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Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism

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Abstract

In this article, the author examines two considerations that are critical to a full and meaningful assessment of the degree to which Islam, and Islamic law in particular, can find authentic expressions of themselves under what may reasonably be considered a democratic form of government. The first of these has to do with the scope of Islamic law, or more properly, the scope of the interpretive authority of Muslim jurists, and whether a State that is governed by Shari'ah must necessarily give priority to the views of religious scholars over those of all others in every aspect of life. Does establishing speed limits, formulating economic policy, or setting standards for medical licensing all fall under the legal authority of the jurists? If not, is there any basis other than political fiat upon which the scope of this jurisdiction might be defined? The second consideration is connected to the question of whether in contemplating the relationship between Islam and democracy, we have not conflated the framework within which modern democracy is packaged, namely the Nation-State (and some would insist on adding capitalism), with the spirit and essence of democratic rule. If we could imagine a State structure whose integrity was not equated with the ability to exercise an absolute monopoly over law-making and the concomitant imposition of a uniform standard of conduct on all of its citizens, would the idea of Islamic democracy present as many apparent difficulties as it presently does? The author's objective is to add a dimension to the discussion on Islam and democracy that will render future assessments and proposals more nuanced and circumspect.

SHARI‘AH, DEMOCRACY, AND THE MODERN NATION-STATE: SOME REFLECTIONS ON ISLAM, POPULAR RULE, AND PLURALISM

*Sherman A. Jackson**

INTRODUCTION¹

In his thought-provoking book, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY*, Professor Noah Feldman maps out a myriad of possibilities for what he terms an “Islamic democracy.”² While most observers proceed on the notion that an Islamic State, and thus the necessary starting point for any Islamic democracy, is a Nation-State that is governed by Islamic law, or Shari‘ah, Feldman points out that among Muslims, the centrality of Shari‘ah to a State’s “Islamicity” ranges from absolute to non-existent. This is important inasmuch as it establishes the possibility of alternatives to what Feldman terms the “Islamist State,” which is a State that is governed solely on the basis of Shari‘ah. In Feldman’s view, Islam is not an insurmountable impediment to the implementation of democracy; it is only Islamist interpretations of Islam that pose this threat.³ This is because Shari‘ah, the Islamists’ *sine qua non* of legitimate government, cannot accommodate, according to Feldman, such basic principles as equality, liberty, and popular rule, not to mention running a modern economy.⁴

Feldman does an enviable job of highlighting the many biases, exaggerations, and misunderstandings that preempt the possibility of even thinking about Islam and democracy in the same breath. At least two additional considerations, however, are critical to a full and meaningful assessment of the degree to

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1. My treatment of Islamic law is applicable only to the Sunni tradition. Certain distinctive features of the Shiite tradition render major aspects of my treatment inapplicable to Shiite law and jurisprudence.

2. NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003).

3. *See id.* at 6-25, 51-61, *passim*.

4. *See id.*

which Islam, and Islamic law in particular, can find authentic expressions of themselves under what may reasonably be considered a democratic form of government. The first of these has to do with the scope of Islamic law, or more properly, the scope of the interpretive authority of Muslim jurists, and whether a State that is governed by Shari'ah must necessarily give priority to the views of religious scholars over those of all others in every aspect of life. Does establishing speed limits, formulating economic policy, or setting standards for medical licensing all fall under the legal authority of the jurists? If not, is there any basis other than political fiat upon which the scope of this jurisdiction might be defined? The second consideration is connected to the question of whether in contemplating the relationship between Islam and democracy, we have not conflated the *framework* within which modern democracy is packaged, namely the Nation-State (and some would insist on adding capitalism), with the *spirit and essence* of democratic rule.⁵ If we could imagine a State structure whose integrity was not equated with the ability to exercise an absolute monopoly over law-making and the concomitant imposition of a uniform standard of conduct on all of its citizens, would the idea of Islamic democracy present as many apparent difficulties as it presently does?⁶ In exploring these questions, my primary aim is not to impugn the conclusions of Professor Feldman, though it will become clear that I think his suggestion that Shari'ah cannot accommodate the essentials of democracy is premature. My objective is simply to add a dimension to the

5. For a prominent example of this conflation, see FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992), where he argues essentially that the end of the twentieth century has brought about the decisive triumph of capitalism and liberal democracy as economic and political ideals. This marks the "end of history" for Fukuyama, in that it represents the end of humanity's ideological evolution in its search for the optimal economic and political order. *See id.* While previous systems and ideologies contained fundamental flaws and inadequacies that rendered them temporary *modi vivendi*, Western capitalism and democracy have now emerged as the final form of human government, humanity's long awaited *terminus ad quem*. *See id.*

6. There are several areas where the United States, for example, appears to show itself willing to serve as a mere referee rather than an actual determiner of rights, and where it also appears to recognize that different groups and individuals might have different rights and obligations substantively. For example, the bylaws and rules of private clubs and professional organizations are enforced without having come into existence through the institution of the State, and despite the fact that non-members fall beyond the reach of such benefits, obligations, or rights.

discussion on Islam and democracy that will render future assessments and proposals more nuanced and circumspect.

