Islam, State and Politics: Separate but Interactive

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1. Introduction

The main point I wish to make in this short essay regarding the relationship among Islam, state and politics for present Islamic societies can be summarized as follows. 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. This separation is already valid because the notion of an Islamic state that can enforce Shari`a as positive law and policy is conceptually incoherent, historically unprecedented and practically not viable. In other words, the enforcement of Shari`a through the coercive power or authority of the state is neither desirable nor possible, while a secular state is both desirable and possible. The fact that some Muslims assert there is an Islamic state model does not make that claim true or valid. But the separation of Islam and the state does not mean that Islam and *politics* are also separate. In other words, I am saying that Islam and the state are and must remain separate, but Islam and politics cannot and should not be separated. I distinguish between the state and politics in order to facilitate the regulation of the relationship of Islam and the state through politics, but subject to constitutional and human rights safeguards.

I prefer to use the term Shari`a instead of Islamic law not only because the latter term is not an accurate translation, but also to emphasize that I am speaking of Shari`a, as it is commonly accepted by Muslims at large. On the first count, Shari`a generally refers to the totality of the normative system of Islam, ranging in subject-matter from doctrine of belief and ritual worship practices, to ethical principles and social institutions. As I will explain below, Shari`a principles are actually being

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transformed when they are asserted as positive legal rules to be enforced through the political of the state, which means they are no longer Shari`a as such. On the second count, there is a tendency in current debates among Muslims to take Shari`a to mean a divine and immutable normative system that is based on the Qur'an and Sunna (traditions of the Prophet), while Islamic jurisprudence (*fiqh*) is human interpretation of those same sources and should therefore remain open to change and reform. As briefly explained later, this distinction is irrelevant since any understanding and practice of Shari`a itself in this world is necessarily the product of human interpretation. The argument I am making here is about Shari`a by any understanding of it that is possible and relevant to human experience, and not about Islamic jurisprudence.

The premise of my argument is that Shari`a, by its nature and purpose, can only be freely observed by believers, and its principles lose their religious authority and value when enforced by the state. It is from this fundamentally religious perspective that the state must not be allowed to claim the authority of Islam, regardless of such claims. On the one hand, the functions of the state, including adjudication among competing claims of religious and secular institutions, are secular functions of a political institution that should not be allowed to claim religious authority. Since whatever standards or mechanisms are imposed by the organs of the state to determine official policy and formal legislation they will necessarily be based on the human judgment of those who control those institutions, it should not be misrepresented as 'religious'. This is what I refer to as the separation of Islam and the state. On the other hand, the religious beliefs of Muslims, whether as officials of the state or private citizens, tend to influence their actions and political behavior. I refer to this difficulty as the connectedness of Islam and politics.

The state is a complex web of organs, institutions and processes that are supposed to implement the policies that are adopted through the political process of each society. It signifies the continuity of institutions like the judiciary and administrative agencies, as distinguished from the government or regime of the day

which is the product of current politics.[2] The state should therefore be the more settled and deliberate operational side of self-governance, while politics is the dynamic process of making choices among competing policy options. To fulfill that and other functions, the state must have what is known as a monopoly on the legitimate use of force, which is the ability to impose its will on the population at large. This coercive power of the state, which is now more extensive and effective than ever before in human history, will be counterproductive when exercised in arbitrary manner or for corrupt or illegitimate ends. That is why it is critically important to keep the state as neutral as humanly possible, which requires constant vigilance by the generality of citizens acting through a wide variety of political, legal, and other strategies and mechanisms.[3]

The distinction between the state and politics therefore assumes constant interaction among the organs and institutions of the state, on the one hand, and organized political and social actors and their competing visions of the public good, on the other. This distinction is also premised on an acute awareness of the risks of abuse or corruption of the necessary coercive powers of the state. The state should not be a complete reflection of daily politics because it must be able to mediate and adjudicate among the competing visions and policy proposals, which require it to remain relatively independent from different political forces in society. But complete independence is not possible because of the political nature of the state which cannot be totally autonomous from those political actors who control it. This reality makes it necessary to strive for a degree of separation of the state from politics, so that those excluded by the political processes of the day can still resort to state organs and institutions for protection against the excesses and abuse of power by state officials.

