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Shari'a and Positive Legislation: is an Islamic State Possible or Viable?

Abdullahi A. An-Na'im*

1 INTRODUCTION

I wish to open this lecture with a clear and categorical answer to the question posed in the title, subject to clarification and substantiation later. In my view, *shari'a* cannot be enforced as positive legislation and remain the source of a religiously sanctioned normative system.¹ That is to say, *shari'a* ceases to be what it is purported or assumed to be by the very act of enacting it as positive law. Consequently, any claim to establish an Islamic state to enforce *shari'a* as the positive law is a contradiction in terms. An Islamic state is conceptually impossible because, as a political institution, a state cannot be characterized as either Islamic or non-Islamic, and its attempt to enforce *shari'a* as positive law repudiates the Islamic basis of this normative system. Moreover, in view of the nature and role of the state in the modern global context, an Islamic state would not be practically viable. I will also argue not only that these views are valid from an Islamic, rather than a so-called secular, perspective, but that this distinction itself is misconceived and unhelpful.

But let me first begin by expressing my gratitude to the organizers of this Memorial Lecture for inviting me to join the distinguished group of legal scholars who spoke before me in honour of one of the leading scholars of *shari'a* of our time. As a Sudanese Muslim, I grew up learning about *shari'a* throughout the stages of school, and as a subject of systematic study at the Faculty of Law, University of Khartoum,

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¹ By the term *shari'a*, I mean the religious normative system of Islam. I prefer to use this term rather than Islamic law precisely because my argument here is that *shari'a* cannot be enacted into law and remain a religiously sanctioned normative system.

Sudan, some thirty years ago. When I first came to the United Kingdom for post-graduate studies in 1971, I began to encounter the work of Professor Noel Coulson. My initial impression, as I recall now, was amazement that an English scholar could master *shari'a* and Islamic history as he did, from their original sources and in their finest details. Since that time, I have come to appreciate Professor Coulson's work in broader perspective. I admire his rare combination of outstanding legal scholarship, an integrated command of related fields, profound insights and sober empathy with Islamic societies in their present civilizational predicament. This last element in his life's work is particularly important for me because technical scholarly skill, however superb and masterly it may be, is stale and uninspiring without understanding and compassion for human beings and their communities, and genuine appreciation of the contributions of their culture to human civilization at large. Although I never met Professor Coulson in person, I would like to think of myself as one of his students. Since a person can best honour his or her teachers by continuing their work, I will attempt here to address some of the profound legal issues facing Islamic societies in the present context, as indicated throughout Professor Coulson's work, and highlighted in *Conflicts and Tensions in Islamic Jurisprudence*.²

As a Muslim lawyer, especially at a time when my own people in Sudan are suffering horrendous oppression and abuse in the name of purported enforcement of *shari'a*, I will attempt a personally engaged, yet hopefully scholarly, discussion of what I see as the fundamental question underlying these issues. In particular, I wish to examine the possibility and viability of integrating *shari'a* into the legal systems of Islamic societies today. Instead of resorting to rhetorical proclamations, as many Muslims tend to do, about Islam and *shari'a* as abstract ideals that should somehow be observed by Muslims everywhere, I prefer to confront the question of whether the enforcement of *shari'a* should be attempted, or what role should it have in the legal system of Islamic countries. In other words, is it possible or desirable to enforce *shari'a* as positive legislation in the present context? If not, how can Muslims around the world define and express their Islamic identity in everyday life?

As I have already stated at the beginning, an Islamic state which can enforce *shari'a* through positive legislation is neither conceptually possible nor practically viable. In my view, Muslims do have a right to self-determination, including the right to define and express their Islamic identity as they deem fit. But that cannot be on the basis of the enactment and enforcement of *shari'a* as such, because whatever norms are enforced as positive law is the political will of that state, and can never be *shari'a* as commonly understood by Muslims to mean the expression of divine will. Consequently, I hold, the pretence of enforcing *shari'a* through positive legislation (as claimed by the present governments of Iran, Afghanistan, Pakistan, Saudi Arabia and Sudan, or advocated by Muslim political activists in many other countries) is dangerous naivety, if not cynical manipulation of the sentiments of Muslims.

