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Contextualizing the Islamic Shari'a

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SHARIʿA IN THE SECULAR STATE
A Paradox of Separation and Conflation

Abdullahi Ahmed An-Naʿim

Introduction

Whereas scholarship about Shariʿa tends to focus on its history, I am more concerned with the future of this religious normative system.[1] Accordingly, I will examine the nature of Shariʿa and its relationship to modern legal systems in order to consider how it might continue to operate in the context of the modern secular state under which all Muslims live today. This essay draws on a forthcoming book: *Islam and the Secular State: Negotiating the Future of Shariʿa*.[2] I will briefly summarize the theoretical framework I am proposing for the future of Shariʿa in that work in the last section of this essay.

To begin by noting what specialists in the field may take for granted, the study of Shariʿa should not be approached in the expectation of finding a comprehensive or systematic code or codes that present definitive answers to precise legal issues of the day. But the inaccessibility of such legal formulations does not mean that such principles do not exist, or are necessarily inappropriate for modern application. As demonstrated by Frank Vogel and other scholars in the field, Islamic jurisprudence includes many outstanding examples of legal precision and sophistication in comparison to the most recent or advanced doctrine and analysis. Shariʿa principles of property, contracts, and commercial law have been incorporated in the civil codes of several countries, such as Egypt, Kuwait, and the United Arab Emirates, through the skillful synthesis techniques pioneered by the Egyptian jurist ʿAbd al-Razzāq al-Sanhūrī in the mid-twentieth century, as will be explained later. The difficulty in appreciating the high jurisprudential quality of the "lawyer's law" aspects of Shariʿa may be due to assumptions about the nature of law as a social and political institution. For comparative law purposes, the challenge is to understand the role of Shariʿa on its own terms, rather than "law" in the American or European sense of the term. As I will argue here, however, our understanding of Shariʿa and its role must take into account the drastic transformation of the economies, political regimes, social institutions, and legal systems of present Islamic societies.

From this perspective, I am concerned here with the relationship between Shariʿa as a religious normative system and the legal system of the modern "territorial" state, which is necessarily secular. To be clear on this point, I am not disputing that Shariʿa is very influential among Muslims, regardless of its formal legal status in the country. This is true not only on a personal and socio-political level, but also because it is an important source of state law and administration of justice in many parts of the Muslim world. It is also clear to me, however, that Shariʿa as such is not the legal system in any country, including those that claim to be Islamic states, such as Iran and Saudi Arabia. As I will explain below, the notion of an Islamic state is conceptually incoherent and historically false, and any Shariʿa principle that is enforced through the coercive authority of the state ceases to be part of the normative system of Islam and becomes an expression of the political will of the state. In other words, the state and its law are always secular, regardless of claims to the contrary. This does not mean that Shariʿa principles cannot be a source of state law, but the outcome of the enactment and enforcement of its principles by state institutions is always a matter of secular law and not of Shariʿa as the religious normative system of Islam.

Moreover, any understanding of the relationship between Shariʿa and state law must be founded on a clear appreciation of the extreme diversity of Muslims, including their interpretations and practice of Shariʿa. The early and enduring schism between Sunni and Shiʿi Muslims is now widely known, and remains politically and legally significant. There is also significant cultural and political as well as theologico-legal diversity among Sunni Muslims. Shiʿi Muslims generally share the belief that the ultimate leader of the Community (*imām*) should be a descendant of ʿAlī and Fāṭima, the Prophet's daughter. But they disagree on the exact historical line of descent for the Imams they accept, which has theological and political implications among various Shiʿi communities. Subject to these differences, the foundational doctrine of the Imamate for all Shiʿi Muslims has far-reaching theologico-legal and political consequences when the supreme role of the Imam is realized in this world; it is unfortunately not possible to discuss this here. At present, the largest Shiʿi sect is that of the Twelvers or Imamis, followed by the Ismaʿilis and Zaydis, but the demographic distribution of Sunni and Shiʿi communities and among the Shiʿa has shifted significantly throughout Islamic history.

For instance, Iran was predominantly Sunni until the end of the fifteenth century, and only gradually converted to Shiʿism, mainly Twelver Shiʿism, during Safavid rule (1501–1722). They now constitute the overwhelming majority in Iran, a slim majority in Iraq (both Arabs and Kurds tend to identify themselves as Sunni) and Bahrain, and smaller minorities in Lebanon, Syria, Kuwait, Eastern Saudi Arabia, Afghanistan, Pakistan, Azerbaijan, and among Muslims of India. Zaydis are now found only

in Yemen, while Ismaʿilis are mainly in India, with smaller communities in Pakistan, Tajikistan, and Yemen, and diaspora communities in Africa, Europe, and North America. But the influence of the Shiʿa is far from limited to their own communities, at least in political terms, especially since the Iranian Revolution.

