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KEYNOTE ADDRESS

ISLAMIC CONSTITUTIONALISM IN CONTEXT: A TYPOLOGY AND A WARNING

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In the spring of 2010, I, alongside a number of other academics who focus on topics connected to Islamic law, participated in a symposium at the University of St. Thomas School of Law on the topic of “Islamic Law and Constitutional Liberty.”¹ At the time, there seemed to be nothing especially unusual about either the topic or the content. The organizers asked participants to address two questions: “First, what challenges and opportunities face democracies in Muslim-majority nations as they seek to integrate Islamic law with the rights typically accorded in constitutional democracies? Second, what tensions exist between adherence to Islamic law and the norms of liberal democracies in nations with growing Muslim minorities?”²

As my own work has addressed the first of these questions extensively, both as a matter of theory and in practice in Iraq,³ I prepared remarks proposing a general theoretical structure for making sense of the complex relationship between Islamic law and constitutional structure. I left the second question to others, and in my public remarks, I remained silent on both the specific language in the title of the symposium and the formulation adopted by the conference organizers in stating the second question.

Then, over the summer of 2010, something truly terrible happened. Beginning with a dispute over the potential placement of an Islamic community center at Park51, a site included in the extensive redevelopment of the areas near the site of the former World Trade Center buildings, the United States entered into an episode of publicly expressed anti-Muslim

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1. For a brief overview, see Robert A. Kahn, *Islam Symposium: Introduction*, 7 U. ST. THOMAS L.J. vii (2010).

2. University of St. Thomas News Service, *Legal scholars to discuss 'Islamic Law and Constitutional Liberty' at Law Journal Symposium Monday*, BULLETIN TODAY, (Tuesday, Apr. 6, 2010, 12:01 AM), <http://www.stthomas.edu/bulletin/2010/04/06/legal-scholars-to-discuss-islamic-law-and-constitutional-liberty-at-law-journal-symposium-monday/>.

3. NOAH FELDMAN, *WHAT WE OWE IRAQ* (2004).

sentiment unprecedented in our history—even, remarkably enough, in the wake of the September 11, 2001 attacks.

The episode had multiple parts. Its initial stage involved the claim that a mosque was being proposed for the Ground Zero site—a misstatement both of the purpose of the proposed community center and the location of its site.⁴ It continued with an increasingly partisan division over the propriety of building the community center. Opponents then began criticizing mosque-building elsewhere in the United States, including in Murfreesboro, Tennessee.⁵ Parallels to a recently enacted Swiss law prohibiting the building of minarets were difficult to avoid.⁶ President Barack Obama drew attention to the constitutional questions raised by the episode by offering the view that any religious group must have the right to build wherever it wished.⁷ But that did not end the episode. Anti-Muslim sentiment continued to be expressed.

Frequently, this anti-Muslim sentiment was coupled with public claims about the threats to the United States posed by Islamic law. The pinnacle of this absurdist scenario—absurdist if it were not so dangerous—was a proposed state constitutional amendment in Oklahoma that purported to ban the state's courts from using or citing Islamic law in their decisions.⁸ The amendment passed in a referendum and was duly enacted, despite its likely unconstitutionality under the Equal Protection and Free Exercise Clauses of the Constitution.⁹ Anti-Muslim bias had now taken legal form.

After the midterm elections of November 2010, the public tenor of this episode appeared, thankfully, to have receded—perhaps an indication of the partisan nature that much of it seemed to display. But in the wake of these events—a kind of two-months'-hate that had not been directed toward a religious minority in the United States since the anti-Jehovah's Witnesses

4. Clyde Haberman, *In Islamic Center Fight, Lessons in Prepositions and Fear-Mongering*, N.Y. TIMES, July 27, 2010, at A13, available at <http://www.nytimes.com/2010/07/27/nyregion/27nyc.html> (noting that it is misleading to call the Park51 center a “mosque,” and that the proposed site is not “at” Ground Zero, as some opponents claim, but only “near” Ground Zero).

5. See, e.g., Bradley Blackburn, *Plan for Mosque in Tennessee Town Draws Criticism from Residents*, ABC NEWS, June 18, 2010, <http://abcnews.go.com/WN/murfreesboro-tennessee-mosque-plan-draws-criticism-residents/story?id=10956381>; Elisabeth Kauffman, *In Murfreesboro, Tenn.: Church 'Yes,' Mosque 'No'*, TIME, Aug. 19, 2010, <http://www.time.com/time/nation/article/0,8599,2011847,00.html>.

