CHAPTER 15

IS CONSTITUTIONALISM COMPATIBLE WITH ISLAM?

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1 INTRODUCTION

The object of this chapter is to discuss the meaning that "constitutionalism" has (or may come to have) in the context of Arab-Islamic political thought. Other terms which have sometimes been used as equivalents of "constitutionalism" in Western languages include "rule of law", *Rechtsstaat*, and *état de droit*. Some of these terms have natural-sounding equivalents in Arabic: thus *dawlat al-qanun* will do very nicely for *Rechtsstaat*, and *hukm al-qanun* for *rule of law*. "Constitutionalism", however, has no readily identifiable Arabic equivalent.

In Western political thought, terms such as "constitutionalism" and "rule of law" have come to express richer and more complex meanings than are suggested by etymology or mere juxtaposition of words. This is usually the mark of terms and concepts that have come to play a pivotal role in the theory of the subject matter in which the term is used. Such terms invariably carry a greater semantic burden than is suggested by their linguistic derivation or by the sum of their parts.

The same cannot be said for the equivalent terms used in Arab-Islamic political writings. But this need not mean that Arab-Islamic political thought does not know what constitutionalism means, or that it is conceptually unequipped to deal with the issues that constitutionalism addresses. On the contrary, a concern with ruling in accordance with the law, the people's right to oppose unjust rule, liberties which rulers are not permitted to infringe, have existed in Arab-Islamic political thought since the earliest times.

There is much to be said for discussing the meaning and role constitutionalism has in Arab-Islamic political thought. Firstly, a discussion of this type can help us make sense of (or at least thematize) some of the concerns that are being expressed by Arab and Islamic political thinkers. Secondly, the concept of "constitutionalism" has come to be regarded as extremely important, as far as Western political thought is concerned.

P. Costa and D. Zolo (eds.), The Rule of Law: History, Theory and Criticism, 515–542.

This invites us to wonder about its universality, since concepts that are truly fundamental should not be (are not normally) of mere local relevance. Thus discussing the meaning and possibility of "constitutionalism" in Arab-Islamic thought may function as a partial test for the universality of this concept.

In Section 2, I shall first go over the meaning of "constitutionalism", as the term is used in contemporary Western political thought. Then I shall go on to raise the question of whether we have any reasons to think that the concept of "constitutionalism" (as the term is used in Western political writings) has any meaning as far as Arab-Islamic political thought is concerned.

In Section 3 I shall proceed to discuss the foundations of constitutionalism in Arab-Islamic political thought. As we will find, this constitutionalism can be said to rest upon "theistic" foundations since they bear primary reference to divine law and revelation. But the theism manifested by Islamic thought is not homogeneous. It is possible to distinguish between two varieties of theism. The Ash'arite variety has a voluntarist outlook, which is almost devoid of rational elements. The Mu'tazilite, on the other hand, follows an objectivist line of thought, and is well known for its rationalism. Both outlooks can be used to establish foundations for constitutionalism in Islamic thought.

In Sections 4 and 5 I discuss the scope of Islamic constitutionalism by looking at the topics and themes relevant to it, and which have been touched upon by Islamic writers. Section 4 will deal with the different individual rights and the protection that Islamic laws may be expected to offer (according to the Ash'arite or Mu'tazilite readings of Islamic law). These rights will be compared with international schemes of human rights. Section 5 will examine the meaning and possibility of a doctrine of "the separation of powers" based on Islamic premises, stopping to consider the views of some "Islamic democrats" on this topic, which has only recently become an object of interest in Islamic political thought.

In the concluding section I shall try to close some of the remaining gaps in the Islamic discussion on constitutionalism. It will be suggested that critics of the Islamic conception of democracy and constitutionalism often base their criticism on the assumption that belief in secularism is required for the possibility of these institutions. This assumption can be questioned, and in fact has been questioned by some Islamic writers. I will therefore conclude that the current Islamic conceptions of democracy and constitutionalism need reconsideration.

2 THE MEANING OF CONSTITUTIONALISM

Unlike some other concepts which play an important role in contemporary Western political thought (e.g. *democracy*), the concept of *constitutionalism* is not "essentially contested".[1] However, difficult questions continue to be raised about the *consequences* of constitutionalism for the functioning of democracy, and the extent to which constitutionalism can be seen as imposing restrictions on liberty of ordinary citizens, government officials, even of future generations. However, this debate takes place within a framework of broad agreement on what constitutionalism basically means.

According to Jon Elster, "constitutionalism refers to limitations imposed on majority decisions; more specifically, to limitations that are in some sense self-imposed".[2] Dario Castiglione, on the other hand, defines constitutionalism arguing that "it comprises those theories which offer a series of principled arguments for the limitation of political power in general, and of government's sway over citizens in particular".[3]

Some writers prefer to understand constitutionalism by reference to the nature of *constitutions*, as the term invites us to do. Thus C.R. Sunstein introduces the meaning of constitutionalism by reference to *constitutions*, which "operate as constraints on the governing ability of majorities".[4] In the same vein, Elster attributes to constitutions two functions: "they protect individual rights, and they pose an obstacle to certain political changes which would have been carried out had the majority had its way".[5]

No matter where one chooses to begin, the basic idea that appears to underlie constitutionalism is that there should be checks and limitations – and means for checking – on the political power of those who are in a position to abuse it, if they were to have their way. Of course, in order to have an effect on the way political power is managed, checks and limitations have to be proclaimed, or otherwise impressed upon society. In modern times, this has come to be accomplished increasingly by means of written constitutions, which seek not only to "protect" the people from the state, but also to regulate the operation of the state so that the power of the state is "internally controlled". For these reasons, I shall discuss Islamic views on constitutionalism in terms of the following characterization proposed by Jan-Erik Lane:

> Two ideas are basic to constitutionalism: 1) the limitation of the state versus society in the form of respect for a set of human rights covering not only civic rights but also political and economic rights; 2) the implementation of separation of powers within the state.[6]

These two ideas are not unconnected. According to Lane, the former functions as an "external principle" which restricts state power with respect to civil society, while the latter functions as an "internal principle" which ensures that nobody (either as an organ or as a person) in the state completely prevails over the others.[7]

As we have seen, there are no exact equivalents within Islamic intellectual history for concepts such as *separation of powers, human rights*, and *civil society*. This makes it easy to understand why some students of Islamic thought may feel unsympathetic about looking for the grounds for constitutionalism in Islam. They see it as yet another attempt to subject Islamic thought to the categories and concepts of Western thought.

Of course, the charges of "hegemonic Western discourse" have to be met and rebutted (if possible) on their own grounds. However, in general, there are no *a priori* reasons to expect Islamic political ideas to be utterly dissimilar to those which have been expressed in Western political thought. On the contrary, there are reasons for expecting similarities and points of correspondence between these two intellectual traditions. These reasons hinge on two powerful considerations.

Firstly, both cultural traditions have been shaped by the operation of monotheistic faiths that can be considered to be "sisters" in more than one sense. Judaism, Christianity, and Islam belong to the same Near Eastern spiritual tradition. They speak the same religious language, even when they disagree on points of doctrine. Secondly, both cultural traditions have absorbed a large dose of Greek thought, which has survived (in different forms and to different degrees) right up to the present day.

These two reasons should constitute a strong enough basis for seeking similarities and areas of correspondence. Islamic thought has always been closer to Western thought than to Eastern intellectual traditions. This can be asserted on the sheer strength of historical influences and intellectual contents, regardless of one's position in the "hegemonic Western discourse" debate, as abstractly understood.

Still, these factors alone cannot allay our doubts about the meaningfulness of the concept of constitutionalism in the context of Arab-Islamic political thought. However, a rapid overview of the discussions that have taken place among Islamic thinkers (and others) about the notion of "divine sovereignty", as well as the causes which underlie demands for the application of the *Shari'a* (Islamic law), should prove the viability of the idea of seeking to understand constitutionalism in Islamic terms.

