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Shari'a: Legal or Religious Rule? A Reflection on Public Law and Beyond

Culture is the only good of humanity that divided between us all, instead of diminishing, will become greater.
Hans Georg Gadamer

Abstract

Globalization has inevitably brought theocratic and theocratic-constitutional models closer to European and Western constitutionalism. Recent historical events, often of a revolutionary and warlike nature, have accelerated constitutional developments, leading states populated predominantly by Muslim worshippers to enact constitutions in which elements of the *Shari'a* tradition coexist with elements of secular and predominantly legal culture. Scholars from different cultural traditions have thus been led to question the nature of the *Shari'a*: is it normative in the Western legal sense, or is it merely a set of religiously based rules? The answer is of great significance, not least in understanding whether *Shari'a* can "dialogue" with Western legal systems. Even more significant is the observation concerning certain Arab-Islamic constitutions (such as those of pre-Taliban Afghanistan, Iraq, Iran, Turkey, and North Africa), particularly the extent to which their reference to *Shari'a* may risk distorting the nineteenth-century function of constitutions. Indeed, a careful and rational use of comparative law, combined with historical-legal analysis, can lead to a fruitful comparison between the two major cultural areas, enriching both legal-constitutional traditions – with greater secularization in one and a deeper emphasis on ethical and value-based considerations in the other.

KEYWORDS: Shari'a, constitutionalism, theocracy, theocratic state, constitutional theocracy, Arab Spring, Afghan Constitution, Iraqi Constitution, Iranian Constitution, Turkish Constitution, North African Constitutions, separation of powers, temporal power, spiritual power.

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1 Introduction

The First (January 16/17 – February 28, 1991[1]) and the Second Gulf Wars (March 20 – May 1, 2003[2]), the conflict in Afghanistan and the collapse of the Taliban regime (October 7 – December 9, 2001[3]), the so-called "Arab Spring" (December 17, 2010 – December, 2011[4]) and the resulting large-scale migration of predominantly Muslim populations to Europe[5] have, among other things, led to an encounter between Western constitutionalism and the legal-theocratic conception of the Arab-Islamic world. Scholars of Mohammedan law and the legislators in the states affected by these upheavals (North African, Middle Eastern, and East Asian) began to question how to reconcile religious norms with a legal framework more closely aligned with European constitutional principles.

For some time, *Shari'a*-based norms have been applied in certain neighborhoods of large European urban areas,[6] in which the presence of Muslim faith communities is particularly conspicuous. Inevitably, this phenomenon prompts national and local authorities to consider how to address such norms, their nature, and, in particular, their compatibility with existing legislation, including constitutional law.

This brief paper aims to examine the reflections of Western and Arab-Islamic jurists on this issue, together with their implications for constitutional developments in North African countries affected by the uprising of 2010-2011, as well as in states emerging from the conflicts following September 11, 2001.

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1 See Stefano Beltrame, *La prima guerra del Golfo. Perché non fu presa Baghdad. Dalla cronaca all'analisi di un conflitto ancora aperto* (Roma: Adnkronos, 2003).

2 See Jonathan Benstein, Carter Malkasian, *La seconda Guerra del Golfo* (Oxford: Osprey Publishing, 2011).

3 See Nico Piro, *Afghanistan missione incompiuta 2001-2015. Viaggio attraverso la guerra in Afghanistan* (Roma: Lantana editore, 2016).

4 See Massimo Castaldo, "Dopo la primavera araba," *Rivista di Studi Politici Internazionali* 79, no. 3 (2012): 35–47.

5 See Marco Zupi, Alberto Mazzali, Sara Hassan, "L'impatto delle primavere arabe sui flussi migratori regionali e verso l'Italia," *Osservatorio di politica internazionale*, no. 59 (2012).

6 See Angelo Rinella, *La Shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America* (Bologna: Il Mulino, 2021); Lorenzo Zucca, "What Is the Place of Shari'a Law in European Lagal Systems?," in *A Secular Europe: Law and Religion in the European Constitutional Landscape*, edited by Lorenzo Zucca (Oxford: Oxford University Press, 2012), 119-124, https://doi.org/10.1093/acprof:oso/9780199592784.003.0006.

