MODERNITY, RATIONALITY AND CONSTITUTIONAL LAW IN MUSLIM-MAJORITY COUNTRIES

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INTRODUCTION

In discussions on the Middle East, people often express a need to "modernize" state institutions in the Muslim world. Constitutions and constitutionalism have often been used, mainly after WWII, to inoculate non-Western countries and ex-colonies with this "modernity". In the Middle East and North African (MENA) countries, however, this process has proven far from unproblematic, in part due to the troubled relations between constitutionalism and religion.

This paper first introduces the concept of modernity (understood in terms of rationality and standardization), discussing its abrupt implementation in the MENA countries. Against this background, the paper goes on to address the effects of the colonization/decolonization process and the role that constitutions and constitutionalism played in this. The first modern constitutions in the newly established states did not only find a new state, but in many cases, institutionalized a new sort of dominion over the former colony. As such, the paper argues, in MENA countries, post-colonial constitutionalism is not necessarily a positive thing, but tainted by on one hand the historical experiences of colonialism, and on the other hand anti-Western sentiments. In the third section, the paper discusses the relationship between constitutionalism and Shari'a law, presenting this as a clash between two competing normative visions that are conceptually difficult to reconcile and which each claim exclusivity and hierarchical superiority. Finally, the conclusion advocates for a deconstruction of the ideas of human rights and constitutionalism in a way to allow for the incorporation of elements of Muslim traditions, thus challenging the understanding of human rights and constitutionalism as a cultural imposition, and as a new form of colonization.

CHAPTER 1

1 MODERNITY, DECOLONIZATION AND CONSTITUTIONALISM

1.1 MODERNITY AND RATIONALITY

Seated in the Muslim Castle of Dénia (in Valencia), watching the sea from the *Alcaçava*, I started to think about the concept of "modernity" and its relationship with the Muslim world. What is modernity? And, perhaps more importantly, what is modernity in the Muslim world? Naturally, the word "modernity", its sound, meaning, dangers and consequences are not new to me; they have been discussed for decades now. In one of the most influential books on modernity, *Dialectic of Enlightenment,* Adorno and Horkheimer see the self-destruction of Western reason as grounded in a historical and fateful dialectic between the domination of external nature and society. They trace enlightenment, which split these spheres apart, back to its mythical roots. Enlightenment and myth, therefore, are not irreconcilable opposites, but dialectically mediated qualities of both real and intellectual life[1].

One can ask whether the diagnoses of the Frankfurt School's members are applicable to the Muslim societies of the twenty-first century. It depends on various elements. First at all, it is hard - if not a mistake - to talk about "Muslim societies" or "the Muslim world" as homogeneous. Countries such as Tunisia and Afghanistan are completely different realities; places like Iraq and Algeria do not face similar conditions. Others have a much more positive understanding of modernity, seeing it as a beneficial and in fact inevitable process towards greater rationalization and technology. I guess what they have in mind is a sort of acultural modernism, as described by Charles Taylor.[2]

Modernity necessarily implies two elements: rationalization and globalization. By rationalization I refer to the realm of reason and "objectivity". By globalization I mean an increasing uniformity in the way of life of citizens and cultures around the world – people drinking Starbucks coffee in *Piazza Navona* in Rome, eating a

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[1] Horkheimer, Max and Adorno, Theodor (1969): Dialektik der Aufklärung, Philosophische Fragmente, S. *Fischer Verlag*, (Frankfurt am Main). See also the description of the book available at http://www.sup.org/book.cgi?id=1103. Last visit on 14 August 2014.
[2] Charles Taylor (1992): "*Modernity and the Rise of the Public Sphere*." The Tanner Lectures on Human Values 14. Ed. Grethe B. Peterson. Salt Lake City: U of Utah.

Big Mac in *Plaça Catalunya* in Barcelona, or Chinese, Bolivians and Moroccans citizens wearing ties and checking e-mails on their new iPhones.

The two components of modernity – rationality and globalization – are relevant when analyzing the constitutional struggles in the Middle East and the relations between *Shari`a* law and constitutionalism. Constitutions and constitutionalism are tools to implement legal and political rationality. Constitution is reason; legal reason from the top of the legal-political pyramid. Max Weber analyzed how formal and substantive rationality affects both theocratic and secular law; the particular feature that distinguishes modern secular law is its formal and logical rationality.[3] As Weber continues, the process of rationalization progressively affects religious norms and beliefs. Sacred law that was implanted in different legal fields is displaced from these objective legal fields by reason.[4] Weber's work, although almost a century old (1922), still seems to be valid today when talking about the MENA countries, where theocratic and secular law cohabit. The second component, globalization, which also affects constitutional texts, provokes a progressive denaturalization of particular societies and ways of life.

