RELIGION, THE STATE, AND CONSTITUTIONALISM IN ISLAMIC AND COMPARATIVE PERSPECTIVES

Abdullahi Ahmed An-Na`im[*]

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The analysis and proposal I advance in this Article should be understood in light of demands in some Muslim-majority countries for the establishment of an Islamic state to enforce Sharia as positive state law. Sharia is the comprehensive religious normative system of Islam, which is derived from interpretations of the Qur'an and Sunna, or traditions, of the Prophet.[1] The call for an Islamic state has gained momentum since the mid-twentieth century, with its most spectacular success being the Iranian Revolution of 1979. This trend is unlikely to succeed in practice even if the proponents of a so-called "Islamic state" managed to come to power in a country. In Sudan, for instance, the National Islamic Front proclaimed its Islamic state after the military coup of 1989, only to totally abandon that project by 1998.[2] Still, it is important to raise the sort of theoretical objections I propose here because ambivalence about these issues among Muslims is likely to have a negative impact on their views and behavior regarding the relationship of Islam, the state, and constitutionalism. This clarification—while subject to contextual, demographic, and other factors—is necessary whether Muslims constitute the majority or minority

    *   Charles Howard Candler Professor of Law, Emory University; Ph. D., (Law), University of Edinburgh (Scotland), 1976; LL. B (Honours) and Diploma in Criminology, University of Cambridge (England), 1973; LL. B (Honours), University of Khartoum (Sudan), 1970.

    1.   *See* ABDULLAHI AHMED AN-NA`IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI`A 9–10 (2008) [hereinafter AN-NA`IM, ISLAM AND THE SECULAR STATE].
    2.   *See, e.g.*, ABDULLAHI A. GALLAB, THE FIRST ISLAMIST REPUBLIC: DEVELOPMENT AND DISINTEGRATION OF ISLAMISM IN THE SUDAN 1 (2008).

of the population.

It may be helpful to begin by clarifying the reference to Islamic and comparative perspectives in the title of this Article. First, for reasons briefly highlighted below, comparative reflection is necessary for developing a shared understanding of constitutionalism. Otherwise, one would be evaluating constitutionalism in one country by the standard of another country instead of applying the same collective understanding of the concept to all countries, each in its own historical context. For our purposes, comparative reflection is necessary not only between Islamic and non-Islamic perspectives, but also among diverse Islamic perspectives regarding issues of religion, state, and constitutionalism. Second, I wish to distinguish three senses of the term *Islamic* without discussing all three in detail in this Article. This term can refer to Islam as a religion, which should be distinguished from Islamic law, or Sharia, and both should be distinguished from Muslim-majority countries.

All three senses of the adjective *Islamic* can be relevant to constitutionalism among Muslims, as briefly highlighted below, but it is important to distinguish Islam as a religion or Sharia as its religious law from state law of countries where Muslims are the majority of the population. In view of significant theological, historical, political, and other differences among Muslim-majority countries, there is no coherent or agreed-upon definition of what is "Islamic" when applied to a state or government. If it is a matter of being a Muslim-majority country, this is as true of Indonesia[3] and Egypt,[4] as it is of Senegal[5] and Turkey;[6] yet these countries are too different to be grouped together in any coherent sense.

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3. *See* CIA, THE WORLD FACTBOOK, http://www.cia.gov/ (follow "World Factbook" hyperlink; then select "Indonesia" from the "Select a Country or Location" menu; then expand "People: Indonesia") (last updated Sept. 24, 2009) (stating that 86.1% of Indonesia's population is Muslim).

4. *See id.*, http://www.cia.gov/ (follow "World Factbook" hyperlink; then select "Egypt" from the "Select a Country or Location" menu; then expand "People: Egypt") (last updated Sept. 24, 2009) (stating that 90% of Egypt's population is Muslim).

5. *See id.*, http://www.cia.gov/ (follow "World Factbook" hyperlink; then select "Senegal" from the "Select a Country or Location" menu; then expand "People: Senegal") (last updated Sept. 23, 2009) (stating that 94% of Senegal's population is Muslim).

6. *See id.*, http://www.cia.gov/ (follow "World Factbook" hyperlink; then select "Turkey" from the "Select a Country or Location" menu; then expand "People: Turkey") (last updated Sept. 24, 2009) (stating that 99.8% of Turkey's population is Muslim).