I. *UPDATING ISLAMIC LAW, LEGALLY AND NON-LEGALLY*

The idea that traditional Islamic law⁷ is inadequate as a basis for modern government is grounded, *inter alia*, in the notion that this law is anchored to a medieval vision of society that is woefully out of step with modern realities and sensibilities. This idea is further exacerbated by Islamic law's purported rigidity that is said to have resulted from the "closing of the gates of independent interpretation," which allegedly took place in the third/ninth, fifth/eleventh, or according to some, seventh/thirteenth century. This cessation of independent interpretation, or *ijtihad* as it is called, and the concomitant institutionalization of *taqlid*, or blind following, as it is most commonly referred to, has led modern observers, Muslim and non-Muslim alike, to the conclusion that Shari'ah is doggedly impervious to change. As one noted scholar put it: "[i]n practical terms . . . any legal work composed between 800CE and 1800CE may be cited as evidence of classical doctrine."⁸ This perception, along with the failure of modern Muslim jurists to respond effectively to any number of issues — from taxation and trading in futures to the admissibility of circumstantial evidence — has given rise to the ubiquitous call for a reopening of the gates of *ijtihad*. The assumption here is that, through fresh and innovative interpretation, the dissonance between Shari'ah and modern reality could be easily, or perhaps not so easily, overcome. Moreover, many insist, such reform would be most effectively realized through a democratization of the enterprise of legal interpretation itself, according to which the classically trained jurists would relinquish their monopoly over the authority to interpret Islamic law.⁹

7. Substantively, Islamic law is divided into two main branches: 1) *'ibadat*, i.e., "religious observances," such as fasting, pilgrimage, prayer and the like; and 2) *mu'amalat*, i.e., civil transactions, criminal sanctions and the like. My comments about Islamic law in this Article are restricted exclusively to the second branch, i.e., the *mu'amalat*.

8. Wael Hallaq, *Usul al-Fiqh: Beyond Tradition*, 3 J. ISLAMIC STUD. 172, 176 (1992) (citing PATRICIA CRONE, *ROMAN, PROVINCIAL AND ISLAMIC LAW: THE ORIGINS OF THE ISLAMIC PATRONATE* (1987)).

9. On this point, see M.A. Muqtedar Khan, *The Priority of Politics: A Response to "Islam and the Challenge of Democracy,"* BOSTON REV., Apr./May 2003, available at <http://bostonreview.net/BR28.2/khan.html> (responding to Khaled Abou El Fadl, *Islam and the*

As I have argued elsewhere,¹⁰ such a perception is deeply indebted to the tendency to approach Islamic law from the perspective of anthropology, philosophy, or science as opposed to that of law.¹¹ The centrality of precedent, the stature of dead jurists, the privileging of provenance over substance, and the fact that jurists sometimes settle on bad law have all been assessed as defects that underscore the inherent inferiority of the Islamic religion, the imperviousness of Muslim jurists to such principles as efficiency or justice, or the plain old cognitive limitations of the Semitic mind. Ignored in all of this has been the fact that, from the perspective of participants *within* a legal tradition, “[i]t is not Wisdom, but Authority that makes a Law,”¹² and, “[w]hen an issue arises, whether in theory or in practice . . . lawyers habitually seek [not philosophical or scientific or even social norms but rather] authority.”¹³ In other words, inasmuch as authority rather than substance is the force that backs law, all legal traditions tend to be backward-looking and to privilege provenance over content.¹⁴ From this perspective, the backward-looking tendencies in Islamic law are not an exception but the norm.

Related to the law’s backward-looking tendencies is the phenomenon of legal traditions disguising change and evolution.

Challenge of Democracy: Can individual rights and popular sovereignty take root in faith?, BOSTON REV., Apr./May 2003, available at <http://bostonreview.net/BR28.2/about.html>).

10. See, e.g., SHERMAN JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* (Ruud Peters & Bernard Weiss eds., 1996) [hereinafter *ISLAMIC LAW AND THE STATE*]; Sherman Jackson, *Taqlid, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: Mullaq and ‘Amm in the Jurisprudence of Shihab al-Din al-Qarafi*, 3 *ISLAMIC L. & SOC’Y* 165 (1996); Sherman Jackson, *Kramer Versus Kramer in a Tenth/Sixteenth Century Egyptian Court: Post-Formative Jurisprudence Between Exigency and Law*, 8 *ISLAMIC L. & SOC’Y* 27 (2001) [hereinafter *Kramer versus Kramer*].

11. One of the limitations built into the study of Islamic law in the West is that the majority of scholars of Islamic law are products of Area Studies programs and have little to no training in law as a discipline. Their training prompts them to explain Islamic law as a Middle Eastern phenomenon as opposed to a legal one, while their status as members of the ascending civilization (in which philosophy and science dominate, neither of which values precedent or authority) prompts them to see their subject in anthropological or philosophical terms. This invariably privileges innovation and change (usually construed as progress) over stasis and stability.

12. Gerald J. Postema, *Some Roots of Our Notion of Precedent*, in *PRECEDENT IN LAW* 11 (Laurence Goldstein ed., 1987) (citing THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAW* (J. Cropsey ed., University of Chicago Press 1971) (1681)).

