

The *Maqāṣid* approach and rethinking political rights in modern society

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Abstract: This paper examines political rights in Islam by focusing on freedom of religion and the extent to which the state is empowered to enforce faith and religious law on society. It starts by comparing the notion of law in both Western and Islamic traditions, and then analyzes the difference between the ethical and legal within *Shari'ah*. The paper illustrates how Islamic law grew historically by working to limit the power of the state, and points out the need to maintain the distinction between the state and civil society for the proper implementation of *Shari'ah*. The paper also contends that those who call on the state to enforce all rules of *Shari'ah* on society rely on a faulty theory of right and concludes that Islamic law fully recognizes the right of individuals to adopt and practice their faith freely. Freedom of religion, it stresses, is an intrinsic aspect of Islamic law and all efforts to limit this freedom is bound to violate its purpose and dictates.

Keywords: *Maqāṣid al-Shari'ah*, human rights, Islamic law, Islam and modernity, methodology

Abstrak: Makalah ini meneliti hak-hak politik dalam Islam dengan menumpukan kepada kebebasan beragama dan sejauh mana sesebuah negara itu diberi kuasa untuk menegakkan agama dan undang-undang agama dalam masyarakat. Makalah ini bermula dengan membandingkan idea undang-undang mengikut tradisi Barat dan Islam, dan kemudiannya menganalisis perbezaan antara etika dan undang-undang dalam *Shari'ah*. Makalah ini menggambarkan bagaimana daripada segi sejarah undang-undang Islam berkembang dengan bekerja untuk menghadkan kuasa negara, dan mengutarakan keperluan untuk mengekalkan perbezaan antara negara dan masyarakat sivil bagi melaksanakan *Shari'ah* dengan tepat. Makalah ini juga berpendapat bahawa mereka yang mengarah negara untuk

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menguatkuasakan semua undang-undang Shari'ah pada masyarakat sebenarnya bergantung kepada teori hak yang salah, dan menyimpulkan bahawa undang-undang Islam sepenuhnya mengiktiraf hak individu untuk menggunakan dan mempraktikkan kepercayaan mereka secara bebas. Ditekankan bahawa kebebasan beragama adalah satu aspek tersirat dalam undang-undang Islam dan segala usaha untuk menyekat kebebasan ini adalah melanggar tujuan dan penentuannya.

Kata kunci: *Maqāṣid al-Sharī'ah, hak-hak manusia, undang-undang Islam, Islam dan pemodenan, metodologi*

The question of political rights under Islam is the subject of intense debate in Muslim societies and beyond. Groups calling for reasserting Islam in public life have long insisted that the key to embracing Islamic values in the political sphere is to declare *Sharī'ah* as the official law of the land. At the heart of the debate lies the question of how the application of *Sharī'ah* affects non-Muslims and women, and how such application relates, in general, to the efforts of democratization and ensuring the accountability of public officials and law makers to the public.

The tension over the application of *Sharī'ah* in modern society has been highlighted recently in the adultery case against Amina Lawal by a Nigerian *Sharī'ah* court, the application of *hudūd* punishments in Kelantan, Malaysia, and most recently the prosecution of the Afghan convert to Christianity, Abdulrahman, under Afghan *Sharī'ah* law.

The understanding and application of *Sharī'ah*, increasingly demanded by the Muslim masses, is an issue that requires special attention from contemporary Muslim scholars. Concerns over the uncritical implementation of *Sharī'ah* is not limited to quarters opposed to Islam but is shared, for completely different reasons, by many Muslim scholars and jurists throughout the world. Concerns over any uncritical implementation of the *Sharī'ah* include the lack of clear delineation between the moral and the legal in Islamic law.

What parts of *Sharī'ah* are moral, and hence fall within the realm of education and voluntary compliance, and what parts are legal, and can therefore be enforced by society? The question of

delineating the legal and moral also relate to the issue of state intrusion into individual privacy, and to what extent the state can police individual morality. Also of concern is the question of due process, rules of evidence, and individual privacy. To what extent can the court rely on circumstantial evidence to convict a person of a crime he or she has not voluntarily confessed? And more importantly, how does implementation of *Sharī'ah* relate to multi-religious societies, in which people of different religions live side by side, and are subject to same legal jurisdictions.

The rise and fall of juristic reasoning: *Qiyās, istihsān, istiṣlāḥ,* and *maqāsid*

It is not uncommon today for Muslim jurists to invoke a specific revealed text, or a direct analogy (*qiyās*) to provide answers to moral and legal issues presented to them. Yet the consideration of analogy as a primary tool of juristic reasoning represents a serious setback for the development of Islamic jurisprudence, even when focusing on the history and evolution of *fiqh*.