This need can be illustrated by experiences of a single ruling party taking

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[2] Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (Stanford, California: Stanford University Press, 1990), pp. 19-33; Graeme Gill, *The Nature and Development of the Modern State* (New York: Palgrave Macmillan, 2003), pp. 2-3

[3] Gill, *The Nature and Development of the Modern State*, pp. 17-20.

complete control over the state, from Nazi Germany and the Soviet Union to many African and Arab countries during the last decades of the twentieth century. Whether it was Arab nationalism in Egypt or the Baa'th party in Iraq and Syria, the state became the immediate agent of the party which was the political arm of the state. Under such circumstances, citizens are trapped between the state and the party, without the possibility of administrative or legal remedy from the state or the possibility of lawful political opposition outside its sphere of control. Failure to observe the distinction between the state and politics therefore tends to severely undermine the peace, stability and healthy development of the whole society. Those who are denied the services and protection of the state as well as effective participation in politics will either withdraw their cooperation or resort to violent resistance in the absence of less drastic remedies. Those commonly known as Islamists should therefore be allowed to operate their political parties openly and legally, or else they will probably resort to political violence or seek to control the state by military coup or other extra-constitutional means.

This necessary balancing of competing claims and tense relationships can be mediated through principles and mechanisms of constitutionalism, rule of law and the protection of the equal human rights of all citizens. But these principles and institutions cannot succeed without the active and determined participation of all citizens, which is unlikely if people believe them to be inconsistent with those religious beliefs and cultural norms that influence their political behavior. For example, the principles of popular sovereignty and democratic governance presuppose that citizens are sufficiently motivated and determined to participate in all aspects of self-governance, including participation in organized political action to hold their government accountable and responsive to their wishes. This motivation and determination are partly influenced by the religious beliefs and cultural conditioning of citizens. In other words, it is necessary for believers to find some religious justification of constitutionalism and human rights as the necessary framework for regulating the public role of religion.

While my analysis can be applied to any religion, I am focusing here on Islam and Islamic societies as a Muslim seeking to contribute to clarifying these issues in present Islamic societies. As I see it, the challenge facing Islamic societies is how to separate Islam and the state despite the connectedness of Islam and politics. My objective is to affirm and support the institutional separation of Islam and the state as necessary for Shari`a to have its proper positive and enlightening role in the lives of Muslims and Islamic societies. This view can also be called 'the religious neutrality of the state', whereby state institutions neither favor nor disfavor any religious doctrine or principle. Such neutrality is necessary for ensuring and protecting the freedom of individuals in their communities to adopt, object to or modify any view of religious doctrine or principles. I am therefore emphasizing the separation of Islam and the state in order to realize the purpose of Shari`a, rather than negate its central role in the lives of Muslims.

Although similar to the standard argument for secularism in Western societies, my position is different in that I do not accept the separation of Islam and *politics* as either necessary or desirable. The combination of the separation of Islam and the state with maintaining the connection between Islam and politics allows the implementation of Islamic principles in official policy and legislation, but subject to the safeguards for constitutionalism and human rights. The approach I am proposing calls for the deliberate and strategic mediation of the tension of separation of Islam and the state (as distinguished from the government of the day) as well as regulating the connection of Islam and politics, instead of attempting to impose a categorical resolution one way or the other. Despite this significant difference, my proposition may be resisted by some Muslims because of its association with negative perceptions of secularism as a 'western concept'.

This common negative perception of secularism among Muslims does not distinguish between the separation of Islam and the state, on the one hand, and Islam's connectedness to politics, on the other. By failing to recognize this distinction, the separation of Islam and the state is taken to mean the total relegation

of Islam to the purely private domain and its exclusion from public policy. Since this is not what I am proposing, why do I use the term secularism, with all its confusing my position with their negative view of secularism? I prefer to use this term, while clarifying what I mean by it, not only because of its value for comparative analysis, but also in order to contribute to rehabilitating and affirming the principle of secularism among Muslims.

The context of the constant negotiation of the relationships among Islam, state and politics in present Islamic societies is shaped by profound transformations in the political, social and economic structures and institutions under which all Muslims live and relate to other communities as a result of European colonialism, and global capitalism. This context is also shaped by the internal political and social conditions of each society, including the internalization of externally inspired changes, whereby Islamic societies have continued to follow Western forms of state formation, education and social organization, and economic, legal and administrative arrangements after achieving political independence. All present Islamic societies not only live within territorial states which are totally integrated into global systems of economic, political and security inter-dependence and cross- cultural influence, but have voluntarily continued to participate in these processes long after they have achieved political independence. These realities require the corresponding safeguards of secularism, constitutionalism and human rights protection.

