"Can Muslims Save Democracy? Muslim Minority Communities Resisting Illiberalism"

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Abstract: Illiberalism, and its catalysis of a shift of focus within the political and social, poses significant challenges to the architecture of democracy and the nation-state, the foundational socio-political units of modern society. Conventional intersections and engagements of law are now being contested and recontested as new commercial and geo-political relationships emerge and their concomitant legal accommodations. While the question of the intersectionality between religion and state vis-à-vis religious law is a complex phenomenon, in situ, the rise of supra-national nodes of engagement will augur a reassessment of how religious law interacts beyond the state-"church" nexus. This paper examines how the architecture of Islamic law and its potential for offering correctives to the new realities created by illiberalism. It will trace the core objectives of Islamic law, a brief history of its implantation during Islamic civilization and explore current and future trajectories that may well "save" democracy.

Modern Western societies define themselves as the creators and bastions of liberalism, an ideology that centers the individual over the collective, and espouses freedom as the paramount virtue. The key defining features of these societies are 1) liberal democracy; 2) rule of law; 3) secularism and 4) a market economy. Of late, however, each of these features is facing erosion. Market economies have been infected by neoliberal policies that corrode the free market, creating greeter income disparity and inequality. Secularism is giving way to religious nationalism and religio-ethno-chauvinism. The rule of law is often flouted in proportion to one's power

positionality within society or geopolitical spaces. And democracies across the world are challenged with the phenomenon of illiberalization.

With the end of the Cold War in the early 1990s, there was jubilation in the West that its values had conquered all possible alternatives. In his 1992 book, *The End of History and the Last Man*, Francis Fukuyama giddily heralded the victory of liberal democracy over communism, declaring that it would be the sole political model to prevail for the rest of the human experience.[1] Unfortunately, Fukuyama's elation was premature; China began its ascent, demonstrating economic dominance within a dictatorial model. Similarly, Russia has shown that authoritarian regimes cannot be discounted or dismissed. And the world's largest democracy, India, is descending into deeper illiberalism by the day, under the administration of Prime Minister Narendra Modi and the BJP party. These refutations of Fukuyama's thesis are important to note as much of the world has changed toward illiberalism in the course of a mere three decades.

Traditional liberal democracies are not immune to the forces of illiberalism. The United States, Great Britain, France and other countries throughout the European Union have recently reassessed whether liberalism is indeed a cardinal virtue worth upholding. Courts, corporations, oligarchs and media outlets have all showed a troubling ambivalence and, in some cases, hostility toward democracy and the primacy of the individual's power of the vote. Notions of citizenship are being reevaluated, expanding its rights and privileges to non-human entities while simultaneously restricting these principles to actual individuals. In many of these

[1] Fukuyama, Francis. (1992) *The End of History and the Last Man*. New York: The Free Press.

societies, and perhaps without much irony, the test case subjects for implementing illiberal policies have been the Muslim communities within these countries.

The past two decades have seen Muslims in many so-called liberal democracies subjected to securitization and added surveillance. The 9/11 attacks in the US and the 7/7 attacks in Great Britain acted as catalysts and justifications to implement a series of limitations on civil liberties and civil rights under the aegis of combatting terrorism. While often cited as generally applicable measures, the impetus for and target of these policies were unmistakable; Muslim communities were now the suspects and presumed guilty by association. Many of these laws were accepted by the broader society, under the conceit that such conditions were necessary and acceptable, perhaps because most people considered that the policies were either temporary or that they would only be applied toward the "bad people." Nearly a generation on since those terrorist attacks, the policies are still in place and in fact, used beyond the Muslim communities. Liberal democracies have mortgaged civil liberties and civil rights in the name of security and have thus created a perpetual war against an undefined enemy.

As illiberalism transforms *terra firma* to *umor in terra*, interactions with religious communities, especially those with established legal traditions require a new perspective and a new model for such engagement. The implementation of and engagement with Islamic law in the age of illiberalism requires an assessment as to what are these legal tradition's objectives; how and to what extent has it been implemented in the state, both by state action and outside the purview of a sovereign

actor and finally, whether it possess sufficient malleability and autonomy from state intervention to operate above the moving tectonic plates of a globalizing world.