Moreover, contrary to the claims of its proponents, a so-called Islamic state that would enforce *shari'a* as positive legislation is the *negation* of the possibility of an Islamic way of life, not its realization. In other words, these efforts are not only doomed to failure at horrendous human and material costs, but are in fact counter-productive. If one is to speak at all of a religious mandate regarding the relation-

² Chicago and London, University of Chicago Press, 1969.

ship between Islam and the state, one should categorically oppose the illusion of an Islamic state and dangers of enforcing *shari'a*. In my view, Muslims everywhere must openly reject the alleged possibility of enforcement of *shari'a* as the law of any state in order to be able to freely express their religious identity, and begin to reflect the high ideals of their faith in the daily working of their state and its institutions, including the administration of justice.

Before elaborating on and substantiating these views, I wish to emphasize two points about the approach I am presenting in this lecture. First, although the formulation of the issues in these terms is inspired by recent and current political developments or trends in Islamic countries and communities, I propose to address them *irrespective* of the particular political context of any Islamic society today. In other words, I am primarily concerned here with the broader and more fundamental theoretical question of the relevance of *shari'a* to the lives of Muslims today, rather than with commentary or reflection on current political trends in Islamic societies. By seeking to frame the issues in these terms I want to avoid futile debates about whether one "experiment" or another, like that of Iran or Sudan today, is better able to enforce *shari'a* in a so-called "true" or "legitimate" manner. The question I am raising is whether any state, of whatever ideological orientation or practical capabilities, can ever enforce *shari'a*. While I appreciate that this issue is profoundly political, and can see that serious political implications follow from my analysis, that is not my focus in this lecture.

Second, I believe that my position is as Islamic as any human proposition can be. In other words, I believe that the views I am advancing here are valid, indeed imperative I would suggest, from an Islamic point of view, rather than as a concession to political expediency or the product of a so-called secular perspective. Moreover, as I hope it will become clear from the following discussion of the unavoidable role of human agency in the development of *shari'a* as a normative system based on Islamic religious texts, a sharp dichotomy between the secular and religious in this context is seriously misconceived and unhelpful.

In making this argument from an Islamic point of view, I remain convinced that succeeding generations of Muslims have always sought to discover *hukm* Allah (what God had decreed or willed for them to do or be), as they believe that to be divine guidance for all aspects of their daily life. As Professor Coulson described it, "Islamic jurisprudence is a speculative essay to comprehend the precise terms of Allah's law".³ One can also assume that generations of Muslims through the ages generally earnestly strove to live up to the ideals set by the Prophet and early generations of Muslims as a matter of personal conviction. I am not concerned here with an assessment or evaluation of whether, and to what extent, any generation or group of Muslims have failed or succeeded in either discovering God's decree or will regarding any matter, or whether and how they have managed to live up to that ideal from a sociological or anthropological point of view. The question I am addressing here is whether it is possible for any state, however constituted and rationalized, to enforce *shari'a* through positive legislation.

I believe that it is impossible for any state to enforce *shari'a* as such, as opposed to voluntary compliance by Muslims, because of the essential nature of *shari'a* it-

³ *Conflicts and Tension*, p. 41.

self, in relation to the nature and role of the state in the modern context. The argument I wish to make in the next section consists of two parts. First, *shari'a*, as commonly understood by Muslims to mean the divinely ordained way of life, cannot retain that quality once it is enacted as positive legislation. Second, the state cannot function in the modern context except through positive legislation and formal adoption of general policies. In other words, the state cannot enforce any principle of *shari'a* except through enacting it as legislation which would immediately negate its quality as *shari'a*. In the third section of this lecture, I will argue that Islamic societies are certainly entitled to exercise their right to self-determination in terms of an Islamic identity, including the enforcement of some Islamic norms through constitutionally sanctioned political, legislative and judicial processes, but not as immutable or divinely ordained *shari'a*.