6. See Edward Cody, *Switzerland Votes to Prohibit the Building of Mosque Minarets*, WASH. POST, Nov. 30, 2009, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/29/AR2009112900482.html>.

7. Sheryl Gay Stolberg, *Obama Says Mosque Remarks Were About Rights*, N.Y. TIMES, Aug. 15, 2010, at A4, available at <http://www.nytimes.com/2010/08/15/us/politics/15mosque.html> (quoting President Obama as stating: “I believe that Muslims have the same right to practice their religion as everyone else in this country. And that includes the right to build a place of worship and a community center on private property in Lower Manhattan, in accordance with local laws and ordinances.”).

8. See James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12, available at <http://www.nytimes.com/2010/11/15/us/15oklahoma.html>.

9. See *Romer v. Evans*, 517 U.S. 620 (1996).

violence of 1940¹⁰ and the extended anti-Mormon bias of the nineteenth century¹¹—my own decision not to address the symposium’s title or its second question needs to be revisited. In an environment of public disparagement of Muslims and Islam—disparagement specifically connected to Islamic law and constitutionalism—I feel it would be irresponsible to reproduce here in writing my theoretical treatment of the question of Islamic law and constitutionalism in majority-Muslim countries without prefacing a discussion of the frame and formulation of the conference in which they were first delivered.

Let me begin, then, with the title of the symposium, “Islamic Law and Constitutional Liberty.” In principle there is nothing wrong with such a formulation except that it is somewhat limited. Why focus on constitutional *liberty* but not other constitutional values such as equality or the separation of religion and government? In my remarks, I finessed this question by simply acting as though the symposium was asking me to address all aspects of constitutional values and their relation to Islamic law in majority-Muslim states. In retrospect, however, it is necessary to ask whether the focus on liberty in particular in the symposium’s title reflected some assumption, unconscious or otherwise, that Islamic law posed a special threat to the general phenomenon of constitutional liberty, taken to mean something like “the benefits of living in a liberal, constitutional state.”

Considered in the context of majority-Muslim countries where, as I shall discuss below, political movements associated with Islam have sought to infuse the constitution with Islamic values, this assumption might perhaps be defended as a starting point for discussion. Considered, however, in the context of the United States and the West generally, where Muslims are minority communities, such a hidden assumption would be troubling indeed. The implication would be that somehow, private adherence to Islamic religious law by Muslims threatens the constitutional liberties of others.

It should be needless to say—though obviously it is not—that the private religious actions and beliefs of Muslims or any religious community cannot threaten the constitutional liberties of others (or themselves for that matter) in the American structure of constitutional law and theory. Constitutional rights are public rights that protect individuals from state action. Private actions cannot threaten such public rights, or even implicate them.

The reason this point needs to be made is that supporters of the Oklahoma amendment apparently believe precisely that adherence to Islamic law by Muslims threatens general constitutional liberty. Otherwise it would be hard to make sense of the somewhat bizarre command of the amendment to courts not to cite or rely upon Islamic law. After all, Islamic

10. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 156 (2005).

11. See, e.g., *id.* at 99–110 (2005) (discussing the genesis of the federal prohibition of plural marriage).

law is not a source of law in Oklahoma, nor has anyone taken any steps to make it so. For Islamic or any other religious law to serve as a source of law in the United States would almost certainly violate the Establishment Clause—notwithstanding the pre-revolutionary, pre-constitutional tradition of declaring that Christianity is part of the common law, an archaism that some courts invoked into the nineteenth century.¹² The supporters of the Oklahoma amendment are wrong. There is no threat to constitutional liberty in play when private citizens follow the dictates of religious conscience.

It may seem unnecessarily textually sensitive to express concern about the title of the symposium; but the effort is nevertheless worthwhile, I believe, because of the formulation of the second question for the symposium, the one I did not address in my remarks. This question asked, “What tensions exist between adherence to Islamic law and the norms of liberal democracies in nations with growing Muslim minorities?”¹³ Here the possible association between private practice of Islamic law and general liberty is raised a bit more explicitly. After all, we must ask, what tension could exist *prima facie* between “adherence to Islamic law” and liberal constitutional norms?

If by “adherence” we are referring to private actions by private parties, the answer is once again, “none.” Constitutional liberalism is built on the fundamental premise that private religious conduct is to be respected, and that it does not threaten the public constitutional rights of others. It is as though one asked, “What tensions exist between receiving Holy Communion and the norms of liberal democracies in countries with growing Catholic minorities?” Such questions were, as a matter of fact, asked in the nineteenth century United States—and they were illiberal, anti-Catholic, and nativist.¹⁴ They depended on the assumption—sometimes hidden, sometimes not—that Catholicism and democratic citizenship were incompatible. It took generations for the American public to rid itself of this prejudiced view, and it would be especially shameful if a symposium at a Catholic law school were to be interpreted as raising a similar charge regarding Muslims.