Current discourse on the role of the legal within society is understandably located within the architecture of the nation-state. In culturally and religiously hybrid societies, Rawls's notion of overlapping consensus has tremendous currency. Yet, Rawls himself is subject to an aporia symptomatic of liberal discourse writ large. Questions abound as to whom within a Rawlsian society has agency to participate in such legally related narratives as justice. After all, Rawls himself appears to have constricted the scope of participatory eligibility from the person to the citizen. Inclusion, therefore, becomes a contested commodity even in so-called liberal, tolerant polities.[2]

Inclusion and its concomitant negotiation of tolerance is of great concern for those commenting on the future of democracy, qua, liberal democracy. German scholar Jürgen Habermas accepts that in a postsecular society, religions and even religious difference do exist within a shared secular space. Yet, religious registers require limits within the social space to the ethical, not political, imperative. As a prerequisite for participation within the discursive space, the burden upon religious communities to walk a fine, if at all existent, tightrope between the ethical and the political, is precarious to the point of impossible. It is the religious narrative that must prove it can adapt to the surrounding society in order to earn its tolerance. Notwithstanding such a potential challenge and onus, Habermas also states that,

[2] See Rawls, John. (1972) *A Theory of Justice*. Cambridge: Harvard University Press and Rawls, John. (1999) *The Law of Peoples*. Cambridge: Harvard University Press.

"There can be no inclusion without exclusion."[3] This acknowledgement suggests latitude for the justification to exclude particular religious subgroups in favor of inclusion of religion in its broad abstraction. Religions that espouse an ethical focus that is congruous to the particular society in which it is located can find space, and ideally, agency within such a paradigm, provided other factors for exclusion based on latest or overt prejudices are curbed and/or overcome.

The 11th Century Islamic Scholar Abu Hamid Al Ghazali enumerated the *Maqasid as-Shariah*, the five foundational goals in Islam, as focusing on the preservation of religion/faith (*din*); life (*nafs*); lineage/progeny (*nasl*); intellect (*aql*) and property/wealth (*maal*).[4] As such, these goals are largely focused upon the individual. The question requiring assessment is how many of these goals require the state as the primary, if not exclusive vehicle of implementation and enforcement. Some will in fact contend that Shariah is not synonymous with Islamic law in the sense that the former is merely an interpretation of law that legitimizes and mandates state authority to enforce, often for its own perpetuation.

Within a state model, Islamic law may be applicable to all members of that society, irrespective of the religion to which they subscribe. Each religious community, arguendo, shares a common ideological affinity vis-à-vis the "*Maqasid as-Shariah"* of their respective faith tradition as it pertains to a functional, righteous, just society. Even Habermas concedes that, "Ideally, legal rules, too, regulate a matter of

[3] Habermas, Jürgen. ((2006) "Religious Tolerance- The Pacemaker for Cultural Rights" in *The Derrida-Habermas Reader*. Edinburgh: University of Edinburgh Press., 197.
[4] Auda, Jasser. (2008) *Maqasid Al-Shariah as Philosophy of Islamic Law*. Herndon: The International Institute of Islamic Thought.

equal interest of all those affected and to that extent give expression to generalizable interests."[5]

A key distinction in understanding the forces that govern humanity is the distinction between law, which governs society and ethics, which governs the individual. For the purposes of the Muslim in how he/she navigates everyday life, it is the ethical imperative that allows for adherence to divine edict. Moreover, this focus allows the believer to be a Muslim even when operating outside a state that ostensibly codifies Islamic law. This engagement is deeply rooted in Islamic history, as the Prophet adhered to divinely prescribed tenets during the Meccan period, in the twelve years that commenced with the first divine transmission, according to Islamic tradition in 610, CE. The establishment of the first Muslim state in Medina (622, CE) certainly allowed for Islam to be implemented and enforced by a government apparatus, but it was hardly a *sine qua non* for the aspects of religion of greatest concern for the believer or for the furtherance of the *Maqasid as-Shariah*. A large segment of Islamic law, especially that which is of chief concern to the vast majority of Muslims, is what may best be described as personal law. This includes liturgical requirements such as prayer, fasting, alms-giving, etc. It also involves hygiene and matters of personal development, such as dietary guidelines. Perhaps the area of law that may be regarded as requiring state intervention is family law, with marriage, inheritance, divorce and custody as critical issues. It is difficult to justify the need for the state to involve itself in the first two categories; an argument may be made for

[5] Habermas, (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press, 154.

family law to be arbitrated by the state but this was not always the case in Islamic history. Much of family law was procured between families and individuals, often with clerical, not state intervention. Marriages, for example, did not necessarily require state sanction as they did not involve a relationship with the state as modern marriages do, with distinctions of economic and political consideration made based upon marital status, e.g. income tax rates, public benefits, etc. Clearly, the enforcement of Islamic law is not contingent upon state action; Muslims have and continue to practice their faith in a self-policing manner.