2 THE IMPOSSIBILITY OF ENFORCEMENT OF *SHARI'A* THROUGH POSITIVE LEGISLATION

To be clear on the task here, what is at issue is whether *shari'a* can in fact be enforced as such by the state, as distinguished from voluntary compliance with its dictates by Muslims out of personal religious conviction or choice. An example of the significance of this distinction is the difference between the formal legal prohibition of paying or taking interest for loans (as in a modern banking system) because that would constitute *riba*, or outlawing modern insurance contracts as too speculative or contingent (*ghavar*), on the one hand, and personal abstention from engaging in these practices because one believes them to be *haram* (a religious sin), on the other hand. Another way of explaining this point is to emphasize the difference between enforcing legal principles and rules in accordance with the constitutional standards and legislative process of the country, regardless of their original source, as distinguished from enforcing them because that is *required* by *shari'a* as the will of God. Accordingly, past or current claims or demands to enforce *shari'a* through positive legislation by the state are based on a historical fallacy because that is inconsistent with the nature of *shari'a* itself, and impossible for the state as constituted today in any country in the world. In other words, it is neither possible to conceive of this possibility in theoretical terms, nor is it true that such a model existed in the past so that it can be re-enacted today.

It is probably an article of faith for Muslims to believe that the Prophet's state in Medina (622–632 AD) did in fact implement *shari'a* in the life of the community. While I believe this to be true in that particular historical context, the implementation of *shari'a* in that instance was neither done through positive legislation, nor was it replicated by any other state after the Prophet's death. Aside from the extraordinary fact of the actual existence of the Prophet who continued to receive and explain revelation throughout that time, and his personal charisma and moral leadership, that state was constituted of close-knit tribal communities of highly motivated new converts who lived within an extremely limited space. In other words, the Medinan state was based more on the moral authority of social conformity than the coercive power of the state in other human societies. The key point to emphasize for our purposes is that the model of the Prophet's state in Medina cannot be applied in the present context of any Islamic society. However one wishes to characterize that historical experience, the Prophet's state was a unique phe-

nomenon that ended with his death. The forms of political and social organization by which all Muslims live today, and the types of economic activities on which they all depend for their survival, make even the much more recent history of Muslim imperial states in the Middle East and India too "alien" to be revived or resurrected in the present postcolonial world of global economic and political interdependence and integration. Accordingly, claims to establish an Islamic state to enforce *shari'a* today are dangerously naive, if not cynical and manipulative.

As clearly explained by Professor Coulson in *A History of Islamic Law*,⁴ and I have highlighted this elsewhere,⁵ what came to be known among Muslims as *shari'a* was in fact the product of a very slow, gradual and spontaneous process of interpretation of the Qur'an, and collection, verification and interpretation of Sunnah during the first three centuries of Islam (the seventh to the ninth centuries AD). This process took place among scholars and jurists who developed their own methodology for the classification of sources, derivation of specific rules from general principles, and so forth. That technical aspect of their work came to be known as *ilm usul al-fiqh* (the science of the foundations or principles of human understanding of divine sources). As one would expect, there was much disagreement and disputation among those early scholars about the meaning and significance of different aspects of the sources with which they were working. Moreover, although those founding scholars are generally accepted to have been acting independently from the political authorities of the time, their work could not have been in isolation from the prevailing conditions of their communities, in local as well as broader regional contexts. Those factors must have also contributed to disagreements among the jurists, and sometimes to differences in the views expressed by the same jurist from one time to another, as is reported of the changes in Al-Shafi'i's views when he moved from Iraq to Egypt. Even after those disagreements eventually evolved into separate schools of thought, *madhahib*, differences of opinion persisted among scholars of the same schools, as well as between different schools.

The significant question to ask here is how can *shari'a* be divinely predetermined, if it can only be discovered through human understanding of the Qur'an and Sunnah? Ebrahim Moosa, the South African Muslim scholar, recently raised this question as follows:

When jurists claim that their extrapolation of the rules [of *shari'a*] from the sources constitute Allah's law (*hukm Allah*) one immediately realises that the law in Islam involves a transcendental dimension. One of the more intriguing questions encountered in the study of *shari'a* concerns the legal ruling or rule (*hukm*). How is it possible for the jurist (*faqih*) to conclude at the end of a very empirical evaluation and research of facts and texts that his conclusions constitute a transcendental and divine authority?⁶

The obvious answer, in my view, is that it is simply impossible for the conclusion of the jurist to ever constitute transcendental and divine authority, and should never be accepted as such. Jurists or scholars, however highly respected they may be, and

⁴ Edinburgh, University of Edinburgh Press, 1964.