Consider the notion of "divine sovereignty", which is popular among many Islamic thinkers and young intellectuals. How should we understand

their proclamation *al-hakimiyyatu li-Allah*, which may be roughly rendered as "sovereignty (rulership) belongs to God"? Bernard Lewis maintains that "the Islamic state was in principle a theocracy, not in the Western sense of a state ruled by the Church and the clergy [...] but *in the more literal sense of a polity ruled by God ...*".[8]

Lewis' explanation paves the way for viewing the Islamic polity as a *despotic* state, for God is hardly the sort of ruler who could be held to account for His actions, or who would need to consult with any of His subjects. However, the Tunisian Islamic thinker Rachid al-Ghannouchi offers a more plausible explanation of "divine sovereignty", with the additional virtue of relating this notion to our current concern with constitutionalism. According to Ghannouchi,

> Those who proclaim that sovereignty belongs to God do not mean to suggest that God rules over the affairs of the Muslim community directly, or through the clergy. For there is no clergy in Islam, and God cannot be perceived directly, nor does He dwell in a human being or an institution which can speak for Him. What the slogan "sovereignty belongs to God" means is *rule of law* (*hukm al-qanun*), government by the people.[9]

The idea that Islamic calls for "divine sovereignty" and the application of the *Shari'a* should be understood as nods towards constitutionalism (or an Islamic version thereof) is not an instance of wishful thinking on the part of those inclined to view Islam sympathetically. The idea has not been lost on the more astute Arab secularists, such as Amzi Bisharah, who claims that in times when social consciousness takes a religious form, calls for the application of *Shari'a* may express a democratic tendency, or at least an opposition to despotism, simply because *Shari'a* rule implies restrictions on the exercise of political power over and above the mere will of rulers.[10]

Remarks by Ghannouchi, Bisharah, and others[11] indicate that it may be possible to find elements of constitutionalism in Islam. These elements can be expressed by means of modern terms, such as "rule of law" (as opposed to the "rule of men").

Of course, constitutionalism does not reduce to the simple idea of legality, or to the mere imposition of restrictions on the power of earthly rulers. For these ideas, noble as they may be, can be undermined by other elements implicit in the tradition, which could make the claim to constitutionalism rather pointless. This will be dealt with in due course. The most suitable starting point is inquiring about the place of the law in Islam. Such an inquiry will hopefully provide us with some insights about the Islamic constitution, and the constitutionalism which it implies.

3 FOUNDATIONS OF ISLAMIC CONSTITUTIONALISM

Constitutionalism refers to the concept of *law*, inasmuch as it requires that the conduct of different organs of state vis-à-vis the citizen, as well as between each other, be regulated by *laws* or *rules* (which may or may not be written down). For this reason it is convenient to begin our inquiry into the possible foundations of constitutionalism in Islamic thought by finding out what Islamic law really is, and by determining the place it holds in society. It is here that we would hope to discover the foundations of constitutionalism, or a certain version thereof, in Islam.

A statement by Mawdudi, an influential Islamic theorist of modern times, indicates that Islamic thinking does not draw a line between the laws which govern the system of nature (considered as mere physical reality) and the laws which govern (or ought to govern) human affairs in society. To the Muslim thinker *all* laws, ultimately considered, are *God's laws*. In a statement which is reminiscent of Aquinas's distinction between eternal law and divine, *revealed* law,[12] Mawdudi says:

> From the moment of their conception to the very last day of their lives, human beings are completely subjected to God's natural law, unable to break it, or to go against it. Those who believe in divine revelation must also believe that God rules over the voluntary part of our lives as well as the involuntary part, and the universe in its entirety.[13]

If we put aside the laws which govern the motions of the planets and other parts of physical reality as irrelevant to our purposes, we are left with those portions of God's law which are collectively referred to as *Shari'a*. The *Shari'a*, as understood by many Islamic thinkers, is all-encompassing, taking into purview all acts that human beings are capable of in society. In Mawdudi's words:

> [*Shari'a*] judgments of good and evil extend to all parts of our lives. They cover religious acts and duties, as well as actions undertaken by individuals which reflect their way of life, morals, customs, manners of eating, drinking, attire, speech, and family affairs. They cover social relations, financial, economic and administrative matters, rights and duties of citizenship, organs of government, war and peace, and relations with foreign powers. [...] There is no part of our lives where the *Shari'a* does not distinguish between good and evil.[14]

Presumably, it is in the rich and varied field of *Shari'a* that we would expect to find elements of an *Islamic constitution*, as well as of a *constitutionalism* to be defined in reference to it. This is a legitimate expectation, which is supported by the fact that Islamic thinkers often view the *Shari'a* as a constitution of sorts. Hasan Turabi, for example, thinks that "*Shari'a* is the higher law, just like the constitution, except that it is a detailed constitution".[15] Mawdudi himself believes that the "unwritten

Islamic constitution" already exists, and that it is only awaiting efforts to codify it on the basis of its original sources, which are identical with the sources as the *Shari'a*.[16]

In the next two sections of this chapter I shall discuss the various constitutionalist themes that can be found in Islamic thought, but first we must examine the basis of the obligatory character which laws have in the Islamic view of law. If we are to arrive at an Islamic view of constitutionalism, we must not only determine the type and number of laws considered to be relevant to constitutionalism as it is understood in the West, but we must also inquire into the rationale which underlies these laws. For, this will give us an insight into the normative character of the laws, the attribute which is needed to provide a situation of *obligation* towards the law, as opposed to *coercion*.

There are essentially two schools of Islamic thought which deal with the question of sources of moral obligation.[17] We do not speak here of moral obligation in general, but of the moral obligation to obey the laws, and to engage in practices which touch upon different aspects of our life, both private and public. These may range all the way from the duty to help a needy wayfarer to the obligation to obey those who are in authority over us.

The first and by far the most enduring and influential of these two schools of thought is the Ash'arite school. This has existed (at least as a tendency) since the early days of Islamic theology, to judge from the letter which al-Hasan al-Basri (d. 728) wrote in rebuttal of certain conceptions of divine justice and human responsibility that tend to go with this view.[18] There is probably nothing which is more suggestive of the spirit which animates the Ash'arite view of morality than the definition which it offers of basic moral notions such as *good*, *evil*, and *justice*. Consider what Ash'ari (d. 935) says about the actions which God is capable of doing. According to the Islamic (as well as the Judeo-Christian) tradition, God is omnipotent. Does this mean that there is nothing which God cannot, in a moral sense, do? According to Ash'ari:

> God is entitled to do everything which He does. This is proven by the fact that He is the overpowering Master; there is nothing which has power over Him, no prohibiter, no commander, ... nothing which sets limits to His power, or draws a boundary around His actions. This being so, it follows that nothing which God may do can be considered to be evil. For to do evil is simply to go beyond what has been assigned to one as a boundary, to do that which one is not entitled to do.[19]

What makes this passage of critical importance is its possible relevance to the question of whether God is to be conceived of as behaving

like a "constitutional monarch", or as a despot who is subject to nothing but the dictates of his will. There are reasons to believe that this will have negative implications for the resulting view of constitutionalism, even if "constitutionalism", in its primary application, is not an attribute of individual agents such as God(s) or monarchs.

The Ash'arites, on the whole, do not seem to view God as a "constitutional" being. Foremost among the laws which God would have to observe, if indeed there were any at all, would be laws such as: *the innocent shall not be punished*, or, perhaps, *the well-doers shall be rewarded*. But this is not the case, according to the famous theologian Ghazali (d. 1111), who followed in the footsteps of Ash'ari. According to Ghazali:

God ... can hurt and torture creatures, despite their having committed no previous wrong. He can also refrain from rewarding them in the Hereafter. For God is entitled to do as He wishes in His dominion (*mulk*). ... To do injustice is simply to undertake actions in a dominion which is ruled over by another, without first obtaining permission from the master. This is, of course, impossible in the case of God, for there is no dominion which does not belong to Him. Hence there is no dominion where He can act unjustly.[20]

This passage may sound highly implausible, but in order to understand it we have to consider the reasons which may have led early Islamic theologians to this conclusion. It is difficult for theologians who take divine omnipotence seriously to accept the idea that God is *subject* to anything, even if it is something intangible, such as the law. One should consider the position of the early Muslim theologians who began to reflect on these philosophical matters in the centuries following the Islamic conquest of the ancient centres of civilization. Filled with a sense of piety and wonder of the divine power, many of them must have found it extremely hard to come to terms with the idea of a limited God, a God whose scope of willing and doing was in anyway restricted.