The use of analogy as the only tool for expanding the rules of *Sharī'ah*, as was done by Muḥammad ibn Idrīs al-Shāfi'ī, can be considered as an initial stage in the development of juristic reasoning. The majority of Muslim jurists employ more complex and developed means to address the issues of their times, particularly during the zenith of Islamic culture and civilization. Juristic reasoning evolved to include such approaches as *istihsān* (juristic preference) and *istiṣlāḥ* (unrestricted common good). Eventually, Muslim scholars realized that the various rules (*aḥkām*) purport to achieve general principles (*qawā'id*) and purposes (*maqāsid*). The work of scholars such as al-Juwaynī and al-Ghazālī that led to the recognition of the five purposes of *Sharī'ah* (i.e., the protection of religion, intellect, life, property, and dignity) was developed into a more sophisticated system of general and universal rules by scholars such as al-'Izz ibn 'Abd al-Salām and al-Shāṭibī.

The process of maturation of Islamic jurisprudence took several centuries. With the death of the Prophet and the emergence of new circumstances and issues never before addressed by the Qur'ān or the Sunnah, the question arose as to how *Sharī'ah* would subsequently be practiced. The answer lay in the exercise of juristic

speculation (*ijtihād*), a practice that had already been approved by the Prophet. However, a juristic opinion (*ra'y*) arrived at by the exercise of *ijtihād* could lead only to tentative conclusions or conjunctures (*zann*). Such judgments were thus considered by jurists as subject to abrogation and refutation. But when juristic opinions arrived at through *ijtihād* were subjects of general agreement by the jurists (*fuqahā'*), they were considered incontrovertible, and hence binding for the entire community. The juristic speculation of individual jurists (*ijtihād*) and their consensus (*ijmā'*) became, after the death of the Prophet, additional sources of *Sharī'ah*, and new methods to define Divine Law.

By limiting juristic speculation (*ijtihād*) to analogical reasoning (*qiyās*), al-Shāfi'ī hoped that he could render the former more systematic and, consequently, ensure the unity of law, while opposing the efforts of those who would be tempted to usurp the law for their own personal ends. Analogy (*qiyās*), nonetheless, continued to be considered by a significant number of jurists as only one of several methods through which the principle of *ijtihād* could be practiced. The followers of the Ḥanafī and Mālikī schools of law, for instance, employed the principles of juristic preference (*istiḥsān*) and public good (*istiṣlāḥ*) respectively, regarding them as appropriate methods to derive the rules of *Sharī'ah*. Apparently, the former method was employed by the Ḥanafī jurists to counteract the attempts of the Shāfi'ī jurists to limit the concept of juristic speculation to the method of reasoning by analogy. *Istiṣlāḥ* (juristic preference) was an attempt to return to the freedom of juristic opinion (*ra'y*) that permitted jurists to make legal rulings without relying solely on analogy. For the more systematic jurists, however, rulings rendered through the application of *istiḥsān* were nothing more than arbitrary rulings or, as al-Shāfi'ī put it, “*innamā al-istiḥsān taladhudh*” (*istiḥsān* is ruling by caprice) (al-Shāfi'ī, 1399/1979, p.507; Coulson, 1964, p.40; Kerr, 1996, p.90).

Istiṣlāḥ (consideration of public good) was another approach employed by Mālikī, and to a lesser extent by Ḥanafī, for jurists to escape the rigid form into which the *Sharī'ah* was gradually cast by more conservative jurists (primarily the Shāfi'ī and Ḥanbalī). The jurists who advocated the use of the *Istiṣlāḥ* method argued that the principles of *Sharī'ah* aimed at promoting the general interests of

the community; therefore, “public good” should guide legal decisions wherever revelation was silent with regard to the question under consideration (Al-Shātibī, 1997).

The introduction of the tools of *istiḥsān* and *istiṣlāḥ* allowed jurist to deal with issues that arose under more sophisticated and far removed social settings than those experienced by the early Muslim society, while preserving the basic Islamic values and attitudes. The reverting to *qiyās* in contemporary times signifies, therefore, a return to more preliminary juristic reasoning when jurists are confronted with complex issue that do not lend themselves to analogous reasoning. This requires us to reexamine the meaning of *Sharī‘ah* and explore how the rich body of juristic reasoning can be re-appropriated and developed for modern times.

Layers and spheres of *Sharī‘ah*

The term “*Sharī‘ah*” is often used by Muslims to denote the divine guidance revealed to the Prophet Mohammad (SAW). Contemporary Muslim jurists have reduced *Sharī‘ah* to the various rules historically derived by Muslim scholars to expound the Qur’ānic and Prophetic teachings. The bulk of these rules were elaborated on by the 5th Century of the Islamic calendar (12th Century CE).

Sharī‘ah was revealed to provide a set of criteria so that right (*ḥaqq*) may be distinguished from wrong (*bātil*). By adhering to the rules of law, the Muslims would develop a just society, superior in its moral and material quality to societies which fail to observe the revealed will of God. As such, *Sharī‘ah* constitutes a comprehensive moral and legal system, and aspires to regulate human behaviour to produce conformity with Divine Law. Adhering to the rules and principles of *Sharī‘ah* not only causes the individual to draw closer to God but also facilitates the development of a just and prosperous society.