One hopes, then—and indeed, one must insist—that the tensions about which the symposium’s second question asks are only possible tensions regarding some imagined *state* adherence to Islamic law, which would, naturally enough, raise constitutional questions. Yet even this hope is not without its worrisome aspects. After all, the paranoia (that is not too strong

12. See, e.g., *Vidal v. Mayor of Philadelphia*, 43 U.S. 127, 198 (1844) (“Christianity [is] a part of the common law of the state [of Pennsylvania]”); see also *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (quoting *Vidal*’s statement on the common law and adding that “this is a Christian nation”).

13. University of St. Thomas News Service, *supra* note 2.

14. David Brion Davis, *Some Ideological Functions of Prejudice in Ante-Bellum America*, 15 AM. Q. 115, 120–25 (1963).

a word) which exists regarding Islamic law in the United States—again, reflected in the Oklahoma amendment—seems strangely fixated on the imagined possibility that Muslims in the United States are somehow planning to implement Islamic law as a binding legal system in this country. This is, needless to say, a view for which no evidence exists, or at least none I have ever seen. As the satirist and social commentator Stephen Colbert has noted in regard to the Oklahoma law, “Just because something doesn’t exist doesn’t mean you shouldn’t ban it.”¹⁵

As other participants in the symposium ably noted, there is no plan or aspiration on the part of American Muslims for Islamic law to be treated any differently than Jewish law or canon law in the occasional interactions between religious and secular legal systems that arise in a liberal democracy. There are, of course, general constitutional questions that arise in this specialized, not to say obscure, area. Can the state certify food as kosher?¹⁶ This question could be asked in parallel about food that is halal. Can the state require or enforce a prenuptial contractual agreement in which one party promises to grant a Jewish religious divorce in case of civil divorce?¹⁷ This question, addressed by American courts, could be asked in parallel regarding Islamic marriage contracts.

In asking these questions, however, we would ordinarily be careful not to imply that American Jews who sought such laws were hoping to establish Jewish law as a constitutional norm. To the contrary, it would be obvious, as it should be in the case of American Muslims, that what is sought is simply ordinary religious accommodation for private religious practice.

The point, then, is that after the anti-Muslim sentiments of the summer and fall of 2010, one cannot be too careful in insisting that, in the United States, there is literally no reason to think there is “tension” between Islamic law and constitutional liberty. In the comments that follow, which track my public remarks at the symposium, I endeavor to address a wholly distinct issue: the relation between constitutional structure and Islamic law in those majority-Muslim countries where political movements have expressly sought to bring Islamic law into the formal constitutional order. It is to this issue that I now turn.

The overarching question of the relationship between Sharia and constitutional liberty can be addressed on three different levels. These three planes or spheres of analysis are features of every constitutional system in the world. They are the political sphere, or the political plane; the philo-

15. *The Colbert Report: Stephen Colbert Gives You Props* (Comedy Central television broadcast Nov. 3, 2010), available at <http://www.colbertnation.com/the-colbert-report-videos/364378/november-03-2010/stephen-colbert-gives-you-props>.

16. See, e.g., *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002); *Ran-Dav’s County Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992).

17. See *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).

sophical sphere; and the sphere of what I shall call institutions and law, or the institutional-legal plane.

Begin with the political: all constitutional systems, wherever they are, deal with and engage political structures within a society. Most importantly, they deal with the competition between different political structures in a society. In some places, those political forces will be arranged into political parties, but it is not always the case that political parties are the form of organization. Sometimes there are mass social movements that exist outside of party politics.¹⁸ Sometimes there are small groups of individuals with strong feelings on certain issues. In some societies, the political forces are arranged around clans or around families or around religious denominations or around the very broad set of possibilities for human association.

All of those different forms of human association can be characterized as political. What characterizes them in a constitutional system is that they struggle with one another for power. That does not mean it is an absolute struggle. It is not always a struggle to the death.¹⁹ Very frequently, it is a struggle among negotiating parties for how power will be allocated amongst them. But the core of any constitutional system that is functioning as a constitutional system is that it provides a mechanism—or really a set of mechanisms—for reconciling, managing, and negotiating the competing demands of different political forces within a society.