Even among so-called Islamic states, how can the same term apply to Iran and Saudi Arabia, when the Shia of Iran regard the *Wahabi* doctrine prevalent in Saudi Arabia as heresy, and Saudis think the same of the Twelvers' Shia doctrine dominant in Iran today?

I prefer to use the term "Sharia" to emphasize that it is both more and less than law in the sense of positive law to be enforced by the state. A principle or rule of Sharia, as the religious law of Islam, cannot become positive law unless the legislative authority of the state makes it so.[7] When so enforced by the coercive authority of the state, however, that principle or rule ceases to be religious, as its binding force becomes dependent on the political authority of the state and not the moral authority of religion.[8] However, even when it is clearly not state law as such, Sharia remains relevant to the legitimacy of some established principles or features of constitutionalism, such as the principle of equality and nondiscrimination on grounds of religion or sex, as I will briefly explain below.

In light of these opening remarks, I will begin by clarifying the comparative sense of constitutionalism with which I am working— including the dialectic of universal and contextually specific conceptions.[9] In the second section of this Article, I will review some concerns about the relationship between Sharia, the state, and constitutionalism.[10] Finally, in the third section of this Article I will present a general theory of religion, state, and constitutionalism as a way of enlisting the legitimizing authority of Islam/Sharia in support of the constitutional needs and experiences of Muslim-majority countries.[11]

I. CONSTITUTIONALISM

Whether based on a written document or not, constitutionalism always relates to the rule of law, enforces effective limitations on government powers, and protects fundamental rights. But because any specific definition of this concept is necessarily the product of the experiences of certain societies in their various settings, it is neither

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7.   *See* AN-NA`IM, ISLAM AND THE SECULAR STATE, *supra* note 1, at 29 ("[T]he state must select among competing views within the massive and complex corpus of Shari`a principles . . . .").

8.   *See id.* at 15 ("[T]he state and all its institutions are by definition secular and not religious, regardless of claims to the contrary.").

9.   *See infra* Part I.

10.   *See infra* Part II.

11.   *See infra* Part III.

reasonable nor desirable to insist on a single approach to its definition or implementation, to the exclusion of all others. A more universally accepted understanding of the term may evolve over time, but that should be the outcome of comparative analysis of practical experiences rather than an attempt to impose an exclusive definition based on an ideological tradition or contextual setting.

In essence, constitutionalism is a framework for the mediation of certain unavoidable conflicts in the political, economic, and social fabric of every human society.[12] This proposition assumes that conflict is a normal and permanent feature of human societies, and defines constitutionalism in terms of being a framework for mediation, rather than permanent or final resolution of such conflicts. For this process to work properly in each setting, the general population must be willing and able to exercise effectively its powers of delegation, as well as to ensure accountability of public officials, whether elected or appointed. The population at large must be capable of exercising intelligent, well-informed, and independent judgment about the ability of its representatives and officials to act on its behalf, and of verifying that they do in fact act in accordance with the best interest of the population. The public must also have the capacity to challenge and replace those who fail to implement its mandate. To ensure and facilitate a wide range of operations and functions of democratic government, all citizens must equally enjoy certain individual and collective rights, such as freedom of expression and association, access to information, and effective remedies against excess or abuse of power by official organs.

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12. *See* JAMES T. MCHUGH, COMPARATIVE CONSTITUTIONAL TRADITIONS 1 (David A. Schultz ed., 2002) ("Constitutions can be found at the apex of the legal system . . . . Any law . . . that fails to conform to the standards of a constitution cannot . . . continue to function *as* law."); Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, *in* Symposium, *Comparative Constitutionalism: Theoretical Perspectives on the Role of Constitutions in the Interplay Between Identity and Diversity*, 14 CARDOZO L. REV. 497 (1993), *reprinted in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 3 (Michel Rosenfeld ed., 1994) ("[I]n the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights."); *Introduction* to POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 2, 4–5 (Daniel P. Franklin & Michael J. Baun eds., 1995) [hereinafter POLITICAL CULTURE AND CONSTITUTIONALISM] ("Constitutionalism is the governmental component of a democratic culture. Every society, by definition, must make decisions concerning the distribution of scarce resources, and those decisions must be enforced.").