The purpose of *Sharī‘ah*, therefore, is to provide the standards and criteria that would gain the ends prescribed by revelation. According to Islamic legal theory, justice, as the ultimate value that justifies the existence of law and as the ultimate criterion for the evaluation of social behaviour, cannot be realized apart from the understanding of the purpose of human existence. Such

understanding cannot be discovered by human reasoning, as natural law theory asserts. It must be acquired by direct exposure to the Divine Will through revelation. Therefore, justice may only be fully realized when Divine Law is recognized and implemented by society.

The question arises here as to what extent *Sharī'ah* can be regarded as the manifestation of the Divine Will? To answer this question we need first to distinguish the levels of meaning that separate the ideal from the existential in Islamic legal thought. In connection with this, the term *Sharī'ah* may refer to any of the following four meanings.

Firstly, law may be perceived as the eternal set of principles which reflect the Divine Will as it is related to the human situation; that is, those principles that relate to the purpose of human existence and the universal rules that must be observed by human beings to achieve that purpose.

Secondly, law could be regarded as the revelatory verbalization of the eternal principles in the form of a revealed word or message that discloses the Divine Will to mankind. The Qur'ān, the manifestation of the Divine Will, consists of two categories of rules: universal rules (*aḥkām kulliyah*) embodied in general Qur'ānic statements, and particular rules (*aḥkām far'iyyah*) revealed in connection with specific instances, which hence may be considered as concrete applications of the universal rules.

Thirdly, law may be viewed as the understanding of revelation as reflected in the oral and written statements of the jurists. The Qur'ān was revealed over a 23-year period in piecemeal fashion in response to the various questions and problems facing the evolving Muslim community. In order to define the Divine Will in new situations never before addressed by revelation, Muslim jurists had to develop a legal theory that spelled out the *Sharī'ah*, and establish the methods of deriving and applying its rules. The jurists had to define the overall objectives of *Sharī'ah*, and, using inductive reasoning, rediscover the fundamental principles underlying the formulation of the rules of *Sharī'ah*. Classical jurists had also to develop the appropriate method that could be used to define the fundamental principles of *Sharī'ah* and expand their application to new situations.

Finally, law could be seen as the positive rules derived from the theoretical principles of *Shari'ah* and used to regulate social and individual behaviour. These rules are collected in major encyclopedic works, as well as in numerous handbooks used by the several schools of law. It is this very specific and concrete meaning of law which usually comes to mind in connection with the term *Shari'ah*.

Evidently, analogous juristic reasoning fails to distinguish the general and abstract ideals of *Shari'ah* from the specific and concrete body of doctrine. That is, it confuses the ideals embodied in the Qur'ān and the practice of the early Muslim community with the rules later developed by jurists. In fact, this confusion did not occur at the early stages of the development of *Shari'ah* but only at a later stage, after the four schools of law began to take shape during the 3rd and 4th Centuries of the Islamic calendar, and finally with the formulation of the classical theory of law.

Earlier jurists, including the founders of the major schools of law, recognized the difference between the ideal and doctrinal elements of law, for they did not hesitate to reject previous legal theories and doctrines, replacing them with others. It was this distinction that ensured the dynamism of *Shari'ah* and its growth during the early centuries of Islam. By constructing new theories, and modifying the old legal theories, the connection between the ideal and existential was maintained and *Shari'ah* was thus flexible enough to respond to the concerns of a developing society. However, when the prevailing doctrine of the 5th Century was idealized, *Shari'ah* lost its flexibility, and the relationship between law and society was gradually severed. Henceforth, the efforts of the jurists were directed towards resisting any developments that would render social practices incompatible with the existing legal code, instead of modifying legal doctrines so that new social developments could be guided by Islamic ideals.

The four levels of meaning that separate the ideal from the existential elements of law enable us to see the fatal epistemological error that the proponents of the classical legal theory commit when they insist on the infallibility of the principle of *ijmā'*. The classical legal theory mistakenly asserts that the ideals which the law aspires to realize have been captured, once and for all, in the legal doctrines

formulated by early jurists, and that classical legal doctrines, substantiated by *ijmā'*, have attained absolute universality. Implicit in this assertion is the assumption that legal decisions give up their subjectivity and specificity as they move away from the domain of the individual to that of the community. As they finally become the subject of juristic consensus, legal decisions acquire complete objectivity and universality.

Such a perception is manifestly faulty, for it could be true only if we ignore the historical evolution of the human experience. As long as the future state of society, be it in the material conditions or social organization, is concealed and uncertain, law must keep the way open for new possibilities and changes. It should be emphasized here that the relationship between the third and fourth meanings of *Sharī'ah* (i.e., law as interpretation and as positive rules) is dialectical, and must be kept that way if law is to be able to function more effectively. For in order for the ideal to have positive effect, its universality and objectivity must be embodied in a specific and concrete doctrine. Only when the universal ideal is reduced into particular and local rules and institutions can it begin to transform the human world. However, the embodiment of the ideal in a concrete rule or institution should always be regarded as tentative, and the possibility for future re-evaluation or modification should likewise be kept open (see Jenkins, 1980, pp.333-335).

