mere guarantee of individual autonomy over the state's intervention.

At work here, according to Michael Walzer, is a "subversive logic of rights," (M. Walzer 1991, 117) in that rights are now asserted to be genuinely universal. They are no longer the rights of the late eighteenth-century declarations tailored to the specific interests of the bourgeoisie but are increasingly the rights claimed by other sectors of civil society: the

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labor movement, the women's movement, ethnic and cultural minorities, and so on. In this sense, rights can be understood as a guarantee of pluralism in civil society: the State within the law of the nineteenth-century (*Rechtsstaat)* can accordingly be described as having given way to a State of rights (Zagrebelsky 1992, 84).

In contemporary pluralistic democracies, rights are no longer a check against government interference but rather serve as a basis on which people can advance claims by individually and collectively participating in the life of the state. In this sense, Jürgen Habermas has argued that the democratic principle consists in the concrete ability to freely exercise basic rights in the process of political will-formation and that therein lies the legitimacy of enacted law: "democratic procedure should ground the legitimacy of law."[9] Contemporary pluralistic democratic societies are increasingly diverse, with a multiplicity of national, ethnic, religious, and cultural groups.[10] We are therefore faced with the problem of setting out the constitutional conditions for the possibility of such pluralistic multicultural societies.

Multiculturalism recognizes the pluralism of values, rejecting the notion that all values can be reduced to a single system of values. This means recognizing the equal status of all existing cultural communities in civil society. Which in turn means that we are no longer faced with the problem of excluded minorities, or of the need for the majority to tolerate minorities. In other words, *multiculturalism means that we need to*

[9] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (The MIT Press, 1996), sec. 4.2.1, p. 151. Originally, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1992), p. 188.

[10] On the relationship between constitutional law and multicultural society see G. Cerrina Feroni 2017. Multiculturalism is a political, legal and ethical project that recognizes the equal dignity of the "cultural expressions of individuals and groups that coexist in a democratic system" (*ibidem*, 5, my translation).
See also Groppi, who emphasises the connection between multiculturalism and constitutionalism, since multiculturalism is an "expression of the 'pluralism' that is the basis of the constitutional state (also called, not by chance, a 'state of pluralist democracy')", in T. Groppi 2018, 2 (my translation).

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definitively move past the principle of majority rule (Raz 1994, 69). The recognition of cultural pluralism also entails a need to embrace *legal diversity*, a system of law allowing for differential treatment of different cultural groups and identities by recognizing their *cultural rights* within the existing constitutional framework.

Underlying the problem of multiculturalism, however, is a deeper problem that has yet to be adequately addressed. As Seyla Benhabib has rightly observed in *The Rights of Others*, this unresolved problem revolves around the concept of the people. This concept is uncritically taken to refer to a naturalistic, culturally homogeneous group (Benhabib 2004, 202ff). But that does not tally with the historical reality of the people in a constitutional democracy, where the people are actually a plurality groups whose interests, self-understandings, and positions in society are always in flux, in becoming. This means that the fundamental problem of multiculturalism — that of *integration* — cannot be solved until we deal with the concept of the people as a culturally homogeneous people. Indeed, this is the source of culturally discriminatory legal norms, in that they do not recognize and protect the specificity of cultural differences, and so we need to be able to move past that concept.

There is therefore a range of transformations that constitutional democracies *could* undergo in view of their underlying multiculturalism. As discussed, these are the transformations that come from recognizing collective rights, moving beyond the principle of majority rule, embracing legal diversity, and revisiting the concept of the people, and they should ultimately translate into *a rethinking of the principles of Western constitutionalism*.

James Tully, a leading theorist of multiculturalism, has observed that the purported universality of the language of constitutionalism stifles cultural differences and imposes a dominant culture by masquerading it as culturally neutral. He instead puts forward a theory of constitutionalism based on intercultural dialogue and negotiation, recognizing that each

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culture is formed in a process of continuous interchange and intermingling with other cultures. The constitution, in other words, needs to be reconceived as a "form of accommodation" of cultural diversity (Tully 1997, 30).