Today, in many, though by no means all, majority-Muslim countries, one of the most powerful, energetic, and popular social and political forces, when measured both by opinion polls and also by elections, is the movement that we usually call the Islamist movement.²⁰ “Islamism” refers not simply to Islam as a faith or to Muslims as people who belong to that faith and choose to associate themselves with it. By Islamism, I mean to designate a self-consciously political movement that draws upon the very contested, rich, and influential ideas and beliefs associated with the religious tradition of Islam to make political claims and to organize people into political action.

It is important to offer this clarification, because although many Muslims today do describe themselves as Islamists, many others simply would say there is no difference between their religion and their political movement.²¹ Islamism, in my view, can broadly be characterized as the political movement that incorporates people who believe in something like the sim-

18. See Jürgen Habermas, *New Social Movements*, 49 *TELOS* 33 (1981).

19. I am distinguishing my view from that of Carl Schmitt. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chi. Press 1996) (1932).

20. See NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* 7, 46–50 (2003).

21. That is characteristic of people in all sorts of movements, all over the world, who do not necessarily want to acknowledge that there is any difference between their core religious identity and their core political identity. That is an individual choice for a person to make.

ple slogan, “Islam is the Answer.” That is an actual political slogan, which has existed in various parts of the Muslim world, and especially in the Arabic-speaking world, for almost three generations now.²² It is framed as a political organizing slogan, but it also has the full range of associations—religious, social, even economic—that characterize successful political movements.

The Islamist movement—which itself is a very deeply complex and varied movement, including Sunnis of many different ideological stripes, and some, but by no means all, Shiite Muslims—has generated within itself a range of identifiable, constitutional, and political goals. The political parties that consider themselves Islamists in the Arabic-speaking Sunni world, are mostly associated with the international movement known as the Muslim Brotherhood. The political parties affiliated with the Muslim Brotherhood (and there are different political parties in different countries) typically offer a detailed, organized, and extremely sophisticated political-constitutional vision of how they would like to shape, change, or interpret the constitutional practices of the countries in which they are based. To make this abstract point very concrete, if one visits the website of the Muslim Brotherhood in Egypt, there will be a constitutional plan. One can click on the constitutional plan and see a description of how the members of that political party, those who write, debate, and argue about the plans, would like to see constitutional affairs organized in Egypt.²³

In Arabic-speaking countries during the last two decades, going back to the Algerian elections of 1990 and 1991, there have been relatively free elections with political parties identifying themselves as Islamists and promoting a worldview connected to a set of constitutional claims. These parties have out-performed expectations, and in many cases, they have done extraordinarily well.

This is not a coincidence. It is partly a result of the rise of their political movement during those years. One sign of a political movement being on the rise is that it can garner votes. That means that in the constitutional discourse of the Arabic-speaking world, and by extension and as a result of the powerful influence of the Arabic-speaking world in much of the broader Muslim world, the topic of constitutionalism and Islam has been a pressing political topic for much of the last two decades.

What began as a set of ideas discussed among political activists or political elites expanded to become much broader in the wake of the new constitutions produced in Afghanistan and Iraq, in the wake of U.S. occupation. In each case, the constitutional process formally took place when the country was not under formal U.S. occupation. But, *de facto*, both of those

22. The slogan is associated with the Muslim Brotherhood. *See, e.g.*, FELDMAN, *supra* note 20, at 42–44; Kristen Stilt, “Islam is the Solution”: *Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 *TEX. INT’L L.J.* 73 (2010).

23. *See* NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 117–26 (2008).

countries were under U.S. occupation when the constitutional processes began.

In both Afghanistan and Iraq, political movements that in some general sense can be characterized as Islamist pressed political claims for how constitutional law should be arranged. In this category of the political, I want to identify Islamism as a very powerful and engaged political movement that makes constitutional claims. It is not the case that Islamism was the only political force at work in the constitutional or political debates of the time. There were other political forces as well, ranging from secular voices who made an argument for secular politics and secular constitutionalism, to ethnic or denominational groups that made ethnic or denominational claims. In the case of Iraq, for example, the Kurdish national movement made a series of very powerful and engaged political-constitutional arguments for federalism based primarily on ethnicity, language, and culture. There is also a broader rights-based constitutionalism that, despite not yet finding a large political constituency, nevertheless exists in discursive space. At the crucial moments of public negotiation over constitutional affairs, however, Islam has remained a major factor in the political debate.

Philosophy, the second category of analysis, is useful for thinking about constitutional systems. It seems very abstract, and lawyers generally do not like it. In the context of constitutions, philosophy is tremendously important because constitutional systems typically claim to have grand philosophical principles that underlie the very existence of the political order. That is not invariably the case. If one considers Great Britain's unwritten constitution (which has many written components, but for many generations was thought to be an unwritten constitution), it was a little hard to pin down what the deep philosophical principles were, precisely because they were contested. The principles were debated, but not written down. Written constitutions in particular typically present themselves as making certain grand philosophical claims. The popular and the elite debates, and the legal debate about what those philosophical claims are, take on outside significance for the foundations of constitutional law.

