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Secularism from an Islamic perspective: Theoretical reflections on the realities of Islamic societies in the 21st century

Abstract

This paper contains edited extracts of a paper initiating a project, 'Debating the Future of Shari'a in a Secular State'. The project celebrates and seeks to contribute to the struggle of Muslim societies to define themselves in the context of the local and global conditions under which they live. A key aspect of this process is the constitutional and legal dimensions of the post-colonial experiences of Muslim societies, especially the relationship among Islam, state and society.

Introduction

In this 'work in progress' (hence no footnotes in this draft), I argue for a coherent theory of the tripartite relationships among religion, state and society for the development of Islamic societies in their present local and global context. I call this theory 'secularism from an Islamic perspective' as a framework for mediating these relationships to maintain a separation between Islam and the state while retaining and regulating an active role for Islam in public policy, as explained below. The context of this constant negotiation of these relationships in present Islamic societies is shaped by profound transformations in the political, social and economic structures and institutions under which Muslims live and relate to other communities as a result of European colonialism (Soviet Marxism in the case of Central Asia) and more recently global liberal capitalism. This context is also shaped by the internal political and sociological circumstances of each society, including the internalization of externally inspired changes, whereby Islamic societies continued, after achieving political independence, Western forms of state formation, economic, legal and administrative arrangements, education and social organization. Consequently, all present Islamic societies now live within territorial states which are totally integrated into global economies, engaged in political and security inter dependence, cross-cultural influence, and so forth.

I will present here a tentative formulation of the main elements of this theory, which I am elaborating through a broader study of current discourse around related issues in several locations (in Indonesia, India, Egypt and Turkey). While drawing on some experiences of Islamic societies regarding these relationships in the various locations, that study is more conceptual than

empirical. That is, I am calling for rigourous and candid appraisal, clarification and re conceptualization of these relationships, rather than offering a detailed discussion of recent political and legal developments in various settings.

One aspect of that study I will not be able to present here is an argument that the conception of secularism presented here is more consistent with Islamic history than the notion of an Islamic state to enforce Shari'a as positive law which is a post colonial idea. In that part of the book, I will trace the main features of Islamic history in different regions to demonstrate that the state was always secular in the sense explained below. Moreover, if Shari'a principles are codified and enacted, the basis of their authority shifts from being the normative system of Islam as such to the political will of the state. In other words, they cease to be part of Shari'a by the very act of codifying and enacting them as positive law, which makes the idea of an Islamic state conceptually incoherent, a contradiction in terms. As briefly discussed later, an Islamic state is also practically unworkable in the modern context because the nature of the post-colonial state in its global context is incompatible with Shari'a notions of Muslim and non-Muslim (*dhimmi*) subjects rather than citizens and the status of women. Certain aspects of Shari'a commercial law principles like the prohibition of interest (*ribba*) and speculative contracts (*qarar*) are of course appropriate for voluntary observance by believers as a matter of religious obligation, but cannot be the subject of legal prohibition by the state under present domestic and global economic conditions.

Another aspect not discussed here is a comparative analysis of corresponding theories of these tripartite relationships in Western societies to show that they are always the product of deeply contextual and constant negotiation within each society. In other words, secularism remains tentative and contested everywhere, not a fixed model with predetermined outcomes for direct application, and hence cannot be transplanted from one society to another. It is true that certain characteristic features of secularism emerge over time, but that is the product of subsequent theoretical analysis of the practical experiences of different societies, rather than the spontaneous or logical outcome of a prescribed doctrine.

Moreover, I argue that the present global context of the negotiation of these tripartite relationships faces all human societies with similar challenges despite significant differentials in power relations among post-colonial African and Asian societies, on the one hand, and former colonial and neo-colonial Western societies, on the other. The recent drastic acceleration of patterns of economic and cultural globalization requires corresponding entrenchment of the values of constitutionalism and democratic governance, international legality and universality of human rights in the domestic and foreign policies of all societies. These developments also emphasize the importance of the deliberate promotion of domestic and international institutional capacity to safeguard the rule of law and universality of human rights. This view, I suggest, is supported by domestic and global developments during the last decades of the 20th century, and dramatically emphasized recently by the twin shared security threats of international terrorism and military unilateralism. While these challenges face all human societies, Western and non-Western alike, my primary concern is with Islamic societies. From this perspective, I argue that the values and institutions of

the rule of law cannot be realized in Islamic societies without developing a clear theory of the relationship between Islam, state and society for domestic governance and international relations.

This cannot be in terms of an Islamic state or other ways of enforcing Shari'a as such through legislation or official policy. Ironically, political activists who call for the establishment of an Islamic state to enforce Shari'a through legislation and official policies are in fact calling for a European positivists approach to law and totalitarian Marxist view of the state. That is, they seek to enforce Shari'a principles through the coercive power of the state, not the moral authority of religious doctrine, and to control the state in order to transform society on their own terms, instead of accepting the free choices of persons and communities. These views are inconsistent with the nature of Shari'a that evolved through consensus among many generations of Muslims, as briefly explained in the next section, and as such defies codification as positive law in the modern sense of the term. The totalitarian model of the state is also illegitimate from an Islamic point of view, and unprecedented in the pre-colonial history of Islamic societies. It is also dangerous to confer the sanctity of Islam on the present state with its extensive power to control and regulate far more of the daily lives of citizens and communities than was ever possible for the pre-modern imperial states or traditional princes who ruled Muslims in the past. Yet, these views of Islamic activities apparently have strong appeal among many Muslims, probably because of the dangerous combination of simplistic utopianism with ruthless authoritarianism, as can be observed in the recently experiences of countries like Iran and Sudan.