It would be necessary to embrace the idea of a *genuinely intercultural sovereignty*, and of constitutions as "based on *the sovereignty of culturally diverse citizens*, not on abstract forgeries of culturally homogeneous individuals, communities or nations" (*ibidem*, 183, italics added). We can thus see coming into view the new face of our democracies, which could accordingly be described as *multicultural constitutional democracies*. Recognizing the multicultural nature of societies, this new constitutionalism can reenvision the democratic constitution as a framework designed to make possible the coexistence of different groups, life-worlds (*Lebenswelten*), and value systems (Belvisi 2000, 164). As Gustavo Zagrebelsky puts it, the outcome of such a constitutional framework can accordingly be described as a "compromise struck between possibilities" (Zagrebelsky 1992, 10, my translation). In the same vein, Zagrebelsky also comments that our constitutions

> need to regenerate themselves with a view to a constitutionalism meant for "open constitutional states." [...] For constitutionalists, this means [...] *taking the notion of law—originally theorized as a command through which the sovereign rules over all subjects, good and bad alike—and rethinking it as a device with which to ensure coexistence in the interaction that takes place among people of different kinds* (Zagrebelsky 2007, 126, my translation).

7. Islamic Perspectives on Constitutionalism

In a very interesting text, Raja Bahlul analyzes the possibility of Islamic constitutionalism, meaning a constitutionalism based on Islamic thought

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and ideals. He begins by pointing out that some concepts from Western tradition have equivalent terms in Arabic. For example, the idea of a state subject to the rule of law (*État de droit*) corresponds to *dawlat al-qānun*, and the rule of law itself corresponds to *ḥukm al-qānun* (Bahlul 2007, 515). And of course, this is not just a matter of formal equivalence or correspondence.

Bahlul observes that discussion of the meaning and possibility of constitutionalism in Arab-Islamic thought can serve as a testing ground for the universality of this concept. He believes that constitutionalism has significance for Arab-Islamic political thought, too. The foundations of constitutionalism in Arab-Islamic thought are theistic. There are two variants: the Ashʿarite variant (which is voluntarist) and the Muʿtazilī variant (which is objectivist, known for its rationalism). Ashʿarism aims to limit the discretionary powers of rulers, i.e. the discretionary power of the executive.

As far as Muʿtazilīsm is concerned, this vision can be argued to have put forward the idea of a separate, independent judiciary, capable of keeping in check the abuses of legislative majorities. What is interesting from this perspective is the interpretation of Western constitutionalism in relation to a possible Islamic constitutionalism.

In the Western perspective constitutionalism, democracy, and the separation of powers are closely linked. In the West, they all came into being in the context of secularism (*laïcité*), which is their necessary background and presupposition.[11] Since the Islamic thinkers (for instance Gannouchi, Turabi) reject secularism,[12] the problem arises as to whether it is possible to espouse Islam, constitutionalism, and democracy all at the same time. How can an Islamic regime be democratic unless it is secular?

[11] Indeed, from the seventeenth century onward, Western political and legal thought has been developed on a secularist basis, meaning it presupposes a separation between revealed truth and reason, between church and state. And this separation has been the condition for pluralism and tolerance.

[12] Here Bahlul is referring to thinkers like Rachid Ghannouchi and his 1993 book *Al-Ḥurriyāt al ʻĀmmah fī al Dawla al Islāmiyya* (Public liberties in the Islamic state).

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But that question assumes that Islam is incompatible with democracy. Western constitutionalism requires democracy, and democracy requires secularism: so, constitutionalism also requires secularism. But on the approach espoused by Islamic constitutionalism, Islam rejects secularism. It follows that Islam is incompatible with both democracy and constitutionalism.

That is the first part of the argument, but there is – in the opinion of some Islamic thinkers – a second part that introduces a different perspective. Democracy – according, for example, to Joseph Schumpeter's interpretation, expressed in his book *Capitalism, Socialism and Democracy* (1942) – can be considered as a political *method* that is neutral with respect to the values of a society. In this perspective democracy, according to Gannouchi, could be understood to mean popular sovereignty, political equality, and majority rule. None of these concepts bears any necessary connection to secularism. So, Islam need not necessarily reject democracy so understood. Islamic thinkers accordingly propose to free democracy from secularism, endorsing the former and discarding the latter. In short, they see secularism as a philosophy, and Islam as another form of philosophy, with its own vision of human life, rights, and duties.