Consider an example taken from the U.S. context. The Declaration of Independence contains a very famous formulation, drafted, I note, by two people who were deists at most—Thomas Jefferson and Benjamin Franklin: “[T]hat all men are created equal, that they are endowed by their Creator with certain unalienable Rights.”²⁴ That formulation, needless to say, has religious content. Not only does it mention a creator, it specifies that the source of some basic rights is the fact of endowment at the moment of creation. The U.S. Constitution, by contrast, makes no reference to a creator. In fact, in the nineteenth century, there was a very active political movement in the United States of people who wanted to amend the U.S.

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Constitution so that it would mention God.²⁵ They believed that the U.S. Constitution was deeply flawed by its failure to mention God, and they wanted it changed.

The silence of the Constitution on this question led to a rich, lively, and ongoing debate in the world of American constitutional thought about the philosophical foundations of our constitutional liberties. Are the foundations grounded in a divine source, the creator of the Declaration? Or are they instead grounded in positive law, in the fact that the Constitution creates these rights and specifies them?

Or is it ultimately some complicated combination of those two things? That is what an outsider looking at our system would say: “Well, some people in the United States believe one thing. Others believe another thing—and they have been arguing about it pretty successfully for most of the last couple of centuries,” (successful in that they are still arguing about it). The one time that people of the United States went to war with each other, we did not go to war over this question. We went to war over other questions that were also unresolved in our Constitution, namely, the questions of race and slavery. So the philosophical plane has tremendous weight when people are asking the philosophical question of what we are doing here as a people, and what principles our Constitution stands for. Of course, one can live one’s entire life as a lawyer, doing the practical business of law, without ever thinking too deeply about the philosophical foundations of a system. It is only if one either has a taste for philosophy or, perhaps more importantly, if one is interested in answering the question of who we are as a country, that one will suddenly find that these philosophical issues are tremendously pressing.

Now, in the Muslim world too, wherever constitutional debates occur, philosophical debates about the nature of the state take place as well. Those philosophical debates are very much like philosophical debates that happen in the United States. They involve people making claims about the true nature of their constitutional system by pointing to language in their constitutions; to religious and cultural and theological values of their societies; to the way their societies are organized; and, to the practical ways that things are run there. It is fair to say that in many Muslim-majority countries, these debates are just as equivocal as they are in the United States. In the process of shaping those debates, people are very interested in introducing language into their constitution that will support their view of the true nature of their system with respect to its philosophical foundations.

In countries with active Islamist movements that reflect, or are intended to reflect, claims about the philosophical nature of Islam, three features of constitutional systems are commonly found. The first feature is general statements specifying that Islam or Sharia is to be a source of law,

25. FELDMAN, *supra* note 10, at 131–32.

or the source of law. That sounds like a very powerful message about the philosophical nature of the state, and it is meant to be. Provisions like that have been desiderata of Islamist political movements wherever they have been involved in constitutional debate and negotiations, including in both Iraq and Afghanistan.

A second set of provisions relates to the question of whether any law passed by a legislature in the constitutional system in question may be allowed to exist if it violates either the values of Islamic law or the specific provisions of Islamic law. These provisions are sometimes called repugnancy clauses.²⁶ It may seem an unpleasant sounding name, but it is just a technical categorization. Repugnancy clauses mandate that any law that violates some set of principles of Islam will be interpreted as or treated as repugnant to the constitutional system, and therefore void. A better way to describe these, in my view, is to call them a version of Islamic judicial review.²⁷ These constitutional provisions specify that some entity, either a court or some other institution, will have the responsibility of reviewing legislative decisions and determining whether they are consistent with either values of the Sharia or the Sharia itself, depending on how the provision is drafted.

The third constitutional component that reflects philosophical claims about the nature of the state and its relationship to Islam has to do with family law. For very complicated reasons—which I will not go to at length here—in almost all majority-Muslim countries, family law, including marriage and divorce, and sometimes inheritance, are shaped in various complicated ways by legal principles and rules derived from the classical Islamic legal tradition of Sharia.²⁸ Most constitutions in the majority-Muslim world acknowledge this historic and continuing reliance in some way. When there is political negotiation over a constitution, and people are making philosophical claims about the nature of the Islamic state, family law always arises. It is worth pausing to note that the fact that something is discussed in the context of philosophy does not mean it does not also have a political context. Nor does it mean that it does not have an institutional-legal result. In the context of philosophical discussion, using Islamic law as part of the mechanism for adjudicating family law relations often becomes a philosophically crucial part of the picture.

