ISLAM AND THE RULE OF LAW

BETWEEN SHARIA AND SECULARIZATION

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PREFACE

For the Konrad-Adenauer-Stiftung, strengthening and developing structures that support the rule of law is one of the most important objectives and elements of its global international cooperation. At the moment, we are running differentiated and regionally customised programmes on the rule of law in Latin America, Southeast Europe and sub-Saharan Africa as well as in East and Southeast Asia to promote functional legal systems that conform to the principles of the rule of law. Regular exchanges of experience and information serve to identify deficits in the rule of law and to analyse the need for corresponding reforms. At the same time, these exchanges serve to promote an understanding of the importance and functions of the rule of law, to consolidate respect for principles such as the separation of powers, the independence of the judiciary, human rights, the suppression of corruption and, not least, commitment to good governance.

Until now, our work on the rule of law included only a few Islamic countries, most prominent among these being Indonesia and Malaysia as well as a number of partly Islamic states. By elevating the discussion about the rule of law, which is highly sensitive in some respects, to the supranational level, we intend not only to provide more knowledge about the interaction between the rule of law, democracy and good governance to reform-oriented forces in many of these countries, but also to integrate these forces in regional and international discussion processes so as to strengthen them in their perception of their reform efforts.

In Islamic countries as well as elsewhere, the KAS aims to contribute sustainably to the development and consolidation of functional legal systems that conform to the principles of democracy and the rule of law. We plan to launch and/or intensify discussion processes about creating the constitutional basis for such developments. This includes creating or strengthening institutions that aim to safeguard the constitutional order and guarantee the enforceability of citizens'

rights. There are many Islamic countries where fundamental civic rights are enshrined in the constitution, although their implementation in real life leaves much to be desired because independent institutions are lacking. This is another respect in which we intend to intensify our endeavours and contribute constructively towards the formation of constitutional structures.

Now that our conference on "Islam and the Rule of Law" has met with such great interest and such an extraordinarily positive echo, many are left with the impression that our approach is a step in the right direction. The conference showed that the normative precept of "justice" enables us not only to enter a religious discourse but also to discuss principles of the rule of law in a secular sense. Moreover, it showed that it is possible to compare even Islamic countries with regard to the conditions and options of developing the rule of law. And lastly, a great many gradations appeared even in the highly controversial and tense relationship between religious and secular law.

I feel certain that the results of this meeting have the potential to inspire concepts and initiate political changes that is not confined to a particular space and time. In Islamic countries, the international work of the KAS is not restricted to observing political developments. Rather, it is our intention to contribute actively towards strengthening democratic processes in these countries as well as in their regional environment and to ensure that the people there can live their lives in freedom. This being so, we plan to initiate and promote dialogues and exchanges among the states of each region as well as between them and the political public in Germany. While it is true that this publication primarily focuses on international cooperation, I do believe that this discussion is of great interest and importance in Germany as well. The numerous differences within the Islamic world that are addressed in this volume throw fresh light on problems that are being debated in Germany. Quite probably, the shared interests that emerged will help us to improve our understanding of the concerns of Muslims in Germany.

To conclude, I should like to express my cordial gratitude to the *Zentrum Moderner Orient* (ZMO) in Berlin, with which we cooperated on planning and implementing this conference as well as on publishing its results in this volume. I feel confident that the articles in these proceedings not only contribute to a more differentiated discourse on the subject, but also

bear witness that we have given the political significance of the issue the attention it deserves.

Berlin, November 2007

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Deputy Secretary General
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INTRODUCTION

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In our modern Western society, state-organised legal systems normally draw a distinctive line that separates religion and the law. Conversely, there are a number of Islamic regional societies where religion and the laws are as closely interlinked and intertwined today as they were before the onset of the modern age. At the same time, the proportion in which religious law (*shariah* in Arabic) and public law (*qanun*) are blended varies from one country to the next. What is more, the status of Islam and consequently that of Islamic law differs as well. According to information provided by the *Organisation of the Islamic Conference* (*OIC*), there are currently 57 Islamic states worldwide, defined as countries in which Islam is the religion of (1) the state, (2) the majority of the population, or (3) a large minority. All this affects the development and the form of Islamic law.

THE SECULARISATION OF THE LEGAL ORDER IN AN ISLAMIC STATE AND IN THE CONSTITU-TIONAL STATES OF THE WEST

Regarding the religious and particularly Christian roots of the foundations of contemporary law in the West, we may say that the relationship between religion and the law was originally quite similar to that found in Islamic countries today, at least in those legal regimes of continental Europe

whose structure is governed by the rule of law today. However, as the concept of modern statehood evolved and the Enlightenment and science came to pervade legal thinking in Europe, legal structures were largely secularised, meaning that they were gradually divested of their religious and particularly Christian content. Nevertheless, public secular law has preserved certain relics and hidden underpinnings that can be understood only as references to the Christian religion. Occasionally, these references influence and even complicate the interpretation of substantive law. One case in which just such a historical reference is made is that of the preamble to the Basic Law of the Federal Republic of Germany, in which the makers of the constitution refer to their "responsibility before God and humankind" (called *invocatio dei*) although it is the constitution alone that, as a substantive code based on a political and legal decision, provides the ultimate rationale and the fundamental norm that serves as a source not only for deriving but also for substantiating and legitimising all further laws.

The meaning of secularisation is different in an Islamic state and in the Muslim world from that of a constitutional state of the Western kind. When one talks about secularity in Islam, the first country that normally comes to mind – at least from the German perspective – is Turkey with its population of well above 70 million, of which more than 90% are Muslims. But this overlooks that *Indonesia* is another important country of the Islamic world in which, despite the high proportion of Muslims in the total population, Islam is not the religion of the state and in which the official separation between the state and religion is seen as particularly strict. Its population of almost 240 million, composed of 88% Muslims, nearly 6% Protestants, 3% Catholics, and almost 2% Hindus, makes it the largest Muslim nation state on Earth today. Indonesia presents itself as the most populous democracy in the Islamic world, as Masykuri Abdillah's contribution documents. The very fact that Indonesia consists of 17,000 islands spread between the Indian Ocean and the Pacific already, geophysically, indicates an environment for pluralism, one might say.

On the other hand, Malaysia's population of 25 million incorporates not only 60% Muslims but also adherents of other religions in large numbers (about 20% Buddhists, 9% Christians, 6% Hindus, and almost 3% followers of traditional Chinese religions) as well as various ethnic groups (Malays, Chinese, Indians, etc.). What all these people need is an order

that is multi-ethnic as well as multi-religious. What they also need is a legal regime that should be not only as consistent as possible, but also capable of absorbing and regulating international and transnational problems relating to the legal order. It is quite another question what the various conceptions of the rule of law that are so virulent in the West can teach Islamic states, assuming that they want to learn from them in the first place. Not all the items on the shopping lists of Western political institutions are readily compatible with the globally established systems of Islamic law.

Today, the Earth is home to about 1.3 billion Muslims, of which almost *one in six* is an Indonesian, while at best *one in four* Muslims is an Arab (if we include all the states from Morocco in the west via the Arab peninsula to Syria and the Iraq in the east). At the same time, *one in three* Muslims lives in South Asia (India, Pakistan, Bangladesh). Although they are mere rough estimates, these figures clearly show that the Arab states are anything but representative of the present discourse about Islam as a world religion and the relationship between Islamic law and the secular states of the West. What is more, the global purview and remit of Islamic law that reflects the legal norms of the Shariah is much greater than what is commonly perceived by the public and the media in the West. Although the Shariah is generally regarded as *the* Islamic legal order, it does *not* correspond to the legal situation in Islamic countries. Thus, despite the postulated universal validity, there is a gap between the normative claims made about the Shariah and reality.

Ultimately, all states whose legal orders have a religious foundation or at least a theonomic background are confronted with the problem of legal secularisation. This also applies to legal cultures and political systems in the West whose foundations are at least derived from natural law or law of reason ("Vernunftrecht") that is Christian or Catholic in origin. However, it also applies to Europe's public-law regimes, which are undergoing a sweeping societal and legal transformation as legal systems grow more Europeanised, to say nothing of the globalisation of other legal matters such as commercial law and transnational law.

Given these conditions, the relationship between religion and the law is now subject to requirements that throw an entirely new light on the issue of law and justice in Islamic regional societies as well as in the largely secularised world of the West. This applies equally to modern Islamic and

to Western secular law. However, Western and continental European thinking on the rule of law and its credo of supposedly universal human rights and civil freedoms – no matter how these are understood substantively – still harbours, as contemporary studies document, remnants of Western political theology that make it difficult to conduct a fruitful dialogue between legal cultures. Enforced by modernity, the secularisation of all legal concepts regarding democracy and the rule of law, however defined, that is said to be progressing everywhere does not provide us with any cut-and-dried convenient solutions that merely have to be dished up to the needy nations. This is corroborated by the keynote speeches and presentations by representative speakers from the Islamic world that are compiled in this volume.

UNIVERSALISM OR PARTICULARISM IN ISLAMIC LAW?

Concerning the keynote presentations and statements in which representatives of various disciplines discussed the subject of the meeting from their own perspective, I should like to point out straight away that the conference was not about *the* religion of Islam or *the* Shariah in Germany and/or within the purview of German law, nor indeed about the legal status of Muslims in German everyday life, which is exercising all the media at the moment.

Given the extent and diversity of the Islamic world, the only possible objective for this international and interdisciplinary meeting was to test a few approaches that might facilitate access to regionally differentiated structures and systems of Islamic law *as well as* to the constitutional systems of the West, so as to facilitate comparing Islamic concepts of law and justice with current developments in Western constitutional and ordinary law. However, our foreign speakers found good reasons for breaking through and extending this frame of reference with its limited comparative function. Almost without exception, they proposed that, viewed from the perspective of Islam and Islamic law, the legal situation in the Arab heartlands as well as in South and Southeast Asia suggests that these problems are political as well as legal and that their analysis and solution is beyond the reach of national endeavours. First and foremost, the Shariah and its claim to universal validity raise normative structural problems of an international and transnational character that can be adequately analysed only in the context of a global society. As the statements printed in this volume document, this largely coincides with

the understanding of the problem, the interdisciplinary approach, and the cognitive interests of the *Zentrum Moderner Orient* (Berlin), which co-organised the preparation and implementation of the meeting.

Guided by historically evolved modern precepts of law and justice, the meeting moved along the interfaces between religion, politics and the law. With all their scientific cognitive interest, both keynote speakers thought that politics as well as the law had a controlling influence on the formation of a normative order. Thus, the first keynote speaker, Prof. Dr. Masykuri Abdillah of the University of Jakarta, Indonesia, is also the Vice Chairman of the Central Board of the *Nahdlatul Ulama* (*NU*), the biggest Muslim organisation worldwide that is active on the local as well as on the global plane and has 30 million or, as some say, 40 million members. And the second keynote speaker, Prof. Norani Othman of University Malaysia in Kuala Lumpur, is a founding member and active ambassadress of the women's rights organisation *Sisters in Islam*.

"SHARIOCRACY" OR SECULAR LAW?

As the keynote speeches, statements, and comments made during this one-day meeting show, the Islamic regions and states that were mentioned are not confronted by a choice of two extremes, although they stand between the Shariah and secularisation. What is more, those legal developments that can be scientifically determined do not reveal any unambiguous trends regarding the future path of the law in the Islamic world, at least with regard to the rule of law. Nevertheless, it is a fact that all Islamic legal regimes, however they may be organised, are confronted by requirements that relate to technical, economic and social modernisation. At the same time, they are subject to political and legal transformation processes that tend to enhance the democratisation, constitutionalisation and codification of all social relations in the sense of the rule of law.

The individual contributions require no introduction, as they speak for themselves. However, I should like to point out that linguistic difficulties tend to arise in the translation particularly of legal terms such as law, justice, principle, value, legal norm, human rights, civil rights, etc. from the German into the English language. Terminological distinctions and differentiations that – based on the Arabic language of law and Islamic jurisprudence – are easy to make in Latin or German are often very hard

to render in English. It may well be that, listening to the English-lan-guage contributions at this conference, some members of the audience did not realise that one of these terms is the German word *Rechtsstaat*, which is commonly translated as the *rule of law*. Normally regarded by continental Europeans as an equivalent translation of *Rechtsstaat*, the English term has no component that signifies "state". Guarantees are given by the law, not by the state. This is no different in Islamic law, which raises the question of what elements of the rule of law the Islamic states really do need from continental Europe. Another point that became clear in the course of the meeting is that the common practice of iden-tifying and equating a constitutional state with a state under the rule of law implies or may imply drastic terminological simplifications and short-cuts that should be closely studied, especially in historical end empirical terms, before their application to Islamic legal systems and their consti-tutionalisation, which was not done in this case. Another concept that should be scrutinised whenever it is applied to modern Islamic law is legal secularisation. After all, secularisation is not all that much concer-ned with emancipation from religious premises, or indeed with the al-leged or suspected loss of importance suffered by religion in the modern age. Rather, the question is how, given the constant demands for demo-cracy and the rule of law, political and legal institutions and processes – be they global or particular – can be reconciled with religious controls exercised by society.

RECOMMENDED FURTHER READING

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I. JUSTICE AS A POLITICAL AND LEGAL ORGANIZING PRINCIPLE

JUSTICE AS A POLITICAL PRINCIPLE IN ISLAM

Werner Ende

INTRODUCTION

Any detailed description of a particular set of facts of the religion and civilisation of Islam should be prefaced with introductory comments specifying its frame of reference. If this is not done, any statements made about, for example, the situation of women, children, farmers, craftsmen, traders, court officials or rulers "in Islam" is apt to be misleading. (Basically, the same holds true for any statements about corresponding phenomena in Christianity and/or in Christendom as well as in other religions, but this is not our subject.). What needs to be clarified to begin with is what a particular description and analysis refers to. In other words, is it, as some Muslim intellectuals demand, exclusively about statements made in the Koran, the pure word of God as Muslims firmly believe? Or should it also concern itself with the sayings and doings of the Prophet Muhammad (died 632 AD), the so-called Hadith, which are regarded as normative, as well as with his religious, political and social practices, or Sunna? If so, what is the importance of the decisions and actions of his companions, particularly the first successors to the leadership of the early Muslim community, the four so-called "rightly-guided caliphs" who reigned from 632 to 661?

It is the statements of the Koran and the traditions of the early age of Islam on which the Shariah rests, a code that was developed essentially during the first three centuries. The Shariah is a monumental system of rules on ritual, social, ethical and legal questions, which, however, is rent by denominational disputes and partly ossified. How important is the Shariah for any general statements about conditions in Islam? Or, to put it differently: What is the current and former status of its detailed regulations *vis-à-vis* the legal and social realities past and present in a territory that ranges from Morocco to Chinese Turkistan? Moreover: When we make statements about "Islam as such", are we talking only about the religious and legal norms that were developed by jurists or also about the discourses written down in Arabic or any other language of the Islamic culture by Muslim theologians, philosophers, historians, geographers or poets? What value do we accord to observations by Muslim and non-Muslim travellers, ethnographers and other observers regarding the diversity of ideas and religious practices followed by certain groups in the "Islamic reality" of the present? What is the scientific import of the content and manifestations of what is called "popular Islam"? Does it really have nothing to do with "true Islam", as today's fundamentalists and their followers would have us believe? Is it admissible in the first place to include in a consideration of the essence of Islam the partially syncretist ideas of heterodox communities? To what extent may or should the sometimes discriminatory judgements to be found in traditional entertainment literature be considered in describing certain phenomena, such as the way the various human races are regarded? Is it not enough merely to say that neither the Koran nor the Hadith contain any statements that might be interpreted as justifying racial discrimination on religious grounds? And if so, what about the fact that racism was and is present in the thoughts and actions of Muslims?

The above shows how very problematic it is to make generalised statements about "Islam as such", for any statement necessarily relates to a limited field of observation. Many Muslims believe it is their right and/or their duty to speak as apologists. (Most followers of other religions or secularist world views do not behave much differently where their convictions are concerned.)

Be that as it may: Both Muslims and non-Muslims should steer clear of any undifferentiated (or, to use a modern buzzword, essentialist) statements when talking about Islam or any other religion. In our case, this refers to generalised statements like "Islam as such is tolerant or intolerant". Those who make such generalised judgements pretend that there is a single subject named Islam that is capable of talking and acting. They dispense with comprehensively addressing all the different things that can be subsumed under Islam, things that are regarded as Islamic in the narrower or broader meaning of the word by many Muslims as well as many outsiders. To quote one example: The followers of Sufism and Wahhabism widely differ on essential points of their religious self-interpretation and practice. From their respective points of view, many of the convictions and phenomena that characterise the religious life of the other side are nothing but false doctrines that range on the fringes or even outside true Islam. At the same time, any holistic representation of Islamic civilisation that strives to be objective will never be complete without including these two manifestations of Islam, once again differentiated by space and time. Of course, it is not necessary for such considerations to be free from criticism.

THE GOD OF JUSTICE, THE JUST RULER, AND THE PROBLEM OF DEVIATION FROM THE IDEAL

What I have said so far is intended to provide a historical and geographical context for the following, necessarily sketchy remarks about concepts of justice "in Islam". There can be no serious doubt that such concepts do exist and that they have played an eminent role in the thinking of many Muslims since the dawn of Islam.

After the dispute that arose over who should succeed Muhammad as leader of the community after his death (632 AD), the debate centred on questions that relate to finding and confirming a ruler, the conditions under which he should exercise power and his personal justice. Even in the early age of Islam, the comments of the religious and political opposition parties revolved around such issues. While they may have lost some of their divisiveness in the later course of Islam's intellectual history, they were never forgotten, and the discourse of today's Muslim fundamentalists has revived them to a degree that is partially astonishing and threatening.

The fact that, both within the Shariah and beyond, justice is one of the key ideas of the Islamic concept of order in no way implies that Muslims regard the course of their civilisation's history as a triumphant progress

of law and justice. Moreover, most of those who think about such things at all believe that the actual history of their religion and/or the societies characterised by it features a number of tragically misdirected developments from the very beginning. In their opinion, these manifested themselves in those numerous cases in which power was usurped, the people were oppressed and Islamic law (i.e. the will of God) was infringed in other ways. This view explains why, even in the early age of Islam, there was an idea that God would send a messiah some time before the end of the world who would conquer evil and create a realm of justice. The Koran does not mention the eschatological figure of this redeemer, called in Arabic the *mahdi* (literally: "he who is guided right" or, in a secondary meaning, "he who rightly guides"), but some of its verses are interpreted as referring to him. Even in the early centuries of Islam, there were many Muslims who regarded the way certain rulers or even entire dynasties exercised their power as unlawful, tyrannical and exploitative. This is why Mahdis kept appearing who promised redemption by divine order. Both Sunnite and Shiite Islam have a history of such persons and their followings that reaches to the present. In Europe, the most generally known *mahdi* is the one who appeared in the Sudan in the 19th century. (The specificity and current political importance of the Mahdist belief in Shiite Islam will be discussed below.)

The idea that misdirected developments began early naturally begs the question of who should be blamed for the wide spread of injustice. Marking the beginnings of denominational rifts in early Islam, the divergent answers to this question are passionately debated even today, albeit occasionally intermingled with nationalist views. Even the Hadith contains utterances of the Prophet that are interpreted as assigning blame, for instance his prediction that the (true) caliphate (see below) would endure for no more than 30 years after his death, to be followed by nothing more than *mulk*, meaning the rule of kings (*muluk*, singular *malik*), who would be devoid of true justice as well as other properties. Quite obviously, this prophecy (construed subsequently) primarily refers to the assumption of power by the Umayyads after 661 AD, i.e. the rule of a Meccan family that, having formed the backbone of pagan resistance against Islam until 630 AD, usurped the caliphate a few decades later. The same tendency to regard the *mulk* as inferior to a caliphate with its religious legitimation, lawful rule and obligation to justice emerges from a purported exchange between the second of the "rightly-guided" caliphs, `Umar, and a companion of the Prophet, Salman. When `Umar asked,

"Am I a king (*malik*) or a caliph (*khalifa*) in thine eyes?" Salman is said to have responded, "If thou hast taken no more than a single Dirham – or more or less – from a Muslim and used it unlawfully, thou art a *king* and not a caliph." Upon which, so tradition has it, `Umar broke into tears". This is literary fiction, to be sure, but it is nevertheless impressive, for in (Sunnite) tradition, `Umar is seen as an unbending man of strict beliefs and great integrity. Now, if even such a person cannot be sure that everything within his responsibility has been handled properly, and if he begins to cry at the thought, this highlights the discrepancy between ideal and reality that, according to a widespread conviction, appeared very early in the history of Islam. (By and large, the term king (*malik*) began to be used in the Islamic world to describe a monarch in a positive vein only in the 20th century, mainly because of endeavours to appear on an equal footing on the international stage.)

The Koran and the religious literature that is based on it contain quite a number of other terms that (more or less precisely) mean "just" and/or "justice" or their opposites, i.e. "injustice", etc. Thus, the Koran uses the term qist in chapter 57, verse 25 to describe the notion of justice. The text runs as follows: "We have (in the course of time) sent our apostles (to mankind) with veritable signs and through them have brought down scriptures and the scales of justice, so than men might conduct themselves with fairness."

As Muslims generally understand the Koran, it is the ruler more than anybody else who is called upon by Allah to act with moderation and justice. Thus, chapter 38 Verse 26 says: "David, we have made you master in the land. Rule with justice among men and do not yield to lust, lest it turn you away from God's path!" In the Muslim exegesis of the Koran, truth (*haqq*), the principle by which King David (one of God's emissaries) is to rule as a successor (*khalifa*, hence the word caliph) by the order of God, implies nothing but justice in the exercise of power combined with the control of personal inclinations. In Islamic legal literature, this Koranic verse has been cited – together with others – again and again as a condition of legitimate good governance. In that context, observing the Shariah and defending it against usurpers, violent warlords and alien "infidel" conquerors became the crucial criterion by which the justice expected of a ruler was assessed. Moreover, there are words of the Prophet to point the way. Thus, he is said to have proclaimed once, "One hour of justice is worth more than sixty years of divine service."

In addition to the numerous religious law treatises about the caliphate that were written, enlarged and commented on over the centuries (often in the service and interest of a particular dynasty), there are certain literary genres that describe the rights and duties of a ruler and the conditions of successful governance. In some of these works, there are passages that criticise the misdemeanours of certain rulers and their confidants relatively openly. Most notable among them are writings that resemble the "mirrors for princes" that were popular in the Occident. Some of these writings go back to pre-Islamic, i.e. ancient Greek or Iranian models. Although they are not necessarily free from near-Machiavellian ideas relating to the preservation of power pure and simple, quite a few of these often-copied and often-quoted works are the product of an earnest endeavour to instruct rulers in acting ethically and justly, not least in their own interest and that of the stability of their dynasty. A similar genre is that of the "political testaments" that were made by certain rulers or that are ascribed to them. Some of their directives have undergone a surprising revival in the discourses of the present. The religious and political instructions given by the forth caliph (and first imam of the Shia), `Ali, to his chosen governor of Egypt, Malik al-Ashtar, are a case in point. These instructions, which mainly deal with how to administer the country so as to maintain justice and peace, played a role anything but minor in the discussions about the constitution of the Islamic Republic of Iran in 1979 .

SHARIAH AND JUSTICE

Concerning the content of the term justice, the Shariah – with the support of the Koran, the Hadith and the practice of the early caliphs – addresses a society in which, to name but a few examples, slavery and strict corporal punishment prevailed, capital interest was banned and the deposition of one man in court could be outweighed only by that of two women. Female judges were unknown, and no Muslima was allowed to marry a non-Muslim man. These and many other regulations are entirely "just" within the meaning of the Shariah, a code that essentially dates back to the period from the 7th to the 9th century AD. Some present-day Muslim apologists maintain that these regulations are not as strict as they might appear at first glance. Many of them point out that Muslim jurists did and still do give consideration to certain exemptions, mitigating circumstances, etc. in their rulings and/or legal opinions (*fatwa*), although this was and is not done uniformly across all fields covered by

the Shariah. By differentiating their interpretations from one case to the next, jurists wanted to adhere to justice without endangering the validity of the system. One often-quoted example of a practice that is flexible and reflects social reality is the way the implementation of punishment for theft (severing the right hand) is circumscribed by conditions. And indeed, the number of cases in which this punishment was actually carried out in the history of most Muslim societies is, by and large, much lower than one might suppose, given the theoretical background and the social conditions described by historians and other authors. (For the contemporary debate about this question, see below.) In saying anything definite about actual legal practice, therefore, it is necessary to differentiate, as mentioned above, on the basis of historical developments and regional peculiarities. While some of the latter spring from pre- or non-Islamic traditions, others are the result of separate developments based on denominational features. Especially the unceasing complaints and polemical comments of "orthodox" Muslim scholars reveal that, almost everywhere, cases abounded in which the provisions of the Shariah were not implemented consistently. Though nominally Muslim, some groups of the population – nomads, for instance – hardly knew them at all. In many ways, these provisions were (and sometimes still are today) pervaded by elements of customary law that had nothing to do with the Shariah. Such local codes appeared and still appear "just" to the members of the group in question, serving, for example, to justify so-called honour killings.

One aspect that cannot be discussed in greater detail in this paper is the justice of *God*. This was quite a controversial question in the formative phase of Islamic theology. Complicated disputes arose about the characteristics of God to which the Koran bears witness (compassionate and merciful as well as wrathful and threatening), about man's free will as a prerequisite for being punished or rewarded and about similar points. The view that ultimately gained acceptance after a prolonged struggle was that God is absolutely just, even though mankind may be unable to perceive his justice every time and everywhere. In the religious and political programmes of present-day Islamic and/or Islamist movements, this dogma manifests itself in an avowal of the "justice of God in creation and legislation", as in Article 2 of the constitution of the Islamic Republic of Iran.