In some ways, the Ash'arist view resembles legal positivism, albeit as a *theistic* variant thereof. Like positive law, God's law is to be understood with reference to the *agent* who *enacts* it as law. Furthermore (according to the Ash'arites), the obligatory character of God's law is not to be explained with reference to the *content* of the law. Nor does it depend on our understanding as *rational* creatures of what the law actually means. Rather, its obligatory nature must be explained in terms of the relationship which stands between those who are *subject*s of the law, and the agent who is recognized as a legitimate source of law.[21]

In the case of Ash'ari's theistic positivism, the agent who enacts the law and proclaims it as such is none other than God Himself. The

relationship between the lawgiver and those who are subject to the law is one of power. God is the master of the universe, and we are part of his dominion, subject to His sanctions. We are not in a position to question His commands or His prohibitions. Good and evil, obligatory and forbidden, as well as all other moral attributes of actions must be defined by reference to God's commands.

Positivism, whether it is of the more familiar natural variety, or the supra-mundane variety which we have attributed to the Ash'arite school, runs into many difficulties. With respect to both varieties we have to ask: "Why does the choice made by the lawgiver have a normative nature, which means that it is binding and therefore ought to be accepted?"[22] It is hard to imagine that an answer to this question would be forthcoming without reference to the *meaning* of the law, and the position which we take towards it as rational, interested creatures.

Of course, the Ash'arite theologian may well object that we are raising an impious question, one which should not be raised in the first place. But this is not a convincing reply, even for those who firmly stand on Islamic grounds. For not only does God explain his commands and prohibitions in many places in the Qur'an, but the Ash'arite interpretation of the meaning of the basic moral terms actually stands to make no sense of many verses in the Qur'an. As Hourani says:

> The repeated commands of God to do what is right would be empty of force and insipid, if they meant only "commands to do what He commands". It is even harder to make sense of statements that God is always just to His servants if all that "just" means is "commanded by God". The only possible move at this point would be resorting to transcendence of meaning in reference to God – always the refuge of the baffled theologian.[23]

Whatever the philosophical difficulties faced by Ash'arism, this does not mean that it is impossible to make a case for constitutionalism on Ash'arite grounds. What it means is that the constitutionalism in question is likely to be *literal* (out of respect for the letter of the scripture, which is, after all, God's word), *rigid* (so as not to risk legislating against God's commands) and *non-rationalistic*.[24] In these respects Ash'arism differs from Mu'tazilism. The latter can arguably be said to support a more rationalistic, less conservative, and more enlightened type of constitutionalism, as can be seen from its moral philosophy.

The Mu'tazilites, as R.M. Frank characterize their view, hold that "all men of sound mind know in an immediate and irreducible intuition that certain actions ... are morally obligatory ... and that certain actions are morally bad".[25] Ethical predicates such as "good" and "evil" can be attributed to actions in an objective manner, that is to say, in a manner which is determined by the qualities of the actions themselves, and not

by the attitude of the beholder of the action, be that a human being or God Himself.

The following passage from the late Mu'tazilite thinker, al-Qadi 'Abd al-Jabbar (d. 1025?), illustrates this approach to morality. 'Abd al-Jabbar maintains that knowledge of good (when this knowledge actually exists) is sufficient to determine moral obligation. He explicitly denies that good and evil are to be defined in terms of what is commanded or prohibited by revelation. These points are made with the help of the example of purely devotional duties (such as the duty to perform prayers in a certain manner, at certain times during the day) which are known only by revelation.

> Revelation only tell us about the character of those aspects of acts whose evil or goodness we should recognize if only we could know them by reason; for if we had known by reason that prayer is of great benefit to us ... we should have known its obligatory character [also] by reason. Therefore we say that revelation does not necessitate (la yujib) the evil or goodness of anything. It only uncovers the character of the act by way of indication, just as reason does, and distinguishes between the command of the Exalted and that of another being by His wisdom, Who never commands what it is evil to command.26

The intellectual orientation of the Mu'tazilite approach to morality promises to deliver a different type of constitutionalism to the Ash'arite type. To begin with, the Mu'tazilite view of the law is far less heteronymous than that of the Ash'arites. According to the latter, the law consists of a number of divine dictates which neither emanate from human reason, nor can be questioned by it. God, moreover, assumes the role of the absolute ruler whose power is utterly unrestrained, but whose judgment defines what is good and bad, what is legal and what is illegal. The Mu'tazilite God, on the other hand, seems very different. To the extent that He abides by moral laws which are valid independently of the attitude of the beholder (or knower) He can be viewed as a "constitutional monarch", one who is not above the law in every respect.

The Mu'tazilites did not only believe in the rationality and objectivity of morality and of the laws which must be justified accordingly, they also characteristically espoused the doctrine of the creation of the Qur'an, which is God's *speech*. This doctrine, which is bound to sound peculiar to modern ears, engendered much debate during the Mu'tazilite period of Islamic intellectual history. Since this debate, at least in part, can be viewed as a debate about constitutionalism and the limits of authority, it may be useful to briefly review the position adopted by the Mu'tazilites.

By the time the issue of the creation of the Qur'an erupted on the Islamic intellectual scene during the second century of Abbasid rule (750–1258), political views were polarized between what W. Montgomery

Watt calls a "constitutionalist bloc" and an "autocratic bloc". The constitutionalist bloc comprised, among others, the nascent body of *'ulema*, and others who were united in the belief that "the Islamic community's way of life was constituted by the supernatural revelation contained in the Qur'an and the Traditions [of the Prophet]".[27]

To suggest that the Qur'an was created did not only mean that the Qur'an might be less than divine but it must also have meant that the caliph (who headed the "autocratic bloc") had a free hand when it came to interpreting the scriptures and enacting the laws. It was also to take away from the authority of the class of the *'ulema*, who enjoyed a popular following among ordinary people, and whose status and authority in the community partly emanated from their special connection to the scripture as students and interpreters. In a way, opposition to the doctrine of the creation of the Qur'an meant opposition to despotism, or unchecked power. According to Watt's estimate:

> The general conception of the caliphate was at stake – not which particular family or person was to rule, but what kind of ruler one was to look for. Must the caliph be a person with a 'divine right' to rule, and so the primary fount of all law in the state? Or was he merely a man subject to the divine law contained in the Qur'an and the Sunnah of the Prophet?[28]

The Mu'tazilites sided with the autocratic party, and their fate was sealed when official support for the doctrine of the creation of the Qur'an stopped during the reign of al-Mutawakil (d. 861). This need not be a reflection on their moral doctrine. For there can be no doubt that the Mu'tazilite alliance with the powers that be was not a logical consequence of their doctrine. Rather, it represents the temptation which enlightened elites throughout Islamic history have always had: unable to put their faith in the ability of the people to rule themselves with good laws, they tended to put their trust in the wise, enlightened ruler who possessed total power. The rule of such a ruler would prove no more lawless or unconstitutional than the rule of Plato's philosopher-king. But it would not be "democratic", either.

In fact, it may be helpful (if this is not altogether too anachronistic) to view the difference between the Ash'arite and Mu'tazilite outlooks in the light of the distinction which Elster makes between two "sides" of constitutionalism. According to Elster, one side of constitutionalism can be summed up as "rules vs. discretion".[29] The meaning of this is clarified by reference to the "war" which constitutionalism wages against the executive power in order to prevent rulers from obtaining too much *discretionary* power in their conduct of government. By insisting on laws

and rules, constitutionalism takes decisions out of the realm of private, individual judgment, even when this latter aims at nothing but the common good. Ash'arist foundations for Islamic constitutionalism may be viewed as taking aim at the discretionary powers which rulers may otherwise be inclined to exercise. By holding the *Shari'a* over their heads as the divine constitution which cannot be overturned, rulers would be kept in check.

