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"Islam, Democratic Constitutionalism, and the Problem of Pluralism"

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An inherent tension exists between the idea of a religious conception of political legitimacy and one grounded in a notion of democratic constitutionalism. Religious legitimacy, at least for theistic religions like Islam, rests in subject assent to a particular revealed truth, e.g., the oneness of God and that Muḥammad is His prophet. Constitutionalism, on the other hand, rests in the notion of a shared agreement, either actual or constructive, among persons living in a particular area, to subject themselves to a certain regime of rules. One might understand modern liberalism's solution to this problem as follows: constitutionalism, and the order it constitutes and sustains, represents a neutral realm of secular justice that is a precondition for the maximum amount of equal human flourishing, which includes withdrawing from the regulation of those areas of life necessary for an individual to express his religious commitments in a fashion consistent with the equal liberties of other citizens. This model of the relationship of religion to the public order assumes that religion has no particular conception of the public order, or that if it does, it is satisfied by the separation of life into these two different spheres, one public and political, and the other private and devotional, or potentially so.

The traditional conception of Islamic public order, on the other hand, does not understand the public order as being self-constituted or being constituted by a conception of the public other than Islam's own criterion of public order. That, at a minimum, seems to be the implication of the idea that establishment of the caliphate is a collective religious obligation. And while many writers have dismissed the idea of an Islamic constitutional law, careful reading of various doctrines of Sunnī positive law, including, but not limited to the works on the caliphate of al-Māwardī and others, specialized treatises on adjudication, and, numerous works of positive law, disclose the existence of a substantial body of constitutional law, meaning, laws that create a distinctive conception of a public domain characterized by its own rules that establish the grounds of public

order's legitimacy, the rules governing its operation and the remedies appropriate to violations of its rules.

The basic ideal that animates pre-modern Sunnī constitutional law is that of a fiduciary relationship between the ruler and the ruled. This fiduciary relationship is best understood as a unique kind of agency relationship, pursuant to which the ruler, whether called caliph, imam, *wālī*, *qāḍī*, *ḥākim*, or *sulṭān*, was deemed at law to be the representative of the ruled, and accordingly, the legal validity of all his actions was determined from the perspective of this imagined relationship of agency: acts that fell outside of the scope of this agency relationship were void for want of authority – *ultra vires* in the words of the common law – and thus of no legal effect, while acts that fell within the scope of the agency relationship were valid and thus legally binding. The explicit theory of agency undergirding the Sunnī theory of public order is found in al-Māwardī's discussion of the caliphate, where he explicitly uses the language of delegation, *tafwīḍ*, to explain the origination of the public order. The agency relationship in turn explains various prerogatives of public officials as well as limits on their powers, including, the general rule of sovereign immunity; the limitation of his powers to matters falling within the public good; the requirement that he act only for the public benefit; that his actions satisfy certain standards of public rationality; the invalidity of commands compliance with which would entail commission of sin; and, that he insure that certain substantive goods, e.g., establishment of public worship, in accordance with their legal requirements, are achieved.

But, to speak of public officials as agents requires identification of a principal on whose behalf they act, and in respect of whose interests one can judge the rationality of their actions. For pre-modern Muslim jurists, this principal was the Muslim community, *jamāʿat al-muslimīn* or *ʿāmmat al-muslimīn*. When I say "the Muslim community," however, what I mean is that the jurists were not talking about the empirical reality of a particular historical community of Muslims living in a particular time or place; rather, they intended by their references to this idea the notion of an *ideally* constituted Muslim community that is properly motivated by the ideals of Islamic law, one that observes the limitations of the law, and fulfills its obligations. This ideal conception of the community, therefore, contemplates both a conception of freedom, but also imposes limits, negative and positive, on the public order: the public order must prohibit certain kinds of unlawful acts just as it must also permit and in some cases facilitate the performance of certain affirmative obligations, such as performance of Friday congregational prayers, establish a public calendar so that calendar dependent rituals may be observed, such as Ramadan and the Hajj, organize the annual pilgrimage, etc. The moral substance of the principal in turn gave coherence to the entire body of public law and its approach to the regulation of the conduct of public officials, including, crucially, authorizing their public rule-making powers while at the same time subjecting those powers to substantive and procedural limitations.

Accordingly, it is not true, as is commonly asserted, that Sunnī jurists did not develop a system of constitutional law, or that if they did, it was little more than a notion of might equals right. They certainly articulated an ideal of legal governance rooted in the fiduciary relationship of agency

which gave politics moral and practical content that was neither lawless nor utopian, at least in the sense that it did not make wildly unrealistic assumptions about human capacities to live up to the applicable legal standards.