BETWEEN REBELLION AND ACCOMMODATION

As mentioned above, disputes about the religious and legal legitimacy of Islamic rule arose very early on. The denominational groups (some of them short-lived) that emerged in Islam in the course of these confrontations largely justified their ambitions by the claim that injustices committed by usurpers had to be atoned for and that the righteous and religiously mandated cause of their party had to be helped to victory. In the process, each of these groups developed its own specific view of the events in the early age of Islam, ranging from the lifetime of the Prophet to the bloody upheavals of the internal Islamic "civil war", the death of the fourth caliph, `Ali, and the assumption of power by the Umayyads, the first hereditary monarchy in Islam (661 AD). These views inform not only the theories these groups hold about governance, but also their ideas about justice in government and society. Together with other events that occurred later, Islam's first internal "civil war" (656-61 AD in the narrower definition), in which companions of the Prophet, all persons of great merit, fought on both sides, induced large segments of the population to adopt a quietist attitude. While revolutionary religious movements, some of them extremely militant, did manage to gather a following every now and then, the bloody events associated with revolts motivated many true believers to bow to the bitter insight that "a century of tyranny is better than a single day of civil war". This insight turned into a kind of conventional wisdom that is evoked to this very day whenever the occasion arises. Not a few Muslim (especially Sunnite) jurists and theologians endeavoured to turn this into an argument for recognising, at least superficially, rulers who are illegitimate and, therefore, unjust. Ultimately, it is all about choosing the lesser evil. Thus, the great theologian and legal scholar al-Ghazali (d. 1111) drew a parallel between submitting to a tyrant and the emergency of a man who has to eat carrion (banned under Shariah law) to avoid dying of hunger. In this sense, al-Ghazali demands allegiance even to an unjust ruler.

The Shiites in general and particularly the sect that is most powerful among them today, the so-called Twelver Shia, tend to take a critical and even polemical view of Islam's early history. According to them, a number of companions of the Prophet had plotted against him (and implicitly, against the will of God) in order to keep the Prophet's blood relations away from power. They already did this while Muhammad was still alive. They succeeded in doing so over centuries, not entirely but largely, and the consequences for true Islam and the Muslims were catastrophic. Since the death of the Prophet, therefore, justice has been largely absent from the world of Islam, which is why any rule that is or ever was could only be conditionally legitimate at best. According to Shiite scholars this does not rule out the possibility that there may be rulers who prove sufficiently just for people to submit to them and even enter into their service. What is more, this may apply to rulers who do not follow the Shiite or even the Muslim faith, provided they offer a certain degree of protection to the Shiites.

Shiites accept the fact that they are in a minority almost everywhere in the Islamic world. Living in an environment that is basically hostile and dangerous, the best course for a Shiite is to remain quiet and merge with the background even to the extent of denying his own convictions. This principle of dissimulation (*taqiya*) is not only admissible for members of the Twelver Shia, but even regarded as highly meritorious, because it serves to protect one's own life and to defend, albeit indirectly, one's brothers in faith. Ultimately, however, it can be understood only as a stratagem employed in a world that is threatening and unjust. The only source of hope is the prospect of a Messiah, a Mahdi, who will appear one day to "establish a realm that is as just as it was filled with injustice before". While this formula has cropped up also among the Sunnite ideas about a Mahdi ever since the early age of Islam (see above), its spread and formative influence among the Twelver Shiites is extraordinary. The reason for this lies in a close association between the figure of the Mahdi and the concept of the Imamate. The idea is that throughout history, Allah has provided his true followers, the Shiites, with a leader (Imam) endowed with superhuman abilities, a manifestation of his goodness and justice towards mankind. Twelver Shiites firmly believe that the twelfth of these Imams was removed to a mysterious place of secrecy in 874 AD, that he is alive today, and that he will reappear some day in the future. Millions of Shiites keep professing their hope for this event, a hope embodied, for example, in Article 5 of the 1979 constitution of the Islamic Republic of Iran. In the language of agitation that was used during the upheavals in Iran, the expected reappearance of the Messiah was called a "revolution". While this was in keeping with the spirit of the times, it also tied in with the centuries-old legends about the Mahdi who was to come: his appearance in Mecca, his progress to Iraq via Medina, his fight against the Antichrist in which he is supported by Jesus Christ and the apocalyptic events that will lead up to his ultimate victory. De-

scribing all this in great and sometimes gruesome detail, the voluminous Shiite literature on the subject revolves around the idea of taking revenge on the enemies of the Shia (especially those who were responsible for the deaths of its Imams). To break the ground for the realm of justice that will be established by the Mahdi, therefore, all evildoers past and present must be punished without mercy. This includes taking retrospective revenge even on those companions of the Prophet who are revered by the Sunnites but, according to the conviction of the Shiites, once sinned against the will of God. We are here looking at the downside of the cult of mourning that surrounds the twelve Imams of the Shia who, it is said, all died as martyrs, except for the twelfth. For their sake, people whip themselves or at least shed floods of tears in the month of Muharram each year. This cult may be one of the reasons why Shiite believers become politically paralysed and passive in the face of blatant injustice. Indeed, this was so for a long time. In certain circumstances, however, the mood may change, so that masses rise in readiness to take up arms to fight for justice and sacrifice themselves. This is exactly what the world has witnessed in the last few decades in Iran, Lebanon and elsewhere. Everywhere, the language of words and images used by the political Shiite movements is fraught with references to religious metaphors and symbols. Thus, for instance, the Koranic term used to describe an unjust ruler is *taghut* (meaning approximately "idol" and its derivatives, "tyrant", "despot", etc.). During and after the Iranian Revolution of 1978/79, the term *nezam-e taghuti* (meaning "a pagan tyrannical system") was commonly used to describe the overthrown regime of the Shah.

"HOW IT SHOULD HAVE BEEN". EARLY ISLAM AS AN INSPIRATION FOR REFORM IN MODERN TIMES

Not only in the Shiite but also in the Sunnite world, the revival of the concept of justice and its exploitation for political purposes has assumed yet another dimension, that of a call for social justice as one of the key concerns of Islam. Already since the 19th century, Muslim thinkers and politicians tried to launch social and political reforms in a modern sense. This they did with reference to the precepts of the Koran and the practices of the Prophet. To gain acceptance, the theoretical justification of these reforms in a modern sense must create the impression that the changes envisaged could be reconciled with Islam without difficulty. Many of these reforms aim to adapt Western institutions that are regarded as

successful to the needs of an Islamic society. Thus, the system of parliamentary democracy may be made to appear harmless and even worthy of imitation by evoking the principle of mutual consultation (*shura*), which the Koran commends. Some modernist politicians and writers regard the so-called statutes with which the Prophet tried to regulate conditions in Medina as the precursor of a constitution and a few even call it "the first written constitution in the history of the world". One remarkable example that illustrates the general trend to forge links between the political values of Western modernity (the French Revolution in this case) and the heritage of Islam is that of Rafiq al-`Azm, a politician and journalist from Syria who campaigned for reforms in Turkey from his Egyptian exile in the early 20th century. In the preface to his book about famous personages in Islam, which appeared in Cairo in 1903, he spoke of Muhammad as the prophet "who established the Shariah on the pillars of freedom, justice and fraternity". It is probably not by chance that the author (a member of a notable Syrian family) named justice instead of equality, which you would normally expect to be included in this triad.

When the concept of development was introduced to intra-Islamic discourse, it was possible to put certain legal constructs of the Shariah in their historical perspective and to mitigate them indirectly. By the same token, it became possible to reinterpret related social institutions as well as norms and behaviour patterns that had been regarded as legitimate and just for centuries. In the case of slavery, for instance, the argument ran as follows: While early Islamic society had accepted slavery as a social fact, based in part on statements in the Koran, Islam had improved the slaves' situation considerably compared to older and contemporary societal orders, demanding that they should be treated justly. The manumission of slaves had always been seen as an act that was pleasing to God. While the Prophet had been unable to abolish slavery entirely and immediately, all sorts of former justifications for it have become obsolete by now. Together with developments in international law, a progressive interpretation of Islam demanded that the slave hunts that were conducted in Black Africa well into the 19th century should be rejected and, consequently, suppressed by the governments of Islamic countries.

Muslim modernists in the late 19th and throughout the 20th century used a similar rationale to justify a demand for improving the societal status of Muslim women, up to and including equality. Highly condensed, the train

of thought ran as follows: In its early age, Islam had brought about enormous improvements in the legal status of women compared to pre-Islamic times, but the process had been neglected later on over a long period. Thus, the claim to education for women that was embedded in Islam had not been realised in general. Currency had even been given to a false Hadith that was supposed to prove that the Prophet himself had recommended teaching girls and women neither reading nor writing, but only how to use a spinning wheel and how to recite a certain chapter of the Koran, the 24th. According to the modernists, present-day Muslims are called upon to join in helping to victory the original intention of Islam, which is to promote justice for women in education as well as in other respects.

Referring to episodes in early Islamic history (whose veracity we are not discussing at the moment) may also serve to mitigate the severity of punishments under Shariah law. Thus, tradition has it that the previously mentioned Caliph `Umar, in a year of famine, had suspended amputation as a punishment for theft. Now, seeing that large parts of the population are currently suffering from want to an extent that is always bitter and sometimes life-threatening, we might conclude that this punishment for theft should not apply today. It would be unjust in view of the fact that most Muslims presently are not living in a truly Islamic society. While this would not imply the permanent abolition of this punishment, its modern interpretation obliges judges to impose retaliatory punishments only in recognition of the prevailing circumstances.

THE FUNDAMENTALIST COUNTERATTACK AND ITS REPERCUSSIONS

The process of re-Islamization that has been taking place for some decades in quite a number of countries has considerably hampered and sometimes totally perverted these attempts to adapt the Shariah and render it more flexible. Radical Islamic fundamentalists accord little or no value to instruments like the Human Rights Charter of the United Nations that are widely recognised (although not always consistently observed) on the international level. To their minds, the introduction of legal regimes and constructions that began to be imported from Western culture in the 19th century is nothing but a consequence of European colonialism. Since the latter was entirely pernicious, being unjust in the eyes of Islam, all traces of it in legislation and jurisdiction have to be obliterated.

However, even the fundamentalists' thoughts revolve around justice of a kind, although the way they interpret its content differs not only from the aforementioned Charter but also from the understanding of the Muslim modernists and even more from that of the secularists. What the Ayatollah Khomeini is alleged to have said about punishment by whipping and/or stoning is characteristic in this respect. Expressing himself unequivocally in favour of these punishments, he nevertheless demanded moderation, saying that not a single stroke of the whip should be administered beyond the number prescribed in Islamic law. He also said it was forbidden to humiliate the guilty. According to Khomeini, the role model in this case is the Imam `Ali, who was in the habit of treating with benevolence and sensitivity those who had lost a hand in punishment by his order, thus winning their hearts afterwards. On the other hand, he is said to have been quite capable of drawing his sword and hacking incorrigible criminals to pieces. "Such was the way of his justice," Khomeini concluded.

Yet current developments in Iran do not necessarily follow the direction that might be implied in Khomeini's statements. There as well as elsewhere, the dispute about how Islamic justice should be rightly interpreted is not resolved yet. To the Taliban in Afghanistan, the apartheid of the sexes that they proclaimed and largely implemented in their territory is entirely just in the context of "true" Islam. Conversely, they regard the equality demanded by modernists for Muslim women as well as their appearance in public as the work of the devil. However, it is anything but certain that this policy will help the Taliban to win over the majority of the population.

The examples cited above are situated on a plane of discussion where the arguments employed are "Islamic" in the narrower or broader meaning of the word. However, we should not overlook that, in the 20th century, the Islamic countries were influenced by ideologies whose foundations were non-Islamic and whose proponents even adopted attitudes that were more or less hostile towards Islam. These include Kemalism in Turkey (with a grain of salt), the communist parties that temporarily gained considerable influence in Iran, Iraq, Indonesia and elsewhere and – with certain limitations – the Baath Party. The reasons why some of these movements had so much success with some parts of the population are many and varied. One of them is that they may have succeeded, at least to a certain extent, in tying their propaganda in with the wish for

more social and political justice, albeit with "Islamic" connotations. The term 'adala, meaning justice and derived from 'adl (see above), turns up in the name of Iran's first communist party, the Hezb-e 'Adalat which was founded shortly after the First World War. Non-Marxist socialist regimes, parties and movements in the Islamic world made similar or even more forceful attempts to underpin their programmes with eclectic references to the Islamic heritage, including the Koran. The Egyptian president Nasser's "National Charter" of 1961, together with the relevant official commentaries, quotes "Islamic" reasons for the need to establish social justice. However, on the subject of parties and their self-chosen names, those more or less "moderate" Islamist parties whose name includes the word justice (surely not by accident) are more important at present. One such party exists in Morocco, for example – the Hizb al-'Adala wal-Tanmiya (Parti de la Justice et du Développement). Another party that is considerably better known in the West is the Turkish *AKP*, which attained governmental powers under Recep Tayyip Erdogan: The letter A in the acronym stands for "Adalet".

Prompted by the success attained by some left-wing (or pseudo-left-wing) parties, movements and regimes in certain Islamic countries in the 1950s and 1960s, Muslim scholars tried to counter the ideologies of their opponents, which, in their opinion, were alien to Islam, by establishing an economic theory that was modern, just and conformable with the Shariah. While the theoretical quality of their writings is not always impressive in the judgement of experts, there is no mistaking the earnestness of their endeavours to find an Islamic rationale for reforms. Whereas the practicability of a "truly Islamic" system (including interest-free banking, etc.) may be regarded with scepticism, the wealth of ideas developed by the proponents of these experiments appears considerable.

At a rather lower but highly practical level, attempts are being undertaken to establish Islamic welfare organisations in order to mitigate social distress at least in part, thus establishing justice of a kind. By way of justification, their initiators may refer directly to the demands for charity (especially towards widows, orphans and other socially deprived persons) that are to be found both in the Koran and the Hadith. Throughout the last few years and decades, Islamist organisations especially distinguished themselves by founding and (relatively) successfully operating welfare institutions, such as hospitals, orphanages, kindergartens, schools (often directly connected to a mosque) and other facilities, which

also helps them to gain political influence. In this, they are succeeding not least in those suburbs where farmers and workers from the rural regions gather and settle together with other destitute persons. These welfare institutions, whose names show Islamic connotations almost without exception, are funded mainly by donations, voluntary gifts and "pious endowments" (*awqaf*). Governmental control of many of these institutions is either nonexistent or limited. Potentially, the resultant autonomous networks may engage in far-flung international activities that in some instances have little to do with the original purpose of the welfare organisations from which they originated.

The idea that Islam aims at a just society that Muslims entirely or partially failed to establish so far was and is widespread among Muslims. As history teaches us, this idea may engender a fundamentally pessimistic attitude towards any chance of improvement in the present situation or, in other words, it may lead to passivity. On the other hand, there are certain circumstances in which it may help to mobilise certain parts of the population in support of religious and political objectives. At the moment, the Islamic world is undergoing a phase in which many are inspired by the desire for revenge for injustice suffered (purportedly or actually), by thoughts of revolt and by utopian hopes.

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JUSTICE AS A PERVASIVE PRINCIPLE IN ISLAMIC LAW

Birgit Krawietz

INTRODUCTION

In this paper, I am going to discuss justice not as a political or moral virtue, but as the expression of a normative principle that governs and characterises all Islamic law. Seen from the normative Islamic perspective, this means that law and justice in whatever form and dosage are informed by religion. This necessarily brings into play all those modern Islamic states that have adopted certain forms of Western legal thinking, such as a constitution that supports the power of the state and other political and legal set pieces. Historically, even *Western* legal systems and states have a religious background, but their constitutions normally draw a line separating law and religion. In the following, I shall concentrate on concepts of justice and law in pre-modern and modern Islamic legal thought. My suggestion, which I shall document in detail, is that debates about justice are much more current in the modern age of Islam than in earlier centuries.

In Arabic, the key *post-Koranic* term for justice is `adl or `adalah. The Koran itself uses `adl only a dozen times or so, but in a wider sense signifying respectable behaviour.

JUSTICE AS AN OBJECT OF QURANIC SCIENCE

Alternative terms include *haqq*, *hissa*, *ihsan*, *istiqamah*, *mizan*, *nasib*, *qasd*, *qist*, *sidq* or *wasat*. There is, therefore, a wide range of terms meaning the same thing or its opposite, injustice or oppression, such as *jawr*, *inhiraf*, *mayl*, *tughyan* and *zulm*.[1] All these terms differ greatly in their religious/theological and/or legal/juridical import.

There are various subdisciplines both in Islamic theology and in Islamic jurisprudence that address these words and terms, including the exegesis of the Koran, lexicography based on the study of holy sources, eschatology – which informs the faithful about consequences and events in the next world, practical jurisprudence and Islamic political science. Most traditional Islamic jurists are trained in several of these so-called Koranic disciplines or traditional studies. Consequently, the *substantive* aspects of the religious law of the Shariah are complemented in their field of vision by the *transcendental* perspective of law and justice that is characteristic of all theonomic legal orders, Islamic or otherwise. This combination of religious and legal training distinguishes Shariah scholars from contemporary Western students of Islam, many of whom lack this twin-track competence. For this reason, they often have only inadequate access to the *normative* aspects of Islamic Shariah scholarship, which, needless to say, go far beyond the text of the Koran. To that extent, we should think of Islamic theology and jurisprudence as two traditionally complementary parts of a normative functional whole. Thus, for example, Shariah law – like other laws – says that no one may be punished twice for one and the same offence (*ne bis in idem*). In this case, however, the conclusion is that a faithful Muslim, once he has been punished under secular Islamic law, need no longer fear that divine jurisprudence might impose on him any additional sanctions in the next world. This is a point of great importance for the Islamic concept of justice. Consequently, any issues relating to the principle of justice and its non-observance need to be considered from both the secular and the transcendental angle in the Islamic view, which takes this complementary relationship into account.

As far as the prospects of the faithful for the afterlife are concerned, it is true that each individual will be held to account only for his personal deeds,[2] because God is just in this as well as in all other respects. On the other hand, the idea of the last judgement does not rank as prominently among the Islamic concepts of law and justice as it does in Christianity,

for it is ultimately dominated by the certainty of all Muslims that they will find salvation. This certainty is reinforced by the divine guarantee that Muslims will be sentenced to hell only for a limited period, if at all. Should he be forced to enter it, no Muslim need fear having to remain in hell for ever, unless he is an apostate.

We should agree with Rahbar, who presented a well-known monograph on the Koranic understanding of justice almost half a century ago, only with regard to his emphasis on the apocalyptic atmosphere of great fear that is to be met with in the Koran.[3] What should be taken with a grain of salt, however, is his marginalisation of other attributes of God, such as incalculable fury and unfathomable compassion, as well as his sweeping theory that pre-modern Islamic thought was dominated by the idea of justice. This statement probably owes too much to his own enlightened views, for the central theory of Rahbar's book is that of a God who is strictly just and, for that very reason, neither capricious and tyrannical nor unpredictable in any other way. While the attribute "just", which turns up in the richly varied lists of the 99 so-called most beautiful names of God, is connected with the Koranic term `adl (as well as various similarly rare verbs), the incidence of the word compassion is incomparably greater, for its root is omnipresent in the Koran. Because he feels fairly certain of his ultimate salvation, a Muslim does not really need to understand fully and transparently how the commands of God are to be interpreted in each and every case. This being so, the faithful can deal much more easily with structural normative uncertainty in traditional Islamic law than is generally assumed in the West. It is part of the essence of compassion that the faithful are confronted by considerable uncertainties and potentials for infringement of the rules as they attempt to follow them, a fact that is not infrequently overlooked in the West. It is true that Islamic theologians emphasise again and again that God will certainly not leave any acquired merit out of consideration, and that the faithful can be sure of receiving the reward promised for it, but there is no way of predicting the extent to which God will lavish his compassion on the individual.

Thus, there are not only many aspects of the Islamic dogma about sin that are beyond calculation, but also large parts of Islamic law, which was never adequately canonised in pre-modern times. Contrary to conventional wisdom, the Arabic word Islam signifies not peace but surrender to the will of God. Unfortunately, neither his will nor the normative

standards associated with it are all that unambiguous and explicit, for they were expressed only in fragments – a fact that, as we shall see, gives rise to considerable problems as well as opportunities in interpretation.

The primary purpose of the Koran is to exhort and edify, and the number of verses that are legally informative is limited.[4] Scholars are able to interpret these verses only if they consult a multitude of other sources or methods. Traditional Islamic jurisprudence (*fiqh*), literally "understanding", is an attempt to make the Shariah speak. In its own interpretation, the Shariah (literally: "way to the watering place"), God's law that was given to man, offers comprehensive orientation based on the will of God, thus showing the path to salvation in this world and the next. However, the normative content of the Shariah is ambiguous and has given rise to numerous interpretation variants in different contexts throughout the course of Islamic history. At all events, it is generally believed that its foundation was laid in the Koran, and that the prophet Muhammad implemented and lived it. These are the two sources from which Islamic jurisprudence springs, for a large proportion of the Shariah's legal provisions were not formulated in detail either by God or by his emissary, which is why they cannot be declared divine law by any human being with anything approaching ultimate certainty. In other words: Most tenets are modifiable or even negotiable, at least within certain limits. They only apply in their proper context, and they have to be reformed or even reformulated in each era to adapt them to recent developments in the light of the general principles of Islam. The matters that are constantly being adjudicated under Shariah law include information about ritual legislation and "private" lifestyles as well as matters that would today be seen as belonging to the realm of civil, criminal or public law. In pre-modern times as much as today, Islamic law was and is laid down in monographs dedicated to specific subjects as well as in comprehensive legal manuals, which, however, do not strictly distinguish between the various spheres of the law. In other words: It is composed of thousands of variations and versions produced by individual scholars belonging to different schools, but all these writings were never compiled in a clear canon, nor was a precise hierarchy of authorities formulated, at least in Sunnite Islam. There has never been a monolithic block of Islamic law, just as there is no "Islam as such". Specific versions were only "nailed down" under the influence of European powers, when Islamic law began to be codified (in part) in various Islamic countries in an analogy to the enacted law of the West. In the present-day nation states of the Islamic

world, these codifications mainly cover family and inheritance matters, existing side by side with other areas of enacted law that are purely Western in character.

TRADITIONAL CORE DEBATES

Therefore, even though the idea of justice is *not* the *paramount* guiding concept of pre-modern Islamic thought, and other aspects may come to the fore depending on circumstances, we can at least identify the following four pre-modern debates that directly relate to justice: *First*, discussions about the nature of God's justice; *second*, the question about the justice of a ruler or spiritual community leader and his possible deposition; *third*, procedural justice regarding the procurement and probity of witnesses in legal proceedings, whose correct selection is supposed to ensure factual truth; and *fourth*, procedural justice in Islamic jurisprudence.

(1) With regard to God's justice, the faithful demand that theologians explain why God allows injustice or misery to exist in the world, like the death of an innocent child. In other words: The problem that Muslim theological scholars and philosophers had to address was that of theodicy, the existence of a world that is clearly sub-optimal and obviously unjust.[5] The victorious Asharites countered the postulate that God should act to the benefit of his creatures with their belief in the unfathomability and profound wisdom of divine predestination.

(2) In Islamic constitutional law, the second aspect – the justice of a ruler, or a spiritual leader of the community – relates to certain standards regarding moral integrity and adherence to the faith that a leader is expected to fulfil. In Islamic history, the groups that particularly emphasised this requirement profile were those who used it in a political discourse to criticise the government. One of these is the early Islamic Kharijite group, which continues to lead an – albeit highly restricted – life to this very day. In the opinion of these dissidents, only the most pious and the best could be elected leaders of the Muslim community. In the course of Islamic history, such maximum demands came to be qualified when spiritual and political rule were separated to a certain extent, and the demands made of a secular ruler were reduced to a minimum.[6] While the Shiites did make the legitimacy of their spiritual leader the central criterion of his rule, they based his legitimacy on his descent from the

fourth Caliph, `Ali. Consequently, it is only descent from and designation by an earlier Imam that can guarantee just rule, although the faithful must defer their hopes until the return of the 12th Imam and make do with interim solutions in the meantime.[7] Then there is the early rationalist group of the Mu`tazilites who were similarly unable to acquire supremacy for their views. Giving itself the name of "people of justice and the one faith" (ahl al-`adl wal-tawhid), this group believed that man could be judged justly at the last judgement only if he was given his own free will. To enable man to make the right choice in his orientation, God's will and his statements should be fathomable by rational inquiry.

(3) Some legal tracts devote a separate chapter to the probity (`adalah) of a witness (shahid `adl). Like a prism, such writings reflect the way respectability and social reputation are construed in an Islamic polity, discussing exactly what behaviour patterns or peculiarities are apt to undermine the respect in which a person is held. The best that mere mortals can acquire without the divine inspiration enjoyed by prophets or emissaries is precisely this `adalah. Properly speaking, this is not tied to the social status of a potential candidate, although it is more readily expected of certain professions like doctors, jurists or leaders in prayer than of tanners or moneychangers. Consequently, even a blameless witness had to submit in court to a process dedicated to reviewing his probity (literally: cleansing, tazkiya).

(4) Regarding the last of the four key items of discussion in pre-modern times, procedural justice, I should like to say this: While the procedures applied in interpreting and administering the law are formally correct, there is an opinion widely received in Islam that says that divine law in its superior wisdom cannot be plumbed to its depths but only plausibly explained by mere reason. As the size of the Koran itself is fairly manageable, such processes of argumentation are indispensable. This is true not only for the deliberations that lead to a court decision but also for all processes by which those norms are determined and communicated, which, in a wide variety of ways, permeate the everyday life of the faithful even today. By concentrating on certain passages of the Koran to the exclusion of everything else, our Western public of today fails to recognise that Islamic normativity is in fact a legal system whose case-law sophistication matches that of Anglo-American case law. The large number of individual cases calls for highly elaborated techniques of legal argumentation and explanation. In both theory and practice, these

techniques follow certain codes that evolved in the course of centuries in the legal literature as well as in the practice of Shariah law under prevailing Islamic living conditions. Thus, obtaining and issuing an oral or written opinion under Shariah law, a fatwa, is not a manifestation of arbitrariness or self-justice or indeed a death sentence; rather, it generates legitimacy for any of the many and varied practical approaches that are open to a faithful Muslim.

MODERN DISCUSSIONS ABOUT KEY ITEMS

Despite these four key items, which are rated by Muslim scholars as constituent elements of the issue of justice, we might easily acquire the impression that justice in all its possible interpretations did not become a central normative idea in Islam until modern times. When asked, most Muslims today would very likely confirm without hesitation that the idea of justice is a *pervasive* Islamic concern. Gudrun Krämer stresses that "*Contemporary* [emphasis added] Muslims believe that justice constitutes the fundamental value of Islam."[8] It was the influence of *Western* thought that added so much to the currency of concepts of justice that are based on Islamic argumentation. Hardly any subject has left such a powerful mark on the intellectual history of *Europe* from antiquity to the present day as that of justice, a core issue of philosophical as well as theological relevance that also touches upon questions of jurisprudence, economics and other social sciences. Islamic societies differ greatly in the extent to which they receive and develop such writings and thoughts. In this context, it is especially important to consider the demography, the political culture and the special historical background of each country in the Islamic world and that we should not restrict our consideration to the Arab states or the Near East. This being so, it is inevitable that the concepts of justice in Islamic *regional* societies should be influenced by a large number of different legal orientations and their respective theories of justice. After all, it is a fact that, all over the world, the law is a phenomenon of emergence that is nowhere dominated by a universal idea of justice.