The other side of constitutionalism, according to Elster, may be summed up as "rules vs. passion". Under this aspect constitutionalism is seen as fighting a war not against the executive, but against the legislative power. The idea here is to ensure good government by somewhat insulating the political process from the "whims" and "passions" of transient and possibly irresponsible majorities which can threaten to encroach on the legislative branch of government. Viewed in this light, constitutionalism dwells in the halls of the Constitutional Court (the Supreme Court of the United States), which is authorized to review legislation and check it for constitutionality.[30]

Of course, it cannot be said that the Ash'arites represented the democratic party, nor can it be said that the Mu'tazilites anticipated the idea of a separate judicial power. Such thinking would be anachronistic, and, what is more, there are no facts to support it. Still, to the extent that Ash'arites had popular following and represented opposition to despotic rule, one could be excused for momentarily blurring the distinction between populism and democracy. On the other hand, it cannot be denied that the Mu'tazilites, in many ways, represented the "voice of reason", enlightenment, and progressivism, which modern constitutionalists sometimes look for in the Constitutional Court. The Mu'tazilites stood against a certain type of conservatism (traditionalism), which could cause stagnation, if it were to have its way. Indeed, one cannot take the Mu'tazilites to have represented that side of constitutionalism which guards against the "passion" of the masses. However, it is plausible to view their constitutionalism as guarding against the inertia, traditionalism, and weak rationality of the masses.

To sum up our discussion so far, we have seen how the idea of government in accordance with the "law" is an essential part of Islamic political thought. The *Shari'a* is simply God's *law* and it is undeniably at the heart of the Islamic faith. But the *Shari'a* can be approached either in a conservative-literal manner (which is the method used by the Ash'arites), or in a liberal-rational manner (which is what the Mu'tazilites chose to do). Both approaches to the *Shari'a* can yield constitutionalism.

We must now explore the themes, elements, and concepts that can be brought together under the rubric of constitutionalism in an Islamic sense. What we need to ask is: what is constitutional in the Islamic *Shari'a*? What potential does it hold for further development of constitutionalist ideas?

4 THE SCOPE OF ISLAMIC CONSTITUTIONALISM: THE QUESTION OF RIGHTS

In the following section we shall keep to Lane's idea of constitutionalism, as explained Section 2. The same idea is succinctly expressed in Article 16 of The Declaration of the Rights of Man and the Citizen (1789): "A society in which rights are not secured nor the separation of powers established is a society without a constitution".[31] We shall first tackle the question of rights, which is easier than the question about the different branches of government, and the relationship between them. What rights do individuals have in Islam? How does the Islamic scheme of individual (and human) rights compare to other schemes?

It is commonplace to say that Islam is not the same thing to all who profess to believe in it, or practise it. This is true in many ways, but the question of rights stands out as a subject of which drastically different interpretations are possible. It is useful to think of the range of possible interpretations in terms of the old rivalry between the Ash'arites and the Mu'tazilites. It is true that contemporary adversaries do not see themselves as historical continuations of that old rivalry, but there is no doubt that many of the concerns, rationales, even conflicting interests which caused that ancient split are still operative now, and are likely to continue in the future.

As one might expect, Ash'arite-minded thinkers tend be literal and traditional, and take a more defensive stance towards modernity, including the question of human rights. Mu'tazilite-minded thinkers, on the other hand, tend to be more progressive and daring in the interpretations and innovations they propose.

To see how rights are dealt with on the Ash'arite model, consider the writings of Mawdudi, an Islamic thinker of considerable fame and influence. In his *al-Khilafah wa al-Mulk* (*Caliphate and Kingship*) he enumerates no fewer than 13 rights that citizens hold against their government. They include the right to life, dignity, privacy, property, due process, equality before the law, freedom of belief, freedom to assemble, and freedom from religious persecution. The majority of the rights which he mentions are supported by reference to Qur'anic verses.[32]

When viewed abstractly, some of the individual rights which Mawdudi dwells on are remarkably similar to the rights mentioned in the Universal Declaration of Human Rights. In the light of Mawdudi's other writings, however, we find reasons to reconsider, specially insofar as women and non-Muslims are concerned. In his *Tadwin al-Dustoor al-Islami* (*Codification of the Islamic Constitution*), rights of women are severely abridged. For example, they are not allowed to be members of the "Consultative Council" (*majlis al-shura*), on the strength of a Prophetic tradition which says: "Never will a people who are led by a woman prosper".[33] Similarly, in his *al-Qanun al-Islami wa Turuq Tanfithih* (*Islamic Law and Methods of its Application*), non-Muslims do not enjoy the same political rights as Muslims, even if the denial is couched in terms of the idea that the Islamic polity is, by definition, non-secular, so that it cannot ignore religion in the apportionment of political rights without self-contradiction.[34]

The same conservative spirit seems to be operative also in many of the Islamic human rights schemes that have been made public. The documents in question tend to be guarded, on account of their being addressed also to non-Muslim audiences. Still, many inconsistencies, obfuscations, and equivocations are to be found in several places, specially in the areas of freedom of thought, the treatment of non-Muslims, and women's rights. For example, whereas the English version of Article XXa of the Universal Islamic Declaration of Human Rights says that a husband owes his wife means of support "in the event of divorce", the Arabic version of the same article uses the phrase "if he divorces her". What the English version passes over in silence is, of course, the troublesome problem of "the unconditional right to divorce", which *Shari'a* has always given to men exclusively. In addition, the Arabic version invokes the notion of *qiwamah* (authority which men have over women), something which the English version omits altogether.

This is not the place to discuss Islamic human rights schemes, nor the circumstances, pressures, and compromises which gave rise to them. Suffice it to say that many concepts are not understood in the same way by conservative Islamists and secular human rights advocates. To the Ash'arite-minded thinker, "the law" simply means (or *ought to mean*) the Law of *Shari'a*. Thus when he welcomes the modern-sounding notion of "equality before the law" he is in fact welcoming the not-so-modern notion of "equality before *Shari'a*". As Ann Mayer says:

> They took the position that equality before the law meant that all Muslims should be treated equally under *Shari'a* and that all non-Muslims should also be treated equally under *Shari'a* – not that Muslims and non-Muslims should be treated alike, or accorded the same rights under the law.[35]

This should not, however, blind us to the wide variety of rights and instruments of protections which *Shari'a* affords – even when it is conservatively understood. In addition to the rights listed above, the social and economic rights ought to be mentioned. Individuals can press against the state and society as a whole on the basis of fairly unequivocal verses in the Qur'an ("[may those be saved] whose wealth is a right known for the beggar and outcast", Q. LXX, 25). Individuals have rights not only during times of peace, but also during times of war and instability – such as the right of asylum, which *Shari'a* extend to unbelievers ("And if any one of the idolaters seeks of thee protection, grant him protection till he hears the words of God, then do thou convey him to his place of security", Q. IX, 6).

Significantly, individuals have also political rights, such as the right to oppose an unjust ruler, on the strength of the Prophetic tradition which says: "There is no obedience to a creature in sin against the Creator". The Universal Islamic Declaration of Human Rights goes so far as to make democracy (at least in theory) a human right. According to Article XI of the Declaration "The process of free consultation (*shura*) is the basis of the administrative relationship between government and the people. People also have the right to choose and remove their rulers in accordance with this principle".

Despite all these positive provisions, the scheme of individual rights and protections which Ash'arite-minded thinkers offer leaves many things to be desired, at least from the perspective of those who want Islamic human rights to conform fully to international standards. Such is the attitude of the contemporary Islamic thinker Abdullahi an-Na'im, whose approach to ethics, and whose daring views on how to interpret *Shari'a* are reminiscent of Mu'tazilism. Naturally, an-Na'im accepts all the non-controversial provisions *Shari'a* has to offer but he pushes reform further, aiming to bring Islamic legislation up to the mark of full correspondence with international human rights provisions.