In his discussion of Islam, Weber stated that there was no single sphere of life in which secular law could have developed independently of the claims of sacred norms.[5] The status of sacred law in Islam is an ideal example of the way in which sacred law operates in a genuinely prophetically created scriptural religion.[6]As Weber pointed out, processes of rationalization also affected the sacred law in Islam. But the inadequacy of the formal rationality of juridical thought made it impossible to have systemic lawmaking that would bring about legal uniformity or consistency.[7] Constitutions have their own empire; they do not concede superior rule, only coexistence. Therefore, the conflict between a constitution and Shari`a law is often inevitable. It is a power conflict between different realms because a full separation between secular and religious spheres is not possible in many countries. The impediment is due to legal unification and consistency in Islamic law, and the fact that the Quran itself contains quite a few rules of positive law does not help establishing different spheres. The clash between constitutions (rationalized and codified secular norm) and sacred law (dispersed and non-rationalized) is even stronger because of different factors. First, the founding of a constitutional doctrine has been supported by religious language to consecrate undisputed legitimacy. Both what is defined as constitutional

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[3] Weber, Max (1978): Economy and Society, *University of California Press*, Berkeley (Ca) p. 809
[4] *Ibid.* at 815.
[5] Ibid at 818
[6] Ibid 819
[7] Ibid at 821

theology, as well as constitutions themselves, have been affected by the colonization/decolonization process. I discuss this below.

1.2 CONSTITUTIONAL THEOLOGY

The constitution must be the highest point of the normative pyramid of laws: the whole system of regulations is under what we may term the constitutional empire. The supremacy of the constitution is essential in the legal and liberal system. In this perspective, modern constitutions are prescriptive texts, as are religious documents. As Thomas Jefferson warned, the "veneration" of the constitution has become a central, even if sometimes challenged, aspect of the American political tradition: "*The flag, the Declaration and the Constitution constitutes the holy trinity of what Tocqueville called American civil religion*".[8] This sort of discourse warrants a non-discursive admission of the constitutional text by the people, and builds up, in Levinson's terms, a constitutional faith. Religious discourse and methodologies tend to affect citizens' understanding of the constitution to facilitate a sort of blind veneration, to treat it as a holy text.[9] What was a criticism of the religious discourse vis-à-vis the constitution can also be read the other way around when constitution becomes a "holy" secular text.

The maxim *Vox populi, vox Dei* hints at a connection between the ways in which the Bible and the constitution are treated. As noted by Grey: "Just as Christians and Jews take the word of God as sovereign and the Bible as the word of God, so Americans take the will of the people as a sovereign, at least in secular matters, and the constitution as the most authoritative legal expression of the popular will".[10] Not only is the United States Constitution considered a holy document; the use of political theology continued once the draft had been deemed legitimate and, in fact, it has continued until the present day. The political use of constitutional faith has been constant, and there are many examples throughout the MENA history of this phenomenon.

Another important consequence of the application of the means and logic of religious discourses to the constitutional system can be seen in the debate between originalism and non-originalism. The former focuses on finding the "original meaning" of constitutional provisions.[11] For originalism, fidelity to the constitution requires fidelity to the original meaning of the constitutional text

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[8] Levinson, Sanford (1989): Constitutional Faith, Princeton University Press, Princeton (NJ), p. 11.
[9] Abat i Ninet, Antoni (2013): Constitutional Violence, Legitimacy, Democracy and Human Rights, *Edinburgh University Press,* Edinburgh (UK), p.9.
[10] Grey, T. C (1984): "The constitution as scripture", *Stanford Law Review*, 37, 1–24.
[11] Abat i Ninet, Antoni (2013): 10.

and to its underlying principles.[12] Non-originalism is more related to the concept of a living constitution,[13] considering the constitution to be adaptable, re-interpreted every day according to the principles of each generation. Just like a sacred text, then, the constitution has its "sects".

Political theology is an old but also a very modern issue. The constitution (including in the MENA countries) is a civil version of the religious discourse and has incorporated contributions from legal normativity and legal positivism. After the American constitutional experience, the triumph of constitutionalism appears almost complete. Just about every state in the world, except for the United Kingdom, Israel and New Zealand, has a written constitution today. The MENA countries are no exception to this phenomenon. But this constitutional "success" has different reasons, and not all of them are unproblematic. After WWII, constitutionalism was a "gift" of the winners. We need only think about the radical influence of US General Douglas MacArthur on the Japanese constitution of 1947. Today, in cases such as Bosnia and Herzegovina, Afghanistan or Iraq, where constitutions have been drafted and/or imposed by outside forces, the gradient of acculturation is even greater.

1.3 COLONIALISM, INDEPENDENCE AND DECOLONIZATION

We cannot analyze the contemporary struggles of constitutionalism in Muslim countries without understanding the meaning and effects of colonization, decolonization, independence, and the subsequent installation of authoritarian governments by Western powers. Constitutions and human rights are going to be successful only if these concepts allow a space for Islamic principles and practices, insofar as these – as complex and multifaceted as they are – play an important role in today's Middle East. Colonization, decolonization and the subsequent authoritarian rule by the West, and indeed the role of the West in all of these events, affect the possibilities of a democratic and constitutional re-founding of the region. As was the case with the first constitutional texts at the beginning of the 19th century in Latin America, the effects of colonization still greatly influence the MENA region's collective sense of self. Countries such as Morocco, Sudan, Libya, Egypt, and Tunisia gained independence in the 1950s, and the damage of colonization remains vivid in the collective memories of their populations. In fact, such memories transcend the post-independence public rationale of these nations and the idea of constitutionalism is constantly challenged by this reality.