This work adopts an interdisciplinary approach that brings history into dialogue with law[7] and constitutional rights, even where these are heterogeneous, in a comparative perspective; this process can be described as a predominantly unilateral exchange, in which doctrinal, jurisprudential and normative influences originate in the West and converge in the aforementioned legal systems. Historical events give rise to new legal acts, which may in turn be transformed – sometimes radically – by subsequent historical facts, just as worldviews travel with people, goods, and services and continue to influence, shape and reshape other worldviews.

First, it is necessary to outline the salient features of the *Shari'a* (Arabic: "beaten path" or "the path that leads to the source to drink from") as the sacred law of Islam, as derived from the four "sources of law" (*uṣūl al-fiqh*): the *Qur'an*, the *sunna* (the practice of the Prophet), the consensus (*iǵmāʿ*) of the Muslim community, and *qiyās* (analogical reasoning). A distinction is made within *Shari'a* between norms concerning worship and ritual obligations and those of a legal and political nature. The rules of Muslim law are divided by the Sunnis into *ʿibādāt*, the practices of worship, and *muʿamalāt*, the rules governing relations with others. Over the course of various historical periods, *Shari'a* has increasingly acquired legal significance (criminal and civil), adding to its religious, moral and spiritual core a body of rules aimed at governing human action from a state, administrative and temporal perspective (without, however, abandoning elements of confessional origin and belonging – to borrow from canon-law terminology – within the so-called "internal forum"[8]).

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7 See Diego Quaglioni, "Diritto e storia," in *Il rapporto tra diritto, economia e altri saperi: la rivincita del diritto. Atti della Lectio Magistralis di Guido Calabresi in occasione della chiusura dell'anno accademico del Dottorato in Studi Giuridici Comparati ed Europei*, edited by Giuseppe Bellantuono and Umberto Izzo (Trento: Università degli studi di Trento, Facoltà di Giurisprudenza, 2022), 65-69.

8 Different Shariatic legal schools (*madhahib*) have been created, developed and evolved with their own peculiarities on the interpretation of the *Shari'a*, depending on the social and territorial context where it is to be applied: *Hanafi* school, originally found in Iraq, Khorasan, Transoxiana and, today, also in Central Asia, Afghanistan, India and Pakistan; *Maliki* school, in the Maghreb and in some countries of sub-Saharan Africa; *Shafi'ite* school, in Bahrain, Indonesia, Southern Arabia, Yemen, Egypt and Eastern Africa; *Hanhalite* school, in Saudi Arabia; *Ihadi* school, in Oman, Zanzibar, in some areas of Libya, Tunisia and Yemen; *Ismaili* school, in India and Pakistan; *Zaydi* school, in Yemen; *Ga'farite Imamite* or *Twelver* school, in Iran; for an elucidation on the different Shariah models, see Noel James Coulson, *A History of Islamic Law* (Edimburgo: Edinburgh University Press, 1964); Wael B. Hallaq, *Introduzione al diritto islamico* (Bologna: Il Mulino,

Shari'a provisions, originating within and implanted in theocratic states, in their interaction with Western, particularly European, constitutionalism, give rise to a form of thought that may be qualified as theocratic-constitutional.

2 Constitutionalism and Constitutional Theocracy

Constitutional theocracy arises from the meeting of two opposing conceptions: the secular conception of constitutionalism – based on limiting state sovereignty and protecting individual rights and freedoms, and rooted mainly in Europe and the Americas – and the religious and confessional one – based on *Shari'a* and a metaphysical vision that transcends the individual and is embedded in Arab, Mesopotamian, and Middle Eastern societies.