We can see, then, that constitutionalism can take different forms in different societies depending on which conceptions of rights and duties are embraced and shared in those societies. And once we frame the problem in this way, we will also be in a position to see that Islamic constitutionalism is profoundly different from Western constitutionalism, because the philosophy of Western democracy is relativism, which allows for pluralism, whether religious, political or ideological. For this reason, Western constitutionalism cannot take a religious conception as its foundation.

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8. An Islamic Constitutionalism?

Nathan Brown, a professor of political science and international affairs at George Washington University, notes that "Arab constitutional texts have been written primarily to enable, organize, and justify political authority" (Brown 2002, 161): from the very start, since the 1861 Tunisian constitution, *they have essentially been conceived to legitimize existing balances of power*. Given this background, Brown asks two central questions: "how can constitutionalism emerge in societies in which liberalism is so far from hegemonic?" And "can Islamic principles [...] be employed to build a different kind of constitutionalism?" (*ibidem*, 162).

In the late nineteenth and early twentieth centuries, several Islamic thinkers set out principles for an Islamic constitutionalism that in the *sharīʿa* located the limits of political power. They were looking to both the Islamic and the Western traditions. This, for example, was the vision espoused by both Rashid Riḍā (1865-1935) and ʿAbd al-Razzāq al-Sanhūrī (1895-1971).[13]

Rashīd Ridā, a Syrian intellectual, published his volume on the caliphate (*Al-Khilāfa wa al-imāma al-ʻuzmà*) in 1922 in which he stated that the community of believers (*umma*) constitutes the basis of any potential political construction. In fact, he declares that the unity of the supreme imamate (or caliphate) derives from the unity of the *umma*: "the unity of the imamate follows that of the Community."[14]

The Community has the right to remove the supreme imām (the caliph), as the "supreme authority is a right that belongs to the people" (Laoust 1986, 24).

[13] N. Brown 2002, 165. Nathan Brown writes: "Rida sought an Islamic state governed by the *sharīʿa* (supplemented by positive law within its boundaries), involving consultation as well as an active role by an invigorated *ʿulama*. Al-Sanhuri saw the *sharīʿa* not as the basic framework of government but as a rich legal source that needed only to be modified to be applied to modern circumstances."
[14] H. Laoust 1986, 89 (my translation). See also M. Campanini 2008, 139.

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The original aspect of Rashīd Ridā's conception consists in the fact that he identifies the 'ulamā' – those who can "lose and bind" (*ahl al-hall wa al-ʻaqd)* – with the members of a freely elected parliament: "These parliamentary institutions - he writes - correspond in Islam to the body of *ahl al-hall wa al-ʻaqd*" (*ibidem,* 100). In this way Rashīd Ridā recovers an important aspect of European political tradition (Campanini 2008, 142).

Compared to Rashīd Ridā, ʿAbd al-Razzāq al-Sanhūrī's conception of the caliphate is more oriented towards a cosmopolitical perspective. He was an Egyptian jurist, professor of law and politician. In his 1926 book on the Caliphate, *Le Califat. Son Evolution vers une Société des Nations Orientale*, he reaches some relevant conclusions: "The best combination in the current state of our civilization involves, in our opinion, entrusting the exercise of religious attributions to a *body distinct and independent from the body in charge of exercise of political powers…*;" the caliph will unite "in his person the two attributions without preventing them from remaining distinct in their practical functioning" (al-Sanhūrī 1926, 571, my translation).

Furthermore, Al-Sanhūrī highlights the need for a League of Nations with specifically "oriental" characteristics.

Al-Sanhūrī wrote:

> […] the establishment of an Oriental League of Nations would reconcile modern nationalist tendencies with the need to ensure some unity among Muslim peoples[…] By examining the question of the application of the principles of Muslim law, we have foreseen the possibility of a legal system that is applicable to all citizens, Muslim or not. This leads us to the conception of a Muslim society in the broadest sense of the term: *political and non-religious society*. It will be accessible to all confessions as long as they respect constitutional laws (*ibidem*, 584-586, (my translation, my emphasis).