2. The Dangerous Illusion of an Islamic State

Contrary to the claims of its proponents, a so-called Islamic state to enforce Shari`a as positive legislation is the negation of the possibility of an Islamic way of life, not its realization. In other words, these efforts are not only doomed to failure at horrendous human and material costs, but are in fact counterproductive. If one is to speak at all of a religious mandate regarding the relationship between Islam and the state, one should categorically oppose the illusion of an Islamic state and dangers of enforcing Shari`a by the state. Muslims everywhere must openly reject the alleged possibility of enforcement of Shari`a as the law of any state in order to be able to freely express

their religious identity, and begin to reflect the high ideals of their faith in the daily working of their state and its institutions, including the administration of justice.

The repudiation of the dangerous illusion of an Islamic state to coercively enforce Shari`a principles is necessary for the practical ability of Muslims and other citizens to live in accordance with their religious and other beliefs. Ironically, the notion of an Islamic state that is asserted in the name of self-determination is a post-colonial idea 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. 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 state. The proponents of a so-called Islamic state in modern context 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. It is particularly dangerous to attempt implementing such totalitarian models in the name of Islam because that would make it far more difficult to resist than when that is done by a secular state that does not claim religious legitimacy. At the same time, it is clear that the institutional separation of any religion and the state is not easy because the state will necessarily have to regulate the role of religion in order to maintain its own religious neutrality, which is necessary for the role of the state as mediator and adjudicator among competing social and political forces as mentioned above.

In making my argument from an Islamic point of view, I remain convinced that succeeding generations of Muslims have always sought to discover what God had decreed or willed for them to do or be (*hukm Allah*), as they believe that to be divine guidance for all aspects of their daily life. But I also see that "Islamic jurisprudence is a speculative essay to comprehend the precise terms of Allah's law".[4] It is reasonable to assume that generations of Muslims through the ages generally

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[4] Noel J. Coulson, *Conflicts and Tension in Islamic Jurisprudence* (Chicago, Ill.: University of Chicago Press,1969), p. 41.

earnestly strove to live up to the ideals set by the Prophet and early generations of Muslims as a matter of personal conviction. lam not concerned here with an assessment or evaluation of whether, and to what extent, any generation or group of Muslims have failed or succeeded in either discovering God's decree or will regarding any matter, or whether and how they have managed to live up to that ideal from a sociological or anthropological point of view. The question I am addressing here is whether it is possible for any state, however constituted and rationalized, to enforce Shari`a through positive legislation.

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

Affirming the religious neutrality of the state does not mean that Islamic principles are irrelevant to law and public policy. Indeed, Muslims can and should propose policy or legislation out of their religious or other beliefs, as all citizens have the right to do so, but must support such proposals in terms of 'public reason', instead of simply asserting them as required by Shari`a. While space does not permit detailed discussion the notion of 'public reason' as it is debated in Western scholarship,[5] and

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[5] See, for example, John Rawls, *Political Liberalism*, (expanded edition, New York:

how it might apply in Islamic societies. For my purposes here, I use the term 'public reason' to refer to the need for reasons of policy and legislation to be publicly declared as well as that the process of reasoning on the matter should be open and accessible to all citizens. In other words, the rationale and purpose of public policy or legislation must be based on the sort of reasoning that the generality of citizens can accept or reject, as well as make counter-proposals through pubic debate, without reference to religious belief or doctrine. Public reason and reasoning, and not personal beliefs and motivation, are necessary whether Muslims constitute the majority or minority of the population of the state, because even if Muslims are the predominant majority, they would not agree on what policy and legislation necessarily follow from their Islamic beliefs.

It is unrealistic and unwise to expect people to fully comply with the requirements of public reason, because such choices are made within the realm of inner motivation and intentions. It is difficult to tell why people vote in a particular way or justify their political agenda to themselves or to their close associates. But the objective should be to promote and encourage public reasons and reasoning, while diminishing the exclusive influence of personal religious beliefs, over time. The requirement of public reasons and reasoning processes does not assume that people who control the state can be neutral. On the contrary, this requirement must be the basis of the operation of the state precisely because people are likely to continue to act on personal beliefs or justifications. The requirement to publicly and openly present justifications that are based on reasons that the generality of the population can freely accept or reject will over time encourage and develop a broader consensus among the population at large, beyond the narrow religious or other beliefs of various individuals and groups. Since the ability to present public reasons and debate them publicly is already present in most societies, what I am calling for is the deliberate

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Columbia University Press, 2003), pp. 212-254, 435-490; and Jurgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls' Political Liberalism," *The Journal of Philosophy*, 92: 3 (March 1995), pp.109-131.

and incremental enhancement and development of these processes, and their underlying culture, over time, rather than suggesting that that is totally absent now or expecting it to be fully realized immediately.