The point with respect to philosophical debate is this: just as in the United States, there is an ongoing and rich philosophical debate about the

26. FELDMAN, *supra* note 23, at 121–24; *see also, e.g.*, CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW 201–56 (2006) (discussing specific cases the Supreme Constitutional Court reviewed for compliance with the Shari'a).

27. FELDMAN, *supra* note 23, at 121–22.

28. *See* Frank Griffel, *Introduction* to SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 1, 1–19 (Abbas Amanat & Frank Griffel eds., 2007).

true principles that underlie the state, so, in many Muslim-majority countries, there exists an ongoing debate about the extent to which the state is fundamentally based upon Islam or Islamic ideas or the extent to which the state is based upon some other positive law values or popular democratic values, or even monarchic values.

We turn now to the third plane of analysis, the institutional-legal. This is an awkward name, but it has two important components: the institutions that administer laws and the content of the laws themselves. Earlier sessions at this conference generated an interesting conversation about the institutional complexity of administering family law systems, mostly in Western countries, with respect to religious pluralism and diversity within those countries.²⁹

The same institutional difficulty exists in any legal system when the time comes to work out the details of administering any legal problem. This can be so in family law, where there are individual family-by-family determinations that have to be made. The law must decide what institutional body—a court, an arbitration body, a community body—gets to make the relevant decisions. This can be true in civil and criminal law, where we must specify the rules that make up the body of law, and then form institutions. These institutions do not just include courts, but also the criminal justice system more broadly, like punishment systems, prisons, police, and other forms of enforcement—all of which are part of the institutional picture of how legal systems operate in the real world. This is also true at the level of constitutional law, because constitutional law, with its complex doctrinal apparatus, has institutional forms through which it operates. Again, those begin with courts, but they also include the institutional balance between—at least in the United States—the Executive Branch, Legislative Branch, Judicial Branch, and let us not forget, the Administrative Branch of government (which, though not mentioned in our constitution, could be described as the fourth branch of government). One must also consider institutions that are not even mentioned in that account, like the press, which is sometimes referred to as though it were a branch of government, or non-governmental associations. Non-governmental associations have a crucial civil-society role to play in most democracies, and function institutionally as part of constitutional democracy.

29. John Bowen, *Can an English Court Enforce Islamic Shariah?*, Keynote Address at the University of St. Thomas Law Journal Symposium: Islamic Law and Constitutional Liberty (Apr. 12, 2010); Faisal Kutty, Joel Nichols & Asma Uddin, Panel Presentation at the University of St. Thomas Law Journal Symposium: Islamic Law and Constitutional Liberty (Apr. 12, 2010); see also John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 U. ST. THOMAS L.J. 411 (2010); Faisal Kutty, *The Myth and Reality of "Shari'a" Courts in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 U. ST. THOMAS L.J. 559 (2010); Asma T. Uddin, *Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia*, 7 U. ST. THOMAS L.J. 603 (2010).

This institutional-legal component is in some ways where the real nitty-gritty action of constitutional affairs takes place among lawyers. One of the things that a good law school education does is prepare the student to be an active player in the institutional-legal side of constitutional affairs.

One could be a politician and never bother with how the legal institutions actually operate, and instead limit oneself, for example, to filling institutions with people who you think share your views. One could be a philosopher or an engaged public citizen, talking about the great questions of the foundations of law and society in the country in which you live, and really do very little and even know very little about how the actual practical institutional-legal details of your society actually work. When you need the practical details, you call a lawyer.

Lawyers, by contrast, have to be engaged in the day-to-day practical institutional details in order to do their jobs. Learning how to navigate the system means developing an expertise in these institutional-legal details. In the countries that are majority-Muslim today, the institutional-legal side of the question of what role Islam plays in the constitutional system is often the least clear.

Certain parts of it are relatively clear. If you are a family law lawyer in Egypt and someone comes to you with a dispute, you can, almost all of the time, give them a pretty good account of which institutional arrangements they will have to negotiate. Which court will hear this question? Which court will hear that question? Where do you have to go, what do you have to do? Lawyers in a country like Egypt will do the same thing for their clients that lawyers will do in any system, namely, help them to figure out what to do with a complicated issue of interpersonal dynamics, like a divorce or a marriage. But with respect to the constitutional level of politics, the question of whether, for example, a court will actually say that a given law is unconstitutional because it falls afoul of the values of Islam, or with respect to a question of whether a law truly captures, in some sense, the spirit of Islamic law—those questions are in many cases deeply contested, but also institutionally unresolved.