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Here we can recognize, as for Ridā, a flexibility of Muslim law which presupposes "a secularization of the State and a peaceful coexistence of faiths and peoples" (Campanini 2008, 148).

In these scholars we can find an encounter with the Western tradition.

Let's continue the analysis of Islamic constitutionalism. In Islamic constitutionalism, a clear distinction is drawn between human-centric views—those that locate sovereignty in human beings—and Islam, which recognizes only God as sovereign, making the *sharīʿa* the foundation of the Islamic constitutional order.

According to Islamic constitutionalists, a

> sharp distinction is often made between the Qur'an and the *sunna* on the one hand and other sources of *sharīʿa*-based law on the other […] A rule based on a clear Qur'anic text or an unambiguous statement of the Prophet cannot be changed by later interpretation; […] but Islamic constitutionalists can be fairly wide-ranging in their acceptance of new interpretations of law.[15]

There are likewise other commentators who, while representing a minority voice in the Muslim world, go so far as to claim that "Sharīʿa is not identical with the sources of Islam as such, but rather with the way those sources were historically interpreted and applied."[16] On this view, "an Islamic political order must be based on the *sharīʿa*, but the *sharīʿa* must be reinterpreted."[17] The problem, then, lies in interpretation.

At the core of the debate on modern Islamic constitutionalism is the concept of the *shūrā* (consultation), the ancient practice of deciding matters of public or communal interest in consultation with those who stand to be affected by the decision. The turn toward consultation therefore

[15] N. Brown, 2002, 170-171. In this regard Brown mentions at p. 171 Tawfiq Shawi, *Fiqh al-shura wa-l-istishara* (The jurisprudence of Consultation and Seeking Advice) (Dar al-wafa', 1992), and Mohamed S. El-Awa, *On the Political System of the Islamic State* (American Trust Publications, 1980).
[16] A. A. An-Naʿīm 1989, 12, quoted in N. Brown, 2002, 175.
[17] N. Brown 2002, 175; cf. An-Naʿīm 1996.

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raises the *problem of how the sovereignty of the people can be made consistent with that of God*. This question of popular sovereignty became a central concern, perhaps irreversibly so, when in the season of the so-called Arab Springs of the early 2011s, a series of uprisings and protests broke out seeking to end the corruption of the power elites in the Arab world. These developments suggested an opening toward Western constitutional models, without going against the Islamic tradition, as was case with the Tunisian constitution of 2014.

Closely bound up with the problem of constitutionalism is that of democracy, in that there can be no democracy without a constitution placing limits on the exercise of power. It is to the problem of democracy that we will therefore now turn.

9. Islam and Democracy

As Nathan Brown comments, it is fair to say that the constitutions enacted in the Arab countries essentially reflect the existing power relations entrenched in these countries, while doing little to secure the separation of powers needed to guarantee basic rights. They can in this sense be described as *constitutions in a nonconstitutional world*,[18] that is, *constitutions without constitutionalism*. Indeed, there is a separation of legislative, executive, judiciary powers, but not a separation of their functions.

Constitutionalism and Western democracy are two inseparable concepts. The absence of constitutionalism in the Muslim world rules out the possibility of establishing forms of democracy comparable to those in the West. Which in turn makes unfeasible the idea of exporting the model of Western constitutional democracy to the Arab world.

This problem raises once again the fundamental question: is Islam compatible with democracy? Or, as Yadh Ben Achour – an exponent of

[18] The expression is from N. Brown 2002.

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the liberal-democratic reformism – puts it, is it possible to be religious and democratic at once? (Ben Achour 1992, 258ff). The question can legitimately be asked because Arab constitutions explicitly invoke Islam,[19] on the premise of the close connection understood to exist among religion, law, and politics,[20] making it difficult (on this conception) to accept the idea that different religions might stand on an equal footing. And yet this is not an idea that a democracy can reject: as Ben Achour observes, democracy must be able to tolerate dissent, nor is it enough to describe democracy as "government by the people," for we also have to ask, who are the people? The people, Ben Achour answers, are "a people made of citizens who understand themselves to be such on the basis of their political allegiance to the state, to the political city, and who do not confuse their role as citizens with their identity as believers" (Ben Achour 1992, 261, my translation).

