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Chapter 1

Contesting Sharia in Postcolonial and Geopolitical Contexts

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Introduction

I have been working on issues of Islam and the state, Sharia, and human rights since the mid-1980s,[1] on the premise that humanity at large is moving toward a globalized legal world that requires mutual understanding in the field of legal and philosophical traditions. Recently, however, I have come to doubt the possibility of a genuinely mutual understanding in view of the realities of postcolonial power relations. In realistic, pragmatic terms, the obstacles facing possibilities of mutual understanding include the tendency of members of each tradition to project the epistemology and rationality of their tradition onto whichever cultures or traditions they presume to understand. It is not that mutual understanding cannot be achieved, but that our approach to mutuality of understanding is more likely to be realized if our attempt is deliberate and strategic, instead of

[1] My first relevant book chapter was titled "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa" (An-Na'im 1984).

expecting the legal and philosophical traditions of other cultures to conform to our own assumptions and expectations about them.

From this perspective, I call on the proponents of mutual understanding between legal and philosophical traditions to seek to promote conceptual and methodological tools to that end, and to draw up practical strategies. Large-scale socioeconomic and political transformations tend to happen with the support of changes at the global and regional level, which push for as well as sustain the structural changes achieved by social and political forces in each society. In other words, it seems to me that large-scale and sustained social transformations are achieved by a combination of social actors who interact through ethical and intellectual forces over extended periods of time. This view does not exclude or marginalize the role of the contributions of individuals who are active and effective at various levels of agency and resources. In this process, I see it as my role, as a Muslim from postcolonial Sudan, to engage in good faith and avoid apologetic or defensive discourse—regardless of what others do or fail to do—to promote mutual understanding.

For instance, and from the perspective of the tentative theory of Islam, society, and state I am briefly proposing here, I see deterministic attitudes of so-called Western and Islamic legal cultures[2] as highly destructive *mis*-understandings. These are likely to follow when human actors assume that since the role of Sharia in Islamic cultures is "similar to" the role of law in Western cultures, Sharia must follow the normative or empirical qualities of law in Western cultures and vice versa. Instead of adopting such simplistic equations, I recommend keeping each normative system true to its own nature, epistemology, and methodology. For instance, the "role" of law or Sharia is not the same when it is *politically* determined and coercively enforced by the state, on the one hand, or believed to be *divinely* ordained, though coercively or socially sanctioned, like the role of tribal structures and power relations for customary law, on the other.

It should therefore be possible, for example, to achieve mutual understanding in the fields of legal and philosophical traditions, *provided* due

[2]I use the terms "Western" and "Islamic" as shorthand, subject to serious reservations about the fallacy of possibilities of geopolitical uniformity. The most destructive wars in human history, particularly the First and Second World Wars in the twentieth century, were fought among Western powers. Muslims were fighting "civil wars" since a couple of decades after the death of the Prophet and continued to experience imperial conquests throughout their histories.

regard is given to the realities of postcolonial power relations and terminological and methodological concerns are clarified. These factors should be included in the comparative analysis and evaluation by all sides in domestic debates about the role of Sharia within a postcolonial "nation-state," as well as in international geopolitical discourse. This is not to suggest that conflicts and tensions among different constituencies can be permanently and categorically resolved through debate and discourse, but such strategies can help in *negotiating* agreement through peaceful means. While I can try to formulate some potential principles and guidelines on these processes within Muslim communities and in their relations to others, I will emphasize the historical and contextual nature of the process and its outcomes.

The human rights paradigm could be an important source of such principles and guidelines, but that paradigm is frequently invoked by the former Western European colonial powers and North America to justify or rationalize their exploitative geopolitical hegemony, instead of being used as an approach to globally inclusive processes for promoting social justice and protecting individual freedom. Negative perceptions of the human rights paradigm are also partly due to the inability of the system to provide effective and sustainable protection of human rights on the ground. Another source of negative perception is the view that the system is colonized by what I call "liberal relativism," because official representatives of states, officers of international organizations, practitioners of nongovernmental organizations, and scholars all tend to routinely define and apply key concepts and institutions of the human rights system in liberal terms.