⁵ See Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Syracuse, NY, USA, Syracuse University Press, 1990, Chapter 2.

⁶ "Allegory of the rule (*hukm*): law as simulacrum in Islam?" *History of Religion*, 1998, pp. 1-24, at p. 12.

even if their views came to be universally accepted by Muslims everywhere (which of course never happened for any of them), can only present their own personal views of what “*hukm Allah*” is on a given matter.

A distinction is commonly drawn in Islamic discourse between *shari‘a* and *fiqh*. As recently explained by Bernard Weiss, “*shari‘a* law is the product of legislation (*shari‘a*), of which God is the ultimate subject (*shari‘*). *Fiqh* law consists of legal understanding, of which the human being is the subject (*faqih*).”⁷ This distinction can be useful in a technical sense of indicating that some principles or rules, as compared to others, are more based on speculative thinking than textual support from the Qur’an and/or Sunnah. But this does not mean that those which are taken to be *shari‘a*, rather than *fiqh*, are the direct product of revelation because the Qur’an and Sunnah cannot be understood or have any influence on human behaviour except through the effort of fallible human beings. Weiss makes this point as follows:

Although the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God as *humanly understood*. Since the law does not descend from heaven ready-made, it is the human understanding of the law – the human *fiqh* (literally meaning understanding) – that must be normative for society.⁸

Because the founding jurists and scholars of *shari‘a* were highly aware of all these factors, and sensitive to the risks of imposing what might be an erroneous view, they exercised profound acceptance of diversity of opinion, while seeking to enhance consensus among themselves and their communities. This was done through the notion that whatever is accepted as valid by consensus (*ijma‘*) among all jurists (or the wider Muslim community according to some jurists) is deemed to be permanently binding on subsequent generations of Muslims.⁹ Once again, however, the many practical difficulties of applying this notion were clear from the beginning. For those who wanted to confine the binding force of *ijma‘* to consensus among a select group of jurists, the problem was how to agree on the criteria for identifying those jurists, and how their opinions are to be identified and verified. If one is to say that the authority of *ijma‘* is to come from the consensus of the Muslim community at large, the question still remains how to determine and verify that this has happened on any matter. Whether the consensus is supposed to be of a group of scholars or of the community at large, why should the view of one generation bind subsequent generations? Whatever solutions one may find for such conceptual and practical difficulties, that will always be itself the product of human judgement. In other words, *shari‘a* norms cannot possibly be drawn from the Qur’an and Sunnah except through human understanding, which necessarily means both the inevitability of differences of opinion and the possibility of error, whether among scholars or the community in general.

In this light, the question becomes how and by whom can such differences of opinion be properly and legitimately settled in practice in order to determine what is the positive law to be applied in specific cases. The basic dilemma here can be explained as follows. On the one hand, there is the paramount importance of a min-

⁷ Bernard Weiss, *The Spirit of Islamic Law*, Athens, GA, USA, University of Georgia Press, 1998. p. 120.

⁸ *Ibid.*, p. 116. Emphasis in original.

⁹ *Ibid.*, pp. 120–122.

imum degree of certainty in the determination and enforcement of positive law for any society. The nature and role of positive law in the modern state also require the interaction of a multitude of actors and complex factors which cannot possibly be contained by an Islamic religious rationale. This is more true of Islamic societies today than ever before, because of their growing interdependence with non-Muslim societies throughout the world, as briefly discussed below. On the other hand, a religious rationale is key for the binding force of *shari'a* norms for Muslims. Precisely because *shari'a* is supposed to be binding on Muslims out of religious conviction, a believer cannot be religiously bound except by what he or she personally believes to be a valid interpretation of relevant texts of the Qur'an and Sunnah. Yet, given the diversity of opinions among Muslim jurists, whatever the state elects to enforce as positive law is bound to be deemed an invalid interpretation of Islamic sources by some of the Muslim citizens of that state.