Muslims in general believe Shariʿa to be directly derived from the Qurʾan and Sunna through a specific methodology (*uṣūl al-fiqh*) that was developed by Muslim scholars in the eighth and ninth centuries. Paradoxically, that belief also underlies the ambiguous status of Shariʿa in relation to state law. On the one hand, the common perception of Shariʿa makes it "more than state law" because of its comprehensive scope, from doctrinal matters of belief and religious rituals, ethical and social norms of behavior, to apparently legal principles and rules. This comprehensive scope itself, on the other hand, means that Shariʿa is also "less than law," in the sense that its enforcement as law requires the intervention of legislative, judicial, and administrative organs of the state. Yet, this sort of state action is necessarily a product of mundane, human politics, and not divine command as such. In other words, the corpus of Shariʿa is commonly believed to include aspects that are supposed to be voluntarily observed by Muslims independently of state institutions, such as the performance of the five daily prayers or of the pilgrimage, and other aspects that require state intervention to enact and enforce them in practice, such as criminal punishment and remedies for breach of legal obligations. In practice, decisions whether an issue falls within the first or second category and what should be done about it are made by state officials or political leaders.

Another factor to emphasize is that the need for an active role for the state has drastically increased in the post-colonial context of present Islamic societies. The role of Shariʿa in the administration of justice probably worked well under the imperial states of the pre-colonial era, which had minimal involvement in the daily governance and administration of justice among local communities. But the situation has significantly changed with the introduction of the European model of the state and conceptions of law as a result of colonialism. All Muslims today live under the exclusive jurisdiction of territorial states, which exercise increasingly extensive powers in governing every aspect of the economic and social life of persons and communities. As noted above and to be explained and illustrated later, to enact Shariʿa into state law or to enforce it through state administration requires state institutions to choose among competing interpretations of Shariʿa. The paradoxical consequence is that the more precise and definite such selectivity becomes, the less truly Shariʿa-based the legal system will be, while allowing judges and administrators the degree of discretion assumed by the historical nature of Shariʿa makes the whole system arbitrary and unstable.

In light of these remarks, it seems that the distinctive issue in the comparative study of Shariʿa in relation to modern state law is the tension between perceptions of the "divinity" of Shariʿa and realities of secular experiences of present Islamic societies. Familiar themes in the comparative law field—the structure of courts and their jurisdiction, the legal profession, and the relationship of legislation to judicial practice—are coherent when understood in the context of specific countries, like Egypt, Indonesia, Iran or Pakistan. From this perspective, such legal systems may be broadly identified as part of civil law or common law traditions. It is also true that there is an "Islamic dimension" that defies a clear classification as either civil or common law systems. Yet, the present status of Shariʿa is ambiguous, even when it is claimed to be the actual legal system of a country. This unavoidable ambiguity, I suggest, is rooted in the nature and development of Shariʿa when viewed from the perspective of modern legal systems, as I will now try to clarify in the following review.

Nature and Development of Shariʿa

The primary sources of Shariʿa are the Qurʾan and Sunna, understood in the context of early Muslim communities, initially in Medina, the town in western Arabia where the Prophet established a state in 622 CE, and subsequently throughout the region known now as the Middle East.[3] Other sources, subject to slight variations among Sunni and Shiʿi Muslims, include consensus (*ijmāʿ*), reasoning by analogy (*qiyās*), and relatively independent juridical reasoning (*ijtihād*) when there is no applicable text of Qurʾan or Sunna.[4] But these were more juridical methodologies for developing principles of Shariʿa, rather than substantive sources as such. The early generations of Muslims are believed to have applied these techniques to interpret and supplement the original sources (Qurʾan and Sunna) in order to extrapolate rules for Muslims to observe. Some general principles began to emerge through the growing influence of the leading scholars at that stage which constituted early models of the schools of Islamic jurisprudence (*madhāhib*, sing. *madhhab*) that matured during subsequent stages of Islamic legal history.

Thus, it seems clear that the systemic development of Shariʿa as a coherent system began during the early Abbasid era (after 750 CE), as demonstrated by the emergence of the major schools of jurisprudence, the systematic collection of Sunna as the second and more detailed source of Shariʿa, and the development of legal methodology, which came to be known as the science of the foundations or principles of human understanding of divine sources (*uṣūl al-fiqh*). These developments took place about 150 to 250 years after the Prophet's death, which means that the first generations of Muslims did not know and apply Shariʿa in the sense in which this concept came to be accepted by the majority of Muslims for the last one thousand years. The early Abbasid era witnessed the emer-

gence of the main schools of Islamic jurisprudence, including the main schools which survive to the present day that are attributed to Abū Ḥanīfa (d. 767); Mālik (d. 795); al-Shāfiʿī (d. 820); Ibn Ḥanbal (d. 855), and Jaʿfar al-Ṣādiq (d. 765, the founder of the main school of Shiʿi jurisprudence). That period also witnessed the emergence of authoritative compilations of Sunna (also known as *Ḥadīth*). Among Sunni Muslims, the most authoritative compilations are those by al-Bukhārī (d. 870); Muslim (d. 875); al-Tirmidhī (d. 892); Ibn Māja (d. 886); Abū Dāwūd (d. 888); and al-Nasāʾī (d. 915). For the Shiʿa the most authoritative compilations also emerged during that general timeframe, namely, those by al-Kulaynī (d. 941); Ibn Bābawayh (d. 991); and al-Shaykh al-Ṭūsī (d. 1067).