I call this *liberal relativism* to counter the charge of *cultural relativism*, which advocates of the present international human rights system frequently raise against proponents of a more globally inclusive system. In fact, every conception of human rights, anywhere in the world, is necessarily *relative* to the culture and worldview of the person or group. The universality of some norms and institutions may evolve over time, as a product of overlapping consensus, but never through "proclamation" by any state, group of states, or international organization (An-Na'im 1993). The present international system's limitation to liberal conceptions of rights as the judicially enforceable entitlements of individual persons renders the entire system only regional (so-called Western) and not universal. The lack of universality deprives the present system of moral and political authority, thereby undermining the legal force of international norms and institutions.

Perceptions of Sharia as socially and politically problematic constituted an imperial "self-fulfilling prophecy" by European colonial administrators, as often happened throughout human history to justify the domination and exploitation of the inferior by the superior. As European imperialism sought to found its superiority on claims of "scientific methodology and rationality," it strove to attribute the civilizational inferiority of Islamic communities to the tenets of Muslims' religious and cultural systems, conveniently embraced by the vague and iconic notion of Sharia (Said 1978, 1993). Respectful belief in the civilizational inferiority and superiority of both sides of the imperial equation requires a common framework, like modernity or human rights, which imperial discourse claims is universally determined, while it is in fact relatively defined and anchored.

If implemented effectively, this colonial stipulation would seem to vindicate the so-called "civilizing mission" of the European colonization of African and Asian territories and populations. However, the nature and development of Sharia defies the simplistic characterizations and expectations of current debates in the late twentieth and early twenty-first centuries. Part of the problem is due to competing claims of Muslims to self-determination and concerns of both Muslims and non-Muslims about political violence and instability, which do not understand or address the underlying causes of those phenomena. Instability and political violence are most likely to follow from frustration with the lack of social justice and effective self-determination at home and abroad. These two dimensions reflect histories of colonial and neocolonial relations, current hegemonic, geopolitical ambitions, and assertions of self-determination to demand social justice. Poor and disempowered Muslims also seem to believe that they should exercise their self-determination by applying Sharia in order to restore social justice, which they believe existed in much of Islamic history. It should be noted here that beliefs of populist leaders are more effective in mobilizing and motivating mass movements and populist politics than the carefully reasoned and well-documented analysis of scholars.

On further reflection, however, Muslims should also realize that Sharia itself authorizes only relative equality and justice for Muslim men and discriminates against Muslim women and non-Muslims. These and other serious problems with traditional Sharia are structural and methodological in traditional interpretations of Sharia and cannot be redressed without a paradigm shift in the (organization of) fundamental sources of Sharia, as I have discussed in detail elsewhere (An-Na'im 1990,

Chapters 2, 3, 4, and 6, 2011). I would also emphasize here that redressing the fundamental limitations of Sharia interpretations in the modern context should be achieved through exercising the *equal* right to self-determination for all human beings, men and women, Muslims and non-Muslims alike. Muslim men are not entitled to the right to self-determination unless they are willing and able to grant the same right to all other human beings.

This obvious principle does not seem to be appreciated by Muslims at large because of their unfounded assumption of the religious sanctity of traditional interpretations of Sharia. Any interpretation of Sharia—past, present, or future—is always a human endeavor and not divine command as such. In other words, since the norms and institutions of Sharia reflect the human interpretation of relevant texts of the Quran and Sunna (*hadith*), they remain open to critical reflection and reinterpretation. The human quality of Sharia is obvious in view of the wide diversity in opinion among the founding scholars of Islamic jurisprudence and their schools of Islamic jurisprudence (*madhahib*), although they applied the same methodologies of interpretation (*usul al-fiqh*). As Ibn Rushd explained, all interpretations of Sharia are suppositional (*zanniyyan*) and not categorical (*qat'iyyan*)—i.e., they are outcomes of speculation and not divine command as such (An-Na'im 2008, 47).

One point to emphasize for this purpose is that Sharia norms defy codification or legislative enactment, because that would change the religious nature of the norm and deny Muslims the inherent religious freedom of choice among different interpretations of the Quran and Sunna (*hadith*) established by traditional Sunni or Shia schools of jurisprudence. Since Muslims are religiously accountable for compliance with Sharia, they must have the freedom and responsibility to decide which interpretation of the sources and methodologies of Sharia they accept (Coulson 1964; Weiss 1998). Moreover, arbitrary and harsh outcomes were bound to follow when the rich diversity of views among Muslim scholars was reduced to the extreme selectivity of the language of codification that characterizes the modern state's positive law. The claim of ruling elites in monarchies as well as republics that they can specify which Sharia norms state authorities should impose on the entire Muslim population of their countries violates Muslims' freedom of religion and inhibits possibilities for positive social change in their communities. This analysis confirms, in my view, that the mediation of competing factors in the practical governance of historical Muslim communities was

consistent with the purpose and rationale of constitutionalism and democratic principles.