However, the best principles and mechanisms of constitutional governance will not operate properly without sufficiently strong civic engagement by a critical mass of citizens. This subtle and mysterious psychological and sociological dimension of civic engagement by a critical mass of citizens is probably the most critical aspect of constitutionalism. These aspects are difficult to quantify or verify, except perhaps in terms of outcomes that indicate the success or failure of constitutionalism in a given context. They include the motivation of citizens to keep themselves well-informed in public affairs and to organize themselves in nongovernmental organizations that can act on their behalf in effective and sustainable ways. People are unlikely to assert and pursue accountability and demand redress without the material and human resources, as well as the psychological and cultural orientation, to do so. Public officials and the agencies and institutions they operate must not only enjoy the confidence of local communities, but also be familiar, friendly, and responsive when approached.

The preceding remarks emphasize the importance of such general constitutional principles as representative government, transparency and accountability, separation of powers, and independence of the judiciary. But this is not to suggest that such features must all be present all at once in a particular model for a country to implement constitutionalism successfully. In fact, in a variety of models such principles and conditions can only emerge and develop through a process of trial and error over time. The rationale and purpose of representative government, transparency, and accountability can be realized through different models, such as the parliamentary system of the United Kingdom or the presidential system in the French or American style.[13] The principles of separation of powers and independence of the judiciary are implemented and safeguarded in various ways specific to each constitutional model.[14] Each model of these successful constitutional experiences generally works in its totality—though not always—and is transformed or adapted in its own ways in times of crisis, as illustrated by the series of French constitutions adopted during the twentieth century.[15]

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13.   *See generally* Daniel P. Franklin, *American Political Culture and Constitutionalism*, *in* POLITICAL CULTURE AND CONSTITUTIONALISM, *supra* note 12, at 43; William B. Gwyn, *Political Culture and Constitutionalism in Britain*, *in* POLITICAL CULTURE AND CONSTITUTIONALISM, *supra* note 12, at 13.

14.   *See* Franklin, *supra* note 13, at 43–45 (United States); Gwyn, *supra* note 13, at 20–22 (Britain).

15.   *See* Jack Hayward, *The President and the Constitution: Its Spirit, Articles*

An underlying tension regarding concepts like "constitutionalism," "democracy," or "human rights" relates to the relationship between their formulations in Western societies—where they developed and were applied earlier—and their more recent application elsewhere around the world.[16] That is, do such concepts, as defined by the experiences of societies in which they were first developed and established, have universal applicability so that they can be "transplanted" into other settings? In my view, a homegrown concept that benefits from the experiences of other societies is more likely to succeed than a crude or coercive imposition of an alien concept. I would also avoid asserting a categorical dichotomy between Western and non-Western societies. There is no uniformity among so-called Western or non-Western societies sufficient to justify lumping them into mutually exclusive categories. As illustrated by Nazi Germany, Fascist Spain and Italy, and Soviet totalitarianism in Russia during the twentieth century, Western societies are as vulnerable to regression into despotic authoritarianism as any other human society. Indeed, there are differences within the same society over time.

Moreover, the universal validity and applicability of concepts like constitutionalism is a pragmatic necessity in view of the "universalization" of the European model of the nation-state through colonialism and postcolonial relations.[17] This model is likely to continue as the dominant form of political organization in national politics and international relations for the foreseeable future. Even globalizing trends and transnational integration—such as the Arab League and African Union—continue to evolve and operate through the agency of the territorial state, often facing resistance from the proponents of national sovereignty.[18] The persistence of these realities requires the development and implementation of concepts like constitutionalism, democracy, and human rights, which have been found necessary for regulating the powers of the state and organizing its relationship to individuals and communities who are subject to its jurisdiction.[19]

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and Practice, *in* DE GAULLE TO MITTERRAND: PRESIDENTIAL POWER IN FRANCE 36, 36–37 (Jack Hayward ed., 1993).

16.   *See* ABDULLAHI AHMED AN-NA`IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 73–75 (1990) [hereinafter AN-NA`IM, TOWARD AN ISLAMIC REFORMATION].

17.   *Id.* at 72.

18.   *See* Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN. ST. INT'L L. REV. 397, 403 (2004).