While the implementation of Islamic law may not require state action, the historical development of Islamic law suggests that state involvement was inevitable from the inception of Islam as a religio-political phenomenon. The Prophet's establishment of the first state in 622, CE represented the confluence of political, theological and legal authority. After his death in 632, the successor political leadership of the state worked with the religio-judicial authority (*ulema*) to codify and enforce the law for a polity that began to expand throughout the Arabian Peninsula and beyond at a frenetic speed. Historically, the law-state nexus resembled the separation of powers evident in the American system, with the Caliph, the titular head of the Muslim community, served as the head of the "executive" branch, being responsible for the enforcement of law. The *Ulema* had a role in "legislation," provided it was extraneous and not in violation with the sacred law. The *qadis*, or judges, were responsible for the interpretation of the law.[6]

[6] See Hallaq, Wael. (2005) *The Origins and Evolution of Islamic Law*. Cambridge: Cambridge University Press.

The unforeseeable rate of expansion of Islamic rule from the 7th to the 15th centuries brought with it a host of challenges and opportunities. It augured the absorption of new, conquered peoples with a tremendous degree of cultural and religious diversity. It also involved the appropriation of existing legal practices that were not anathema to Islamic tenets, as with the adoption of the Byzantine tax system by the Caliph Umar after his conquest of Damascus in 635, CE.

Islamic political expansion brought with it the concomitant extension of Islamic law and its enforcement in the empire. But it also created the obligation to protect and preserve the agency, authority and authenticity of religious minority communities. Deference to these groups was best exemplified by the Millet system during the Ottoman Empire.[7] Each religious minority community, including minority Islamic sects, received the Sultan's sanction to designate its own leadership and to maintain full authority over its own personal religious law. The state would not interfere in matters of an intra-faith nature, nor would it be responsible for legislating and imposing religious laws upon each respective community. On issues that occurred between faith communities, the state would be the arbiter of such disputes and/or transactions.

The essentialism and eternality of the nation-state, the fundamental socio-political entity of the modern era, in which liberal democracy is such a vital cornerstone, are under scrutiny for their viability and necessity. For Habermas,

[7] The Ottoman Millet system allowed each religious minority community to designate its own authority and gave that individual plenipotentiary power on behalf of the Sultan to conduct all religious affairs for his community, especially within the realm of personal (family law) matters, liturgy, matters of religious observance, demarcation of the community's religious calendar and intra-religious disputes.

> "Today, as the nation-state, finds itself challenged from within by the explosive potential of multiculturalism and from without by the pressure of globalization, the question arises of whether there exists a functional equivalent for the fusion of the nation of citizens with the ethnic nation."[8]

As Habermas strives to make sense of the forces of globalization and their impact on democracies, while simultaneously attempting to maintain a socio-political model whose elemental ontologies are now being scrutinized and even confronted, he fears that the battle may already have been lost, contending, "The nation-state, conscious of its historical achievements, stubbornly asserts its identity at the very moment when it is being overwhelmed, and its power eroded, by processes of globalization."[9] The irony is not lost that Habermas accuses the nation-state of a level of obduracy detectable in his own stubborn effort to keep it buoyant. Globalization and its impact on the nation-state is a reality, and one that has implications well beyond the mere philosophical meditations of political engagement.

Illiberalism brings two major challenges to humanity: first, the ability for peoples to address, acknowledge and adapt to cultural and civilizational pluralism. As technology, communications and migration catalyze diverse engagement, the recognition of human and civil rights will similarly increase, all the while confronting the inevitable reactions of ethnochauvinism, sectarianism and tribalism. Current lurches toward hypernationalism, neofascism and nativism are rejoinders to the postnational, transnational nature of illiberalism. In addition, illiberalism is facilitating the rise of a new dimension of science, including the development of

[8] Habermas, Jürgen. (1999) *The Inclusion of the Other*. Cambridge: MIT Press, 114.
[9] Id., 127.

artificial intelligence and automation on an unprecedented scale. With the prospect of technological singularity occurring within a generation, the very definition of personhood will be called into question. The impact on dignity and identity may be to reduce humankind to a polyglot machine measured only by a highly utilitarian calculus. Each of these issues will affect the Muslim world and the need for Islamic law to address these weighty matters is critical. The inquiry among many is whether Islamic law has the mechanisms to cope and realign itself to paradigm shifts these emergences will create.

The purpose of law is to regulate society; the purpose of ethics is to regulate the individual. Societies that have highly structuralized mechanisms of law tend to provide clear, explicit parameters for what is expected of the individual and its engagement with society, with the concomitant apparatus for enforcement of that legal corpus. Conversely, in the absence, or relatively minimal presence, of such structure, the onus- and agency- to adhere to the legal injunctions obligated upon the individual rests upon that individual. The ethical, therefore, eclipses the legal as the primary modality of regulation.