Constitutionalism[9] – a political, philosophical and cultural movement aimed at limiting "Authority," whether monarchical or republican – elevates the role and function of law above arbitrariness and despotism, to the point of constructing a norm superior to all others (i.e., constitution), capable of imposing itself on "Power," whatever its form; constitutionalism, through doctrinal developments over time, has thus led to "transformations of the legislative function (which) are reflected in new forms through which the supremacy of the constitution is manifested. And if the traditional supremacy of the law recedes into a sphere of discretion, the constitution can no longer be identified solely with a set of limitations on the exercise of public power, nor with a set of guarantees of fundamental interests elevated – in a static sense – to the rank of a superior normative force. Rather, it is conceived as a complex legal order, the maintenance of which, in the face of legislative encroachment, constitutes a permanent task entrusted dynamically to the interpreter.[10]"

2013); Ibidem, *Sharīa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009); Massimo Papa, Lorenzo Ascanio, *Shari'a. La legge sacra dell'Islam* (Bologna: Il Mulino, 2014).

9 For an interesting historical-legal overview, see Paolo Ridola, "Il costituzionalismo e lo stato costituzionale," *Nomos*, no. 2 (2018).

10 Ridola, "Il costituzionalismo," 5.

Within the complexity of the constitutional debate, both within Europe and between the "Old Continent" and the "New World," the Islamic theocratic universe is also inevitably involved, where the civil institutional and legislative apparatus is subordinated to the religious one, if not entirely absorbed by it.[11]

The first authors[12] to theorize constitutional theocracy as an autonomous category (Olivier Roy, Ran Hirschl and Larry Catà Backer) provided a thorough examination of the basic features and limits of the principles of Islamic theocratic constitutionalism.

Ran Hirschl[13] argues that, from a mixture of seemingly contradictory values, ideals, and viewpoints, constitutional theocracy offers a framework, and an ideal scenario, through which constitutionalism can be studied and analyzed. This approach relies on analytical tools that go beyond the traditional perspective of examining constitutionalism as a doctrine traceable only in those social and political systems directly inspired by democracy.

Moreover, beyond the well-known plurality of voices in classical Islamic doctrine, on both the philosophical-political and legal levels, it is necessary to recall two highly influential doctrines of the twentieth century. Both Pakistani thinkers, al-Mawdūdī and Muhammad Asad, starting from the same "*Shari'a* base," developed markedly different conceptions of the "Islamic State": the former theorizing a "theodemocracy"; and the latter envisioning a form of (Islamic) rue of law.[14]

Constitutional theocracy lies at the intersection between the general and the contextual, the universal and the particular: it may be defined as the constitutional version of what Ran Hirschl[15] also calls "glocalization," that is, the process through which global and local elements merge into a synthesis. Constitutional theocracy may be understood as a dynamic and evolving laboratory, in which constitution and religion, morality and

11 For an in-depth reading, see Fernando Fussi, Pietro Motroni, Daniele Beacco, *L'origine dell'Islam. Sogno di una teocrazia universale* (Roma: Youcanprint, 2020).

12 See Alberto Vespaziani, "La Teocrazia Costituzionale: una Nuova Forma di Stato?," in *Scritti per la Costituzione del Dipartimento Giuridico dell'Università del Molise*, edited by Dipartimento Giuridico (Campobasso: AGR editrice, 2012), 971-994.

13 See Ran Hirschl, "The Realistic Turn in Comparative Constitutional Politics," *Political Research Quarterly* 62, no.4 (2009).

14 See Abu Ala Mawdudi, *Islamic Law and Consitution* (Lahore: Islamic Publication, 1995); Muhammad Asad, *The Principles of State and Government in Islam* (Berkley and Los Angeles: University of California Press, 1961).

15 See Ran Hirschl, *Constitutional Theocracy* (Cambridge, Massachussets: Harvard University Press, 2010), 36-37.

earthly interests, and the governance of souls and the organization of the *res publica* are combined in a form not yet fully defined.

Constitutional charters provide paradigmatic examples of this instability, as their content often resembles quicksand due to the "confusion" that arises not only within individual systems but also among them, notably as a result of the unresolved problem of the coexistence of Koranic norms and civil rules, which may be, if not formally, at least substantively in conflict.