What came to be known among Muslims as Shariʿa was therefore the product of a very slow, gradual, and spontaneous process of interpretation of the Qurʾan, and collection, verification, and interpretation of Sunna during the first three centuries of Islam (the seventh to the ninth centuries).[5] That 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. Modern scholars debate whether, or to what degree, the early formative process was based on and responded to the concrete needs of daily practice in the communities or whether it was a product of more speculative development of theoretical principles leading to their logical conclusions.[6] For our purposes here, it is enough to confirm that the framework and main principles of Shariʿa were developed as an ideal normative system by scholars who were clearly independent of the state and its institutions. The fact that the founding jurists were not employed by the state or subject to its control, which is beyond dispute, may partly explain their drive to elaborate the normative system of Islam as they believed it ought to be, regardless of pragmatic factors that may diminish its practical application. Shariʿa evolved as a "jurist's law" in the sense that the founding jurists proclaimed the norms and institutions of Shariʿa as they believed them to be stipulated by the Qurʾan and Sunna, and not as judicial precedents in actual cases as happened some four to five centuries later in the development of English common law.

As to be expected, 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 in 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 the juridical opinions of al-Shāfiʿī when he moved from Iraq to Egypt. Even after those disagreements eventually

evolved into separate schools of thought (*madhhabs*), differences of opinion persisted among scholars of the same schools, as well as between different schools.

The systematic development of the methodology and Shariʿa principles of the various schools of Islamic jurisprudence was done by the students of the master scholar whose name was adopted to identify the school, like Hanafi of Abū Ḥanīfa, Maliki of Mālik, among the majority Sunni schools, or Jaʿfari and Zaydi among Shiʿi schools. However, the subsequent development and spread of these schools have 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 Shiʿi schools at present, or even in the total extinction of some schools like those of al-Thawrī and al-Ṭabarī in the Sunni tradition. For example, having originated in Iraq, the center of the Abbasid dynasty in the eighth and ninth centuries, the Hanafi school enjoyed the important advantage of official support of the state, and was subsequently brought to Afghanistan and later to the Indian subcontinent, where immigrants from India brought it to East Africa. The Hanafi school continued to receive state support in the Middle East region up to the Ottoman Empire and into the modern era.[7] The Maliki school enjoyed similar status in North and West Africa, while the Shafiʿi school prevailed in Southeast Asia.

An aspect of the way in which Shariʿa evolved that is relevant for our purposes here is that the founding jurists followed an integrated approach to their subject as a total normative system that included matters of doctrine or dogma, ritual practices, and ethical norms as well as legal issues. The original manuscripts compiled by the early jurists from the oral tradition of their master scholars would normally begin with issues of confession of the faith, various ritual practices, rules of jihad and conduct of war, treatment of heretics and apostates, justice and fairness in social and commercial dealings, and so forth. While that approach and method of organizing original manuscripts and subsequent commentaries and elaborations were consistent with the essentially religious nature of Shariʿa, they make those foundational sources inaccessible to modern lawyers who have to go through the whole text to discover relevant legal principles and rules. Since those manuscripts and manuals were written by hand more than a thousand years ago, it is not surprising that they do not include a table of contents or subject index that would be helpful for modern readers.

But the approach and organization of these manuscripts were familiar and logical for the early scholars and jurists, as well as for judges and practitioners of subsequent generations who were trained in the specialized colleges (*madrasas*).[8] As the imperial states become more established, they also began employing judges and administrators who had enjoyed that specialized education in the various schools. When an individual Muslim

sought an expert arbiter, or the ruler appointed a judge or official who specialized in a particular school, they were seeking legal opinions or judgments associated with that specific juridical tradition.[9] It was therefore possible for rulers to favor some schools over others through the appointment of judges trained in the chosen school and specification of their geographical and subject-matter jurisdiction. But that was not done by legislation or codification of Shariʿa principles until the middle of the nineteenth century under the late Ottoman Empire, as will be explained below.

The timing of the emergence and the early dynamics of each school also seem to have influenced the content and orientation of their views on Shariʿa. For instance, the Hanafi and Maliki schools drew more on pre-existing customary practices than the Shafiʿi and Hanbali schools, which insisted that juridical elaborations must have more direct textual basis in the Qurʾan or Sunna. These differences reflect the influence of the timeframe and intellectual context in which each school emerged and developed, which partly explains the similarities in the views of the latter two schools, in contrast to the stronger influence of reasoning and of social and economic experience in the Hanafi and Maliki schools. However, the principle of consensus (*ijmāʿ*) 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 (*ijtihād*). 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 express the particular rule.[10] This consensus permitted believers free choice among competing views of Shariʿa on any specific issue, which is good for freedom of religion, but problematic if any of the schools is imposed as the legal system of any state, as in Iran and Saudi Arabia today.