While ideally serving as a model for an ethical, productive life that adheres to divinely ordained principles of social and personal conduct, Islamic law has been deployed as the law of the community but also has been enlisted by the state for its legitimizing power in support of political authority. There is no dearth of evidence of regimes that cynically utilize Islamic law to further their own ends of state control under the guise of protecting the public from itself. Currently, religion- and religiously related law- is being leveraged by various state actors against the ever-encroaching

forces of illiberalism in homogenizing cultural and legal modalities in their respective countries. The resulting expression is religious nationalism.

Colonialism's encounter with Islam achieved two significant objectives. It unmoored Muslim society from its anchoring in Islamic law and ruptured the organic evolution of the latter to address the dynamic changes of the former, including the development of and evolution toward democracy, something actively retarded by colonizer forces. It also developed a deep confession of inadequacy among Muslim societies and within Muslim leadership that western legal systems from somehow superior. In several Muslim countries during the 19th Century, the implementation of western-inspired legal systems was met with a myriad spectrum of societal resistance due to their inevitable impact upon the cultural morphology of the countries in which they were introduced. Equally damning and deleterious was the Islamicization of existing secular, or quasi-secular, legal codes, ostensibly to mollify traditionalists, who sought a greater role for Islamic law, but were complacent to have it institutionalized at a superficial level. This has been particularly evident since the late 20th Century, with the decline of such movements in the Muslim world as pan-Arab nationalism and the rise of exported Wahhabism and other forms of Islamic fundamentalism. Such post-colonial interventions of law and state perpetuate and codify the notion that state implementation of Shariah is a *sine qua non* for the application of Islamic law. This would be an odd, even untenable conceit given how much of Islamic law is personal and the fact that the vast corpus of so-called secular law is "Shariah compliant."

In examining the rise of religious nationalism, it is important to identify in which states this phenomenon is expressed, whether it is a function of the codification of religious law and whether the state and its legal modalities is a matter of religio-cultural and demographic realities. Among Muslim countries, Iran and Saudi Arabia often are defined, or self-defined, as religious states. That both countries proffer an essentialization of Islam as the state religion is explicit, but it appears that such a construction is further informed by demographic realities, i.e. overwhelmingly Muslim societies, and by an assumed general will akin to Rousseau's conception of the social contract, itself predicated upon the organization of states along homo-religious, homo-cultural/ethnic, racial lines of demarcation.[10] It is important, therefore to gauge whether the implementation of Islamic law in these states requires state intervention or whether the population would naturally adhere to a certain quantum of Islamic law. In addition, neither Iran nor Saudi Arabia assert a religious nationalism in the classical sense, whereby the state is the ultimate arbiter of religious law; in fact, and despite the powerful role of the religious establishment in both countries, the government apparatus is still distinct from the sacro-juridical.

An understanding of the position of Islamic law in Muslim states may be elucidated in comparison to non-Muslim states that identify closely with a particular religious tradition. Debates abound over whether Israel is a Jewish state. Would such taxonomy suggest a move toward the codification of Hebraic and/or Talmudic law? While some Orthodox and ultra-Orthodox Jews may answer in the affirmative, the prospect would doubtless raise objections among reform and secular oriented Jews.

[10] Rosenblatt, Helena. (1997) *Rousseau and Geneva*. Cambridge: Cambridge University Press.

In addition, such a religious nationalism, if so sought, may be problematic given the absence of religious homogeneity in Israel, where the Jewish and non-Jewish populations approach an approximate parity.

With its current lurch toward *Hindutva*, India provides an additional assay for the phenomenon of religious nationalism.[11] The election of Narendra Modi in 2014 and the emergence of his Bharatiya Janata Party as the dominant political force in the Indian parliament have evoked a newfound departure from India's secular orientation, emblematic of the diverse nation's social and legal construction since its independence seventy years ago. Yet, Prime Minister Modi has asserted a robust Hindu narrative, and allegations of a state endorsed religio-chauvinism persist. Hindus constitute the overwhelming majority of India's population, and certainly far from all support Modi or his promotion of *Hindutva*. It is difficult to comprehend a state that would be governed and/or dictated by Vedic law.

While there does not appear to be a nexus between religious law and the indispensability of the state to procure it, religious law is nonetheless leveraged as a validator of the majority demographic's dominance as the essential marker in a nation's identity construction. Ironically, it is illiberalism that is expediting the promulgation of this notion as some nations, particularly those that are multi-cultural, seek an identity to assert and present in a world where lines of distinction become increasingly nebulous.

