THE CHALLENGE OF INSTITUTIONAL GOVERNANCE IN ISLAM: JUSTICE, DEMOCRACY, AND SHARIAH

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ABSTRACT

Justice is an absolute standard for the conduct of human relations while democracy is a formalism by which decisions are made. In modern times, Western societies have had more success in establishing a degree of domestic justice within a democratic formalism than have Muslim societies. Assertions that this is because Islam is inherently unjust or undemocratic are fallacious. I shall argue instead that Muslims face two special challenges.

Democracy is a contentious term with conflicting definitions. Although attracted to the concept, the Muslim world has had insufficient familiarity with its nuances and insufficient experience with its practice. We may compare the turns and upheavals faced by the British in the centuries it took to establish their democracy with the difficult and painful progress of Iran in establishing an Islamic republican government. We may also compare the obstacles faced by the Americans in moving from the Declaration of Independence to the Constitution with the constitutional issues facing the Iraqis today.

Muslims have preferred to take a personal rather than corporate approach to social issues. While this has certain advantages over the Western approach, it has had the undesirable consequence that Muslims have paid insufficient attention to questions of sound institutional governance. The only serious modern corporate institution in the Muslim world has been the state, but because it has been unconstrained by sound institutional governance, the state has been neither just nor democratic. I argue that by viewing *shari`ah* in the same manner that Western jurists approached natural law, it is possible for Muslim legal scholars to accept a formal role for democratic processes and in a manner consistent with original conception of *shari`ah*. Finally, I shall show how such processes can protect rather than threaten the centrality of the traditional sources of Islamic law even as they offer hope to solve the problem of the inflexibility of Muslim jurisprudence in modern times. Sound governance must incorporate *shurah* and *ijma`* while respecting justice as both a means and a goal.

INTRODUCTION

Justice is an absolute standard for the conduct of human relations while democracy is a formalism by which decisions are made. Achieving the former within the structure of the latter is a challenge for any society. In modern times, Western societies have had more success in establishing a degree of domestic justice within a democratic formalism than have Muslim societies. Assertions that this is because Islam is inherently unjust or undemocratic are fallacious. I shall argue instead that Muslims face two special challenges.

First, although Muslims are attracted to the concept of democracy, it is a contentious term with conflicting definitions, and the Muslim world has had insufficient familiarity with its nuances and insufficient experience with its practice. For instruction we shall compare the turns and upheavals faced by the British in the centuries it took to establish their democracy with the difficult and painful progress of Iran in establishing an Islamic republican government. We shall also compare the obstacles faced by the Americans in moving from the Declaration of Independence to the Constitution with the constitutional issues facing the Iraqis today.

Second, I shall argue that Muslims have preferred to take a personal rather than corporate approach to social issues. While this has certain advantages over the Western approach, it has had the undesirable consequence that Muslims have paid insufficient attention to questions of sound institutional governance. The only serious modern corporate institution in the Muslim World has been the state, but because it has been unconstrained by sound institutional governance, the state has been neither just nor democratic. I shall argue that by viewing *shari`ah* in the same manner that Western jurists approached natural law, it is possible for Muslim legal scholars to accept a formal role for democratic processes and that such a view is consistent with original conception of *shari*`ah. Finally, I shall show how such processes can protect rather than threaten the centrality of the traditional sources of Islamic law even as they offer hope to solve the problem of the inflexibility of Muslim jurisprudence in modern times.

Because *fiqh* is only the human attempt to map the reality of divine law, differences of interpretation in the formulation of the law is inevitable. Yet Islamic principles require individual responsibility of each of God's servants to the Creator. Thus, sound governance must incorporate *shurah* and *ijma*` while respecting justice as both a means and a goal.