I am therefore approaching this study with a strong sense of urgency because I believe that the failure to clarify these relationships is a major obstacle facing the realization of political stability, economic development and social justice for present Islamic societies. I am not suggesting here that the theoretical clarification of these tripartite relationships is the sole problem facing these societies today. But I do believe this to be one of the major issues facing all of them to varying degrees and in different ways.

It is also important to understand that the apparently deliberate avoidance of these issues in many Islamic societies is probably due to apprehensions that open and free debate might promote the supporters of an Islamic state in some cases, or encourage secularism as an inherently anti-Islamic doctrine. In my view, these apprehensions are unwarranted or exaggerated. Islam can neither be enforced by the state as a matter of official policy and formal legislation, nor excluded from the public life of Islamic societies. Since the state is a political institution that cannot have a religious faith, whatever is enforced as Islamic policy and law will necessarily reflect the views and interests of the ruling elite. Seeing the issue in this light immediately exposes the paramount danger of allowing such claims to prevail because they will force Muslims as well as non-Muslims to live by the ideological vision or narrow self-interest of the ruling elite. The view that Islam may be relegated to the so-called 'private domain' is unrealistic because the religious beliefs and values of Muslims will continue to influence their political and economic behaviour and social relations. This view is also undesirable because it denies Islamic societies the benefit of the most formative and dynamic sources of ethical reflection and moral authority in the

formulation and implementation of public policy and legislation. While it should not be asserted as the basis of the state and administration of justice as such, Islam is too central to the moral consciousness and social institutions of Muslims to be overlooked or relegated to the purely private domain. A brief background on Islam, Shari'a and the state may be helpful for the purposes of this presentation, before elaborating on some aspects of the proposed theory.

Islam, Shari'a and the modern state

The term Islamic law is misleading in that Shari'a, the normative system of Islam, is both more and less than 'law' in the modern sense of this term. It is more than law in that it encompasses doctrinal matters of belief and religious rituals, ethical, and social norms of behaviour, as well as strictly legal principles and rules. Shari'a is also 'less' than law in the sense that it can only be enforced as positive law through the political will of the state, which would normally require statutory enactment or codification, as well as practical arrangements for the administration of justice. Thus, the corpus of Shari'a includes aspects that are supposed to be voluntarily observed by Muslims individually and collectively independently of state institutions, and other aspects which require state intervention to enact and enforce them in practice. I will discuss the implications of this and related points later. For now, this is to explain why I use the term Shari'a, rather than Islamic law.

The primary sources of Shari'a are the Qur'an (which Muslims believe to be the final and conclusive Divine Revelation) and Sunnah (traditions of the Prophet), as well as the general traditions of the first Muslim community of Medina, the town in western Arabia where the Prophet established a state in 622 CE. Other commonly accepted sources of Shari'a include consensus (*ijma'*), reasoning by analogy (*qiyas*) and juridical reasoning if there is no applicable text of Qur'an or Sunnah (*ijtihad*). But these were matters of juridical methodology for developing principles of Shari'a, rather than substantive sources as such. The early generations of Muslims are believed to have applied those techniques to interpret and supplement the original sources (Qur'an and Sunnah) in regulating their individual and communal lives. But that process was entirely based on the understanding of individual scholars of these sources, and the willingness of specific communities to seek and follow the advice of those scholars. Some general principles also began to emerge through the gradually evolving tradition of leading scholars at that stage which constituted early models of the schools of thought that emerged during subsequent stages of Islamic legal history.

The more systemic development of Shari'a began with the early Abbasy era (after 750 CE). This view of the relatively late evolution of Shari'a as a coherent and self-contained system in Islamic history is clear from the time-frame for the emergence of the major schools of thoughts (*madhabib*, singular *madhhab*), the systematic collection of Sunnah as the second and more detailed source of Shari'a, and the development of juridical methodology (*usul al-fiqh*). All these developments took place about 150 to 250 years after the Prophet's death. In other words, the first several generations of Muslims did not know and apply Shari'a in the sense this term came to be accepted by the majority of Muslims.

The early Abbasy era witnessed the emergence of the main schools of Islamic jurisprudence, including the main schools which survive to the present day which

are attributed to Ja'far al-Sadiq (died 765 - the founder of the main school of Shi'a jurisprudence) Abu Hanifah (died 767); Malik (died 795); al-Shafi'i (died 820); and Ibn Hanbal (died 855). However, the subsequent development and spread of these schools has been influenced by a variety of political, social, and demographic factors. These factors sometimes resulted in shifting the influence of some schools from one region to another, confining them to certain parts, as is the case with Shi'a schools at present, or even the total extinction of some schools like those of al-Thawri and al-Tabari in the Sunni tradition. Also, Muslim rulers tended to favour some schools over others throughout Islamic history. For example, having originated in Iraq, the center of power of the Abbasy dynasty, the Hanafi School enjoyed the important advantage of official support of the state. This School was also popular throughout Central Asia and the Ottoman Empire which sponsored principles of Hanafi jurisprudence as the basis of state and judicial practice. But until the late Ottoman Empire, as noted below, state sponsorship of certain schools traditionally happened through the appointment of judges trained in the chosen school and specification of their geographical and subject-matter jurisdiction, rather than legislation or codification in the modern sense of these terms.