This does not mean rejecting religion but rather "interiorizing" it and mutually acknowledging the variety of religions and the right to practice them. Indeed, democracy today - in the Western perspective - is sustainable only to the extent that we recognize that the values we choose to live by, and which shape our personal identity, are not absolute (but only relative) and therefore cannot be imposed on everyone else (*ibidem*, 271). Indeed, as Hans Kelsen – one of the most important philosophers of law of the last century – puts it, the philosophy of democracy is the philosophy of relativism.[21]

[19] Examples are Article 2 of the Algerian Constitution of 1971, Article 2 of the Egyptian Constitution of 2014, Article 1 of the Tunisian Constitution of 1959, and Article 2 of the Jordanian Constitution. Islam is conceived as a source of identity and a basis of social integration, and in this sense the relation between Islam and the state ought to be understood as descriptive rather than normative. See Amor 1994, 45.

[20] In this relation "the political and the legal do not have any autonomy, and any distinction in this sphere was limited, almost trivial." Amor 1994, 36, my translation.

[21] H. Kelsen 1955, 39:" This is the true meaning of the political system which we call democracy and which we may oppose to political absolutism only because it is political relativism."

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10. Conclusions

In the Western tradition there are different conceptions of constitutionalism with different models of democracy, notable among which are the American and French models.

In Islam, too, there are different conceptions of constitutionalism. Islamic constitutionalism rests on a theistic foundation and declares Islam to be incompatible with secularism: it accordingly considers democracy only as a method, compatible with different philosophies, namely, Islam itself and secularism.

Even so, there are authors, such as Rashid Riḍā and ʿAbd al-Razzāq al-Sanhūrī, whose outlooks overlap significantly with the Western tradition, as with respect to parliamentarianism.

There are also Muslim authors who embrace liberal-democratic reformism and make the case that Islam is compatible with democracy and pluralism.

In short, there is no single conception of constitutionalism. The idea needs to be traced back to different traditions and societies. There are significant convergences with the Western tradition, but Islam will inflect constitutionalism in its own way, safeguarding its own cultural identity.

References

Alexy R. (1986). *Theorie der Grundrechte* (Suhrkamp). Translated into English by Julian Rivers. as *A Theory of Constitutional Rights* (2002) (Oxford University Press).

Amor A. (1994). Constitution et religion dans les États musulmans, in *Constitution et religion*, Proceedings of the 10th session of the Académie Internationale de Droit Constitutionnel, Tunis, 1994 (Presses de l'Université des Sciences Sociales de Toulouse).

An-Naʿīm A. Ahmed (1996). *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081

An-Naʿīm A. A. (1989). Constitutionalism and Islamization in the Sudan, in *Africa Today* 36, no. 3/4.

El-Awa M. S. (1980). *On the Political System of the Islamic State* (American Trust Publications).

Bahlul R. (2007). Is Constitutionalism Compatible with Islam? chap. 15, in P. Costa, and D. Zolo (eds.), *The Rule of Law: History, Theory and Criticism* (Springer).

Bähr O. von (1864). *Der Rechtsstaat* (Wigand).

Belvisi F. (2000). *Società multiculturale, diritti, costituzione (*CLUEB).

Ben Achour Y. (1992). *Politique, religion et droit dans le monde arabe* (Cérès).

Benhabib S. (2004). *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press).

Böckenförde E.-W. (1976). Entstehung und Wandel des Rechtsstaatsbegriffs, in *Staat, Gesellschaft, Freiheit* (Suhrkamp).

Bolingbroke H. Saint John, 1st Viscount. Letter X (1735). Dissertation upon Parties, to the Right Honorable Sir Robert Walpole, in vol. 2 of *The Works of the Late Right Honorable Henry St. John, Lord Viscount Bolingbroke (*London: 1754).

Bongiovanni G. (1998). R. Alexy e il costituzionalismo, in F. Belvisi (ed.), *La filosofia del diritto costituzionale e i problemi del liberalismo contemporaneo* (CLUEB).

