Dossier: From Revolutions to Constitutions

The Secular State for Religious Society: The Role of Islam in New Arab Constitutions and the Quest for Democracy

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The first part of the title of this article refers to the mediation I am proposing through the constitutional neutrality of the State regarding all religion in order to secure the possibility of religious piety by conviction and choice, rather than coercive conformity. I am advocating a secular nature for the State and its constitutional and legal systems from an Islamic point of view because the religious neutrality of the State is necessary to ensure the possibility of being a Muslim by conviction and choice, which is the only way to be a Muslim.[1] The State is a political institution that is incapable of having a religion, and the claim that any state is Islamic can only mean that the ruling elite are using the State to enforce their own view of Islam, regardless of the religious beliefs of the citizens at large. In fact, there is no agreed criterion for judging the Islamic quality of the State and no way of verifying any Islamic quality of an institution except through the political judgment of fallible human beings.

The second part of the title indicates that the democratic legitimacy of demands for a role of Islam must be balanced by the constitutional quality of the State. Since we are speaking of a "quest for democracy," the political will of the general population should prevail, and this will is bound to include a role for Islam among the predominantly Muslim populations of the Arab world. The reference to constitutions, however, means that the role of Islam must be consistent with the protection of the constitutional rights of all citizens, equally and without any discrimination on such grounds as sex, religion, race, ethnicity or language. The quest for constitutional democracy means a combination of government by the political majority subject to the constitutional rights of the minority, even of a single person.

The basic selfish reason for this emphasis on the rights of minorities is that every person is a member of both a majority through one identity and a minority through another. For example, a person may feel empowered by his membership in a dominant political party, although he may be disempowered by his membership in an ethnic or socio-economic group. Women often suffer all sorts of violations and discrimination, even when they identify with the governing political party, which is usually controlled by men. In addition to the overlapping status of being a member of both a minority and majority at the same time, an apparently dominant identity may decline over time through democratic or other means. A recent striking example of this is the case of the Muslim Brotherhood in Egypt, which turned from a hegemonic political power in government to a persecuted and repressed unlawful organisation within weeks. It is clear in light of these remarks that all citizens should be equally concerned with preserving the constitutional rights of every group or segment of the population because of overlapping and consecutive majority/minority statuses.

Commitment to the protection of the rights of all citizens also means safeguarding disagreement and dissent because that is the source of all political formations, regardless of demographic size or profile. Freedom of thought and opinion, and the right to organise in order to express and propagate even the most marginal or radical views must therefore be consistently protected. This is particularly important for dissident views that tend to challenge the

[1] An-Na'im, Abdullahi Ahmed. *Islam and the Secular State: Negotiating the Future of Sharia*. Harvard University Press, 2008.

conventional sensibilities of majorities of the population because such views are most likely to be repressed despite, or perhaps because of, their potential for initiating social and political reform. All religious and philosophical orthodoxies that we take for granted today started as heresies of the pre-existing orthodoxies of the time and place. Islam emerged as a heresy to the pre-existing polytheism and tribal relations of Arabia in the early seventh century.

The roles (in the plural) of Islam in the recent political and legal developments in the Arab region should be evaluated in relation to the quests of those societies for constitutional democratic governance. Though we tend to speak of the role of Islam, there are in fact competing interpretations of Islam and competing views of its role in politics and the State. Focusing on what Muslims think and do rather than on Islam in the abstract, underscores the relevance of history, context, demographic factors and power relations, which also tend to shift and change over time. The criteria and process are therefore about neither a monolithic and static Islam, nor a trans-historical and uniform regional identity within any of the countries of the so-called Arab region, let alone among all of them. We should therefore avoid generalised evaluations of the role of Islam even within, for instance, the sub-region of North Africa in view of the theological, historical and contextual differences between Libya, Tunisia and Morocco.

There is also the need for an evolving perspective on the democratic constitutional development of any of the countries of the region, as has been the case with all other countries in the world. As indicated by even the briefest review of the progression and regression of democratic constitutional development in any of the countries of Western Europe or North America, for instance, this process is not inevitable, immediate, linear or permanent anywhere in the world. Democratic constitutional development has always taken time and has been contingent and contested everywhere. With regard to the role of religion for our purposes here, that also has not been inevitable or permanent for any of the world's faiths. There are significant variations in the role of Christianity, whether Catholic or Protestant, in North and South America and in northern and southern Europe. Likewise, there are significant variations in the role of Islam, whether Sunni or Shia, in West Africa and Central, South or Southeast Asia, Turkey, Syria and Yemen.