The timing of the emergence and early dynamics of each school also seem to have influenced the content and orientation of their views on Shari'a. For instance, the Hanafi and Maliki Schools drew more on pre-existing customary practices bear a stronger influence of reasoning and social and economic experience than the Shafi'i and Hanbali Schools which insisted that juridical elaborations must have more direct textual basis in the Qur'an or Sunnah. However, the principle of consensus (*ijma*) apparently acted as a unifying force that tended to draw the substantive content of all these four Sunni schools together through the use of juristic reasoning (*ijtihad*). Moreover, the consensus of all the main schools has always been that if there are two or more differing opinions on an issue, they should all be accepted as equally legitimate attempts to identify and express the relevant rule.

The principle of consensus originally is clearly foundational to all aspects of Islam, as it has been the basis of acceptance of the text of the Qur'an and Sunnah themselves, as well as the process by which Shari'a principles came to be accepted as authoritative over time. This principle can also be useful today for achieving similar authority for newly developed principles of Shari'a through a more democratic theology under modern conditions of education and communication, as I argue later. But it is also clear that excessive reliance on consensus by the ninth and tenth centuries resulted in a gradual diminishing of the role of creative juridical reasoning on the assumption that Shari'a had already been fully and exhaustively elaborated by that time. This rigidity was probably necessary for maintaining the stability of the system during the decline, sometimes breakdown, of the social and political institutions of Islamic societies. It is true that there were some subsequent development and adaptations of Shari'a through legal opinions and judicial developments after the tenth century. But that took place firmly within the framework of already established framework and methodology of *usul al-fiqh*. In other words, there has not been any change in the basic structure and methodology of Shari'a since the tenth century. In that way, formulations of Shari'a principles gradually grew out of touch

with subsequent developments and realities of society and state.

Moreover, the essentially religious nature of Shari'a and its focus on regulating the relationship between God and human beings was probably one of main reasons for the persistence and growth of secular courts to adjudicate a wide range of practical matters in the administration of justice and government in general. The distinction between the jurisdiction of the various state and Shari'a courts under different imperial states came very close to the philosophy of a division between secular and religious courts. That early acceptance of a 'division of labour' between different kinds of courts has probably contributed to the eventual confinement of Shari'a jurisdiction to family law matters in the modern era.

Another aspect of the legal history of Islamic societies that is associated with the religious nature of Shari'a is the development of private legal consultation (*ifta*). Scholars who were independent of the state issued legal opinions (*fatwa*) at the request of provincial governors and state judges, in addition to providing advice for individuals from the very beginning of Islam. This type of private advice has persisted throughout Islamic history, and became institutionalized since the mid-Ottoman period. The significant difference between this sort of moral and social influence of independent scholars, and the enforcement of Shari'a by the state as such underlies the theory of Islamic secularism I am proposing.

It is not possible or necessary here to examine the variety of mechanisms for negotiating the relationship between Shari'a and secular administration of justice over the centuries. The main point is that varying degrees of practical adaptability did not succeed in preventing the encroachment of European codes from the mid-19th century. As openly secular state courts applying those codes began to take over civil and criminal jurisdictions during the colonial era and since independence in the vast majority of Islamic countries, the domain of Shari'a was progressively limited to the family law field. But even in this field, the state continues to regulate the relevance of Shari'a as part of broader legal and political systems of government and social organization. Thus, selectivity among competing views of various schools and scholars on such issues as grounds for judicial divorce (*faskh*) or inheritance reflected the social and political preferences of different states, and governments in the same state over time.

However, there was a tension between that reality of state sponsorship of a particular school and the need to maintain the traditional independence of Shari'a, as rulers are supposed to safeguard and promote Shari'a without claiming or appearing to create or control it. This tension has continued into the modern era, in which Shari'a remains the religious law of the community of believers, independent of the authority of the state, while the state seeks to enlist the legitimizing power of Shari'a in support of its political authority. This ambivalence persists as Muslims are neither able to repudiate the religious authority of Shari'a, nor willing to give it complete control over their lives because it does not provide for all the substantive and procedural requirements of a comprehensive and sustainable modern legal system. This came to be more effectively provided for by European colonial administrations throughout the Muslim world by the late 19th century.

The concessions made by the Ottoman

Empire to European powers set the model for the adoption of Western codes and systems of administration of justice. Moreover, Ottoman imperial edicts justified the changes not only in the name of strengthening the state and preserving Islam, but also emphasized the need to ensure equality among Ottoman subjects, thereby laying the foundation for the adoption of the European model of the nation state and its legally equal citizens.

Reforms introduced into Ottoman law followed the European model of attempting a comprehensive enactment of all relevant rules. Although Shari'a jurisdiction was significantly displaced in the fields of commerce, penal and civil laws, an attempt was still made to retain some elements of it. The Majallah, which came to be known as the Civil Code of 1876, though it was not devised as such, was promulgated over a ten-year period (1867-77), to codify the rules of contract and tort according to the Hanafi School, combining European form with Shari'a content. This major codification of Shari'a principles simplified a huge part of the relevant principles and made them more easily accessible to litigants and jurists/lawyers.

The Majallah acquired a position of supreme authority soon after its enactment, partly because it represented the earliest and most politically authoritative example of an official promulgation of large parts of Shari'a by the authority of a modern state, thereby transforming Shari'a into positive law in the modern sense. Moreover, that legislation was immediately applied in a wide range of Islamic societies throughout the Ottoman Empire, and continued to apply in some parts into the second half of the 20th century. The success of the Majallah was also due to the fact that it included some provisions drawn from other sources than the Hanafi School, thereby expanding possibilities of "acceptable" selectivity from within the Islamic tradition. By applying the principle of selectivity (*takhayur*) among equally legitimate doctrines of Shari'a through the institutions of the state, the Majallah opened the door for more wide-reaching reforms. But at the same time, the codification of the views of a single school, even with some selectivity or inclusion of some other views, also precludes access to other schools and scholars.