A negative consequence of the strong emphasis on consensus was the drastic decline in the practice of *ijtihād* by the tenth century, probably on the assumption that Shariʿa 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. Some historians question this commonly held view that *ijtihād* ended by the tenth century,[11] but the point is, of course, relative. It is true that there were some subsequent development and adaptations of Shariʿa through legal opinions and judicial developments after the tenth century. But it is also clear that this took place firmly within the already established framework and methodology of *uṣūl al-fiqh*, rather than through significant innovation outside that framework and methodology. In other words, there has not been any change in the basic structure and methodology of Shariʿa since the tenth century, although practical adaptations continued in limited scope and locations.

While appreciation of the ways in which Shariʿa worked in practice at different stages of its history continues to grow,[12] it is clear that the traditional nature and core content of the system still reflect the social, political, and economic conditions of the eighth to tenth centuries, thereby growing increasingly out of touch with subsequent developments and realities of society and state, especially in the modern context. This conceptual and methodological deficit has been mitigated in the pre-colonial context by the ability of judges and legal practitioners to maintain nominal allegiance to the classical theory of Shariʿa, with minimal observance of that in their daily practice. But such expedient strategies have increasingly become untenable, especially in the present globally interdependent context of Islamic societies. The requirements of sustainable economic development, international investment, and trade with other countries, as well as political stability and democratic governance at home demand much greater predictability and consistency of legal practice throughout predetermined territorial jurisdictions.

The essentially religious nature of Shariʿa and its focus on regulating the relationship between God and human beings was probably one of the 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 Shariʿa courts under different imperial states came very close to the philosophy of a division between secular and religious courts.[13] That early acceptance of a "division of labor" between different kinds of courts has probably contributed to the eventual confinement of Shariʿa 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 Shariʿa is the development of private legal consultation (*iftāʾ*). Scholars who were independent of the state were issuing legal opinions (*fatwās*) at the request of provincial governors and state judges, in addition to providing advice for individual persons, from the very beginning of Islam.[14] This type of private advice has persisted through subsequent stages of Islamic history, and became institutionalized since the period of the Ottoman Empire,[15] but there is a significant difference between this sort of moral and social influence of independent scholars, and the enforcement of Shariʿa by the state as such.

The above-noted tension in the combination of religious and legal qualities of Shariʿa raises the following question: How can a legal ruling (*ḥukm*) derived by jurists from an empirical evaluation and research of facts and texts have divine authority? The obvious answer seems to be in the negative, because such a ruling would be human and not divine. Yet, such Shariʿa rulings are believed by Muslims to be binding from a religious perspective, regardless of whether or not it is supported by the coercive authority of the state. In an attempt to resolve this apparent contradiction,

some scholars tend to emphasize a distinction between Shariʿa and *fiqh*. "*Shariʿa* Law is the product of legislation (*Shariʿah*), of which God is the ultimate subject (*shāriʿ*). *Fiqh* law consists of legal understanding, of which the human being is the subject (*fāqih*)."[16] 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 Qurʾan and/or Sunna. But this does not mean that those which are taken to be Shariʿa rather than *fiqh* are the direct product of revelation because the Qurʾan and Sunna can neither be understood nor have any influence on human behavior except through the effort of fallible human beings. "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."[17]

As noted earlier, the founding jurists and scholars of Shariʿa accepted diversity of interpretations and resisted imposing their views which could be wrong, while seeking to enhance consensus among themselves and their communities.[18] That position may have in fact provided valuable flexibility in local legal practices under highly decentralized imperial states. For present legal systems, however, the obvious question is how and by whom can reasonable and legitimate difference of opinion among schools and scholars be settled in order to determine what is the law to be applied by state courts and other authorities? The basic dilemma here can be explained as follows: On the one hand, there is the paramount importance of a minimum 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. On the other hand, a religious rationale is key for the binding force of Shariʿa norms for Muslims. 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. The imperatives of certainty and uniformity in national legislation are now stronger than they used to be. 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.

Reform and Adaptation

It is not possible or necessary here to examine the variety of mechanisms of negotiating the relationship between Shariʿa and secular administration of justice during earlier parts of Islamic history. Instead, this section will focus on recent developments in the period immediately preceding

European colonialism and its drastic impact on the legal systems of present Islamic societies. As openly secular state courts applying those codes began to take over civil and criminal matters during the colonial era and since independence in the vast majority of Islamic countries, the domain of Shariʿa became progressively limited to the family law field.[19] Even in this field, the state continues to regulate the relevance of Shariʿa as part of broader legal and political systems of government and social organization.[20] An earlier related development during the Ottoman Empire was the patronage of the Hanafi legal school that eventually resulted in the codification of that school's doctrine by the mid-nineteenth century.[21] That was the first ever codification of Shariʿa principles, which marked a significant shift to European models of the state and administration of justice, and away from traditional approaches to the role of Shariʿa in these fields. The symbolic significance of the Ottoman "capitulations" to European powers that culminated in the abolition of the caliphate by 1924 marked the irreversible shift to European models of the state and its legal system that came to prevail throughout the Muslim world.