This dilemma was clearly explained by Professor Coulson as follows. Because of the religious nature of *shari'a*, the strong traditional view has always been that "each individual Muslim was absolutely free to follow the school [of jurisprudence] of his choice and that any Muslim tribunal was bound to apply the law of the school to which the individual litigant belonged".¹⁰ Accordingly, an individual also had the right to change his or her school of law on a particular issue. This state of affairs continued until the introduction of *Al-Majallah* by the Ottoman Empire in the late nineteenth century, and more widely through the enactment of family law codes in most Islamic countries over the last few decades. As Professor Coulson put it:

The principle underlying the codes [of Islamic family law] is that the political authority has the power, in the interest of uniformity, to choose one rule from among equally authoritative variants and to order the courts of his jurisdiction to apply that rule to the exclusion of all others; and the choice of this rule or that has been made simply on grounds of social desirability, the codes embodying those variants which were deemed most suited to the present standards and circumstances of the community.¹¹

Moreover, I would emphasize, the imperatives of certainty and uniformity in national legislation are now stronger than they used to be even three decades ago when Professor Coulson made those remarks. This is not only due to the growing complexity of the role of the state at the domestic or national level, but also because of the global interdependence of all peoples and their states. Regardless of the relative weakness or strength of some states in relation to others, the realities of national and global political, economic, security and other relations remain firmly embedded in the existence of sovereign states that have exclusive jurisdiction over their citizens and territories. For Islamic societies, this point has recently been painfully and traumatically emphasized by the eight years of the Iran–Iraq war of the 1980s, and the composition of the international alliance of Muslim and non-Muslim countries which forced Iraq out of Kuwait in 1991. The governments of Islamic countries on both sides of the latter conflict were acting (and continue to act) as nation states, and not as part of a uniform or united global Islamic community, or on behalf of the totality of Muslims at large (traditionally referred to as the *Umma*).

¹⁰ *Conflicts and Tensions in Islamic Jurisprudence*, p. 34.

¹¹ *Ibid.*, pp. 35–36.

The point I am making here is not that the nature of the state is identical for all societies, because the processes of state formation and consolidation vary from one country to another. Rather, the point is that there are certain common characteristics that all states need to have in order to be part of the present international system because membership is conditional upon recognition by other members. For the states of Islamic societies to be and remain accepted as members of the international community, they must comply with a recognizable set of minimum features of statehood in the present sense of the term. In particular, the ability to determine and enforce the law in everyday life is central to the existence of any state, whatever its philosophical or ideological orientation may be. Moreover, as explained in the next section, the nature of the state and its present global context preclude the possibility of the application of *shari'a* as historically understood by its founding jurists, and as still commonly accepted among Muslims.

In conclusion of this section, I wish to emphasize that whether in its traditional formulation, as known to Muslims today, or through some new or modernist elaboration and articulation, *shari'a* will always remain a historically conditioned human understanding of the Qur'an and Sunnah of the Prophet. While sharing the belief of all Muslims that these sources are divine, it is clear to me that their interpretation and expression as *shari'a* norms will always remain a human endeavour, open to challenge and reformulation through alternative human efforts. In other words, the divine sources of *shari'a* cannot influence human life and experience except through human agency in the understanding and implementation of those sources in the specific historical context of Islamic societies.

This does not mean, of course, that Islamic societies are not entitled to realize their right to self-determination in terms of an Islamic identity or that they are incapable of achieving that objective. On the contrary, I believe that they do indeed have that right and can realize it in practice. For that to happen, however, I am suggesting that Islamic societies must categorically renounce any commitment to a romantic ideal of an Islamic state that never was, and expressly abandon expectations of the enforcement of *shari'a* as such by the state. I will now turn to a general exploration of the conditions and context of the right to self-determination for Islamic societies today.