This trend toward increased eclecticism in the selection of sources and the synthesis of Islamic and Western legal concepts and institutions was carried further, especially through the work of the French-educated Egyptian jurist Abd al-Razzaq al-Sanhuri (died 1971). The pragmatic approach of al-Sanhuri was premised on the view that Shari'a cannot be reintroduced in its totality, and could not be applied without strong adaptation to the needs of modern Islamic societies. He used this approach in drafting the Egyptian Civil Code of 1948, the Iraqi Code of 1951, the Libyan Code of 1953, and the Kuwaiti Code and Commercial law of 1960/1. In all cases, al-Sanhuri was brought in by an autocratic ruler to draft a comprehensive code that was enacted into law without public debate. In other words, such reforms would not have been possible at all if those countries were democratic at the time, as public opinion would not have permitted the formal displacement of Shari'a by what was believed to be secular Western principles of law.

Paradoxically, those reforms also made the entire corpus of Shari'a principles more available and accessible to judges and policy makers in the process of selecting and adapting which aspects could be

incorporated into modern legislation. In the process, that synthesis of the Islamic and European legal traditions also exposed the impossibility of the direct and systematic application of traditional Shari'a principles in the modern context. The main reason for that is the complexity and diversity of Shari'a itself, as it has evolved through the centuries. In addition to strong disagreement among and within Sunni and Shi'a communities that sometimes coexist within the same country as in Iraq, Lebanon, Saudi Arabia, Syria, and Pakistan, different Schools or scholarly opinions may be followed by the Muslim community within the same country, though not formally applied by the courts. Judicial practice may not necessarily be in accordance with the *madhhab* followed by the majority of the Muslim population in the country, as in North African countries that inherited official Ottoman preference for the Hanafi school, while popular practice is according to the Maliki school. Since the modern state can only operate on officially established principles of law of general application, Shari'a principles can be influential politically and sociologically, but not automatically enforced as positive law without state intervention.

The legal and political consequences of these developments were more recently intensified by the significant impact of European colonialism and global Western influence in the fields of general education and professional training of state officials. Curricular changes in educational institutions meant that Shari'a was no longer the focus of advanced instruction in Islamic knowledge, and was displaced by a spectrum of secular subjects, many derived from Western models. Regarding legal education in particular, the first generations of lawyers and jurists took advanced training in European and North American universities and returned to teach subsequent generations or hold senior judicial office. Moreover, in contrast to the extremely limited degree of literacy in traditional Islamic societies of the past, where scholars of Shari'a (*ulema*) monopolized the intellectual leadership of their communities, mass literacy is growing fast throughout the Muslim world, thereby opening the door for a much more democratic access to knowledge. Thus, the *ulema* not only lost their historical monopoly on knowledge of the sacred sources of Shari'a, but traditional interpretations of those sources are gradually being questioned by ordinary Muslims.

Another significant transformation of Islamic societies relates to the nature of the state itself. Although there are serious objections to the manner in which it happened under colonial auspices, the establishment of European model nation-states for all Islamic societies has radically transformed political, economic and social relations throughout the region. By retaining this specific form after political independence, Islamic societies have freely chosen to be bound by a minimum set of national and international obligations of membership in a world community of territorial states. While there are clear differences in the level of their social development and political stability, all Islamic societies today live under domestic constitutional regimes (including countries that have no written constitution as in Saudi Arabia and the Gulf states) and legal systems that require respect for certain minimum rights of equality and non-discrimination for all their citizens. Even where national constitutions and legal systems fail to expressly acknowledge and effectively provide for these obligations, a minimum degree of practical compliance is ensured by the present realities of international relations. The fact that countries where Muslims constitute the predominant majority

of the population have acknowledged these principles as binding on them is used by foreign governments and global civil society to pressure for compliance. These changes are simply irreversible, though stronger and more systematic conformity with the requirements of democratic governance and international human rights remain uncertain and problematic for most of these countries, as it is for other societies throughout the world.

Elements of a theory of Islam, state and society relations

A fundamental concern is how to ensure the institutional separation of Islam and the state, despite the organic and unavoidable connection between Islam and politics. The first part of this proposition sounds like 'secularism' as commonly understood today, but the second part indicates the opposite. This is a permanent paradox that is part of my thesis, namely, that the relationship among religion, state, and society is the product of a constant and deeply contextual negotiation, rather than the subject of a fixed formula, whether of total separation or complete fusion of religion and the state. The paradox of separation of Islam and the state while regulating the organic relationship among Islam and politics can only be mediated through practice over time, rather than completely resolved through theoretical analysis. The question is therefore how to create the most conducive conditions for this mediation to continue in a constructive fashion, rather than hope to resolve it once and for all.

One controversial aspect of the proposed theory relates to the use of the term secularism, which may be seen as problematic and distracting from my main thesis because it widely viewed as hostile to religion in general. This term is suspect in popular Islamic discourse for its strong association with the Christian experience of Europe, colonialism and post-colonial Western hegemony in general. It also seems to be difficult to dispel the common view that this term inherently and necessarily requires the total exclusion of religion from the public domain. Since my primary objective is to ensure the institutional neutrality of the state regarding matters of religious doctrine, as explained below, it may be wiser to present this proposal in these terms instead of a call for secularism. But the problem with this shift in terminology is that it hinders comparative analysis with non-Islamic societies, which would be most useful for debates within and among Islamic societies. Moreover, many Islamic societies, from Senegal to Turkey to the Central Asia Republics, have already accepted the term 'secularism' in their own domestic constitutional and political discourse. I will therefore use this term and definite it for the purposes of my proposal.

