

Reconciling Secular Government with Islamic Law

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www.minaret.org

A Paper for the 6th Annual Conference of the Center for the Study of Islam and Democracy: DEMOCRACY AND DEVELOPMENT—Challenges for the Islamic World April 22-23, 2005, Washington DC

ABSTRACT

We address the question: “In what way, or to what degree, if any, is secularism a pre-condition for political development in the democratic mode, or can religious values and practices be accommodated?” We compare the French and American models of secularism and argue that while the former is incompatible with Islamic law, the latter is conformable to it when understood in the manner interpreted by de Tocqueville. Secularity is compatible with Islamic law only if it is understood as a separation of authority between the rulers (or executive authority of government) and the religious establishment (the “Church”). It is incompatible with Islamic law when interpreted as a prohibition of religious ethics, identity, or sentiment in the public sphere.

We explore specifically how classical Islamic civilization harmonized with, or differed from, the American model and propose a new model, grounded in Islamic values, that borrows heavily from successful aspects of the American experiment. We argue that the free exercise of religion is inherently part of Islamic law, and that while Islamic law does not prohibit the establishment of religion, neither does it prohibit its disestablishment. Both the British model (in which there is a state religion) and the American model (in which there is not) are compatible with Islamic law. We present historical and theoretical arguments that the American model is more protective than the British model of both the polity and religion, and the most compatible with the defense of minority rights and that Muslims scholars should now consider its merits in an Islamic context.

Finally, we outline a vision of Islamic pluralism, cognizant, yet critical, of the neo-orientalist critique of the dhimma. We contend that difficulties of dhimmi status in Muslim history arise from human choices in a political and cultural context rather than from the Qur’anic mandate. We conclude that Islamic pluralism, based in the belief that tolerance is an absolute divine mandate, offers a stronger foundation from which minorities may appeal to the majority for the defense of their rights than do relativistic conceptions of secular tolerance that are, by definition, dependent on the whims of the majority.

One may approach the question of the compatibility of secular government and Islamic law in one of two ways. One can ask, as the organizers of this conference have, “In what way, or to what degree, if any, is secularism a pre-condition for political development in the democratic mode, or can religious values and practices be accommodated?” Or one may turn the question around, as many Muslims might insist,

and ask, “In what way or to what degree is religion a pre-condition for political development in the democratic mode, or can secular values and practices be accommodated?”

I am not being flippant. If secularism means an absence of religion in society, then the least democratic societies of the twentieth century, Nazi Germany, Soviet Russia, and Communist China met that definition far better than the highly religious society of the United States of America. In order to examine the relationship of secularity and religion the notion of “political development in the democratic mode” we must first define what we mean by secularity and we must take care to distinguish the concept of “society” from the concept of “state.”

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Comparing the French and American models of secularism facilitates understanding this fact. For the French secularism means the complete absence of religion from public life. This means not only the separation of politics from religion, but the prohibition of religious symbols from the public sphere in any case or context where they might be perceived or misperceived as infringing on the primacy of the French civil religion, a secular religion of citizenship intended to replace the role that the religion of a society played in pre-modern life in facilitating social solidarity. Because the French have identified nationality as identical to citizenship, they strive to eliminate any competing suggestion of nationality, including religion, from the public square. This notion of secularity has influenced important parts of the world, including Muslim countries such as Turkey.

In America, there is a long history of religious involvement in politics, from the Pietest Protestant opposition to slavery through the religious partisans in the civil rights movement to the religious opponents of the Vietnam War—including Father Robert Drinan, a Catholic priest who served in the U.S. Congress for ten years—right up to the “religious right” of our own time. Only a small fringe group of secular fundamentalists see such involvement as un-American. In America secularism means the freedom of religion clauses in the First Amendment of the U.S. Constitution: the right to free exercise of religion and the disestablishment of religion from state. Thus, the famous “wall of separation between church and state” serves the dual function of protecting American political life from the domination of any church institution, and of protecting religious life, thought, and conviction from the corrupting power of the state.