Not only is Abdullahi an-Na'im a rationalist thinker when it comes to ethical theory, but he is also a historically minded thinker. Following his teacher Mahmoud Taha, he distinguishes between two stages of Islam. During the first Meccan stage, when Islam was still a weak and persecuted religion, Islam presented itself as a simple spiritual message which recognized the dignity and humanity of all persons, without reference to gender or religious belief. During the second Medinan stage, however, the victorious Islam formed a polity which needed to be governed in specific ways, appropriate to the prevailing historical conditions. According to an-Na'im:

Unless the basis of modern Islamic law is shifted away from those texts of the Qur'an and Sunnah of the Medina stage, which constituted the foundations of the constructions of *Shari'a*, there is no way of avoiding drastic and serious violation of human rights. There is no way to abolish slavery as a legal institution and no way to eliminate all forms and shades of discrimination against women and non-Muslims as long as we remain bound by the framework of *Shari'a*.[36]

An-Na'im, in effect, proposes a new *Shari'a*, based on the earlier Islamic message, which he elsewhere described as "the eternal and fundamental message of Islam".[37] To give an impression of the content of his essentially ethical-humanistic message, consider the following verses from an early Meccan *sura* (VI, 150–151):

Say: Come, I will recite what your Lord has forbidden you: that you associate not anything with Him, and to be good to your parents, and not to slay you children because of poverty; We will provide you and them; and that you approach not any indecency outward or inward, and that you slay not the soul God has forbidden, except by right. That then He has charged you; haply you will understand. And that you approach not the property of the orphan, save in the fairer manner, until he is of age. And fill up the measure and the balance with justice. We charge not any soul save to its capacity. And when you speak, be just, even if it should be to near kinsman. And fulfil God's covenant. That He has charged you; haply will remember.[38]

An-Na'im relies on a "principle of reciprocity", by which we are enjoined not to deny others rights which we believe we are entitled to. This principle underlies the universality of human rights, and is to be found in all the major religious traditions, including Islam:

There is a common normative principle shared by all the major cultural traditions which, if construed in an enlightened manner, is capable of sustaining universal standards of human rights. That is the principle that one should treat other people as he or she wishes to be treated by them. This golden rule, referred to as the principle of reciprocity, is shared by all the major religions traditions of the world. Moreover, the moral and logical force of this simple proposition can easily be appreciated by all human beings of whatever cultural tradition or philosophical persuasion.[39]

Arguing in this manner, an-Na'im invokes the ethical-humanistic Meccan texts, and looks for contextual explanations of the Medinan texts which enable him to put them aside as being inappropriate to modern conditions. In this way an-Na'im arrives at a "reformed" *Shari'a* which bans slavery, recognizes equality of men and women, and grants full citizenship rights to all citizens, regardless of religious affiliation.

To summarize, we can say that the *Shari'a* offers a rich and varied field for human rights to be grounded in. Depending on how *Shari'a* is interpreted, there may be limitations, serious omissions, and shortcomings

which our modern ethical sensibilities cannot accept. However, neither the Islamic *Shari'a* nor any other religious tradition should be judged too harshly. After all, we would never have been able to entertain the vision of one humanity, whose members are equal in worth and dignity, endowed with inalienable human rights, regardless of gender, race, or social position, had we not "stood on the shoulders" of prophets who were the first to announce the equality of all humans in the sight of God, their Creator.

5 THE SCOPE OF ISLAMIC CONSTITUTIONALISM: THE SEPARATION OF POWERS

We now turn to the question of the internal workings of government from the point of view of the *Shari'a*. The first thing to notice here is that *Shari'a* (as it has been understood and practised until very recently) does not offer a doctrine of the "separation of powers". This should come as no surprise, for the Western doctrine of the separation of powers itself has recent origins. Moreover, the Islamic traditional *Shari'a* did not conceive of distinct governmental powers to be separated from each other, in the first place.

Of course, there is no reason why contemporary *Shari'a* thinkers cannot take up the challenge to elaborate a position with respect to the separation of the different branches of government. However, before looking at the prospects for accomplishing this task, and the possible picture that can emerge from it, it may be useful to take into account Mawardi's (d. 1031) political theory. In some ways, his theory represents the "political sphere", as conceived of by traditional *Shari'a*.

Mawardi considers (or, at least, seems to consider) the caliphate to be an elective office. Mawardi notes that there is some disagreement about the number of the "electors", with some saying the electors are "the generality" throughout the land, some saying five, and others saying "at least one". Moreover, "investment by the nomination of a predecessor is permissible and correct". This is based on the precedent of Abu Bakr (the first caliph) who nominated 'Umar for the caliphate.[40] Beyond mentioning the qualifications which the electors should have, such as probity, knowledge, and prudence, Mawardi does not say how the electors are to be chosen. Given the important role which the electors can play, this is no a minor omission.

Allegiance to the caliph is not an absolute, unconditional duty of the subjects. In fact, there are two circumstances under which the caliph may be legitimately disqualified: lack of justice, and physical disability.

"An incumbent so disqualified must step down and may not be reinstated upon regaining probity without new appointment".[41] However, Mawardi does not deal with the question of who declares, and by what procedure, that the ruler has become illegitimate (in the event of his lack of justice or otherwise). According to Bernard Lewis, this is "the crucial question which a modern constitutional lawyer would put".[42]

Lewis's remark draws attention to another question: what sort of constitution, if any, should a *Shari'a*-based regime have? In recent decades, modern Islamic thinkers have begun to discuss this question, after they absorbed the lesson that a modern Islamic state, like other modern states, requires separate branches of government (executive, legislative, and judiciary), as well as different types of law (constitutional, criminal, administrative, public, etc.)

Concern with the structure and inner workings of government has reached a considerable degree of maturity in the theories and proposals of the Islamic thinkers who have seriously grappled with the question of democracy or popular government. Among such thinkers, Ghannouchi, Turabi, Mawdudi, and M. Khatami are probably the best-known.

Despite his conservatism, Mawdudi offers a clear treatment of the questions at hand. In his *Tadwin al-Dustoor al-Islami* (*Codification of the Islamic Constitution*) he recognizes an existing but "unwritten" Islamic constitution, and in his *al-Qanun al-Islami* (*Islamic Law*) he explains the various types of law (constitutional and other) which Islamic lawmakers need to design.

Along with other Islamic thinkers, Mawdudi paves the way for a discussion of the meaning and role of the parliament ("legislative assembly") in the Islamic regime, because he takes the decisive step of espousing popular government, where people can freely elect their representatives. Some pious remarks which serve as a preface to these passages need not detain us here; they include a reminder that "sovereignty" is retained by "God alone"[43] while the people as a whole act as "vice-regents":

> The Qur'an has established that the caliphate [...] is not a right that inheres in a certain individual, or family or class. It is a right which belongs to all those who recognize divine sovereignty, and who believe in the supremacy of divine law. [...] This feature makes the Islamic caliphate democratic, in contrast to caesarism, papism, or theocracy, as known in the West. It must also be recognized that the system which is called democracy in the West is not one that allows the people to be sovereign. Our [Islamic] democratic system, which we call the 'caliphate', allows the people to be vice-regents of God, while reserving the sovereignty to God alone.[44]

Mawdudi is not alone in his espousal of the democratic method of government. Similar positions have been taken by both Turabi and Ghannouchi. Having recognized the people's right to elect the caliph, it is not a great additional step to recognize the people's right to elect "representatives" with the task of voicing people's concerns, and watching over the executive power, which is represented by the caliph and his officers.