3 SELF-DETERMINATION FOR ISLAMIC SOCIETIES TODAY

Much of the current public discourse in many Islamic societies is dominated by support for or opposition to the notion of an "Islamic state" which is supposed to implement *shari'a* in a comprehensive and systematic manner. Proponents of this idea are commonly known as "Islamists" and its opponents described as "secularists", each addressing their own constituency with little interaction between the two groups in their different orientations – traditionalist or fundamentalist on the Islamist side, and liberals or nationalists, on the other side. In this section, I wish to challenge this alleged Islamist/secularist dichotomy and the assumptions on which it is based. Then I will attempt to outline the parameters within which Islamic societies should seek to exercise their right to self-determination in the present context. In other words, I will first attempt to show what the right to self-determination *cannot* mean for Islamic societies, and then offer some suggestions for what it can mean today.

To begin with some terminological clarification; while the term "Islamic state" may serve as shorthand for referring to states where Muslims constitute a clear majority of the population, the adjective "Islamic" logically applies to a people, rather than to a state as a political institution. Some scholars tend to use the term "Islamic state" to refer to those countries which have officially proclaimed Islam to be the state religion, or where *shari'a* is a formal source of legislation. However, I find this characterization misleading because such features do not accurately reflect an "Islamic" quality of the state itself as a political institution. Unless one is willing to accept every claim by a state to be "Islamic", the question becomes one of who has the authority to determine the quality of being Islamic, and according to which criteria. For example, the religious and political establishment of Saudi Arabia is unlikely to accept the claim of the present government of Iran that it is an "Islamic republic", or even accept the notion of an Islamic republic. From the Iranian point of view, the Saudi monarchy is by definition un-Islamic, and cannot possibly be legitimized by its purported commitment to the enforcement of *shari'a*.

Moreover, I suggest, an Islamic state as a political institution is conceptually impossible, historically inaccurate, and practically not viable today. In support of this proposition, I recall here my earlier argument that an Islamic state is conceptually impossible because for a political authority to claim to implement the totality of the precepts of *shari'a* in the everyday life of a society is a contradiction in terms: enforcement through the will of the state is the negation of the religious rationale of the binding force of *shari'a* in the first place. Since enforcement by the state today requires formal enactment as the law of the land or adoption of clear policies specifying certain action by organs of the state, the legislature and government of the day (whatever their form may be) will have to choose among equally authoritative but different interpretations of the Qur'an and Sunnah. In other words, any principles or rules of *shari'a* simply cease to be part of a religious normative system by the very effort to enact and enforce them by the organs of the state because the state can only enforce its own political will, not that of God. The practical impossibility of enforcing *shari'a* as positive law is also emphasized by the fact that Muslims in general acknowledge that there has never been an Islamic state in this sense since the Medinan state of the Prophet. As briefly explained above, however, there is no basis for comparison between that early city state and subsequent Muslim imperial states of the past, let alone present day complex states with their diverse populations and global context.

The lack of historical precedent is more significant, I would add, in view of the total transformation of the local and global context in which the state has to operate today. As briefly explained below, a state constituted according to the theory of *shari'a* is simply unworkable in the present national and international context. Difficulties facing this model include the profound ambivalence of the founding jurists of *shari'a* to political authority. They neither sought to control nor knew how to make those who hold it accountable to the *shari'a* itself. Economic activities would be crippled by the formal enforcement of prohibition of a fixed rate of interest on loans (*riba*), and of insurance as based on speculative contracts (*gharar*). The enforcement of corporal punishments for certain specified offences (*hudud*) faces serious unresolved procedural and evidentiary objections, let alone human rights concerns about cruel, inhuman or degrading treatment or punishment. Another type of problem is that the denial of basic citizenship rights for women and non-Muslims

will face serious challenge by these groups internally, and by the international community at large.