19.   *See* AN-NA`IM, TOWARD AN ISLAMIC REFORMATION, *supra* note 16, at

It may therefore be desirable to articulate some universal principles around each of these concepts as political and philosophical parameters for domestic territorial and international practice. The fact that various societies experience similar difficulties with the state and politics indicates that notions like constitutionalism should be expanded to cover the experiences of a wider variety of contexts. As I have argued regarding human rights, this process calls for mediating the generality of universal principles and the cultural–contextual specificity of the particular situation.[20] Consensus around "content" of constitutionalism can be realized through deliberate consultation and comparative reflection. Conversely, whatever universal principles are agreed to through this consensus-building process will need to be adapted to the specific socioeconomic and political context and cultural traditions of each time and place. It logically follows from this requirement of adaptation of universal principles to local context that some of the principles may or may not work in relation to a specific place at a given point in time. Moreover, this failure of adaptation may occur at any point on a continuum—from minor differences regarding practical arrangements to incompatibility on fundamental or substantial aspects of constitutionalism. Differences or variations in practical arrangements for such matters as separation of powers or judicial review may be expected and acceptable, while failure to acknowledge the need for separation of powers or judicial review may be tantamount to repudiation of the core of constitutionalism. In this light, I will now consider whether Islamic principles are fundamentally incompatible with the notion of constitutionalism as defined through the above-mentioned consensus-building process. To the extent that there is some incompatibility, I will also consider ways of mediating such tensions.

II. ISLAM, SHARIA, AND CONSTITUTIONALISM

To begin, I must qualify the sense in which I am discussing the relationship between Islam, which is an extremely diverse religious tradition, and constitutionalism, a modern secular doctrine of governance and rights. A straightforward comparison is out of the question due to the fundamental differences in the nature, functions, and operation of these

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73–74.

20. *See generally* Abdullahi Ahmed An-Na`im, *Toward a Cross-Cultural Approach to Defining International Standards to Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, *in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na`im ed., 1992).

two paradigms. Moreover, in whatever terms the relationship between the two is conceived, it cannot be the same for all Muslims—who constitute one-fifth of the world's population today—living on every continent and in every region.[21] It is also clear, however, that some interpretations of Islam are seriously problematic from a constitutional point of view, while others are at least consistent with the principle of constitutionalism, if not positively supportive of it.

My concern with the relationship between Islam and constitutionalism does not mean that Islam completely or exclusively determines the constitutional behavior of Muslims. Muslims are influenced by a wide range of economic, political, and other factors; in this way, the role of religion for Muslims is similar to the role of religion in other human societies. Nevertheless, perceptions of the relationship between Islam and constitutionalism are important for many Muslims, who may take a negative or even hostile view of constitutionalism to the extent that they believe it to be inconsistent with their religious obligation to observe Sharia as the totality of the normative system of Islam.[22] The relationship to constitutionalism is emphasized by the comprehensive scope of Sharia, which is believed to cover the political and social sphere, property and economic aspects, and moral and ethical principles, in addition to matters of religious doctrine and ritual practices.[23] Yet this does not mean that Sharia was in fact observed in all these aspects of life. As Anderson explains:

> [T]o a Muslim, it has always been a far more heinous sin to deny or question the divine revelation than to fail to obey it. So it seemed preferable to continue to pay lip-service to an inviolate Shari'a, as the only law of fundamental authority, and to excuse a departure from much of it in practice by appealing to the doctrine of necessity (*darūra*), rather than to make any attempt to adapt that law to the circumstances and needs of contemporary life.[24]

Thus, the commonly assumed view among Muslims today is that the

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21.   Theodore Karasik et al., *Islamic Finance in a Global Context: Opportunities and Challenges*, 7 CHI. J. INT'L L. 379, 380 (2007).

22.   *See* NORMAN ANDERSON, LAW REFORM IN THE MUSLIM WORLD 172–214 (1976).

23.   *See id.* at 3 (stating that "Shari`a . . . covers every aspect of law as this is classified today" as well as "religious and social duties, matters of ritual and devotion, and rules for seemly conduct").

24.   *Id.* at 36.