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[12] Balkin, J. M. (2007): "Original meaning and constitutional redemption", *Constitutional Commentary*, 24(2), pp. 427–532.
[13] Ackerman, Bruce (2007): "The living constitution", *Harvard Law Review*, 120, pp. 1737–93.

Fanon, Memmi, Sartre, Bourdieu, Césaire *et al*., have recounted colonization from the French cultural and political perspective. They may also enlighten us on how the human rights concept can be understood, especially if we want to openly confront notions of constitutionalism and democracy that differ radically from those in the West. As Fanon remarks, the questioning of the colonial world by the colonized is neither a rational confrontation of points of view nor a discussion on the universal; it is the unbridled assertion of an originality posed as absolute.[14] The colonized's own legal, religious and cultural institutions and traditions were considered decidedly "uncivilized." Insult, imposition, and tyranny were the rule of law. Continuous economic and cultural expropriation, along with what can today unequivocally and justifiably be branded as grave breaches of human rights, were practiced with impunity until the colonies eventually became independent. Fanon remarked that the colonizer had a deep-seated idea of the Arab's "congenital barbarism," which is what led to the exaltation of racialized cultural phenomena.[15]

Most of the Arab territories were under colonial domination, and the struggle for national liberation was accompanied by "*a cultural phenomenon known by the name of Islam*".[16] The goal of this new movement was to ensure not so much a national culture as an Arab one, to counter the global condemnation brought by the colonizer.[17] Consequently, Islam became linked not only with national emancipation, but also with something genuine, something fundamentally non-Western, and because of this it became suspicious to many Westerners.

The struggle of constitutionalism in the Muslim countries is intimately related to the multifaceted nature of Islam and the manifold political and legal positions taken by the different Islamic movements. In addition, the requirements of democracy, human rights, and liberal constitutionalism can never obviate the colonialism that denied human rights to human beings. As Sartre states, in the colonies the native was considered subhuman - the Declaration of Human Rights did not apply to him; he was forsaken, without protection.[18] To now claim the application of precisely such rights can be a painful reminder of colonialism, as an echo of the colonizer's values.

Not only the experience of colonization has implications for the way that constitutionalism is addressed and understood in the MENA region; the process

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[14] Fanon, Frantz (2002): Les damnés de la terre, Éditions la Découverte/Poche, (Paris), p. 202

[15] Frantz Fanon (2002): 203.

[16] Ibid at 200.

[17] Ibid at 200.

[18] Sartre, Jean Paul (1957) in Albert Memmi, The Colonizer and the Colonized*, Beacon Press*, Boston (MA): xxiv.

of decolonization is also important here. Decolonization was not a neutral cleansing of all colonial elements, leaving the colonies free and independent; neither was it a straightforward reconstruction of the pre-colonial culture and society. Rather, it was the replacement of one sort of men with another species of men. Without transition, it was a full substitution.[19] Colonization was an historic process that consisted of two cohabitant different and antagonistic forces, the colonizer and the colonized.[20] To have been colonized was a fate with lasting, indeed grotesquely unfair, consequences, especially after national independence had been achieved. Poverty, dependency, underdevelopment, various pathologies of power and corruption, as well as notable achievements in war, literacy, economic development; this mix of characteristics defined the colonized people who had freed themselves on one level but who remained victims of their past on another.[21]

Decolonization did not bring an end to colonization insofar as countries continued to be ruled by the reason of the colonizer. In this sense, the new rulers continued embracing the values, uses, and institutions of the colonizers, denying their own pre-colonial values. This was a consequence of the influence of the colonial bourgeois and elites on the new rulers during the period of liberation.[22] This influence affected the re-founding of the states; independence did not mean a break from colonialism. The new constitutional systems juridified Western values and institutions. In some cases, the colonial power did not retract with independence, but instead achieved an even more permanent stranglehold on economies and major social institutions. When the West now praises the virtues of modernity and rationality, these concepts have an entirely different ring to them in the MENA region, historically associated as they are with the reason of the colonizer.

Today, in Western societies, colonization and decolonization seem to be centuries ago, but Great Britain occupied Egypt in 1882 when the country was legally part of the Ottoman Empire. In November 1914, after the Empire sided with the Central Powers, the British government declared the country (Egypt) a British protectorate.[23] The legal form to shape the colonial occupation was the Protectorate, a form of governance that was later introduced in French Morocco

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[19] Frantz Fannon (2002): 41.

[20] Ibid

[21] Ahmad, Eqbal (1980): "From Potato Sack to Potato Mash: The Contemporary Crisis of the Third World," Arab Studies Quarterly 2 (Summer 1980): 223-34; as quoted in Edward W. Said (1987): "Representing the Colonized: Anthropology's Interlocutors", *Critical Inquiry*, Vol. 15, No. 2, pp. 205-225.