The existence of a Sunnī constitutional law is crucial for formulating a contemporary theory of Islamic citizenship insofar as it affirms the notion that at least *some* conceptions of public order are not morally problematic for a committed Muslim. On the other hand, it suggests that the *only* kind of public order that is morally unproblematic is one whose content is derived entirely from substantive Islamic conceptions of the good. This of course raises the problem of pluralism and the possibility of equal citizenship for non-Muslims within an Islamic public order, or to put it differently, is it possible to conceive of a public order that is, at the same time, lawful from the internal perspective of Islamic law *and* recognizes the equal citizenship of non-Muslims?

Pre-modern Islamic law conceived of non-Muslims' participation in an Islamic public order via the mechanism of the contract, in particular, the contract of protection. Even under the most expansive conception of this contract, however, non-Muslims could never hope for more than the equality which a legal resident could hope for: equality in civil rights and obligations, but exclusion from political rights, and especially political offices. Because the domain of freedom was constituted by reference to Islamic ideals, non-Islamic conceptions of the good were not admissible in determining the boundaries of acceptable ways of life. In short, while pluralism certainly existed, it was a pluralism bounded by Islamic conceptions of toleration, and the Islamic limits thereon. It is hard to imagine, for example, that an Islamic public order could conceivably tolerate Mormonism, or any other religion claiming to have originated in revelation after the death of the Prophet Muḥammad, to say nothing of tolerating open atheism.

On the other hand, and in light of the waves of Muslim migration post-World War II to numerous states in the liberal west, and the successful decolonization of most of the Muslim world, Muslim jurists in the 20th and 21st centuries have attempted to narrow the moral difference between Muslim states and non-Muslim states, albeit in a hesitant, ad hoc and unsystematic manner. The most important theoretical development in this respect has been the concept of *fiqh al-aqalliyyāt*, the jurisprudence of minorities. Originating in theories of expediency (*ḍarūra*), and designed to ensure that Muslim minorities living in liberal democracies could continue to observe the shariʿa in a minimally acceptable fashion, it has developed to provide principled arguments for an Islamic conception of citizenship based on equality with non-Muslims. Of course, the notion of *fiqh al-aqalliyyāt* had its pre-modern antecedents in juristic discussions of the conditions pursuant to which it was permissible for a Muslim to sojourn to non-Islamic lands or to live there permanently. In the pre-modern era, jurists largely accepted the permissibility of Muslims living under non-Muslim rule provided that Muslims had a fair opportunity to practice their faith, even if they could not do so fully, and even if they did not enjoy full political equality.

The conditions of liberal citizenship are both more promising for Muslims, from one perspective, and more threatening, from another. Liberal citizenship promises Muslims equal rights, and accordingly, from that perspective, promises them greater freedom and opportunities in a liberal

state than would have been possible in a pre-modern non-Muslim Christian state, for example. On the other hand, liberal commitments to equality undermine the pre-modern Muslim ideal that Muslims living under non-Muslim rule would enjoy a degree of autonomy and segregation from the non-Muslim population that would be sufficiently robust as to allow them to resist assimilation and apply much of Islamic law, particularly, Islamic family law, to their internal disputes. Indeed, we see the vestiges of such a conception of Muslim minorities in many states where Muslims live today as minorities, but are allowed, pursuant to the jurisdiction's constitution, to enjoy limited legal autonomy, particularly, in the area of family law. In liberal jurisdictions, however, Muslim immigrant communities do not enjoy legal autonomy, and accordingly, must fend for themselves in upholding the standards of Islamic law, even in the area of family law.

On what basis, then, did Muslim jurists in the 20th and 21st centuries justify Muslim residence in liberal democracies, even though they could not conceivably enjoy the autonomy over their own affairs that pre-modern jurists had assumed was a condition precedent to their continued residence under a non-Muslim regime? The most fundamental issue facing Muslim jurists was that of loyalty – *walā'* – to the non-Islamic state. It was settled doctrine in the pre-modern period that a Muslim could not give *walā'* to a non-Islamic state, and that doing so was a virtual repudiation of Islam. On the other hand, in the pre-modern period, states were not democratic, and many in fact were organized around adherence to a specific religion, e.g. Catholicism, or after the Reformation, a national church, e.g. The Church of England.[1]