Clearly the French conception is incompatible with Islamic law, since Muslims are commanded to judge by what Allah has revealed. Further, Muslims who are proud of their Muslim identity, evidenced by wearing a Muslim-style headscarf or a *ghalabiya*, are seen as threatening the French culture. In America, not only are Muslims free to wear what they like as part of the “mixed salad” of American culture, but they may even

attempt to influence legislation by convincing their fellow Americans to incorporate Islamic legislation into the secular law.¹ Even more importantly, they can conform to Islamic law in their own private and communal affairs to an enormous degree. In Canada, which likewise defends free exercise of religion, one province has recently allowed Muslims to resolve family matters in their own courts. Under American law contracts may always provide for private arbitration, which would allow the Muslim community to resolve disputes among itself within its own legal system.

Further, until recently it was recognized that any religious group would be exempt from legislation that violated its religious laws unless such legislation served a compelling state interest, and did so in the least restrictive means possible. Although this requirement has been destroyed by recent Supreme Court decisions, it is a principle consistent with Islamic law that Muslims may incorporate in to their own governments in seeking to reconcile Islamic law with secular governance.²

American law is conformable to Islamic law when it is understood in the manner interpreted by Alexis de Tocqueville. As a Frenchman studying democracy in America, Tocqueville would be sensitive to the distinctions between the American and French secularism. He noted the complex interaction between strong religious faith in America and its democratic practices.³ Religion effects a moderating influence on man's natural impulse to self-interest, not negating it, but restricting it to honest modes and benevolent ends. "[R]eligious peoples are naturally strong just at the point where democratic peoples are weak. And that shows how important it is for democratic people to keep their religion when they become equal."⁴ Conversely, the liberality of democratic society moderates the dangerous trend of fanaticism to which religious people are susceptible. "A religion which became more detailed, more inflexible, and more burdened with petty observances at a time people were becoming more equal would find itself reduced to a band of fanatic zealots in the midst of a skeptical multitude."⁵

It was precisely because Tocqueville, having no sound knowledge of Islam, erroneously identified Islam as a religion characterized by the above-mentioned flaws and pronounced that therefore it could not sustain itself in the modern world. His error

¹ This is not to say that such an effort would be wise or prudent, only that it is legally permissible. It is even legal in the United States to form an "Islamic party." However, such an effort in a Muslim country is insulting to the other parties as it implies that that the others are not Islamic. This is thus harmfully divisive to the *ummah*, and has an air of *takfir* to it. The Prophet warned us that if aman calls his brother kafir, then one of them is (Sahih al-Bukhari 8:125A,B).

² Imad-ad-Dean Ahmad, "American and Muslim Perspectives on Freedom of Religion," *Journal of Constitutional Law*, accepted for publication.

³ Alexis de Tocqueville, *Democracy in America*, George Lawrence, trans., J.P.Mayer, ed. (New York: Harper-Collins, 2000) pp. 442ff, 528ff.

⁴ *Ibid.*, p. 445.

⁵ *Ibid.*, p. 447.

should be a warning not only to those Westerners who underestimate the flexibility and resiliency of Islam, but to those Muslim extremists who wish to confute the religion of Islam with outdated traditions and particularistic political theories, neither of which may be found in the pages of the Qur'an.

I have elsewhere analyzed the American constitutional system in the light of the Qur'an and the Medina Compact.⁶ For our purposes, let it suffice to say that classical Islamic society established a religiously based (as opposed to secular) pluralism. The Qur'an explicitly guarantees the free exercise of religion to the People of the Book, subject only to their payment of taxes and submission to the Muslim authorities. This freedom was extended to other religious groups implicitly in the Qur'an, explicitly by the example of the Prophet in his general amnesty to the Makkans and by the subsequent general practice of Muslim rulers.

However, there was no disestablishment of religion in the classical Muslim societies. One can argue that the establishment of religion is implicit in the Qur'anic assertion that Allah aids "those who if We establish them in the land establish regular prayer and give regular charity, enjoin the right and forbid wrong...."⁷ If we accept this interpretation, then the secularism of an Islamic society resembles the British society in which the ruler is defender of the faith even as he allows his subjects free exercise of their religion. However, I shall argue that disestablishment, while neither traditional, nor required by Islamic law, is in fact permitted by Islamic law and, in practice more beneficial to both the polity and the religion.