Medina state was the original and perfect model of an "Islamic state," established and ruled by the Prophet,[25] who continued to receive Divine Revelation, according to Muslim belief, until his death in 632 A.D.[26] In modern constitutional terms, the Prophet was the original and exclusive human sovereign, and sole source of law and political authority.[27] The subjects of that state—they could not be called "citizens" in the modern sense of the term—are believed to have been the ideal Muslims, both individually and collectively as a community of devout believers; they are believed to have been the embodiment of Islamic values under the immediate instruction and supervision of the Prophet himself.[28] By its own terms, therefore, this view of the Medina state and its population can never be replicated because Muslims do not accept the possibility of another Prophet after Muhammad and also believe the first generation of Muslims were the best possible embodiment of Islamic values and lifestyle. Yet the Medina state is supposed forever to provide Muslims with the most authoritative constitutional model of an Islamic government under Sharia. In this light, it is instructive for our purposes to analyze that model in constitutional terms, because Muslims presumably continue to hold it as the standard by which a modern state is to be judged, if not actually implemented, today.

The key constitutional features of the Medina state derive from the central role of the Prophet as the ultimate source of moral, political, and "legal" authority, who enjoyed complete, unfettered allegiance and obedience of the believers—those who believed him to be the final and conclusive Prophet.[29] He combined ultimate legislative, executive, and judicial powers—declaring what the law was, interpreting and implementing it in practice, as well as adjudicating disputes.[30] According to Muslim beliefs, it was simply inconceivable for the Prophet's political and legal powers to be restricted or challenged by any human agency. Moreover, the ideas of formal or institutional limitations, and separation of powers of rulers, were totally unknown anywhere else in the world.

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25. *See* AN-NA`IM, ISLAM AND THE SECULAR STATE, *supra* note 1, at 106.

26. Abdullahi A. An-Na`im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1, 16 n.45 (1987).

27. *See* AN-NA`IM, ISLAM AND THE SECULAR STATE, *supra* note 1, at 53.

28. *See id.* at 106.

29. *See id.* at 53 ("As the ultimate embodiment of [religion and political authority], the Prophet was accepted by Muslims to be their sole legislator, judge, and commander.").

30. *See id.*

Since the founding of Islam in the seventh century:

> Muslims have experienced a variety of methods for identifying rulers throughout history: from limited election, direct appointment, and limited selection in the city state of Medina to the hereditary monarchies of the imperial states that finally ended with the collapse of the Ottoman Empire after the First World War. From a modern constitutional point of view, and regardless of the method of selection or appointment, the Caliph enjoyed absolute powers for life because, once bay`a [public oath of allegiance] was given, there was no organized and peaceful mechanism for withdrawing or restricting it. Indeed, it is not clear at all that the Muslim population at large had a choice in declaring and upholding their allegiance once a candidate was selected or appointed by the leaders of the community. Withholding the oath of allegiance at the beginning or attempting to withdraw it subsequently was commonly perceived as tantamount to rebellion or treason, which may result in death if the person is thought likely to engage in military resistance.[31]

Although "classical Caliphs did not enjoy the Prophet's religious authority, they did in fact exercise the full range of his political and legal powers, which were supposed to be limited and checked by moral and ethical constraints; the assumption that the Caliph and his officials would voluntarily abide by Sharia."[32] It is possible to develop traditional notions of consultation (*shura*)[33] to support constitutional and democratic principles in the modern sense, but it would be grossly misleading to suggest that this notion has already been understood and practiced in this sense. A similar point can be made regarding some civil rights and human rights concerns about historical interpretations of Sharia, especially regarding equality for women and non-Muslims and freedom of religion. Such modern notions were not, and could not have been, dominant when Sharia principles were developed in the seventh and ninth centuries. On the contrary, those Sharia principles that I find objectionable from a

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31.   ABDULLAHI AHMED AN-NA`IM, AFRICAN CONSTITUTIONALISM AND THE ROLE OF ISLAM 11 (2006).

32.   *Id.* at 12.

33.   *See* Qur'an 3:159 ("Consult with them about matters, then, when you have decided on a course of action, put your trust in God: God loves those who put their trust in him.") (M.A.S. Abdel Haleem trans., Oxford Univ. Press 2004); *id.* 42:38 ("[R]espond to their Lord and keep up the prayer; conduct their affairs by mutual consultation; give to others out of what We have provided for them."); *see also* AN-NA`IM, *supra* note 31, at 12 (stating that under *shura*, "the ruler is expected to consult with the community about public affairs").

constitutional or practical point of view today were in fact consistent with the political and social values of the historical context in which they evolved, and were practically applied in building a major civilization that flourished for many centuries across vast regions of the world. Being consistent with the values and institutions of their time, the founding jurists of Sharia did not address the need to limit the powers of the Caliph through notions of separation of powers or independence of the judiciary.[34] Moreover, while those founding jurists were careful to explain a certain set of rights for women and those non-Muslims accepted as People of the Book—mainly Christians and Jews—they did not envision the possibility of equal rights of citizenship for these groups.[35] While such aspects of Sharia represented significant improvements on political and legal systems that prevailed throughout the pre-modern world, they are totally unacceptable from a constitutional point of view today.