In conclusion of this section, what is at issue is whether Shari`a can in fact be enforced as such by the state, as distinguished from voluntary compliance with its dictates by Muslims out of personal religious conviction or choice. The significance of this distinction can be seen in the difference between the formal legal prohibition of paying or taking interest for loans as a matter of economic and social policy, as opposed to refraining from engaging in such practices because they constitute *riba*, which is prohibited for Muslims under Shari`a (*haram)*. Another example is the difference between outlawing insurance contracts as too speculative or contingent in contrast to personal abstention from engaging in these practices because they are not allowed to Muslims as *qharar*. Another way of explaining this point is to emphasize the difference between enforcing legal principles and rules in accordance with the constitutional standards and legislative process of the country, regardless of their original source, as distinguished from enforcing them because that is required by Shari`a as the will of God. In my view, past or current claims or demands to enforce Shari`a through legislation by the state are based on a historical fallacy because that is inconsistent with the nature of Shari`a itself and impossible for the state as constituted today in any country in the world. In other words, it is neither possible to conceive of this possibility in theoretical terms, nor is it true that such a model existed in the past so that it can be re-enacted today. The question then becomes what should the role of Shari`a be in a modern-state society in its present global context.

3. Shari`a and State Law

Muslims tend to believe that the Prophet's state in Medina (622-632 AD) did in fact implement Shari`a in the life of the community, but the implementation of Shari`a in that instance was neither done through state legislation and administration that can be applied today. Aside from the extraordinary fact of the actual existence of the Prophet who continued to receive and explain revelation throughout that time, and his

personal charisma and moral leadership, that state was constituted of closely-knit tribal communities of highly motivated new converts who lived within an extremely limited space. That experience was also based more on the moral authority of social conformity than on the coercive power of the state in other human societies, a unique phenomenon that ended with the Prophet's death. In other words, the Medina experience was too exceptional to be relevant as a model for the state the present postcolonial world of global economic and political interdependence and integration, too "alien" to be revived or resurrected in. Claims to establish an Islamic state on that model are dangerously naive, if not cynical and manipulative.

What came to be known among Muslims as Shari`a was in fact the product of a very slow, gradual and spontaneous process of interpretation of the Qur'an and collection, verification and interpretation of Sunna during the first three centuries of Islam (the seventh to the ninth centuries CE).[6] This process took place among scholars and jurists who developed their own methodology for the classification of sources, derivation of specific rules from general principles, and so forth. That technical aspect of their work came to be known as the science of the foundations or principles of human understanding of divine sources (*usul al-fiqh*). As one would expect, there was much disagreement and disputation among those early scholars about the meaning and significance of different aspects of the sources with which they were working. Moreover, although those founding scholars are generally accepted to have been acting independently from the political authorities of the time, their work could not have been in isolation from the prevailing conditions of their communities, in local as well as broader regional contexts. Those factors must have also contributed to disagreements among the jurists, and sometimes to differences in the views expressed by the same jurist from one time to another, as is reported of the changes in the view of Imam al-Shaf `i when he moved from Iraq to Egypt. Even

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[6] See, generally, Noel J. Coulson, *A History of Islamic Law* (Edinburgh, Scotland: Edinburgh University Press), 1964; Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Syracuse, NY, USA, Syracuse University Press, 1990, Chapter 2.

after those disagreements eventually evolved into separate schools of thought, madhahib, differences of opinion persisted among scholars of the same schools, as well as between different schools.

The significant question to ask here is how can Shari`a principles be divinely predetermined if it can only be discovered through human understanding of the Qur'an and Sunna? As Ebrahim Moosa posed the question:

> When jurists claim that their extrapolation of the rules [of Shari`a]] from the sources constitute Allah's law (*hukm* Allah) one immediately realises that the law in Islam involves a transcendental dimension. One of the more intriguing questions encountered in the study of shariʿa concerns the legal ruling or rule (*hukm*). How is it possible for the jurist (*faqih*) to conclude at the end of a very empirical evaluation and research of facts and texts that his conclusions constitute a transcendental and divine authority?[7]

The obvious answer, in my view, is that it is simply impossible for the conclusion of the jurist to ever constitute transcendental and divine authority, and should never be accepted as such. Jurists or scholars, however highly respected they may be, and even if their views came to be universally accepted by Muslims everywhere (which of course never happened for any of them), can only present their own personal views of what "*hukm* Allah" is on a given matter.