3 A Look at Selected Religious-Based Constitutions

The Iraqi Constitution of 2005[16] reflects the extensive catalogue of rights belonging to the Western tradition, which, together with the precepts of the Qur'an and the written and oral Islamic legal sources, constitute the parameters for constitutional review by the Constitutional Court, which assesses whether a provision is constitutionally valid, that is, consistent with the dictates of Islam and aligned with the values of democracy, individual rights, and freedoms. This represents a blending of two distinct and largely opposing perspectives, a grafting of the constitutionalist framework onto a religious-normative foundation. This operation of legal-constitutional engineering is reminiscent of the syncretic overlap observed in colonial Mexico, where the Catholic tradition was superimposed on pre-conquest rituals, and elements of Christian worship coexist with those of pagan and animist origin, giving rise to either harmonious or conflicting combinations.

In contrast, Article 4[17] of the Iranian Constitution of 1979, amended in 1989, qualifies *Shari'a* as the supreme law, superior even to the Constitution

16 Constitution of Iraq, on August 28, 2005, approved by referendum on October 15, 2005, published in the Official Journal no.4012 on December 28, 2005, https://mofa.gov.iq/losangeles/wp-content/uploads/sites/85/2019/11/THE-CONSTITUTION.pdf; see on this issue Stefano Vince, "La costituzione irachena: un profilo storico giuridico", in *Una dècada de cambios: de la guerra de Irak a la evoluciòn de la primavera àrabe (2003-2013). Actas del II Congreso de Estudios sobre Historia, Derecho e Instituciones (Valladolid, 25 ottobre 2013*), edited by Maria Fernández Rodríguez, David Bravo Diaz and Leandro Martinez Peñas (Madrid: 2013), 201-245.

17 Article 4 of the Constitution of the Islamic Republic of Iran (dated on November 15, 1979, approved by referendum on December 2-3, 1979, amended on July 28, 1989): "All civil, penal, financial, economic, administrative, cultural, military,

itself – without any modification resulting from "Western contamination" – thereby emphasizing the divine origin of the entire legal apparatus and political authority. At the same time, under Article 6,[18] the administration of the state is entrusted to the people, who elect the president and municipal councilors. While Hirschl identifies constitutional theocracy as a new form of state resulting from the confluence of the expansion of constitutional review and the return of religion to the public sphere, Larry Catà Backer[19] prefers to describe transnational Islamic constitutionalism as the most significant phenomenon to emerge globally in recent decades. While the twentieth century witnessed a struggle between state-centered and market-oriented models, the twenty-first century has been marked by a tension between Western-style secular constitutionalism and Islamic-style theocratic constitutionalism. By contrast, in postwar transnational constitutionalism, religion occupied a limited place – one legal source among others – whereas in theocratic constitutionalism it assumes a pre-eminent role as the ultimate foundation of the legal system and a limit on legislation, as well as on constitutional supremacy itself, as illustrated in the Iranian Constitution. Its deeper roots, however, lie in nineteenth-century pan-Arab nationalism and Persian resistance to Westernization prior to World War I.

political laws and other laws and regulations must be based on Islamic criteria. This principle prevails over itlaq or umum (general statements) of all articles of the Constitution and all other laws and regulations, and it is vested within the powers of the fuqaha of the Shura-ye Negahban to ascertain this," https://www.shora-gc.ir/en/news/87/constitution-of-the-islamic-republic-of-iran-full-text.

18 Article 6 of the Constitution of the Islamic Republic of Iran: "In the Islamic Republic of Iran, the affairs of the state must be conducted by relying on public opinion expressed through elections: such as the election of the President, members of Majlis, members of shuras and the like, or through referenda specified in the relevant articles of this Constitution."

19 Larry Catà Backer, "God(s) over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century," *Mississippi Law Review*, no. 27 (2008): 101-154.