Nevertheless, *three* general trends can be identified that, from the beginning and especially the middle of the 20th century to this day, manifest themselves in Islamic legal literature and, beyond that, in the current debate. Relating either directly or at least rhetorically to concepts of Islamic law, they include, *first*, a fundamental debate on democracy and the rule of law; *second*, explicit support for legal reforms and gender

justice; and *third*, demands for social justice and an Islamic economic order.

(1) The orientation towards modern nation states on the Western model and a corresponding new style of legislation led to more intensive debates about the rule of law, different forms of government (monarchy, parliamentary democracy, etc.), and their reconcilability with Islam. Some of the fundamental considerations and solution models proposed under this heading by various reformers of different leanings do not agree in every respect with the West's ideas about democratisation and constitutional structures and processes. In particular, the idea that political and religious functions should be interlinked meets Western scepticism. Furthermore, certain sanctions such as blood revenge that are still practised under customary law in some parts of the Islamic world are regarded as manifestations of self-administered justice and inadmissible violence. This very old talion principle and other parts of the Islamic penal code that are still officially valid in some states and regions are regarded as an expression of a persistently archaic penal culture that failed to detach itself from its historical religious heritage. Together with the violent settlement of political conflicts in real life, the fixed corporal and capital punishments mentioned in Koran and Hadith (*hudud*) of the Islamic penal code that are still in force in some countries of the Islamic world nourish the idea that the Islamic culture is bellicose *per se*. The fact of the matter is that in purely normative terms, traditional Islamic criminal as well as international law restricts the use of violence against fellow Muslims, against defaulting rulers and even against non-Muslims at home and abroad. Islamic law commentaries bar such abuses or at least predicate them on precisely specified conditions if they are permitted in the first place. Modern Muslim authors lay great stress on a rhetorical recourse to the early Islamic autochtonic principle of Shura, literally: mutual consultation, which is commonly presented as a quasi-protodemocratic ancestor of parliament.[9] However, one of the questions that arise in this context is whether non-Muslims really are "fellow citizens but not second-class citizens" (*Muwatinun, la dhimmiyyun*, the title of a famous book written by the Egyptian thinker and columnist Fahmi Huwaydi) who may lawfully participate in the societal policy-making process. According to traditional Islamic law, Dhimmis are followers of other religions with a holy book who permanently live on Muslim territory as "wards of the state" and who, as such, have to tolerate certain restrictions in law as well as in the visible practice of their religion. The fact that

some states discriminate against Christian and other minorities and pay no more than superficial attention to the characteristics of a modern constitutional state is regarded as a grave deficit in justice by both Western and Muslim commentators.

(2) Another grave deficit in justice in the eyes of diverse reformers and many Western observers is the lack of opportunities for women to participate in many spheres of Islamic society, often endorsed in normative terms by Islamic-law fatwas. However, many Muslim authors or activists shy away from identifying themselves explicitly as feminists. Initiatives to promote gender justice are unevenly distributed among the countries of the Islamic world, depending on the regime and the structure of the local population. Gender justice is a key term whose scope ranges far beyond mere questions of personal status, i.e. the Islamic family and inheritance law that is valid in numerous states of the Islamic world. Rather, it addresses a very broad spectrum of societal debates, ranging from the question whether women should be allowed to become religious dignitaries, such as muftis or leaders in prayer, to a large number of highly complex bioethical problems. According to Norani Othman,[10] the process of globalisation was accompanied in the last decade by the rise of something like Islamic feminism, which is engaged in a cultural battle with the political Islam that emerged from the 1970s onwards. In her view, political Islam challenges the indigenous cultural legacy that, particularly in Southeast Asia, assigned "quite central public roles" to women in the marketplace as well as in the role of ruling queens. Any threat to an indigenous culture in the name of global Islamic developments is highly problematic. In the opinion of Othman, Islam will have a chance in the 21st century only if cultural differences can be overcome by integration. These days, only a few really prominent women who criticise the situation of women in the Islamic world come from the core countries concerned; most of them are either at home in the so-called periphery or primarily work in the West. The last is true, for example, of the well-known Afro-American Koranic hermeneuticist and convert to Islam, Amina Wadud. She vehemently attacks interpretations that reduce the religious and cultural heritage to traditional masculine hegemony. In books like *Qur`an and Women. Rereading the Sacred Text from a Woman's Perspective*, New York 1999, and *Inside the Gender Jihad. Women's Reform in Islam*, Oxford 2006, she defends gender justice as one of the profound principles of the Koran. Gender justice also includes the sensitive issue of homosexuality, although the connotations implicit in the

Arabic word *liwat* differ from those of the modern term. Although homosexuality is expressly banned and officially pilloried in almost two dozen countries of the Islamic world today, the picture that emerges from the cultural heritage, poetry included, as well as from concrete practices in some regions, is much more ambivalent. Problems arise especially whenever certain social ills such as AIDS are associated with specific religions and/or cultures in a monocausal relationship. A historical and political analysis of the marginalisation strategies against homosexuals that give rise to specific legal problems of justice permits conclusions that are much more cogent than those to be drawn from a mere reference to the basic treatment of homosexuality in Islamic law.

(3) "Social justice (*al-`adalah al-ijtima`iyyah*)", the title of a famous book by the Egyptian Muslim Brother Sayyid Qutb (executed in 1966), has by now become a major subject of its own that in this case implies a certain critique of capitalism.[11] Other publications that appeared in Pakistan and India bear this out.[12] They address such disparate subjects as the blessings of a prohibition of interest, the advantages of the Islamic alms tax (*zakah*), the dignity of labour, rules in Islamic law that relate to agriculture or land ownership, the ban on begging and the prohibition of the capitalist practice of hoarding goods so as to create an artificial shortage. All this, however, most likely revolves around problems of justice within the economic order. To Sayyid Qutb, an influential social critic, economic justice constitutes a subsystem within a comprehensive superior society such as that guaranteed by an Islamic fundamental order.[13] After the first socialist party was founded in Egypt in 1921, the second half of the 20th century saw quite a number of socialist experiments or at least relevant declarations in the Islamic world, such as those launched by Nasser in Egypt, Ghaddafi in Libya, the Baathists in Iraq and Syria and Sukarno in Indonesia. By and large, however, all these designs of a socialist-inspired third path to economic and social justice have meanwhile given way to sceptical disillusionment. The 1980s finally witnessed the first boom of so-called Islamic investment companies.

SUMMARY AND OUTLOOK

On occasion, the debate about justice in all its three main currents is conducted without reference to Islam even in Islamic countries. I should point out, however, that there are at least some reformers at present

who consider it necessary to drape an Islamic mantle around their ideas and proposals, although these might be quite secular in nature. There are many social players in the Islamic world who are unable to reveal their secular inclinations for strategic reasons. This being so, Western partners should consider the possibility that such avowals of Islam might be nothing more than window-dressing adopted as a strategy in the political discourse. On the other hand, Islam has become an important element in the formation of national identities in the course of the last few years and decades. Now that other master tales, such as promises of complete national independence or societal blueprints with a socialist character, have begun to crumble, the Islamic heritage has become an important resource in self-perception, self-determination and self-development. Generally, those modern debates that concentrate on the constitution of a state, the rule of law, social justice and gender justice can be linked much more readily to secular debates than to the aforementioned speculations about specific legal and theological questions that also figure in the natural and rational law philosophy of the West under the heading of legal theology.

Western observers should avoid thinking solely in terms of relating anything and everything directly to the Koran and using it as the sole source for understanding or refuting developments in Islamic (legal) thought. Instead, they should recognise the existence of an immense pluralism within Islam that is always engaged in a lively exchange with the current environment. What is more, they should recognise that the focal points of the debate have shifted *markedly* since pre-modern times. For this reason, each and every debate should be analysed not in ideological or abstract terms but, wherever possible, with reference to its concrete details and, most importantly, its context, taking into account the environment prevailing in the respective Islamic regional society. It appears apposite to address the numerous subordinate debates about specific subjects, for these are not universalist but particularist. What is more, issues of justice often need to be addressed in areas where nobody would suspect their existence. One case in point I should like to mention is the problem of gender justice in the governmental transplantation centres of Pakistan, where more and more women appear as supposedly voluntary donors of organs for sick family members.[14] Male members of extended families often use their hegemonial position to urge socially disadvantaged women to donate a kidney or another organ, even though they themselves might be far better suited as donors from the medical

point of view. Given that the Muslim population numbers about 1.3 billion worldwide, it makes little sense to ask for sweeping statements about "women in Islam", as often happens in the West. A meaningful view of the overall issue can be obtained only if we make geographical, temporal and thematic distinctions.

Following the opinion of some Islamic critics, the Shariah or, more precisely, traditional Islamic jurisprudence is characterised by "the interwovenness of religion and law as well as by systematic defects" and by "the lack of a consistent development of guiding precepts, terminological confusion and dissent between the various schools on almost all questions of law".[15] It is correct to say that Islamic Shariah scholars in premodern times never endeavoured to arrange the near-unmanageable thicket of Islamic case law in a system that is free of terminological contradictions. Instead, there were and are numerous coexistent variants that occasionally differ from one school to the next but nevertheless lay equal claim to validity. This being so, the question arises whether it makes sense to demand that Islamic law – or the law as such, for that matter – should be crammed, with the means available to Islamic jurisprudence, into a system that is free of terminological contradictions and therefore more easily comprehensible. Pre-modern as well as contemporary history teaches us that Islamic law is more like a patchwork pieced together by many generations of Muslims and Shariah scholars who followed the example set by the Koran and by Muhammad without, however, confining themselves to these two sources of law in practice. It is only a slight exaggeration to say that it is this very quality that makes traditional Islamic law a modern code, for in Islamic case law, any content can be or become law in both theory and practice, provided it can be traced back to the religious foundations of the Islamic legal system, and that it can be reconciled with and substantiated by these foundations. In the dynamic system of Islamic case law that formes the core of the Shariah, the question of justice expresses a pervasive principle that reaches out to all forms and processes of lawmaking.

Conversely, some recent developments in the interpretation of the law as well as in related publications tend to emphasise the spirit rather than the letter of God's law. Arguing against purely formal obedience to details in the law of God, quite a number of reputable pre-modern scholars spoke out against simple scriptural literalism and the related practice of legal dodges (*hiyal*). Authorities like Ghazali (d. 1111) and al-Shatibi

(d. 1388) emphasised the elementary nature of certain basic assets (*maqasid al-shariah*) that, permeating the entire Islamic legal order consistently, should be respectfully considered and tip the scale in each individual case.[16] Approximately since the end of the 19th century, more and more modern Muslim jurists, human-rights theorists and even philosophers have been using this idea of an entelechy inherent in Islamic law to ensure public acceptance for their concepts of fundamental values, human freedom and – later on – human rights and gender justice.

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II. CONSTITUTION BUILDING

WAYS OF CONSTITUTION BUILDING IN MUSLIM COUNTRIES

THE CASE OF INDONESIA

Masykuri Abdillah

INTRODUCTION

Muslims claim that Islam is not merely a theological system, but also a way of life that contains a number of ethical and moral standards as well as legal norms implemented in life in society and state. In Islamic history, these Islamic doctrines were mostly implemented in personal, social, and political lives from the prophetic period until the coming of Western colonialism. The implementation of Islamic teachings made Islam a world civilization. H.A.R. Gibb, for instance, said: "Islam is indeed much more than a system of theology. It is a complete civilization,"[1] while Edward Mortimer says: "Islam, we are told, is not mere religion: it is a way of life, a model of society, a culture, a civilization."[2] In fact, Muhammad is not merely a prophet, but also a head of state, a judge, and a military commander, so that Muslims believe that Islam does not separate religion and state.

Islamic law (*shariah*) is the most important and distinctive aspect of Islamic teachings in the life of state, so that its existence is becoming an indicator of religiosity of a Muslim country. Yet the coming of Western colonialists to many

Muslim countries brought with it a reduction of the power of Islamic law among its adherents. Colonialists used their power, as well as modern education for Muslim people, to introduce their own, secular law. Since the 18th century, some political elites in several Muslim countries have been fascinated by Western civilization, which led them to adopt certain European laws in their own national law. In the Ottoman Empire, for instance, the law reform called *Tanzimat* was initiated with the proclamation of the *Hatti Sherif of Gülhane* (Imperial Edict of the Rose Chamber) on November 3, 1839. Among other things, this decree established equality before the law for all Ottoman subjects and removed a number of abuses.[3] The legal reform in the Ottoman Empire was based partly on principles of Islamic law and partly on European principles, but it took the form of European codification.[4]

Turkish law has become completely Westernized, especially since the end of the Ottoman Caliphate and Kemal Atatürk's 1924 proclamation of the Republic of Turkey, which is secular in nature. Since then, the process of secularization has been an ongoing process in most Muslim countries, even after they became independent states. The modernization of law has partly or fully adapted the legal and political system of the majority of Muslim countries to the Western political and legal system. Instead of the Caliphate state that ruled all Muslim territories, they accepted and implemented the nation-state, although some of them continue to maintain their traditional political system. The majority of them introduced a constitution (*dustur*); some introduced basic rules (*nizam asasi*) and some had no basis at all.

Most Muslim countries, however, continue to maintain the important position of religion in the state, although there are various stipulations in their constitutions concerning the position of Islam and Islamic law (*shariah*). There are also various stipulations on modern democratic institutions in the state. There are similarities in stipulating human rights in the constitution, although the concepts and practice of those rights differ. This paper will describe and analyze the various kinds of constitution in Muslim countries, especially Indonesia, the most populous Muslim country in the world which is today moving toward substantive democracy while recognizing the important position of religion in the state.

ISLAM AND THE IDEAS OF STATE AND LAW

Islamic doctrines on the political system consist of ethical and moral principles as well as a legal system based on Islamic belief. The ethical and moral principles consist of: trust (*amanah*), justice (`*adalah*), consultation (*shura*), pluralism (*ta`addudiyyah*), equality (*musawah*), brotherhood (*ukhuwwah*), and peace (*silm*), while the legal system consists of constitutional law, civil law, criminal law, and other laws. Yet there is no definite injunction in Islam concerning the form of state and the system of government, so that Muslim states in the classical and medieval periods differ theoretically and practically from those in the modern period. Some contemporary religious scholars, such as `Ali `Abd al-Raziq, even argued that Islam is merely a religion and the position of the Prophet as the head of state does not mean that Islam obliges its adherents to establish a state and to implement Islamic teachings in the life of the state.[5]

Most religious scholars and Muslim intellectuals, however, argue that Islam obliges its adherents to implement Islamic teachings in the life of the state. The Prophet himself established the Madinah state in 627 by issuing the "Madinah Constitution" (*mithaq al-madinah*, considered by observers to be the first written constitution in the world.) He was entrusted with a mandate from God to guide his people (*ummah*) in their life, so that he is not only an executive of God's orders but also a legislator (*al-shari`*). The people's loyalty to him is absolute, yet he conducted mutual consultation (*shura*) with them in making public policy and treated them justly and humanely. Thus, Muslims should first obey God, then the Prophet, and then those who have authority (*ulu al-amr*), to the degree that their decisions and policies are in accordance with God's injunction (the Koran) and His Prophet's tradition (*hadith*) as stipulated in Koran (4:59).

This means that ultimate authority or sovereignty does not lie with human authorities, but in God's law, known as Shariah. Madjid Khadduri called this "divine nomocracy",[6] because sovereignty is based on the laws derived from God (Allah), while Abul A`la al-Maududi called this "theo-democracy", because Muslims have been given a limited popular sovereignty under the suzerainty of God.[7] Although the basic character of the Islamic political system is "divine nomocracy" or "theo-democracy", most contemporary religious scholars and Muslim intellectuals accept democ-

racy and consider it compatible with Islamic teachings. It is true that the Shariah is God-made law, but on a more detailed and operational level it is interpreted by interpretive authorities (*ijtihad*) as well as by authorities in public affairs. Only a small number of religious scholars and Muslim leaders reject democracy, arguing that it is a man-made system negating the sovereignty of God over men.[8]

Another difference of opinion between the classical and contemporary religious scholars of Islamic political ideas and system is the concept of the nation-state, instead of the Caliphate state practiced in Islamic history. The nation-state means that a state is developed within the frame of a certain population, territory, government, and sovereignty. Hence the state is defined as "a geographically delimited segment of human society united by common obedience to a single sovereign".[9] Today most religious scholars and Muslim intellectuals accept the concept of the nation-state, and all Muslim countries have implemented it, while maintaining the unified Muslim *ummah* (nation). The 1972 Charter of the *Organization of the Islamic Conference* (*OIC*) that recognized the sovereignty of each country stated that the *OIC* aimed to promote Islamic solidarity among *OIC* members.[10] It is true that in modern times there are ideas among Muslim activists who support the caliphate (*khilafah*) state, as expressed by the *Hizb al-Tahrir* (Liberation Party) founded by Taqiyy al-Din al-Nabhani. But this is difficult to implement in modern times, because conditions have changed, especially concerning borders, the rule of law, the ethnic composition, and the language of any specific state. The caliphate system is certainly historical Islam; but there is no Islamic injunctive that Muslims should implement it under all conditions.

Furthermore, there are differences of opinion among the religious scholars concerning the existence or the form of state bodies and authorities. The above mentioned Koranic verses (4:59) imply the existence of executive (*tanfidhiyyah*), judicial (*qada'iyyah*), and legislative (*tashri`iyyah*) authorities. In early Islamic history, all of these authorities were under the Prophet and the caliphs, although they sometimes delegated some competencies to certain people who were capable of handling the delegated authority. Contemporary religious scholars generally support the distribution of powers, and many of them, such as `Abd al-Hamid Mutawalli, even support the separation of powers (*fasl al-sultah*) introduced by Montesquieu. According to Mutawalli, although in Islamic history the caliphates had all three authorities, their power was not absolute, be-

cause the Koran and Sunnah limited them.[11] In fact the Koran and Hadith do not stipulate such system, but give Muslims the opportunity to decide a proper system through individual or collective efforts to solve problems (*ijtihad*) in accordance with conditions where they live.

In accordance with the important position of the Shariah as well as the existence of the Madinah Constitution, most religious scholars and Muslim intellectuals promote the existence of a constitution in a Muslim country. This aims to realize good governance to avoid any power corruption or violation of human rights. Since the beginning, Islam has recognized the existence of human rights, formulated by the classical religious scholars as "necessities" (*al-umur al-daruriyyah*) and "needs" (*al-umur al-hajiyyah*) that must be catered for and protected in human life. Yet the term *huquq al-insan*, as a translation of "human rights" and its formulation, did not become popular in Muslim societies until the end of World War II. This is because religious teachings generally emphasize obligations rather than rights. Rights will be achieved if the individual fulfils his obligations and responsibilities. In fact all governments in Muslim countries as well as religious scholars and Muslim intellectuals support the term human rights. The *Cairo Declaration of Human Rights in Islam*, agreed upon in 1990 by the *OIC* members, shows this support. Although Muhammad `Ammarah wrote a book *Islam and Human Rights, Necessities, Not Rights* (*al-Islam wa-huquq al-insan, darurat la huquq al-insan*), he certainly does not reject human rights. He just wants to explain that Islam stipulates more obligations and responsibilities, not merely rights.[12]

KINDS OF CONSTITUTION IN THE MUSLIM WORLD

One of the important changes influenced by the Western legal and political system is the idea of constitutionalism, defined as a set of fundamental rules that generally

(a) establish the powers and responsibilities of the legislative, executive, and judicial branches of government,
(b) allocate powers to different levels of government, such as federal, provincial, and local,
(c) enumerate the rights of citizens in relationship to each other and to the government, as in a bill of rights, and
(d) stipulate a procedure for amending the constitution.[13]

Although Islam legitimates the necessity of a constitution as basic rules in the life of state, as practiced by the Prophet in the form of the "Madinah Constitution", in fact almost all Muslim countries enacted their constitutions only after they achieved independence after the end of World War II, and not all of them even enacted a constitution. Saudi Arabia, for example, had no constitution in the modern sense until the early 1990s. In 1993, however, this country carried out a legal reform through the enactment of the Basic System of Rule *(nizam asasi)* and the establishment of the Consultative Council (*majlis shura*) and the Regional Administrative System (*nizam al-muqata`at al-idariyyah*). The *nizam asasi* can function as a written constitution (*dustur*), but the Saudi people themselves avoid using this word because their constitution is the Koran and the Sunna.[14] Meanwhile, the Sultanate of Oman has no written constitution, and its rule of law is based on customs based in the Shariah.[15]

The idea of constitutionalism is usually identified with secular thought, but in most Muslim countries it has been adjusted to or even based on Islamic principles. Hence, most constitutions in the Muslim countries stipulate the position of Islam in the state, but they promote popular sovereignty (*siyadat al-sha`b*) rather than the sovereignty of God. The countries can be classified into six groups:

(1) Those that stipulate that Islam is the state religion, the head of state should be Muslim, and the Shariah is national law, such as Saudi Arabia, Iran, Pakistan, Sudan, and Libya.
(2) Those that stipulate that Islam is the state religion, the head of state should be Muslim, and the Shariah is the major source of legislation, such as Syria.
(3) Those that stipulate that Islam is the state religion, and the Shariah is the major source of legislation, such as Egypt, Kuwait, Qatar, and the United Arab Emirates.
(4) Those that stipulate that Islam is the state religion, and the head of state should be Muslim, such as Tunisia, Algeria, and others.
(5) Those that stipulate that Islam is the state religion, such as Jordan, Malaysia, and others.
(6) Those that do not mention Islam in their constitution, as in the case of Turkey and Indonesia.

The above classification shows that the majority of Muslim countries did not fully enact the Shariah (Islamic law), and most of them have even

developed their national law in the mold of Western law. Only the first group can be called "Islamic states" or "Islamic countries", while the others are called "Muslim states" or "Muslim countries". All of them, however, enacted Islamic family law, except Turkey, which enacted fully secular family law. This condition has affected the emergence of Islamic revivalism in many countries since the 1970s to oppose secular law as well as the process of secularization in general. Many of the revivalists demand the total implementation of the Shariah, not only in the sphere of family law, but also in that of criminal law. As they see it, their demand is actually for a kind of "re-Islamization" of the legal and political system. It is not for a kind of "Islamization" of the legal and political system, because in the last decades all of these systems have been Islamized.[16]

Some Islamic revivalist movements succeeded in implementing the Shariah, for example in Iran and Sudan; and some of them succeeded in influencing the state's policy to be more favorable toward Islam, for example in Jordan, Indonesia, and Malaysia. There are two ways of Islamizing the law and the political system, namely a legal and constitutional way, or by social movement or even revolution. Most Muslim leaders support making efforts for Islamization in the first way, because it is peaceful, while the second way can lead to radicalism and violation. The effort for Islamization is actually not the major factor leading to social movements; the existence of authoritarian government supported by foreign powers is the most significant factor, as in Iran at the end of the 1970s and Algeria in the early 1990s.

All of the constitutions also stipulate state bodies as foreseen in the democratic system as introduced by Montesquieu, although there are various terms and authorities. The state bodies consist of executive, legislative, and judicial bodies whose authorities and responsibilities can be classified into three groups, namely:

(1) delegation of powers, implemented especially in the Gulf countries, where the king and sultan are the single power, but delegate part of their power to judicial and legislative bodies,
(2) distribution of powers, implemented in Egypt, Syria, Pakistan, and elsewhere, and
(3) separation of powers, implemented in Turkey, Indonesia, and Malaysia.

Nevertheless, this does not mean that the second group is better than the first one, because in many respects public policies in the first group of countries are more popular than those in the second group of countries. In general, however, in most Muslim countries the executive power is more dominant than the others. The dominant power of an executive body or government is also reflected in that body's relation to citizen's rights, which are certainly stipulated in all of the constitutions. Consequently, citizens in several countries do not fully enjoy freedom, especially freedom of expression and of association. Almost all of the constitutions also stipulate equal rights for citizens, although some observers consider the law of personal status as discriminating between men and women and general law in certain countries as discriminatory against non-Muslims, especially in the form of privileges for Muslim citizens to be the head of state.[17]

In comparison with other Muslim countries, Turkey and Indonesia are today the most democratic countries in the Muslim world, as shown by the existence of effective electoral control of the government as well as free elections and more freedom in these two countries. This is not because Islam is absent in their constitutions, but because of the existence of democratic culture and because of the government's political will in these countries. But sometimes problems emerge that are not in line with democracy, such as certain government policies that limit citizens' freedom or implement an intolerant attitude and radical actions of certain groups. Although Turkey and Indonesia resemble each other in not mentioning Islam in their constitutions, the position of religion differs in these two countries. The Indonesian constitution stipulates that the state is based on the belief in God, while Turkey is based on secularism, although for several years now, Turkish people have increasingly supporting the Islamic-oriented parties, especially the Justice and Welfare Party (*AKP*) that is today becoming the ruling party.

THE EXPERIENCE OF THE INDONESIAN CONSTITUTION

The majority (about 88%) of Indonesian people are Muslims. Although Islam is not mentioned in the Indonesian Constitution, it has a significant role in the social and political lives in this country. Since the establishment of the first Islamic kingdom in Indonesia in the end of the 13th century, Islam has become one of the sources in the formation of values, norms, and behavior of the Indonesian people. In the period of Dutch

colonial rule that came to Indonesia in 1602, Islam helped to maintain, sustain, and even symbolize the identity and distinctiveness of the Indonesian people as well as its opposition to foreign Dutch colonial rule.[18] In March 1942, the Dutch colonialists were pushed aside by the Japanese, who at that time were the principal actors in the Pacific war.