It is difficult to know today just how the institutional-legal side of the relationship between Sharia and the constitutional liberty will play itself out. Certainly, in Afghanistan, the legal system is itself still operating in a very rudimentary way in most of the country. In Iraq, legal development is far more advanced, but the institutional practices of courts are in the process of transitioning from one legal system that was well understood by its practitioners to a new legal system which is more complicated and in many ways less clear. That is equally true in countries that have not undergone upheavals like Afghanistan and Iraq, but where the political plane is contested and debated in such a way as to call into question the results in practical, real-world cases.

What is remarkable about constitutional law and what makes constitutional law so hard, I think, is that in any real-world case that a client might bring to you, all three of these planes might be in play. If the case becomes well-known enough, it can engage politicians. If the case becomes popularly debated, it can engage philosophy. And inevitably, it will engage the question of practical institutional design and control and the problem of law. Thus, when one wants to generalize about this third category, the institutional-legal category, the difficulty is much greater than it is in generalizing about the political forces or in generalizing about the philosophical forces that are at work in the contemporary Muslim world.

What, then, can we say about these three levels by way of summing up analysis of where we are now and where we are going? Let us go back to our first category, the category of the political. In countries where autocratic governments have continued to limit and constrain the capacity of Islamist political movements to take action, Islamism is stronger, more vibrant, and more powerful as a political force than it is in those countries where Islamism has been allowed by state authorities to play a greater role in actual practical governance. That might seem counterintuitive, because after all, repressing a political movement is usually a bad thing for that political movement. I am suggesting something to the contrary. In fact, one of the key sources of growth and success for Islamism has been its repression by governments that are not perceived by their citizens as legitimate. I think it is possible to observe this trend line throughout the region.³⁰

Where, by contrast, Islamists run for office, are elected to office, and have the opportunity to try to govern, popular support for them tends to decline. It tends to wane for the very simple reason that many of the people who are voting for these parties are voting for them to express their frustration with what they see as corrupt or illegitimate governments. When Islamist politicians are elected and turn out to be human, and therefore susceptible to many of the same political pressures, fallibility, and even in some cases the same corruption as autocratic governments, then public opinion about those political parties begins to stabilize. This is a very complicated question worthy of many symposia.

I have participated in a few of them so far without reaching any resolution. If one looks at the recent Iraqi elections, one can see that this is a very complicated claim to make, but in at least some cases, several of the political parties that self-consciously organized themselves around religion did far worse in recent elections than they had done previously. That is an example of how allowing politicians to be elected on Islamist platforms leads, I think, to actual Islamist politicians proving that they are human and no longer able definitively to offer a solution. By contrast, in countries where

30. See FELDMAN, *supra* note 20, at 43–45; see also *id.* at 162–68 (describing this phenomenon in Egypt).

autocracies still repress political Islam, popular support for those political movements seems to be as strong as it ever was, and in some ways possibly even growing. The reason is that political Islam, or Islamism, represents in those countries an alternative to the system that exists—an alternative that is centered and also philosophically appealing.

Turn now to the question of philosophy. The idea that one might construct a just and legitimate state around the principles of Sharia, Islamic law, and Islamic legal tradition, I think, has the capacity to continue to grow in appeal as it has done for most of the last several decades. For that to happen, those governments that get a chance to implement these values must be able to do it in a way that communicates to ordinary citizens that these governments actually are in some sense implementing these values. Abstraction is well and good, but if you are elected to government on a platform that includes a philosophical claim about the truly Islamic nature of the state and then nothing changes, people may become disillusioned with you as a politician. Then they also become disillusioned with your ideas, because actual human beings always carry out philosophical ideas. There is no such thing as a philosophical idea that exists in an utterly Platonic way in politics. Philosophical ideas are promoted by actual human beings who are then connected to actual institutions. Those ideas have to be implemented in a way that seems appealing to people for those ideas to continue to grow in value. My conclusion with respect to the philosophical plane is that it is growing, has actually become much more sophisticated over the last twenty years, and shows every prospect of continuing in those directions.

Much of the debate twenty years ago on the philosophical question of whether the state should be Islamic or secular focused on the claim (made mostly by secularists) that it was impossible to have a democratic state that was grounded in Islamic values. That argument has faded almost to the point of disappearing in the majority of Muslim countries. There is still a very lively debate on the institutional question, which I will turn to in a moment. But the theoretical claim that somehow democracy and Islam are incompatible is now almost as obsolete as was its precursor, which was the philosophical claim made in Western constitutional thought from the early part of the nineteenth century until the middle of the twentieth century, that Catholicism and democracy were incompatible.