Establishment of a state religion opens the door to the politicization of religion. The art of politics is coercive by definition. The hallmark of its successful practice is compromise. Religion, on the other hand is spiritual and the hallmark of its art is adherence to principle. The threats that differences of religious opinion pose to the state can be defended against by guaranteeing the free exercise of religion, but the threats that the state poses to the understanding of religion by its establishment have no defense. The Islamic civilization was able to flourish because for centuries the religious scholars were independent of the state. Once they became employees of the state their value and their merits withered quickly and the decline of the Muslim civilization became only a question of time.

Americans are more religious than the British. This should be sufficient proof that the establishment of religion is no guarantor of greater religiosity among the people. In Saudi Arabia the establishment of a state religion has resulted in the triumph of a single interpretation of Islam over even the four traditional schools, a stultified understanding of the religious law that has become an embarrassment for Muslims all over the world and

⁶ Imad-ad-Dean Ahmad, "On the American Constitution from the Perspective of the Qur'an and the Madinah Compact," *American Journal of Islamic Social Sciences* 20 #3-4 (Summer/Fall 2003), 105-124.

⁷ 22:41.

that has inspired caricature imitations like the late unlamented Taliban regime in Afghanistan.

The reconciliation of Islamic law with secular government is easy for us Muslims living in America. The American government is secular, and we only have to resolve to live our lives in accord with Islamic law, establishing our own institutions (schools, Islamic centers, social service and arbitration agencies) in compliance with our understanding of that law. More challenging is how a Muslim majority society can set up a government compliant with both shari`ah and even the American notion of secularism.⁸

In my vision, this is achieved through Islamic pluralism. An Islamic democracy is not a contradiction in terms. Democracy means rule of the people and an Islamic state is one compliant with Islamic law. A government responsive to the people, if the people are determined to make the government compliant with Islamic law, will be a government by Islamic law. A truly free society is not a society of atomic individuals ruled by an all-powerful state; it is a society with intermediate structures like families, local and professional associations, religious institutions, unions, etc., capable of protecting the individual from the state.⁹ In my vision, the national state is a severely limited institution with a narrow mandate to provide for the national defense, serve as a court of last appeal, oversee the minting of money, and to prevent any of the intermediate institutions from usurping power over the freedom and dignity of the citizenry or of their direct responsibility to the Creator. An Islamic society is one in which there is no intermediary between the believer and the Lord. No one, least of all the state, can take responsibility for our actions away from the individual.

In order for such a Islamic democracy to satisfy the concerns of secular government, it is appropriate to follow the Islamic model in the compact of Medina that allows for the non-Muslim minorities to be governed by their own religious laws, and to expand this model to allow for non-tradition, even non-religious *dhimmi* groups to define themselves and to enter into a contract with the state whereby they will pay the *jizya* in lieu of military service¹⁰ and submit to the state's adjudication of their disputes with those outside their group, while maintaining control over their internal affairs as they have agreed among themselves. It is necessary that this guarantee of the autonomy of *dhimmi* groups be part of the constitution of the society in order that it not be taken away from the

⁸ An articulation of the Muslim concerns about reconciling secular government and Islamic law is given by Zaid Shakir, "Muslim Involvement in the American Political Process" http://www.daar-ul-ehsaan.org/islamic/Politics_USA.htm.

⁹ An interesting study of the role of intermediate institutions is Grace Goodell, *The Elementary Structures of Political Life: Rural Development in Pehlave Iran* (New York: Oxford, 1986).

¹⁰ It is important to understand that the *jizyah* is a fee for defense services and *not* a payment for any religious activities of the state. *Jizyah* differs from taxation systems that require citizens to pay for activities that may violate the religious sensibilities of the taxpayers, as when Catholics pay money used to support abortions or Muslims pay taxes to subsidize tobacco farmers.

minorities if the majority should ever become hostile to the minority because, for example, some of their coreligionists were to engage in some outrage against the majority. This was a problem when Egypt, for example, stripped Egyptian Jews of their Egyptian nationality in retaliation for the Israeli persecution of the Palestinians.

We contend that difficulties of *dhimmi* status in Muslim history arise from human choices in a political and cultural context rather than from the Qur'anic mandate. We conclude that Islamic pluralism, based in the belief that tolerance is an absolute divine mandate, offers a stronger foundation from which minorities may appeal to the majority for the defense of their rights than do relativistic conceptions of secular tolerance that are, by definition, dependent on the whims of the majority.

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