The Japanese promised to grant Indonesian independence, and for this they set up the Investigation Committee for Preparation of Indonesian Independence (*BPUPKI*) on April 9, 1945. The first session was held from May 29 to June 1, 1945, and the principal matters discussed in the session were the form of the state, borders, the basis of the state, and so on. The discussion went smoothly except for the part devoted to the basis of the state. There were two political currents that arose within these sessions, namely the idea of an Islamic state and the idea of separation between state and religion. The sub-committee under the *BPUPKI* reached a compromise in the form of the Jakarta Charter, on June 22, 1945, which made the *Pancasila* the basis of the state and its first principle (belief in God) was followed by a clause: "with the obligation for Islamic adherents to implement the Islamic Shariah". Yet just several hours after the proclamation of Indonesian independence on August 17, 1945, the non-Islamic minority in eastern Indonesia refused to ratify the Constitution and demanded the exclusion of this clause.[19] Then, in concession to the Muslims' demand, the government set up a Ministry of Religious Affairs in January 3, 1946.[20]

In 1955 the Indonesian people conducted its first general elections, which were carried out democratically. Islamic parties obtained only 43.5% of the total number of votes. The Constituent Assembly began its sessions on November 10, 1956, and its major task was to determine the definitive form of the Indonesian Constitution. The Assembly completed about 90% of the work, but was unable to finish the final 10%, particularly concerning the basis of the state. There were two major drafts of the basis of the state philosophy, i.e. the *Pancasila*, and Islam. All the Islamic parties supported Islam as the ideological basis of the state, but their votes totaled only 48%. The others, whose votes totaled 52%, supported *Pancasila* as the ideological basis of the state. Thus, neither of the two blocs was able to garner 2/3 (66.6%) of the votes, which was the condition necessary to ratify the new Constitution. The leaders of the two blocs wanted to make a compromise, but President Soekarno, a vigorous defender of *Pancasila*, supported by the Armed Forces, promul-

gated the Decree of July 5, 1959 on "the return to the 1945 Constitution".

Then, not long after the upheaval of 1965-1966, many Muslim leaders requested that the "Jakarta Charter of June 22, 1945" be given official status. Yet from the beginning they affirmed that they supported *Pancasila* as the state ideology. Then, during the session of the *MPRS* in March 1968, the *Nahdlatul Ulama* (*NU*, Renaissance of Religious Scholars) and the *Parmusi* (*Partai Muslimin Indonesia*, Party of Indonesian Muslims) attempted to have the Jakarta Charter legalized as the Preamble to the 1945 Constitution, but these efforts did not succeed.[21] Responding to this request, the secular and non-Islamic groups as well as the government suspected that Muslims and the Islamic parties were still attempting to establish an Islamic state. The government, which supported modernization and secularization, even proclaimed that any effort to establish an Islamic state in Indonesia would be considered subversive. In response to this suspicion, the Muslim leaders reaffirmed that they supported *Pancasila* as the state ideology and would not establish an Islamic state.

The Reform Era that began with the fall of Soeharto in 1998 has been characterized by the promotion of substantive democracy, the demand of certain Islamic groups to implement the Shariah has been more open and stronger than in the previous period (New Order Era, 1966-1998).[22] The demand takes the form of calls for implementation of the Jakarta Charter or for total implementation of Islamic law (*shariah*) without changing the name of the Republic of Indonesia to include the term "Islamic". The groups concerned consist of Islamic political parties, such as the United Development Party (*Partai Persatuan Pembangunan*, *PPP*), the Star Moon Party (*Partai Bulan Bintang*, *PBB*), and the Justice and Welfare Party (*Partai Keadilan Sejahtera*, *PKS*), as well as several mass organizations, such as the Liberation Party (*Hizbut Tahrir*), Forum of Islam Defender (*Forum Pembela Islam*, *FPI*), Council of Indonesian Mujahidin (*Majelis Mujahidin Indonesia*, *MMI*), and others. In general, they argue that the implementation of the Shariah is a religious obligation and legitimized by the state ideology and Article 29 of the Constitution.

Generally, their demands have been expressed through legal and constitutional channels, although some Muslim hard-liners have sometimes

expressed them through radical actions, especially against immoral activities or particular crimes ignored by the authorities. The constitutional ways can be seen in their struggle for the first, second, and third amendments to the Constitution, conducted in 1999, 2000, and 2002 respectively, to explicitly mention the obligation for Islamic adherents to implement the Islamic Shariah in Article 29 of the Constitution. In fact, the majority of members of the People's Assembly (*MPR*) did not agree to this demand.[23] The two biggest Islamic mass organizations, *Nahdlatul Ulama* (*NU*) and *Muhammadiyah*, also did not agree to this and preferred to maintain the existing formulation of Article 29. Nevertheless, the *MPR* accommodated certain aspirations on religious practice in Article 31 Paragraphs 3 and 5 on the national education system, which is religious in nature as well as on the necessity of religious values in the development of Indonesian civilization. As the consequence of Article 31:3, the state legislated Act No. 20/2003 on the National Educational System, although certain social groups do not support this act.

In addition, the new constitution revised the structure of the legislative body, which today consists of two houses, namely the House of Representatives (*DPR*) and the House of Provincial Representative (*DPD*). It also gives more power to the legislative body, which was previously very weak. The change is in accordance with popular demand to promote substantive democracy by limiting executive power as well as promoting more freedom for citizens. Furthermore, the new constitution stipulates citizens' rights and obligations in greater detail than the old constitution did. It also continues to maintain the equal rights of citizens, which is shown by the fact that the constitution does not mention the word "Islam" or "Muslim", as is found in almost all constitutions in the Muslim countries. In fact the government in the reform era promoted substantive democracy by organizing free general elections in 1999 and 2004, although certain politicians and political parties are still more oriented toward power than toward promoting people's prosperity.

Concerning the state's policy on equal rights, there is no discrimination against minority groups. Each religious and ethnic group has equal rights, and each religion even has its religious holidays recognized as official holidays. The state officially recognizes five religions, namely Islam, Christianity (Protestant and Roman Catholic), Hinduism, Buddhism, and Confucianism. The government has a strong commitment to promoting human rights, as shown by the legislation of the Act on

Human Rights of 1999 in the B.J. Habibie era and the creation of the position of the Minister of Human Rights Affairs in Abdurrahman Wahid's era (1999-2001), as well as the establishment of an independent Human Rights Commission. During the era of Megawati as President of the Republic (2001-2004) and her successor Susilo Bambang Yudhoyono (2004-present), the Ministry of Human Rights Affairs has merged with the Ministry of Justice and Human Rights. In accordance with this, women also have a proper status in society, although this has not yet been optimally realized. They are able to hold all positions that men hold, including in the political area, and the Act on Elections of 2002 even set a quota of 30% for women in the House of Representatives.

CONCLUSION

It can be concluded that Islam legitimates a constitution as basic rules in the life of the state, as practiced by the Prophet in the form of the "Madinah Constitution", although in fact almost all Muslim countries did not enact their constitutions until just after they achieved independence after the end of World War II. In accordance with modernization, almost all Muslim countries adopted a Western-style legal and political system, as seen in their constitutions, which introduce popular sovereignty rather than the sovereignty of God. Yet most of them continue to maintain the important position of Islam in the state, although only some of them fully implement the Shariah. In addition, most Muslim countries stipulate the separation or distribution of powers as well as citizens' rights as inherent in a democratic system, although there are various terms and authorities as well as various concepts of rights. In general, however, the democratization process in most Muslim countries is not going well, except in Turkey and Indonesia, which are today moving toward substantive democracy.

Indonesia, whose majority (about 88%) is Muslim, enacted its constitution after it declared its independence in 1945. There were constitutional debates whether the basis of the state should be Islam or rather *Pancasila*. The first and the second debates were conducted in preparation for Indonesian Independence in 1945 and in the sessions of the Constituent Assembly in 1956-1959, respectively. The third and forth debates concerned the position of the Shariah in the state, while maintaining the *Pancasila* state, conducted at the end of 1960s and in the early 2000s, respectively. In fact the majority of political parties and Islamic organiza-

tions, as well as of Muslim people, do not support the inclusion of the Shariah in the constitution. Nevertheless, the state enacted certain aspects of Islamic law, such as business law, in addition to Islamic personal law, which has been in force since the period of colonial rule. The state also continues to protect minority rights, including officially recognizing five religions embraced by minorities of Indonesians. In the reform era (1998-present), Indonesian people are attempting to promote substantive democracy, while maintaining the important position of religion in the life of the state.

In the future, in accordance with the process of globalization that promotes more democratization in the world, it is important for Muslim countries to promote and strengthen the democratic system in their constitutions. Of course, it is undeniable that they should compromise between the ideals of Islam and the democratic system. This means that certain Islamic teachings that are basically incompatible with democracy should be reinterpreted, while certain values of democracy that are fundamentally incompatible with Islamic teachings should be adjusted to Islam without negating the essence of democracy. In addition, Muslim countries should improve the quality of citizens' education and prosperity. Such an effort would enlighten the citizens and motivate them to act legally and constitutionally in expressing their rights as well as struggling for their aspiration and interests. This would also reduce the growth of radicalism in the Muslim countries, which is usually caused by socio-economic factors as well as government policy and domination by foreign powers. Hence, foreign powers or hegemons should not implement policies and actions that could provoke peoples in the Muslim countries to act radically.

1| *Gibb, H.A.R, Whither Islam, London 1932, p.12.*
2| *Mortimer, Edward, Faith and Power. The Politics of Islam, New York 1982, p. 16.*
3| *Liebesny, Herbert J., The Law of the Near & Middle East. Reading, Cases and Materials, Albany (NY) 1975, p. 46.*
4| *Ibid., p. 64.*
5| *See `Abd Al-Raziq, 'Ali, al-Islam wa-usul al-hukm, Tunis, pp. 21-29.*
6| *See Khadduri, Majid, War and Peace in the Law of Islam, Baltimore and London 1955, p. 16.*
7| *See Maududi, Abul A'la, Islamic Law and Constitution, Lahore 1960, pp. 147-148.*
8| *Salih, Hafiz, al-Dimuqratiyya wa-hukm al-islam fiha, Beirut 1988, pp. 95-96*
9| *Sills, David L. (ed.), International Encyclopedia of the Social Sciences, 15 (1981), p. 150.*

10| See Mayer, Ann Elizabeth, "Modern Legal Reform", in: The Oxford Encyclopedia of the Modern Islamic World, vol. 2, New York and Oxford 1995, p. 466.

11| Mutawalli, 'Abd al-Hamid, Azmat al-fikr al-siyasi al-islami fi al-'asr al-hadith, Alexandria 1970, pp. 314-315.

12| See ´Ammara, Muhammad, al-Islam wa-huquq al-insan. Darurat la huquq, Damascus 2004, p. 13.

13| Dickerson, Mark O. and Thomas Flanagan, An Introduction to Government and Politics, Ontario 1994, p. 52.

14| See Aba-Namy, Rashed, "The Recent Constitutional Reforms in Saudi Arabia", in: International and Comparative Law Quarterly 42 (1993), p. 295.

15| al-Ahkam al-dusturiyyah lil-bilad al-'arabiyyah, Beirut, p. 168.

16| Cf. Tibi, Bassam, Die fundamentalische Herausforderung. Der Islam und die Weltpolitik, Munich 1993, p. 45.

17| Cf. Mayer, Ann Elizabeth, op. cit., p. 466.

18| Cf. Wertheim, W.F., Indonesian Society in Transition. A Study of Social Change, Bandung and The Hague 1956, p. 205.

19| The Jakarta Charter was a document proposed as a preamble to the Indonesian Constitution, in which Pancasila was approved as the foundation of the state and its first principle was followed by a clause: "with the obligation for Islamic adherents to implement the Islamic Shariah". The formulation of the Pancasila in the Jakarta Charter was: (1) the belief in God with the obligation for Islamic adherents to implement the Islamic Shari'ah, (2) just and civilized humanitarianism, (3) the unity of Indonesia, (4) democracy guided by the inner wisdom of deliberation among representatives, and (5) social justice for all Indonesian people. On August 16, 1945 all members of BPUPKI, including non-Muslim representatives, accepted the formulation of the 1945 Constitution by acclamation. Because the non-Islamic minority in eastern Indonesia rejected the constitution, the Islamic representatives on August 18, 2007 approved the exclusion of the clause in order to avoid a split among the Indonesian people, who had just proclaimed their independence, but the first principle became "Belief in the One and Only God" (Ketuhanan Yang Maha Esa), which for the Muslims meant tawhid (oneness of God or monotheism). Moreover, Article 29 of the Constitution says: "The state shall be based upon the belief in the One and Only God".

20| In fact the Ministry of Religious Affairs organizes not only Muslim affairs, but also Christian, Hindu, and Buddhist affairs.

21| Cf. Samson, Allan A., Conception of Politics, Power and Ideology in Contemporary Indonesia, in: Karel D. Jackson and Lucian W. Pay (eds.), Political Power and Communication in Indonesia, Berkeley and Los Angeles 1978, pp. 221-222.

22| Concerning debates on Islam and democracy in Indonesia, see Abdillah, Masykuri, Responses of Muslim Intellectuals to the Concept of Democracy (1966-1993), Hamburg 1996.

23| In the reform era there are three Islamic political parties, namely United Development Party (Partai Persatuan Pembangunan, PPP), Star Moon Party (Partai Bulan Bintang, PBB), the Justice and Welfare Party (Partai Keadilan Sejahtera, PKS) and two parties based on Islamic organization, namely the National Awakening Party (Partai Kebangkitan Bangsa PKB,) and the National Mandate Party (Partai Amanat Nasional, PAN). In the 2004 election the PPP obtained 8.15 % of the votes, the PKS obtained 7.34 %, and the PBB obtained only 2.62 %, while the PKB obtained 10.57 of the votes and the PAN obtained 6.44 %. The two biggest parties are national or non-religious parties, namely the Functional Group Party (Partai Golongan Kary, Golkar), which won 21.58 %, and the Indonesian Democratic Party (Partai Demokrasi Indonesia – Perjuangan, PDI-P), which won 18.53 %.

WHERE IS THE "ISLAM" IN THE "ISLAMIC STATE"?

Farish A. Noor

Much of what I wish to say here is a reaction to the comments made by Prof. Masykuri Abdillah and will refer to the developments in a region that I know better than most, namely Southeast Asia. While taking the observations made by Prof. Abdillah seriously, I have to state my own reservations on a number of points.

I begin by addressing his earlier statement that for many Muslims all over the world, "Islam is not merely a religion but also a way of life"; one that encompasses the totality of all societal and normative praxis, and one that has an opinion on practically all aspects of human life, from the moment of birth to death, and some may argue even beyond. The view that Islam is a total way of life, a mode of being and existing in the world, is hardly novel to us now. This oft-repeated claim has been made by Muslims whose own commitment to Islam may vary according to their particular lifestyles, political commitments, and so on.

Yet more often than not, the claim that Islam is a totalizing system with a totalizing discursive economy has been made by Islamists in particular – Muslims who see Islam as also the basis of their respective political projects – as a justifica-

tion and rationale for the political appropriation of Islam and the instrumentalization of Islam as a political ideology as well. The shift from Islam as a totalizing way of life to a totalizing political system is not too great a semantic-discursive shift, and we have seen numerous attempts to install precisely such a totalizing political system, albeit defined and inspired by religion, in many postcolonial Muslim societies since the 1970s.

This view of Islam as a religion that is somehow unique due to its totalizing aspect, however, deserves to be further examined. For a start, it could be argued that the totalizing aspect of Islam is rendered all the more evident thanks to the body of Shariah or jurisprudential laws and norms that certainly do have a totalizing ambition. Yet it cannot honestly be said that Islam is alone in its totalizing claims, for other religions also have a similarly totalizing universalist outlook; and surely it cannot be said that Christianity, Hinduism, or Buddhism are silent on issues ranging from concerns over the environment, ethical conduct in society and governance, and social relations.

If Islam has something to say on these matters, the universal demand for Justice, Equity, and Ethics in all other religions likewise compel their adherents to act justly, ethically, and religiously in all other areas as well. We should not suppose that the ethical demands placed on a Christian, Hindu, or Buddhist politician are less than those placed on the shoulders of a Muslim politician, for instance, simply because the former religions do not possess a body of jurisprudential laws and codes that spell out clearly the lines of conduct and behavior in that domain?

It could therefore be said that all religions have a totalizing and universalist outlook, for it is in the nature of all bodies of revealed religious knowledge to make such universalist claims. Religion, as Gai Eaton once wrote, "has to be all or nothing" and has to try to change the world. Indeed it could be argued that any religion that does not seek to change the world as it finds it, or which chooses to leave the *status quo ante* as it is, does not have a message of salvation and/or transformation at all.

How, then, does religion seek to change the world, and to what end? In attempting to answer this question, one has to look at the two components of the equation itself. On the one hand, there is religion – as a body of scripture, rules, norms and values, in other words a discursive economy on its own and by itself. And on the other hand there is the community of the faithful – who try to take into account and make sense

of that body of religious knowledge and transform it into a body of normative praxis.

The two components, it has to be remembered, are existentially and ontologically distinct: The community of the faithful are made up of individual actors and agents endowed with rational human agency, free will and choice and as a collective body of individuals may also be (and often is) internally differentiated by virtue of differences of perspectives, wills, desires, competence, etc.

Religion, on the other hand, is the passive component that does not possess the agency to move things or change things on its own. Erroneous claims such as "Islam made them behave that way" or "they did that because they are Christian" fails to take into account the simple fact that no religion has the ability to affect human action and agency without the willful compliance of the adherents themselves. The behavioral norms of faith communities are determined rather by the active engagement between human agents and bodies of religious knowledge and the active process of transforming and translating religious ideas to action. But again, as Ebrahim Moosa has noted, religious texts do not cause action and have no causal potential in themselves: Religious behavior, or religiously-inspired behavior (ranging from religiously-motivated acts of benevolence to religiously-inspired violence), is the result of human (and therefore subjective, particular, and historically determined and thus contingent) engagement with ideas. To sum up, religious people behave and act the way they do because they are fundamentally people with rational agency, choice, and the capacity to act in the first place.

Let us now turn to the observations made by Prof Abdillah in his account of the Islamization process in postcolonial Indonesia.

Indonesia's Muslim community, as we know, happens to be the single biggest Muslim community in the world today, numbering more than 200 million members. Historically, Islam has been in the Indonesian archipelago since the 13th century and has certainly played an important role in the development of Indonesia's national and collective identity for seven centuries. In practically all areas of life – ranging from the plastic arts to literature, from architecture to commerce and certainly to politics – Islam has been a constant factor that has shaped and determined the historical development of Indonesia to this day.

But as Prof. Abdillah has also noted, the development of political Islam in Indonesia has never been a straightforward, linear process; nor was it historically pre-determined from the outset. From the mid-19th century on, various schools of normative Muslim thought have emerged in the Indonesian landscape, with different, and sometimes conflicting approaches to the question of religion's place in society and politics. While there have been groups of a more modernist, reformist bent such as the *Muhammadiyah*, there have also been more traditionalist groups that have upheld a more traditionalist and conservative view of religion's place in society, such as the *Nahdlatul Ulama*. Right up to the 1950s, there was never a consensus on how Islam was to make the transition from a body of textual knowledge to a corpus of social-political and cultural norms of behavior. Those who opted for a more direct, positivistic approach included the leaders of the *Darul Islam* movement, who wished to see Islam transformed into the singular, primary source of positive law in the country, with Islam serving as the basis of the new Indonesian Republic's constitution. Yet even then they were opposed by traditionalists and conservatives who regarded Islam as a specifically cultural phenomena that colored Indonesian identity but that should not have a direct impact on the determination of the county's political future.

Looking back at the history of Islam's involvement with politics in Indonesia, we come to several simple observations:

First, it has to be remembered that Islam *per se*, as a body of knowledge and a discursive economy, did not ever determine the shape and direction of Indonesian politics – any more than any of the other religions found in the country. It was Indonesian Muslims, as individual actors and agents, who propelled this process of ideological and political engagement, and it was through their collective and individual agency as rational actors that Islam was slowly factored into the process.

Second, the integration of Islam – and religion in general – into politics in Indonesia was from the outset a contested process that involved the negotiation (and sometimes even confrontation) of wills and world-views by a number of agents and actors, and as such the entire process of Islamization has been driven by human agency and certainly not pre-ordained or destined by the truth of revealed knowledge.

Third, throughout this contested process, it is clear that what was at stake was infinitely more than the cherished dreams of an idealized religious Utopia or lofty notions of religious purity, values, and ethics, but rather the demands of political economy. Viewed from the point of view of political economy, the entire process was driven by calculations of interest and power. It is vital to note, for instance, that the reformist camp (such as the members of the *Muhammadiyah* movement) were mainly Indonesian citizens who were urban-based and who belonged to the newly emerging urbanized commercial classes and entrepreneurs. Conversely, the more conservative traditionalists of the *Nahdlatul Ulama*, who opposed radical religious and political reform, were often from the rural-based agricultural aristocracy and feudal classes themselves, who were understandably less keen on any form of political-economic reform, even when it was based on Islamic notions of equity and social justice.

It would therefore appear that the primary drivers and motivating factors for the Islamization wave in Indonesia since the 1960s have been political-economic, rather than theological or ethical. But should we be surprised by any of this? For is this not simply the common mode of religious engagement with politics the world over, multiplied and repeated in so many other cases and in so many other societies as well?

Prof. Abdillah has noted that Indonesia's engagement with Islam is still continuing today and is set to continue in the decades to come. With demographic factors ensuring the continued presence of a Muslim majority in the county, there is no reason to believe that the debate on Islam in Indonesian politics will cease any time soon. Furthermore, in the wake of the economic and financial crises of 1997-98, the Indonesian state has experienced massive social and structural trauma that is unprecedented, which has also opened up the public domain in a more democratic manner.

As Indonesia lurches forward in its discovering of a new mode of democratic public engagement with politics, there will undoubtedly be repeated calls for the assertion of stronger Muslim identity and representation in politics as well. As we have seen in the turbulent years of 2002-2004, this representation can also take the form of extreme forms of religiously-inspired militancy by Muslims and Christians alike. But one thing is set to remain, namely the intimate connection between religion and the factors of political economy. Indonesian society today is experiencing a

rate of internal differentiation that is accelerated by the fracturing of the economy and the emergence of new classes and categories of political-economic actors. As such, new proponents of societal reform will undoubtedly come to the fore as well, and many of them may choose the path of communitarian-sectarian religious politics in their struggle for power and representation. Islam and the other religions of Indonesia will surely be called upon to serve the role of collective banner and mobilizing factor in the contested politics of this new democracy.

But for that reason we also need to question the extent to which "Islam" is really the prime mover in this societal-political development process, and we should not forget that the factors that have really propelled the Islamization process in the country are the human actors and agents themselves: the Muslims of Indonesia.

THE INFLUENCE OF RELIGIOUS CLAUSES ON CONSTITUTIONAL LAW IN COUNTRIES WITH AN ISLAMIC CHARACTER

Naseef Naeem

Generally speaking, it is not easy to present, on a few pages, a precise and comprehensive legal comment on the process of making and shaping constitutional law in countries with an Islamic character.[1] The reason for this lies in the perspectival and conceptual scope of these terms, with their far-reaching and diverse implications. To summarise them in a concept that is both consistent and readable is a great challenge. This is why the following analysis will be confined to outlining the substantive-law aspect in a pattern that concentrates on constitutional law, leaving those aspects out of account that are of lesser relevance in a constitutional-law consideration.

SUBJECT AND OBJECT OF THE INVESTIGATION

Basically, there are three sets of facts that play a crucial role in "making and shaping constitutional law in countries with an Islamic character". These are:

1. A state normally shapes its constitution by constitutional lawmaking, transforming itself into a constitutional state in the process. Thus, the constitutional system of a state incorporates three aspects: Constitutional law, constitutional policy and constitutional reality. In most analyses that address constitutional policy and/or constitutional reality, the legal component is considered in a formal context and/or in conjunction with other historic, cultural, societal or political components. Constitutional-law analyses, on the other hand, revolve around constitutional provisions and their substantive effects. This being so, this paper focuses on examining constitutional law in Islamic countries in both its constituent elements, namely state organisation law and fundamental rights, and in both its dimensions, namely constitutional theory and the legal methodology for solving constitutional-law disputes.

2. As a religion, Islam prescribes certain principles that its adherents must obey absolutely. From the constitutional-law point of view, however, its different schools of law and its interpretations of governmental issues make it less of a faith and more of an ideology that mainly or partially serves to control the constitutional law of a state. Thus, Islam is transmuted into a constitutional principle that is not merely formal in nature but actually exerts a substantive influence on constitutional law. This influence is what we are looking for.

3. By definition, countries with an Islamic character are those in which the reality of constitutional law in some way or another either reflects Islam as a holistic concept or the principles of the Islamic faith in general or, alternatively, in the interpretation of one of the Islamic schools of law. Consequently, those countries with a Muslim majority whose constitution recognises in one way or another the principles of laicism, secularism, the religious neutrality of the state or the separation of the state and religion[2] will not be considered in this paper. Nevertheless, there is no overlooking that even in these countries, Islam has some status in the system or, to be more precise, the legal system of the state. However, its influence extends not so much to constitutional law as to other areas, such as family law. This is why these countries are not included in the constitutional-law analysis made in this paper.

Based on these three sets of facts, we will now address the question of whether the constitutional law of the states in question is affected by the embodiment of Islam as a constitutional concept in any way that can be expressed in concrete terms.

REFERENCE TO ISLAM IN A CONSTITUTIONAL CLAUSE

Islamic countries are generally characterised by complex mosaic-like configurations and various properties of constitutional law.[3] This diversity is clearly apparent from the provisions of the various constitutions, affecting all their constituent elements, such as the foundations of the state or the formation of its branches of government. Similarly, reference to Islam is made in the constitutions of these states in a variety of forms. Thus, for example, the state may be designated as "Islamic",[4] Islam may be named as "the religion of the state",[5] and/or the Islamic Shariah may be identified as "the main source"[6] or merely as "one of the main sources"[7] of legislation. Some constitutions, especially the more recent ones, contain more stringent legal formulations that forbid the legislature to make any laws that conflict with the principles of the Islamic faith.[8]

The effect of these formalities in constitutional law differs widely. Thus, they may oblige the entire system of the state to adhere to a specifically Islamic divine order, or they may oblige the branches of government (particularly the legislative branch) to respect certain Islamic principles or legal teachings in some or even all matters. For the purposes of this paper, I have subsumed them under the heading of "religious clauses", not least because – from the systematic point of view – calling the inclusion of a reference to Islam in a constitution a "clause" creates a basis for examining its possible concrete effects at all levels of constitutional law. What is more, adopting this approach in an analysis of constitutional references to Islam is especially helpful when we study the implementation of regulations and substantive norms derived from Islam and evaluate their impact on the constitutional system as a whole. Thus, we need to cast the question asked above in more precise terms: Can a religious constitutional clause that relates to Islam have a concrete material impact on the two constituent elements of constitutional law, namely the law of state organisation and fundamental rights, when viewed from the aspects of constitutional theory and legal methodology?