Dominance and hegemony by military or other means have always been an integral part of the history of all human societies, including the expansion of Islam itself as well as struggles among Muslims through military and peaceful means for centuries. The rise of European colonialism since the sixteenth century can also be seen as the most recent expression of that ancient common human experience. However, European colonialism has been spectacularly successful not only in its scale and scope, but in transforming the global economic and trade system, as well as the political and legal institutions of the colonized societies. While it is difficult to document the timing and manner of the transformative colonial experiences of various Islamic societies and communities, the ultimate outcome has been the establishment of territorial "nation" states all the way from North and West Africa to South and Southeast Asia, and their incorporation into global economic, political, and security systems.[22] The point for our purposes here is the impact these new realities have had on the relevance and application of Shariʿa among Muslims.

This issue is not entirely new or peculiar to the post-colonial era, except in its scale and the more far-reaching consequences. During the rule of imperial states of the past, there was tension inherent in the needs of the daily administration of justice to be legitimized in terms of Shariʿa principles, which paradoxically required the state to respect the autonomy of scholars and jurists because that was necessary for their legitimizing role for the authority of the state. Rulers were supposed to safeguard and promote Shariʿa without claiming or appearing to create or control it.[23] That traditional tension has continued into the modern era, in which Shariʿa remains the religious law of the community of believers, independently of the authority of the state, while the state seeks to enlist the legitimizing

power of Shariʿa in support of its political authority. This ambivalence persists as Muslims are neither able to repudiate the religious authority of Shariʿa, 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 practicable modern legal system.[24] These qualities came to be more effectively provided for by European colonial administrations throughout the Muslim world by the late nineteenth century.

While this process unfolded in different ways among Islamic societies, the experience of the late Ottoman Empire has probably had the most far-reaching consequences. The concessions made by the Ottoman Empire to European powers during the nineteenth century set the model for the adoption of Western codes and systems of administration of justice. 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 state and its legal system. Those reforms introduced into Ottoman law a Commercial Code of 1850, a Penal Code of 1858, a Commercial Procedure of 1879, a Code of Civil Procedure of 1880, and a Code of Maritime Commerce, following the European civil law model of attempting a comprehensive enactment of all relevant rules. Although Shariʿa jurisdiction was significantly displaced in these fields, an attempt was still made to retain some elements of it. The Ottoman Majalla, 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 (1867–1877), to codify the rules of contract and tort according to the Hanafi school, combining European form with Shariʿa content. This major codification of Shariʿa principles simplified a huge part of the relevant principles and made them more easily accessible to litigants and jurists.

The Majalla 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 Shariʿa by the authority of a modern state, thereby transforming Shariʿa into positive law in the modern sense of the term.[25] 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 twentieth century. The success of the Majalla 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. The principle of selectivity (*takhayyur*) among equally legitimate doctrines of Shariʿa was already acceptable in theory, as noted earlier, but not done in practice. By applying it through the institutions of the state, the Majalla opened the door for more wide-reaching subsequent reforms, despite its initially limited purpose.[26]

This trend toward increased eclecticism in the selection of sources and the synthesis of Islamic and Western legal concepts and institutions not only became irreversible, but was also carried further, especially through the work of the Egyptian jurist 'Abd al-Razzāq al-Sanhūrī (d. 1971). The pragmatic approach of al-Sanhūrī was premised on the view that Shari'a could not be reintroduced in its totality, or 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-Sanhūrī was brought in by an autocratic government to draft a comprehensive code that was "enacted" into law without public debate. In other words, such reforms would probably not have been possible at all if those countries were democratic at the time, as public opinion would not have permitted the formal and conclusive displacement of Shari'a by what was believed to be secular Western principles of law.

Those reforms had the paradoxical outcome of making the entire corpus of Shari'a principles more available and accessible to judges and policy makers in the process of transforming their nature and role through formal selectivity and adaptation for their incorporation into modern legislation. (1) On the one hand, Shari'a principles began to be drafted and enacted into statutes that were premised on European legal structures and concepts. This was also done by often mixing some general or partial principles or views from one school of Islamic jurisprudence with those derived from other schools, without due regard to the methodological basis or conceptual coherence of any of the schools whose authority was being (2) invoked. Another aspect of the paradox is that the emerging 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'i communities that sometimes coexists 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. In addition, judicial practice may not necessarily be in accordance with the school 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 continues to be according to the Maliki school.

The legal and political consequences of these recent developments were intensified by the significant impact of European colonialism and global Western influence in the fields of general education and professional training of state officials, business leaders, and other influential social and economic actors. Changes in educational institutions not only dislodged

traditional Islamic education, but also introduced a range of secular subjects that tend to create a different worldview and expertise among young generations of Muslims. Moreover, the monopoly of Islamic scholars of intellectual leadership in societies which had extremely low literacy levels has been drastically eroded by the fast growth of mass literacy and growing higher education in secular sciences and arts. Thus, Shariʿa scholars not only lost their historical monopoly on knowledge of the "sacred" sources of Shariʿa, but traditional interpretations of those sources are no longer viewed as sacred or unquestionable by ordinary "lay" Muslims. 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.