As noted earlier, a distinction is commonly drawn in Islamic discourse between Shari`a and fiqh. As explained by Bernard Weiss, "*shari`a* law is the product of legislation (*shari`a*), of which God is the ultimate subject (*shari`*). *Fiqh* law consists of legal understanding, of which the human being is the subject (*faqih*)."[8] 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

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[7] Ebrahim Moosa, "Allegory of the rule *(hukm):* law as simulacrum in Islam?" *History of Religion*, 1998, pp. 1-24, at p.12.
[8] Bernard Weiss, *The Spirit of Islamic Law*, Athens, GA, University of Georgia, p. 120.

than textual support from the Qur'an and/or Sunna. But this does not mean that those which are taken to be Shari`a, rather than fiqh, are the direct product of revelation because the Qur'an and Sunna cannot be understood or 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."[9]

Because the founding jurists and scholars of Shari`a were highly aware of all these factors, and sensitive to the risks of imposing what might be an erroneous view, they exercised profound acceptance of diversity of opinion, while seeking to enhance consensus among themselves and their communities. This was done through the notion that whatever is accepted as valid by consensus (*ijma*) among all jurists (or the wider Muslim community according to some jurists) is deemed to be permanently binding on subsequent generations of Muslims.[10] But the many practical difficulties of applying this notion were clear from the beginning. For those who wanted to confine the binding force of consensus to that among a select group of jurists, the problem was how to agree on the criteria for identifying those jurists, and how their opinions are to be identified and verified. If one is to say that the authority of ijma' is to come from the consensus of the Muslim community at large, the question still remains how to determine and verify that this has happened on any matter. Whether the consensus is supposed to be of a group of scholars or of the community at large, why should the view of one generation bind subsequent generations? Whatever solutions one may find for such conceptual and practical difficulties, that answer will itself always be the product of human judgment. In other words, Shari`a norms cannot possibly be drawn from the Qur'an and Sunna except through human understanding, which necessarily means both the inevitability of differences of

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[9] *Ibid.* p.116, emphasis in original.
[10] *Ibid*., pp. 120-22.

opinion and the possibility of error, whether the matter is decided among scholars or the community in general.

In this light, the question becomes how and by whom can such differences of opinion be properly and legitimately settled in practice in order to determine what is the positive law to be applied in specific cases? The basic dilemma here can be explained as follows. On the one hand, there is the paramount importance of a 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. This is true of Islamic societies today more than ever before, because of their growing interdependence with non-Muslim societies throughout the world, as briefly discussed below. On the other hand, a religious rationale is key for the binding force of Shari`a norms for Muslims. Precisely because Shari`a is supposed to be binding on Muslims out of religious conviction, a believer cannot be religiously bound except by what he or she personally believes to be a valid interpretation of relevant texts of the Qur'an and Sunna. Yet, given the diversity of opinions among Muslim jurists, whatever officials of the state elect to enforce as positive law is bound to be deemed an invalid interpretation of Islamic sources by some of the Muslim citizens of that state.

This dilemma has traditionally been mediated by hodling that "each individual Muslim was absolutely free to follow the school [of jurisprudence] of his choice and that any Muslim tribunal was bound to apply the law of the school to which the individual litigant belonged".[11] Accordingly, an individual also had the right to change his or her school of law on a particular issue. This situation continued until the introduction of Al-Majallah by the Ottoman Empire in the second half of the 19th century, and more widely through the enactment of family law codes in most Islamic countries over the last few decades:

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[11] Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p. 34.