THE INFLUENCE OF RELIGIOUS CLAUSES ON THE CONSTITUTIONAL STATUS OF FUNDAMENTAL RIGHTS

Reviewing the impact of religious clauses on the law that governs the organisation of the state, a survey of the diverse regulations relating to the structure of governmental branches in Islamic countries would satisfy us that religious clauses do not in principle exert any specific substantive influence in this context. Neither the manner in which the powers of the state are distributed among the organs of the legislative, executive and judiciary branch nor the regulation of their mutual relationships indicate any specifically Islamic influence on the organisation of the state, even if God is referred to explicitly or implicitly as the origin of all governmental power and the Quran is designated as the supreme law or the supreme constitution of the state.[9] For with or without reference to God, regulations resembling those in the state organisation laws of all Islamic countries may be found in the constitutions of other states as well.[10] Even Shiite Iran and Sunnite Saudi Arabia, two states where the link between religion and the state has its own special character, cannot be said to have formed their branches of government along "specifically Islamic" lines, not least because each of the three functions of the state is performed by dedicated organs. This does not mean, however, that no unusual regulations on the organisation of the state are to be found in the constitutions of these two as well as other Islamic countries. In formal terms, these peculiarities might be ascribed to the Islamic character of the state, such as the creation of a so-called organisational authority for religious affairs alongside to the executive and judiciary, as well as the establishment of an advisory council to the king under Art. 44 and 67ff of the basic law of the Kingdom of Saudi Arabia of March 1, 1992. As these constitutional peculiarities differ from one country to the next, however, they should not be regarded as the expression of a specifically Islamic influence on the substantive law of state organisation.

The diversity of ways in which state authorities are structured and organised in Islamic countries might give rise to the assumption that the religious clause as it is variously formulated in their respective constitutions relates to the substantive work and not the form of the state authorities. This is why the constitutional impact of religious clauses should not be investigated with the aid of methodological questions about, for example, how political, societal, economic and cultural affairs are regulated by the legislative branch, how laws are implemented by the execu-

tive branch or how legal disputes are resolved by the judiciary. Such an investigation must be strictly confined to the content of laws, government decisions and court judgements. By these acts of government, the rights of the individual vis-à-vis the state and other individuals are regulated in the constitutional sense. This being so, the subject of this paper may be narrowed down to defining in concrete terms the impact of religious clauses on the actual form of these rights. However, as the rights of the individual vis-à-vis other individuals form an issue of private rather than constitutional law, a constitutional-law analysis must confine itself to the individual's rights vis-à-vis in relation to the power of the state and the impact of the religious clause on them. The question is, in other words: To what extent do religious clauses influence the constitutional status of fundamental rights in Islamic countries?[11]

THE RELIGIOUS CLAUSE AS A CONSTITUTIONAL BARRIER TO HUMAN RIGHTS

To answer the last question posed above, two facts need to be established regarding the codification of human rights alongside to a religious clause:

1. The constitutions of Islamic countries contain lengthy enumerations of human rights that, apart from a few peculiarities,[12] cannot be distinguished from those named in occidental constitutions. In constitutional terms, therefore, these fundamental rights include all rights of liberty and equality that state authorities would normally have to observe in their dealings with citizens.

2. However, these fundamental rights are incorporated in the constitutions of Islamic countries only within the framework of a basic Islamic order that is formally established either by a religious clause, as explained above, and/or by a codification of civic duties of a religious nature[13] or with a religious background.[14] In other words, the Islamic religious order with its prescriptions and proscriptions provides a constitutional framework for the fundamental rights embodied in the constitution.

If we consider these two facts in the context of constitutional law, the freedom of religion, the right to self-fulfilment, and equality in the widest possible sense as recognised in the constitution are confronted by the

principles of the Islamic faith. As Islam juristically affects all these matters, for instance, apostasy, the proscription of extramarital sexual freedom, the denial of rights to children born out of wedlock and the one-sided ban on Muslim women marrying non-Muslim men,[15] it is easy to see that the religious clause does concretely influence constitutional law in this context. Its effect is that of an undefined constitutional prescription that enables governmental authorities to curtail fundamental rights whenever they conflict with an Islamic principle. Along with the fundamental rights named above, this holds particularly true for freedom of opinion, the press, research, and the arts as well as for the general specificity of women's rights in all those cases where religion is affected in any way by these rights and liberties or an image of man is presented that deviates from the moral principles of Islam.

Most of the cases in which the aforementioned fundamental rights are curtailed because of the religious clause relate to an extension of the Islamic concept of apostasy. Its effect on Muslims is not restricted to explicit renunciations of the faith or religious conversions, for any Muslim citizen may submit an application describing certain actions or attitudes that may then be interpreted by the authorities in general and the judiciary in particular as implying apostasy.[16] This clearly reveals a constitutional "conflict of fundamental rights" because the religious clause enshrined in the constitution obliges the authorities in general and the judiciary in particular to enforce the ban on apostasy, as well as other religious proscriptions hidden in this principle, at the expense of fundamental rights. Thus, the religious tenets of Islam are reinterpreted as concrete constitutional restrictions on fundamental rights, the result being that there can be no question of a clearly-defined substantive concept for these rights, although they are formally embodied in the constitution.

There is no denying that, in countries with a constitution that includes a religious clause as one of its principles, the authorities and especially the judiciary will regard fundamental rights as second-class constitutional provisions wherever one of the Islamic principles – such as that regarding apostasy – is involved. Thus, the knotty legal problem of a lengthy recital of fundamental rights existing side by side with a religious clause in a constitution often leads to decisions that favour the principles of Islam at the expense of the fundamental rights of the individual. As far as this goes, the opinion is not unwarranted that a state whose constitu-

tion makes reference to Islam denies its citizens a number of fundamental rights by virtue of that instrument. At the same time, this makes the branches of government not guardians of fundamental rights, but guardians of Islamic tenets that take precedence under constitutional law.

CONCLUSION

In constitutional theory and history, such options to use principles of the Islamic faith to justify curtailing fundamental rights in favour of the authorities of the state clearly conflict with the political liberalism that forms the basis of the historic development of a modern constitutional concept that reflects a liberal and individualistic image of man. This liberal and individualistic concept emerges particularly clearly from the historic evolution of the German basic law, not least because Germany's constitution was designed first and foremost to reflect the country's specific experience of National Socialism as a regime that annihilated all fundamental rights. Seen in that light, it appears that the incorporation of a religious clause in the relatively modern constitutions of the Islamic countries[17] constitutes a break with the development of the constitutional concept inasmuch as the aim no longer is to protect fundamental rights in these countries. According to constitutional theory, therefore, the concept by which these countries are governed has no room for the dignity of the concept of the constitution.

Along the same lines, it appears necessary to contradict an opinion, widespread in Islamic countries, that there is a proper Islamic constitutional theory postulating that the focus should be not on the individual and his rights but solely on a common fundamental order based on Islam. From the point of view of constitutional theory and history, such a theory relates not to constitutions but to rules and regimes, because constitutional theories are impossible to disassociate from a liberal democratic order.[18] The conclusion is that in constitutional law, the constitutions of Islamic countries deserve their name only if their respective religious clauses are either abolished or interpreted merely in formal terms, so that they do not substantively affect any fundamental rights.[19] As long as this is not the case, any such order must be denied recognition as a constitution.

1| *Originally, this paper was presented in the session on "Making and Shaping Constitutional Law in Countries with an Islamic Character" at the conference on "Islam and the Rule of Law" on Sept. 6, 2007. Edited for publication, this version was carefully designed to retain the character of a statement with its brief sentences. In addition, only a few selected references to literature on constitutional design in Islamic countries were made, and the number of examples quoted from the constitutions of these countries – most of them members of the Arab League – was kept low to render the paper more accessible. No sources on constitutional theory and constitutional law in general were quoted, not least because so many are accessible in German and other languages.*

2| *E.g. Turkey as well as some member countries of the Commonwealth of Independent States (CIS), the union of former Soviet Republics. For a detailed explanation of the constitutional systems of this group of states with a Muslim majority, see Mikunda-Franco, Emilio, "Gemeinislamisches Verfassungsrecht. Eine Untersuchung der Verfassungstexte islamischer Staaten in rechtsphilosophisch vergleichender Perspektive", in: Jahrbuch des öffentlichen Rechts 51 (2003), pp. 21-81, 49-60.*

3| *Cf. Mikunda-Franco, Emilio, "Der Verfassungsstaat in der islamischen Welt", in: Die Welt des Verfassungsstaates, 1st ed., Baden-Baden 2001, pp. 152-173, 157-159.*

4| *As in Art. 1 of the constitution of Bahrain of December 16, 1973.*

5| *As in Art. 2 of the constitution of the Hashemite Kingdom of Jordan of January 1, 1952.*

6| *As in Art. 1 of the basic statute of Qatar of April 2, 1967.*

7| *As in Art. 7 of the constitution of the United Arab Emirates of December 2, 1972.*

8| *As in Art. 3 of the constitution of the Islamic Republic of Afghanistan of January 27, 2004 and in Art. 2 Par. 1 (a) of the constitution of the Republic of Iraq of October 15, 2005.*

9| *As in Sect. 1 of the Declaration on the Establishment of the Authority of the People in Libya of March 2, 1977.*

10| *See, for example, the reference to God in the preamble of the German basic law, where the authors expressly postulate a "responsibility (of the German nation) before God" despite the principle of religious neutrality of the state embedded in the constitution.*

11| *For a general comment on the problem of so-called Islamic human rights in the constitutional systems of Islamic countries, see Ebert, Hans-Georg, "Arabische Verfassungen und das Problem der islamischen Menschenrechte", in: Verfassung und Recht in Übersee 30 (1997), pp. 520-532; Mikunda-Franco, Emilio, "Das Menschenrechtsverständnis in den islamischen Staaten. Allgemeine Betrachtungen im Licht vergleichender Rechtsphilosophie", in: Jahrbuch des öffentlichen Rechts 44 (1996), pp. 205-236.*

12| *These peculiarities emerge particularly clearly when we compare the way the provisions on certain fundamental rights are formulated in the constitutions of Islamic and European countries. Thus, for example, freedom is generally assured explicitly only with regard to belief and religious practice, as in Art. 35 of the constitution of the Syrian Arab Republic of March 13, 1973, but not with regard to religion or the choice of religion. This might create the impression that freedom of religion is not implied in such a text, but this impression is incorrect. The Arabic word for belief, `aqida or i`tiqad, is a generic term that describes anything and everything one believes in, including a religious faith or a world-view.*

13| *E.g. Art. 9 of the Saudi basic law, which postulates that family members should be raised in the spirit of the Islamic faith.*

14| *E.g. Art. 40 of the basic law of the Sultanate of Oman of November 6, 1996, which demands respect for the general principles of morality. As a religious clause exists, it is only natural that these principles of morality should be derived from Islam and its image of society in a number of contexts.*

15| *Conversely, this ban does not apply to Muslim men, for they are allowed to marry non-Muslim women.*

16| *For an explanation of the problem of apostasy in Islam, see O'Sullivan, Declan, "Egyptian Cases of Blasphemy and Apostasy against Islam. Takfir al-Muslim (Prohibition Against Attacking those Accused)", in: The International Journal of Human Rights 7 (2003), pp. 97-138.*

17| *For an overview of constitutional evolution in the Arab states that illustrates relatively modern developments in Islamic countries, see Brown, Nathan J., "Regimes Reinventing Themselves. Constitutional Development in the Arab World", in: International Sociology 18 (2003), pp. 33-52.*

18| *Cf. Mikunda-Franco, Emilio, "Gemeinislamisches Verfassungsrecht", p. 22. Unlike the theoretical analysis detailed above, the path Mikunda-Franco consciously chooses for his legal-policy consideration is not that of rejecting the constitutional reality he describes in Islamic countries, but that of accepting it as an order sui generis.*

19| *This demand is linked to a general postulate that calls for ending all attacks on fundamental rights by governmental authorities by creating a humane system. For more information, see Zakaria, Fareed, Islam, Democracy, and Constitutional Liberalism, in: Political Science Quarterly 119 (2004), pp. 1-20, 19.*

THE SUDANESE INTERIM CONSTITUTION OF 2005

A MODEL TO ESTABLISH COEXISTENCE BETWEEN AN ISLAMIC AND A SECULAR LEGAL REGIME

Markus Böckenförde

At the moment, Sudan owes its presence in the media to the civil war in Darfur, a conflict in the west of the country in which – seen from the religious perspective – Muslims fight each other without regard to, and with cruel consequences for, the civilian population. This event overshadows the implementation of the peace treaty that put an end to another civil war that raged for decades between the government and the rebel movement in the south of Sudan. In attempts to make that conflict comprehensible, a variety of contrasts were invoked, the one that was probably most frequently used being that between the Arab Muslims and the African Christians/animists. Although this juxtaposition is not wrong, it reflects only some of the causes of the conflict. The civil war in Sudan was not primarily about religion, yet there were various motivations why it became so overlain with religion that religious aspects played a key role in the negotiations about the peace treaty. The constitution that sprang from the peace treaty created a complex federal state structure in which Islamic and secular law are supposed to exist side by side. To take a closer look at the facets of this coexistence will be the subject of this paper.

HISTORICAL OVERVIEW FROM THE PERSPECTIVE OF RELIGION[1]

Inspired by Coptic Egypt, by what is today called Ethiopia (the Kingdom of Aksum), and by Byzantium, three Nubian Christian kingdoms began to form in the 5th century AD in the northern part of present-day Sudan, only to disintegrate around 1500. In parts of the region, Arab tribes established their own sheikdoms, while other parts were incorporated in the sphere of influence of the Ottoman Empire.

Early in the 19th century, the Ottoman viceroys of Egypt conquered what is today the north of Sudan. The south of the country was used as a storehouse of slaves, ivory and gold, but there was no effort to develop the region. It was only around 1870 that Egypt began to administer the south of the country and set up garrisons under pressure from Great Britain. In 1877, the British took over the administration so that the ban on trading in slaves, which had been in force since 1860, could be implemented more effectively. Rising against exploitation by Egypt, the Mahdi Muhammad Ahmad united the tribes of the north under the banner of a united Islam and drove the British as well as the Egyptians out of the country (1885).

In the late 19th century, Great Britain reconquered the region under the Anglo-Egyptian condominium and concluded a number of border agreements with its French, Italian, Belgian and Ethiopian rivals. The British were not interested in uniting the Sudan and giving it a national identity. On the contrary, they set up two separate administrative structures for the north and the south. The most important *raison d'être* for the southern Sudan was to stem the tide of Arab and Islamic influence and to serve both as a buffer with British East Africa and a bastion of Christian and English values. There were even thoughts about integrating it in British East Africa at a later date. Missionaries were permitted to Christianise the south of the Sudan but, in order to avoid religious conflicts, were not allowed to establish missions in the north, although there were Christian roots in the region. North Sudanese were not permitted to work in the south.[2]

In the run-up to independence (1956), the south was promised a proper share in the national government and a federal structure of the state if it would agree to a united Sudan. The south did agree, but the regime in the north never fulfilled its promise. Fighting broke out, varying in intensity until it was ended in 1972 under the Nimieri (Arabic: Numayri or Numairi) government when the peace treaty of Addis Abeba was signed. The south was accorded certain rights of autonomy, especially with regard to religion. In that period, secular law was dominant even at the national level. There were only a few regions in the north where inheritance and family laws followed the maxims of the Shariah. Opposing both the secular policy and the concessions towards the south, Islamic elites began increasingly isolating Nimieri. A coup attempt in 1976 failed; Nimieri launched a process of national reconciliation with the Islamist opposition. While it did secure his political survival at first, this move allowed radical Islamists to undermine the administration of the state and resist the agreements of the peace treaty. When oil was found in the south, the administration of the areas in question was transferred from the southern to the northern authorities. Various other autonomy rights were cancelled, and Arabic was made the official language of the south. The "September Acts" of 1983 placed the entire country under Shariah law. So-called "emergency courts" were instituted under Shariah judges, of which only one had proper legal training. Books were burnt, and a moderate Islamic cleric, Mahmood Muhammad Taha, was hanged at the age of 76. The Missionary Act forbade any non-Islamic missionary activities, and the Churches were given the status of foreign non-governmental organisations. Civil war broke out once again, the government's opponent this time being the *Sudanese People Liberation Army* (*SPLA*) led by Dr John Garang. While the war in the south continued, Colonel Umar Hassan al-Bashir seized power by a coup in 1989 and did away with the Sadiq al-Mahdi government that had been democratically elected before, which had mitigated the enforcement of the September Acts although it did not actually revoke them. Under al-Bashir, Islam became even more of an instrument of political power, and the September Acts were reinstated fully. Al-Bashir called a *jihad* – a holy war – against his enemies, including moderate black African Muslims. By waging war against its own Muslim citizens, the Sudan lost most of its standing as an Islamic state in the Arab world.

At the beginning of the millennium, constant pressure from the international community, with the USA at its head, led to serious negotiations about peace under the direction of the regional organisation *IGAD*. In June 2002, an agreement was reached on the fundamentals of a peace treaty that regulated in outline the relationship between the state and

religion. Early in 2005, the *Comprehensive Peace Agreement* (*CPA*) was signed, and the national constitution that is based on it came into force six months later.

THE STRUCTURE OF THE SUDANESE STATE AFTER THE PEACE ACCORD[3]

The new structure of the Sudanese state owes a great deal to the experiences of the south in the decades after the independence of Sudan. It accords the south extensive autonomy in religious as well as other matters, guarantees its proper share in the oil revenue and grants it the right to secede. Thus, the structure of Sudan can be best described as a doubly asymmetrical federal state on probation.

A federal state on probation: As of now, the constitution will remain in force for a period of six years, after which the southern Sudanese will have the right to hold a referendum on whether they would like to remain part of Sudan or become an independent state.

The federal structure: Below the national level, Sudan consists of 25 federal states endowed with extensive competences. Fifteen of these states belong to the north and ten to the south.

The first asymmetry: In two of the northern states that border directly on the south (Southern Kordofan/Nuba Mountains and Blue Nile), special regulations apply because during the civil war, a large part of the population fought with the *SPLA*, which now wanted to protect its followers from discrimination in times of peace. Situated in the Muslim-dominated north of the country, Khartoum, the capital and seat of the national government, also enjoys a special status that accords particular importance to the religious freedom of the population.

The second asymmetry: Wedged between the national level and that of the federal states is the *Government of Southern Sudan* (*GoSS*), which has all the characteristic features of a state. Its territory covers all ten southern federal states. It has its own government, parliament and judiciary. According to Art. 162 of the national constitution, the primary functions of the *GoSS* include exercising the regional autonomy of the south and providing a link between the national government and the southern federal states. The southern government may assume all major

competencies of the southern federal states. Seen from their point of view, this constitutes a weakness in the federal structure that favours the southern government. This construction with its additional level of government may be explained by the intention of the *SPLA* to have its own consolidated structures ready to hand in case of secession in order to keep the country from plunging into anarchy and chaos.

THE CONSTITUTIONAL ESTABLISHMENT OF RELIGIOUS COEXISTENCE

The constitution implements the "one country – two systems" approach postulated in the peace treaty. The term "two systems" basically refers to the structure of the legal system in two different territories, namely that of the ten southern federal states that form the Government of Southern Sudan and that of the fifteen northern states. Established as an umbrella that covers both these systems, the national government is free of specifically religious overtones in all matters relating to Sudan as a whole. According to its constitution, Sudan is not an Islamic republic, nor is Islam the religion of the state. Unlike the Sudanese constitution of 1998,[4] it does not include a clause specifying that any law that applies to the entire nation must harmonise with the Shariah. Nor must the president belong to any particular religion.[5]

Whereas a secular approach is practised in the territory of the south (although modified by local traditions and religions), the Shariah still shapes the law in the north. However, even though the Shariah may be a source of law in the north,[6] any laws adopted under that premise must be in harmony with the constitution as the supreme law of the country.[7]

The establishment of two legal systems was achieved in part by relocating relevant competencies to the level of the federal states. Most criminal and all religious matters are regulated exclusively at that level.[8] Moreover, federal states are empowered to ensure that family and inheritance matters are adjudicated by the laws that apply in the relevant religious and/or cultural communities.[9] In addition, there are national laws whose applicability is restricted to the north only, and there are others that contain different regulations for different regions. What may appear odd in this context is the introduction of a dual banking system. While the banking system in the northern states is Islamic, that of the south is entirely conventional. As there is no additional level of govern-

ment between the national and the federal-state level in the north, the convoluted language that is used to describe the scope of regionally limited national laws is sometimes confusing.[10]

The constitution provides the following interim regulations for national laws with a religious background that are still valid at present: If a law motivated by a specific religion should not conform to the religious orientation of the population in a particular federal state, that state may either make laws that conform to the religion or the customs of its majority or else introduce a bill at the national level to include exemptions in the act in question.[11]

This construction clearly aims to ensure not so much the religious freedom of the individual, but rather the religious autonomy of the federal states. Apart from those laws that relate to the individual (family and inheritance laws), each federal state applies whatever law conforms to the religious/cultural orientation of the majority of the population. One particular consequence of this is that in certain circumstances the Islamic penal code may be applied to followers of another faith. Although it is guaranteed to each individual in Art. 38 of the interim constitution, freedom of worship does not remove a person from the reach of a religiously motivated law unless he or she moves to another part of the country. Nor is the freedom of religious conversion guaranteed in Art. 38 of the interim constitution. *To that extent*, the sanctions imposed on the apostasy of a Muslim do not contravene any of the human rights explicitly named in the constitution.

However, as the interim constitution accords constitutional rank to all international human rights conventions ratified by Sudan,[12] and as these treaties include the *International Covenant on Civil and Political Rights*, Art. 18 (2) of that convention similarly enjoys constitutional status; depending on the interpretation of Art. 18 (2) *ICCPR*[13], the religious rights granted by the interim national constitution could be extended. There can be no constitutional conflict with the provisions of international Islamic human rights declarations that would theoretically enjoy the same legal rank because these instruments have not yet come into force.[14]

Khartoum, the capital and seat of the government, was given a special status in that respect. The reason is that, pursuant to the peace treaty, members of the *SPLM* (the political branch of the rebel army) are in-

volved in the government and administration at Khartoum and that the southern Sudanese were anxious not to come under the jurisdiction of the local criminal code with its Islamic features. In Khartoum, therefore, any person who pursues a practice based on his or her culture or religion is regarded *a priori* as exercising a personal liberty in conformance with the law unless a public disturbance is created thereby.[15] Furthermore, courts may not impose *hudud* penalties on non-Muslims.[16] Please note that non-Muslims may still be convicted on the basis of laws that have an Islamic character, but their sentence must follow premises other than those of the Shariah. To monitor the rights of non-Muslims in Khartoum, the constitution provides for creating a commission dedicated to overseeing these rights.

CONSTITUTIONAL REALITY IN SUDAN

Progressing rapidly, the formation of an autonomous southern Sudan has meanwhile acquired so much momentum that it sometimes overshoots the mark. As in most other states with an authoritarian government, moreover, there is a considerable discrepancy in Sudan between the rights guaranteed by the letter of the law and their practical value. Fundamental democratic rights such as the freedom of the press, the freedom of assembly, and the freedom of opinion are curtailed particularly severely, and few eminent journalists have so far escaped temporary internment for criticising the regime. Nor is this astonishing, for the peace treaty and the constitution that sprang from it forced the regime to adopt a system of government whose serious implementation would lead to its ultimate dissolution. We may well doubt whether the new constitution of 2005 is strong enough in practice to counteract this repugnance effectively. On the other hand, it has been rarely put to the test so far. After all, the establishment of human rights in a constitutional system does not guarantee their observance *ipso iure*. Just as the existence of a criminal code cannot prevent crime, so constitutional reality must be judged by the quality of the judgements of the courts and their acceptance by the government. Sudan has a constitutional court that rules on constitutional complaints by individuals and others as the ultimate authority. Even opposition members agree that the composition of the present constitutional court of Sudan is more or less balanced. The number of complaints about infringements of human rights submitted to the court has been inadequate so far. Not without reason, large parts of a frustrated population do not expect the government to implement any judgement against

itself, even if such a judgement could be obtained. In a country that witnessed five successful military coups in the five decades of its independence, the introduction of democratic reforms and the rule of law tend to be perceived as a passing phase rather than the beginning of a new era.

Particularly in our context, however, it is important to emphasise that, as in Christian-traditional Zimbabwe or in Buddhist Myanmar, most human rights infringements have no religious motivation. They are generally the result of efforts to retain power by persons who sometimes also do not shy from instrumentalising Islam. Although freedom of religion is not always assured in Sudan, particularly in the north, infringements have been declining markedly in recent years. Discrimination and marginalisation mainly take place along ethnic or quasi-ethnic, rather than religious lines.

1| For a more detailed historical overview, see Johnson, Douglas H., *The Root Causes of Sudan's Civil Wars*, Oxford and Bloomington 2003; Pabst, Martin, *Der Sudan – Land der Gegensätze*, in: Österreichische Militärzeitschrift 1 (2004), pp. 13-22; Rogier, Emeric, *No More Hills Ahead? – The Sudan's Tortuous Ascent to Heights of Peace*, Clingendael Security Paper N°1, The Hague 2005.

2| Tobler, Urs, *"Kurze Geschichte eines langen Konflikts"*, in: Zeitschrift für Friedenspolitik, Aktuell-3, No. 6/99.

3| Böckenförde, Markus, *"'Constitutional Engineering' and Decentralisation – Federal Structures as a Means for Peace-building in Sudan"*, in: H. Eberhard, K. Lachmayer and G. Thallinger (eds.), *Transitional Constitutionalism*, Vienna 2007, pp. 25-48.

4| See Art. 65 of the Constitution of Sudan of 1998: "[Source of Legislation] The Islamic Sharia and the national consent through voting, the Constitution and custom are the source of law and no law shall be enacted contrary to these sources, or without taking into account the nation's public opinion, the efforts of the nation's scientists, intellectuals and leaders."

5| See Art. 6.3 of the Machakos Protocol, which is incorporated in the interim constitution by reference in Art. 225: "Eligibility for public office, including the presidency, public service and the enjoyment of all rights and duties shall be based on citizenship and not on religion, beliefs, or customs."

6| Art. 5 (1) of the interim constitution says: "Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people."

7| Art. 3 of the interim constitution says: "The Interim National Constitution shall be the supreme law of the land. The Interim Constitution of Southern Sudan, state constitutions and all laws shall comply with it."

8| Par. 10, 18, 20 Schedule C 1 of the interim constitution.

9| Par. 10 Schedule C 1 of the interim constitution from Art. 6.4 of the Machakos Protocol ("All personal and family matters including marriage, divorce, inheritance, succession, and affiliation may be governed by the personal laws (including Sharia or other religious laws, customs, or traditions) of those concerned.") as well as Art. 6.6 of the Machakos Protocol, which postulates that this principle should be reflected in the constitution.