Incompatibility of Sharia and Constitutional Rights

The Medina State established in western Arabia by the Prophet in 622 CE is commonly cited in Islamic discourse as the model of an Islamic state that will enforce Sharia. That model is projected in modern constitutional terms as a fully developed state ruled by the Prophet as the original and exclusive human sovereign and sole source of law and political authority. That state is believed to have been populated by ideal Muslims, both individually and collectively as a community of devout believers. According to modern Islamists, since they are instructed by the Quran to strictly adhere to the example of the Prophet, Muslims today are religiously obliged to seek to re-enact the model of the Medina State in their respective post-colonial nation-states.

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Even if the Islamists' anachronistic projection of the modern State and its constitutional order into the ancient past is accepted for the sake of argument, it is clear that the model of the Medina State cannot be replicated today because the role of the Prophet was unique and cannot be repeated. Muslims do not accept the possibility of another Prophet after Muhammad who can govern, enact Sharia law and enforce it as divinely ordained. To Muslims of the Medina State, what the Prophet said and did was Islam itself, while for all subsequent generations of Muslims governments can at best seek to implement what fallible human beings can do. Yet the cultural and psychological risk of adherence to the Medina State model remains among Muslims today who support an un-

constitutional model in which the rulers enjoy unfettered legislative, executive, and judicial powers. This belief contradicts the idea of formal or institutional limitation or separation of powers of rulers.

Muslims have experienced a variety of methods for identifying rulers throughout history, but regardless of the method of selection or appointment, the Caliph enjoyed absolute powers for life because once an oath of allegiance was given, there was no organised and peaceful mechanism for withdrawing or restricting it. As the nature of the State was transformed by European colonialism, Islamists today tend to place modern constitutional and legal constraints on the powers of the State through an expansive re-interpretation of traditional notions of consultation (*shura*) in order to support constitutional and democratic principles in the modern sense.[2] Such efforts may be politically attractive at the time they are invoked, but they can easily be reversed in practice because they lack methodological support in traditional Islamic jurisprudence (*usul al-Fiqh*). Being consistent with the values and institutions of their time, the founding jurists of Sharia did not address the need to limit the powers of the Caliph through notions of the separation of powers or an independent judiciary. Advocates of the *shura* as an Islamic basis for constitutional democratic governance should first revise the methodology of Islamic jurisprudence to support systematic and coherent reform, instead of opportunistic and arbitrarily selective apologia for political expediency.[3]

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A similar point can be made regarding some constitutional rights (human rights) concerns about historical interpretations of Sharia in relation to equality for women and non-Muslims and freedom of religion. It is true that alternative interpretations of Sharia are theoretically possible today,[4] but the more pertinent issue here is the practical difficulties facing the mediation of the tensions between Sharia and constitutional democratic governance, regardless of the precise reform methodology one is proposing to resolve those tensions. Part of the problem is the attitude of scholars and policymakers, both within Islamic societies and elsewhere, who take claims of the unity of Islam and the State at face value. In my view, realistic mediation of the tensions can begin only when the issue is framed in terms of historical and contextual forms of the relationship between Islam and the State, rather than a sharp dichotomy between total unity of religion and the State or categorical separation. Taken in contextual terms, the issue becomes one of understanding the basis and dynamics of this relationship as a process that is capable of change and transformation, rather than a permanent or inescapable fact of nature.

Mediation of Sharia and Secular Law of the State

As noted earlier, the enforcement of Sharia through the coercive power or authority of the State repudiates the religious quality of compliance, which must be voluntary and deliberate to be valid. Moreover, the claim that Iran and Saudi Arabia are Islamic states is belied by the fact that each of those two states regards the other as a heresy, so which is "Islamic" and how do we know that? If we take each claim at face value, we have deadlock on the issue. The fact that it is simply not possible to decide whether either of them is "truly" Islamic, or which has the better claim, shows the inherently political nature of the claim. Yet, the separation of Islam and the State does not mean that Islam and *politics* should or can be separated. I distinguish between the State

[2] On *shura* see verses 3:159 and 42:38 of the Quran. Coulson, N.J. "The State and the Individual in Islamic Law." *International and Comparative Law Quarterly*, vol. 6, p. 49-60 at 55-56, 1957.

[3] On both a critique of government under Sharia and possibilities of reformation see Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Syracuse University Press, 1990.