13. ALAN WATSON, *THE EVOLUTION OF LAW* 117 (1985).

14. ALAN WATSON, *THE NATURE OF LAW* 95 (1977).

This preserves the immutability of the foundation documents, such as constitutions or scripture, and adds to the image of the founding figures as having proffered correct interpretations of these, which distinction transforms them into repositories of authority whose doctrines can definitively terminate disputes. Over time, the advantages of sustaining genetic links to these authorities give rise to the phenomenon of later jurists feigning consistency with their predecessors' doctrines, while consciously introducing changes of their own. In the most highly developed systems, this ability to effect change in the name of stability is often taken to signify the very definition of legal acumen. The legal historian Alan Watson has referred to this process as "legal scaffolding," according to which, rather than abandoning existing rules in favor of new interpretations of the sources, necessary adjustments are sought through the creation of new classifications, distinctions, divisions, exceptions, and the manipulation of the scope of standing rules.¹⁵ In this capacity, *taqlid*, as I have noted elsewhere,¹⁶ often turns out to be a far more complex, demanding, and sophisticated enterprise than *ijtihad*.

In the Western tradition, movements such as American Legal Realism and Critical Legal Studies have made careers of exposing the tendency of legal traditions to disguise change and conceal the real as opposed to the putative sources of legal doctrine. While no such movements have yet to appear in Islam, such an effort would prove equally revealing.¹⁷ For, far more than any absence of change, it has been the pre-modern Muslim jurists' acumen at disguising the latter that has sustained the image of Islamic law as a rigid, unchanging edifice. In this context, modern Muslim (and non-Muslim) observers often reveal themselves to be "victims" of the legal mastery of their medieval predecessors.¹⁸

Once Islamic law is viewed from the perspective of law and legal science, the appearance of stasis and the privileging of provenance over substance take on a different meaning. Unalloyed, *ijtihad* turns out to be far less effective as an instrument of

15. *Id.*

16. *See, e.g.,* ISLAMIC LAW AND THE STATE, *supra* note 10, at 93.

17. I hope to be able to complete a work in the near future tentatively entitled, *Towards an Islamic Legal Realism*.

18. For good examples of such disguised change in Islamic law, see *Kramer Versus Kramer*, *supra* note 10; *see also* ISLAMIC LAW AND THE STATE, *supra* note 10, at 96-102.

change. For without the advantage of a genetic link to pre-existing authorities, the results of *ijtihad* often lack the authority to command assent, just as the process of *ijtihad* itself lacks the power of self-authentication. This is why feminist, modernist, reformist, and even fundamentalist forms of independent interpretation tend to exert such little influence on the actual substance of Islamic law. Such efforts may exert an enormous impact in social, political, cultural, and other contexts, but little of this is reflected in the manuals of Islamic law.¹⁹

The upshot of all of this is that if Islamic law is to change to accommodate the *desiderata* of modern democracy, such change will almost have to be effected through legal as opposed to non-legal (not to be confused with illegal) means. Non-jurists may exert an indirect influence through their contributions to a public discourse that informs the sensibilities of the jurists. Muslim jurists, however, will undoubtedly exert the most direct influence. This means that, for better or worse, Muslim jurists will remain an inextricable element in the actual substance, formation, and legitimization of any Islamic democracy, both before and after the concept itself has been vindicated. This is why it is important to gain a firmer grasp of issues such as the law-fact dichotomy and the scope of the jurists' interpretive authority — issues that exercised many classical jurists but seem to have largely disappeared from modern discussions.

II. THE LAW-FACT DICHOTOMY AND THE SCOPE OF THE JURISTS' INTERPRETIVE AUTHORITY

If the jurists are to play an integral role in any modern Islamic State, democratic or other, what are the boundaries within which their views carry legal authority and outside of which they carry no authority at all? Similarly, if, as is commonly stated, Islamic law is unlimited in scope and recognizes no distinction between the sacred and the profane, does this mean that the juris-

19. One need only imagine the impact of feminist, fundamentalist, or reformist views being taken up and advocated by jurists (as has often proved to be the case). Recently, Shaykh Yusuf al-Qaradawi issued a *fatwa*, or legal opinion, in which he affirmed that it was permissible for women to work in the movie industry as actresses, as long as they observed certain principles of Islamic law. See *al-Mujtama'* No. 1319, at 44, 48; see also *al-Mujtama'* No. 1322, at 42-44. Whatever this opinion may have lacked in terms of whether it went far enough, no amount of advocacy from women's and other groups could have earned this position comparable recognition in Islamic law.

diction of those who interpret this law is equally unlimited? Or are there areas where the views of non-jurists would take precedence over those of the jurists?

As far back as the fourth/tenth century, Muslim jurisprudential writings reflect a burgeoning debate over what would effectively amount to a distinction between jurisdiction of law and jurisdiction of fact. The growing trend was to recognize that the jurist's authority accrued to him or her by virtue of his or her mastery of the sources of the law and the interpretive methodologies deemed sufficient to guarantee the plausible if not correct conclusions.²⁰ On this understanding, jurists were recognized as enjoying only jurisdiction of law. Only those opinions that were a result of their effort to deduce the strictly legal intent and meaning of scripture were clothed with authority. Jurists were not recognized, on the other hand, as enjoying any jurisdiction of fact. As such, their declarations that were not arrived at as a part of the activity of interpreting the *sources* were not deemed authoritative.