[11] According to the Oxford English Dictionaries, *Hindutva* is an ideology seeking to establish the hegemony of Hindus and the Hindu way of life.

Sociologist Anthony Smith argues that a national identity requires three features. The first is the existence of a 'historical land.' Smith argues that another feature of a 'nation,' qua national identity is the *patria*, "a community of laws and institutions with a single political will." Lastly, Smith contends the need for a legal equality of the members of a political community.[12] While these characteristics may be emblematic of some current perspectives in Judaism and Hinduism, they are absent from the narratives of Islam and Christianity, thus obviating the prospect of a "national identity." They share three common characteristics: they are both proselytizing faiths; they maintain an assertively universalistic focus and they are unmoored to geography.

In Christianity, there are few, if any, narratives that espouse a sense of global community; to the contrary, the segmentation of the world and Christian societies into binaries such as East vs. West and Global North vs. Global South militates against an organic construction of unified identity. By contrast, the Islamic "world" bears the constancy of the *Umma*, which has been a compelling and cohering concept, central to the faith community since the very inception of Islam as a religion, a socio-political entity and a global phenomenon. The *Umma* has survived fourteen centuries, through the rise and fall of empires, the devastating impact of colonialism, and even the abolition of the Caliphate. Now, the post-colonial era is interesting, thanks to illiberalism, a potential post-national architecture to the world.

[12] Smith, Anthony D. (1991) *National Identity*. Reno: University of Nevada Press, pp. 9-11).

For Smith, "the place of law in the Western civic model is taken by vernacular culture, usually languages and customs in the ethnic model."[13] Islam's diversity and transcontinental reach is testament to the absence of reliance on a model that resembles the post-Westphalian, Western paradigm. Arabic may be the *lingua sacra* of Islam, but Islamic law has always adapted to and adopted local cultural particularities, provided they were not inimical to Islam's core theological tenets and objectives for an ethical and functional society.

Smith's invocation of Rousseau's *patria* has resonance within the Muslim concept of the *Umma*, but the nation-state is not a requirement for the development and enforcement of law.[14] In fact, Islamic "law" as a regulatory device upon Muslims emerged concurrent to the religion's establishment in Mecca and continued unabated for the twelve years under which Muslims lived as a marginalized, persecuted community. The codification of Islamic law did not occur until the Abbasid dynasty, the fourth significant political era in Islamic history after the Prophetic, Caliphal and Umayyad eras.

A common inquiry is that given the prominence of the *Umma* as a trans-national religio-social abstraction, does Islam require a Caliphate, a global polity with a recognized central authority to implement its legal system. While Islamic society in some places may appear to suffer from a certain amount of dysfunctionality, it is unclear whether a Caliph would or could remedy the maladies, either through or without enforcement mechanisms, any more readily or effectively than, say, the Pope

[13] Id., at p.12.
[14] For further reading on Rousseau's concept of *patria*, see Rousseau, Jean-Jacques Rousseau. (1978) *On The Social Contract*. Boston: St. Martins Press.

can for Catholic societies. More critically, the self-enforcement mechanism of a large aspect of Islamic law by the individual obviates such structural redevelopment, particularly as the world shifts away from such models of authority.

According to Abdulaziz Sachedina, Islam not only is compatible with democracy, it possesses the essential components of counsel (*shura*) and consensus (*ijma*) that democratic societies need.[15] In addition, as a complete socio-political religious system, Islam can furnish, as Peter Berger, describes, a plausibility structure to provide society with a totalistic, functional model that creates stability and flourishment.[16]

Despite the calamitous trauma that has befallen the Islamicate in the past two hundred years, with colonization and imperialism rupturing its efforts to engage in an organic interaction with western emanating socio-political developments, Muslim societies are equipped with fundamental values and systems that can allow it to not only implement liberal democratic modalities within them, but also rectify existing, dysfunctional democracies. A strong legal system affirms a strong commitment to the rule of law and justice, which Islam possesses. It also possesses a long, sustained tradition of pluralism and tolerance, with the dignity of the individual centering social formations. As illiberalism threatens democracies across the world, Islam and Muslims are well positioned, both within their respective locales and also as members of a two billion strong Umma, to protect and even save democracy from itself.

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[15] Sachedina, Abdulaziz. (2001) *The Islamic Roots of Democratic Pluralism*. New York: Oxford University Press.

[16] Berger, Peter. (1967) *The Sacred Canopy*. Garden City, Doubleday.