The positive rules of *Sharī'ah* as well as the legal doctrines that have been formulated by Muslim jurists are therefore tentative, because they have been formulated by fallible human beings situated in specific historical moments. The consensus (*ijmā'*) cannot confer universality or absoluteness on rules or decisions agreed upon by any particular generation. All that *ijmā'* can do is to make the rules more objective for a specific community situated in a specific time and space. The claim that the positive rules of *Sharī'ah* (or more accurately the rules of *fiqh*) and Divine Will are identical is erroneous and ill-founded, for it ignores the historical significance of the legal doctrine and the human agency that has been responsible for its development.

To see how the *Maqāsid* approach to *Sharī'ah* can liberate us from a literal and uncritical understanding of how *Sharī'ah* relates

to a multi-religious society, let us reexamine the prophetic tradition in bringing *Sharī'ah* to bear on the Madīnah society he founded at the dawn of Islam.

The formative principles of the Madīnah state

The notion of the Islamic state advanced today by populist writers is a mixture of the nationalist structure of the modern state with the communal structure of the historical *Sharī'ah*. The concept of the state that emerges as a result is in complete contradiction with the nature and purpose of the polity founded by the Prophet, or developed historically by successive Muslim generations. A quick review of the guiding principles of the first Islamic polity reveals the disparity between the modern state and the early Islamic polity. The principles and structures of the early Islamic polity are epitomized in the Compact of Madīnah (*Ṣaḥīfat al-Madīnah*) that formed the constitutional foundation of the political community established by the Prophet.¹

The Compact of Madīnah established a number of important political principles that, put together, formed the political constitution of the first Islamic state and defined the political rights and duties of the members of the newly established political community, Muslims and non-Muslims alike, and drew up the political structure of the nascent society. The most important principles included in this Compact are:

Firstly, that the *ummah* is a political society, open to all individuals committed to its principles and values, and ready to shoulder its burdens and responsibilities. It is not a reclusive one, whose membership rights and securities are restricted to a select few. The right to membership in the *ummah* is specified by: (1) accepting the principles of the Madīnah Compact, and manifested in the commitment to adhere to the principles of mutuality and justice; (2) declaring allegiance to the political order defined by the Compact, through practical contributions and struggles to actualize its objectives and goals. Thus, allegiance and concern for public good are the principles determining the membership of the *ummah* as defined by the first article of the document: "This is a Compact offered by Muhammad the Prophet, (governing the relations) among the believers and the Muslims of Quraysh and Yathrib (Madīnah),

and those who followed, joined, and labored with them” (Ibn Hishām, 1411/1990, vol.3, p.34).

Secondly, a general framework that defines individual norms and the scope of political action within the new society but preserved the basic social and political structures prevalent then in tribal Arabia is delineated in the Compact. The Compact of Madīnah preserved tribal structure, while negating tribal spirit and subordinating tribal allegiance to a morally-based legal order. As the Compact declared that the nascent political community is “an *ummah* to the exclusion of all people,” it approved a tribal division that had already been purged of tribal spirit epitomized by the slogan “my brethren right of wrong,” subjecting it to the higher principles of truth and justice. The Compact therefore declared that the emigrants of the Quraysh, Banū al-Ḥārith, Banū al-Aws and other tribes residing in Madīnah, according “to their present customs, shall pay the blood wit they paid previously and that every group shall redeem its prisoners” (Ibn Hishām, 1411/1990, vol.3, p.34).

Islam’s avoidance of the elimination of tribal divisions can be explained by a number of factors that can be summarized in the following three points. (1) The tribal division was not a mere political division but also a social division providing its people with a symbiotic system. Therefore, the abolition of the political and social assistance provided by the tribe before developing an alternative would have been a great loss for the people in this society. (2) Apart from its being a social division, the tribe represented an economic division in harmony with the pastoral economy prevalent in the Arabian Peninsula before and after Islam. The tribal division is the ideal division of the pastoral production as it provides freedom of movement and migration in search of pasture. Any change in this pattern requires taking an initiative first to change the means and methods of production. (3) Perhaps the most important factor that justified the tribal division within the framework of the *ummah* after the final message had purged the tribal existence of its aggressive and arrogant content, is the maintenance of the society and its protection from the danger of central dictatorship that might come into existence in the absence of a secondary social and political structure, and concentration of political power in the hand of a central authority.

Hence, Islam adopted a political system based on the concept of the one *ummah* as an alternative to the divisional tribal system and upheld the tribal division having cleared it from its aggressive elements. It left the question of changing the political structure to gradual development of economic and production structures. Although Islamic revelation avoided any arbitrary directives aimed at immediate abolition of the tribal division, it criticized openly tribal and nomadic life (Qur'ān, 9:27; 49:14).