More generally, the establishment of European model states for all Islamic societies, as part of a global system based on the same model, has radically transformed political, economic, and social relations throughout the region. By retaining these models at home and participating in them abroad after independence, Islamic societies have become bound by the national and international obligations of membership in a world community of states. While there are clear differences in the level of their social development and political stability, all Islamic societies today live under national constitutional regimes (including countries that do not have written constitutions, such as 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. These transformations also affect the situation of Muslim minorities living in other countries, including Western Europe and North America, probably to a larger extent than those living as majorities. It is clear now that these changes are simply irreversible, though their full implications are not sufficiently developed or integrated in practice. It is also clear that such problems are not peculiar to Islamic countries, as they are also experienced by many other post-colonial states in Africa, Asia, and Latin America, where few Muslims live. But the question for this essay is whether it is possible to develop a coherent theory for the future of Shariʿa in a secular state, whether Muslims constitute the majority or the minority of the population.

A Theory for the Future of Shariʿa

As noted at the beginning of this essay, I am concerned here with the future relationship between Shariʿa and state law, rather than the history of Shariʿa in general. The theoretical framework I am proposing for this forward-looking perspective is premised on the need to ensure the institutional separation of Islam and the state, despite the organic and

unavoidable connection between Islam and politics. In other words, the challenge is to maintain the neutrality of the state regarding all religious doctrine, although the political behavior of believers will continue to be influenced by their religion. The first part of this proposition sounds like "secularism" as commonly understood today, but the second part indicates the opposite. The relationship among Islam, state, and society is always the product of a constant and deeply contextual negotiation, rather than the subject of a fixed formula of either total separation or complete fusion of religion and the state.

At the risk of stating the obvious but to avoid confusion or misunderstanding of what I am proposing, 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, yet will also be subject to established constitutional safeguards to protect the rights of others. What is problematic is for Shari'a principles to be enforced as state law or policy on that basis alone, 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 bases of this right in the first place. In other words, 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.

The paradox of separation of Islam and the state (religious neutrality of the state) and connection of Islam and politics can only be mediated through practice over time, rather than completely resolved by theoretical analysis or stipulation. The challenge 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. The two poles of this necessary mediation can be clarified as follows. First, the modern territorial state should neither seek to enforce Shari'a as positive law and public policy, nor claim to interpret its doctrine and general principles for Muslim citizens. Second, Shari'a principles can and should be a source of public policy and legislation, subject to the constitutional and human rights of all citizens, men and women, Muslims and non-Muslims equally and without discrimination. In other words, Shari'a principles are neither

privileged or enforced as such nor necessarily rejected as a source of state law and policy simply because they are derived from Shariʿa. 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 accepted as sufficient reason for their enforcement by the state as such. I will now briefly explain how these two main elements of the proposed theory can work together in promoting individual freedom and social justice in Islamic societies.

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 Shariʿa principles, as noted earlier. That selection will necessarily be made by the ruling elite. When the policy or law is presented as mandated by the "divine will of God" it is difficult for the general population to oppose or resist it. For example, there is a well-established principle of Shariʿa, known as *khulʿ*, whereby a wife can pay her husband an agreed amount (or forfeit her financial entitlement) to induce him to accept the termination of their marriage. Yet, this choice was not available in Egypt until the government decided to enact this Shariʿa principle into law in 2000. The fact that this principle was part of Shariʿa did not make it applicable in Egypt until the state decided to enforce it. Moreover, this legislation certainly gave Egyptian women a way out of a bad marriage, but the condition that this was possible only at a significant financial cost for the wife could not be contested because the legislation was made in terms of "enacting" Shariʿa, rather than simply a matter of good social policy. Since the legislation was framed in terms of binding Islamic principles, the possibility and requirements of the legal termination of marriage remains limited to general principles of Shariʿa as formulated by Islamic scholars a thousand years ago.[27] The broader point for my purposes here is that the inherent subjectivity and diversity of Shariʿa principles mean that whatever is enacted and enforced by the state is the political will of the ruling elite, not the normative system of Islam as such. Yet, such policies and legislation would be difficult to resist or even debate when presented as the will of God.

To avoid such difficulties, I am proposing that the rationale of all public policy and legislation always be based on what might be called "public reason," whereby Muslims and other believers should be able to propose policy and legislative initiatives emanating from their religious beliefs, *provided* they can support them in a public, free and open debate with reasons that are accessible and convincing to the generality of citizens, regardless of their religion or other beliefs. But since such decisions will in practice be made by majority vote in accordance with democratic principles, all state action must also conform to basic constitutional and human rights safeguards against the tyranny of the majority. Thus, the majority would

not be able to override objections to any policy or legislation that violates the fundamental requirements of equality and non-discrimination. These propositions are already supposed to be the basis of legitimate government in the vast majority of present Islamic societies. Yet they are unlikely to be taken seriously by most Muslims unless they are perceived to at least be consistent with their understanding of Islam. This is the reason for my attempt to substantiate this theory from an Islamic perspective, including calling for reinterpretations of certain aspects of Shariʿa.