THE CONTENTIOUSNESS OF DEMOCRACY

I will waste no time arguing the popularity of democracy before a meeting of the Center for the Study of Islam and Democracy. Instead I shall review the reasons why the meaning of democracy has been so hotly contested. In its least contentious form, the democratic principle is that legitimate rule requires the consent of the governed. According to the Qur'an even Allah asked the children of Adam to assent to His Lordship over them: "When thy Lord drew forth from the children of Adam from their loins their descendants and made them testify concerning themselves (saying): 'Am I not your Lord

(who cherishes and sustains you)?'"[1] Once we attempt to move beyond that simple conception of democracy, agreement on a definition of democracy becomes hopeless. Must every individual consent to the choice of the leader? Such a requirement will serve for very small groups or even for medium size groups at their initial formation, but becomes impossible for groups of any large size. Does it mean that legislation requires unanimous consent? Then nothing will ever be legislated. Even if we admit of a representative democracy in which legislation is the function of a popularly elected elite, those elite will rarely agree unanimously on any legislation of significance. Then shall we permit the majority to rule in all cases? This is rightly called the "tyranny of the majority" and will appeal only to crude populists with no concern for the rights of minorities or the wisdom of the learned.

When we examine the democracies of the Western world, we see they come in a wide variety of forms and flavors. Americans, with their two-party system have contempt for the multi-party democracies because of the leverage those systems give to small splinter groups. On the other hand, third parties in the United States condemn the two-party system as a shared monopoly of power by which the elites exclude those with new ideas and leave unrepresented the disenfranchised minorities.

Yet, we cannot deny that most Western countries have working democracies, which few Muslim countries do.[2] Since Britain and America are the most commonly advanced examples of successful democracies, let us focus not on the details of their systems, but on the history of their origin.

The creation of a working democracy in Britain was not due to the imposition of a completed structure, nor was it an instantaneous epiphany. The establishment of the British democratic system began with the Magna Carta in 1215 C.E., a document that established the supremacy of the law above the king. The nobility that imposed this concept on King John had just returned from the Crusades where they had witnessed that the ruler of the Muslims, Salahuddin, was subject to the same laws as governed his citizens. The British barons demanded that John submit, not to Islamic law, but to a notion of an English traditional law that they imagined but until that moment had never been explicit.

Significant as the rights established in the Magna Carta may be, they are far short of anything we would call a democracy. While it established the rule of law as an abstract principle and specified some particular limits on the king's authority, that authority was still very sweeping. It was 33 years before the House of Commons was established and it was not until the 14th century that the current parliamentary structure was developed and the feudal system began to erode as taxation of commerce and exports began to replace the land tax. The tilt of the balance of legislative power from king to parliament remained

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[1] Qur'an 7:172 from the translation of Abdullah Yusuf Ali, The Holy Qur'an (Elmhurst, NY: Tahrikr Tarsile Qur'an 1988).

[2] The democracies of Malaysia, Bangladesh, Indonesia and Iran have serious flaws, but they do work. Even the democratic structures of Turkey and Pakistan work when not interrupted by military interventions.

a contentious and drawn out process, with frequent violent and authoritarian climaxes, such as the reign of Oliver Cromwell.

Nor was the establishment of the free market and the protection of property rights a rapid process. England developed an entrenched Mercantalist system supporting huge monopolies and with strong protectionist tariffs aimed at sustaining an imperial system. It was not until the "Glorious Revolution" of 1688 instituted reforms inspired by natural law and pro-property philosopher John Locke—himself inspired by Ibn Tufayl.[3] Yet, as late as 1815, Britain adopted the infamous Corn Laws preventing the importation of corn unless the price of domestic corn rose to such a high level that the working classes were faced with an unmanageably high cost of food. It was in the atmosphere of discontent under these laws that the reform act of 1832 more fairly reapportioned representation in the parliament and doubled the size of the electorate from 217,000 to 435,000—although only one man in five yet had the right to vote and no woman did.[4] The repeal of the corn laws in 1846 delayed the enfranchisement movement, but could not stop it and by 1876 the franchise had been extended to "every male adult householder living in a borough constituency" and "[m]ale lodgers paying £10 for unfurnished rooms," a total of about 1,500,000 men.

If we look at Iran with a tolerance for extremely loose comparisons, we might see parallels between Mossadeq and development of the British parliament, between the *viliyat i fiqh* and Cromwell, between the English reform acts and the extension of the franchise in Iran today. How strong the parallels are in the uneven development of these democracies are may be debated, yet we should be impressed by the speed with which Iran is going through its development compared to the timescale of the evolution of British democracy. One should not read too much into this comparison, for obviously Britain trod this road first. Yet it is unreasonable to be impatient that Iran is taking decades to travel the road that took Britain centuries.