[22] Frantz Fanon (2002): 41.

[23] Botman, Selma (1991): Egypt from Independence to Revolution 1919 -1952, *Syracuse University Press,* Syracuse (NY), p. 25.

and Tunisia. The British declaration of a protectorate in Egypt ended four centuries of Ottoman sovereignty, under which Egypt had attained a certain degree of autonomy since the rule of Muhammad Ali. With the occupation of Egypt Great Britain gained a decisive voice in all areas of Egyptian life.[24]

The Declaration of Protectorate stated: "*give notice of the state of war arising out of the action of Turkey, Egypt is placed under protection of his Majesty and will henceforth constitute a British Protectorate*".[25] Behind the stated aim of saving and protecting the Egyptians were other non-altruistic reasons, financial and strategic, to establish British control of the country: Egypt is on the route to India; it provided control of the Suez Canal and the Nile; and it gave Britain geopolitical influence in the whole area, preventing the influence of France and Russia.[26]

After Egyptian "independence" in 1922, the effects of British colonialism in Egypt continued influencing the country. The ideas of independence and constitutional government were supported not only by the wealthy, Europophile Egyptians of the *Wafd* political party,[27] but also by Britain. As such, the *de jure* "independence" can be seen as a new form of protectorate. British influence after independence and decolonization was ensured; an influence that continued for decades. The focus on constitution-making in the post-colonial setting, as inherently Western imposed, tends not to exclude or reduce the effects of domestic processes in each constituent process, but simply to show a pattern reproduced in the examples presented.

Libya (a Western creation) was an Italian colony until its occupation by the Allies in WWII. After almost 40 years of Italian occupation of the remaining Ottoman North African possessions, Libya obtained its independence. The Italian invasion lasted until Italy's defeat in WWII. The Italian and German evacuation of North Africa, matched by the advance of the Free French Forces, led to the establishment of a British Military Administration in Tripolitania and Cyrenaica, as well as a French Military Administration in Fazzan after the country's final conquest by the Allies in 1943.[28]

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[24] Ibid at 18.

[25] Declaration of the British Protectorate on December 17, 1914, *London Gazette* numbers 29,010; 29,011 and 29,012.

[26] Editorial Comment (1915):"Egypt a British Protectorate" *American Journal of International Law*, pp. 202-204. See also Darwin, John (1999): "An Undeclared Empire: The British in the Middle East, 1918-39", *The Journal of Imperial and Commonwealth History,* Vol.27.2, 159-176.

[27] Cleveland, William L & Bunton Martin (2013): A History Modern Middle East, *Westview Press,* Philadelphia (PA), 182.

[28] Vandewalle, Dirk (2006): A History of Modern Libya, *Cambridge University Press*, Cambridge (UK), p.36. As the author points out, the official history of the British Military Administration can

Neither France nor the United Kingdom initially supported the creation of a united and independent Libya, and both states tried to pre-empt a United Nations (UN) decision supporting the new state. Both European nations signed the Bevin-Sforza plan, published on May 10, 1949, proposing a ten-year trusteeship for France in Fazzan, for Great Britain in Cyrenaica, and for Italy in Tripolitania.[29] But after violent protests in Cyrenaica and Tripolitania, it was clear that the Bevin-Sforza plan had served to unite the previously disparate factions against a common enemy.[30]

The first Libyan constitution was drawn up in 1951 shortly before the country's independence on 24 December of that year, making it an important piece on the Cold War chessboard because of its geographical placement. The constitutional form was a 1949 UN requirement; not the form of government. However, to avoid a veto from France of the UN Security Council's recognition of the new state's independence, the National Constituent Assembly accepted a monarchic form of governance, appointment of King Idrîs as-Sanoussi as its new chief of state, and a federal territorial form.

The first article of the constitution reaffirmed the very recent unity of the three provinces, declaring that neither their collective sovereignty nor any part of their newly shared territories may be relinquished. Article 6 of the constitution evidenced that the text was drafted under the pressure of a deadline imposed by the UN. There was not even time to decide on key national symbols (the emblem of the state and national anthem, for example). Even the name of the country, The United Kingdom of Libya, was new.[31]

Morocco was no exception to this pattern of prolonged colonial influence. During the period of colonization, Moroccan society was divided between a strong, urban Moroccan bourgeoisie on the one side, and a military, feudal and religious class on the other. Both managed to strengthen their economic bases during the protectorate period.[32] These families became the main financial support base for the new regime. Some of the heirs of those families invested in the colonial system of education and became the backbone of Moroccan nationalism.[33]

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be found in Lord Rennell of Rodd, *British Military Administration of Occupied Territories in Africa during the Years 1941 -1947* (London: His Majesty's Stationery Office, 1948).
[29]Vandewalle, Dirk (2006): 39
[30] Ibid
[31] Storm, Lise (2007): Democratization in Morocco. The political elite and struggles for power in the post-independence state, *Routledge Studies in Middle Eastern Politics,* NY (NY),
[32] Vermeren, Pierre (2006): Histoire du Maroc depuis l'indépendance, *La Découverte & Syros,* Paris, p. 13.
[33] Ibid at 14.