10| Art. 5.1 of the interim constitution says: "Nationally enacted legislation having effect only in respect of the states outside Southern Sudan shall have as its source of legislation Sharia and the consensus of the people."

11| Art. 5 (3) of the interim constitution says: "Where national legislation is currently in operation or is to be enacted and its source is religion or custom, then a state, and subject to Article 26 (1) (a) herein in the case of Southern Sudan, the majority of whose residents do not practice such religion or customs may: (a) either introduce legislation so as to allow practices or establish institutions, in that state consistent with their religion or customs, or (b) [...] initiate national legislation which will provide for such necessary alternative institutions as may be appropriate".

12| Art. 27 (2) of the interim constitution says: (2) "The State shall protect, promote, guarantee and implement this Bill. All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill".

13| Art. 18 (2) of the Convention on Civil and Political Rights says: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." The wording of the pact was carefully crafted to avoid extending the scope of this human right to include wilful conversions. According to the text, this liberty is limited to having or adopting a religion but does not include apostasy after adoption. The Human Rights Committee has been endeavouring for some time to establish an interpretation that deviates from the original intention inasmuch as it includes religious conversion.

14| The 1990 Cairo Declaration of Human Rights in Islam has not yet come into force, nor has it been ratified by Sudan. As it is not included in the constitution for this reason, it ranks below other international human rights conventions. The same holds true for the Arab Charter of Human Rights of 1994 that was adopted by the Arab League. As it has not yet been ratified by a quorum of seven member states, it is not a binding document. For the same reason, the revised Arab Charter of Human Rights of 2004 that was initiated by the standing Arab committee on human rights has no binding force, either.

15| Art. 156 (c) of the interim constitution says: "Behaviour based on cultural practices and traditions, which does not disturb public order, is not disdainful of other traditions and not in violation of the law, shall be deemed in the eyes of the law as an exercise of personal freedoms".

16| Art. 156 (d) of the interim constitution says: "The judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established Sharia principle that non-Muslims are not subject to prescribed penalties and therefore remitted penalties shall apply according to law".

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III. RELIGIOUS VERSUS SECULAR LAW?

ISLAM, CONSTITUTION, CITIZENSHIP RIGHTS AND JUSTICE IN MALAYSIA

Norani Othman

INTRODUCTION

Please allow me first to state an important preamble, which is to remind everyone in this lecture hall that I am not trained as a lawyer or a legal scholar focussing on such big topics of constitutional law, constitutionalism, legal pluralism and justice. I am a sociologist whose research interests in these past two decades have focussed on Islam, gender, women's human and citizenship rights in the fast-modernizing, Muslim-majoritarian country of Malaysia.

It was my research interest in those related issues that led me to study and understand the larger context of Malaysia's multi-ethnic and multi-religious society, the nature of the Malaysian post-*Merdeka* state, the Malaysian Federal or National Constitution and the political role of Islam that are being appropriated by the state, as well as the Islamist oppositional party (*Partai Islam seMalaysia* or *PAS*) and other Malaysian political-Islamist groups and movements. *Merdeka* is the Malay word for independence or freedom; its common usage in Malaysia refers to the attainment of political independence from British colonial rule since 1957. The need to go beyond that and explain gender discrimination, certain misogynistic tendencies and the injustices

incurred in the amendments and administration of contemporary Shariah in the modern Malaysian judicial or justice system requires a deeper study of the multi-stranded "Islamisation policy and processes" implemented since 1982 under the Prime Ministership of Mahathir Mohammad. Given that many of the recent developments in politics, law, society and culture in contemporary Malaysian public life are showing a worrying, anti-democratic and religiously intolerant (sometimes even fascist) trend, I needed to understand other dynamics and processes related to religion, religious and secular identities, and national community of citizenship in Malaysia. Relevant among these dynamics and processes are: the ascendancy of Malaysian propagation of Islamic faith (*dakwah*) movements and political Islam since late 1970s; the processes of Islamisation and de-secularization of the Malaysian polity since Independence (*Merdeka*); post-*Merdeka* or modern "patriarchalisation" of gender relations and the "Arabisation" of Malay-Muslim identity and cultural norms; debates about the legitimate role of religion in the public sphere; the constitutional institutionalisation of principled equality and non-hierarchical or non-discriminatory diversity and genuine multiculturalism; the institutionalisation of religious pluralism; and ultimately the very relevant question of the meanings and interpretations that Malaysian publics gave to the modern secular values of liberalism, universal human rights, political democracy and tolerant inclusive multiculturalism.

To understand the present predicament or contestation over the constitutional status of Islamic and common laws,[1] I shall first outline the colonial legacy underlying the constitutional and political arrangement for independent Malaya (later in 1963 known as Malaysia with the inclusion of Sabah and Sarawak in the Federation of Malaya). I shall then describe how some relevant post-*Merdeka* political developments and the Islamisation policy and processes since 1981 in peninsular Malaysia have resulted in a "jurisdictional ambiguity and problems" between the two sets of laws in Malaysia – the Syariah and the Common Law.

BACKGROUND: ISLAM, SHARIAH AND THE MALAYSIAN FEDERAL CONSTITUTION

Malaysia is a country whose legal system comprises essentially two sets of laws: one derived from the British common law tradition, the other based on Malaysia's own legal and cultural tradition, the Islamic or Shariah laws (Malay: *hukum syara'* or *syariah*).[2] Emerging from the former

Federation of Malaya, which in turn had been formed from the coalescence of the various Malay states and British Crown Colonies on the Malay Peninsula, modern Malaysia is a federation of 14 states, of which nine have evolved directly from and are thus based upon the pre-colonial sultanates of peninsular Malaysia.

Under Malaysia's present constitution, the powers of the central government – i.e. the federal government of Malaysia – are overwhelming, as they are in many new national development states. But the constituent states do have some significant powers and constitutional prerogatives. These states now express not only their own individual identities but also the historical continuity of peninsular Malay society generally and the primacy within the modern nation of its indigenous Malay-Muslim (or *Bumiputera Melayu*) population.[3] Nine of these states (all of them in peninsular Malaysia) are still headed by rulers or sultans who are descendants of the former ruling sultans and their families or progeny.

These states and their royal heads still enjoy a significant constitutional position: for while much of their role is now decoratively ceremonial, the position of the Malay rulers as symbols of Malay continuity and ascendancy within modern Malaysia is powerfully entrenched within their own constitutionally-based prerogatives, and those of their state governments, over the administration of the Islamic religion within their own domains. Since *Merdeka* or national independence in 1957, this division of powers between the central government, on the one hand, and the state administration and their royal figureheads, on the other, has given rise to recurring constitutional tensions over the division between federal and state powers, often involving conflicts over competing Shariah jurisdiction and enforcement prerogatives. Most of these conflicts occur in the respective states' Muslim Family Laws in cases of divorce and polygamy; for example some states are more lenient or lax in applying conditions for a second marriage.

Among other things, the 1957 or *Merdeka* Constitution, is the embodiment of a Westminster-type constitution based on parliamentary democracy, as well as on the principles of the rule of law and separation of powers, with the notion of state and citizen underpinning it. At the same time, the Malaysian Constitution is also a unique expression of the country's varied culture and history:

"It is an amalgam of diverse elements, some having their own origin in Malay constitutional ideas, some in British, some in Indian, and some again which derive from purely Malaysian context determined by the political realities of its multi-cultural, social and political life."[4]

One such Malaysian feature was the constitutional policy of maintaining a "social contract" by which since 1957 and especially since 1970 special privileges have been accorded to the *bumiputera*, i.e. the indigenous population, in return for citizenship and fundamental freedoms for the non-*bumiputera* population (at that time comprised mainly of immigrants from China and India who came to settle during British Colonial Rule).

Today Malaysia is a federation of fourteen states with a written Federal Constitution that is the supreme law of the country.[5] The Constitution was amended in 1963 to include Sabah, Sarawak and Singapore when Malaysia was formed. Singapore left the Federation of Malaysia in 1965, leaving thirteen states in the Federation. The current fourteenth state is the *Wilayah Persekutuan* or the Federal Territory of Kuala Lumpur which was formed in 1974. The Federal Territories of Kuala Lumpur and Labuan came into being when the *Wilayah Persekutuan Kuala Lumpur dan Labuan* was enlarged to include the island of Labuan in 1982.

Apart from the Federal Constitution, each state in the Federation also possesses its own constitution regulating the government of the state but the state constitution must have certain "essential" provisions enumerated in the Eighth Schedule of the Federal Constitution. If such essential provisions are inconsistent, state constitution, Article 71 of the Federal Constitution permits the Federal Parliament to make provision to give effect to these provisions or to remove any inconsistencies, as the case may be.[6]

THE "PROTECTED" POSITION OF ISLAM, ISLAMIC LAWS AND THE MALAYSIAN LEGAL SYSTEM

According to the Federal Constitution [Article 3 (1)] (and recognizing the preeminent role played by the sultans or rulers of the individual states in the religious administration before and under colonial rule), the power to administer Muslim laws is primarily that of the states comprising the Federation. The head of Muslim matters in each state of the Federation of Malaysia is the sultan or ruler, if there is one. Where there is not, as in

the Federal Territories of Kuala Lumpur and Labuan, and in the states of Penang, Malacca, Sabah and Sarawak, the federal constitutional King of Malaysia elected from among and by the nine sultans (*Yang di Pertuan Agong*) is the head of Muslim matters.[7]

The Islamic laws applicable in Malaysia appear to follow the Shafii school and Malay customs (*adat*) as modified by Islamic law.[8] These regulate such matters as marriages, divorce, adoption, legitimacy, inheritance and certain religious offences among Muslims in the state. Similar enactments dealing with the administration of Muslim law exist in the various states. Except for the Federal Territories of Kuala Lumpur and Labuan, and the states of Malacca, Penang, Sabah, and Sarawak there is a general pattern whereby the sultan of each state, in his role as the head of Islamic matters in his state, is advised by a "Council of Religion and Malay Customs" (*Majlis Agama dan Adat Melayu*).[9] In some states, the *Majlis Agama* (*Islam*) also possesses the authority to issue fatwas (legal opinions; Arabic plural: *fatawa*) on matters concerning Muslim law that are referred to it and also to administer charitable trusts (*wakaf*s; in Arabic *waqf*). It can act as executor of the will of a deceased Muslim and, in the case of death occurring intestate, act as administrator.

Normally there is also a "Department of Religious Affairs" in each state government (*Jabatan Agama Islam Negeri*) to manage the day-to-day administration of religious matters. In Malaysia even at the time of British rule, there was a separate system of Muslim or *Syariah* Courts comprising the Courts of the Chief *Kadi*s and Assistant *Kadi*s (a *kadi*, Arabic *qadi*, is a judge). They possess jurisdiction in proceedings between Muslim parties in such varied matters as marriages, divorce, judicial separation, maintenance, guardianship of infants and wills. Aside from civil matters, they also have limited criminal jurisdiction to try and impose punishment for offences committed by Muslims against the religion (for example, alcohol consumption, violation of the fasting month prohibitions and sexual impropriety). An appeal against the decision of the *Kadis*' Court can be made to an Appeal Committee or Appeal Board constituted under the relevant state enactments.

Since the early 1990s, the *Syariah* Court System provided for under the Federal Territories (FT) Act 505 is a three-tier system consisting of the *Syariah* Subordinate Courts, the *Syariah* High Courts and the *Syariah* Appeal Court, headed by the chief *Syariah* Judge. This same Act also

provides for the appointment of the *Syariah* Prosecutor, who empowered to institute and conduct proceedings for offences before a *Syariah* Court, and of *Syariah* attorneys (*Peguam Syarie*), who are persons with sufficient knowledge of Islamic Law to represent parties in any proceedings before any Syariah Court. The registration, regulation and control of the *Peguam Syarie* is in the purview the Religious Council, without whose formal recognition no person can appear in any *Syariah* Court on behalf of any party.

In the Federal Territories of Kuala Lumpur and Labuan, for example, the administration of Islamic Law and the organization of the *Syariah* Courts are now governed by the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505) and Rules (henceforth referred to as FT Act 505). This law provides for the establishment of the Committee of Religious Council (*Jawatankuasa Majlis Agama*) and for the nomination of the *Mufti* (state jurisconsult), who chairs the Islamic Legal Consultative Committee. Administration matters all come under the Islamic Religious Department of the respective constituent state.

Malaysian Muslim family laws, which have been codified and are administered under the legislative authority of the respective states, differ from one another in some aspects. Historically evolved from the *Hukum Syara'* of the old colonial Malay states, they are basically similar in terms of principle. They do, however, differ in their details, especially in their implementation and administrative procedures. An effort was made in the early 1970s to reform the Muslim Family Law and to make the various state enactments uniform. It was only in 1983 that a draft bill (of the federally-sponsored standard Muslim Family Law) was at last submitted to the various states for adoption. Each state however, made its own amendments to the bill before passing it. As a result, the state enactments continued and still continue to differ from one another again.

Since the 1980s the Islamic Centre (*Pusat Islam*),[10] in Kuala Lumpur, has also initiated similar reforms, both of the enactments and in the administration of Islamic law, including the *Syariah* Civil and Criminal Procedure Codes and the Evidence Laws. *Pusat Islam* was a federal government body or agency that evolved from the Islamic Affairs Division (*Bahagian Agama*) of the Prime Minister's Department: within it known as Islam Research Centre (*Pusat Penyelidikan Islam*) that was set up in 1971 "to promulgate correct Islamic teaching in society".[11] In 1996, the adminis-

trative status of *Pusat Islam* was upgraded to become the Department of Islamic Development of Malaysia (known as *Jabatan Kemajuan Islam Malaysia*, or now popularly known as *JAKIM*).

As a federal government department, *JAKIM* is now the main arbiter

> "for the planning and management of Islamic affairs and the development of the *umma*. It formulates policies for the development of Islamic affairs in the country and safeguards the sanctity of the faith (`*aqidah*) and the teachings of Islam. It also helps to draft and streamline laws and regulations that are necessary, as well as to evaluate and coordinate the implementation of the existing laws and administration".[12]

Apart from sponsoring lectures and publications embodying "correct Islam", *JAKIM* also collects information about the practice in Malaysia of what is deemed "incorrect or deviant Islam", publicizes what it considered "correct" information about such deviations, and where necessary initiates official action against perceived errors and their perpetrators. Associated with *JAKIM* is the Propagation and Training Institute (*Institut Dakwah dan Latihan*), whose task is "to strengthen the welfare of, and eliminate the unbelief that increasingly and greatly threatens, Islamic society today".[13]

As a consequence of historical evolution and in accordance with the constitution, two systems of family laws now operate in Malaysia, one for Muslims (Islamic laws), the other for non-Muslims (common law). Muslim family law is under the legislative authority of the fourteen states, with each of these states having its own state enactments, while in the Federal Territories of Kuala Lumpur and Labuan and the states of Penang, Malacca, Sabah and Sarawak, Muslim family law is regulated under federal authority by an Act of Parliament. Long a matter of some controversy, the division of areas of jurisdiction between the Civil Courts and the *Syariah* Courts was clarified, very much in favour of the latter, under Article 121 (1A) of the National Constitution. Introduced in 1988, this amendment prohibits the civil courts from intervening in the areas of jurisdiction of the *Syariah* Courts or their decisions. With a hindsight, a number of events and court cases since 1989 have demonstrated that this amendment is of great significance because of its important implications, not just for issues relating to the relationship between religious

rights of Muslims and peoples of other faiths, but also for the ability of the *Syariah* Courts and those supporting them to pursue authoritatively their own socio-political agenda in Malaysia. That is, it raises questions not simply about freedom *of* but also freedom *from* and *in* religion in Malaysia, for Muslims perhaps even more pointedly than for non-Muslims.

For example, since Malays are, by constitutional definition, required to be of the Muslim faith [Article 160, Clause (2)] all Malays (and other Muslims) are liable to prosecution if their conduct is in violation of Islamic precepts. Therefore, despite the constitutional guarantee of freedom of religion, no Muslim can lay a claim to opt out of *Syariah* laws. Muslims in Malaysia are subjected to many religious restraints due to the power of the states to punish Muslims for offences against the precepts of Islam (Schedule 9, List II, Item 1). Throughout the fourteen states, Muslim or Syariah Criminal Codes have been established. There are specific provisions for the criminal punishment of Muslims found guilty of consuming alcoholic beverages in public places, eating in public during the fasting month of Ramadan or committing the "sexual offence" of irregular consorting between sexes (*khalwat*). The Department of Religious Affairs (*Jabatan Agama*) describes *khalwat* or improper covert association between sexes as close proximity between male and a female who are not relatives or unmarriageable kin (*muhrim*, Arabic *mahram*) and, second, who are, first, not legally married to each other. It is not necessary that both parties be Muslims; many cases have been taken to court under this charge in which only one of the parties is a Muslim, thus compromising the freedom of a non-Muslim from the jurisdiction of Islamic laws as guaranteed by the Constitution.[14]

Upon independence and with the establishment of the Federal Constitution in 1957, Malaysia was perceived and described as a secular state. Since the declaration of independence of its Malayan core in 1957, the political definition of the Malaysian state has rested on the axis of non-negotiable Malay dominance in both political and economic terms and commitment to the essentially multi-ethnic and multi-religious character of the state. The centrality of Islam within this political process has been dictated largely by these structural (pluralistic) constraints and by its relationship to Malay identity, legitimacy and dominance. The Constitution, in granting Malay citizens certain special rights and privileges, defines a Malay as one who professes Islam as a religion, habitually

speaks the Malay language and conforms to Malay custom. The Constitution therefore recognizes special rights for Malays as bearing a religious qualification, further reinforcing not only the synonymity of Islam with Malay culture, but also the special needs of the Malays and therefore of the Muslim community. Consequently,

> "the Constitution, in legitimating Malay prerogative through Islam, indirectly but inevitably sanctioned the place of religion in the main arena of politics [and the domain of the state]. The so-called 'innocuous' provision for Islam, as it stands in the Constitution, has left unresolved the precise role of religion in the contemporary state. Indeed, the conclusion that Malaysia lies somewhere between the character of a secular state and a theocracy, in legal terms at least, has contributed to confusion and unease among the Malaysian public, not to mention the institutional pressure that it has placed on the government, in contemporary times, towards resolving this ambivalence."[15]

In fact since the early 1980s, and with the 1988 Constitutional Amendment of Article 121 (1A), the Malaysian state governments have embarked on a policy of "Islamisation" of state and society by implementing more Islamic laws and in greater areas of public life of Malaysian Muslims, further complicating the relationship between religion and the state. The issue whether Malaysia is an Islamic state or a secular state was never raised in public discussion until late 2001 and throughout 2002. Since 2001, this "ambiguity" regarding the secular nature or intent of the Malaysian Constitution became an issue of media discussion among leading members of civil society and religious organisations following two sets of significant events. One was the announcement made in September 2001 by the then Prime Minister Mahathir Mohammad, "Malaysia is an Islamic State".[16]

A number of parties took exception to that declaration and expressed great concern over the political and other possible implications of the government's statement, which was actually based on a booklet released by the Ministry of Information, Malaysia sometime in late June or early July 2001, about three months before Mahathir's controversial speech. The booklet entitled *Malaysia* adalah *sebuah negara Islam* ("Malaysia *is* an Islamic state", emphasis on the cover title of the booklet) was authored by Dato' Wan Zahidi bin Wan Teh – a senior religious official of the

Department of Islamic Development of Malaysia (*Jabatan Kemajuan Islam* or *JAKIM*). This booklet was later withdrawn from public circulation due to the controversy and disquiet that it had created among non-Muslim and some Muslim civil society movements.

The second set of events that raised the question of the primacy of Shariah jurisdiction comprises the various cases that involve Muslims and Muslim converts and non-Muslim spouses or, as in most cases, intended ex-spouses when one party in the marriage decided to convert to Islam. In the past few years, a number of these "unique cases" have come to public attention. An understanding of the complexity and problematic of this issue in Malaysian current political life and in the context of its constitution requires a historical understanding of the evolution of Malaysia into an independent modern state within the period of at least the past fifty years. In the past two decades, the public and private role of Islam has indeed undergone extensive changes as a consequence of the impact of both global Islamic resurgence or revivalist movements and the interplay of internal or domestic politics in which Islam became an important factor in the political rivalry between *UMNO* and *PAS* for the electorate support of the indigenous Malay *bumiputera*-Muslim population.[17] I have elsewhere described how the two processes of this Islamic resurgence and the Islamisation policy undertaken by the Malaysian government under the leadership of Mahathir Mohammad have determined and influenced Malaysian political life. In fact,

> "by the election year of 1999, it was clear that Islamic resurgence has reached and made its impact on a generation of young, urban, and middle class and professional Malays whose zeal to Islamize Malaysia was a crucial response both to modernizing or capitalist globalization and the globalization of Islamic resurgence originating from the Middle East. The social formation of this new breed of political Islamists is in itself an outcome of globalized Islam. They are the current actors of both globalized Islam and modern globalization: for they are the religiously inclined and motivated young professionals who are knowledgeable in the two global instruments – current world or global affairs as well as the new Information and Communication Technology or ICT which is a tool and important facet of modernized globalization. The strident voices of various Muslim NGOs that represent these new breed of Islamists have emerged in the past few years expressing the need to re-assert the primacy of Islam in determining status and rights of the religious Other."[18]

The twin aspects of Islam – as faith in the heart and as actualized in society through public policy – underlie the attempt of contemporary Islamist[19] activists to consider Islamic religion (*din*) as a formulation of public policy in which religion, state and faith merge in a single form of action. The emphasis on religion as the basis for public policy has led numerous Muslim political groups and movements – including their thinkers, writers and pamphleteers – to claim that Islam is not only a religion but "religion and state" (*din wa dawla*) or a religion fused with a state order. Islamists' or political Islamists' religious discourse is therefore not simply religious in nature, but also inescapably social and political in its implications.

One must also note here that the political background and influence from which the modern movements of Islamic resurgence and re-politicisation arise in Southeast Asia, and which they also reflect, is the Middle Eastern heartlands of Islamic civilization, which are not, however, notable exemplars of political modernity and democratic pluralism. This makes it imperative for us today to analyse how the approach and practice of these contemporary Islamisation initiatives in Southeast Asia, especially Malaysia, are mediated through a traditional Arab-centric interpretation of Islam – and how in consequence the ideologues of Islamisation have anachronistically and even deceptively projected the meaning of various modern political concepts (such as state, sovereignty, legislation, democratic rights, constitutionalism and citizenry) onto the past, while simultaneously importing many archaic social and political ideas from a largely imagined or idealised Islamic political past into the present and thereby seeking to legitimise their mandatory institutionalisation within the order of modernity itself.

"ISLAMISATION" AND ITS IMPLICATION FOR GENDER JUSTICE, FREEDOM OF RELIGION AND RELIGIOUS PLURALISM

As described above, there are now (and especially since the Constitutional Amendment of 1988) two separate systems of family laws operating in Malaysia, one for Muslims, the other for non-Muslims. Muslim family law is under the legislative authority of the fourteen states, with each of these states having its own state enactments, while in the Federal Territories of Kuala Lumpur and Labuan and the states of Penang, Malacca, Sabah and Sarawak, Muslim family law is regulated under

federal authority by an Act of Parliament. In 1988, the division of areas of jurisdiction between the Civil Courts and the *Syariah* Courts was clarified, very much in favour of the latter, under Article 121 (1A) of the National or Federal Constitution. Introduced in 1988, this amendment prohibits the civil courts from intervening in the areas of jurisdiction of the *Syariah* Courts or their decisions. This was made possible because the Shariah judicial system is now separate and independent of the Malaysian common law system.

Since 1989, a number of cases involving Muslim and non-Muslim parties caught between the two sets of laws have demonstrated the problematic nature of maintaining two parallel and separate sets of family laws in a multi-religious society. Recent court cases in 2007 and 2006, for example, that involve Muslims and/or Muslim converts and their non-Muslim spouses or, as in most of these cases – due to religious conversion of one of the parties – intended ex-spouses have had tragic impact in separating family members (a Muslim woman from her husband and children) and caused hardship for a non-Muslim wife and mother in acquiring the legal rights upon divorce under which her marriage was initially contracted (i.e. under civil law). In 2005, Islamic authorities deemed that M. Moorthy – a celebrated mountaineer and a practising Hindu according to his wife (and shown in a TV documentary about him just a year before he died) – had secretly converted to Islam before his death. Despite and over his wife's protests, Moorthy's body was taken from his family and given a Muslim burial.

In another case, a woman in her 40s has spent many years unsuccessfully seeking official recognition of her conversion from Islam to Christianity. She has been waiting a court decision on her application for legal recognition of her religious conversion since 2004. One of the newspaper reports captured the important implication of this case in its summing up of the findings of the Appeal Court:

> "On 30 May 2007, the Appeal Court announced that it had no jurisdiction over the case since it was under the purview of Shari'a law, effectively punting on any attempt to clear up the gray space that exists between Malaysia's two legal systems. The ruling was greeted by shouts of 'God is great!' from many in the assembled crowd outside the Palace of Justice in Kuala Lumpur. More secular observers were far less jubilant. 'I see this case not just as a question of religi-

ous preference but one of a potential dismantling of Malaysia's (…) multi-ethnic, multi-religious [character],' warned Malik Imtiaz Sarwar, a member of [Lina] Joy's legal team, before the decision was announced."

Many in Malaysia see the Joy verdict, which will likely become a precedent for several other pending conversion cases, as evidence of how religious politics are cleaving the nation, with a creeping Islamisation undermining the rights of both non-Muslims and more moderate adherents to Islam. Last November, at a party conference for the Muslim-dominated United Malays National Organisation, one delegate vowed he would be willing to 'bathe in blood' to defend his ethnicity – and, by extension, his religion. In several Malaysian states, forsaking Islam is a crime punishable by prison time. Earlier this week, Malaysian Prime Minister Abdullah Ahmad Badawi, who in December acknowledged that race relations in his homeland were 'fragile', hosted the World Islamic Economic Forum in Kuala Lumpur. In an era when Islam is so often partnered with extremism and autocratic governance, Malaysia was held up at the annual conference as a model of a moderate Muslim nation committed to safeguarding the rights of its diverse population. But the Federal Court's verdict on Joy's case, which represented her last legal recourse, may undercut that reputation. After all, is it complete religious freedom if a 42-year-old woman isn't allowed to follow the faith of her choosing?" (see www.malaysia-today.net/index.shtml)

In 2004, followers of a spiritual movement called "Sky Kingdom" saw their commune razed by authorities as their beliefs, communal and religious practices were declared "deviationist" and "heretical". Another indicator of perhaps a rising militant and potentially-violent type of religious assertion was the Siliban church incident in Perak last year, in which a large group of Muslims were mobilised via text-messaging (or sms) to protest at the church in which the text message claimed that a number of Muslim youths were about to be converted to Christianity and baptised. This rumour mongering and the actual effect it has on some groups of Muslims showing a readiness and willingness "to take action" does not augur well for the state of democracy and level of religious tolerance in multi-religious Malaysia, which is about to celebrate her 50th anniversary of *Merdeka* or political independence.

