

REVIEW ESSAY

ISLAMIC POLITICS AND SECULAR POLITICS: CAN THEY CO-EXIST?

ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A. By 'Abdullahi Ahmed An-Na'im. Harvard University Press 2008. Pp. 324. \$35.00. ISBN: 0-674-02776-0.¹

*Reviewed by Mohammad Fadel**

Professor Na'im, over a period of more than twenty years, has been thinking, writing and lecturing on the relationship of international human rights law and the *Shari'a*—Islamic law.² Throughout this period he has expressed allegiance to two moral and intellectual traditions that are typically viewed as in competition if not outright conflict:³ an international legal system based on a liberal conception of universal human rights and Islam as a religious system that also makes universal claims. One can sense a palpable feeling of relief in the book's first sentence when the author declares that "This book is the culmination of my life's work, the final statement I wish to make on issues I have been struggling with since I was a student at the University of Khartoum, Sudan, in the late 1960s." (vii)

1. The reviewer participated in a pre-publication workshop with the author in January 2007.

* Canada Research Chair for the Law and Economics of Islamic Law and Assistant Professor of Law at the University of Toronto Faculty of Law.

2. 'Abdullahi Ahmed An-Na'im has written numerous books dealing with Islam and human rights, or Islam and constitutionalism, *see, e.g.*, 'ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990); 'ABDULLAHI AHMED AN-NA'IM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (1992); 'ABDULLAHI AHMED AN-NA'IM, et al., HUMAN RIGHTS AND RELIGIOUS VALUES: AN UNEASY RELATIONSHIP? (1995); 'ABDULLAHI AHMED AN-NA'IM, ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK (2002); 'ABDULLAHI AHMED AN-NA'IM, AFRICAN CONSTITUTIONALISM AND THE ROLE OF ISLAM (2006). He also has numerous articles to his credit, including, for example, 'Abdullahi Ahmed An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987); 'Abdullahi Ahmed An-Na'im, *Islam and International Law: Toward a Positive Mutual Engagement to Realize Shared Ideals*, 98 AM. SOC'Y INT'L L. PROC. 159 (2004); 'Abdullahi Ahmed An-Na'im, *Globalization and Jurisprudence: An Islamic Law Perspective*, 54 EMORY L.J. 25 (2005); 'Abdullahi Ahmed An-Na'im, *Shari'a and Positive Legislation: Is an Islamic State Possible or Viable?*, in 5 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 29-42 (Eugene Conran & Chibli Mallat eds., 1998-99).

3. *See, e.g.*, David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819 (1993).

Na'im could not have persisted in this task for so long, however, without genuine dedication to the advancement of both a universal system of human rights, and the promotion of a religious conception of Islam that would enable Muslims to endorse the emerging international human rights regime on terms that would not compromise their moral integrity. Because of his leadership, dedication, and courage in working toward the realization of both of these ends, I would genuinely be disappointed if this work is, in fact, his last word on this subject. It is unlikely that the problems that have preoccupied him over the last twenty years are going to disappear any time soon. And I am extremely doubtful that, as long as these problems persist, he would have nothing significant to add to their conceptualization and, one hopes, their resolution.

It is a testament to Na'im's importance in this field that the publication of *Islam and the Secular State* prompted almost immediately a vibrant series of thoughtful academic exchanges on his arguments among various scholars of religion, historians, political theorists and social scientists.⁴ And as evidence that Na'im remains vitally engaged in the project of reconciling human rights law and Islam, Na'im himself has published a reply to the many academics who have written about his book.⁵ In the hope, therefore, that Na'im will continue to be an active participant in the ongoing conversation regarding Islamic commitments and human rights law, my review joins the already vibrant discussion of the book's themes.

My review takes up the author's express normative invitation to Muslims to take seriously the Islamic desirability of a secular state (vii)—defined for purposes of his argument as a state which is neutral with respect to both religion and non-religion, and adheres to a constitution that protects human rights—by considering whether Na'im's arguments enjoy sufficient Islamic plausibility to win the support of substantial numbers of *believing* Muslims.

This review, therefore, will proceed in two parts. The first will set out an overview of Na'im's arguments and the second will set out some possible Islamic objections to those arguments. The conclusion will consider the extent to which Na'im could respond to those arguments

4. More than ten reviews of *Islam and the Secular State* have already been published on the blog *The Immanent Frame*. See *The Immanent Frame: Islam and the Secular State*, http://www.ssrc.org/blogs/immanent_frame/category/islam-and-the-secular-state/ (last visited Dec. 13, 2008).