Contextual approach to secularism as mediation

To begin with a brief clarification of the term secularism and its deeply contextual nature; the word secular derives from the Latin word *saeculum*, meaning 'great span of time' or more closely 'spirit of the age'. Later on, the meaning changed to mean of 'this world' implying more than one world, eventually translating into a concept of the secular and the religious derived from the idea of the temporal and the spiritual. The term also evolved in the European context from 'secularization' as privatization of church lands, to secularization of politics and later, art and economics. Following dictionary definitions, the term is therefore often taken to signify such notions as decline of religion, conformity to the present world,

disengagement/differentiation of society from religion (separation of church and state), transposition of religious beliefs and institutions (shift from the source of divine power to a phenomena of human capability and creation), and 'desacralization' of the world and subsequent 'sacralization' of rationality.

From my perspective of deeply contextual understandings of secularism, such views are at most reflections of how the concept has evolved in various European and North American settings. Such views of secularism are so deeply contested within and among different societies that there is simply no uniform systematic understanding and practice of the principle that can neatly fit into any specific definition. Secularism is in fact a multidimensional concept, reflecting elements of the historical, political, social, and economic landscape of a particular country. In the United States, for instance, it usually taken to signify a 'wall of separation between church and state', but what that means remains the subject of intense political contestation and constitutional litigation. Mexican secularism requires such a strict separation of religion and politics that priests are not allowed to vote, while in the Republic of Ireland the Catholic Church wields so much political power that abortion is illegal on the grounds that it violates Church doctrine.

By the same token, secularism for various Islamic societies must also account for the religious dimension of the lives of local communities, instead of being seen as an effort to impose preconceived notions of categorical relegation of religion to the private domain. In my view, it is grossly misleading to speak of complete separation or total union of any religion and the state. The state and its constituent organs and institutions are conceived and operated everywhere by people whose religious or philosophical beliefs will necessarily be reflected in their thinking and behaviour. Yet, a ruling elite cannot effectively impose their religious views on others, and their attempt to do so is bound to lead to serious problems, as can be observed in the current experiences of countries like Iran and Sudan. I suggest that the tension in these relationships and the need for its mediation should be acknowledged and regulated, instead of insisting on the illusion of either complete separation or total fusion.

Another reason for the importance of the proposed definition of secularism as mediation is that to limit this principle to separation of religion and the state is not sufficient for achieving its purpose of safeguarding political pluralism in diverse societies. Secularism in that limited sense is able to unite diverse religious communities into one political community precisely because it makes minimal moral claims on the community and its members. This is not to say that the principle of secularism is morally neutral, as it must encourage certain civic ethos on the basis of some specific understanding of the person in relation to the community and the state. But that normative content needs to remain minimal to achieve and maintain consensus among completing religious and philosophical traditions. As such, secularism in the sense of categorical exclusion of religion from the public domain fails to inspire or motivate believers unless it relies on a religious foundation or justification.

Moreover, secularism as only separation of religion and the state is capable of meeting neither the needs of individual citizens nor the collective requirements of public policy. Emphasizing exclusion of religious ethics

without providing an alternative, fails to take into account the moral or ethical foundations of public policy. Moreover, questions of public policy, like whether or not to legalize abortion or how to adjudicate custody of children after divorce, necessarily draw on moral and ethical underpinnings which are influenced, if not significantly shaped, by religion in any society.

A related concern is that secularism, as simply the strict separation of religion and the state, is unable by itself to address any objections or reservations believers may have about specific constitutional norms and human rights standards. For example, since discrimination against women is often justified on religious grounds in Islamic societies, this source of systematic and gross violation of human rights cannot be eliminated without addressing commonly perceived religious rationale. Moreover, this must be done without violating freedom of religion or belief for Muslims, which is also a fundamental human right. While a purely secular discourse in the European/ North America sense can be respectful of religion in general, indeed by far more than the present practice of Islamic societies, it is unlikely to succeed in rebutting religious justifications of discrimination against women among Muslims. Adherence to the principle of secularism as I am defining it here can also encourage and facilitate internal debate and dissent within religious traditions.

The first part of the proposition I wish to advance is that the modern territorial state should neither seek to enforce Shari'a (the normative system of Islam) as positive law and public policy, nor claim to interpret its doctrine and general principles for Muslim citizens. Since effective governance requires the adoption of specific policies and enactment of precise laws, the administrative and legislative organs of the state must select among competing views within the massive and complex corpus of Shari'a principles, as noted earlier. That selection will necessarily be made by the ruling elite, and yet difficult for the general population to oppose or resist when the policy or law are presented as mandated by the 'divine will of God.'

The rationale of all public policy and legislation must always be based on public reason which all citizens can accept, reject or amend, without reference to any religious doctrine as a matter of individual conscience. At the same time, citizens should be able to propose policy and legislative initiatives emanating from their religious beliefs, provided they can support them by reasons that are accessible and convincing to the majority of citizens, including non-Muslims. Such proposals must also conform to basic constitutional and human rights safeguards against the tyranny of the majority, especially requirements of equality and non-discrimination. These commonsensical propositions are already supposed to be the basis of legitimate government in the vast majority of post-colonial Islamic societies. But I believe that these principles are unlikely to be taken seriously enough for the processes of institutionalizing and systematic implementation to even begin unless they are perceived to be at least consistent with Islam.