It is true that alternative interpretations of Sharia are possible today, but the process of reform can only begin when the incompatibility of Sharia with the principles of constitutionalism is acknowledged as a serious problem. That subject is beyond the scope of this Article. The more pertinent issues are the practical difficulties facing the mediation of the tensions between Sharia and constitutionalism, regardless of the precise reform methodology one is proposing to resolve those tensions. Part of the problem is the attitude of scholars and policy makers, both within Islamic societies and elsewhere, who take claims of the unity of Islam and the state at face value. Realistic mediation of the tensions between Sharia and constitutionalism can begin only when the issue is taken seriously, and is framed in terms of historically conditioned forms of the relationship between Islam and the state, rather than a sharp dichotomy between total unity or categorical separation of religion and the state. Given a clear understanding of the particularity of the relationship between Islam and constitutionalism in each Islamic society, the issue becomes one of understanding the basis and dynamics of this relationship as a historical process that is capable of change and transformation, rather than a permanent or inescapable fact. It is from this perspective that I will now briefly present my proposal for clarifying the relationship among Islam, the state, and constitutionalism.

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34. *See* BERNARD LEWIS, THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS 54 (Scribner 1995) (describing the Caliphate at the time of its establishment as "the supreme sovereign office of the Islamic world").

35. *See id.* at 205–12 (discussing "the subordinate status of the slave, the woman, and the unbeliever" under the law in early Islamic societies).

III. GENERAL THEORY OF ISLAM, THE STATE, AND CONSTITUTIONALISM

The general theory I propose can be summarized as follows.[36] First, Islam and the state must be institutionally separate in order to safeguard the possibility of being Muslim out of personal conviction, rather than conformity to the coercive will of the state.[37] The notion of an Islamic state that enforces Sharia as positive law and policy is conceptually incoherent, historically unprecedented, and practically unworkable. The enforcement of Sharia through the coercive power or authority of the state repudiates the religious quality of compliance, which must be voluntary and deliberate to be valid. The fact that some Muslims assert there is an Islamic state model does not make that claim true or valid.[38] But the separation of Islam and the state does not mean that Islam and *politics* should or can be separate.[39] I distinguish between the state and politics to facilitate the regulation of the relationship of Islam and the state through politics, subject to constitutional and human rights safeguards.

An Islamic state is conceptually impossible, historically unprecedented, and practically not viable today. An Islamic state is conceptually impossible because for a political authority to claim to implement the totality of the precepts of Sharia 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 Sharia in the first place. Because 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 will have to choose among equally authoritative but different interpretations of the Qur'an and Sunna. In other words, any principles or rules of Sharia 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 the will of God. The practical impossibility of enforcing Sharia as positive law is reflected in the common view among Muslims that there has never been an Islamic state in this sense since the Medina state of the Prophet.[40]

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36.   *See* AN-NA`IM, ISLAM AND THE SECULAR STATE, *supra* note 1, at 1–44 (providing a more complete statement of the theory).

37.   *See id.* at 28–29.

38.   *See id.* at 29.

39.   *See id.* at 28–29 (arguing that Sharia "should be a source of public policy and legislation").

40.   *See id.* at 55.

The lack of historical precedent is more significant in view of the total transformation of the local and global context in which the state must operate today. A state constituted according to the theory of Sharia is simply unworkable in the present national and international context. One difficulty facing this model is the profound ambivalence of the founding jurists of Sharia to political authority. They neither sought to control those who rule the state, nor knew how to make rulers accountable to Sharia. Moreover, economic activities would be crippled by the formal enforcement of a prohibition of fixed-rate interest loans (*riba*) and of insurance based on speculative contracts (*gharar*). Another problem is that the denial of basic citizenship rights for women and non-Muslims would face serious challenges from these groups internally and from the international community at large.