The early Maliki jurist, Ibn al-Qassar (d. 398/1008) provides a primitive example of this line of thinking.²¹ In treating the question of the propriety of following the views of the early authorities, Ibn al-Qassar states that it is not permissible to follow the jurists in their declarations regarding such things as the sun's actual decline from its meridian as a legal cause, or *sabab*, obligating the performance of the noon prayer. One may, and according to Ibn al-Qassar should, follow the jurists when they report that the sun's decline constitutes a legal cause. But one should not follow them when they say that the sun has actually declined. The distinction here is between law and fact.

A jurist determines the sun's decline to be a legal cause based on his interpretation of the sources of the law, i.e., the Qur'an and the Sunnah, or normative practice of the Prophet Muhammad. He determines the sun to have actually declined,

20. While it has long been recognized that women were an integral part of the Islamic legal tradition (as teachers, transmitters, etc.), the subject of female jurists in pre-modern Islam has to date been inadequately treated and still awaits serious study. For a few examples of female involvement, see Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L J. MIDDLE EAST STUD. 185 (1997).

21. See Ibn al-Qassar, *Al-Muqaddima fi usul al-fiqh [Introduction to Legal Theory]* (Beirut: Dar al-Gharb al-Islami 1996).

however, on the basis of his own physical observation. Because his mastery of scripture and interpretive methodology cannot guarantee the integrity of his sentient observations, the latter are not to be clothed with any authority. Rather, outside the area of scriptural interpretation, the views of those with specific expertise or experience, from medical doctors to seamen, take priority over those of the jurists.²²

Ibn al-Qassar's early articulations are informative but brief and somewhat crude. Discussions of the law-fact dichotomy reach a high point, however, in the writings of a later jurist, Shihab al-Din al-Qarafi (d. 684/1285). In several of his works, al-Qarafi takes up the problem of what he refers to as "improper *taqlid*." Unlike modern observers, al-Qarafi does not see a problem in *taqlid* itself, which in his understanding is more a species of *stare decisis* than an exercise in blind following. For him, the problem is, rather, that the jurists, and particularly the ancient authorities, are often followed in a fashion that reflects a basic failure to distinguish law from fact and to restrict the authority of the jurists to their pronouncements of law.

According to al-Qarafi, the function of a jurist is analogous to that of a translator who interprets the meaning of his patron's speech to those who do not understand the latter's language. The patron served by the jurist is God. Those translated to are lay Muslims who do not understand the more intricate aspects of God's speech. God's speech is of course revelation, understood here in the broad sense, which would include the practices and pronouncements of the Prophet Muhammad. Inasmuch as the function of the jurist *qua* jurist is to explicate the legal material in scripture, as opposed to the historical, theological or other, his jurisdiction is limited strictly to questions of law. In other words, his function is to determine such things as the degree of obligation implied in scriptural commands and prohibitions or whether a human action carries a particular ruling, or whether a natural occurrence or human action qualifies as a form of admissible evidence, impediment, legal cause, or prerequisite. This is in contrast to determining the actual *occurrence* of human and natural acts, even those that may carry direct legal implications. In al-Qarafi's words: "The jurisconsult does not give information about the *occurrence* of a legal cause, which activates a legal rule;

22. *Id.*

he gives information only on the *status* of a legal rule as a legal rule."²³

This distinction between law and fact, or between the status of entities and their actual occurrence, has far reaching implications both for the proper modality of *taqlid* and the scope of the jurists' interpretive authority. This distinction becomes obvious when we consider that much of what is recorded in the manuals of law and handed down on the authority of the masters, contains a mixture of strictly legal interpretations and assessments of facts to which these were intended to be applied. Al-Qarafi's point is that contemporary jurists must always be careful to separate these two aspects of legal doctrine and to strive constantly to deny extra-legal doctrines the authority of law. For, when this is not observed, the result is invariably a violation of the proper boundaries of *taqlid* and an inadmissible clothing of non-legal doctrine with the authority of law.

An example of how all of this applies in a modern context is the following. In *Bulghat al-salik*, a twelfth/eighteenth century Maliki manual still used at the al-Azhar seminary in Egypt today, under the provisions of implied warranties [*khiyar al-naqisah*], the maximum warranty-period on real estate is given as thirty-six days.²⁴ This thirty-six day allowance was not dictated by scripture, but rather was the result of Malik's assessment of how long a buyer should be given to inspect a property. In other words, this was not a strictly legal assertion, but what might be considered a para-legal one. As a para-legal assertion, it might be accepted and even acted upon. But it should not be granted the status of permanent unassailable law. Rather, regarding the factual question of how much time would be required to afford a buyer a reasonable opportunity to confirm the integrity of a property, the assessments of other experts whose specific knowledge was superior to Malik's could be brought forth to displace those of the latter.

As al-Qarafi had pointed out earlier, however, failure to distinguish law from fact was an endemic problem. In his words: "It

23. 1 AL-FURUQ, ANWAR AL-BURUQ FI ANWA' AL-FURUQ 11 (Beirut: 'Alam al-Kitab n.d.) [hereinafter 1 AL-FURUQ] (emphasis added).