Thus, policy initiatives and legislative proposals may emerge from the principles of Shari'a, and can be implemented or enacted by state institutions, provided they are supported by public reason and not simply asserted as the divine precepts of Islam. To permit the latter view to prevail is to repudiate the equal citizenship of not

only non-Muslims, but also of Muslims who have always had significant disagreements about the meaning and implications of Islam. At the same time, Islamic principles should remain available for Muslims who believe in them to observe privately in personal and communal affairs, and not for state policy and legislation. Such principles can also be adopted as official policy and legislation through the political process and subject to constitutional safeguards as emphasized below, but not automatically just because some Muslims believe them to be divinely ordained. In other words, Shari'a principles are neither privileged or enforced as such nor necessarily rejected as a source of state law and policy. The belief of even the vast majority of citizens that these principles are binding as a matter of Islamic religious obligation should remain the basis of individual and collective observance among believers, but is not sufficient reason for their enforcement by the state as such.

The second part of my proposition is that Shari'a can and should be a source of public policy and legislation, subject to the fundamental constitutional/human rights of all citizens, men and women, Muslims and non-Muslims equally and without discrimination. This will require reform of certain aspects of Shari'a, especially regarding the rights of women and religious minorities, as explained later. The point I am emphasizing here is that the total or categorical exclusion of Shari'a from the public domain is neither realistic nor desirable. In addition to holding this view as a matter of principle, I also find it helpful for convincing Muslims that secularism does not mean the exclusion of Islam from public life altogether.

To summarize my argument so far, I define secularism as a principle of public policy for the regulation of the relationship among Islam, state and society to ensure constitutional governance, pluralism, stability and development with due regard to the Islamic identity of each society. The underlying idea here is one of balancing these competing demands. This balance may shift back and forth at different times within the parameters of the equal human rights of all citizens, provided the negotiation process is fair, open and fully inclusive of all segments of the population. First, this neither permits the enforcement of Shari'a as such by the state, nor excludes it as a possible source of public policy and law. This view can also be called 'the religious neutrality of the state', whereby state institutions neither favour nor disfavour any religious doctrine or principle. Second, the mediation of this paradoxical proposition is subject to constitutional and human rights safeguards. In this way, constitutionalism, democratic governance and respect for human rights are both ends and means as the standards for regulating substantive content as well as the process of negotiating the relationship among Islam, state and society. But this view of the relationship requires significant Islamic reform, as outlined later.

Various understandings of Shari'a will remain, of course, in the realm of individual and collective practice as a matter of freedom of religion and belief, but also subject to established constitutional safeguards. What is problematic is for Shari'a principles as such to be enforced as state law or policy because once a principle or norm is officially identified as 'decreed by God' it will be extremely difficult to resist or change its application in practice. At the same time, the integrity of Islam as a religion will decline in the eyes of believers and non-believers alike when state officials and institutions fail to

deliver the promise of individual freedom and social justice. Since Islamic ethical principles and social values are indeed necessary for the proper functioning of Islamic societies in general, the implementation of such principles and values would be consistent with, indeed required by the right of Muslims to self-determination. This right, however, can only be realized within the framework of constitutional and democratic governance at home and international law abroad because these are the legal and political basis of this right in the first place. That is, the right to self-determination presupposes a constitutional basis that is derived from the collective will of the totality of the population, and can be asserted against other countries because it is accepted as a fundamental principle of international law.

Allowing Shari'a principles to play a positive role in public life without permitting them to be implemented as such through law and policy is a delicate balance that each society must strive to maintain for itself over time. For example, such matters as dress style and religious education will normally remain in the realm of free choice, but can also be the subject of public debate, even constitutional litigation to balance competing claims. This can happen, for instance, regarding dress requirements for safety in the work place, or the need for comparative and critical religious education in state schools to enhance religious tolerance and pluralism. I am not suggesting that the context and conditions of free choice of dress or religious education will not be controversial. Rather, my concern is with ensuring fair, open and inclusive social, political and legal conditions for the negotiation of public policy in such matters. Those conditions, I argue, are to be secured through the entrenchment of such fundamental rights of the persons and communities as the right to education and freedom of religion and expression, on the one hand, and due consideration for legitimate public interests or concerns, on the other. There is no simple or categorical formula to be prescribed for automatic application in every case, though general principles and broader frameworks for the mediation of such issues will emerge and continue to evolve within each society.

Not an Islamic state model

My call to recognize and regulate the political role of Islam and accept the possibility that Shari'a principles can be a source of state policy and legislation, subject to the safeguards noted earlier, is untenable without significant Islamic reform. It is critically important for Islamic societies today to invest in the rule of law and protection of human rights in their domestic politics and international relations. This is unlikely to happen if traditional interpretations of Shari'a that support such principles like male guardianship of women (*qawamah*), sovereignty of Muslims over non-Muslims (*dhimmah*) and aggressive *jihad* are maintained.

While the Qur'an and Sunnah are the divine sources of Islam according to Muslim belief, the meaning and implementation of these sources for everyday life is always the product of human interpretation and action in specific historical context. It is simply impossible to know and apply Shari'a in this life except through the agency of human beings. Shari'a developed through the consensus of believers over many centuries, and not by the spontaneous decree of a ruler or will of a single group of scholars. Beyond this basic premise, I remain completely open to any methodology that is capable of achieving the necessary degree of reform in the interpretation of Shari'a and takes into

account the following considerations.