Bongiovanni G. and Gozzi G. (1997). Democrazia, in A.Barbera, and G. Zanetti (eds.), *Le basi filosofiche del costituzionalismo: Lineamenti di filosofia del diritto costituzionale* (Laterza).

Brown N. J. (2002). *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press).

Burke E. (2003). *Reflections on the Revolution in France* (1790) (Yale University Press).

Campanini M. (2008). *Ideologia e politica nell'Islam* (Il Mulino).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081

Cerrina Feroni G. (2017). Diritto costituzionale e società multiculturale, in *Rivista AIC*, no 1.

Dogliani M. (1994). *Introduzione al diritto costituzionale* (Il Mulino).

Dworkin R. (1977). *Taking Rights Seriously* (Duckworth).

Fioravanti M. (1991). *Appunti di storia delle costituzioni moderne* (Giappichelli).

Frankenberg G. (2000). Tocqueville's Question: The Role of a Constitution in the Process of Integration, in Ratio *Juris* 13, no. 1.

Ghannouchi R. (1993). *Al-Ḥurriyāt al' Āmmah fī al Dawla al Islāmiyya (*Public liberties in the Islamic state).

Grimm D. (1996). Il futuro della costituzione, in G. Zagrebelsky, P. P. Portinaro, and J. Luther (eds.), *Il futuro della costituzione* (Einaudi).

Grimm D. (1980). Reformalisierung des Rechtsstaats als Demokratiepostulat?, in *Juristische Schulung*, 10.

Groppi T. (2018). Multiculturalismo 4.0, in *AIC - Osservatorio costituzionale*, Fasc. 1.

Habermas J. (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (The MIT Press). Originally, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992) (Suhrkamp).

Hamilton A. (2022). A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behavior (May 28, 1788). Federalist 78, in Hamilton A., Madison J., and Jay J. *The Federalist Papers* (Open Road Integrated Media).

Kelsen H. (1955). Foundations of Democracy, in Ethics*: An International Journal of Social, Political, and Legal Philosophy*, 66, no. 1.

Laoust Henri (ed.). (1986). *Le Califat dans la Doctrine de Rashīd Riḍā* (Maisonneuve). Traduction annotée d'*al- Khilāfa*. Cairo, 1341 (1922-3).

Leibholz G. (1957). Demokratie und Rechtsstaat, in *Schriftenreihe der Landeszentrale für Heimatdienst in Niedersachsen*, Heft 5.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081

McIlwain C. H. (1958). *Constitutionalism: Ancient and Modern* (1940) (Great Seal Books).

Paine T. (1953 a). Rights of Man, part I, in *Common Sense (1776) and Other Political Writings* (The Liberal Arts Press).

Paine T. (1953 b). "Common Sense" (1776), in *Common Sense (1776) and Other Political Writings* (The Liberal Arts Press).

Raz J. (1994). Multiculturalism: A Liberal Perspective", in *Dissent* 41.

Romano S. (1969). *Lo Stato moderno e la sua crisi* (1909) (Giuffrè).

Rousseau J.-J. (1994). *The Social Contract* (1762), trans. Christopher Betts (Oxford University Press), bk. II, chap vi.

al-Sanhūrī, 'Abd al Razzāq A. (1926). *Le Califat. Son Evolution vers une Société des Nations Orientale* (Geuthner).

Schumpeter J. (1950). *Capitalism, Socialism and Democracy* (1942), 3. ed. (Allen & Unwin).

Shawi T. (1992). *Fiqh al-shura wa-l-istishara* (The jurisprudence of Consultation and Seeking Advice) (Dar al-wafa').

Tully J. (1997). *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press).

Walzer M. (1991). Constitutional Rights and the Shape of Civil Society, chap. 6, in R. E. Calvert (ed.), *The Constitution of the People: Reflections on Citizens and Civil Society* (University Press of Kansas).

Zagrebelsky G. (2007). *La virtù del dubbio: Intervista su etica e diritto* (Laterza).

Zagrebelsky G. (1996). Storia e costituzione, in G. Zagrebelsky, P. P. Portinaro and J. Luther (eds.), *Il futuro della costituzione* (Einaudi).

Zagrebelsky G. (1992). *Il diritto mite* (Einaudi).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081