All the above objections to the enforcement of *shari'a* through positive law and the notion of an Islamic state do not, of course, preclude Muslims from personally conforming with every aspect of *shari'a*. The fact that *riba* and *gharar* contracts are not illegal in a given country does not mean that Muslims have to engage in these practices. Any person can simply abstain from any form of commercial transaction or personal behaviour in accordance with his or her own religious or moral convictions. As emphasized above, the arguments I am making here are against enforcement by the state, and not to combat private conformity with the dictates of one's beliefs. Indeed, people may seek to reinforce the religious or moral values through the activities of non-governmental organizations and other forms of agency of civil society. It is true that legal prohibition will reinforce the authority of religious norms, as in the Arabic maxim: "inna Allaha yazi'u bil-Sultan ma la yazi'u bil-Qur'an" (which may be translated as: "God may enforce through political authority what God does not achieve through moral authority"). To my knowledge, this maxim is attributed to Ali ibn Abi Talib (the fourth Caliph of Medina and first Imam for all the Shi'ah), but even if it was said by the Prophet himself or expressed in the Qur'an, it must be interpreted by human beings in context, like any other text. For instance, this formulation does not say which norms or policies are to be enforced in one way or the other, and how. Human judgement about such questions will necessarily have to be made in terms of a balance of the benefits and costs of legal enforcement of any norm, in contrast to other ways of promoting social policy. In the present limited space, I will focus on the general framework within which any Islamic text, including the Qur'an and Sunnah, can influence public policy.

The underlying assumption of claims to enforce *shari'a* through positive legislation is that Islamic societies and communities have the right and responsibility to organize their public and private lives in accordance with the dictates of Islam. In modern terms, one can say that this is a matter of political and cultural self-determination. But self-determination is not an absolute right, because the manner in which one group or entity exercises the right will have consequences or implication for the rights of others. As Asbjorn Eide put it,¹² it is really the right to co-determination, to be exercised in collaboration with others, rather than an exclusive right of the self, whatever that may mean. In particular, all the states of Islamic societies are bound by customary international law and humanitarian law, like any other state in the world, as well as by all the international treaties they have ratified, such as the Charter of the United Nations which is binding on all of them as members of that organization. All these sources set clear and categorical limits on what the states of Islamic societies may or may not do, both within their own borders as well as in their dealings with other states and their citizens. As a practical matter, moreover, other states do act on these principles in their economic, political, security and other dealings with the states of Islamic societies. Whether it is the organization and operation of the state in general, the treatment of vulnerable per-

¹² During discussion at a seminar commemorating the 50th anniversary of the Declaration of Human Rights, Royal Netherlands Academy of Science, Amsterdam, The Netherlands, 10–11 December 1998.

sons and groups who are their own citizens, or the treatment of citizens of other countries, the states of Islamic societies are not free to behave as they please.

As I have elaborated elsewhere,¹³ many traditional formulations of *shari'a* are fundamentally inconsistent with universally accepted principles of domestic constitutionalism as well as certain foundational principles of international law. It would therefore follow that even if *shari'a* can be enforced by the state, those problematic principles are morally untenable and practically impossible to maintain. It is not therefore surprising that there is no state in the world today, including self-proclaimed so-called Islamic states like Iran, Saudi Arabia and Sudan, that is practically capable of actually living by all the dictates of *shari'a*, as commonly understood by Muslims everywhere. Instead of insisting on these futile and profoundly hypocritical pretensions, I hereby reiterate my earlier call on Muslims everywhere to openly and categorically reject such approaches, and face the realities of their daily life in the present context of global interdependence and mutual influence. Islamic societies must also create and safeguard the political and social space for uninhibited and creative reflection on the Qur'an, Sunnah and the wealth of experience of their own history. Only then will Islamic societies begin to explore ways of making the positive contributions they can make to human civilization out of the spiritual and moral resources of Islam as a major world religion.

To emphasize a point I made in the introduction, attempts to establish a so-called Islamic state to enforce of *shari'a* through positive legislation is a negation of the possibility of an Islamic way of life because selecting certain interpretations of the Qur'an and Sunnah for such enforcement will necessarily mean denying some Muslims citizens the right to personally conform with what they accept as valid interpretation of the Qur'an and Sunnah. Moreover, such enforcement will also stifle possibilities of free and open debate about alternative interpretations. This point can also be expressed in terms of self-determination in that the enforcement of *shari'a* as the law of the land will lead to suppressing political dissent as apostasy, and possibly treason. That is why I am calling for categorical rejection of such attempts from an Islamic point of view.