Whatever judicial system or manner of resolution of disputes prevailed among Muslims in the precolonial era no longer exists (Vikør 2005, 140) but remains most instructive on the nature and development of Sharia. The historical theory and practice of Sharia emphasize the importance of the political and social context of modern political regimes' pre-bureaucratic organization. In those polities, the caliphs and sultans had on the one hand apparently absolute military and political power and authority, and on the other hand needed the legitimizing authority of scholars and religious leaders of the communities (Hallaq 2009, 131, 147). The political and legal history of Muslim societies consists of interaction and negotiation between rulers and scholars/jurists. The rulers needed the legitimacy of the knowledge and interpretation of Sharia by the Muslim scholars/jurists, who in turn needed the political authority of the rulers to implement Sharia. Rulers needed to respect the integrity and autonomy of scholars in order to preserve their legitimizing competence, and the scholars needed to protect their integrity and autonomy in order to maintain their moral standing among their communities.

The integrity and autonomy of the founding Muslim scholars of Sharia were structurally safeguarded by the independence of the informal educational system, which consisted of circles of learning (*halaqas*) usually convened in mosques, where Muslims go to pray five times a day. Throughout Muslim history, these informal circles of learning remained the established forum of legal education and retained their autonomy by receiving funding not from the state ruling elites but from religious endowments (*waqfs*) established by private individual benefactors (Hallaq 2009, 140). In addition, more institutionalized colleges (*madrasas*) emerged at the end of the eighth century when endowments and salaries became available to professors. Ironically, it was through the funding of these institutions that the ruling elites gradually co-opted scholars/jurists and influenced the legal profession. By the seventeenth century, the state employed most jurists, and those who insisted on maintaining their autonomy still had to rely on state funding through their colleagues who did accept state patronage (151). The autonomous role of Sharia and its scholars started to decline before the rise of European colonialism in Africa and Asia, but the impact of colonialism seems to have been more effective and sustained in diminishing the role of Sharia in the transition to the nation-state.

To conclude this section, a central role in the daily practice of Sharia was played by the jurist/scholar (*mufti*), whose task was to consult a whole host of Sharia sources in order to produce a legal opinion (*fatwa*), which became the basis of rulings by judges (*qadis*) in specific cases. The authority of the mufti was based on his reputation as a learned and pious scholar, while the authority of judges was derived from either official appointment by the ruler or voluntary submission by individual litigants in the case at hand. The fatwa established the connection between relevant principles of Sharia and the particular facts of a case and was in theory valid only for the case for which it was formulated. Judges were not obliged to seek a fatwa for every case they had to rule on. They could seek it only when unsure of the legal basis for determining the case or if they felt the need for a more authoritative ruling due to the nature of the case or the public attention it attracted. The roles of both judge and mufti were limited to identifying and interpreting the law for application to specific cases, and never included creating the law. The tasks of a judge included resolving conflict, adjudicating rights and obligations, and representing the community in maintaining law and order in the market and in public life (*hisba*). In order to perform his functions, a judge was supposed to investigate not only the facts of the case but also information about the integrity of the litigating parties and the history of their interactions. He had to consider social customs and strive to resolve the dispute in ways that preserved social harmony and stability (Vikør 2005, Chapters 8, 9).

Transition to Legal Systems of Nation-State

European colonialism transformed the preexisting nature and manner of Sharia's role in the administration of justice in Muslim communities across the world, even in regions that were not formally colonized, like the Arabian Peninsula and Iran. European colonialism has been spectacularly successful not only in its scale and scope but, more importantly, also in transforming the political and legal institutions of colonized societies and integrating them into the global economic and trade systems. These transformations were initially prompted by attempts of the Ottoman Empire to modernize its political and legal institutions during the nineteenth century to meet the challenge of rising European powers. The symbolic significance of the Ottoman concessions to rising European powers culminated in the abolition of the caliphate (symbol of Islamic unity and sovereignty) by 1924. This event signified the irreversible shift

to European models of the state and its legal system, which came to prevail throughout Ottoman regions in the Middle East and North Africa. Concurrent processes were taking place in Iran and South Asia, which culminated in similar outcomes.