> The principle underlying the codes [of Islamic family law] is that the political authority has the power, in the interest of uniformity, to choose one rule from among equally authoritative variants and to order the courts of his jurisdiction to apply that rule to the exclusion of all others; and the choice of this rule or that has been made simply on grounds of social desirability, the codes embodying those variants which were deemed most suited to the present standards and circumstances of the community.[12]

The imperatives of certainty and uniformity in national legislation are now stronger than ever before 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. Despite the many problems of the present national and international systems, the realities of national and global political, economic, security and other relations remain firmly embedded in the existence of sovereign states that have exclusive jurisdiction over their citizens and territories. For Islamic societies, this point has recently been painfully and traumatically emphasized by the eight years of the Iran-Iraq war of the 1980s, and the composition of the international alliance of Muslim and non-Muslim countries which forced Iraq out of Kuwait in 1991, as well as the invasion and occupation of Iraq in 2003. The governments of Islamic countries on both sides of these violent conflicts acted (and continue to act) as states and not as part of a uniform or united global Islamic community, or on behalf of the totality of Muslims at large (so-called *Umma*). The point I am making here is not that the nature of the state is identical for all societies, because the processes of state formation and consolidation vary from one country to another. Rather, my point is that there are certain common characteristics that all states need to have in order to be part of the present international system because membership is conditional upon recognition by other members. For the states ruling over Islamic societies to be and remain accepted as members of the international community, they must comply with a recognizable set of minimum features of statehood in the present sense of the term. In particular,

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[12] *Ibid*., pp. 35-36.

the ability to determine and enforce the law in everyday life is central to the existence of any state, regardless of its philosophical or ideological orientation. Moreover, as explained in the next section, the nature of the state and its present global context preclude the possibility of the application of Shari`a as historically understood by its founding jurists and still commonly accepted among Muslims.

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

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

4. Self-determination for Islamic Societies Today

Much of the current public discourse in many Islamic societies is dominated by support for or opposition to the notion of an "Islamic state" which is supposed to implement Shari`a in a comprehensive and systematic manner. Proponents of this idea are commonly known as "Islamists" and its opponents described as "secularists",

each addressing their own constituency with little interaction between the two groups in their different orientations - traditionalist or fundamentalist on the Islamist side, and liberals or nationalists, on the other side. In this section, I wish to challenge this alleged Islamist/secularist dichotomy and the assumptions on which it is based. Then I will attempt to outline the parameters within which Islamic societies should seek to exercise their right to self-determination in the present context. In other words, I will first attempt to show what the right to self-determination cannot mean for Islamic societies, and then offer some suggestions for what it can mean today.

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

An Islamic state as a political institution is conceptually impossible, historically inaccurate, and practically not viable today. In support of this proposition, I recall here my earlier argument that an Islamic state is conceptually impossible because for a political authority to claim to implement the totality of the precepts of Shari`a in the everyday life of a society is a contradiction in terms: enforcement through the will of the state is the negation of the religious rationale of

the binding force of Shari`a in the first place. Since enforcement by the state today requires formal enactment as the law of the land or adoption of clear policies specifying certain action by organs of the state, the legislature and government of the day (whatever their form may be) will have to choose among equally authoritative but different interpretations of the Qur'an and Sunna. In other words, any principles or rules of Shari`a simply cease to be part of a religious normative system by the very effort to enact and enforce them by the organs of the state because the state can only enforce its own political will, not that of God. The practical impossibility of enforcing Shari`a as positive law is also emphasized by the fact that Muslims acknowledge that there has never been an Islamic state in this sense since the Medina state of the Prophet. As briefly explained above, however, there is no basis for comparison between that early city state and subsequent Muslim imperial states of the past, let alone present day complex states with their diverse populations and global context.

The lack of historical precedent is more significant in view of the total transformation of the local and global context in which the state has to operate today. As state constituted according to the theory of Shari`a is simply unworkable in the present national and international context. Difficulties facing this model include the profound ambivalence of the founding jurists of Shari`a to political authority. They neither sought to control nor knew how to make those who control the state accountable to the Shari`a itself. Moreover, economic activities would be crippled by the formal enforcement of prohibition of a fixed rate of interest on loans (*riba*), and of insurance as based on speculative contracts (*gharar*). The enforcement of corporal punishments for certain specified offences (*hudud*) faces serious unresolved procedural and evidentiary objections, let alone human rights concerns about cruel, inhuman or degrading treatment or punishment. Another type of problem is that the denial of basic citizenship rights for women and non-Muslims will face serious challenge by these groups internally, and by the international community at large.[13]

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[13] See generally, An-Na`im, *Toward an Islamic Reformation.*