Iran's Constitution serves as a model, followed by the Afghan Constitution of 2004[20] and the Iraqi Constitution of 2005,[21] with significant influences on the constitutions of the North African states[22] that were central to the Arab Spring. A new form of state emerges from the historical developments outlined above: constitutional theocracy, understood as a combination of theocratic elements and classical institutions characteristic of Western constitutionalism. In the latter, however, the constitution embodies the principle of self-sufficient legitimacy (i.e., it legitimizes itself as a supreme source, a fundamental norm (*Grundnorm*), hierarchically

20 Constitution of the Islamic Republic of Afghanistan of January 26, 2004, https://www.diplomatie.gouv.fr/IMG/pdf/The_Constitution_of_the_Islamic_Republic_of_Afghanistan.pdf, suspended *de facto* on September 28, 2021, by the Taliban authorities after the seizure of power in Kabul and the reconquest of Afghanistan following the U.S. defeat (for a historical, war and political overview of the Afghan-Taliban *quaestio*, see *Afghanistan 2021 fine della guerra infinita? Storia, geopolitica, diritto, sicurezza*, edited by Francesco Cherubini and Luigi Giorgi (Roma: FrancoAngeli, 2024). The legal vacuum was filled with the issuance of decrees and general guidance notes. In reality, the Taliban's intention was to temporarily "implement" the 1964 Constitution of the former Afghan monarchy, "cleaning it up" from anything that contradicted the precepts of the Islamic faith. The Taliban's announced pledge to replace the suspended 2004 Constitution with the 1964 Afghan Constitution has not materialized in practice: no such initiative has been undertaken by the government to date. Instead, the Taliban administration has incorporated principles of strict Muslim observance in various regulations and directives adopted before and under the new regime, thus interpreting every aspect of the legal order, directly or indirectly, through a strict *Shari'a* framework.

21 For an in-depth review of the subject matter, see Azza Moharram Abou Elfadl, "The Centrality of Shari'ah to Government and Constitutionalism in Islam," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, edited by Rainer Grote and Tilmann Röder (Oxford-New York: Oxford University Press, 2012), 35-62.

22 See on this issue Ciro Sbailò, *Diritto Pubblico dell'Islam Mediterraneo. Linee evolutive degli ordinamenti Nordafricani Contemporanei: Marocco, Algeria, Tunisia, Libia, Egitto* (Padova: CEDAM, 2022); North Africa has historically been a predominantly Christian region, which has equipped the local peoples with a strong sense of respect for human rights *uti singulus*. This respect has persisted despite the significant decline in the Christian presence in the area, caused by widespread conversion to Islam, *manu militari* or voluntary, facilitated by extensive trade during the period following the Prophet's death, between 632 and 750 A.D., and further intensified in subsequent centuries. The core provisions safeguarding fundamental individual rights, as reflected in the constitutions of Egypt, Tunisia, Morocco, and Algeria, represent the positivization of principles rooted in a Christian heritage safeguarding each individual as a human being and transmitted from the pre-Islamic era, including patristic teachings, beginning with those of St. Augustine.

superior to all others within the same system), whereas in Islamic public law doctrine the constitution cannot, under any circumstances, violate divine law.

In modern Western constitutionalism, religion has been conceptualized as one legal source among others,[23] with varying levels of protection and different arrangements governing the relationship between religion and political power. In postmodern theocratic constitutionalism, religion constitutes "the" very foundation of political communities. Religion "is" the Higher Law that limits the constitutional expression of society, exists outside the law and control of state institutions, and is supported by an institutional apparatus for the protection and implementation of its rules, which are not only legal but also moral, ethical, and theological.[24]

It is in this context that *Shari'a*, in principle, stands as a normative order superior to constitutional rules and serves as the source of legitimacy for temporal power.[25]

23 Two examples among them: Article 25 of the Constitution of the Republic of Poland: "§ 1. Churches and other religious associations have equal rights. § 2. The public authorities of the Republic of Poland shall maintain impartiality in matters of religion, worldview and philosophy, guaranteeing their freedom of expression in public life. § 3. Relations between the State and the various churches and religious associations shall be formed on the basis of respect for their autonomy or mutual independence, each in its own order, as well as cooperation for the individual and common good. § 4. Relations between the Republic of Poland and the Catholic Church are defined by the international agreement concluded with the Apostolic See and by laws. § 5. Relations between the Republic of Poland and other churches and religious associations shall be defined by laws enforced on the basis of agreements concluded by the Council of Ministers and their representatives."; Article 19 of the Constitution of the Italian Republic: "Everyone has the right to freely profess their own religious faith in any form, individually or in association, to propagate it and to worship in private or in public, provided that it is not contrary to morality."