Given this reality, it is easy to understand why Muslim jurists would conclude that a Muslim who pledged loyalty to such a state necessarily repudiated Islam. But should this rule apply to a democratic state which makes no *religious* demands on its citizens, in the sense that it does not require its citizens to profess one faith or any faith at all? Accordingly, and unlike the case of Hapsburg Spain, for example, Muslims could become citizens and retain their adherence to Islam, at least in a *prima facie* sense. The pre-modern discourse, however, was concerned with more than just the ability to maintain the name of Islam; it also was desirous of protecting the dignity (*'izza*) of Muslims and Islam, and was concerned that by living in a non-Islamic state, a Muslim would subject himself to humiliation (*dhull*) because the legal system of the non-Islamic state would not protect his dignity. Finally, there was the concern that by living under the protection of a non-Islamic state, a Muslim would become subject to the "rules of infidelity" (*aḥkām al-kufr*), something that would entail both humiliation and injustice.

Muslim jurists writing in the field of *fiqh al-aqalliyyāt* analyzed these two questions from three perspectives: the first was the purpose (*al-maqṣūd*) of the various rules of Islamic substantive law which either prohibited or discouraged residence in non-Islamic states; the second was the nature of the kinds of claims democratic states can legitimately make upon Muslims; and, the third was whether a Muslim could accept those obligations consistently with his Islamic commitments.

[1] See generally, Andrew March, "Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies," 101,2 *American Political Science Review*, pp. 235-252 (2007).

Starting with the first question, that of *walā'*, Muslim jurists developed a distinction between *walā'* as a political concept and *walā'* as a religious one. They argued that what Islam prohibits is expressing loyalty to falsehood.[2] Accordingly, a Muslim could not have loyalty to a Catholic State any more than he could have loyalty to the Roman Catholic Church, because in both cases he would be endorsing falsehood. Democratic constitutions, however, do not require loyalty in this sense. Rather than requiring loyalty to a specific religious doctrine, citizenship requires loyalty to a set of principles that are accepted as just and which form the basis of the state's legal system, most notably, its constitution. This kind of loyalty is acceptable because it does not contradict loyalty to Islam as a religious doctrine. In other words, loyalty to a system of law that is not derived from a false metaphysical doctrine but is instead limited to just principles of law does not require Muslims to reject their belief in Islam or their continued religious solidarity with the Muslim community and accordingly is consistent with Islamic commitments. So too the kind of love and affection that arises between Muslims and non-Muslims living together in a just society is also permitted because it is love and affection that is civic in nature and born of mutual cooperation for one another's welfare; it does not require or imply acceptance or recognition of the legitimacy of whatever false views non-Muslims hold about God.[3] The terms of democratic citizenship, however, do far more than simply allow Muslims to be citizens without renouncing Islam. The inherent limits of legislation in a democratic state ensure that Muslims, at a minimum, will be permitted to fulfill certain fundamental Islamic obligations, specifically, the open fulfillment of the most fundamental ritual obligations of Islam (*al-sha'ā'ir*) as well as open teaching of Islamic doctrines to both Muslims and non-Muslims (*da'wa*).

Norms of democratic legitimacy also protect Muslim dignity insofar as they can be assured that they will not be singled out for a set of specific norms intended to stigmatize them as separate from, and as less worthy than other non-Muslim citizens. Finally, democratic legislation does not result in Muslims' submission to *aḥkām al-kufr* because the rules governing a democratic state are the product of the deliberative assemblies of the citizens who apply their collective reasoning as citizens to questions of the public good, not questions of religious belief. Such assemblies therefore are not the equivalent of an ecclesiastical council promulgating rules for their followers pursuant to false religious doctrine. In other words, because democratic citizenship does not make claims on a Muslim that require him to repudiate Islam, whether explicitly or implicitly, pledging loyalty to a democratic state as embodied in the terms of democratic citizenship does not constitute a repudiation of Islam in a way that pledging loyalty to a Catholic regime or a Communist regime, for example, might.

Significantly, the jurists who developed *fiqh al-aqalliyyāt* assume, implicitly at least, the existence of a certain kind of justice that can be derived from rational deliberation and is thus independent of religious premises. This assumption is implicit in the justification of democratic politics as a legitimate kind of lawmaking in contrast to false claims of other religions which claim an ability to disclose the will of God to human beings, e.g., the Catholic Church. Yūsuf al-Qaraḍāwī, for

[2] Id. at 249.