One might argue that it is not unreasonable to expect new nations using man-made constitutions to solve these problems faster than those that, traveling the road first, had to solve by an evolutionary process. Yet we must ask how much faster will a designed constitution be? Surely the United States of America was in a better position to take advantage of the mistakes of Britain than anyone, since the colonists were mainly of British stock, well-versed in the history of that land, and comfortable with its culture— more so than one should expect of Iraq or Iran. Yet, when the Americans sought to rationally create a written constitution (unlike Britain's unwritten one) they botched up the first attempt. The articles of Confederation were adopted by Congress in 1777, ratified four years later, and abandoned—to be replaced by the Constitution—in 1788. There were twelve years between the Declaration of Independence and the Constitution.

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[3] See G. A. Russell, "The Impact of the Philosophus Autodidactus: Pocockes, John Locke, and the Society of Friends," The "Arabick" Interest of the Natural Philosophers in Seventeenth Century England (Brill's Studies in Seventeenth Century England; Leiden: E.J. Brill, 1994), pp. 224-265.

[4] Glenn Evrett, "The Reform Acts," (10/14/2002) http://www.victorianweb.org/history/hist2.html, accessed 5/25/04.

Perhaps the Iraqis also will need two attempts to get their constitution right. However, to be on an equal footing with the American Founding Fathers, the Iraqis would need to be free to elect their constitutional representatives. Perhaps they also should be allowed to elect their local and provincial governments even before a national constitution is adopted, as did the Americans. Finally, we note that the American Constitution still required amendment after 80 more years to give the vote to blacks, another 52 years to give the vote to women, and another 41 years to give the vote to young adults 18-20. Fifteen to seventeen year olds, adults under Muslim law, are already allowed to vote in Iran.[5] It is these young people who are the driving force pressing for further democratic reform and liberalization. We note that the clause in the Iraqi constitution that gives women 25% of the seats in parliament—a considerably larger percentage than enjoyed by women in the U.S. Congress—received no objections from the Iraqi public.

PERSONALISM VS. CORPORATISM

We have elsewhere[6] noted that Islam is a "nomocratic" system, in which law is discovered, rather than a system of positive law, in which law is invented. There is, however, no scriptural obstacle for democratic reform, since an elected legislature is one means for settling disagreements over interpretation of the law. (Another means, well established in Islamic jurisprudents, is the existence of competing schools of law among which the individual is free to choose). However, there is a serious albeit indirect obstacle to meaningful democratic reform in the cultural preference among Muslims for personalism over corporatism.

What I mean by personalism is encapsulated in T.E. Lawrence's observation that "Arabs believe in individuals, not institutions."[7] The idea is that we will do business with people we trust. An institution will be judged by the person at its head. It is for this reason that Middle Eastern Muslims want to sit down and socialize with potential business associates, while Americans don't see why the need even to meet the directors of a company in which they invest money, but are satisfied to read the prospectus.

The virtues of personalism are that it avoids bureaucracy, red tape, and the high overhead costs that are associated with institutional record keeping and oversight. The problem of personalism is that in relying completely on trust in the morality of the trustee, it neglects the elements of procedural protections aimed at insuring good governance of corporate structures, and too easily opens the door for corruption. In treating the head of state as the owner of the state, it opens the doorway to tyranny.

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[5] Robin Rowland, "Iran: Facing a Demographic Revolution," *CBC News Online* (June 18, 2003) http://www.cbc.ca/news/background/iran/. Accessed 5/27/04.

[6] See, *e.g*., Imad-ad-Dean Ahmad, "Definitions of Democracy," *Muslim Democrat* 1 #2 (Sept. 1999) , 2.

[7] Quoted in Lawrence Rosen, The Anthropology of Justice: Law as Culture in Islamic Society (Cambridge: Cambridge Univ. Press, 1989; the Henry Morgan Lewis lectures 1985), p. 14.