With two organs of government at hand, the question of the relationship between them immediately arises. Adapting an ancient term to modern usage, Mawdudi often refers to members of the parliament as "those who lose and bind" (*ahl al-hal wa al-'aqd*). He raises the question of what position they have, whether they serve as mere consultants to the caliph, or whether the caliph is "bound" by their decisions. His answer is that "we have no choice but to make the executive power subject to the majority decision of the legislative council".[45]

The question of whether or not the executive power should be subject to the authority of the parliament (or to the legislative council) is not the most interesting that the Islamic debate on constitutionalism gave rise to. Most "Islamic democrats", if they may be referred to in this manner, answered the question in the affirmative, and then they proceeded to discuss another, more serious and (to our mind) interesting matter: the question of *the limits of the legislative power*.

With this question we finally reach a point on which modern Western constitutionalists and Islamic constitutionalists see eye to eye. In both cases there is a concern with the possibility that the legislative power may pass wrong or unjust laws.

We have already cited Elster's presentation of constitutionalism fighting a "two-front war": against the executive branch of government, which is liable to ask for much discretion in the interest of efficiency, and against the legislative branch, which may give rise to oppressive or foolish majorities. Islamic constitutionalists (and democrats) greatest fear is that the legislative branch may legislate measures inconsistent with the *Shari'a*. For this reason many of them reject the idea of an "unqualified popular sovereignty" out of hand. This can be illustrated by referring to the writings of Ghannouchi and Turabi. According to the former:

> In the Qur'an it is stated: 'O believers, obey God, and obey the Messenger and those in authority over you'. (Q. IV, 59). [This verse] clearly indicates the centre of supreme authority in the lives of Muslims ... After this comes the power which the people exercise. The legitimate scope for this power does not violate divine law which is found in the Qur'an and the Traditions of the Messenger.[46]

Turabi, on the other hand, says:

> Naturally, there is no place in Islam for a popular government which is separated from the Faith. ... Democracy in Islam does not mean absolute popular power, but rather popular power in accordance with *Shari'a*.[47]

Very often, Arab secularists who see themselves as supporters of democracy do not realize the need for placing constitutional restrictions on the power of the legislative assembly. They fail to distinguish between *democracy*, pure and simple (which can degenerate into populism or anarchy), and *constitutional democracy*, which (presumably) has inherent protections against such deformations. To them the qualifications which Ghannouchi and Turabi would impose on the power of the legislative branch are a violation of democracy and they cite these as evidence of the spuriousness of the Islamic claim to democracy.

We shall not discuss here the various concepts of democracy in relation to secularism (more about this issue will be found in the final section of this chapter). We will focus instead on the significance of the restrictions which Islamic democrats intend to place on the power of the legislative branch of government.

It is fairly obvious that an agency is needed in order to review the laws that the Parliament can propose and approve. The most natural way to conceptualize this function is in terms of a third branch of government, a *judicial branch*, including a Constitutional Court charged with the task of reviewing legislation. It is here that critics begin to see threats to the very concept of democracy. It is also here that Islamic constitutionalism has to step carefully, if it is to succeed in avoiding this charge.

It is instructive to look at the way these matters are dealt with in the constitution of the Islamic Republic of Iran.[48] This constitution probably represents the first attempt that has ever been made to write a detailed constitution from an Islamic point of view. Here are some of the relevant articles:

> All civil, penal, financial, administrative, cultural, military, political laws and regulations, as well as other laws or regulations, should be based on Islamic principles. This principle will in general prevail over all of the principles of the constitution, and other laws and regulations as well. Any judgment in regard to this will be made by the clerical members of the Council of Guardians (Article 4).

> The Islamic Consultative Assembly cannot enact laws contrary to the *usul* (fundamentals) and *ahkam* (judgments) of the official religion of the country or to the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred in accordance with Article 96 (Article 72).

The determination of compatibility of the legislation passed by the Islamic Consultative Assembly with the laws of Islam rests with the majority vote of the *fuqaha'* of the Guardian Council; and the determination of its compatibility with the Constitution rests with the majority of all the members of the Guardian Council (Article 96).

The Guardian Council is not a popularly elected body. The clerical members, who are six in number, are appointed by the religious leader, while the remaining six are nominated by head of the Judicial Power, who is appointed by the religious leader. This moves Mayer to say: "In consequence, not even constitutional rights guarantees can have force, should the clerics ... decide that those guarantees are not based on Islamic principles".[49]

At this stage Islamic constitutionalists face problems which, in all fairness, are not radically different from the ones being discussed by contemporary Western thinkers. For if Islamic thinkers were to make the Constitutional Court – or the "guardian council", or any agency that is entrusted with the task of deciding on constitutional matters – completely subject to the will of the legislative branch, this would tilt the balance of power towards the legislative, with the risk of oppressive, unenlightened, or wayward majority rule. On the other hand, if the "guardian council" is made completely independent of the popular will, this risks robbing democracy, which is "government by the people", of its very meaning.

There are no easy, obvious, or perfect solutions to these problems, which are discussed at length by Mawdudi in *Tadwin al-Dustoor al-Islami*. It is worth following his train of thought on this matter, because it is representative of the ideals which move many Islamic thinkers. He begins by reflecting on the Islamic "golden age", i.e. the period of the "the rightly-guided caliphs" (*al-khulafa'u al-rashidun*). In those times the caliph could be the head of three different offices: the caliphate, the judges, and *ahl al-hal wa al-'aqd*. Mawdudi seems to think of these as Islamic prototypes of the modern branches of government. This positing of a "golden age" rests on the assumption that the men who lived back then were men of a special type: the caliphs were "rightly-guided" (by God, of course), and "those who bind and lose" were no ordinary politicians insofar they were wise, truthful, trustworthy, well-qualified, and distinguished by their work for Islam.

Mawdudi finds no precedent, during the period of the rightly-guided caliphs, of the judges overruling judgments made by *ahl al-hal wa al-'aqd*. The reason for this, according to Mawdudi, is that members of the latter group (headed by the caliph) were men of great insight. They were

simply incapable of producing legislation that contravened the Qur'an or Prophetic practice.[50] During this period, also, the advice of *ahl al-hal wa al-'aqd* to the caliph was not always binding. The first caliph waged war against the apostates (*al-murtaddin*) despite advice to the contrary. The caliph was perceptive enough, and his companions had faith in his good judgment, so that all things went well.[51]

Mawdudi recognizes that the golden age of Islamic "civic virtue" is forever gone, and that different times require different methods. However, this remains clearly his ideal. Short of attaining it, he suggests to resort to plebiscites in cases of irresolvable conflict between the legislative and the executive branches of government.[52] "Public opinion", led and articulated by *ahl al-hal wa al-'aqd*, carries considerable weight for Mawdudi. *Ahl al-hal wa al-'aqd*, who play a vital role in the public affairs of the polity, are distinguished primarily by their standing with the people in the community. They are held in esteem not as a consequence of their wealth or inherited position, but on account of their courage, wisdom, dedication to Islam, and public service to the community.

Mawdudi's position offers valuable insight into the basic concerns that Islamic constitutionalism tries to address. On the one hand, Islamic constitutionalism is concerned that neither the executive, nor the legislative branch of government act in ways that contravene *Shari'a*. Yet there is a reluctance to place all authority in the hands of one person, or agency, as the willingness to "devolve" decisive power to the community (led by *ahl al-hal wa al-'aqd*, who possess Islamic "civic virtue") clearly shows.

CONCLUDING REMARKS: NO PLACE FOR SECULARISM

The objective of these final remarks is to tie some loose ends, and deal with some unanswered questions. Constitutionalism, democracy, and the separation of powers are closely connected, both conceptually and in practice. In the West they have arisen in the context of secularism, which (as some have argued) is a condition presupposed by all three. Since most Islamic thinkers firmly reject secularism, the question often arises of how one can speak of Islam, constitutionalism, and democracy in the same breath.

How can an Islamic regime be democratic, if it is not secular? Democracy requires giving citizens equal political rights, but to think of the possibility of a head of an Islamic state to be Christian, Jewish, or atheist strains credulity. Islam is therefore incompatible with democracy. Constitutionalism, on the other hand, requires democracy, for it

is hard to think how individual rights could be protected, and government kept in check, if the political regime is not democratic. Thus, if constitutionalism presupposes democracy and democracy presupposes secularism, constitutionalism, too, presupposes secularism. Yet Islam rejects secularism. It follows that Islam is incompatible with both democracy and constitutionalism.