[3] Id. at 250.

instance, refers to such a non-sectarian conception of justice in a fatwa which he explains how it is possible for Muslims to engage in *political co-operation* with non-Muslims despite the fact that non-Muslims entertain false beliefs about God.[4] Al-Qaradawi gives many reasons, some of which amount to explaining why difference in belief does not constitute an obstacle as such to political cooperation, but he also explains that it is the Muslims' love of justice (*qisṭ*) which motivates them to cooperate productively with non-Muslims, despite the latter's adherence to false doctrines.[5]

The significance of these arguments is that they go beyond narrow utilitarian-based justifications for Muslim citizenship in non-Islamic (but democratic) states. A utilitarian argument would run along the lines of the following: it is distasteful or even prohibited for Muslims to accept citizenship in a democratic state because it requires them not only to tolerate a non-Islamic state, but also to support it actively. Nevertheless, these harms are outweighed by the benefits accruing to Muslims from living in a democratic state, at least until such time as Muslims are present there in large enough numbers that would allow them to Islamize the host regimes' legal systems more thoroughly so as to make them more systematically compatible to Islamic substantive law. In other words, the kinds of justifications recently articulated by Muslim jurists in connection with the concept of *fiqh al-aqalliyyāt* go well beyond a justification that rests on a conception of necessity that is, at least conceptually, only temporary and will be revised once the circumstances giving rise to the necessity (the minority condition) are resolved, i.e. Muslims become a majority of the population or otherwise obtain political power.

If democratic states fulfill a certain moral ideal of political society that is compatible with Islamic commitments, the question arises as to whether the justifications for Islamic endorsement of democratic citizenship set out in the *fiqh al-aqalliyyāt* discourse are not applicable to states with Muslim majorities? While Muslim states, as a matter of their national legal systems, have made much progress in creating legal systems based on equal citizenship, they can still be criticized for retaining substantial elements of sectarianism in their legal systems that are substantially inconsistent with the democratic ideal of *equal* citizenship.

Another way to understand this point is that the concept of equal citizenship requires a positive conception of toleration, not simply a negative one. While pre-modern Islamic law accepted a negative concept of toleration, meaning that it would allow non-Muslims to preserve many aspects of their ways of life even though Muslims believed them to be erroneous, Islamic law did not permit non-Islamic conceptions to have a role in formulating the laws of the Islamic state, even if they received equal benefit of the laws once formulated. They could be protected by the laws, but not its authors.

The political marginalization of non-Muslims eventually led to severe problems in historical Islamic states such as the Ottoman Empire, most prominently in the form of a sectarian consciousness that allowed outside powers to manipulate one group against another to further their

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4 Yūsuf al-Qaraḍāwī, 3 *Fatāwā Muʿāṣira* (Beirut: al-Maktab al-Islami, 2003), pp. 189-191.

5 Id.

own imperialist interests, even leading to extension of the infamous capitulations to non-Muslims who were nominally citizens of Islamic states.[6] For this reason, one of the main objects of legal reform in the Ottoman Empire was to create a more unified legal system that would be in greater conformity with the ideal of equal citizenship in the hope of creating national solidarity that transcended sectarian affiliation.

While the political reforms of the 19th and 20th century were often driven by practical necessity, a more systematic approach to this problem of reconciling Islamic commitments to justice with a non-sectarian conception of justice was one of the driving factors behind the new Egyptian civil code. According to ʻAbd al-Razzāq al-Sanhūrī, Egypt could not be genuinely independent unless its legal system had an organic tie to its indigenous legal system, i.e. the Sharīʻa. At the same time, however, its legal system had to be modern and thus required a recasting of the substantive values of historical Islamic law that would make them workable for the needs of a modern Islamic state. Significantly, ʻAbd al-Razzāq believed that non-Muslim jurists were equally competent in working out the details of a modernized Islamic civil code. This was because, in al-Sanhūrī's opinion, Islamic law was a universal legal system that had to be able to justify its rules to both Muslims and non-Muslims.[7]

Its rules regarding the interactions of citizens, however, had to be revised to make them compatible with modern life, both substantively, and in terms of their justifications. One of the methodological innovations Sanhūrī introduced in his attempt to develop a modern Islamic law code was the principle that, because Islamic law is universally valid, it was capable of adopting any principle of law that was not repugnant to its fundamental commitments. This principled accommodation of non-Muslims in the juristic project of a modern Islamic code is reminiscent of justifications offered by Muslim jurists as to why Muslims can accept the terms of democratic citizenship in good faith: because democratic commitments do not require Muslims to affirm articles of faith, for example, that are repugnant to Islam, its results are substantially equivalent to Islamic conceptions of justice. Sanhūrī's desire to include non-Muslims in his project of a renewed and modernized Islamic legal system, however, was also in his view good practical politics. He recognized the danger to national independence that alienated religious minorities posed, and accordingly, he believed that those elements within the Egyptian religious establishment who opposed full integration of the Copts into the structure of the Egyptian state were just as dangerous

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6 Fadel, *supra* note **Error! Bookmark not defined.** at ¶ 35 and ¶¶ 41-43.