Personalism is the best way for dealing with small institutions, but public choice theory has demonstrated why it becomes unmanageable in dealing with large organizations. Consider the family-owned business. The workers, the owners and the managers are all the same people. There is no conflict between their individual success and the success of the business. A son, say, has too much incentive to avoid losing the respect of his father to slack off or otherwise cheat the business. If he does act in ways that go against the good of the family, the father soon knows it and acts as necessary. Compare this to a large international corporation with thousands of branch offices. The stockholders, the managers, and the workers are completely different sets of people. Their interests are wildly divergent, and it is extremely difficult to detect when any one is working at odds to the interests of the others. Thus, regulations and bureaucratic monitoring and procedures are necessary.

Islam has heavily based its culture on precedents from the early *ummah* where bureaucratic complications were unnecessary. To give an example, consider a problem faced by modern zakat institutions when applicants resent having to fill out application forms and give the names of references. They object that the Prophet (*as*) never asked for application forms and references. They are correct, but they overlook the fact that the Prophet *knew* the people whom he was assisting. He was their reference and he already knew their situation.

The only serious modern corporate institution in the Muslim world has been the state, but because it has been unconstrained by sound institutional governance, the state has been neither just nor democratic. The modern nation state is the institution least amenable to personalization. It suffers from the public choice problem of large corporations on an even grander scale because of its sheer size. In addition it is divorced from accountability in a way no business corporation can be because of its monopoly on the use force. Thus the state can defend itself from criticism by controlling the media, the election process, and the people themselves in ways no business would dare. Rather than avoid corruption, such states repress those who would seek to take action to reform it. The only possible way of limiting such a state is by the institutionalization of democratic processes that guarantee the freedom to criticize it and peaceful means for attempting to change it.

I want to argue that there is a role for democratic processes in the original conception of *shari`a*. To do so, we must clarify that meaning of shariah, which too often is confused with the *fiqh*. *Sharî`a* literally means "the path to the well." What does "the path to the well" have to do with Islamic law? The path to the well is whatever it is as the Islamic law is whatever God has made it. Thus, the *fiqh* is to the shariah as a map of the path to the well is to the path itself. It is a human conception of a divine fact. In other words the shariah is like the laws of nature, eternal and unchanging, while the fiqh is like our scientific theories, scholarly human attempts to understand the divine law.

Islamists who speak of "imposing the shariah" then are making an extreme error, since the shariah can no more be imposed by man than can the law of gravity. And man has no more right to impose a particular school of fiqh on others than he has to impose Newton's law of gravity as opposed to Einstein's or vice versa. That is why the Prophet told his

companions: "It is incumbent upon those who are present to inform those who are absent because those who are absent might comprehend (the message) better than the present audience."[8] Notice how this is a forward-looking view of the shariah, in contrast to the backward-looking view that denies the possibility that the shariah might be better understood by later generations than earlier one.[9] Within this concept of shariah, democratic process can play a role in circumventing violence due to different understandings of shariah.

In the end it is insufficient to fall back on generalities, asserting that we want to use *shurah* and *ijmâ'* to resolve our differences. We must formalize the rules of consultation and consensus so that people may know how to use them and give their consent to the processes by which we propose to implement them.

Such processes can protect rather than threaten the centrality of the traditional sources of Islamic law even as they offer hope to solve the problem of the inflexibility of Muslim jurisprudence in modern times. When violent means are relied on to resolve disputes about the law, too many people end up believing that it is the law itself that causes violence. This is what led Europe to abandon the belief in absolute law altogether and to plunge into moral relativism. Those who want to give some humans the ability to dictate to other humans what only Allah may dictate set the stage for a similar misdirected rebellion in the Muslim world. Anger that should be directed against human tyrants is turned against the Law and perhaps against Allah (*saws*) Himself.

Because *fiqh* is only the human attempt to map the reality of divine law, interpretation in the formulation of the law is inevitable. Yet Islamic principles require individual responsibility of each of God's servants to the Creator. Thus, sound governance must incorporate *shurah* and *ijma`* while respecting justice as both a means and a goal.