24. See Mohammad Fadel, *The Social Logic Of Taqlid and the Rise of the Mukhtasar*, 3 ISLAMIC L. AND SOC'Y 193, 200 (1996) (discussing the distinct classes of Muslim jurists including the Maliki school).

is a pitfall into which many a jurist has fallen.”²⁵ True to this description, thirteenth/nineteenth century Egyptian jurists indiscriminately clinging to the dictates of medieval law books, led modern Egyptian authorities to the conclusion that the Islamic law of implied warranties provided inadequate protection in several areas, such as commercial buildings and public utilities. Ultimately, this would prompt them, in frustration, to take over from the French “*la garantie décennale*,” or ten-year warranty, which rendered contractors and constructors liable for a period of ten years after the completion of a project.²⁶

Again, this was all based on a fundamental failure to distinguish between law and fact, and to limit the authority of the law books to questions of law. Whether an act of sale generates a warranty is a question of law, resolved on the basis of scripture. But whether the warranty period should be five, ten, or thirty-six days is a para-legal question of fact, resolved on the basis of observation and experience. Moreover, and this is the crux of the matter, modern experience in this regard would be just as probative for moderns as the medieval experience had been for medieval observers. As such, based on the conclusions of modern observers, Islamic law could adopt ten, twenty, or more years as the warranty period, based on a modern assessment of what would be fair and reasonable. Furthermore, in setting this duration, it would be the conclusions of modern contractors, engineers, or insurance adjusters that were probative, not those of the modern jurist.²⁷

Another problem related to the enterprise of separating law from fact revolves around the issue of custom and its contribu-

25. AHMAD IBN IDRIS QARAFI, *AL-IHKAM FI TAMYIZ AL-FATAWA 'AN AL-AHKAM WA TASARUFAT AL-QADI WA AL-IMAM* 206 (Abu Ghuddah & Abd al-Fattah eds., 1967) [hereinafter TAMYIZ].

26. See Ian Edge, *The Development of Decennial Liability in Egypt*, in *ISLAMIC LAW AND JURISPRUDENCE* 161-75 (Nicholas Heer ed., 1990) (discussing the adoption of “*la garantie décennale*”).

27. *ISLAMIC LAW AND THE STATE*, *supra* note 10, at 133-39 (clarifying that while jurists have no jurisdiction of fact, this does not mean that all of their factual conclusions are worthless; it only means that these conclusions do not enjoy the status of binding unassailable law and that they are in no way superior to similar declarations by non-jurists). Similarly, an executive's actions that are based on factual determinations could be binding as law, as for example, where the State sets speed limits, but these are neither permanent nor unassailable, inasmuch as they do not recline upon scripture. *Id.*

tion to the law. The difficulties with custom are highlighted in the following question put to al-Qarafi:

What is the correct view concerning those rulings found in the school of al-Shafi'i, Malik and the rest that have been deduced on the basis of habits and customs prevailing at the time these scholars reached these conclusions? When these customs change and the practice comes to indicate the opposite of what it is used to, are the legal opinions recorded in the manuals of the jurisconsults rendered thereby defunct, it becoming incumbent [upon us] to issue opinions based on the new custom? Or is it to be said, "We are bound by precedent (*taqlid*). It is thus not our place to innovate new rulings, as we lack the qualifications to do so. We issue, therefore, opinions according to what we find in the books handed down on the authority of the masters."²⁸

Al-Qarafi's response was that a legal opinion or ruling remained valid only as long as the custom upon which it had been based remained intact and retained the same implications it had at the time of the original ruling: "Holding to rulings that have been deduced on the basis of custom, even after this custom has changed, is a violation of unanimous consensus (*ijma'*)²⁹ and an open display of ignorance of the religion."³⁰

Al-Qarafi provides a striking example of how the failure to apprehend properly the impact of custom on the declarations of the jurists could lead to gross misapplications of the law. In the famous *al-Mudawwanah* attributed to Malik, and compiled in the third/ninth century, if a man uttered to his wife such phrases as, "You are forbidden to me" ["*anti 'alayya haram*"], or "You are devoid [of obligation]" ["*anti khaliyah*"] or "You are exempt" ["*anti bariyah*"] or "I have given you to your family" ["*wahabtuki li ahliki*"], he enacted a triple, irrevocable divorce. On the basis of this entry, Maliki jurists in al-Qarafi's day, some four centuries later, declared that any time a man uttered these phrases to his wife he set in motion the same legal effects. Al-Qarafi protested that in seventh/thirteenth century Egypt these statements no longer carried their former meanings and that people now used them without the slightest idea that they carried any legal effect.

28. TAMYZ, *supra* note 25, at 231.

29. According to classical Sunni theory, unanimous consensus, or *ijma'*, was binding proof, the violation of which could theoretically result in excommunication.

30. TAMYZ, *supra* note 25, at 231.

It was thus wrong, he insisted, for contemporary jurists to impute any legal force to these words.