Part of the need for that Islamic argument, in my view, is that secularism as simply the separation of religion and the state is not sufficient for addressing 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 their commonly perceived religious rationale. This must be done without violating freedom of religion or belief for Muslims, which is also a fundamental human right. While a secular discourse in terms of separation alone can be respectful of religion in general, as can be seen in West European and North American societies today in contrast to the present practice of Islamic societies, it is unlikely to succeed in rebutting religious justifications of discrimination without invoking a counter-religious argument. In contrast, the principle of secularism, as I am defining it here to include a public role for religion, can encourage and facilitate internal debate and dissent within religious traditions that can overcome such religiously-based objections. When a society ensures that the state is neutral in regard to religion, the coercive power of the state cannot be used to suppress debate and dissent. But that safe space still needs to be actively used by citizens to promote religious views that support equality for women and other human rights. In fact, such views are needed for promoting the religious legitimacy of the doctrine of separation of religion and the state itself, as well as other general principles of constitutionalism and human rights.

Allowing Shariʿa 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 secularism. I am not suggesting that the context and conditions of free choice of dress or religious education will not be controversial. In fact, such matters are likely to be very complex at a personal and societal level. Rather, my concern is

with ensuring, as far as humanly possible, fair, open and inclusive social, political, and legal conditions for the negotiation of public policy in such matters. Those conditions, for instance, 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, although general principles and broader frameworks for the mediation of such issues will emerge and continue to evolve within each society.

To reiterate, my call for recognizing and regulating the political role of Islam is untenable without significant Islamic reform. I believe that 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 Shariʿa that support principles like male guardianship of women (*qiwāma*), sovereignty of Muslims over non-Muslims (*dhimma*), and violently aggressive jihad are maintained. Significant reform of such views is necessary because of their powerful influence on social relations and political behavior of Muslims, even when Shariʿa principles are not directly enforced by the state.[28] One premise of my whole approach is that Muslims are unlikely to actively support human rights principles and effectively engage in the process of constitutional democratic governance if they continue to maintain such views to be part of their understanding of Shariʿa. The imperative need for reconciliation can also be illustrated by recalling earlier comments on the nature of the modern territorial state and its citizens.

Whatever possibilities of change or development can be proposed must begin with the reality that European colonialism and its aftermath have drastically transformed the basis and nature of political and social organization within and among territorial states where all Muslims live today. This transformation is so profound and deeply entrenched that a return to pre-colonial ideas and systems is simply not an option. Any change and adaptation of the present system can only be sought or realized through the concepts and institutions of this local and global post-colonial reality. Yet many Muslims, probably the majority in many countries, have not accepted some aspects of this transformation and its consequences. This discrepancy seems to underlie the apparent acceptance by many Muslims of the possibility of an Islamic state that can enforce Shariʿa principles as positive law and underlies widespread ambivalence about politically motivated violence in the name of jihad. Significant Islamic reform is necessary to reformulate such problematic aspects of Shariʿa, but should not and cannot mean the wholesale and uncritical adoption of dominant Western theory and practice in these fields. To illustrate the sort of internal Islamic transformation I am proposing, I will briefly review here how the

traditional Shari'a notions of *dhimma* should evolve into a coherent and humane principle of citizenship. Such evolution should take into account the following considerations.

First, human beings tend to seek and experience multiple and overlapping types and forms of membership in different groups on such grounds as ethnic, religious or cultural identity, political, social or professional affiliation, economic interests, and so forth. Second, the meaning and implications of each type or form of membership should be determined by the rationale or purpose of belonging to the group in question, without precluding or undermining other forms of membership. That is, multiple and overlapping memberships should not be mutually exclusive, as they tend to serve different purposes for persons and communities. Third, the term "citizenship" is used here to refer to a particular form of membership in the political community of a territorial state in its global context, and should therefore be related to this specific rationale or purpose without precluding other possibilities of membership of other communities for different purposes. Proposing this threefold premise is not to suggest that people are always consciously aware of the reality of their multiple memberships, or appreciate that they are mutually inclusive, with each being appropriate or necessary for its different purpose or rationale. On the contrary, it seems that there is a tendency to collapse different forms of membership, as when ethnic or religious identity is equated with political or social affiliation. This is true about the coincidence of nationality and citizenship in Western political theory that was transmitted to Muslims through European colonialism and its aftermath.

Thus, official or ideological discourse regarding the basis of citizenship as membership in the political community of a territorial state did not necessarily coincide with a subjective feeling of belonging or an independent assessment of actual conditions on the ground. Such tensions existed in all major civilizations in the past and continue to be experienced in various ways by different societies today. For our purposes here in particular, the development of the notion of citizenship in the European model of the territorial "nation" state since the Peace Treaty of Westphalia (1648) tended to equate citizenship with nationality. This model defined citizenship in terms of a contrived and often coercive membership in a "nation" on the basis of shared ethnic and religious identity and political allegiance that was both required by and assumed to follow from residence within a particular territory. In other words, the coincidence of citizenship and nationality 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. This is the reason why I prefer to use the term "territorial" state to identify citizenship with territory, instead of nation state as that can be misleading, if not oppressive of minorities.