We may use the issue of women's rights as an example of the problem and its solution. Consider the difference between of Umar and the Prophet on the matter of hijab:

> When 'Umar asked for the permission to enter [where the Prophet was meeting with some Quraishi women], the women quickly put on their hijab. ... The Prophet said, "These women who have been here, roused my wonder, for as soon as they heard your voice, they quickly put on their hijab." Umar said, "O Allah's Apostle! You have more right to be feared by them than I." Then 'Umar addressed the women saying, "O enemies of yourselves! You fear me more than you do Allah's Apostle?" They said, "Yes, for you are harsher and sterner than Allah's Apostle."[10]

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[8] *Sahih Bukhari* 1:67.

[9] A critique of the backward view was presented at this conference by Kamran Ashgar Bokhari, "Poverty of Islamic Thought as an Obstacle to Justice."

[10] *Sahih Bukhari* 5:32.

Discretion by managers and ministers is unavoidable, but a discretionary authority that can deprive women of their right to *khula* divorce, as happened in Egypt[11] requires institutional safeguards. Political circumstances will affect the legal interpretations of those empowered to interpret. The Islamist politicians in Jordan initially opposed women voting, until they realized that they needed the votes of women in their own ranks to win seats whereupon they decided that it is the Islamic duty of women to vote. The best protection against a counter-productive corporatism is personal inclusion in the process of establishing the governing documents. Involve women in the writing of the constitutions and bylaws of Muslim organizations and states. This is no innovation as women were involved in the transmission of hadith literature. Anyone who studies hadith literature will clearly see the importance of the inclusion in the relative fairness of hadith to women. Exclusion of hadith transmitted by women would substantially alter the balance of the picture of the sunnah we have received. Example of Aisha's correction to those who said that the presence of a women in front of a man will invalidate his prayer:

> "It is not good that you people have made us (women) equal to dogs and donkeys. No doubt I saw Allah's Apostle praying while I used to lie between him and the Qibla and when he wanted to prostrate, he pushed my legs and I withdrew them."[12]

CONCLUSIONS

We have argued for a reconciliation of the modern concepts of corporate governance with the traditional Muslim preference for personalism. The traditional Muslim view that all relationships are contractual is not antagonistic to good corporate governance provided certain principles (that happen to be principles of good corporate governance are observed.

To the largest degree possible, decentralize authority so that personalism in decision-making is least subject to corruption. If the individual is responsible for all decisions that affect only the individual, then no problem of public choice conflicts arise.

Where decision affect others in small groups allow all members of the group to voluntarily and contractually set the terms of their interaction. Respect the autonomy of natural groups like the family and only intervene when a decision may adversely impose consequences on others outside the group or when a member of the group (for example an infant in the case of the family) is unjustly harmed by a disadvantage of power.

Where decisions must be made in large groups obtain the consent of all members of the group to a due *process* of decision-making. To this we submit the proposal of the *Islamic*

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[11] See, *e.g.*, Amira El-Azhari Sonbol, *The New Mamlukes: Egyptian Society and Modern Feudalism*, (Syracuse, NY: Syracuse Univ. Press, 2000), p. 184-186.

[12] Bukhari, vol. 1, #498.

Rules of Order.[13] All corporate structures whether governmental, civil, or commercial, must be governed by rules that are fair, simple and understandable. Rules of accountability must also be put in place.

Establish nation-states, like Iraq, on a federal structure so that the subsidiary groups, whether geographical, ethnic, linguistic, or sectarian, will be autonomous and at minimal risk of adverse intrusion. The laws of such states should not be biased towards preferential treatment of large corporations which must rely on burdensome accountability checks, so that individuals may elect to organize in smaller familiar groups where personal trust will suffice.

The main problem with attempts at both democratization and liberalization in the Muslims world has been that they have been long on generalities and short on specifics.[14] The process of writing documents of institutional governance forces Muslims to deal with specifics.[15]

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[13] Imad-ad-Dean Ahmad, *Islamic Rules of Order*, in preparation.

[14] See, e.g., "Arab Leaders Adopt Reform Plan.... Or Do They?" *Democracy Digest* 1 #4 (May 28, 2004)

[15] An example of a specific project in which the Minaret of Freedom Institute is involved is a proposal for a workshop in Jordan for Iraqi civics educators by which we may encourage them to incorporate the ideas to which I allude in my talk in the still-to-be-constructed civics curriculum in Iraq. All interested in this effort should contact the Minaret of Freedom Institute at mfi@minaret.org.