A combination of colonial European challenges and accommodation and adaptation by Islamic societies during the nineteenth to the first half of the twentieth century resulted in the establishment of "nation-states" from North and West Africa to South and Southeast Asia. When the Islamic societies of Central Asia were finally released from the grip of Russian/Soviet colonialism by 1991, they also opted for the nation-state model, which has become the established global order. The same process resulted in the full incorporation of all Islamic societies into the global, state-centric economic, political, and security systems of today. Secular state courts applied European statutes during the colonial era and since independence in almost all Islamic societies; the domain of Sharia became limited to family law. Even in the family law field, the state continued to regulate the role of Sharia as part of broader legal and political systems of government and social organization within the framework of postcolonial European models.

While this process unfolded in different ways among Islamic societies, the experience of the late Ottoman Empire has probably had the most far-reaching consequences, because it set the model for similar effects of European colonialism on preexisting, indigenous legal systems. In particular, the Ottoman Majalla—enacted by the Sultan in the early second half of the nineteenth century (1867–77)—set the example of a highly selective combination of European codes and Sharia principles of contract and tort according to the Hanafi School of jurisprudence. This process simplified a vast part of the relevant principles of that School, making them more easily accessible to litigants and jurists. While it was a total innovation in form and substance, the Majalla was highly authoritative because it represented the earliest and most politically significant example of an official promulgation of large parts of Sharia by the authority of a modern state. In the circumstances of its promulgation, the Majalla successfully claimed to transform Sharia into positive state law in the modern sense of the term, although it dealt with only a small section of the jurisprudence of one of four Sunni schools. The principle of selectivity (*takhayyur*), allowing believers to choose among equally legitimate doctrines of Sharia, was not new to Muslim communities, but the Majalla transformed the practice by representing it

in statutory form for the centralized and bureaucratic administration of justice by the state.

This trend toward the selection of sources and a synthesis of Islamic and Western legal concepts and institutions continued to develop and became irreversible. The most influential work in this regard is that of the Egyptian jurist Abd al-Razzaq al-Sanhuri (d.1971) (Bechor 2007), who applied this approach when drafting the Egyptian Civil Code of 1949, and that of Iraq in 1951, Libya in 1954, Kuwait in 1960, and others. This process made the entire body of Sharia norms and institutions more accessible to judges and other actors in the process of incorporating these principles into modern legislation. The process of mixing some general or partial principles or views from one school of Sharia (*madhhab*) with those derived from other schools was selective, without due regard to the methodological basis or conceptual coherence of any of the schools whose authority was being invoked. The ironic outcome of the entire process was that it exposed the extreme diversity among and within different schools of Islamic jurisprudence, which should undermine rather than promote the enforcement of Sharia as the law of the modern state.

In addition, the process of civil education and professional training of officials of the modern nation-state introduced a range of secular subjects that tend to create a different worldview and expertise among young generations of Muslims. The monopoly on intellectual leadership held by Islamic scholars in societies that had very low literacy rates has been drastically eroded by the fast growth of mass literacy and growing higher education in secular sciences and arts. In relation to legal education, for instance, the first generations of lawyers and jurists took advanced training in European and North American universities and returned to teach subsequent generations or to hold senior legal and judicial offices (Hallaq 2009, 445).

Sharia, Society, and the State

According to Islamic religious doctrine, every Muslim is personally responsible for knowing and complying with what is required of him or her as a matter of religious obligation. The fundamental principle of individual and personal responsibility that can never be abdicated or delegated is one of the recurring themes of the Quran (6:164, 17:15, 35:18, 39:7, and 53:18). In practice, however, when Muslims seek to know what Sharia

requires of them in any specific situation, they are more likely to ask a trusted Muslim scholar (*'alim*, plural *ulama*) or Sufi leader than to refer directly to the Quran and Sunna themselves. Whether done personally or more usually by a scholar or Sufi leader, reference to the Quran and Sunna necessarily happens through the structure and methodology one has been raised to accept. This would normally happen within the framework of a particular school (*madhhab*) and its established doctrine and methodology, but never in a totally fresh and original manner, without preconceived notions of how to identify and interpret relevant texts of the Quran and Sunna.