24 See: Grzegorz Maroń, "Miejsce Dekalogu w polskim porządku prawnym," *Prawo i Więź* 40, no. (2022): 221-223.

25 See Alberto Predieri, *Shari'a e Costituzione* (Roma-Bari: Edizioni Laterza, 2006).

4 The Nature of *Shari'a*

The system of Islamic law[26] appears to be marked by a "common apex law" superior to that of individual Islamic states. From this perspective, *Shari'a* is not merely a law, code, decalogue, table, or document, but a comprehensive system of values that transcends law,[27] ethnic diversity, place, and time. *Shari'a* forms the basis of every institutional organization, every branch of law, every policy, even every constitution and thus constitutes the foundation of cohesion for the entire community (*Umma*[28]), regardless of national affiliation. *Shari'a* is therefore a religious "norm" that governs all aspects of life within the Muslim community as a whole, in a genuinely holistic sense.

The legal rules stemming from *Shari'a* and Islamic *fiqh*[29] cover all forms of social activity: they regulate the purchase and sale of goods, lease, pledges, and taxation; address criminal matters; and govern family relations[30] and kinship ties in matters of marriage, divorce, filiation, and succession.

Shari'a possesses the distinctive feature of being both a religious and normative system governing life, inevitably affecting the individual as part of the *Umma*. It thus "governs" the individual as a Muslim, wherever he or she may be, rather than as a citizen of a particular state. In fact, when predominantly Muslim countries adopt constitutions, while partly drawing on Western constitutional models, they often place *Shari'a* at the top of the hierarchy of sources, above all others, a position that does not guarantee equal dignity for individuals according to Western standards, but instead conditions such dignity on whether or not they belong to Islam.[31]

As one of the most distinguished legal scholars, the Egyptian academic Tàriq Al-Bishrì[32] states, there is a complementary relationship between

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26 See Joseph Schacht, *An Introduction of Islamic Law* (New York: Clarendon Paperbacks, 1982).

27 See Jacques Heers, *L'islamcet inconnu* (Versailles: Editions de Paris, 2010).

28 See Carlo De Angelo, *I Musulmani in Occidente. Le Linee Evolutive del Dibattito Islamico Contemporaneo* (Napoli: De Frede Edizioni, 2011).

29 For an overview *in parte qua*, see Nicola Fiorita, *Dispense di Diritto Islamico* (Firenze: University Press, 2002).

30 See: Michał T. Najman, "Pozostałości prawa religijnego we współczesnym prawie," *Prawo i Więź* 54, no. 1 (2025): 603-604.

31 See Anna Luisa Basti, "Shari'a e valori costituzionali occidentali," *Filodiritto*, no.11 (2012).

32 See Tarek Al-Bishri, "Shari'a, invasione coloniale e modernizzazione del diritto nella società islamica," in *Lo Stato di Diritto. Storia, teoria, critica*, edited by

religion and law in Islam. The intertwining of religion, morality, and law is a defining and inescapable feature Islamic doctrinal thought.

In light of the foregoing, the question arises as to how the inherent immutability of religious doctrine and its rules can be reconciled with the inevitable adaptability of legal norms, whose characteristics, as Di Plinio[33] states, of historicity and relativity imply both the absence of a single, standardized, and eternal model of law and the unavoidable presence of synchronic (spatial) and diachronic (temporal) variability governing legal phenomena. There is not "one law," but rather "different types of law," understood as historically situated legal systems, each deriving its legitimacy, structure, internal coherence, and very rationale from the historically, and often socio-economically, structured organization of society. Law requires both space and time, which render it inherently mutable.