Thirdly, the Islamic political system adopted the principle of religious autonomy based on the freedom of belief for all members of society. It conceded to the Jews the right to act according to the principles and rulings to which they adhered according to their belief: "The Jews of Banū 'Awf are one community with the believers. The Jews have their religion and the Muslims theirs." The Compact emphasized the fundamentality of cooperation between Muslims and non-Muslims in establishing justice and defending of Madīnah against foreign aggression. "The Jews must bear their expenses and the Muslims their expenses. Each must help the other against anyone who attacks the people of this Compact. They must seek mutual advice and consultation." It prohibited the Muslims from doing injustice to the Jews or retaliating for their Muslim brothers against the followers of the Jewish religion without adhering to the principles of truth and justice. "To the Jew who follows us belongs help and equality. He shall not be wronged nor shall his enemies be aided" (Ibn Hishām, 1411/1990, vol.3, p.34).

Fourthly, the Compact stipulated that the social and political activities in the new system must be subject to a set of universal values and standards that treat all people equally. Sovereignty in society would not rest with the rulers, or any particular group, but with the law founded on the basis of justice, goodness, and maintaining the dignity of all. The Compact emphasized repeatedly and frequently the fundamentality of justice, goodness, and righteousness, and condemned injustice and tyranny. "They would redeem their prisoners with kindness and justice common among the believers," the Compact stated: "The God-conscious believers shall be against the rebellious, and against those who seek to spread injustice, sin, enmity, or corruption among the believers, the hand

of every person shall be against him even if he be a son of one of them,” it proclaimed (Ibn Hishām, 1411/1990, vol.3, p.34).

Fifthly, the Compact introduced a number of political rights to be enjoyed by the individuals of the Medinan State, Muslims and non-Muslims alike, such as (1) the obligation to help the oppressed, (2) outlawing guilt by association which was commonly practiced by pre-Islamic Arab tribes: “A person is not liable for his ally’s misdeeds;” (3) freedom of belief: “The Jews have their religion and the Muslims have theirs;” and (4) freedom of movement from and to Madīnah: “Whoever will go out is safe, and whoever will stay in Madīnah is safe except those who wronged (others), or committed sin” (Ibn Hishām, 1411/1990, vol.3, p.35).

Religion and the state in historical Muslim society

Adhering to the guidance of revelation, the *ummah* has respected the principle of religious plurality and cultural diversity during the better part of its long history. Successive governments since the Rāshidūn period have preserved the freedom of faith and allowed non-Muslim minorities not only to practice their religious rituals and proclaim their beliefs but also to implement their religious laws according to an autonomous administrative system. Likewise, the *ummah* as a whole has respected the doctrinal plurality with both its conceptual and legal dimensions. It has resisted every attempt to drag the political power into taking sides with sectarian groups, or to prefer one ideological group to another. It has also insisted on downsizing the role of the state and restricting its functions to a limited sphere.

Anyone who undertakes to study the political history of Islam soon realizes that all political practices which violated the principle of religious freedom and plurality were an exception to the rule. For instance, the efforts of the Caliph al-Ma’mūn to impose doctrinal uniformity in accordance with the Mu’tazilite interpretations, and to use his political authority to support one of the parties involved in doctrinal disputes, were condemned by the *‘ulamā’* and the majority of the *ummah*. His efforts to achieve doctrinal homogeneity through suppression and force eventually clashed with the will of the *ummah*, which refused to solve doctrinal and theoretical problems by the sword. This compelled Al-Wāthiq Billāh, the third caliph after al-Ma’mūn to

give up the role assumed by his predecessors and abandon their oppressive measures.

Obviously, Muslims have historically recognized that the main objective of establishing a political system is to create the general conditions that allow the people to realize their duties as moral agents (*khulafā'*) and not to impose the teachings of Islam by force. We, therefore, ascribe the emergence of organizations working to compel the *ummah* to follow a narrow interpretation, and calling for the use of political power to make people obedient to Islamic norms, to the habit of confusing the role and objectives of the *ummah* with the role and objectives of the state. While the *ummah* aims to build the Islamic identity, to provide an atmosphere conducive to spiritual and mental development of the individual, and to grant him or her the opportunity to realize his or her role and aims of life within the general framework of the law, the state makes efforts to coordinate the *ummah's* activities with the aim to utilize the natural and human resources to overcome the political and economic problems facing society.

Differentiating between the general and particular in the *Sharī'ah* and distinguishing between the responsibilities of the *ummah* and the state is a necessity if we want to avoid the transformation of political power into a device for advancing particular interests, and ensure that state agencies and institutions do not arrest intellectual and social progress, or obstruct the spiritual, conceptual, and organizational developments of society.

Differentiating civil society and the state

Historically, legislative functions in Muslim society were not restricted to state institutions. Rather, there was a wide range of legislations related to juristic efforts at both the moral and legal levels. Since the major part of legislation relating to transactional and contractual relations among individuals is attached to the juristic legislative bodies, the judicial tasks may be connected directly with the *ummah*, not with the state. The differentiation between civil society and the state can only be maintained by dividing the process of legislation into distinct areas that reflect both the geographical and normative differentiation of political society.

The importance of the differential structure of the law is not limited to its ability to counteract the tendency of centralization of power, which

characterizes the Western model of the state. Rather, it is also related to guarantees extended to religious minorities.