In other words, whenever Muslims consider these primary sources, they cannot avoid the filters of not only layers of experience and interpretation by preceding generations but also of an elaborate methodology that determines which texts are relevant to any subject and how they should be understood. Human agency is therefore integral to any approach to the Quran and Sunna at multiple levels, ranging from centuries of accumulated experience and interpretation to the current context, in which an Islamic frame of reference is invoked. The next question to briefly clarify is how an Islamic frame of reference can be invoked from an institutional perspective of state policy and legislation. As a political institution, the state is not an entity that can feel, believe, or act. It is always human beings who act in the name of the state, exercise its powers, or operate through its organs. Thus, whenever a human being makes a decision about a policy matter or proposes or drafts legislation that is supposed to embody Islamic principles, this will necessarily reflect his or her personal perspective on the subject, and never that of the state as an autonomous entity. Moreover, when such policy or legislative proposals are made in the name of a political party or organization, such positions are also taken by the human leaders speaking or acting for that entity. It is true that specific positions on matters of policy and legislation may be negotiated among significant actors, but the outcome will still necessarily be the product of individual human judgment and the choice to accept and act on a view that those actors agree about.

For instance, a decision to punish the consumption of alcohol as a *hadd* crime defined by Sharia is necessarily the view of individual political actors, taken after weighing all sorts of practical considerations, and the language used in drafting legislation and the measures taken when implementing it are similarly the product of human judgment and choice. For my purposes, the point here is that the entire process of formulating

and implementing public policy and legislation is constantly subject to human error and fallibility, which means that it can always be challenged or questioned without violating the direct and immediate divine will of God. This is part of the reason why matters of public policy and legislation must be supported by civic reason, even among Muslims who can and do disagree on all such matters without violating their religious obligations.

The structure and methodology known as *usul al-fiqh*, through which Muslims can comprehend and implement Islamic precepts as conveyed in the Quran and Sunna, was developed by early Muslim scholars. In its original formulations, this field of human knowledge sought to regulate the interpretation of these foundational sources in light of the historical experience of the first generations of Muslims. It also defines and regulates the operation of such juridical techniques as *ijma'* (consensus), *qiyas* (reasoning by analogy), and *ijtihad* (juridical reasoning). These techniques are commonly taken to be methods for specifying Sharia principles, rather than substantive sources as such. However, *ijma'* and *ijtihad* had a more foundational role beyond this limited technical meaning. This broader sense can form the basis of a more dynamic and creative development of Sharia now and in the future.

The consensus (*ijma'*) among generations of Muslims from the beginning of Islam that the text of the Quran is in fact accurately contained in the written text known as *al-Mushaf* is the underlying reason why that text is accepted by Muslims at any time and place. The same is true of what most Muslims accept as authentic reports of what the Prophet said and did (Sunna), though that took longer to establish and is still controversial among many believers. In other words, our knowledge of the Quran and Sunna is the result of intergenerational consensus since the seventh century. This is not to say or imply that Muslims manufactured these sources through consensus, but simply to note that we know and accept these texts as valid because generation after generation of Muslims have believed that. Moreover, consensus is the basis of the authority and continuity of *usul al-fiqh* and all its principles and techniques, because this interpretative structure is always dependent on its acceptance as such among the generality of Muslims from one generation to the next. In this sense, *ijma'* is the basis of the acceptance of the Quran and Sunna themselves, as well as the totality and detail of the methodology for their interpretation.

For Muslims, the significant difference between the Quran and Sunna, as distinguished from the techniques of *usul al-fiqh*, is that there is no

possibility of new or additional texts because the Prophet Muhammad is the final prophet and the Quran is the conclusive divine revelation. In contrast, there is nothing to prevent or invalidate the formation of a new consensus around techniques of interpretation or innovative interpretations of the Quran and Sunna—which would thereby become part of Sharia—in the same way that existing techniques or principles came to be part of it in the first place. The safeguards of separating Islam from the state and regulating the political role of Islam through constitutionalism and protection of human rights that I am proposing are necessary for ensuring freedom and security for Muslims to participate in proposing and debating fresh interpretations of those foundational sources.