The primacy of the metaphysical over the juridical entails the subjection of the believer to Islamic law, regardless of territorial affiliation. This also explains the fundamental difference between Islamic law and the European-style secular conception of law as an emanation of sovereign power: since sovereign rests with Allah, any distinction between legal and moral norms may be lost. Consequently, *Shari'a* cannot be qualified as a material constitution,[34] as it lacks the fundamental principle of separation[35] between temporal and religious power, between the state and religious associations, and between civil and spiritual law, the former being subsumed within the latter.

In "new generation" Arab-Islamic Constitutions, the coexistence of the recognition of individual rights with the "*Shari'a* clause" – as noted – is not balanced, as the latter assumes primary importance, effectively structuring the entire constitutional system around it.

The past century witnessed struggles between competing ideological, political, economic, and social conceptions; the present century may be

Pietro Costa and Danilo Zolo (Milano: Feltrinelli, 2002), 667-679.

33 See Gianpiero Di Plinio, "Appunti su Shari'a, Diritti e Costituzionalismo islamico," *IuraOrientalia*, n.VI(2010): 283-315.

34 Let me refer you for a comprehensive view on the topic of the so-called material constitution to Fabrizio Giulimondi, *Costituzione materiale, costituzione formale e riforme costituzionali* (Roma: Eurilink, 2016).

35 Matthew 22:21; Mark 12:17; Luke 20:25: "Give to Caesar that which is Caesar's and to God that which is God's": it is undoubtedly suggestive to see in Jesus Christ the one who first divided temporal power from spiritual power and civil laws from ecclesiastical laws by arranging for both obedience.

marked by a confrontation between secular and theocratic constitutionalism.[36]

It is, and will be, not only a clash between intellectual, that is, abstract, levels, but also a clash between legal, and thus existential, conceptions that will affect concrete aspects of everyday life within communities. This tension encompasses both physical and metaphysical dimensions, concerning the protection of the individual in "earthly life" or in a supra-individual dimension oriented toward the "hereafter." It may be argued that the choice between European constitutionalism and constitutional theocracy is akin to deciding on which side of the Berlin Wall one would have stood before November 9, 1989.

Cultural and academic debate has played, and will continue to play, an essential role in fostering dialogue and confrontation among jurists engaged in diverse and often distant doctrinal traditions and schools of thought. Mutual enrichment through Aristotelian dialectic and Socratic maieutics may also serve as a means of fostering understanding between political worlds often at odds, even at war. It is important to recognize that legal formalism can serve as a safeguard – as has occurred during tragic periods of history – when Western legal thought confronts contexts in which radicalism and ideological, political, and religious extremism coexist; legal formalism has functioned, both in the past and in the present, as a form of resistance to doctrinal orientations that provide technical and theoretical support to communism, Nazism, fascism, and forms of Islamism that have shaped human history: legal form, in opposition to the principles of democracy and humanity, may act as an obstacle (not always absolute) to the advancement of theories that claim to bring about profound changes in favor of individuals, society, and the state.

Constitutionalism is a body of principles, rules, and norms that limit internal authority and restrain the advancement of ideas and regimes fundamentally opposed to it.

36 It is pertinent to recall one of the cornerstone rules of the European Union, which gather within it the synthesis of a very long tradition and doctrinal and jurisprudential production in the field of natural law related to the most established and fervent European constitutionalism, i.e. Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Constitutionalism, as developed from the seventeenth century onward in conjunction with natural law traditions of the seventeenth and eighteenth centuries, articulated conceptions of the person, rights, order, the state, and the relationship between authority and the citizen that differ radically from those advanced by schools of *Shari'a* or proponents of so-called constitutional theocracy.

Rather than shifting from traditional territorial colonization to forms of academic, doctrinal, and, by extension, normative and constitutional colonization, such a transition must be avoided. Conversely, it is both appropriate and necessary that the exchange – not only unilateral but also bilateral and multilateral – of public law scholarship and research encourage Arab-Islamic legal systems to engage in reflection oriented toward more democratic frameworks and stronger guarantees of individual rights and freedoms.