7 For more on Sanhūrī and his contributions to modern Islamic law, see Enid Hil, "The Place and Significance of Islamic Law in the Life and Work of ʿAbd al-Razzāq al-Sanhūrī, Egyptian Jurist and Scholar", Parts I and II, 3,1 *Arab Law Quarterly* (1988), pp. 33-64 and 3,2 *Arab Law Quarterly* (1988), pp. 182-218 and ʿAmr Shalakany, "Between Identity and Distribution: Sanhūrī, Genealogy and the Will to Islamise, 8,2 *Islamic Law and Society*, pp. 201-244 (2001).

to the future of Islam as those Egyptian intellectuals who had become secularists in the mold of Kamal Attaturk.[8]

So, the question naturally arises: if it is permissible to argue that the fundamental goals of Islam are met in a democratic society, why should democratic constitutions be limited to non-Muslim states? Isn't it the case that if Muslim-majority countries adopted legal orders that satisfied standards of liberal democratic legitimacy that such polities would be equally capable to satisfy the requirements of Islam for a just order, if not more so? This is precisely the case I hope to make in the concluding part of this lecture.

The first step in making this case is to make the case that the distinction between the obligations of Muslims in a minority context and when they are in a majority context ought not to be relevant from the perspective of what Islam deems to be the minimum conditions required for a state to earn the political loyalty of Muslims. As Wahba al-Zuḥaylī argued in his book *Islam and International Law*,[9] the world has become the equivalent of one territorial jurisdiction (*dār*). This is a result of the fact that contemporary international law guarantees the most valuable rights in the eyes of Islam – namely, the right to preach Islam peacefully without active opposition by governments who are to take an officially neutral position vis-à-vis Islam. Moreover, peaceful relations among states, religious freedom, the self-determination of peoples and the prohibition against aggressive war have become effective international norms. The fact that the world is one unified jurisdiction ought to entail the universalization of public law norms. Accordingly, what ought to be significant is not numbers of Muslims relative to non-Muslims, but whether the legal order of the state itself guarantees the security of Muslims and guarantees their ability to practice, teach and call to Islam. Once those conditions are satisfied, Muslims are *Islamically* bound to maintain their ties of loyalty to that state even if they gain numbers and thus become politically more powerful.

The nature of law in democratic societies also ought to be decisive here rather than the underlying religious composition of the populace. All legal officials in a democracy, Muslim or non-Muslim, are bound to enforce law fairly without regard to religion; moreover, that law is the product of their collective deliberation and not religious reasoning. Such an official, whether he is a Christian, Jew, Hindu, Buddhist or atheist, is bound to apply this body of democratic law and is not permitted to apply his or her own religious conception of what is true or right. If such an official did so, it would constitute an *abuse* of power for which the law would provide a remedy. In short, a democratic state provides protections against the threat that non-Muslims would use their political power to discriminate against, dominate, or persecute Muslims. If that fact can be relied upon to legitimate Muslims' residence in democratic states in which they are the minority, it applies *a fortiori*

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[8] See, for example, Nādiya al-Sanhūrī and Tawfīq al-Shāwī, *al-Sanhūrī min Khilāl Awrāqihi al-Shakhṣiyya* (Cairo: Dār al-Shurūq, 2002), pp. 134-135 and pp. 150-151.

[9] Wahba al-Zuḥaylī, *al-'Alāqāt al-Duwaliyya fi al-Islām: Muqarana bi-l-Qanūn al-Dawlī al-Ḥadīth* (Beirut: Mu'assasat al-Risāla, 1981).

to states where Muslims are the majority. In short, if we accept the premise that democratic political life is sufficient to protect the interests of Islam and Muslims where they are a minority, then *a fortiori* it is sufficient to protect them in circumstances where they constitute the majority. In this latter situation they are even in less need of special privileges from the state to maintain the health of the Muslim community, teach Islamic doctrines, and call others to it. Just as Muslim jurists tackled the problem of Muslim minorities in liberal democracies creatively, it is time for Muslim jurists in Muslim-majority countries, particularly in the post-authoritarian context of the Arab Spring, to reconsider basic concepts of Islamic political thought to make adapt them to a deeper form of pluralism than historically had been the case.