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Book Review

CONSTITUTIONAL THEOCRACY, by Ran Hirschl¹

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WHEN I WAS A CHILD, the chant I always associated with Islamism, one still in use among the Taliban,³ was “the Qur’an is our constitution.” Gradually it has been replaced, however, with the mantra of the Muslim Brotherhood in Egypt, “Islam is the solution.”⁴ These simplistic tropes seem similar, but the difference between them is significant. In many ways, this distinction lies at the heart of the considerable contribution that Ran Hirschl has made in his fine work, *Constitutional Theocracy*, to the understanding of constitutional governance in societies where there is a substantial legal and formal recognition of religion. However, this distinction also reveals the biggest problem in his analysis. Simply stated, one of these slogans (“the Qur’an is our constitution”) is logically incompatible not only with modern constitutional governance but also with the very notion of the Westphalian nation-state, while the other (“Islam is the solution”) is not.

To many people raised in a secular tradition, constitutional governance is necessarily secular. It is precisely this belief, often so thoroughly internalized that it is not questioned, that Hirschl convincingly critiques. Developing ideas that he introduced in much of his earlier work, Hirschl compellingly argues that a new form of government, known as constitutional theocracy, has arrived on the global scene. He then defines some of its more salient features.⁵ Aptly criticizing comparative constitutional scholars who are focused exclusively on Western societies’

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1. (Cambridge: Harvard University Press, 2010) 300 pages.
 2. Associate Professor, University of Pittsburgh School of Law.
 3. I owe this piece of information to my friend Dr. Wadir Safi, a former Dean of the Law and Political Science Faculty at Kabul University. Placards with this phrasing were found in Tahrir Square during the recent demonstrations against the former Mubarak regime, though their use appeared from television broadcasts to be limited to more hardline Salafi groups.
 4. Anthony Shadid, “Yearning for Respect, Arabs Find a Voice,” *New York Times* (30 January 2011) A10.
 5. *Supra* note 1 at 2-3.

separation of religion and state,⁶ Hirschl points out that a healthy proportion of the world's population lives in constitutionalist systems that include one or another of the features of constitutional theocracy.⁷ While he acknowledges that the marriage of theocratic and constitutional governance is one fraught with friction, Hirschl also points out—correctly—that the two systems have far more in common than has been previously acknowledged.⁸

While I might quibble with one or two details, this central claim is a compelling part of Hirschl's work and is convincingly delivered with ample examples of constitutional text and praxis to support it. Less convincing is what I might describe as an ancillary thesis, though one Hirschl takes quite seriously, which is that constitutional theocratic structure is a rational and prudent secular response to growing global religious fervour. Hirschl argues that constitutional theocracy is designed to empower courts, with their secularly trained elite judges, to interpret religious mandate, thereby constraining, limiting, and in some cases neutering the more radical religious claims.⁹ I do not mean that Hirschl is entirely wrong about this, for surely he is describing a fair number of constitutional theocratic states accurately. However, when understood as a global feature of constitutional theocracy, his description seems flawed in at least two respects. First, the notion of court as secularizing agent may be widely applicable but, as Hirschl well knows, it is by no means universal. There are plainly courts and legal systems in which the judiciary is far from being a force on the side of secular and progressive liberalism. Second, and more importantly, Hirschl seems to be conflating two different phenomena. The first involves traditional and informal forces of law-making and law interpretation, from tribal councils to local priests (*i.e.*, those likely to proclaim Qur'an as constitution), that *any* state instrument, including a court, would seek to constrain and limit for reasons that Max Weber described decades ago.¹⁰ The second involves religio-political movements operating within the state and competing for maximum control over state institutions and apparatus. To assume that these immensely popular movements, which are perfectly comfortable within a national constitutional structure (but still hold Islam as the solution), will not be able to exercise significant influence over a judiciary seems

6. *Ibid* at 243-44.

7. *Ibid* at 3.

8. *Ibid* at 206-07.