There are two important methodological requirements of coherent and sustainable Islamic reform. First, one must be clear on the actual traditional interpretations of Shari'a before considering how and to what extent alternative views can be supported from an Islamic perspective. Second, whatever alternative interpretation one may favour should rely on a systematic methodology of reform, and not arbitrary selectivity among competing texts. It is not helpful to cite texts of the Qur'an and Sunnah that are apparently supportive of one view of the status of non-Muslims, for instance, without addressing verses that can be cited in support of the opposite view.

A necessary consequence of the above-mentioned premise of inevitability of human interpretation of divine text is that alternative views of Islam and formulations of Shari'a principles are always possible, and can be equally valid if accepted as such by Muslims. Since it is impossible to know whether or not Muslims would accept or reject any particular view until it is openly and freely expressed and debated, it is necessary to maintain complete and unconditional freedom of opinion, expression and belief for such view to emerge and be propagated. The idea of prior censorship is therefore inherently destructive and counter-productive for the development of any Islamic doctrine or principle. It is therefore critical to maintain the possibilities of dissent as the only way for the tradition to remain responsive to the needs of the believers. It would therefore follow that securing constitutional democratic governance and protection of human rights is not only necessary for the religious freedom of Muslim and non-Muslim citizens of the present territorial state, but for the survival and development of Islam itself. Indeed, freedom of dissent and debate were always essential for the development of Shari'a itself because it enabled consensus to emergence and evolve around certain views that matured into established principles through acceptance and practice by generations of Muslims in a wide variety of settings.

This would preclude the idea of an Islamic state that can enforce Shari'a as positive law and official state policy for several reasons. In addition to the conceptual incoherence and practical difficulties of an Islamic state noted earlier, the formal enactment of Shari'a principles requires selection among competing and equally valid interpretations of the various Schools and scholars. That would deny believers freedom of choice among these views as a matter of conscience, as when the Shi'a citizens of Saudi Arabia, who are a significant minority, are forced to live by the Wahabi doctrine enforced by the Saudi monarchy, which deems Shi'a doctrine to be heretical. In fact, the concept of citizenship itself is inconceivable under an Islamic state that enforces the Shari'a principle of *dhimmah* as positive law because that principle does not accept the possibility of non-Muslim citizens in the modern sense of this term. The basic idea of this system is that, upon the conquest and incorporation of new territories through *jihad*, People of the Book (mainly Christians and Jews) should be allowed to live as protected communities upon submission to Muslim sovereignty, but cannot enjoy equality with Muslims. Those who were deem to be unbelievers by Shari'a standards were not permitted to live within the territory of the state at all except under temporary safe conduct (*aman*). Such notions are obviously morally indefensible and politically untenable for present Islamic societies who all now live within pluralistic

territorial states which are totally integrated into an international legal and economic context.

The coincidence of citizenship and nationality as understood today was not only the product of a peculiarly European and relatively recent process, but was often exaggerated in that region itself at the expense of other forms of membership, especially of ethnic or religious minorities. To avoid this discrepancy I prefer to use the term territorial state to identify citizenship with territory, instead of nation state that can be misleading, if not oppressive of minorities.

The colonial origins or antecedents of the present system of territorial sovereignty and international relations do not mean that it is inherently bad or wrong. It may be hypothetically possible to imagine an alternative system for organizing internal politics and inter-communal relations, but that system would probably also have its own problems for Muslims and non-Muslims alike. On the one hand, agreement on an alternative system is unlikely among Muslims themselves, as clearly demonstrated by the fact they have all retained the territorial state model after independence. On the other hand, non-Muslims are unlikely to accept such an alternative if it will threaten their interests or violate their rights. The intellectual resources and political will of Muslims should therefore be devoted to developing the present system to ensure human dignity and social justice for all human beings, instead of attempting to set it aside, even if that was possible. In view of concrete issues of citizenship in particular, this transformative approach is both desirable as a matter of principle and unavoidable in pragmatic practice.

These reflections clearly emphasize the importance of creative Islamic reform that balances the competing demands of religious legitimacy and principled political and social practice which are simply inconsistent with the notion of an Islamic state. But this notion is so appealing to Muslims in the present domestic and global context that other possible justifications must also be confronted. For example, it is sometimes suggested that it is better to allow the idea of an Islamic state to stand as an ideal while seeking to control or manage its practice. This view is dangerous because as long as this notion stands as an ideal, some Muslims will attempt to implement it according to their own understanding of what it means, with disastrous consequences for their societies and beyond. It is impossible to control or manage the practice of this ideal without challenging its core claims of religious sanctity for human views of Islam. Once the possibility of an Islamic state is conceded, it becomes extremely difficult to resist the next logical step of seeking to implement it in practice because that would be regarded as a heretical or 'un-Islamic' position.

Maintaining this ideal is also counter-productive because it will preclude debate about more viable and appropriate political theories, legal systems and development policies. Even if one overcomes the psychological difficulty of arguing against what is presented as the divine will of God, charges of heresy can result in severe social stigma, if not prosecution by the state or direct violence by extremist groups. As long as the idea of an Islamic state is allowed to stand, societies will remain locked in stale debates about such issues as whether constitutionalism or democracy are 'Islamic', interest banking to be allowed or not, instead of getting with securing constitutional democratic governance and pursuing economic

development. Such fruitless debates have kept the vast majority of present Islamic societies locked in a constant state of political instability and economic and social under-development since independence. Instead, Muslims need to accept that constitutionalism and democracy are the ultimate foundation of the state itself, and engage in the process of securing them in practice. To authoritatively establish that the state will not and cannot enforce any religious view of charging or paying interest on loans (*riba*) is to ensure the freedom of all citizens to choose to practice or avoid interest banking as a matter of personal religious belief. Moreover, citizens who wish to avoid such practices can establish their own banking institutions, subject to appropriate regulation by the state and general public supervision, like any other business venture.