But it is equally important to also categorically reject any attempt to impose a so-called "secular state", as we have seen in the case of Turkey, Iran under the Shah, and the Ba'athist regimes of Syria and Iraq. Such authoritarian efforts are not only doomed to failure, as they invariably have to be maintained by force, but are also objectionable as a matter of principle because the suppression of the political expression of an Islamic identity constitutes a total repudiation of the right of Muslims to self-determination. Despotism must be rejected, whether it is in the name of enforcement of *shari'a* or in opposition to that claim. While fully appreciating the dangers of efforts to establish a so-called Islamic state, as discussed above, I am equally convinced that its rejection can only be achieved through encouraging, rather than suppressing, public debate about these issues. The model I am calling for here is one of a constitutional, democratic state that fully protects and promotes human rights for all citizens, Muslims and non-Muslims alike, purported Islamists as well as self-proclaimed secularists.

¹³ See generally, An-Na'im, *Toward an Islamic Reformation*.

Some Muslims may seek to dismiss what I am expressing here as “secular”, in the sense of attempting to separate between Islam and the state or politics, and relegate Islam 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. Any state, as well as its constituent organs and institutions, are conceived and operated by people whose religious or philosophical beliefs will necessarily be reflected in their thinking and behaviour. In other words, I am not only saying that Islam does not require unity between religion and the state, but also that the issue itself is misconceived. The authority of religion and power of the state are two sides of the same coin, rather than being separate or opposing paradigms. Since every state will seek to legitimize its authority in terms of the prevailing religious and moral beliefs of its citizens, the states of Islamic societies will attempt to do that in terms of an Islamic frame of reference. There is no point in arguing against this fundamental political principle. What I have attempted to argue for in this lecture is the meaning and implications of an Islamic frame of reference in the modern context, not its negation or rejection as dated or irrelevant. The crucial question, in my view, is not whether Islam and the state are united or can be separated. Rather, it is the nature and implications of that relationship which must be defined and specified by each Islamic society for itself. There is no single so-called Islamic model for this relationship, but there can be distinctive models for each society in accordance with its own struggle to understand and live by the spiritual and moral precepts of Islam, as understood and applied in the present global context.

4 CONCLUDING REMARKS

In the introduction to this lecture, I have indicated that my focus here is on the fundamental jurisprudential and ideological confusion that underlies disastrous schemes to establish an Islamic state in order to enforce *shari'a* through positive legislation. But that does not mean, of course, that I am not concerned with current political trends in Islamic countries today. On the contrary, my objective is to influence those trends through critical reflection and well substantiated arguments. As a Muslim lawyer, especially from Sudan, I can hardly ignore the tragic costs of futile efforts to enforce *shari'a* through positive legislation in any Islamic society. I hope that I have succeeded in at least raising serious doubts about the possibility and desirability of such misguided, if not cynical, adventures.

I am painfully aware that most of the views I have expressed in this lecture are not only controversial, but also psychologically and intellectually difficult for the vast majority of Muslims to accept today. But this hardly means that my position is necessarily wrong from an Islamic point of view, or that it is unlikely to be accepted by the majority of Muslims in due course. On the other hand, however, my position is not necessarily right or likely to be widely accepted simply because it is now resisted by so many. But I hope that my analysis will at least attract serious consideration and reflection, and that it will stand or fall on its own merits, not because it is not accepted by the majority of Muslims today. For my part, I will keep trying to improve and clarify the argument presented here precisely because there is no alternative to their voluntary acceptance by the majority of Muslims today.

In conclusion, let me openly state what is probably already clear to you from some of my opening remarks, namely, that I am an active advocate of the views presented above, rather than a detached scholar engaged in purely academic analysis. For me the issues are too important and the stakes are too high to simply engage in abstract reflection on the relationship between *shari'a* and positive legislation in Islamic societies today.

To Muslims in the audience, let me close by reiterating what my ultimate teacher and mentor, *Ustadh* Mahmoud Mohamed Taha, used to say to Sudanese intellectuals who used to tell him that his ideas sounded convincing, but when would people accept and act on them? In response, *Ustadh* Mahmoud used to say: “You *are* the people; when will you accept these ideas and act accordingly?”