Political science textbooks from roughly 1830 to roughly 1930 often presented it as an inevitable fact of philosophy and institutional design that only northwestern European, i.e., Protestant, countries could generate democratic institutions, and that Catholic countries could not. That view, obviously, is anachronistic. Many people today have never even heard of it. Certainly, at the University of St. Thomas School of Law, the natural reaction to a claim like that should be that it is literally absurd. But it is an important reminder to us that something can be deeply believed for centu-

ries and then turn out to simply have been false. The claim of incompatibility of Islam and democracy, in my view, was of a comparable type to the claim of incompatibility of Catholicism and democracy. It is just as false.

Turn then to the third plane, the institutional-legal plane. Here, the prospects for what is going to happen in terms of constitutional governance connected to Sharia are three-fold. One possibility is that there will be dynamic and innovative invention of new arrangements and new institutions that somehow capture some of the values of an Islamic legal tradition, and apply them in new ways to existing political legal arrangements. This is the optimistic vision. It is just possible. A lot of very smart people think about these questions in the Muslim world today and a lot of experimentation goes on in many different places throughout the majority-Muslim world. What is more, because of communication on the Internet, there is a great deal of cross-pollination. If you have an idea and you use it effectively in Malaysia, it is possible for people in Indonesia to know about it, but it is also possible for people in Morocco to know about it. There is conversation, discussion, and communication that may lead to some spread of semi-innovative ideas.

The second possibility—a pessimistic possibility—is the possibility of collapse. Islamists exercising constitutional authority will try to design institutions that may not work well. They will be subject to the same kinds of problems and constraints as other governments that operate in relevant countries, or that operate in the West for that matter. On this view, there will be a kind of historical trend away from success, in which case the political and philosophical trends will change, too. If over time, political Islamists cannot deliver distinctive, effective institutions that actually improve people's lives, their ideas will seem less attractive and their political movements will fail. The pessimistic possibility is a very real possibility as well.

The third possibility lies somewhere in the middle: call it the muddling-through option. In the muddling-through option, those components of constitutional design that were intended originally to emphasize the Islamic character of the state and to give a fundamentally Islamic grounding to the state might simply exist on the periphery of the societies in which they function. They might end up not mattering very much to ordinary people most of the time. They might end up, therefore, not being especially appealing as a basis for political movements, but also not harming those political movements. They might become the background noise of the constitutional norms of a society. A consequence of the middle ground result is that the rhetoric of constitutional discourse might change, while the realities in the countries with these innovations might change very little.

Now, whether this is a good thing or a bad thing depends on how one feels about muddling through. In the U.S. system, some people (I am one of them) actually believe that muddling through in our deepest philosophical

debate has been a good thing. I do not think it would be good for the United States if there were some way to resolve once and for all the question of whether our values are derived from the Declaration of Independence or the Constitution, or whether we are a state in some ultimate foundational way based upon Christian values or whether we are a state in some ultimate way based on secular values. We have tremendous diversity of opinion on these questions in our country. Part of what a constitution does is to enable as many citizens as possible to feel that it is their state, they belong to it, and it belongs to them. When you begin to specify things in a more definitive way it becomes harder for people who disagree with that view to feel loyalty and citizenship and to play a participatory role. There are times when muddling through is just fine.³¹ That may turn out to be the case for countries that are presently involved in the kinds of debates that I describe in the Muslim world.

Yet the thought that muddling through is just fine depends on believing that the institutional-legal realities work. If the institutional-legal realities do not work, and a substantial number of citizens feel that the state is not fully their state and that it does not reflect their values in the way they wish, then they will not feel allegiance to the state and society in which they live. Then muddling through would be a tragic result.

I have given you three possible scenarios: an optimistic one, a pessimistic one, and something in the middle. Though this analysis may not be inspiring, it has the virtue of being honest. The best that I can do for you in sketching these issues is to try to provide a framework for thinking about them. That framework, as I have said, is political analysis, philosophical analysis, and institutional-legal analysis. In each of those planes, there is interaction between the ideas of constitutional democracy and Islamic law. In each of those areas, there is contest, debate, and disagreement. Every legal problem, from the smallest to the largest, will import to some extent each of these three levels of analysis. If we look at things through these three lenses, we have a better chance of understanding constitutional structures—and a better chance of gripping the question that we are struggling with today.

31. See FELDMAN, *supra* note 23, at 220–49.