The disquieting cumulative effect of "Islamisation" and the rise of neo-conservatism among contemporary Malaysian Muslims is partly a consequence of the *UMNO* and *BN* government style of authoritarianism in responding to political dissent either from opposition parties or civil society. The *UMNO*'s need to prove its "Islamic legitimacy" or "Islamic credentials" has also led some of its leaders to accept rather uncritically and unquestioningly the ideological claim of current Islamist tendencies. One such tendency is the issue of the "Islamic state". The issue of establishing or reconstituting Malaysia as an "Islamic state" is another issue that has serious implication for multiculturalism, religious pluralism and democracy in Malaysia. This issue is not a new one. It came into some public discussion when the Islamic party *PAS*, upon winning the state government of Kelantan in the country's general elections of 1990, declared that "establishing an Islamic State" throughout the country is its ultimate political objective. In fact, by the early 1980s, the *PAS* has already openly adopted a radical Islamist politics explicitly espousing its intention of bringing about a new social, moral and political order embodied by the Islamic State. Both the state governments of Kelantan (in 1993) and Trengagnu (in 2000) have passed the Hudud laws[20] in the state legislature as a demonstration of their commitment towards establishing an "Islamic state" rule.

When the *PAS* won the state of Trengganu in the general elections of November 1999, Abdul Hadi Awang, then the new Chief Minister of Trengganu (also at that time, the Deputy President of *PAS*) stated that *PAS* would set up an Islamic state for the whole of Malaysia when it comes into federal power. Abdul Hadi also claimed that this was already stated in the Manifesto of the Alternative Front (*Barisan Alternatif* or *BA*) in the 1999 general elections.[21]

It is this political issue of whether Malaysia is an Islamic state or not that came up again in early July 2007 when the current Deputy Prime Minister of Malaysia, Dato' Seri Najib bin Abdul Razak, repeated the assertion made by Prime minister Mahathir in Sept. 2001 that Malaysia *is* an Islamic state and not a secular state without providing further explanation as to what they really mean or intend to say with that assertion.

MUSLIM FAMILY LAWS IN MALAYSIA AND HOW THEY CAN DISCRIMINATE AGAINST MUSLIM WOMEN AND IN SOME CASES NON-MUSLIMS[22]

Islamic laws in Malaysia apply only to Muslims and include only matters specified in the State List of the Federal Constitution, such as matrimonial law, charitable endowments, bequests, inheritance and offences that are not governed by federal law (matrimonial offences, *khalwat*, i.e. close proximity, and offences against the precepts of Islam). The power to legislate these matters lies with each state legislature and state sultan; the Federal Parliament legislates such matters only for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. Because there are 13 states and one federal jurisdiction, there are altogether 14 different sets of Islamic laws in Malaysia. The inconsistencies between these laws provide difficulties for understanding and enforcement.

Prior to 1984, when landmark legislation was passed for the Federal Territories, the family laws for Muslims in the different States were separate or disconnected. Since the early 1980s, there have been various attempts to codify and unify Muslim family laws. In terms of gender equality, these efforts often seem to move one step forward, two steps backward with various amendments that have been implemented intermittently since 1984. Even though the indigenous kinship system of the Malay-Muslims was bilateral rather than patriarchal and despite some positive reforms in the laws, efforts at codifying the family laws reaffirmed a patriarchal vision of marriage and the subordination of women.[23]

In the early 1980s, Malaysia took a step forward in the reformation of Islamic family laws under the doctrine of *siyasah shar'iyyah*. This doctrine allows the state to choose the most suitable option for each provision from the opinions of the different schools of law, with the goal of serving the best interests of the community. The resulting *Islamic Family Law (Federal Territories) Act* of 1984 was to serve as a model for each state to follow. Although many people believe that Malaysia's laws are or can be based only on the Shafii school of law, the process of drafting the *Islamic Family Law Act*, whose provisions are based on different schools of law, demonstrates that this is not the case in theory or in practice. In the second half of the 1980s and early 1990s, however, religious authorities and departments ignored some of the provisions in force under the enactments, especially in the area of polygyny. This, combined

with a conservative reaction that surfaced in the early 1990s, led to the *Islamic Family Law (Amendment) Act* 1994, which effectively overruled some of the positive reforms for women that had been adopted prior to 1994. For instance, the amendments recognised the validity of a husband's pronouncement of divorce by unilateral declaration (*talaq*) outside the court and re-emphasised the issue of disobedience (*nusyuz*, Arabic *nushuz*) when a wife attempts to avail herself of divorce by *ta`liq* based on the husband's breach of a stipulation in the marriage contract. In addition, the 1994 law removed a ban on registrations of invalid marriages and removed some of the conditions required for court approval of polygamous marriages, effectively allowing applications for polygyny to proceed without court permission, without the consent of the first wife, and regardless of whether the first wife's standard of living will be impaired by the subsequent marriage. Such amendments are contrary to the spirit of reform and equality that characterised the original 1984 law.

The 1994 amendments also complicated the maintenance and custody aspects of divorce proceedings. In the 1984 Act, which required court registration of all divorces, the court had to issue an order for custody and maintenance of the children before the divorce could be registered. Under the 1994 amendments, a husband could pronounce talaq outside the court and have it registered later, thus separating the custody and maintenance issues from the divorce proceedings. This means that the children from the marriage – whose interests should be paramount in both marriage and divorce – are not provided for upon divorce and could be neglected in the process.

Other areas of particular concern because they provide for legal discrimination against Muslim women include gender-specific provisions on polygamy, divorce and guardianship and the existence of selective gender-neutral provisions, such as the provision on the distribution of joint marital property (*harta sepencarian*). In this case, although the gender-neutral language is similar to the provisions on matrimonial assets in the Law Reform (Marriage and Divorce) Act 1976 for non-Muslims, the effect is discriminatory to Muslim women because, unlike the Law Reform Act, the other provisions in the Islamic family law are not gender-neutral.[24]

A further regressive development took place in 2003 when the Selangor State Assembly enacted its new *Islamic Family Law Enactment (Selangor) 2003*, which is supposed to be the new model for a uniform law in Malaysia. Except for Terengganu and Kedah, all of the other states went on to pass similar laws through their own state legislative assemblies. In December 2005, the Federal Parliament also passed this same legislation, calling it the I*slamic Family Law (Federal Territories) (Amendment) Bill 2005*. The debate and passage of the bill provoked a great deal of public discussion. Although 16 women senators spoke against the bill, a briefing by the *Joint Action Group on Gender Equality (JAGGE)* led by *Sisters in Islam*, eventually pressured to vote for the bill so as not to breach party discipline. Due to intense public pressure, however, the government decided to temporarily suspend the implementation of this new bill. Upon the request of the cabinet, the Attorney General has convened a broad commission charged with negotiating a compromise in the way the law is drafted.

Under the Islamic Family Law Acts/Enactments in Malaysia, the conversion of non-Muslims to Islam warrants their immediate governance by the rules of Islamic law in every sphere of life. Consequently their pre-conversion rights and obligations under their personal and other laws change. The most affected areas are marriage and matrimonial obligations. The Shariah deals separately with male and female converts. If the husband converts to Islam and his wife belongs to the category of people who possess a divine book (*ahl al-kitab*), then the marriage remains intact because Islam permits the marriage of a Muslim to a *kitabiyyah*.[25] In other words, the unconverted wife can still remain in lawful wedlock without renouncing her religion. But, under the law, a Muslim woman is forbidden to marry a *kitabi* man. Furthermore, the definition of *kitabiyyah* is very narrow and it is impossible for present-day Christians and Jews to fall under this category.

In the Singapore case of *Abdul Razak v Maria Menado [1965] 1 MLJ xvi*, the court decided that even though the wife was a Christian at the time of marriage, her ancestors were not originally Christian. They converted to Christianity after the Prophethood of Muhammad and thus the marriage was considered invalid. The same decision was reached in the case of *Visvalingam v Visvalingam [1980] 1 MLJ 10*. The court referred to a fatwa issued by the then Mufti of the Federal Territory and he defined *kitabiyah* as what was then adopted in the *Islamic Family Law (Federal Territory) Act*.

CONCLUDING REMARKS[26]

The complexity and problematics pertaining to relationships between and among Islam, the state, law, politics and society are currently a fundamental concern of many modernising and fast-changing Muslim countries, such as Malaysia. As I have described here, the post-colonial experience of Malaysia showed that a fundamental problem and challenge for a multi-ethnic society is how to ensure the institutional separation of the Shariah and the state while at the same time recognising and accepting the important fact that there is always an unavoidable connection between Islam and politics. Indeed, in every multi-confessional society, there is always a connection between religion and politics.

Shariah is indeed a central concern in the private and public life of a majority of contemporary Muslims. It has a paramount role in the public life of Islamic societies, for it provides the main reference for shaping and developing ethical norms and values that are the basis of public law and public policy in many Muslim countries, such as Saudi Arabia, Pakistan and Malaysia.

The dilemma or paradox that I am presenting here is as follows. Should Shariah principles and rules be enacted or enforced by the state as public law and public policy purely on the grounds that they are believed to be part of "the" Shariah (as is the situation in Malaysia now)?

One must take note that the actual outcome of such an enactment will be the imposition of the political will of the state and not the religious law of Islam. Yet, one cannot exclude Islam from the formulation of public policy, legislation or even public law in general, bearing in mind that legislation and public policy do need and should reflect the beliefs and values of citizens, including their religious values, provided this is not done in the name of any specific religion since that will necessarily favour the views of those who control the state and exclude the religious and other beliefs of other citizens.

But here one encounters the dilemma of how to balance "the need to sustain the public role of Islam and yet maintain the distinction between the state and politics, instead of ignoring the tension in the hope that it will somehow resolve itself". According to An Na'im, this necessary and difficult distinction – between the state, politics and Islam – "can be

mediated through the principles and institutions of constitutionalism and the protection of equal human rights of all citizens".

This is a great challenge indeed and unfortunately there is no simple answer or solution to the questions posed here. The most important step towards finding a balance between the requirements of constitutionalism and the rule of law, on the one hand, and the demand for a greater role for the Shariah, on the other, must necessarily include the tenuous issue of "Islam and democracy". In many Muslim countries today, democratisation is occurring within societies without a democratic culture. Thus the opening up of spaces or political participation and the "one person one vote" principle have also brought into the power structure Islamist groups, as well as tribal and conservative leaders who do not believe in equality or reformist Islam. Given the current state of play in all Muslim countries, one finds that Islamic fundamentalists and neo-conservatives have learnt to use the democratic system to promote their less than democratic vision of politics and society. Hence there has to be a system of checks and balances to ensure both the freedom of religion and the need for the regulation or some measure of control over religious institutions and well-organized religious communities primarily, in order to limit or restrain the ways they can propagate whatever values or engage in whatever activities they wish to independently pursue in the name of freedom of religion and belief.

1| *See news report in The Sun, 23 Aug. 2007, p. 3.*

2| *Syariah (other cognates syar'ie, syara') is the modern Malay transliteration of the Arabic word shari'a (or shari'ah), i.e. Shariah. In this essay, the Malay transliteration (syariah, syar'ie, and syara') are only used when referring to the various Malaysian or Indonesian Shariah enactments, documents, courts or judicial institutions. Otherwise the English term Shariah is used throughout this essay.*

3| *Bumiputera is a Malay word denoting indigenousness; literally it means "native sons and daughters of the land". This bumiputera status was at first accorded to the Malays residing in the Federation of Malaya, but since 1963 includes also indigenous Orang Asli population (or Aboriginal people) and various indigenous groups in Sabah and Sarawak.*

4| *Harding, Andrew, "Law, Government and the Constitution in Malaysia", Kuala Lumpur, in: Malayan Law Journal (1996), p. 47.*

5| *The Malaysian Parliament does not enjoy legislative supremacy like its English counterpart. The English Parliament can make and unmake any law, and the validity of such acts cannot be challenged by the courts, which are bound to accept them as law. In Malaysia, the Parliament exists under a written Constitution so that its legislative acts must not be inconsistent with the Constitution. If any such act is inconsistent with the Constitution, it is regarded as void on grounds of unconstitutionality.*

6| This feature will be significant when we later review how some of the Islamic Criminal Enactments such as the Hudud laws introduced by the State governments of Kelantan and Trengganu cannot be enforced without first amending the Constitution.

7| Malaysia has a constitutional monarch called the Yang di Pertuan Agong. He is the Head of State, and government is carried out in his name. The office of Yang di Pertuan Agong was first created in 1957 upon independence and it is both hereditary and elective. It is hereditary in the sense that only the nine sultans of the states are eligible for the post; the appointed Yang di Pertua Negeri (previously called Governors) of Sabah, Sarawak, Penang and Malacca are not eligible. It is elective in that one of the nine sultans is elected to hold the office for a term of five years in accordance with a set of rules based on a system of rotation so that each sultan will have a chance of being elected, unless he declines. This election is carried out at a "Conference of Rulers" made up of all the sultans when the office falls vacant, either on an incumbent's death or the normal expiration of the term of office. The Conference of Rulers is also empowered to remove an incumbent Yang di Pertuan Agong from office. In Perlis and Negeri Sembilan, the rulers are called Raja and Yang di Pertuan Besar respectively. There is also a provision in the constitution for a Deputy Head of State, termed Timbalan Yang di-Pertuan Agong.

8| For further details, see Ibrahim, Ahmad, "Islamic Law in Malaya", Singapore 1965; on the administrative aspect, see also Ibrahim, Ahmad, "The Administration of Muslim Law in Southeast Asia", in: 13 Malaysian Law Report 124 (1971), and The Administration of Muslim Law in Sabah, in: Journal of Malaysian and Comparative Law 2 (1975).

9| See also Roff, William R., "The Origin and Early Years of the Majlis Agama", in: Roff, William R. (ed.) Kelantan. Religion, Society and Politics in a Malay State, Kuala Lumpur 1974.

10| Pusat Islam (now known as JAKIM) was a central agency in the planning and management of Islamic affairs in Malaysia. It was a federal government agency comprising several bodies. It was upgraded in 1996 and became the "Department of Islamic Development" (Jabatan Kemajuan Islam Malaysia or JAKIM), and placed under the Prime Minister's Department.

11| Quoted from Pusat Islam's own journal, in: Abu Bakar, Mohamad, Penghayatan Sebuah Idea. Suatu Tafsiran tentang Islam Semasa, Kuala Lumpur 1987, p. 78.

12| See http://www.islam.gov.my/, from the homepage of JAKIM.

13| From the brochure of the Yayasan Dakwah Islamiah Malaysia (YADIM); see also Roff, William R., "Patterns of Islamization, 1890s-1990s. Exemplars, Institutions, and Vectors", in: Journal of Islamic Studies 9 (1998) pp. 210-228.

14| Since 1986, the police can detain a non-Muslim party to a khalwat arrest for not more than 14 days for purposes of investigation in the case.

15| Nair, Shanti, Islam in Malaysian Foreign Policy, London 1997, p. 22.

16| See the publication (undated) released in 2004 entitled Is Malaysia an Islamic State? Secularism and Theocracy – A Study of the Malaysian Constitution, edited by Abdul Razak Baginda and Peter Schier; jointly published by the Malaysian Strategic Research Centre (MSRC) and the Konrad Adenauer Foundation (or KAF Office in KL) under the MSRC-KAF Intercultural Discourse Series. The book was a record of the proceedings of the half-day seminar entitled "Is Malaysia an Islamic State? Secularism and Theocracy, A Study of the Malaysian Constitution".

17| Since the 1970s, Islamic revivalism that originated in Middle East and spread globally came increasingly to pose a political challenge to all governments of Muslim countries, including Malaysia. Even in the preceding years since political Independence or Merdeka in peninsular Malaysia, Islam was a source of

cleavage within the Malay community. Its principal manifestation was the political rivalry between the two Malay political parties, UMNO and PAS (originally known as PMIP or Pan Malayan Islamic Party) which mainly gained support in the two northeastern coastal states of Kelantan and Trengganu and also Kedah in the northwest.

18| See Othman, Norani, Globalization, Islamic Resurgence, and State Autonomy in Malaysia. The Response of the Malaysian State to "Islamic Globalization", paper read at the 5th International Conference of Asian Scholars (ICAS5), Kuala Lumpur 2-5 August 2007.

19| In this paper, I use the term "Islamist" to refer to groups or discourses of those contemporary Muslim activists committed to the introduction of an Islamic state or at the very least the implementation of more or greater scope for Muslim laws in the state as a way of reviving the Islamic character of public life of their country. "Political Islamists" is another term that others have used to refer to similarly-oriented Muslim groups.

20| Hudud laws are Islamic criminal laws pertaining to certain types of offences such as adultery, armed robbery and apostasy (i.e. when the apostate took up armed rebellion against the Islamic state or community). Among the punishments prescribed under hudud laws are flogging or lashing, mutilation of limbs by amputation, stoning to death and cruxification.

21| Utusan Malaysia, 23 June, 2001, p. 12

22| This section is drawn from a paper jointly written by Norani Othman and Razlina Razali, Muslim and Non-Muslim Marriages in Malaysia. Problems of Jurisdictional Dualism in a Multi-Religious Society, paper presented at the Asia Research Institute, National University of Singapore, Sept. 2006.

23| This process of development of the laws cannot be separated from the nature of "Islamisation" (i.e. in terms of religiosity, ideas of piety and a resurgence of a strict adherence to religious rituals or practices in everyday life that are deemed "truly Islamic") that has taken place in Malaysian society since late 1970s and after the Iranian Revolution of 1979.

24| SIS and other women's NGOs have submitted several memoranda on these and other examples of discrimination against Muslim women. They are: Memorandum on Reform of the Islamic Family Laws on Polygamy in 1996; Memorandum on Reform of the Islamic Family Laws and Justice in the Syariah System in 1997; Memorandum Pembaharuan Proses Perceraian dan Tuntututan Sampingan dalam Prosiding Mahkamah Syariah in 2000; and Memorandum Perbandingan Rang Undang-Undang Keluarga Islam dengan Akta Undang-Undang Keluarga Islam in 2002. All of these can be found on the SIS website, http://www.sistersinislam.org.my.

25| Kitabiyah means a woman who believes in a revealed religion possessing a Divine Book. In India, it is a term applied only to Jews and Christians. In Malaysia, under section 2 of the Islamic Family Law (Federal Territories) Act 1984, Kitabiyah is defined as:
(a) a woman whose ancestors were from the Bani Ya`qub; or a Christian woman whose ancestors were Christians before the prophethood of the Prophet Muhammad; or
(b) a Jew whose ancestors were Jews before the prophethood of the Prophet Isa.

26| Since 2001, the issue whether Malaysia is an Islamic or a secular state and whether it should strengthen the "secular intent" of its 1957 constitution has become one of my academic and advocacy concerns. Since 1993, I have been deeply engaged with (and have often shared and debated) the views and positions of three of my Muslim scholars and friends on issues of universality of

human rights; freedom of expression; women's rights; citizenship; and the public role of Islam (Shariah in particular) in a Muslim-dominant but multi-religious country. These three scholars are Abdullahi An Na'im (a Sudanese scholar-activist currently based at Emory Law School, USA), Fathi Osman (an Egyptian currently based in Los Angeles) and Hashim Kamali (a Law Professor at Universiti Islam Antarabangsa Malaysia (UIAM or International Islamic University of Malaysia). On the issue of the public role of the Shariah, An Nai'm has recently embarked on extensive and scholarly research on what he calls "The Future of Shari'a. Secularism from an Islamic Perspective". Most of the questions that I raised in this concluding section can be found in An Na'im's current work (in progress). For more information, visit his website at http://people.law.emory.edu/-abduh46/.

MUSLIM COUNTRIES BETWEEN RELIGIOUS AND SECULAR LAW

Silvia Tellenbach

Islam is a religion that accords special importance to the law, by which the faithful must organise their lives. According to a well-known definition, a Muslim is a person who lives under Islamic law. Many present-day constitutions of Islamic states contain provisions regarding Islamic law that typically appear side by side with the profession of Islam as the religion of the state. Such provisions say, for example, that all legal regulations should be Islamic (Iran), that the Shariah is one or even the only source of the law (Egypt) and that no regulation can be contrary to Islamic law (Afghanistan). A closer look reveals that these formulations are graded to some extent. While the demand that all regulations should be Islamic appears all-inclusive, the phrase "one or the only source of the law" does not rule out laws that are not rooted in Islam. Finally, the demand that legal norms should not contradict Islamic law affords the greatest bandwidth of flexibility. In a manner of speaking, it shifts the onus of proof onto those who claim that a particular norm is irreconcilable with Islam. Despite all these gradations, however, the point of reference to Islam is ubiquitous. At first glance, this conclusion suggests that there is no way of circumventing the maxim that the origin of the law should be divine.

However, if we look at the reality of Islamic law we find quite a number of phenomena that suggest that there is a great deal of the human element interleaved between the divine origin of the law and its daily practice.

To begin with, the Koran is not a code of law, as some of the people here suppose. It contains only a few immediate legal norms, most of them related to family and inheritance matters. The Sunna, the authoritative tradition of what the prophet Muhammad said, did and tolerated, is similarly limited. On the other hand, the facts of life that have to be dealt with are unlimited in their diversity and in a state of constant flux. This is why Islam developed a highly differentiated jurisprudence (*fiqh*) at a very early stage, bringing forth a methodology of interpretation that, in many cases, implies legal development. And jurisprudence is a matter for human beings, even if its fundamental purpose is to divine the will of God.

Islamic law makes a variety of different interpretations possible. "In diversity (of the law) lies a blessing", as a famous saying of the Prophet goes. Apart from the division into Shiites and Sunnites, the Sunnites today have four schools of law (*madhahib*), which may reach different conclusions on legal issues. Whether and under what conditions the conclusions of different schools of law may be combined (*talfiq*) is a question that is hotly debated today. What is more, in Islam there is not really any supreme authority to decide definitely about the proper answer to a legal question. In this respect, the status of the Ayatollah Khomeini in Iran is an exception, not the rule. And the same holds true for the constitutional and political aspects of his unusual position, the *velayat-e faqih*, the rule of the Supreme Legal Scholar, which forms the ideological core of the Islamic Republic of Iran today. Among Shiite jurisprudents it is hotly disputed, which is probably the reason why anyone who criticises that rule in Iran is prosecuted with particular strictness for breaking a taboo.

Unlike a law made in Europe, a norm that is enshrined in the Koran or in one of the Prophet's traditions cannot be simply abolished if it appears no longer appropriate. However, Islam has developed other methods of *de facto* voiding any regulations that are no longer considered conformable with the times. Here are some of the many examples that could be cited. There is, for instance, tacit non-application: Crucifixion, a punishment

that is still to be found in some of the penal codes of Islamic states (Iran, Sudan, Yemen) is no longer practiced anywhere. In law, slavery has ceased to exist, although there are indeed living conditions that cannot be called by any other name. Blood money paid for slaves on the basis of their material value no longer appears even in states where blood money as such is encoded in criminal law. Another method is narrow interpretation: Theft, a crime for which the Koran prescribes the amputation of a hand, has been strictly limited in law for centuries. To satisfy the Koranic definition, the object stolen should not just be anything but has to have a relatively high minimum value and had to be suitably contained to protect it from theft. Nor was punishment by having a hand cut off meted out to those who inherited or bought a stolen object after the fact or had it presented to them as a gift. In present-day Iran, the criminal code cites 16 conditions that have to be met to justify cutting off a hand. If only one of them is not met, all an offender may be sentenced to is a term in prison, sometimes combined with a whipping. Or let us look at the crime of renouncing Islam altogether. According to the prevailing opinion in Islam, apostasy is a crime that merits death. There are attempts to interpret it so that only those deserve death who actually fight against an Islamic state, committing high treason in a manner of speaking, while those who merely change their faith do not, as this merely concerns their private lives. This model is supported by the teachings of the Hanafi, the biggest Sunnite school, which holds that women who renounce Islam should not be executed but "merely" imprisoned because they are too weak to pose a serious threat to an Islamic state. Another way of dealing with a rule that cannot be abolished as it stands is to hedge it in with procedural restraints. Thus, a Muslim man is basically entitled to marry as many as four women. There are many modern states, however, in which he needs a court permit to do this, which is only issued if a variety of conditions are met. Thus, the court may check whether he is able to feed another family in the first place. Contractual freedom is fairly ample as well: If you want to get married in Iran, you are given a nicely printed booklet containing clauses that annul many of the provisions that constitute the marital law of the state. In such a marriage contract, parties can agree that the wife is entitled to demand a divorce if the husband marries another woman, or that the wife is entitled to have her own occupation. All the bride and groom need do is sign those clauses that they wish to retain. They may also add further clauses, provided they do not contravene the spirit of Islamic marriage. And these booklets are handed out not by some self-help organisation or

other but by the authorities of the Islamic Republic. More examples could be cited.

Furthermore, there are many aspects of law on which the Sharia does not rule in detail, such as the organisation of the state. Islam does not prescribe any form of government, and there is no rule that says that the state should be a kingdom, a republic, or anything else. Administrative law is virtually non-existent, and large parts of commercial and criminal law remain unregulated as well, including the respective procedures. Specific regulations are few in number; normally, there are only general Islamic principles such as the principle of *shura*, or consultation in council, which forms the basis for building a democratic structure, or the quotation "And if you judge, then let justice prevail", which serves as a basis for jurisdiction. Everything else is left in the hands of the people that constitute a state and a society. There is a relatively new formula that says that while God is sovereign, he delegated his sovereignty in trust to man. This idea, which is reflected in the constitutions of both Pakistan and Iran, shows that man is now actually becoming more prominent in his role as lawmaker.

There are some norms that play a special part in the profession of the faith and are symbolic in character. While these are untouchable, there are many things that can be done below that level. Islamic foundations may be invoked by a modern, liberal code of law as well as by its opposite, a state which so many of us are (wrongly) pleased to call medieval. There are historic reasons why most of the law in Muslim states today is European in origin, although family and inheritance laws are normally Islamic. Even so, these states are frequently confronted by demands for re-Islamisation of the law in other respects.