In only a few short months in 1955, the international status of Morocco changed from that of a "protected" state to an "independent" one. But this independence, agreed to by France and later Spain, did not end relations between the new state and the ancient metropolis. The agreements that built up the independence established the principle of "interdependence" with France – as happened with Tunisia later on – and of "cooperation" with Spain.[34] In the case of France, the government publicized a declaration stating its will to give to Morocco the status of a sovereign and democratic state. This independence, however, was conditioned upon permanent strategic, political, diplomatic, economic and cultural bonds.[35] We can see how democracy, at least to some extent, can be linked to the departed colonial power. The interdependence was seen by many sectors of the new state as a new form of submission to the former colonizer.

In the case of Morocco, the main peculiarity of its process of independence was the role of the Sultan Sidi Mohammed Ben Youssef. The sultan, a national hero of the independence movement, was in charge of relations with the colonizers following the independence of Morocco. The sultan ruled the new nation. His first acts were to transform himself into a monarch (assuming the title of King Mohammad V in 1957) and to fulfill his commitment to the creation of a constitution.[36]

The same concept of interdependence was applied in the Protocol of Agreement signed between France and Tunisia on March 20, 1956. The agreement recognized the independence of the country of the Maghreb, but also established a mandatory interdependence of the new state with France in relation to defense and external affairs.[37] The relatively pacific nature of the Tunisian nationalist movement meant that there was no massive settler flight, and many Europeans decided to remain in the country after the conclusion of the protectorate. However, the peaceful transition of power was followed by a violent incident, and France wanted to punish Tunisia for supporting Algerian rebels.[38]

The constitution of 1962 defined the state of Morocco as a democratic constitutional monarchy, mirroring several states in Europe that combined those

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[34] Laubadere André (1956): "Le statut international du Maroc depuis 1955", *Annuaire français de droit international,* V.2, p. 122.

[35] Ibid at 124.

[36] Storm, Lise (2007): 14. See also Vermeren, Pierre (2006).

[37] Blaustein, Albert Paul; Sigler, Jay Adrian & Beede, Benjamin R (1977): Independence Documents of the World, *Oceana Publications* (NY), p. 711.

[38] Rothermund, Dietmar (2006): The Routledge Companion to Decolonization, Routledge (NY), p. 120.

three elements. Other fundamental principles of the first Moroccan draft were the principle of national sovereignty instead of popular sovereignty, following the French conception (Condorcet and Sieyes). It is also remarkable that it did not vest *de jure* sovereignty in the king, but rather in the nation. According to the text, the Moroccan nation exercises sovereignty directly by referendum or indirectly through constitutional institutions(monarchy and parliament). The colonial situation in Tunisia was similar to other colonial situations where new elites challenged the colonizer; but what distinguished Tunisia from the others was the extent of social transformation effected by the French rule, a fact that evidences the intensity of the colonial experience in the country.[39]

As Moore states, this colonial intensity was mainly a result of two elements: the duration of colonial rule (the French Protectorate lasted seventy-five years, from 1881 to 1956) and the number of colonial settlers (the highest concentration of Europeans in the population with South Africa).[40] These two aspects had a number of important consequences that lasted after the process of decolonization, among them secular jurisdiction; the most basic political institutions; and familiarity with the concepts of constitution and constitutionalism. The first Tunisian constitution was influenced by the French legal system and political understanding; in fact the Tunisian founding fathers used Jacobinism and the republican tradition to build up the sense of national identity and unity.

The first constitution of the Republic of Tunisia has a liberal and democratic preamble influenced by the declaration of the rights of man and citizen of 1789 in France. It declares that the new nation remains *faithful to the human values that constitute the common heritage of the peoples attached to human dignity, justice and liberty and who are striving for peace, progress and free cooperation among nations*. [41]The preamble defines Tunisia as a democratic regime based on popular sovereignty and the separation of powers. It recognizes that the republican regime constituted the best guarantee for the respect of human rights and for the establishment of equality among citizens.
In brief, the whole MENA region suffered and, in some cases, still suffers from the wounds of colonization. Constitutions are not only a good example to evidence this colonial history, but also to analyze the post-colonial influences of the metropolis. If we look back, only sixty years have passed since countries such as Morocco, Libya, Algeria, Jordan and Syria gained their independence; and

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[39] Moore, Clement Henry (1965): Tunisia since Independence. The Dynamics of One-Party Government, University of California Press, Berkeley, p.15.
[40] Ibid at 16.
[41] See the preamble of the constitution of Tunisia 2014.

these processes came after the protectorates, economic privileges and other facilities that the ancient metropolis maintained.