History teaches that legal culture plays a significant role in processes of cohesion and integration among peoples and legal systems. The exchange of theories entails the exchange of ideas, which are instrumental in addressing issues that, insofar as they concern humanity, pertain to every human being. Although no system is perfect and everything can be improved, constitutionalism has, for centuries, provided a positive response to the establishment of a balanced relationship between the spheres of freedom and authority, while also serving as an effective safeguard against the arbitrary exercise of public power.

This approach may be considered, at least in part, equally effective in cultural contexts that are ontologically different from those in which constitutionalism has developed.

Mindful of the core principles of comparative law, which emphasize the need to "juxtapose" normative systems that are as closely aligned as possible in terms of historical and legal conceptions of the role and function of law, as well as the *communis opinio* of justice, this process of mutual interaction between a "worldly" perspective and one deeply rooted in religion is neither straightforward nor easily achievable.

5 Conclusions

In the hope that the heterogenesis of ends will not lead these reflections in adverse directions, *Shari'a*, while possessing a metaphysical and therefore legally non-binding character, may, through the development of constitutional theocracy, absorb elements of Western constitutional values, drawing on the legacy of European and North American constitutionalism.

In conclusion, there is no need to impose Western-style artificial additions upon Arab-Islamic *regulae iuris*; rather, what is required is a genuine maturation of the relevant elites and intelligentsia, recognizing the importance of harmonizing executive, legislative, and judicial power, while unequivocally affirming the inviolable rights of individuals.[37]

37 Turkey has long been a "closely observed country," an institutional and constitutional laboratory that, over the decades, has generated reforms of particular interest at the interface between the West and the East. The successive constitutions of 1921, 1924, 1961, and, finally, that of November 7, 1982, https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf, have marked a difference in the secular and attentive approach to the protection of human rights, compared to the constitutional documents promulgated in the other Muslim-majority countries. The 1982 Constitution has undergone 19 amendments of varying scope and intensity, including the most recent and particularly extensive reform, approved by referendum on April 16, 2017, which introduced 18 amendments to the constitutional text; this reform has raised significant questions regarding its nature, that is, whether it constitutes a substantial amendment to the 1982 Constitution or, in effect, a replacement of the original constitutional framework with a new one (see Mauro Volpi, "Una nuova Costituzione che mira all'instaurazione di un regime autoritario," *Forum Associazione DPCE*, Approfondimento (2017): 13-14). The question that arises is whether Turkey is undergoing an Islamization of its constitutional order. I adopt the question posed by Spanò and, in turn, address it to both myself and the reader: "Can contemporary Turkey be described as an Islamic model of the state, irrespective of constitutional provisions? To what extent does the explicit constitutionalization of *Shari'a* matter, if the program of the majority party (AKP – *Adalet ve Kalkinma Partisi*, founded and led by Turkish President Recep Tayyip Erdoğan) is *Shari'a*-inspired within a formally secular state? Moreover, the system's shift toward (hyper)presidentialism cannot be regarded as merely symbolic. Initially substantial and subsequently "constitutional," this transformation has resulted in an almost plenipotentiary executive and a reconfiguration of checks and balances, including adjustments to representativeness within the interplay of powers. In addition, the extent to which the "Islamist" orientation of the majority party plays a decisive role appears increasingly evident, provided that it is appropriate *ab initio* to frame the question in these terms" (Giovanni Spanò, "Principi sciaraitici e Costituzione: un binomio da ripensare," *DPCE online*, numero speciale (2021): 1580).

A genuine internalization of the structural elements of constitutionalism grounded in natural law can foster an effective exchange of "brain cells" that, on the one hand, may contribute to the secularization of the institutional and constitutional systems of Arab-Islamic countries and, on the other hand, may enrich Western systems with stronger ethical and value-based content. Such an exchange, both intellectual and pragmatic, and conducted on equal terms, could, over time, benefit all institutions involved.

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