Any understanding of Sharia is always the product of *ijtihad*, in the general sense of reasoning and reflection by human beings as ways of understanding the meaning of the Quran and Sunna of the Prophet. Practical questions, such as who decides the Sharia rule on any issue and which methodology is used, are all resolved through human judgment, regardless of the specific outcome in a given situation. It is therefore illogical to say that a specific matter or issue is beyond *ijtihad*: this is a contradiction in terms, because that determination itself is the product of human reasoning and reflection. It is also dangerous to limit the ability to exercise *ijtihad* to a restricted group of Muslims who are supposed to have specific qualities, because in practice that will depend on those human beings who will set and apply the criteria used to select who is a qualified *mujtahid*. To grant this authority to any institution or organ, whether it is believed to be official or private, is dangerous because that power will probably be manipulated for political or other reasons. Since knowing and upholding Sharia is the permanent and inescapable responsibility of every Muslim, no human being or institution should control this process for Muslims. The power to decide who is qualified to exercise *ijtihad* and how it is to be enjoyed by every Muslim, as a matter of religious belief and obligation, cannot be censored or controlled. In other words, any restriction on free debate by entrusting human beings or institutions with the authority to decide which views are to be allowed or suppressed is inconsistent with the religious nature of Sharia itself. This reasoning is one of the main Islamic foundations I propose for safeguarding pluralism, human rights, and citizenship for all.

In concluding this brief overview, it is clear that there is an urgent need to continue the processes of Islamic reform to reconcile the religious commitment of Muslims with the practical requirements of their societies

today. In my view, the main premise of a viable reform process is as follows: while the Quran and Sunna are the divine sources of Islam according to Muslim belief, the meaning of these sources for and their implementation in everyday life is always the product of human interpretation and action in a specific historical context. It is simply impossible to know and apply Sharia in this life except through the agency of human beings. Any view of Sharia known to Muslims today, even if unanimously agreed on, necessarily emerged from the opinion of human beings about the meaning of the Quran and Sunna, as accepted by many generations of Muslims and the practice of their communities. In other words, opinions of Muslim scholars became part of Sharia through the consensus of believers over many centuries, and not through the spontaneous decree of a ruler or the will of a single group of scholars.

Ends and Means of Social Transformation

The transformation of Muslims' attitudes to the relationship among Islam, Sharia, and the state involves the arena of state action, as governmental policies and constitutional and legal reform ensure the separation of Islam and *the state*. There is also the domain of *society*, at the individual as well as communal level, where the objective is to incorporate the values of religious neutrality of the state, constitutionalism, and human rights as at least consistent with, if not required by, Islam. These two dimensions of transformation through official institutional as well as civil, societal change are in fact interdependent and mutually supportive. Each objective may require different actions and strategies that will vary from one social and cultural context to another, but the two kinds of transformations are deeply connected in that each is both the cause and outcome of the other. For this dynamic transformation to happen in Islamic societies, we also have to clarify and transform the permanent and desirable relationship between Islam and *politics*, as suggested earlier.

The proposed transformations, therefore, recognize the multifaceted relevance of Islam to Muslim communities across the globe, as religion and—more broadly—as culture and the basis of social practice. This indicates a third dimension of my proposal, which is the question of how to root social change in culture or endow it with cultural legitimacy. The separation of Islam and the state does not mean the exclusion of a role for Islam in public policy, legislation, or public life in general, provided it is supported by what I call civic reason and subject to constitutional and

human rights safeguards. Thus, Sharia does indeed have a most important future in Islamic societies and communities for its foundational role in the socialization of children, sanctification of social institutions and relationships, and shaping and development of those fundamental values that can be translated into general legislation and public policy through the democratic political process. But it does not have a future as a normative system to be enacted and enforced as such by the state as public law and public policy. The claim may of course be made that a certain policy or law is Sharia, but such claims are a necessarily human attempt to invoke the sanctity of Islam for the political will of the ruling elite.