9. *Ibid* at 13.

10. Weber's work has proven deeply influential in the social sciences. In *Politics as a Vocation*, he argued that states are defined by their legitimate monopolization of violence in society. See *e.g.* Max Weber, *Politics as a Vocation*, translated by HH Gerth & C Wright Mills (Philadelphia: Fortress Press, 1965) at 1-3.

fanciful and difficult to defend, at least as an empirical matter. It seems that Hirschl therefore describes not so much the successful constraining of religion by forces of secularism as the destruction of the traditional mechanisms for the creation of religious law. These traditional mechanisms were replaced with something altogether different—whether the new mechanisms are secular or simply some dramatic mutation of religio-legal norms that enable them to fit better within a modern state paradigm. Precisely why religious movements would go along as happily with such destruction as they have is a matter deserving of some consideration.

The balance of this review proceeds in two Parts. Part I describes Hirschl's central thesis and explains why it is a fresh and compelling contribution. Part II describes the ancillary claim that the courts in constitutional theocracies operate as secular agents and highlights some of the problems associated therewith, as outlined above.

I. THE NATURE OF THEOCRATIC CONSTITUTIONALISM

Along with Larry Catá Backer in the United States,¹¹ Hirschl deserves immense credit for giving serious and sustained thought to this rising constitutional phenomenon he defines as “theocratic constitutionalism.” While most of the popular media was, and often continues to be, enthralled with the notion that one cannot marry the idea that the People are sovereign with the idea that God is sovereign,¹² Backer, Hirschl, and others (among them Noah Feldman¹³) have been at the forefront of those proclaiming that this combination is precisely what various political movements have sought to do. Such scholars offer convincing explanations for why these oft-adopted modalities of governance deserve greater attention than they have been receiving.

Hirschl describes four main components to theocratic constitutionalism, the first of which, prosaically enough, is constitutionalism. This characteristic presumably excludes the Taliban, who combine religious and political authority entirely and who do not divide political authority into constituent units, let alone empower a judiciary to engage in anything resembling judicial review.¹⁴ However,

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11. “Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering” (2009) 16 *Ind J Global Legal Stud* 85.
 12. Hirschl himself points out this phenomenon. *Supra* note 1 at 206.
 13. See e.g. *After Jihad: America and the Struggle for Islamic Democracy* (New York: Farrar, Straus and Giroux; 2003) at 6-7.
 14. See Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*, 2d ed (New Haven: Yale University Press, 2010) at 93-94 (describing Taliban contempt for any

the requirement of constitutionalism would be fulfilled in systems such as Iran, which governs itself by a constitution and which recognizes at least a formal distinction between the clerical institutions of Qom and the political institutions of Teheran.¹⁵

The balance of the features of theocratic constitutionalism—the privileging of a single religion, the constitutional enshrining of that religion as source of and constraint upon legislation, and the existence of non-state religious bodies—are straightforward enough. They require little comment other than to say that they might be criticized in some contexts as excessively formal. To say that a law may not contravene the “settled rulings of Islam,” as article 2 of Iraq’s Constitution does,¹⁶ is not to say very much. As for the requirement that “Islam” be a “source” (or “a chief source,”¹⁷ or “the chief source,”¹⁸ or “a foundational source,”¹⁹ as the case may be) of legislation, it is hard not to dismiss such a provision as symbolic and ornamental for the most part. In my experience working with legislatures, which is extensive in one Arab and Muslim country with such a requirement, legislative committees do not spend very much time considering “Islam” when drafting their competition law, consumer protection law, or antidumping law.²⁰

In some instances, one wonders whether this phenomenon is less theocratic constitutionalism and more some form of Islam as ornament, relevant only when the legislature chooses to make it so. For example, in a nation such as Iraq, among hundreds of opinions, the Federal Supreme Court has decided only a single case with respect to article 2 (on a matter concerning the requirement that a contract be in writing).²¹ Furthermore, most legislation emerging from the post-Saddam legislature (called the Council of Representatives) bears no reasonable relationship

form of modern state organization along Western lines).