For al-Qarafi, the distinction was, again, between legal and factual. The idea that God had granted husbands the right to initiate divorce was a legal question resolved on the basis of scripture. But, neither God nor the Prophet had prescribed the actual formulae to be used when resorting to this right. Nor were the legal effects of the words that came to be used for this purpose intrinsic to them from the standpoint of language. Legal effect had only accrued to these words through customary practice, from pre-Islamic times down to the present. As such, determining whether these words had actually been converted from plain words into legal formulae was a para-legal question of fact resolved on the basis of observing local custom, not a legal question resolved on the basis of interpreting scripture or the entries in law manuals. As al-Qarafi explained:

A man's statement to his wife, "You are divorced," does not affect divorce according to the original meaning of these words. Rather, the original meaning of this expression is that of informing her that a divorce had occurred. As such, ordinarily speaking, these words would not legally bind him in any way. On the contrary, the effect of such a statement would be similar to what would occur were she to ask him about her status after a divorce had already occurred and he were to respond, "You are thrice divorced," informing her that divorce had taken place. This is the original effect of these words. And they have only come to acquire the ability to bring divorce into actual existence by the fact that custom has converted them from a mere assertion into a formula with legal effect. This is how all such formulae acquire their [legal] effect.³¹

Obviously, the decisive issue in all of this was determining if and when customary usage had actually transformed an ordinary phrase into a legal formula. This issue represents another dimension of the difficulties attending the enterprise of separating law from fact. In making such a determination, one must not look to the doctrines of ancient or contemporary jurists, but to the contemporary practice of the people on the ground. In this regard, it is neither proper nor sufficient to hold people to the

31. 1 AL-FURUQ, *supra* note 23, at 23.

legal effects of a statement simply because it has come to be understood as such among the jurists. As al-Qarafi pointed out:

It is not enough that a jurist believes that a particular expression has become customary [as a legally binding formula]. For a jurist's belief regarding what has become customary may stem from his specialized training, persistent study and disputation in the law. Rather, for an expression to become customary is for the common people of a particular locale to come to understand one thing only whenever they hear it, not from one of the jurists but from one of their own and according to *their* use of the expression for this purpose. It is this "becoming customary" that is sufficient to transform an ordinary expression into a legal formula by dint of custom.³²

This extensive quoting of this medieval jurist can only be justified by the clarity with which it demonstrates that Islamic law is not synonymous with the contents of classical law books, even on the assumption that the legal interpretations reflected therein are substantively correct. At the same time, it clearly demonstrates the possibility of reconciling the need for stasis with the need for change in Islamic law. Furthermore, this direct testimony from a classical jurist proves that even under an optimally operating Muslim polity, Muslim jurists are not the only authoritative voices to be heard, even on subjects that are connected to Islamic law. This has far-reaching implications for the relationship between Islam, Islamic democracy, and Islamic law.

First, not every opinion recorded in the authoritative manuals of classical Islamic law is necessarily binding in a modern context. On the contrary, there is always a need to separate what is factual from what is legal, and to restrict the authority of the law books and the jurists to the strictly legal domain. This opens the possibility, indeed the necessity, for significant change, even in areas where the legal deductions of the classical jurists are deemed to be correct. For example, classical doctrines regarding the role of non-Muslims in a Muslim government would invariably be informed by pre-modern jurists' understandings of the implications of this issue for the security, integrity, and perhaps even the image of the Muslim State. Given the anti-Muslim sentiments emanating from certain Christian and Jewish quarters,

32. TAMYZ, *supra* note 25, at 234.

even today, it is not unreasonable to assume that this was a reality in classical times. As such, there is nothing necessarily wrong about the discriminatory aspects of the classical law regarding the role of religious minorities in a Muslim government. (After all, U.S. law disqualifies persons born outside the United States from holding certain offices.) Equally valid, however, and this is the heart of the matter, might be a modern assessment that concludes that there is little to no threat posed by Jews and Christians serving in government. This would yield a set of rules that, on the one hand, differed from their classical antecedents, while, on the other hand, enjoyed an equal claim to authenticity on the basis of classical interpretive theory.

Second, there are numerous areas in which the views of the jurists would not be probative and in which those of experts and even non-specialists could justifiably determine the actual application of the law or government policy. The idea that the jurists would preside over the concrete substance of economic policy, the granting of medical licenses, or the setting of speed limits is simply misguided. Jurists may set the outer limits or basic parameters within which such laws and policies would have to be formulated. But they themselves would have no direct authority to set such policies.

Finally, the law/fact dichotomy impinges directly upon the Islamic version of the doctrine of the separation between church and State. Unlike Western law, Islamic law was not the creation of the early "Islamic State," but developed in conscious opposition to the latter through the efforts of private sub-state actors.³³ On this development, while the jurists would seek to guard their interpretive authority from any and all encroachments from the State, they would also cede to the latter the exclusive authority to apply the law so interpreted. In this context, the clarity of the boundary marking the preserve of the jurists also serves to highlight the proper limits of the State's authority and to mark the perimeters of its preserve.³⁴ This has obvious implications for any construct of an Islamic democracy and must be duly considered in any discussion of that topic.

33. See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1-5 (1964).

34. See ISLAMIC LAW AND THE STATE, *supra* note 10, at 185-224.

III. TAMING THE LEVIATHAN: TOWARD A TRUER PLURALISM

I turn now to the second of the two considerations raised at the outset, namely that of conflating the framework of modern democracy with its essence and spirit. Among the issues commonly raised in discussions of Islam and democracy is whether Islam can accommodate what are presented as the twin-values of equality and pluralism, particularly as these apply to religious minorities. It is rarely, if ever, asked whether these principles are really reconcilable with each other in the context of a State structure that insists on exercising an absolute monopoly over law making and the uniform assignment of rights and obligations across the board. If the State can vindicate its monopoly over the law by insisting that its law will be applied equally to all members of society, can this be relied upon to obscure or offset the fact that, while such laws may be consistent with the most deeply held beliefs of the dominant group, they may be fundamentally inconsistent with those of others? And in such a context, can the right to be treated equally with the dominant group, under the laws and values of the dominant group, conceal the advantages enjoyed by the dominant group, on the one hand, and the obliteration of laws and values that issue from sources outside its recognition, on the other?