Cultural legitimacy may be defined as the quality of being in conformity with accepted principles or standards of the culture in question, thereby drawing on the authority and relevance of its internal validity. A culturally legitimate norm or value is respected and observed by members of the particular culture because it satisfies certain needs or purposes in the lives of individuals and their communities. Recognition that this is true of the newly introduced or modified norm or institution is therefore necessary for the success of this process. This is not as difficult or unlikely as it might seem, because a similar process is always happening within every culture through internal contestation and transformation. Because there may be conflicts and tensions between various competing conceptions of individual and collective needs or objectives, the norms and values that are accorded respect and observance are constantly changed and adjusted in any culture. The proponents of change must not only have a credible claim to being *insiders* to the culture, but also use internally valid arguments to persuade the local population. In this way, the presentation and adoption of alternative perspectives can be achieved through a coherent *internal discourse* within the culture. The internal validity criteria for any initiative to secure cultural legitimacy for change will vary from issue to issue within the same culture or society and across societies, but can be questioned and reformulated as well.

While this approach raises the possibility of local culture being invoked as the basis for violating or rejecting the existence of a human right, I am unable to see an alternative to a basic methodology of cultural legitimacy that can be constantly improved through practice and over time. For example, culture may be used to justify discrimination against women or the use of corporal punishment against children as being in their own "best interest." Rejecting the cultural argument presented in support of such views is unlikely to work in practice. Indeed, women

themselves are likely to support their own repression if they believe it to be "the will of God" or the immutable tradition of their communities. In contrast, an approach that acknowledges the underlying value of respecting the will of God or local tradition and then proceeds to question what that means under present circumstances is more likely to be persuasive. As a Muslim, if I am presented with a choice between Islam and human rights, I will always choose Islam. But if presented with an argument that there is in fact consistency between my religious beliefs and human rights, I will gladly accept human rights as an expression of religious values and not as an alternative to them. As a Muslim advocate of human rights, I must therefore continue to seek ways of explaining and supporting the claim that these rights are consistent with Islam and indeed desirable from an Islamic perspective, though they may be inconsistent with certain human interpretations of Sharia.

Second, since the individual person is dependent on his or her society, which has a powerful capacity to instill or enforce conformity in its members, public policy and action are more likely to accord with ideal cultural norms and patterns of behavior than private actions. Changes in public behavior are likely to take longer because of the tendency of individuals to conform until the new norm is widely accepted. In other words, open and systematic nonconformity gravely threatens those who hold authority in society: the elite who have developed a vested interest in the status quo. In suppressing nonconforming behavior, such elites would assert the imperative of preserving the stability and vital interests of society at large, rather than admit the reality that it is their own interests that they seek to protect. It thus becomes a question of who has the power to determine what is in the public interest, and the substance of the issue being debated becomes a proxy for that permanent struggle. These factors emphasize the desirability of seeking the support of the cultural ideal for any proposition of public policy and action, because that is less likely to be successfully resisted by the self-appointed guardians of society's stability and well-being.

My emphasis on the role of internal actors and discourse in the cultural legitimacy of social change does not preclude the role that can be played by those who are cultural outsiders in promoting acceptance of change. But external actors can best influence an internal situation through engaging in internal discourse on the same values within their own societies, thereby enabling participants in one culture to point to similar processes taking place in other cultures. External actors can also help support the

right of internal participants to challenge prevailing perceptions, while avoiding overt interference since this will undermine the credibility of internal actors. Advocates of change in various societies should also engage in a cross-cultural dialogue to exchange insights and strategies of internal discourse and promote the global acceptance of their shared objectives. Cross-cultural dialogue can also seek to promote the universality of shared values at a theoretical or conceptual level by highlighting moral and philosophical commonalities of human cultures and experiences.

Ultimately, the key to all this is that the human agency of social change proponents should be able to motivate the human agency of the population at large in favor of the proposed change. The methodology of cultural legitimacy therefore emphasizes the central role of human agency by firmly locating the impetus for change within the social and cultural lives of communities and individuals, rather than viewing persons and communities as passive subjects of change. At the same time, human agency operates in the context of networks of social action and interaction, which emphasizes the need for collaboration and cooperation. It is clear that nothing happens in human relationships, whether good or bad, except through the agency of some person or groups acting or failing to act. But it is also clear that this conception of the role of human agency must be inclusive of all human beings, especially in today's globalized world, and cannot be limited to Muslims alone. Consequently, the outcome of human agency in any society is contingent on what else is happening in the world around us and not only on what happens within our societies or communities.