15. *Supra* note 1 at 36-37.

16. *Dustūr Jumhūriyyat al-Iraq* (Iraqi Constitution), 2005, art 2 [translated by author].

17. This was the original phrasing in the Egyptian Constitution. *Dustūr Jumhūriyyat Misr al-‘Arabiyya* (Constitution of the Arabic Republic of Egypt), 1971, art 2 [translated in Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari‘a into Egyptian Constitutional Law* (Leiden: Brill, 2006) at 125].

18. *Dustūr Jumhūriyyat Misr al-‘Arabiyya* (Constitution of the Arabic Republic of Egypt), 2011, art 2 [translated by author].

19. *Iraqi Constitution*, *supra* note 16.

20. From 2008 through early 2010, I was based in Baghdad, acting as Deputy Chief of Party to a project entitled Global Justice Project: Iraq. I was specifically tasked to offer expert advice on major legislative and constitutional initiatives originating in Iraq’s Council of Representatives. The consultation was part of a larger project organized and run by the SJ Quinney School of Law at the University of Utah and funded by the US Embassy’s Constitutional and Legislative Affairs Office.

21. *Decision 60*, [2010] Federal Supreme Court of Iraq, online: <<http://www.iraqja.iq>>.

to Islam's "rulings," settled or otherwise. It is for this reason that I have tended to regard the work on theocratic constitutionalism with some hostility in the past,²² though upon reflection I think the fairer criticism would be that, because the scholarship on this subject paints with such a broad brush, there may be some messiness in the details in particular nation-states.

II. THE COURT AS SECULARIZING AGENT

Larger problems emerge with the claim that courts are vested with the authority to ensure compliance of legislation with religious law precisely because they are more likely to constrain and limit the impact of that religious law. Hirschl is not wrong about this phenomenon in many instances. There can be no doubt that various secular political hegemonic movements, from Malaysia to Israel to Egypt, when faced with rising religious fervour, have sought to temper the movements by investing their courts, staffed as they are by a secular elite, with the power to invalidate legislation that is deemed to be in conflict with religious norms.²³

Yet exceptions are rife. Chile's Supreme Court, by Hirschl's own admission, prohibited another branch of the government from distributing the "morning-after" pill freely.²⁴ Since the Islamic revolution, Iran's judiciary and its Guardian Council (which is empowered to strike down legislation as being un-Islamic) has acted as a bulwark of religious conservatives against what has at times been a comparatively progressive parliament and president.²⁵ Perhaps Pakistan affords the most salient example of this phenomenon. While Hirschl is correct that much of the Pakistani bar and bench are among the secular elite, it was precisely this fact that inspired the Pakistani general Muhammad Zia-ul-Haq to create a separate *shari'a* court in the first place. That is to say, Zia's decision to Islamize society and to empower a judiciary with the enforcement of Islamic law was certainly not meant as a way to limit the influence of *shari'a*, but rather to ensure its deeper penetration. When the court failed to do so, Zia replaced it with a more compliant court, which promptly did.²⁶

22. Haider Ala Hamoudi, "Dream Palaces of Law: Western Constructions of the Muslim Legal World" (2009) 32 *Hastings Int'l & Comp L Rev* 803 at 807.

23. See *supra* note 1 at 86-90.

24. *Ibid* at 185.

25. Nazila Fathi, "Iran's president trying to limit power of clergy," *New York Times* (29 August 2002) A1.

26. Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge, UK: Cambridge University Press, 2005) at 159.