The Islamic model maintains the legislative and administrative independence of the followers of different religions, as the sphere of communal legislation does not fall under the governmental authority of the state. On the other hand, the majoritarian model of the democratic state deprives religious minorities of their legal independence, and insists on subjugating all citizens to a single legal system, which often reflects the doctrinal and behavioural values of the ruling majority.

The early Muslim community was cognizant of the need to differentiate law to ensure moral autonomy, while working diligently to ensure equal protection of the law as far as fundamental human rights were concerned. Thus, early jurists recognized that non-Muslims who have entered into a peace covenant with Muslims are entitled to full religious freedom, and equal protection of the law as far as their rights to personal safety and property are concerned. Muhammad ibn al-Ḥasan al-Shaybānī states in unequivocal terms that when non-Muslims enter into a peace covenant with Muslims, “Muslims should not appropriate any of their [the non-Muslims] houses and land, nor should they intrude into any of their dwellings. Because they have become party to a covenant of peace, and because on the day of the [peace of] Khaybar, the prophet’s spokesman announced that none of the property of the covenanter is permitted to them [the Muslims]. Also because they [the non-Muslims] have accepted the peace covenant so as they may enjoy their properties and rights on par with Muslims” (al-Sarakhsī, 1405/1984, p.1530). Similarly, early Muslim jurists recognized the right of non-Muslims to self-determination, and awarded them full moral and legal autonomy in the villages and towns under their control. Therefore, al-Shaybānī, the author of the most authoritative work on non-Muslim rights, insists that the Christians who have entered into a peace covenant (*dhimmah*) – and hence became *dhimmi* (covenanters) – have all the freedom to trade in wine and pork in their towns, even though such practice is considered immoral and illegal among Muslims (al-Sarakhsī, 1405/1984, p.1530). However,

dhimmī were prohibited from doing the same in towns and villages controlled by Muslims.

Likewise, early Muslim jurists recognized the right of a *dhimmī* to hold public office, including the office of a judge and minister. However, because judges had to refer to laws sanctioned by the religious traditions of the various religious communities, non-Muslim judges could not administer law in Muslim communities, nor were Muslim judges permitted to enforce *Shari'ah* laws on the *dhimmī*. There was no disagreement among the various schools of jurisprudence on the right of non-Muslims to be ruled according to their laws; they only differed in whether the positions held by non-Muslim magistrates were judicial in nature, and hence the magistrates could be called judges, or whether they were purely political, and therefore the magistrates were indeed political leaders (Al-Māwardī, 1401/1983, p.59). Al-Māwardī, hence, distinguished between two types of ministerial positions: plenipotentiary minister (*wazīr tafwīd*) and executive minister (*wazīr tanfīdh*). The two positions differ in that the former acts independently from the caliph, while the latter has to act on the instructions of the caliph, and within the limitations set by him (Al-Māwardī, 1401/1983, pp.20-23). Therefore, early jurists permitted *dhimmī* to hold the office of the executive but not the plenipotentiary minister (Al-Māwardī, 1401/1983, p.24).

However, while early *Shari'ah* law recognized the civil and political rights and liberties of non-Muslim *dhimmī*, *Shari'ah* rules underwent drastic revision, beginning from the 8th Century of the Islamic calendar. This was a time of great political turmoil throughout the Muslim world. It was during this time that the Mongols invaded Central and West Asia, inflicting tremendous losses on various dynasties and kingdoms, and destroying the seat of the caliphate in Baghdad. This coincided with the crusaders' control of Palestine and the coast of Syria. In the West, Muslim power in Spain was being gradually eroded. It was under such conditions of mistrust and suspicion that a set of provisions attributed to an agreement between the Caliph Omar and the Syrian Christians were publicized in a treatise written by Ibn al-Qayyim (Ibn al-Qayyim, 1381/1961). The origin of these provisions is dubious, but their intent is clear: to humiliate Christian *dhimmī* and to set them apart in dress code and appearance. Their impact,

however, was limited, as the Ottomans, who replaced the Abbasid as the hegemonic power in the Muslim world, continued the early practice of granting legal and administrative autonomy to non-Muslim subjects.

Islam, civil society and the state

The modern state emerged to foster individual freedom and to protect the individual against arbitrary rule, and to ensure that the members of the political society assume full control over public institutions. To do so, the modern state found it necessary to free public institutions from the control of all exclusive groups, including organized religions. However, despite the clear desire of the pioneers of the modern state to replace religious morality with civic virtue as the moral foundation of the state, secularism gradually developed anti-religious tendencies, leading to the continuous erosion of the moral consensus. The continuous erosion of morality and the rampant corruption in modern politics threaten to turn the state into an instrument in the hands of corrupt officials and their egoistic cronies.

This has prompted calls for the return of religion and religiously-organized groups into the political arena. Nowhere are these calls louder and clearer than in Muslim societies where Islamic values have historically exerted great influence on the body politic. Unfortunately, the reunion envisaged by the advocates of the Islamic state is often presented in crude and simplistic terms, as it fails to appreciate the great care that was taken by early Muslims to ensure that the state incorporates, both in its objectives and structure, the freedom and interest of all intra- and inter-religious divisions.