After the events of September 11, we have been concentrating much more on those characteristics of Islam that in our view symbolise primitiveness, immobility and violence. It is a sad fact that this form of Islam is not infrequently regarded as the true manifestation of a religion that is incapable of transforming itself. The point that is often forgotten is that there are many millions of Muslims who, far from recognising as the true faith the form of Islam that uses terrorist means, regard it as an aberration. To be sure, there are many countries in the Muslim – as well as in other – parts of the world where we find abuses that must be abolished urgently. However, these abuses may be traced to societal, economic or

political conditions that have no roots in Islam whatsoever. Torture, for instance, is not a device that originated in Islam, nor does Islam condone it as an instrument.

To cooperate with Muslim countries on promoting the rule of law and democratic structures we need to be thoroughly familiar with each country and its specific needs. The point is to find partners in each country whose projects appear worthy of support, or who may be motivated to tackle important projects. The foundations might be laid when people visit Germany for study or research purposes. After their return home, these people might be supported by long-term programmes promoting their work in their respective home countries. Moreover, it is frequently noted that people are highly interested in learning how other Muslim countries handle their own laws. It often appears that suggestions from another Muslim country are accepted more readily than suggestions from a "western" nation. According to my own observations, Turkey – although a laicist state – is perceived as part of the Islamic world by the citizens of the Arab states and Iran. One important option in development cooperation is to seize any appropriate opportunity to forge links between people from different Muslim countries, possibly also on neutral ground.

By way of conclusion, let us cast a glance at Turkey, the country that – so it is often hoped – might form a bridge between the two worlds. After the unexpectedly massive victory of the *AKP* in the parliamentary elections of July 22, 2007, Abdullah Gül was elected President of the Republic in the third ballot. When he was inaugurated on August 28, 2007, he became the first president of the secular Republic of Turkey to come from an Islam-oriented party. In the five years of its rule to date, that party refrained from meddling with the foundations of the laicist state – as its critics believe: – only because it was kept from doing so by a laicist president and a laicist constitutional court. Now, it is feared that the incoming president might use his manifold powers to appoint people to the highest offices of the state to create a situation that would mark a departure from laicism. Within a few days, a group of scientists commissioned by Prime Minister Erdogan presented the draft of a new constitution that will replace the constitution of 1982. Although much attention is being paid to the provision that is supposed to enable female students to enter a university in a headscarf (Art. 45 Par. 6), rather more attention should be paid to Art. 2 which says that Turkey will go on being a laicist state in which sovereignty rests with the people "unreservedly and un-

conditionally". The right to change faith is specifically guaranteed (Art. 24 Par. 1). The draft constitution expressly forbids taking advantage of the freedom of religion to carry out any activities that aim at basing the social, economic, political and legal foundations of the state on religious tenets (Art. 24 Par. 5). Further provisions address the prescription of laicism for political parties (Art. 38) and the rule that pupils should attend religious instruction voluntarily. Regarding this rule, two variants have been put up for debate: Pupils might either attend at their own request or be given an opportunity to withdraw from religious instruction (Art. 24 Par. 4). The debate about the new constitution has only just begun, and while there will be many changes, the regulations on laicism and religion that have been suggested are notable, and we will have to see whether and how they will be changed before the new constitution finally comes into force.

In the next few years, Turkey will be observed with a great deal of interest, not to say excitement, not only by European but also by the other Muslim countries. Could it be possible for a political leadership that professes Islam as the central force of their entire lives to implement a state in which the separation of religion and the state remains untouched? Or will those be vindicated who are worried that there might be a hidden agenda that, if implemented, might do away with the secular state? The future will show whether something completely new is emerging in Turkey, and whether Prime Minister Erdogan's statement comparing the *AKP*, the Party for Justice and Development to a Muslim *CDU* will come true one day.

SUGGESTED FURTHER READING

- *ENDE, WERNER AND UDO STEINBACH (eds.): Der Islam in der Gegenwart, 5th ed., Munich 2005*

SHARIAH VERSUS SECULAR LAW?

Kilian Bälz

There is a widely spread opinion that the religious character of the law in Muslim countries prevents legal development and innovation. The "sacred character" of the Shariah, it often is argued, makes Muslim countries immune to legal reform (or, at least it is held that the religious character of the law is a significant barrier to more fundamental legal change). Although there are – without any debate – serious shortcomings with regard to the rule of law, human rights, and fundamental economic freedoms in many parts of the Muslim world, in this intermission I want to advocate that this cannot be attributed to the allegedly "sacred" character of the Shariah. Not only that throughout the Muslim world Shariah principles, over the last two centuries, have been replaced by man made statutes in many (if not most) areas of law. I further argue that, looking at matters more closely, there is no contradiction between Islamic law (Shariah) and secular law, because law is always man-made. The concrete legal rules (US lawyers would refer to them as "black letter law"), which the state requires the individual to abide by, are always mundane. Law in Muslim countries, in this respect, is not different.

This proposition has far reaching consequences on how we should discuss law reform in Muslim countries. It implies the responsibility of man for the concrete content of legal rules.

There is no escape from assuming that responsibility by blaming a higher authority. It is always man who puts the divine ordinances into practice. This approach also has consequences on how to advance legal dialogue with Muslim counterparts.

Although in the Islamic legal tradition law and religion are presented as inseparable, this does not mean that there is no differentiation between law and religion. On the contrary: this distinction has been fundamental to the thinking of Muslim jurists over the centuries and is expressed by the dichotomy of *shariah* (the divine, revealed law) and *fiqh* (jurisprudence, the mundane effort to understand, interpret and implement the Shariah). There is the divine ideal on the one hand and the way it is put into practice in the world on the other. One is the realm of the revelation, the other the worldly practice inspired by it.

The distinction between divine ordinances and their worldly interpretation is a key element of Muslim legal thought and has played an important role, also with regard to the development of the law. Even if there is one divine ideal, lawyers may (or should I say: inevitably will?) disagree in how to implement it in view of concrete cases. Differences in opinion, in turn, provides flexibility in developing the law. Where there is no consensus, according to Islamic legal doctrine the jurists may choose which opinion to follow. This allows to adopt legal rules to changing social and economic conditions. Difference in opinion among jurists and interpretative pluralism thus is a major tool to bring about legal change.

This dichotomy between the divine ideal and its worldly interpretation is also found in many modern Arab constitutions, where (as for example in Egypt) the "principles of the Islamic Shariah" are "the major source of legislation" (Art. 2 of the Egyptian Constitution of 1971 as amended on 22 May 1980). In a groundbreaking decision of 15 May 1993 the Egyptian Supreme Constitutional Court, one of the most powerful judicial bodies in the Muslim world, explained that this provision indeed implied that the legislator was bound to the principles of the Islamic Shariah in the sense that legislative enactments may not contravene Islamic rules which are "definite with regard to their existence and textual basis." The Court however continued to explain that these "definite rules" only comprise the "general principles and immutable sources of Islamic law, which are not open to interpretation." In contrast to such immutable rules on the general level, the Court held, there are the specific rules

which are based on interpretation. Such rules are open to *ijtihad*, normally translated with "independent reasoning". These specific rules, the Court continued, are open to an interpretation that fits the "change in time and clime", as long as the interpretation "conforms to the overall spirit of the Shariah and does not transgress these boundaries."

The Egyptian courts thus readily acknowledge that although the legislator is bound to the ideal and principles of the Shariah, there is discretion and flexibility with regard to how these principles are put into practice. This, in effect, allows the courts to define an authoritative contemporary understanding of the tradition of Islamic law within the framework of the nation state.

In view hereof it becomes clear that my proposition stating that there is no contradiction between the Shariah and secular law may not be understood to imply that the Shariah is of no importance with respect to contemporary Muslim jurisdictions. The opposite is correct – what also is underpinned by the position of the Egyptian Constitutional Court. Legal discourse in many (maybe most) Muslim countries develops against the backdrop of Islamic legal rules. The Islamic legal tradition is an important framework of reference for legal policy discussions. This becomes evident if one considers the discussions in the field of human rights, family law or economic matters (Islamic finance): all these discussions are underpinned by a reference to Shariah principles. In all these areas of law bringing about legal change requires to also consider Islamic legal principles and bring the authorities on board who administer them. What I do propose, however, is that Islamic legal principles are subject to change and that one should consider possibilities of influencing the direction such change may take.

Looking at the issue more closely, one finds that Islamic legal discourse is highly productive: we see Islamic acts of parliaments, Islamic constitutions, Islamic human rights and even Islamic hedge funds – all products of the modern age, all without precedent in Islamic legal history (and at times even in contradiction with a literal interpretation of inherited rules). Although the Islamic frame of reference is given, the interpretation of black letter law is open to interpretation by man and responds to changing social, political and economic conditions. Without any doubt: medieval Muslim jurists did neither debate the details of various reproductive medical technologies (a growing body of literature in the Muslim world is

dedicated to that issue) nor whether a divorce can validly be declared by text message (SMS), an issue the courts in Dubai and Malaysia were concerned with more recently. Improved exchange on the international level, notably due to modern communication technologies, in particular the internet, but also an emerging global Islamic conference jet-set, specialising in Shariah compliant banking transactions and other questions of economic significance, have contributed to a dynamic and steadily evolving body of modern Islamic law, dealing with the aspects of today's life. This means that Islamic legal discourse is more lively, active and innovative then ever.

In view hereof, the intriguing question is: although Islamic legal discourse can be very flexible and innovative, it in no way needs to be so. In contrast: in spite of the dynamic development of the law, Muslim jurisprudence tends to be in conflict with certain internationally acknowledged principles, among them, in a prominent place, freedom of religion. A majority of Muslim jurists upholds that a Muslim is not entitled to abandon the religion of Islam. This view also continues to be endorsed by the courts in many Muslim countries. Apostates from Islam, i.e. Muslims who convert to another religion or may even give up their belief altogether, face sincere sanctions in many Muslim countries, in particular in the area of family and inheritance law: the marriage of an apostate regularly is being annulled and an apostate loses the capacity to inherit. This demonstrates that a change of social, political and economic circumstances alone does not seem to be sufficient to bring about the desired change. There is no automatism that the law changes and that the change will inevitably take a – from the standpoint of the international legal community – positive direction.

For anyone interested in Islamic legal developments, who does not see his role confined to mere observation, this leads to the question as to how innovation and legal reform in the Muslim world can be supported and encouraged. If the law, as a matter of principle, is flexible and susceptible to change, what can be done that change takes the right direction?

In order to enhance legal reform in Muslim countries, it is in my view important to first of all accept the Islamic framework of reference. Legal reform can only be encouraged through dialogue and must evolve from the inside. Any dialogue, in turn, is dependent on mutual respect for the broader framework of reference. It would be erroneous to condemn the

tradition of Islamic law altogether simply because one feels uncomfortable with some of the results it has produced and continues to produce in certain areas (such as freedom of religion or issues of Muslim family law). There also may be pragmatic aspects which support that approach: it simply will be very difficult to "secularise" the Muslim world. A social concept such as secularisation, which has evolved in the Western world over centuries (and remains an uncompleted project), cannot be readily transferred to the Muslim world in hope of an instant solution to pressing issues. Even if one should share the view that secularisation may be the ultimate solution to these issues – there are also Muslim intellectuals who favour that view – it will be near to impossible to bring about this state of society in the Muslim world some time in the foreseeable future. This implies, from a practical perspective, that secularisation will not be the solution. Any short time perspective must get to grips with the Shariah and its development.

Development of black letter law in the Muslim world over the last 150 years has occurred to a large extent as a result of the encounter with Western legal principles. Although the concept of secularisation as such cannot be transferred, the confrontation with Western legal thought has regularly provided the starting point for a productive discourse. From the 19th century onwards, the reception of European laws in North Africa, the Middle East and South Asia, comprising the transfer of legal concepts and methods of legal education, has triggered a process of reform of Islamic law, which, in quantitative terms, marks a distinct rupture with the gradual and creeping change in legal structures over the years before. At the same time legal history shows us that the simple "export" of black letter rules is impossible. What can be readily transferred and put to productive use, however, are "legal production techniques", such as the knowledge of international standards and best practices etc.

This can again be illustrated by the approach of the Egyptian Supreme Constitutional Court. The reasoning of the Court summarised above is based on the modern western concept of constitutional review, namely that a certain judicial body is vested with the competence to scrutinise acts of parliament in the light of supra legislative norms (and eventually avoid acts of parliament which do not comply with them). It is exactly the modern concept of constitutional review which allows the Egyptian Supreme Constitutional Court to make reference to (and hereby redefine) the rules of Islamic law.

This experience shows that a transfer of a legal systematic, of a way how to approach and think the law, is likely to have much more of an impact than the imposition of substantive legal principles whose content is received as "alien". "Legal assistance," in the sense of aid work aiming at building and enforcing the legal system and the rule of law, in my opinion should exactly focus on the transfer of such legal technology as opposed to attempting to export substantive legal rules. As opposed to exporting ready made codes and standards, one should focus on fundamental concepts and procedures, which are more likely to be suited as the intellectual seed of indigenous change.

From a practical point of view, it therefore should be a prime goal to assist in further improving legal education in the Muslim world and further to make post graduate studies at German universities better accessible to students from Muslim jurisdictions. Legal education is the key to any sustainable legal development. It allows to implant exactly those legal technologies in the future legal elite which are necessary to bring about legal change. In order to be successful at that, there are certain fundamental prerequisites. In order to enhance the exchange and transfer of ideas and concepts in legal education between Germany and jurisdictions of the Muslim world, it does not only require a further internationalisation of legal education in Germany, in the sense of opening our university system to foreign law students (in particular by offering relevant courses, permitting to take degrees in the English language etc.). This also is dependent on having the right candidates who have worked a sufficient foundation of the laws of their home county so that they have a backdrop against which they can compare their international experience with.

DEVELOPING DEMOCRACY AND THE RULE OF LAW IN ISLAMIC COUNTRIES

Helmut Reifeld

In recent years, the debate about Islam-specific questions has widened considerably in German development co-operation. It is a debate in which political issues increasingly occupy a key position. At the same time, the range of bridge-building functions that the KAS can and must assume has broadened accordingly. Outstanding issues in this context include those relating to the development of democracy and the rule of law as well as other interconnected issues relating to human rights and good governance. In most Islamic countries, too, the dispute about these subjects has been growing more vehement in recent years. However, as such subjects are often debated within a wider context in these countries, it is normally impossible to isolate issues relating to, for example, fundamental rights from the overarching tension between religion and politics. Even so, in these as well as in many other countries we create opportunities for talking about current political issues and universal fundamental values. Our intention is to initiate a fair dialogue that gives us an opportunity to defend our own position clearly and frankly and to respond to similar initiatives by our Muslim partners.

In this, we do not aim to present the religion of Islam as the cause of various problems, but rather to counteract the "clash of cultures" that appears to be coming to a head. Nor do we assume when we make offers to talk that the positions held by our counterparts are generally or even essentially different from ours. Rather, we are convinced that the diversity of opinions and the plurality of political and philosophical convictions is as great among Muslims as it is among Christians, Hindus or Buddhists. This is why most of our projects primarily address not Islam as a religion, but individuals, Muslims championing certain contents, goals and interests with whom we would like to cooperate.

FRAMEWORK CONDITIONS FOR A DIALOGUE ON THE RULE OF LAW

In many ways, political developments in the Islamic world are marked by internal as well as external upheavals. The gravest consequences are doubtlessly those of international terrorism, which originates mainly in the Islamic world, but the number of Islamic countries that are suffering from the aftermath of terrorist attacks is growing, and there is a large majority of Muslims who reject this form of violence as categorically as other people. On the other hand, there are the as-yet unresolved territorial conflicts in the Middle East, Kashmir, Iraq and Afghanistan, all of which are somehow related to the spread of terrorism. In effect, these conflicts impair both the scope of international cooperation and the chances of peaceful constitutional development.

Addressing these two sets of grave problems is difficult because of the effects of globalisation and the profound changes triggered by it in the political, economic and social structures of Islamic as well as other societies. Endeavours have only just begun to extend the reach of international problem-solving strategies to the Islamic countries, which are being drawn into the vortex of globalisation in as many ways as other states. The Islamic world needs to open up, but there are powerful reactionary forces confronting this move that oppose any external pressure to change, hoping to preserve an Islamic identity of their own by turning to fundamentalism in the domestic sphere. These internal reform movements are highly diverse and differ greatly in intensity in the various parts of the Islamic world. What is more, the importance of religion – and particularly that of Islam – has been growing swiftly worldwide, changing the character of constitutional developments, the opportunities of conflict settlement and the perception of a global "clash of cultures".

These developments unroll against the background of structural political problems. First and foremost, there is the fact that, formal independence notwithstanding, the political order in many states of the Islamic world is still characterised by considerable deficits in democracy and a lack of political liberties. Only a very few of the states that are peopled by an Islamic majority can be regarded as democratically legitimised. In all these states, there is still a wide gap between societal living conditions and political organisation, and in most of them, there is no other term but authoritarian to describe the basic character of their political condition.

In addition, the Islamic world displays a multitude of social, territorial and economic problems. The most important socio-political challenges hampering any development towards the rule of law include the traditionally disadvantaged status of women, the unemployment that is widespread particularly among young people, the glaring deficits in education, the extreme inequality in the distribution of income and demographic developments. Along with the territorial conflicts mentioned above, there are numerous ethnic conflicts like the Kurdish question as well as conflicts over resources and the supply of energy or water, all of them with a territorial dimension. Among the common economic problems we find slow economic growth, fragmented and fenced-off markets, rent economies, interventionist bureaucracies and relatively undifferentiated national economies that still display colonial traits.

In Islamic countries as well as elsewhere, constitutional development cannot be promoted without regard to these framework conditions. However, development potentials do not depend on social and economic conditions alone, but also on the fundamental values and political goals of a nation that form the foundation for the development of the rule of law, a liberal democracy and a social market economy. Promotion is easiest when each of these developments – tardy or speedy as it may be – goes hand in hand with the others.

DEMOCRACY AS A GUIDING PRECEPT

In many cases, existing political, social and economic core problems are due not only to historic or outside influences, but also to neglected reforms and the absence of any will to create a suitable regulatory framework. Nevertheless, most of the people who live in these countries see constitutional democracy as the best and most desirable form of govern-

ment, although these problems do impair their willingness to achieve it in a consistent long-term effort. If we look beyond the Middle East to Southeast Asia, we can see that democracy, the rule of law, secularism and "modernity" exist even in Islamic countries. Especially in these countries, it would not serve our purpose to base international cooperation on preconceived notions about "Islam as such" that might easily turn into self-fulfilling prophecies: Islam versus modernity, Islam versus democracy or even Islam versus the Enlightenment. Instead, we should focus on and strengthen those elements that hold us together. Everywhere, it is our intention to promote democracy, human rights, freedom and the rule of law with the aid of partners who are committed to the same objectives – independently of their religious beliefs. Our international work must continue to be guided by political objectives and concepts among which democracy and the rule of law rank at the very top.

A discussion of issues relating to the development of democracy and the rule of law may be informed or influenced but never governed by religious aspects. In all these respects, we should never underrate the political adaptability of Muslims. Today, about a quarter of all Muslims worldwide live in minority communities that normally integrate very well in their host societies, supported by their own cultural traditions. At the same time, the practice of applying religious labels to political issues is being challenged again and again in all Islamic states. The causes of territorial conflicts like the one about Kashmir are not related to religion at all. Most of the conflicts in Afghanistan and Pakistan are ethnic and social but not religious in nature.

Not only "progressive" but also many "conservative" Muslims are engaged in an intense discourse about the requirements of democracy, the rule of law and human rights; this is exemplified by the Muslim Brotherhood: While some Muslim Brothers still believe that politics threatens everything that is religious and strive to keep the two spheres separate, there are many countries in the Middle East where others jostle to enter parliament and assume political responsibility. The term "moderate" seems best suited to describe those Muslims with whom we wish to cooperate in Islamic countries. In this case, "moderate" mainly describes a certain pattern of thought and action, referring not so much to specific political contents but to the way in which political problems are addressed. Moderate Muslims are to be found in most Islamic groups: among the Ulama as well as among laymen, among academics as well as

among non-academics, among law scholars as well as among sufis, among tablighis as well as among Muslim Brothers. Conversely, we are not prepared to cooperate with Muslims whose political aim is to establish a theocratic state, who accept those elements of the Shariah that run counter to the principles of humanity and human rights or who are not prepared to recognise liberal democracy as a principle of political order.

SUBJECTS FOR DIALOGUE

Disputes about substantive political issues are most likely to lead to the identification of common interests from which opportunities for long-term cooperation may arise. In Islamic countries as well as elsewhere, the international work of the KAS revolves around factual issues of current and political relevance. Most of these relate to the legal sphere, ranging from fundamental and human rights, democracy and constitutionality to matters of private law and subjects relating to the social order, the global economy and the international community of states. The general theme of our work embodies our core concerns – liberal democracy, freedom under the rule of law, freedom for the media and human rights. In our view, discussing such factual issues is itself a means to promote democracy.

Surely the most important question we can ask in an Islamic country concerns the chances of ongoing development in democracy and the rule of law. As in the field of human rights, these countries have various constitutional designs that are informed by Islam. As a general rule, their constitutions emphasise the principles of religious freedom, equal treatment and minority protection rather less than others that are exclusively secular in nature. In addition, most Islamic states lack democratically legitimised institutions, transparent administrative structures and, most importantly, a multi-party democracy whose pluralism might encourage a dialogue that is open and fair. Just as at present, democracy, liberality, the rule of law and human rights will continue to constitute an acid test that will decide about opportunities for joint political action and about integration in the international political system.

Within this range of issues, there are two subjects on which the KAS concentrates with particular emphasis. To us, human rights and their constitutional codification come first everywhere. The starting point in this context should be a shared concept of the dignity of man, from

which a variety of common political and other value concepts may be derived. To be sure, the Islamic ideal of humanity emphasises the importance of the community much more than that of the individual. Religious Muslims do not always find it easy to understand the concept of individual self-determination. Similarly, many Muslim intellectuals are disconcerted by the extent to which the individual is habitually regarded in the West as free and endowed with universal human rights. Given the present framework conditions, the opportunities for establishing an enforceable title to human rights are limited. Across the board, trends towards liberalisation – wherever they have appeared in recent years – did not go beyond granting certain liberties here and there and exercising passive tolerance in various forms that could be cancelled at any time. In the absence of securely and comprehensively codified civil and human rights, the available freedom of political design does not allow the development of innovative solutions for social, political and economic problems. While human rights and the independence of the judiciary do exist on paper in many Islamic states, they are frequently restricted in practice in a variety of ways, substantiated by invoking a specific interpretation of the Shariah, regional traditions, national interests and sometimes without any reasons at all.

The second field that plays a key role comprises religious freedom and secularism. Islamic countries must grant the adherents of other faiths the right to practice their religion freely. This can only happen if both sides accept the coexistence of cultures as a fact to which there is no alternative in our globalised world. Humane coexistence comes only to those who recognise that every individual should have the right to practice his or her religion freely and to contribute towards peace. What we aim for is not a "mix of religions", but clearly defined lines of distinction that are respected. The only thing that makes sense is a dialogue that is both critical and self-critical and is free from negative clichés and preconceived notions about the enemy.

In this context, it is indispensable to broach the question of a secular order of the state. In view of the powerful role played by religion in the state as well as in society, doubts keep arising as to whether and how a secular constitutional order can ever be made to harmonise with a deeply rooted Islamic faith in all its forms. Turkey offers the best-developed model of religious freedom being assured in a state that is democratic and basically neutral in terms of religion. However, we should not use

Turkey as a role model for the Islamic world, but merely as an example of something that is feasible but not readily transferable.

PERSPECTIVES

Basically, all the subjects in this range are being debated on the Islamic side, too. If you can demonstrate a common interest in a certain subject, you are sure to find adequate partners to talk to. It is true that certain groups of Islamists in various countries believe that the aforementioned subjects conflict with what they regard as the "Islamic order", but most Muslims can readily reconcile these issues with the democratic or parliamentary process that is desirable in their view.

Therefore, the crucial question is not whether Islam as such can be constitutionally "modernised", but what new forms and models of a secular constitutional state are evolving in this field. There can be no doubt that there is a readiness to accept modernisation, democracy and plurality in the Islamic world. There are processes of modernisation and democratisation going on that extend not only to social issues in society but also to religious self-perception. Yet there are still many instances where the opposite is true: views that oppose modernity and enlightenment and endorse a static interpretation of the Koran and the Sunna, frequently encouraged by national governments that exploit them in their own political interest. For more years, our international cooperation will have to deal with this tension.

In Islamic countries as well as elsewhere, democratisation is a lengthy process that implies more than merely formulating a new constitution. In all these countries there are numerous players working on that process, including quite a number of religious Muslims who are receptive towards secular reasoning. To be sure, they are easier to find in Ankara, Delhi or Kuala Lumpur than in Khartum, Kabul or Riyadh. Disillusionment with political ineptness in their own country induces many Muslims to accept a more liberal understanding of politics as well as the separation of politics and religion. Even committed Islamists can be receptive towards democracy and secularism, though not to save politics from religion, but rather, as Olivier Roy states, to save religion from politics. Indeed, there are many neo-Islamists who would like to see their religion privatised these days, but they are motivated by mistrust of their own state. Even though we may not share this motivation, we should nevertheless check

whether such an "opening" might not serve to strengthen the autonomy of the political sphere.

Secularisation processes in the Islamic world take a highly asymmetrical course to this day. In view of the powerful role played by religion in the state and in society, the key challenge lies in establishing permanent harmony between a secular constitutional order and a deeply-rooted Islamic faith. The case of Turkey is exemplary for the whole Islamic world in the way the country confronts the question of how a democratic state that is basically neutral in terms of religion can assure religious freedom. The case shows that a secular constitutional state in the Islamic world is as capable as any other of dealing constructively with the practice of religion and matching the practice of Islam to the requirements of a modern society. Even though Turkey is neither able nor willing to serve as a model for the Islamic world, its example offers some valuable guidance.

In the Western world, religious positions run straight across party lines, and the same holds true for the Islamic countries. This is not to say, however, that political core issues such as the rule of law, secularisation, democracy and human rights should rank below theological aspects. If we are prepared to include people in our dialogue who do not share our opinion a priori, and who are sceptical towards our Christian or "western" values, we must be allowed to limit our dialogue to those who conform to the principles of fairness, mutual respect and non-violence. This is all the more important and more likely to bear fruit if the content of our dialogue with Islam consists of concrete factual issues and if both sides agree on specific objectives right from the start. One of our primary goals should be to create a climate of political dialogue within which the rule of law, human rights and good governance are discussed controversially, but are basically recognised as shared values.

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