Legitimate objections to the enforcement of Sharia through positive law and the notion of an Islamic state do not, of course, preclude Muslims from personally conforming to every aspect of Sharia. The fact that *riba* and *gharar* contracts are legal in a country does not mean that Muslims who live there must engage in these practices, because they have the freedom to simply abstain from any transaction or behavior that violates their own religious or moral convictions. The arguments I am making here are against coercive enforcement of religious obligations by the state, not for suppressing private conformity with the dictates of one's beliefs. Indeed, one may seek to reinforce 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 increase apparent conformity with religious norms, but that neither enhances piety nor justifies the violation of the freedom of religion and other human rights of believers and non-believers alike.

The underlying assumption of claims to enforce Sharia 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 implications for the rights of others. All the states of Islamic societies are bound by customary international law and humanitarian law, like any other state in the world,[41]

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41.   *See* CASES & MATERIALS ON INTERNATIONAL LAW 28, 201 (Robert McCorquodale & Martin Dixon eds., 4th ed. 2003) (stating that customary

as well as by 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.[42] These international legal obligations 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.[43] As a practical matter, other states 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 persons 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.

The claim of an Islamic state is a postcolonial innovation that is premised on a European model of the state and a totalitarian view of law and public policy as instruments of social engineering by ruling elites.[44] Although the states that have historically ruled over Muslims did seek Islamic legitimacy in a variety of ways, they did not claim to be Islamic states.[45] The proponents of a so-called Islamic state seek to use the powers and institutions of the state—as constituted by European colonialism and continued after independence—to coercively regulate individual behavior and social relations in the specific ways selected by ruling elites.[46] It is particularly dangerous to attempt implementing such totalitarian models in the name of Islam because that would make it far more difficult to resist than when the same is done by a secular state that does not claim religious legitimacy. At the same time, it is clear that the institutional separation of any religion and the state is not easy because the state will necessarily have to regulate the role of religion to maintain its own religious neutrality, which is necessary for the state in its role as mediator and adjudicator among competing social and political forces.

Affirming the religious neutrality of the state does not mean that

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international law is binding on states and states may be obligated to protect some human rights even if they have not ratified human rights treaties).

 42. *See* U.N. Charter art. 2, para. 2 ("All members . . . shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.").

 43. *See, e.g.*, CASES & MATERIALS ON INTERNATIONAL LAW, *supra* note 41, at 175 (stating that international human rights law limits state sovereignty).

 44. *See* AN-NA`IM, ISLAM AND THE SECULAR STATE, *supra* note 1, at 3 (discussing European postcolonial influence on the Islamic state).

 45. *See, e.g.*, *id.* at 16 (explaining that Ottoman sultans negotiated a balance between pragmatic politics and religious authority).

 46. *See id.* at 3.

Islamic principles are irrelevant to law and public policy. Indeed, Muslims can and should propose policy or legislation based on their religious or other beliefs, as all citizens have the right to do, but they must support such proposals in terms of civic reason instead of simply asserting them as required by Sharia.[47] I use the term "civic reason" to refer to the need for the reasons of policy and legislation to be publicly declared and for the process of reasoning on the matter to be open and accessible to all citizens. The rationale and purpose of public policy and legislation must be based on the sort of reasoning that average citizens can accept, reject, or make counter-proposals in response to, without reference to religious belief or doctrine. This is necessary whether Muslims constitute the majority or minority of the population of the state, because even if Muslims are the predominant majority, they will not agree on what policy and legislation necessarily follow from their Islamic beliefs. This notion of civic reason is similar to, but also different from what some Western political theorists call "public reason."[48]

In conclusion, I should note 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 Sharia through positive legislation. 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 Sharia 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 here 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, my position is not necessarily correct, or likely to be widely accepted, simply because it is now resisted by so many. I hope that my

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47.   *See* AN-NA`IM, ISLAM AND THE SECULAR STATE, *supra* note 1, at 28–29.

48.   JOHN RAWLS, POLITICAL LIBERALISM 212–54, 435–90 (2003); *see also* AN-NA`IM, ISLAM AND THE SECULAR STATE, *supra* note 1, at 97–101 (explaining the difference between public reason and civic reason); Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109, 130–31 (1995).

analysis will at least attract serious consideration and reflection, and that it will stand or fall on its own merits. 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.