This calls upon Muslim scholars to engage in new thinking that aims at redefining political principles and authority. In doing so, Muslim scholars should be fully aware of the need to transcend the historical models of political organizations in Muslim society. Political structures and procedures adopted by early Muslim societies are directly linked to their social structures, economic and technological developments, and political experiences. While historical Islamic models provide a mine of knowledge for contemporary Muslims to utilize, any workable formulation of

the modern Islamic model of a state that is true to Islamic values and ethos must emerge out of fresh thinking that takes into account the structure of modern society.

Islamic political thought, I believe, can make a profound contribution towards reclaiming the moral core of social life, and preserving religious traditions, without sacrificing the principle of freedom and equality promoted by the modern state.

The hallmark of Islamic political experience is the limitations historical Muslim society was able to place on the actions of rulers, and the presence of vigorous and robust civil society. Many of the functions the secular state assumes today were entrusted to civic institutions, including education, health and legislation. The state was mainly entrusted with questions of security and defence, and was the last resort in questions relating to dispensation of justice. This understanding of state power would potentially free religious communities from intervention of the state and state officials, who tend to enforce their religiously-based values and notions on the members of society, including those who do not share some of those values and beliefs.

The notions of individual freedom and equality are intrinsic to Islamic political thought, and those principles require that individuals have the basic civil liberties offered by the modern state. However, by freeing civil society from the heavy hand of the state, and by extending individual liberties to the community and recognizing the moral autonomy of social groups, social and religious groups under the Islamic conception of law (*Shari'ah*) would have the capacity to legislate their internal morality and affairs in their communities. While the new sphere of freedom acquired under this arrangement allows for differentiation among citizens, equality would have to be maintained as the criteria of justice in the new area of public law, and in access to public institutions – i.e., in matters that relate to the sphere of shared interests and inter-communal relations.

Apostasy law

The issue of apostasy under Islamic Law (*Shari'ah*), brought recently to public attention in the widely-publicized case of the

conversion of an Afghan citizen, raises troubling questions regarding freedom of religion and interfaith relations.² The prosecution by the Afghan State of an Afghan man who converted to Christianity in 1990 while working for a Christian non-governmental organization raises in the mind of many the question of the compatibility of Islam with plural democracy and freedom of religion. Although the state court dropped the case under intense outside pressure, the compatibility issue has not been resolved as the judge invoked insanity as the basis for dismissing the case (*Christian Science Monitor*, March 27, 2006).

The case was presented as an example of conflict between Islam and democratic governance but in many respects the case is rooted in, and influenced by, the forced secularization of Muslim society, and the absence of free debate under authoritarian regimes that currently dominate much of the Muslim world (*New York Times*, March 24, 2006).

The issue of apostasy, like many other issues stemming from the application of *Shari'ah* in modern society, is rooted more in the sociopolitical conditions of contemporary Muslim societies than in Islamic values and principles. More particularly, it is rooted in the incomplete transition from traditional to modern sociopolitical organizations. It is rooted in the decision of many post-colonial Muslim countries to abandon traditional legal codes informed by *Shari'ah* in favour of European legal codes developed to suit modern European societies. The new laws were enforced by state elites without any public debate and with little attention for the need to root legal codes in public morality.

Islam is the foundation of moral commitments for the overwhelming majority of Muslims and is increasingly becoming the source of legitimacy for state power and law. Yet the post-colonial state in Muslim societies has done little to encourage debate in the area of Islamic law. The increased interest in adopting legal codes based on Islamic values leaves the majority of Muslims with outdated legal codes that were intended for societies with markedly different social and political organizations and cultures.

Traditionalist scholars have long embraced classical positions on apostasy that consider the rejection of Islam as a capital crime,

punishable by death. This uncritical embrace is at the heart of the drama in the case of the Afghan convert to Christianity, and which will more likely be repeated until the debate about *Shari'ah* reform and its relevance to state and civil law is examined and elaborated by authentic Muslim voices.

Theory of right

Shari'ah is essentially a moral code with few legal pronouncements, and the question of which precepts are purely moral and which have legal implications is determined through the theory of right.

The widely accepted theory of right among jurists divides rights into three types: (1) Rights of God (*Huqūq Allāh*) – These consist of all obligations that one has to discharge simply because they are divine commands, even when the human interests or utilities in undertaking them are not apparent, such as prayers, fasting, hajj, etc.; (2) Rights shared by God and his servants (*Huqūq Allāh wa-al-'Ibād*) – These include acts that are obligatory because they are demanded by God, but they are also intended to protect the public, such as *hudūd* law, *jihād*, *zakāh*, etc., and (3) Rights of God's servants (*Huqūq al-'Ibād*) – These are rights intended to protect individual interests, such as fulfilling promises, paying back debts, and honouring contracts. Still, people are accountable for their fulfilment to God (Ibn 'Abd al-Salām, 1999, vol.1, pp.113-121; al-Shāṭibī, 1997, vol.2, pp.539-542).