It is paradoxical that Western countries claim to support human rights implementation in the MENA region, yet at the same time have supported many of the leaders suppressing those rights. France, for example, enjoyed a close relationship with Tunisia's former president, Zine El Abidine Ben Ali. As late as 2008, for instance, then French president Nicolas Sarkozy declared on a visit to Tunis that the space for freedom was expanding.[42] Similarly, despite then US president George W. Bush warning Tunisia in 2008 that the country must improve its human rights record, later, US defense secretary Donald Rumsfeld described Tunisia as a "successful country," citing its ability to create an "environment that is hospitable to investment, enterprise and to opportunity for their people."[43]

It is also well known that former Egyptian president Hosni Mubarak was considered a pillar of regional stability by the major Western powers. Mubarak was long Washington's man in Cairo: he kept open the Suez Canal, repressed the Islamists and maintained peace with Israel. In return, the United States provided for Egypt, contributing billions in economic assistance to build up the country's infrastructure, agricultural technology, and public health programs.[44] France's relationship with Mubarak's regime came under fire when then prime minister François Fillon admitted that he had enjoyed a holiday paid for by Mubarak's government.[45] Fillon's admission brought further embarrassment to the French government, which was already embroiled in a row over the revelation that Michèle Alliot-Marie, the foreign minister, had used a hospitality jet on a Tunisian Christmas holiday.[46]

Relations with many of the now-former dictatorships in the Arab world were not completely cut off after the Arab Spring. Indeed, Britain has allowed key members of Egypt's toppled dictatorship to retain millions of pounds of suspected property and business assets in the United Kingdom, potentially in

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[42] http://www.theguardian.com/world/2011/jan/17/tunisian-protests-sarkozy-off-guard Last access on August 14, 2014.

[43] Financial Times, "France regrets misjudgement over Ali", Roula Khalaf and Scheherazade Daneshkhu, January 18,2011. Available at http://www.ft.com/cms/s/0/68bef0c2-232a-11e0-b6a3-00144feab49a.html#axzz2OYcVXwds Last access on March 25, 2013.

[44] Steven A Cook, "The U.S. - Egyptian Breakup", *Foreign Affairs,* February 2, 2011.

[45] http://www.bbc.co.uk/news/world-europe-12397397

[46] Adam Sage, "Sarkozy hit by turbulence on 'Air Mubarak' free trip", *The Times,* February 9, 2011, available at http://www.thetimes.co.uk/tto/news/world/europe/article2904245.ece (Last access March 25, 2013).

violation of existing international agreements.[47] In December 2007, then French president Nicolas Sarkozy welcomed Gaddafi to Paris and insisted to a French newspaper that "Gaddafi is not perceived as a dictator in the Arab world. He is the longest serving head of state in the region." The United Kingdom also had close ties with Gaddafi's Libya. The former prime minister, Tony Blair, helped draw Libya out of international isolation and become a close ally with the United Kingdom in the Global War on Terror. This cozy relationship extended to the military as well: Blair had pushed to increase arms sales to Libya as recently as 2006.[48]

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[47] Jack Shenker, "Scandal of Mubarak regime millions in UK", *The Guardian,* September, 2, 2012, available at:
http://www.guardian.co.uk/world/2012/sep/02/scandal-mubarak-regime-millions-assets-uk
(Last access on March 26, 2013)
[48] William Lee Adams, "The other Special relationship: documents reveal cozy ties between Britain and Gaddafi", *The Times,* September, 6 2011. Available at:
http://www.time.com/time/world/article/0,8599,2092008,00.html (Last accessed on March 25, 2013)

CHAPTER 2

2 ISLAMIC LAW

For over a millennium, Shari'a law provided the social, institutional, and judicial structure for the Arab world, as well as the underlying ethical codes and moral views binding this structure together.[49] Shari'a law also involved a complex and sophisticated system in which the jurists were educators and forged a multi-layered set of relations that at times created political truth and ideology.[50] While there were often disagreements as to how to interpret Shari'a law, most often the *ulema* seemed to be in a strong position to determine how the holy text was to be interpreted. At this point, it is necessary to remark that the relative autonomy that *ulema* and *kadis* used to have as political authorities in pre-modern societies is not true anymore, and this fact changed not only the independence of these communities of legal students of Islam and Shari'a, but also the content of the interpretations and understandings of the Islamic law.

The law of Shari'a does not distinguish between religious and secular life but arbitrates in both spheres, including formal criminal punishments and judicial matters as well as acts of worship and family life. Muslims are expected to accept the Quran as the word of God, but this is not the unique source of law. Shari'a law also appears as the regulator of society and daily life. There are different sources and tools to be used for interpretation such as (Professor I don't suggest you accept my crude attempts to render these complex and subtle concepts, but only that it would perhaps be helpful and more inclusive for the reader if there were some interpretative English phrases at this point, even though you deal with some of the concepts in more detail later - AS) *ijtihad* (independent reasoning), *urf* (custom), *taqlid* (deference to scholarship) and *hadith* (reports of the Prophet's teachings). This system of interpretation, together with the great historical, cultural, social, political, and economic differences between Muslim countries, makes for very different interpretations of Shari'a law. Shari'a law is not "simply" a law in the modern sense of the word, but is also a moral and religious system with implications for other spheres of life.