Stephen L. Carter has recently given a vivid example in this regard.³⁵ Carter recalls a conversation with a leading evangelist who protested that Muslim inmates had no cause to complain because they enjoyed all the rights and privileges that Christian inmates have in prison. To this Carter responded, "No doubt they do. But they would prefer to have the rights they need as Muslims. The right to do everything that Christians are allowed to do is not the same as the right to follow God in their own way."³⁶

My point in all of this is that the perceived inability of Islam to accommodate equality and pluralism may be far more indebted to a particular construction of these principles than it is to any categorical incompatibility with them. Moreover, this particular construction of these principles may be far more in-

35. See STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* (2000).

36. *Id.* at 157-58.

debted to the presumption that an Islamic State, and thus any Islamic democracy, must pursue an absolute monopoly over law-making that results in a uniform set of rules equally applied than it is to any plain meaning of either equality or pluralism. Stated differently, if an Islamist democracy is to be couched in a framework that presumes, first, a uniform code of law, and second, that the only legally justiciable rights and obligations are those that issue from the State, how can this State avoid obliterating, in the name of equality, numerous rights and obligations that may not originate with the State, but are deeply held by sizeable segments of society? More concretely, how can an Islamic State that recognizes only one repository of law truly respect religious diversity without either violating the principle of equality or assuming a certain religious authority that it cannot or should not claim the right to assume?

For example, suppose that Egypt has become an Islamic democracy with a majority of Muslims and a minority of Coptic Christians.³⁷ According to all of the schools of Islamic law, divorce is permissible. But the unanimous consensus in Coptic Christianity is that divorce is prohibited. Based on the demographics, this Islamic State would recognize divorce. By extending this right equally to all citizens, however, it would run into a problem. If a Coptic woman petitioned for divorce, the State would grant it, based on the principle of equality. But this decision would put the State in the position of rivaling the religious authority of the Coptic Church, inasmuch as it implied that a Coptic woman could get a divorce, despite the traditional doctrine upheld in the Coptic Church. In this instance, the Coptic Church would have a rightful claim that the State was favoring the Muslims, since its actions violated the consensus of the Church but respected that of the Muslims. On the other hand, if the State refused to grant this divorce, the Coptic woman might protest that the State had violated the principle of equality because she was denied a right that others, namely Muslims, were routinely granted. In both instances, these claims against the State would obviously undermine the latter's legitimate

37. Scott Kent Brown II, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Nonstate Discrimination*, 2000 BYU L. REV. 1049, 1051 (2000) (tracing the origins of the Coptic Church in Egypt from A.D. 55 to A.D. 61).

claim that it was democratic.³⁸

This challenge to the State's claim to be democratic, however, either from the Coptic woman or the Coptic Church, would not revert to the State's claim to be egalitarian or pluralistic. This challenge would emerge, rather, out of the State's insistence that it must exercise an absolute monopoly over the identification and adjudication of all legal rights and obligations. As far as equality and pluralism are concerned, these values could be easily upheld by invoking an "equality of respect" for the diverse religions within its borders. This would serve both the function of treating Christians and Muslims equally and of avoiding the appearance of undermining the authority of the Coptic Church while respecting that of the Muslims. At the same time, it would effectively authorize the Muslim and Christian communities to define certain rights and obligations that were exclusive to Muslims and Christians, respectively. In other words, by recognizing sources of rights and obligations other than itself, the State could countenance some members of society enjoying rights and being bound by obligations that did not apply to others. And none of this would violate the principles of equality, pluralism or democracy.

Of course, even if the State did invoke an equality of respect that simultaneously recognized the consensus of the Muslim and Coptic communities, this would not necessarily satisfy the woman in question, since on this recognition she would still not be able to get a divorce. But, if her disgruntlement reached the point of becoming intolerable, she could opt out of the Coptic Church, at which time she would be able to avail herself of the right to divorce, without pitting the State against the religious authority of the Coptic Church.³⁹

Ultimately, the problem here is not the State's inability to commit itself to democratic principles. The problem is that democracy is being packaged in the presumptions and accoutrements of the modern Nation-State, which can recognize no other repositories of legal rights and obligations beyond itself.

38. I am indebted to Professor Bernard Freamon of Seton Hall University School of Law for this example.

39. Of course the issue of opting out of one's religious tradition raises the question of apostasy, especially when it comes to Muslims who wish to opt out. See M.H. KAMALI, *FREEDOM OF EXPRESSION IN ISLAM* 93-8 (1997) (stating a modern view that apostasy in general terms is not a capital offense under Islamic law).

On this understanding, the State is destined in any number of instances either to impose obligations or deny rights that violate the most deeply held beliefs and values of major groups in society. This has far-reaching implications for any discussion of Islamic democracy. For it is ultimately the presumption that an Islamic State would necessarily seek to impose Islamic law in this uniform fordizing fashion that raises the greatest fear and opposition among religious minorities, and promotes the kinds of doubts expressed by Feldman on the inability of "Islamist Islam" to accommodate the dictates of democracy.