As can be seen, the theory of right devised by late classical jurists – around the 8th Century of the Islamic calendar – emphasizes that people are ultimately answerable to God in all their dealings. However, by using the term 'rights of God' to underscore the moral duty of the individual, and his/her accountability before God, classical jurists obscured the fact that rights are invoked to support legal claims and to enforce the interests of the right-holder. Because the Qur'ān makes it abundantly clear that obeying the divine revelation does not advance the interests of God but only those of the human being, the phrase 'rights of God' signifies only the moral obligations of the believers towards God, and by no means should they be taken as a justification of legal claims.³

It follows that the ‘rights of God’ which are exclusively personal should be considered as moral obligations for which people are only answerable to God in the life to come. As such, accepting or rejecting a specific interpretation or a particular religious doctrine, and observing or neglecting fundamental religious practices, including prayer or *hajj*, should have no legal implications whatsoever. A legal theory in congruence with the Qur’ānic framework should distinguish between moral and legal obligations, and should confine the latter to public law that promotes public interests (constitutional, criminal, etc.) and private law that advances private interests (trade, family, personal, etc.).

Unless the above legal reform is undertaken, there is no way to ensure that *takfīr* (charging one with disbelief) and *zandaqah* (charging one with heresy) claims would not become a political weapon in the hands of political groups to be used as a means to eliminate rivals and opponents. Indeed, there is ample evidence to show that *zandaqah* and *takfīr* have been used by the political authorities during the Umayyad and Abbasid dynasties to persecute political dissidents.⁴

Reciprocity and social peace

The principle of reciprocity, central to all religious and secular ethics, lies at the core of the Islamic concept of justice. The Qur’ān is pervaded with injunctions that encourage Muslims to reciprocate good for good and evil for evil (2:194; 55:60). The principle is, similarly, epitomized in the Golden Rule of the Christian faith, and has been given a secular expression in Kant’s categorical imperative: “Act only on that maxim through which you can at the same time will that it become a universal law” (Kant, 1993, p.84).

In modern society where people of different faiths live side by side, and cooperate under a system of law that recognizes their equal dignity, due attention must be given to the principle of reciprocity as the essence of justice in a multi-religious society. Any attempt by a religious community to place sanctions and apply coercion on its members who choose to convert to another religious group will place a moral obligation on the latter to defend the newcomers who choose to join their faith. Muslim would feel morally obligated to defend the right of a Jew and Christian to freely embrace Islam, and would

not accept any coercive measure intended to restrict the right of Jews and Christians to convert to Islam. A Christian or a Jew who converts to Islam is no longer a Christian or a Jew but a Muslim and must be respected as such. By the same token, a Muslim who converts to Christianity is no more a Muslim but a Christian and must be respected as such.

Indeed, there are already signs that the calls by radical voices within Muslim societies to revive apostasy laws have provoked calls by others to restrict conversion to Islam of members of their communities. In December 2004, members of the Coptic community in Egypt cried foul when a Coptic woman converted to Islam. Coptic leaders accused Muslims of forcing the woman to accept Islam and thousands of Christian Copts demonstrated “in various parts of the nation against what they say is the government’s failure to protect them against anti-Christian crimes” (Klein, 2004).

Although medieval Christian Europe practiced coercion to force reverse conversions to Christianity, modern societies recognize the freedom of religion of all citizens. Muslim scholars have the obligation to reconsider modern reality and reject any attempt to revive historical claims rooted in classical jurisprudence that are clearly at odds with Qur’ānic principles and the Islamic spirit, and with modern society and international conventions and practices. It would be a tragedy, for both social peace in Muslim societies and world peace in an increasingly diverse global society, if religious communities embrace practices that limit freedom of religion, and adopt measures that rely on coercion to maintain the integrity of religious communities.

Endnotes

1. To review the full text of the Compact of Madīnah, please refer to Ibn Hishām (1411/1990). *Al-sīrah al-nabawiyah*, vol.3, pp.34-35.
2. Abdul Rahman is an Afghan national who converted to Christianity in 1990 while working as a medical assistance for a Christian non-governmental aid group Peshawar, Pakistan. In 1993, he moved to Germany, and later unsuccessfully sought asylum in Belgium before returning to Afghanistan in 2002. Abdul Rahman was divorced by his wife over his conversion to Christianity, and in the ensuing custody battle over the couple’s two daughters,

she and her family raised the issue of his religion as grounds for denying him custody. In February 2006, after a custody dispute concerning Abdul Rahman's daughters, members of his family reported him to the police. He was arrested after police discovered that he possessed a Bible.

3. The Qur'ān repeatedly points out that people's neglect of its commandments has no consequences onto the Divine whatsoever – be it good on evil – but only onto themselves (see for example, verses: 2:57, 7:160, 3:176-7, and 47:32).

4. The execution of Ghaylān al-Dimanshqī by the order of Caliph 'Abd al Malik ibn Marwān, and Ahmed ibn Nāṣir by the order of Caliph al-Wāthiq after being accused of heresy are cases in point.

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