[4] *Ibid.*

and politics in order to facilitate the regulation of the relationship of Islam and the State through politics, but subject to constitutional safeguards.[5]

The claim to implement the totality of the precepts of Sharia in the everyday life of a society is a contradiction in terms because enforcement through the will of the State is the negation of the religious rationale of the binding force of Sharia. Legal prohibition may increase apparent conformity with religious norms, but that does not justify either enhancing piety by force or the violation of the freedom of religion and other human rights of believers and non-believers alike. As a practical matter, moreover, since enforcement by the State requires formal enactment as the law of the land, the legislature of the day will have to choose among equally authoritative but different interpretations of the Quran and Sunna. The practical impossibility of enforcing Sharia as positive law is reflected in the fact that such centralised coercive enforcement of Sharia as a code of State law was never attempted in Islamic history until the twentieth century.

Although the decentralised imperial states that have historically ruled over Muslims did seek Islamic legitimacy in a variety of ways, none claims to be an Islamic State. The proponents of a so-called Islamic state seek to use the powers and institutions of the State, as constituted by European colonialism and continued after independence, to coercively regulate individual behaviour and social relations in the specific ways selected by ruling elites. It is particularly dangerous to attempt implementing such totalitarian models in the name of Islam because that would make it far more difficult to resist than when that is done by a secular state that does not claim religious legitimacy. At the same time, it is clear that the institutional separation of religion and State is not easy because the state will necessarily have to regulate the role of religion in order to maintain its own religious neutrality, which is necessary for the role of the State as mediator and adjudicator among competing social and political forces.

There are also major practical and political problems facing any effort to found a modern state on principles of Sharia. Difficulties facing this model include the profound ambivalence of the founding jurists of Sharia to political authority. They neither sought to control nor knew how to make those who control the State accountable to the Sharia itself. Moreover, economic activities would be crippled by the formal enforcement of a prohibition on a fixed rate of interest on loans (*riba*) or of insurance on the grounds that it is founded on speculative contracts (*gharar*). It is simply impossible to operate a modern economy and engage in international trade on the basis of those norms of traditional Sharia. Another type of major problem noted earlier is the violation of basic citizenship rights for women and non-Muslims under Sharia, which will not only face serious challenge abroad but will also be resisted by these groups internally.

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Such objections to a so-called Islamic state enforcing Sharia as the law of the land does not of course preclude individual Muslims from observing Sharia norms in their own daily lives as a matter of freedom of religion, as long as they do not violate the rights of others. The fact that *riba* and *gharar* contracts are legal in a country does not coerce Muslims who live there to engage in these practices. Not only are Muslims free to engage in alternative commercial practices, but secular financial institutions are also offering a variety of services in compliance with Sharia norms for Muslims who wish to observe those principles. The arguments I am making here are against coercive enforcement of religious obligations by the State, not for suppressing private conformity with the dictates of one's beliefs. Constitutional rights such as freedom of religion and respect

[5] This theory is discussed in detail in my book, *Islam and the Secular State*, 2008.

for privacy enable believers to reinforce their religious or moral values through the activities of non-governmental organisations and other forms of agency of civil society.

Affirming the religious neutrality of the State does not mean that Islamic principles are irrelevant to law and public policy. Indeed, Muslims can and should propose policy or legislation out of their religious or other beliefs, in the same way that all citizens of any State in the world have the right to do so. At the same time, the religious neutrality of the State requires that such proposed legislation be supported by "civic reason," instead of simply being asserted as required by Sharia. By civic reason I mean reasons that can be debated, accepted or rejected by all citizens without reference to religious beliefs.[6] If *riba* is to be illegal, that should be based on economic and social reasons, and not simply on the religious belief that it is a sin to charge or pay a fixed rate of interest. This is necessary whether Muslims constitute the majority or minority of the State's population, because even if Muslims are the predominant majority, they would not agree on what policy and legislation necessarily follow from their Islamic beliefs.

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In conclusion, each Muslim-majority country in the Arab region and elsewhere is striving to find its own balance between Islam and constitutional democratic development, and they will all achieve that on their own terms, as every other country in the world has or can do. There are no set scenarios or predetermined models for this process to unfold according to the historical context of each society, including recent colonial and post-colonial experiences and influences.[7] My own premise and approach would require me to step back and try to see how the quest for democratic constitutional development will take its course. What I can do in this limited space is contribute to clarifying the basic underlying tension in current debates regarding the role of Islam and democratic constitutionalism.

[6] I should also note here that my notion of civic reason is similar but different from what some Western political theorists call public reason. See John Rawls, *Political Liberalism*, New York: Columbia University Press, p. 212-254 and 435-490, 2003, and Jurgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls' Political Liberalism," *The Journal of Philosophy*, vol. 92, No. 3, p. 109-131, March 1995. On the difference between Rawls's public reason and my civic reason, see An-Na'im, *Islam and the Secular State*, p. 97-101.

[7] An-Na'im, Abdullahi Ahmed. *African Constitutionalism and the Role of Islam*. University of Pennsylvania Press, 2006.