In point of fact, however, even from the perspective of Shari'ah, an Islamic State need not proceed on the monopolizing and fordizing presumptions of the modern Nation-State. Outside the area of certain public policy concerns, there is no religious obligation to impose the laws and values of the Muslims on the entire society. Nor is the Islamic State unable to recognize that other communities derive their sense of rights and obligations from sources other than that of the Muslims. In fact, the pre-modern Muslim State offers clear precedents for the establishment of a political arrangement grounded in the principle of equality of respect that recognizes the right of non-Muslims to follow the dictates of their own religion.

To take one example, the eighth/fourteenth century Hanbalite jurist, Ibn Qayyim al-Jawziyah, takes up the question of how the Muslim authorities are to respond to certain practices deemed morally repugnant from the perspective of Islam but well-established within the traditions of various other religious communities in Muslim lands.⁴⁰ Among these practices was the Zoroastrian institution of self-marriage. In the Zoroastrian tradition, Zoroastrian men were encouraged to marry their mothers and sisters. The question taken up by Ibn Qayyim was whether the Muslim State should recognize or ban such marriages if they occurred.

In his response, Ibn Qayyim lays down a basic rule governing all such practices by non-Muslim minorities. He affirms that such practices are to be recognized under two conditions: 1) that the religious minorities who engage in them not present their case to a Muslim court; and 2) that these religious minori-

40. 1-3 AL'ARURI, *AHKAM AHL AL-DHIMMAH* [ORDINANCES GOVERNING NON-MUSLIM MINORITIES] (Y. al-Bakri & A.A. eds., Beirut: Dar Ibn Hazm 1997) (1418).

ties believe these practices to be permissible according to their own religious tradition. In the case of the Zoroastrian institution of self-marriage, Ibn Qayyim conceded that this had been a long-standing tradition in the Zoroastrian community. On this recognition, despite his own moral indignation, he insists that the Muslim State was not to intervene in any effort to ban such marriages.⁴¹

Ibn Qayyim was not, in any sense, a representative of what might be considered a liberal trend in pre-modern Islam. In fact, he was the star-pupil of the reputedly puritanical Ibn Taymiyah, whose views are often erroneously credited with providing the basis for the modern Wahhabi movement. Despite all of this, Ibn Qayyim did not deem the accommodation of these repugnant non-Muslim marriages to be an affront to the integrity or optimal operation of the Muslim State. This was because the pre-modern Muslim State — unlike the modern Islamic State which models itself on the modern Nation-State instead of its own pre-modern predecessor — did not equate the integrity of the State with either the exercise of an absolute monopoly over law-making or the ability to impose a uniform code of behavior on the entire society. Because of this, the pre-modern Muslim State bore the potential for the establishment of a true pluralism, where multiple sources of rights and obligations were recognized even as the State zealously guarded its status as final arbiter. In fact, far more than posing a problem for non-Muslims, whose independent source of rights and values provided a clear basis for difference, it was the heterogeneous Muslim community, with four schools of law and massive diversity within each school, that had the greater difficulty sustaining the right to dissent. Modern discussions of Islam and democracy seem to have largely ignored this dimension of the issue.⁴²

CONCLUSION

In these times, the relationship between Islam and democracy has come to constitute an issue of global concern. Feldman

41. See 2 AL'ARURI, *AHKAM AHL AL-DHIMMAH [ORDINANCES GOVERNING NON-MUSLIM MINORITIES]* 764-69 (Y. al-Bakri & A.A. eds., Beirut: Dar Ibn Hazm 1997) (1418) (providing an entire discussion on Muslim States positions on Zoroastrian marriage).

42. See generally *ISLAMIC LAW AND THE STATE*, *supra* note 10 (discussing the issue of pluralism in Muslim communities).

makes the important point that, as far as the Muslim world is concerned, the only democracy of any true value will be a democracy that can be fully embraced in good conscience by the broadest spectrum of Muslims. I have argued that in any such democracy, Islamic law, and thus Muslim jurists, will play an integral role. I have attempted to show, however, that contrary to popular belief, neither Islamic law nor Muslim jurists need to be viewed as enemies of democracy or harbingers of theocratic tyranny. On the other hand, the classical Nation-State need not be viewed as democracy's inseparable friend, with its monopolizing, fordizing tendencies, or "secular tyranny." Of course, the suggestion that democracy might be better served by a less centralized State will stretch the credulity of many. But even in the United States, there are those who believe that the only way out of the looming battle over gay marriages will be for the State to relinquish to the various religious communities the right to define or bless marriages, reserving for itself the role of referee in protecting the civil rights that accrue to unions so defined.⁴³ It may be, then, that the global discourse on democracy is not at all a one-way street from the West to Islam. And even if Muslims should decide to embrace democracy, and they may not, it is not clear that the Western model would be the best one to follow. Nor is it clear, in light of all that has been said, that Western democrats themselves have nothing to learn from Islam.

43. Still, beyond such arguments as those based on genetics, one can only wonder, assuming that gay marriages are allowed, how the United States will deal with Zoroastrian petitions for self-marriages.