The term citizenship is used here to denote an affirmative and proactive belonging to an inclusive pluralistic political community that affirms and regulates possibilities of various forms of "difference" among persons and communities to ensure equal rights for all, without distinction on such grounds as religion, sex, ethnicity or political opinion. This term is intended to signify a shared cultural understanding of equal human dignity and effective political participation for all. In other words, citizenship is defined here in terms of the principle of the universality of human rights as "a common standard of achievement for all people and nations," according to the Preamble of the 1948 United Nations' Universal Declaration of Human Rights.

In my view, the desirability of this understanding of citizenship is supported by the Islamic principle of reciprocity (*mu'āwaḍa*), also known as the Golden Rule, and emphasized by the legal and political realities of self-determination. Persons and communities everywhere have to affirm this conception of citizenship in order to be able to claim it for themselves under international law as well as domestic constitutional law and politics. That is, acceptance of this understanding of citizenship is the prerequisite moral, legal, and political basis of its enjoyment. Muslims should strive toward this pragmatic ideal from an Islamic point of view, and regardless of what other peoples do or fail to do in this regard.

Moreover, there is a dialectical relationship between domestic and international conceptions of citizenship, whereby the agency of subjects at each level seeks to ensure human dignity and social justice everywhere in the world, at home and abroad. The same human rights principles underlie the proposed definition of citizenship in domestic politics as well as international relations, whether expressed in terms of fundamental constitutional rights or universal human rights. Citizens acting politically at home participate in the setting and implementation of universal human rights which, in turn, contribute to defining and protecting the rights of citizens at the domestic level. The relationship between citizenship and human rights is therefore inherent to both paradigms which are mutually supportive.

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 counterproductive 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," and whether interest banking is to be allowed or not, instead of getting on 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 underdevelopment since independence. Instead, Muslims need to accept that constitutionalism and democracy are the ultimate foundation of the state itself and to engage in the process of securing them in practice.

It is not appropriate to offer here some concluding remarks because the ideas I outlined above are drawn from the large manuscript mentioned earlier, which itself is really a "work-in-progress." My purpose here is to simply present this essay in honor of our colleague and friend, Professor Frank Vogel, in recognition of his efforts to clarify the underlying issues and contribute to this vitally important debate.

NOTES

[1] I will use the term Shariʿa throughout this chapter and not Islamic law, which is a misleading translation for the reasons discussed below.

[2] Harvard University Press (March 2008).

[3] Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, ²1979), 11–29.

[4] Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 1–35.

[5] Noel Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964).

[6] Ibid., 82–4; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 23–7, 76.

[7] Bernard G. Weiss and Arnold H. Green, *A Survey of Arab History* (Cairo: American University in Cairo Press, 1987), 155.

[8] George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981); Daphna Ephrat, *A Learned Society in a Period of Transition: The Sunni 'Ulama' of Eleventh Century Baghdad* (Albany: State University of New York Press, 2000).

[9] Noel Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: University of Chicago Press, 1969), 34–6.

[10] David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet & Maxwell, ³1998), 14–17.

[11] Haim Gerber, *Islamic Law and Culture, 1600–1840* (Leiden: Brill, 1999); Wael B. Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (Aldershot: Variorum, 1994), 3.

[12] See, e.g., Aziz al-Azmeh, "Islamic Legal Theory and the Appropriation of Reality," in Aziz al-Azmeh (ed.), *Islamic Law: Social and Historical Contexts* (New York: Routledge, 1988), 250–61; Hallaq, *A History of Islamic Legal Theories*.

[13] Coulson, *A History of Islamic Law*, 122.

[14] Muhammad Khalid Masud, Brinkley Messick, and David Powers, "Muftis, Fatwas, and Islamic Legal Interpretation," in Muhammad Khalid Masud, Brinkley Messick, and David Powers (eds.), *Islamic Legal Interpretation: Muftis and their Fatwas* (Cambridge, Mass.: Harvard University Press, 1996), 3, 8–9.

[15] Hallaq, *A History of Islamic Legal Theories*, 123, 143.

[16] Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), 120.

[17] Ibid., 116, emphasis in original.

[18] Ibid., 120–22.

[19] Coulson, *A History of Islamic Law*, 149.

[20] Ibid., 218–25.

[21] Ibid., 151.

[22] See generally, for example, James P. Piscatori, *Islam in a World of Nation-States* (Cambridge: Cambridge University Press, 1986).

[23] Colin Imber, *Ebu's-Su'ud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997), 25.

[24] Gerber, *Islamic Law and Culture*, 29.

[25] Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993), 57.

[26] Pearl and Menski, *Muslim Family Law*, 14–17.

[27] Essam Fawzy, "Law No. 1 of 2000: A New Personal Status Law and a Limited Step on the Path to Reform," in Lynn Welchman (ed.), *Women's Rights and Islamic Family Law: Perspectives on Reform* (London: Zed Books, 2004), 58–86.

[28] On the approach I find most promising in achieving the necessary degree of reform, see Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse: Syracuse University Press, 1990).