Hirschl also points to former-President Pervez Musharraf's appointment of a relative moderate, Ejaz Yousaf, as Chief Judge of the Federal Shari'at Court in Pakistan as an example of a religious court functioning as a check on growing religious fervour.²⁷ However, this appointment was made at a time when the political authorities were interested in constraining the reach of *shari'a*, long after the Islamization plan had been implemented.²⁸ A far more pertinent example of how the court was supposed to work in ensuring and implementing Islamization occurred at a time when General Zia was in power and responsible for determining the composition of the *shari'a* bench. Most prominent among his appointments was M. Taqi Usmani, a leading expert in Islamic finance. Where Yousaf was a member of Pakistan's chess and cricket teams, Usmani is the son of a mufti. He has an LL.B., but his primary training is in *shari'a* and took place in religious schools. Where Yousaf may have been known for cricket and chess, Usmani's curriculum vitae consists of membership in religious associations that are Islamist to their core.²⁹ He was the author of an opinion of the Shari'at Appellate Bench that rendered it illegal in Pakistan to charge interest on loans—a decision that was much celebrated among Islamists, and one that has been disregarded by the other branches of government.³⁰ His appointment was by no means a way of constraining Islam; rather, the appointment made Islam a source of significant constraint on law—albeit at times, as in the case of the interest ban, an unsuccessful constraint. Usmani thus has no problem using the state to impose Islam (and may well be derogating from the right of the traditional cleric to determine what *shari'a* is), but he is no secular agent.

Hirschl thus appears to conflate two very different phenomena. One is the projection of *shari'a* through state institutions to the derogation of the authorities who traditionally form Islamic law. The other is the marginalization of *shari'a* in all instances. The former is universal, or at least nearly so, while the latter is not. The extent of Hirschl's conflation is evident in his rather lengthy exposition of South Africa and Canada as providing space for religious and indigenous law, but constraining and limiting such law to the extent that it seeks to replace the state's secular law.³¹

That states seek a monopoly on the exercise and enforcement of law is not a terribly novel assertion. What is interesting, however, is that unlike South Africa

27. *Supra* note 1 at 93-94.

28. Peters, *supra* note 26 at 158.

29. Usmani has his own website profiling these associations in ample detail. See Mufti Muhammad Usmani, online: <<http://www.muftitaqiusmani.com>>.

30. Haider Ala Hamoudi, "The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law" (2008) 56 Am J Comp L 423 at 456-58.

31. *Supra* note 1 at 185-202.

and Canada, some states do not seek to impose a supreme form of secularized law. Rather, states like Iran and Pakistan prefer to create a highly selective amalgam of religious and state law where family law is developed in a manner that defers to religious law—albeit administered and modified as the state sees fit—and commercial law all but ignores Islamic juristic text in favor of European transplant.³² That is, even when the Islamists have the upper hand, or win through outright revolution as they did in Iran and Pakistan, they do not change the basic structure of the theocratic constitutional state to defer to more traditional articulation of religious law. This may signal the death of Islamic law as understood and articulated by traditional religious scholars, but it does not mean that the state will in all instances be secularized. In many cases, in fact, it is very much the opposite.

Thus, I accept the claim that theocratic constitutionalism involves competition between religious and state law and that the various institutions of government will be involved on one side or another in that competition. However, I do not accept that this polarization means that courts, or indeed any political institutions, necessarily constrain more “radical” religious tendencies—at least not among those Islamist organizations that have significant backing and that advocate a modern state. The Usmanis of the theocratic constitutional nation-state are no less committed to that state than the secularists. The question dividing them is not whether to permit state supremacy over and state determination of the relevant content of *shari’a*—that matter has been conclusively settled. The question, rather, is *how much* to limit *shari’a*, and the ensuing competition over state apparatus therefore revolves around this crucial axis. What this effectively means is that Islamic law, as determined by traditional non-state jurists and village clerics alike, is dead and gone. By contrast, theocratic constitutionalism—or the marrying of modern constitutional structures and secular law with religious law—is here to stay, irrespective of who controls the state or its judiciary. We are fortunate to have sharp minds like that of Hirschl dedicated to explaining it.

32. See Haider’Ala Hamoudi, “The Death of Islamic Law” (2010) 38 Ga J Int’l & Comp L 293 at 297.