Obviously, secularism lies at the heart of the problem here. Unless a way is found to put secularism aside as being only contingently related to democracy and constitutionalism, there may be no way to combine Islam with either of these forms. Let us look at how some contemporary Islamic democrats propose to deal with these problems.

Simply stated, the basic logical move which some contemporary Islamic democrats propose is to view democracy as a "doctrine of procedure", a mere method for dispensing, sharing, and managing political power. This outlook has been classically expressed by Joseph Schumpeter in these words:

> Democracy is a political *method*, that is to say, a certain type of institutional arrangement for arriving at political – legislative and administrative – decisions, and hence incapable of being an end in itself, irrespective of what decisions it will produce under given historical conditions.[53]

According to Schumpeter's definition, democracy is neutral between ends and values which may prevail in a given society. According to Ghannouchi, who also takes democracy to be a "doctrine of procedure":

> It is possible for the mechanisms of democracy ... to operate in different cultural milieus. ... Secularism, nationalism, ... and the deification of man ... are not inevitable consequences of democracy, inasmuch as this latter resolves itself into popular sovereignty, equality between citizens, ... and recognition of the majority's right to rule. There is nothing in these procedures which necessarily conflicts with Islamic values.[54]

The conceptually innovative move of Ghannouchi and others, such as Khatami,[55] lies in their claim that democracy *as such* is only contingently related to the abhorred doctrine of secularism. Democracy means popular sovereignty, political equality, representative government, and majority rule. None of these things spell secularism. Hence there is no call (from an Islamic point of view) for rejecting democracy.

Ghannouchi welcomes free elections, believing that an Islamic society will want to live in an Islamic way. His has an equally welcoming attitude toward political pluralism, party competition, parliamentary debates, and other aspects of democratic practice. This is because he imagines that all the competition, opposition and debate will take place within limits set by a *national consensus on an Islamic constitution*. If and when

this consensus comes into being, some groups of people may well stand outside it, unable to agree on the basic assumptions and values which are to govern the social structure. Ghannouchi does not call for suppressing these groups. His wager is that "civil society will see to it that such groups will remain marginal, [so] there will be no need to resort to state power [in order to 'contain' them]".[56]

That pluralism and opposition (so characteristic of democratic practice, as it is customarily understood) take place within the framework of a basic constitutional consensus is not an original insight on the part of Islamic writers examining the presuppositions of democracy. Many Western political writers recognize this. According to Esposito and Voll:

> In standard modern Western political thought, acceptable opposition in a democratic system is closely tied to the concept of a constitutional government, in which there is an underlying, fundamental consensus on the 'rules of the game' of politics. Opposition is the legitimate disagreement with particular policies of specific leaders within the mutually accepted framework of the principles of an underlying constitution that is either written or based on long-established practice.[57]

Islamic thinkers could heartily agree with this. In their case, however, the constitution derives from the basic principles of the faith. This is all too evident in the case of Turabi, who clearly understands the logic of "government and loyal opposition", as practised in Western democracy:

> Such a consensus on the foundations, ... in whose light specific policies may be debated, is a condition for the stability of all democratic systems. This is how Western democracies have achieved their stability: the people, through a process of cultural and political development, have eventually reached a consensus on the foundations, and have succeeded in isolating the matters which are subject to consultation and parliamentary debate. [Thus] when we look at partisan debates in Western democratic countries we find that the debates take place within an established [constitutional] framework. For example, the difference between Labour and the Conservatives in Britain is very limited, and so is the difference between the Republican and Democratic Parties in America.[58]

This is, therefore, the Islamic "take" on democracy. Islamic democrats propose to free democracy from secularism, to adopt the former, and leave the other one behind. This proposal also goes a long way toward solving (or alleviating) the perceived conflict between Islam and constitutionalism.

Standing on Islamic ground, an Islamic democrat may follow the path taken by An-Na'im, which is to accept all international legal instruments that have to do with human rights. Such an Islamic democrat can expect much criticism from many Islamic quarters, to the effect that conformity to all international human rights legislation is bound to dilute Islam beyond recognition, and that acceptance of these bills is just a polite way of rejecting Islam altogether.

It is also possible for Islamic democrats to insist on a more specific conception of rights, while rejecting secularism on the strength of independent philosophical arguments. Many philosophers have argued, and continue to argue, that the universality of human rights is a fiction. According to Rorty, for example, there are no universal "foundations" for human rights – not An-Na'im's rule of reciprocity, not Kant's categorical imperative, nor Plato's rationality. It is all a matter of social facts: "nothing relevant to moral choice separates human beings from animals, except historically contingent facts of the world, cultural facts".[59] This view of morality is shared by Michael Walzer, who claims that:

> We cannot say what is due to this person or that one until we know how these people relate to one another through the things they make and distribute. ... A given society is just if its substantive life is lived in a certain way – that is, in a way faithful to the shared understandings of the members. ... Every substantive account of distributive justice is a local account.[60]

As far as some Islamic thinkers are concerned, secularism (and other modern values such as rationalism, utilitarianism, belief in science) is a philosophy, one among many others. It is a philosophy which says that religion is not the right way to employ in the ordering of society. Islam is another type of philosophy. Each has its view of human life, rights, and obligations.

If rights and duties are (to some degree, at least) socially and culturally specific, if we are not in possession of universally acceptable arguments for all the rights and protections which human beings are entitled to, then it stands to reason to think that constitutionalism is (or can be) realized differently in different societies, each according to its conception of rights and obligations. This should leave room for a certain brand of constitutionalism – call it "Islamic constitutionalism" – which in some ways differs from, and in other ways resembles constitutionalism in its Western form.

NOTES

1. In Gallie's sense, a term is "essentially contested" when there are disputes about the *use* of the term – disputes "which, although not resolvable by arguments of any kind, are nevertheless sustained by perfectly respectable arguments and evidence" (W.B. Gallie, *Philosophy and the Historical Understanding*, London: Chatto & Windus, 1964, p. 14).
2. J. Elster, "Introduction", in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy: Studies in Rationality and Social Change*, Cambridge: Cambridge University Press, 1988, p. 2.