Another argument in support of the notion of an Islamic state that I will challenge is based on the distinction between Shari'a and *fiqh* (Islamic jurisprudence), namely, the claim that since *fiqh* is human interpretation, it can be amended and adjusted to fit the current circumstances of Islamic societies, whereas Shari'a should remain immutable. This distinction is not useful for our purposes here because both Shari'a and *fiqh* are the product of human interpretation of the Qur'an and Sunnah of the Prophet in particular historical context. As such, whether a given proposition is said to be based on Shari'a or *fiqh*, it is subject to the same risks of human error and influence of ideological or political bias, economic interest and social concerns of its proponents. Moreover, the distinction is not only difficult to maintain in practice, but any attempt to do so will itself necessarily be the expression of a human opinion that is subject to the same risks and limitations.

A modified version of the same argument asserts that all is required is to observe the fundamental objectives of Shari'a (*Maqasid al-Shari'a*), while *fiqh* principles and rules can change from one time or place to another. But the problem with this line of thinking is that the so-called fundamental objectives of Shari'a are expressed at such a high level of abstraction that they are neither distinctly Islamic nor sufficiently specific for the purposes of public policy and legislation. If and when these principles are presented in more specific and concrete terms, they will immediately be implicated in the familiar controversies and limitations of *fiqh*. For example, 'the protection of religion' is one of the objectives of Shari'a, but this principle has no practical utility without a clear definition of what 'religion' means in this context, and specification of the necessary conditions and limitations of its protection as a matter of state policy and legislation. Does 'religion' include non-theistic traditions like Buddhism, or atheism? Can a Muslim adopt another religion or belief? When can freedom of religion be limited in the public interest of the state or the rights of others? Yet, addressing such questions immediately takes the subject into the realm of *fiqh* principles which raise the serious human rights and political objections outlined earlier.

Concluding remarks

As noted earlier, the realities of Islamic societies in the 21st century I am concerned with in this study are not only permanent and structural, but also necessary for the stability and development of present Islamic societies. The nature of the state, political, social and economic conditions, domestic and foreign relations of these societies are not simply the result of Western colonial and neocolonial hegemony that can be overcome through asserting an idealized 'Islamic' right

to self-determination. These transformations have become so much internalized and integrated into Islamic societies that they have become part of the 'self' as well as the conditions under which self-determination can be realized. Even possibilities of alternative models can only be pursed through these realities of domestic and international politics and relations. Since 'opting out' of the present realities of pluralistic state societies in their global context in favour of an autonomous pre-colonial notion of an Islamic state and society is no longer possible, or desirable in my view, Islamic societies should define their own role in the context of these irreversible realities instead of having it defined for them by others.

Various Islamic societies today can be seen as being at different stages of the spectrum in accepting or rejecting the proposed understanding of secularism. To the extent that the proposed theoretical framework can include strategies for practical advocacy, one should try to understand the role and relative strength or weakness of various elements in the internal dynamics of continuity and change in each society. Relevant questions include: How are the secular realities of life perceived and justified in public discourse, and balanced against religious considerations in formulating public policy? What are the arguments used by proponent and opponents of an Islamic or secular state in mobilizing their own political constituencies, and what are the economic or other interests that underlie their influence?

There is also the impact of regional and global geopolitical factors and power relations on the dynamics of internal transformation. The likely resistance to the term secularism among Muslims because of its colonial and neocolonial associations, as noted earlier, is part of this phenomenon. This dimension has been complicated and intensified by the aggressively militaristic response of the United States to the atrocities of 9/11, especially its colonization of Iraq since April 2003 in collaboration with United Kingdom, which was the last Western colonial power in the country. Regional geopolitical, religious or ethnic relations can also influence perceptions of the issues or willingness to accept change in underlying political and social attitudes. For instance, Christian/Muslims relations in Nigeria today also seem to affect debates about secularism and the enforcement of Shari'a by northern Nigerian states. The challenge raised by such considerations is how to present the proposed theory of secularism as an internal priority of Islamic societies, rather than an externally imposed ideology or concession to regional or global 'hostile' protagonists.

I am firmly convinced that there are strong factors and forces in favour of the thesis and objectives of this study in most Islamic societies. In my view, the clear majority of Muslims are open to persuasion, indeed desperately seeking a viable balance between the religious neutrality of the state and the role of Islam in public life. These and related issues should of course continue to be debated in a fair, open and inclusive process, whereby ideas are accepted or rejected on the basis of their argument and supporting evidence. When objections are raised to the proposal on its own terms, the question will ultimately be settled through consensus at the theological level, and/or the democratic process at the political level. In both cases, as emphasized earlier, constitutional and human rights safeguards are critically important as ends and means of Islamic transformation in the present context.

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A full description of the Emory University School of Law project, 'Debating the Future of Shari'a in a Secular State' is available at:
http://www.law.emory.edu/cms/site/index.php?id=2383

The complete book chapters, written after the paper included in this Dossier, are available for download at:
http://www.law.emory.edu/cms/site/index.php?id=2245