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[49] Hallaq B. Wael (2009): An Introduction to Islamic Law, *Cambridge University Press,* Cambridge (UK), p. 163.
[50] Ibid.

Shari'a law relied on a cognitive approach to the facts; an intellectual engagement to comprehend all the possible ways of thinking and interpretation pertaining to a particular case.[51] It was not the case that was of primary importance, but rather the principle that governed a group of cognate cases. The law was a heuristic project, not "a body of rules of action or conduct prescribed by (a) controlling authority".[52] The religious law was the intellectual work of private individuals, jurists whose claim to authority was based primarily on erudition, legal knowledge, and religious and moral distinction, rather than a "solemn expression of the will of the supreme power of the state".[53] This nature of Shari'a gave it a high degree of acceptance and respect among citizens. But the multiple effects and fields of application of these religious compendia of moral, ethical, legal, and political rules collided with the rules of the state.
A major difference between the modern notion of law and Shari'a law is that the religious law did not apply equally to all, for individuals were not seen as indistinguishable members of a generic species, standing in perfect parity before law, but instead as believers.[54] As such, equality before the law – a fundamental premise of democratic states of law and a common requirement of liberal constitutions – is not fulfilled. This conceptual contraposition between modern law and Shari'a law seems to drastically reduce the possibility of establishing a workable system of cohabitation, since the antinomy can affect the principle of equality. It might be that Shari'a is not concerned with secular notions of equality, but it is accountable for all members of society including non-Muslims.

This difference also explains why Islamic thinkers never accepted the concept of blind justice; another source of collision between modern law and Shari'a. In Shari'a law, each individual and circumstance was deemed unique, requiring context-specific *ijtihad* (a classical methodology for interpreting Shari'a consisting of making a decision independently of any school of jurisprudence).[55] More than a law, Shari'a was a juristic guide that directed the judge and all legal personnel on the ground to resolve a situation in due consideration of the unique facts involved therein.[56]

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[51] Ibid at 166

[52] Ibid

[53] Ibid

[54] Ibid. We focus our attention on the Islamic law and its relation with the constitutional system and public law. We exclude the legal religious dispositions concerning the personal status aspects. To analyze the personal regulations and principles of Shari'a see March, Andrew F (2009): Islam and Liberal Citizenship: The Search for an Overlapping Consensus, *Oxford University Press.*

[55] Ibid.

[56] Hallaq Wael B. (2009): 167.

An old method of interpretation of religious provisions was the *taqlid,* which consisted of reasoning from the four "sources" of law instead of reasoning from precedent.[57] As such, there was common acceptance of the fact that there would be, at any one time, several contending interpretations of Islamic law, and Muslims came to follow different interpretations, or schools, under the supervision of different guilds of jurists.[58] This shows that Muslims historically were used to dealing with competing and equally orthodox versions; an experience that could be useful when dealing with the new competitor that also claims superiority, the secular constitution.

Another problem when seeking to combine Shari'a principles with secular constitutionalism is the abstract character of the universal principles in both sets of norms. The abstraction, as is the case with constitutional principles, must be overcome by interpretation. In Western constitutional systems, the role of the negative legislator, the constitutional control, is developed diffusely by the judiciary in common law systems, and by the Schmittian *Hüter der Verfassung* in continental systems. In civil law systems, the courts are specialized in law, and the interpretation is based on jurisprudence and the *bloc de constitutionnalité.* Who is going to interpret Shari'a law dispositions in Arab post-revolution Supreme Constitutional Courts?

Some authors have focused primarily on arguing for the compatibility between democracy and Islam. This discourse is manifested in Egypt by the jurisprudence of the Egyptian Supreme Court, the Muslim Brotherhood, and significant legal scholars like Abdel Razzaq al-Sanhuri, Tariq el-Bishri, Khaled Abou El Fadl and Tariq Ramadan. In Tunisia it comes from the political movement Ennahda, legal scholars Radwan A. Masmoudi, the political leader and founder of the Islamist Party Rached Al-Ghannouchi, and Nader Hashemi; and in Morocco, from Mohamed Najib Bouli and Malika Zeghal.[59] But the compatibility between Islam and democracy is one thing; the compatibility of Islamic law and constitutionalism is a slightly different matter. Are Islamic law and constitutionalism compatible – or can they become compatible? This question is different because it affects different items and it has different repercussions. Can the modern sovereign and its juridification share its power and legitimacy with another power, with a divine one? Can we share the rule of the people, certainly

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[57] Lombardi Clark B & Brown Nathan J: (2006): "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with Liberal Rule of Law", *American University International Law Review.* 403.
[58] Ibid
[59] Lombardi Clark B & Brown Nathan J: (2006): 379. On Morocco see http://www.leparisien.fr/flash-actualite-monde/islam-et-democratie-sont-compatibles-les-responsables-arabes-veulent-rassurer-davos-26-01-2012-1830902.php . See also, Mezghani, Ali (2011):L'État inachevé: La question du droit dans les pays arabes, *Gallimard,* Paris (France).

divinized in the modern secular countries, with the rule of God? Who rules in case of contradiction – the constitution or Shari'a law? The conceptual confrontation between the Shari'a and the constitutional empire is served.