3. D. Castiglione, "The political theory of the constitution", in R. Bellamy and D. Castiglione (eds), *Constitutionalism in Transformation*, London: Blackwell, 1996, p. 5.
4. C. Sunstein, "Constitutions and democracies: an epilogue", in J. Elster and R. Slagstad (eds), op. cit., p. 327.
5. J. Elster, op. cit., p. 3.
6. J.E. Lane, *Constitutions and Political Theory*, Manchester: Manchester University Press, 1996, p. 25.
7. Ibid.
8. B. Lewis, "Islam and liberal democracy", *Atlantic Monthly*, 27 (1993), pp. 89–98, quoted in S.M. Lipset, "The social requisites of democracy revisited", *American Sociological Review*, 59 (1994), p. 6., italics added.
9. R. Ghannouchi, *Muqarabat fi al-'Ilmaniyya wa al-Mujatama' al-Madani* (*Conceptions of Secularity and Civil Society*), London: al-Markaz al-Magharibi lil-buhuth wa al-tarjamah, 1999, p. 155, italics added.
10. A. Bisharah, "Madkhal li-Mu'alajat al-Demoqratiyya wa-Anmat at-Tadayyun" ("Democracy and Religious Forms"), in B. Ghalyun *et al*. (eds), *Hawla al-Khiyar al-Demoqrati* (*The Democratic Alternative*), Ramallah: Muwatin, 1993, p. 83.
11. T. al-Bishri, *Al-Wad'u al-Qanuni baina al-Shari'a al-Islamiyya wa al-Qanun al-Wad'i* (*The legal situation with regard to Islamic Shari'a and positive law*), Cairo: Dar al-Shuruq, 1996, p. 121. Cf. Nazih Ayubi's remark that "[the Islamists] are thus after a kind of 'nomocracy', not the reign of any group in particular (democracy, aristocracy or, for that matter, theocracy)" (N. Ayubi, *Political Islam: Religion and Politics in the Arab World*, London: Routledge, 1991, p. 218).
12. A. Pegis (ed.), *The Basic Works of St. Thomas Aquinas*, New York: Random House, 1944, vol. 2, pp. 748–57.
13. Mawdudi, *Al-Qanun al-Islami wa Turuq Tanfithih* (*The Islamic Law and the Methods of its Application*), Beirut: Mu'assat al-Risalah, 1975, p. 18.
14. Ibid., p. 24.
15. H. Turabi, *Qadaya al-Hurriyyah wa al-Wihdah wa al-Shura wa al-Dimoqratiyyah* (*Problems of Liberty, Unity, Consultation and Democracy*), Jedda: al-Dar al-Su'udiyyah lil-Nashr, 1987, p. 25.
16. Mawdudi, *Tadwin al-Dustoor al-Islami* ("The Codification of the Islamic Constitution"), Beirut: Mu'assat al-Risalah, 1975, p. 11.
17. Cf. R.M. Frank, "Moral obligation in classical Muslim theology", *Religious Ethics*, 11 (1983), pp. 204–23.
18. H. Ritter, "Studien zur Geschichte der Islamischen Frömmigkeit", *Der Islam*, 21 (1935).
19. Ash'ari, *Kitab al-Luma' fi al-Raddi 'ala Ahl al-Zaigh wa al-Bida'* (*The Theology of al-Ash'ari*), Cairo: Matba'at Misr, 1955, p. 117.
20. Ghazali, *Ihyz' 'Ulum al-Din* (*Reviving the Sciences of Religion*), Beirut: Dar al-fikr, 1975, p. 3.
21. For a discussion of the meaning and role of positive law in relation to natural law see S. Cotta, "Positive law and natural law", *Review of Metaphysics*, 37 (1983), pp. 265–85, According to Cotta, the "positivity" of positive law has to do with the fact that it is "*factually* enacted" (ibid., p. 267). Compare this with what Schacht says about the Islamic law: "It follows from the heteronymous and irrational side of Islamic law that its rules are valid by virtue of their *mere existence* and not by virtue

of their rationality" (J. Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, p. 203, italics added). I take *factuality* and *mere existence* to be nearly synonymous in the present context.

22. S. Cotta, op. cit., p. 276.
23. G.F. Hourani, "Divine justice and human reason in Mu'tazilite ethical theology", in R. Hovannisian (ed.), *Ethics in Islam*, Malibu (CA): Undena Publications, 1985, p. 81.
24. Schacht prefers to speak of the "irrationality" of Islamic law (see note 21 above.), but I think "non-rationality" will serve the purpose better. That which does not belong to reason need not, therefore, be *opposed* to reason, which is what the term "irrationality" suggests.
25. R.M. Frank, op. cit., p. 205.
26. Abd al-Jabbar, *Al-Mughni*, (ed.) by A.F. al-Ahawani, Cairo: al-Mu'asasa al-Misriyah li-ta'lif wa al-tarjamah, 1962, vol. 6, sect. 1, p. 64. I follow Hourani's translation, in G.F. Hourani, "The rationalist ethics of'Abd al-Jabbar", in S.M. Stern *et al*. (eds), *Islamic Philosophy and the Classical Tradition*, Oxford: Bruno Cassirer, 1972, p. 111.
27. W. Montgomery Watt, "The political attitudes on the Mu'tazilah", *Journal of the Royal Asiatic Society*, (1963), p. 44.
28. Ibid., p. 48.
29. J. Elster, op. cit., p. 6.
30. Ibid., pp. 6, 7.
31. S.E. Finer (ed.), *Five Constitutions: Contrasts and Comparisons*, New York: Penguin Books, 1979, p. 271.
32. Mawdudi, *Al-Khilafah wa al-Mulk* (*Caliphate and Kingship*), Kuwait: Dar al-Qalam, 1987, pp. 27–31.
33. Mawdudi, *Tadwin al-Dustoor al-Islami*, p. 65.
34. Mawdudi, *Al-Qanun al-Islami wa Turuq Tanfithih*, p. 47.
35. A.E. Mayer, *Islam and Human Rights: Tradition and Politics*, Boulder (CO): Westview, 1991, p. 98.
36. A.A. an-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Syracuse (NY): Syracuse University Press, 1990, p. 179.
37. Ibid., p. 52.
38. I have used Arberry's translation in A.J. Arberry, *The Koran Interpreted*, London: Oxford University Press, 1964, p. 140.
39. A.A. an-Na'im, op. cit., p. 163. It is not obvious that the principle of reciprocity, or the golden rule, as explained by An-Na'im, is sufficient as a basis for universal morality. It does indeed deliver the correct judgement in the case of the sadist who does not wish to be tortured, or the robber who wishes not to be robbed. But the sadistic-masochist survives the test of reciprocity; so does the robber who self-consistently refuses to condemn robbery, no matter who is affected by it. Yet (presumably) sadism and robbery are unethical.
40. Mawardi, *The Ordinances of Government* (*Al-Ahkam al-sultaniyya wa al-wilayat al-diniyyah*), tr. W.H. Wahba, Reading: Garnet, 1996, p. 9.
41. Ibid., p. 17.
42. B. Lewis, *The Political Language of Islam*, Chicago: The University of Chicago Press, 1988, p. 94.
43. Using different types of argument, secularists and Islamic conservatives often reach the same conclusion, namely that Islam is incompatible with democracy. In their

arguments both parties use the premise that divine sovereignty and popular sovereignty are incompatible. This premise is far from obvious. In fact, it can be argued that it is false. Cf. R. Bahlul, "Democracy without secularism?", in J. Bunzl (ed.), *Islam, Judaism, and the Political Role of Religions in the Middle East*, Florida: University Press of Florida, 2004; Id., "People vs. God: The logic of 'divine sovereignty' in Islamic democratic discourse", *Islam and Muslim-Christian Relations*, 11 (2000), 3, pp. 287–97.

44. Mawdudi, *Al-Qanun al-Islami*, p. 25.
45. Ibid., p. 38.
46. R. Ghannouchi, *al-Hurriyat al-'Ammah fi al-Dawlah al-Islamiyya* (*Public Liberties within the Islamic State*), Beirut: Markaz Dirasat al-Wihdah al-Arabiyyah, 1993, p. 119.
47. H. Turabi, op. cit., pp. 63–4, 67.
48. A. Blaustein and G. Flanz (eds), *Constitutions of the World*, Dobbs Ferry (NY): Oceana, 1986.
49. A.E. Mayer, op. cit., p. 37.
50. Mawdudi, *Tadwin al-Dustoor al-Islami*, p. 35.
51. Ibid., p. 37.
52. Ibid., p. 38.
53. J.A. Schumpeter, *Capitalism, Socialism and Democracy*, London: Allen & Unwin, 1954, p. 242.
54. R. Ghannouchi, *al-Hurriyat al-'Ammah fi al-Dawlah al-Islamiyya*, p. 88.
55. M. Khatami, *Mutala'at fi al-Din wal-Islam wal-'Asr* (*Writings on Religion, Islam and Times*), Beirut: Dar al-Jadid, 1998, p. 103.
56. R. Ghannouchi, *al-Hurriyat al-'Ammah fi al-Dawlah al-Islamiyya*, p. 295.
57. J.L. Esposito and J. Voll, *Islam and Democracy*, Oxford: Oxford University Press, 1996, p. 36.
58. H. Turabi, op. cit., p. 68.
59. R. Rorty, "Human rights, rationality and sentimentality", in id., *Truth and Progress*, Cambridge: Cambridge University Press, 1994, p. 170.
60. M. Walzer, *Spheres of Justice*, Oxford: Blackwell, 1983, pp. 312–14.