All the above objections to the enforcement of Shari`a through positive law and the notion of an Islamic state do not, of course, preclude Muslims from personally conforming by every aspect of Shari`a. The fact that riba and gharar contracts are not illegal in a given country does not mean that Muslims have to engage in these practices. Any person can simply abstain from any form of commercial transaction or personal behavior in accordance with his or her own religious or moral convictions. As emphasized above, the arguments I am making here are against enforcement by the state, and not to suppress private conformity with the dictates of one's beliefs. Indeed, people may seek to reinforce the religious or moral values through the activities of non-governmental organizations and other forms of agency of civil society. It is true that legal prohibition will reinforce the authority of religious norms, but the question is how to ensure the freedom for personal religious conformity without violating the rights of others. Human judgment about law and public policy will necessarily have to be made in terms of a balance of the benefits and costs of legal enforcement of any norm, in contrast to other ways of promoting the social good. In the present limited space, I will focus on the general framework within which any Islamic text, including the Qur'an and Sunna, can influence public policy.

The underlying assumption of claims to enforce Shari`a through positive legislation is that Islamic societies and communities have the right and responsibility to organize their public and private lives in accordance with the dictates of Islam. In modern terms, one can say that this is a matter of political and cultural self-determination. But self-determination is not an absolute right, because the manner in which one group or entity exercises the right will have consequences or implication for the rights of others. As Asbjorn Eide put it,[14] it is really the right to co—determination, to be exercised in collaboration with others, rather than an exclusive

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[14] Seminar commemorating the 50th anniversary of the Declaration of Human Rights, Royal Netherlands Academy of Science, Amsterdam, The Netherlands, 10-11 December 1998.

right of the self; whatever that may mean. In particular, all the states of Islamic societies are bound by customary international law and humanitarian law, like any other state in the world, as well as by all the international treaties they have ratified, such as the Charter of the United Nations which is binding on all of them as members of that organization. All these sources set clear and categorical limits on what the states of Islamic societies may or may not do, both within their own borders as well as in their dealings with other states and their citizens. As a practical matter, other states do act on these principles in their economic, political, security and other dealings with the states of Islamic societies. Whether it is the organization and operation of the state in general, the treatment of vulnerable 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.

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

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

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

I realize that many Muslims will resist what I am arguing for as secularism that relegates religion to the purely private individual domain. I have attempted to respond to this by emphasizing the distinction between state and politics, and facilitating a public role for religion while protecting the rights of others. I should

also acknowledge that it is very difficult to achieve sustainable separation between Islam and the state as a dynamic negotiation process, rather than a status that is to be achieved once and for all. Any state, as well as its constituent organs and institutions, are conceived and operated by people whose religious or philosophical beliefs will necessarily be reflected in their thinking and behavior. The authority of religion and power of the state are often two sides of the same coin, rather than being separate or opposing paradigms. Since every state will seek to legitimize its authority in terms of the prevailing religious and moral beliefs of its citizens, the states of Islamic societies will attempt to do that in terms of an Islamic frame of reference. There is no point in arguing against this fundamental political principle. What I am arguing for is clarifying the meaning and implications of an Islamic frame of reference in the modem context, not its negation or rejection as dated or irrelevant. The crucial question, in my view, is not whether Islam and the state are united or can be separated. Rather, it is the nature and implications of that relationship which must be defined and specified by each Islamic society for itself. There is no single so-called Islamic model for this relationship, but there can be distinctive models for each society in accordance with its own struggle to understand and live by the spiritual and moral precepts of Islam, as understood and applied in the present global context.

5. Concluding Remarks

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

I am painfully aware that most of the views I have expressed 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 right or likely to be widely accepted simply because it is now resisted by so many. But I hope that my analysis will at least attract serious consideration and reflection, and that it will stand or fall on its own merits, not because it is not accepted by the majority of Muslims today. For my part, I will keep trying to improve and clarify the argument presented here precisely because there is no alternative to their voluntary acceptance by the majority of Muslims today.

Finally, let me openly state what is probably already clear to you from some of my opening remarks, namely, that I am an active advocate of the views presented above, rather than a detached scholar engaged in purely academic analysis. For me the issues are too important and the stakes are too high to simply engage in abstract reflection on the relationship between Shari`a and positive legislation in Islamic societies today. To Muslims readers, I would close by reiterating what my Master Teacher and Mentor, *Ustadah* Mahmoud Mohamed Taha, used to say to Sudanese intellectuals who used to tell him that his ideas sounded convincing, but when would people accept and act on them? In response, *Ustadh* Mahmoud used to say: “You are the people; when will you accept these ideas and act accordingly?”