The history of Islamic thought also shows that human agency has been central to the development of Sharia. As emphasized earlier, the inherent nature of Sharia is that it is necessarily the product of human interpretations of the Quran and Sunna of the Prophet. This process was conducted by scholars and jurists, who developed and applied the sources or methodology (*usul al-fiqh*) completely independently of the state but with due regard to the circumstances and concerns of their communities and political institutions. These scholars also accepted diversity of opinion as a healthy and creative feature of their work, while seeking to enhance consensus among themselves and their communities. Thus, every single principle of Sharia became established through consensus (*ijma'*) and voluntary compliance by Muslims at large, and never through an institutional authority, whether official or nonofficial. In other words, the validity and binding authority of any Sharia principle was always the

product of the human agency of scholars and communities of Muslims, operating through many generations.

Concluding Reflections

The purpose of the theory of the relationship among Islam, state, and society I am proposing is to ensure the institutional separation of Islam and the state, despite the organic and unavoidable connection between Islam and politics.[3] The relationship among Islam, state, and society is always the product of a constant contextual negotiation, rather than the subject of a fixed formula of either total separation or complete fusion of religion and the state. In this tripartite relationship, various understandings of Sharia will remain in the realm of individual and collective practice as a matter of freedom of religion and belief, subject to established constitutional safeguards to ensure the institutional separation of Islam and the state. As explained above, Sharia principles *as such* cannot be enforced as the law of the state by virtue of their being decreed by Sharia. The outcome of any attempt to enforce Sharia as law of the state is the product of the political will of the state and not the religious values of Islam. Religious norms shall continue to influence the behavior of believers, but this relationship must remain outside the institutions and services of the state.

In the final analysis, however, major transformations of public consciousness and personal practice cannot be achieved and sustained by theoretical articulation alone. They must also be reflected in cultural expression and sociological orientation, as well as in the general popular worldview and everyday practice. It is as if transformative change is realized on all levels of human experience and practice at once, in which theoretical articulation is merely one aspect of social experience trying to catch up with transformative change that is already in progress.

References

An-Na'im, Abdullahi A. 1984. "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa." In *Human Rights and Development*

[3] For elaboration and documentation of this proposition, see my articles and book chapters: An-Na'im (2009, 2010, 2011, 2013, 2015, 2016).

in Africa, edited by Claude E Welch Jr and Ronald I Meltzer, 75–89. New York: State of New York Press.

An-Na'im, Abdullahi A. 1990. *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*. Syracuse, NY: Syracuse University Press.

An-Na'im, Abdullahi A. 1993. *Human Rights in Cross-Cultural Perspective: Quest for Consensus*. Philadelphia: University of Pennsylvania Press.

An-Na'im, Abdullahi A. 2008. *Islam and the Secular State: Negotiating the Future of Shar'ia*. Cambridge, MA: Harvard University Press.

An-Na'im, Abdullahi A. 2009. "Religion, the State and Constitutionalism in Islamic and Comparative Perspectives." *Drake Law Review*, 57, no. 4: 829–50.

An-Na'im, Abdullahi A. 2010. "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law." *Modern Law Review*, 73, no. 1: 1–29.

An-Na'im, Abdullahi A. 2011a. "Religious Norms and Family Law: Is it Legal or Normative Pluralism?" *Emory International Law Review*, 25, no. 2: 785–809.

An-Na'im, Abdullahi A. 2011b. *Muslims and Global Justice.* Philadelphia: University of Pennsylvania Press.

An-Na'im, Abdullahi A. 2013. "Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective." *Pepperdine Law Review*, 39, no. 5: 1231–55.

Bechor, Guy. 2007. *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932–1949)*. Leiden Netherlands: Brill.

Coulson, N. J. 1964. *A History of Islamic Law*. Edinburgh: Edinburgh University Press.

Hallaq, Wael B. 2009. *Sharia: Theory, Practice, Transformations*. Cambridge: Cambridge University Press.

Said, Edward W. 1978. *Orientalism*. New York: Pantheon Books.

Said, Edward W. 1993. *Imperialism and Culture*. New York: A.A. Knopf.

Vikør, Knut S. 2005. *Between God and the Sultan: A History of Islamic Law*. New York: Oxford University Press.

Weiss, Bernard G. 1998. *The Spirit of Islamic Law*. Athens: University of Georgia Press.