The solution has been to constitutionalize Shari'a law and its universal principles, to establish the religious law as a primary source for legislation and interpretation.[60] This is the model used in the Egyptian constitution, where Article 2 declares Shari'a law as the main source of legislation.
People arguing for compatibility have sought to resolve this tension in different ways, either by interpreting popular sovereignty as popular power under constitutional constraints, or by interpreting divine sovereignty as including popular sovereignty. It is people who are entrusted with interpreting and applying God's commands when they tend to be vague and indeterminate.[61]

The debates that took place in Israel in 1948 between democracy (ethnic or not) and theocracy, and between constitution (written or not) and Shari'a law, are now reproduced in Tunisia and Egypt. It seems paradoxical to understand democracy as a step towards theocracy, but arguably that was the goal of the Muslim Brotherhood, which won a democratic election to install a theocracy. Having said that, the compatibility between a liberal constitution and Shari'a law, which was defended by the Egyptian Constitutional Supreme Court, is now challenged with the approval of the new constitutional text. As Sultany remarks, the question is whether non-religious constitutional drafters consider yielding to religious demands to enact Shari'a principles and dispositions within the constitutional structure, and if Shari'a law's ambiguity can be used as a reason to move towards a more liberal, secular, rights protection.[62]

Former Egyptian president Morsi's constitutional declaration of November 22, 2012, putting its resolutions and the Constituent Assembly over law and also limiting their prosecution to "sovereign affairs", seems to point to the fact that the country was to follow a path toward an authoritarian regime. On November 27, 2012 thousands of people demonstrated against his attempt to expand his powers. The protesters argued that the constituent power dominated by the Islamists would limit some of the basic rights in Egypt, introducing a theocracy that would subordinate the constitution to Shari'a law.

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[60] Lombardi Clark B. (1998 -1999):"Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State", 37 *Colum J. Transnat'l L.* 81. See also Meital, Yoram (2006): "The Struggle over Political Order in Egypt: The 2005 Elections, 60 (2) *Middle East J.* Vol. 257.

[61] Feldam Noah, (2003): After Jihad: America and the Struggle for Islamic Democracy, *Farrar, Straus and Giroux,* NY; 19.

[62] Ibid at 39.

As Hirschl argues, his concept of constitutional theocracies is incompatible with radical conceptions of democracy,[63] but also with the concept of constitutionalism. Certainly, no constitutional democracy is purely democratic, but a constitutional democracy must respect at least some basic characters to be considered as such. Does the ruling of the Shari'a assure the observance of law? Probably, but there is no separation of powers at all, no checks or balances; there is only a sort indisputable legitimacy, the holy and unique one. Hirschl's aim to incentivize constitutionalism in theocracies is admirable, but legitimacy cannot be built based on the "problems of liberal constitutionalism". Furthermore, no liberal constitutions are to blame for the economic, legal, and social inequalities listed by the author to seek the legitimacy of a new version of religious constitutionalism.

Democratic elections have occurred recently in Egypt, Tunisia and Libya, and the constitutional processes have been more or less turbulent in each. However, in all these scenarios, Shari'a law plays an important role within the legal system, at times balancing the scales towards democracy, at times theocracy. As we have said above, the cohabitation of the two has been challenged, but it is more than that – it is in danger. In Tunisia, the dominant Islamist Ennahda party wants to make the personal status code stronger, banning polygamy and granting Tunisian women unequaled rights.[64] The fears were basically grounded in the position that the Islamist party has taken in the constituent debate, remarking the necessity to mention Shari'a law.

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[63]Hirschl, Ran (2010): Constitutional Theocracy, *Harvard University Press*, Cambridge (Ma), p. 42.
[64] Alston Philip and Goodman Ryan (2013): International Human Rights, *Oxford University Press,* Oxford, (UK): 7.

CONCLUSION

The possibilities of constitutionalism depend not on modernity, but on an Islamic version of constitutionalism. I do not know if Shari'a law clauses, Al Azhar, Sunni references, and other religious contents are the solution to attenuate the clash between the two emperors – religion and constitution. The paradox is that at the beginning of modern constitutionalism, the constitutions used religious speech to achieve legitimacy and pseudo-divinity. Now, it might be the other way around. Not only the constitution, but also religion is struggling in the MENA countries. The debates on the role of Shari'a law, the need to accommodate concrete words in the constitutional text, and the necessity to declare Islam as the official religion of the country are all evidence of this. Perhaps it is now religion that needs constitutionalism more than constitutionalism needs religion. This overturn is the best symptom of modernity and can be considered the first step towards a deconstruction of what is called "Islamic constitutionalism" with the aim to reconcile Islam and constitutionalism.

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