5. Posting of 'Abdullahi Ahmed An-Na'im to *The Immanent Frame*, http://www.ssrc.org/blogs/immanent_frame/2008/07/24/call-it-x/ (July 24, 2008, 07:49 EST) (entitled *Islam and the Secular State: "Call it X"*).

using the resources of the Islamic tradition itself. The second part of the review will show that at many critical junctures in his Islamic argument for a secular state, Na'im makes claims about Islam that, from the perspective of traditional Islamic theology, are extremely controversial and as a result, threaten to undermine the likelihood that his principal argument—that a religiously neutral state is Islamically desirable—will persuade large numbers of Muslims. The conclusion will argue that Na'im, if he were to reformulate some of these controversial arguments about the nature of Islamic commitments so that they are in greater conformity with historically orthodox Islamic commitments, or if his argument were to recognize explicitly orthodox objections to his arguments, he would have a much greater chance of winning support for his project from within the orthodox Muslim community.⁶ I believe he can show greater appreciation for these orthodox arguments without threatening either the goal of a religiously-neutral state or his commitments to a universal system of human rights.

One group of critics has already expressed their skepticism of Na'im's Islamic arguments, suggesting they are insufficiently grounded in Islamic revelation to be taken seriously by Muslims.⁷ I too have my own doubts regarding the Islamic plausibility of Na'im's arguments, but not because they are insufficiently grounded in Islamic revelation. Indeed, in some ways Na'im is also a scripturalist: he argues against the normativity of the Islamic tradition in favor of continuous individual interpretations of revelation. (15-16)

In my opinion, however, revelation is ambiguous (but not silent) with respect to questions of governance. Accordingly, it is not plausible to believe that revelation, on its own, can provide a solid foundation for an Islamic theory of the secular state because it could also provide a plausible basis for a religious state. Muslims, moreover, do not read revelation in a vacuum: a learned Islamic theological, ethical and legal tradition that has existed for well-over a millennium is already in place that provides Islamic reasons to object to at least some features of a

6. On the importance of distinguishing theological from legal arguments in the Islamic context, see generally Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J.L. & JURISPRUDENCE 5 (2008), and Mohammad Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 CHI. J. INT'L L. 1 (2007).

7. See, e.g., posting of John Esposito to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/08/25/the-challenge-of-creating-change/ (Aug. 25, 2008, 15:30 EST) (entitled *Islam and the Secular State: The Challenge of Creating Change*); posting of Daniel Philpott to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/07/14/arguing-with-an-naim/ (Jul. 13, 2008, 07:37 EST) (entitled *Islam and the Secular State: Arguing with An-Na'im*).

secular state. In order to be plausible, an Islamic argument for a secular state must be able to overcome objections to this project that could arise out of that tradition by demonstrating, presumably, that those elements within the Islamic tradition that are consistent with the ideal of the secular state are more faithful representations of Islamic ideals than those that do not.

In order to resolve contradictions between the Islamic tradition and the requirements of a secular state, I believe it is necessary to explain to Muslims why the views of their ancestors may have been the product of mistaken readings of revelation, or why those views may be qualified in a manner that makes them irrelevant to assessing whether a secular state is Islamically desirable. Na'im, however, expressly eschews any attempt to engage in any exegetical or hermeneutical analysis of Islamic sources. (viii)

It might be thought that an emphasis on the learned traditions of Islam is too theoretical and therefore not necessarily representative of how actual Muslims conceive of the relationship of religion to the state. In this case, some might think it would be preferable to use the empirical methods of the social sciences, including statistically-significant polling data,⁸ to demarcate the median Muslim's reaction to the prospect of a secular state. I believe, however, that an explicitly doctrinal approach that uses historical orthodoxy as a proxy for baseline Islamic commitments (and hence can serve as a proxy for Muslim objections to Na'im's project) rather than alternative methods such as polling data or the arguments of contemporary Muslim reformers is superior because it requires the argument to answer plausible Islamic objections to the project of a secular state.⁹ Because I assume a substantial number of Muslims derive, and for the foreseeable future will continue to derive, their normative understandings of Islam from historical conceptions of Islamic orthodoxy, it is important to take into account orthodox objections to any theory of Islamic reform before assessing its plausibility. Conversely, to the extent that a reform theory could be viewed as satisfying historical standards of orthodoxy, then one can, to that extent, be justified in expecting that such a theory would be persuasive to Muslims. In other words, an Islamic theory of the secular state should aim for convincing Muslim skeptics, not those who already

8. See, e.g., posting of John Esposito to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/03/02/who-speaks-for-islam/ (Mar. 2, 2008, 13:04 EST) (entitled *Rethinking Secularism: Who Speaks for Islam*).

9. See Fadel, *The True, the Good and the Reasonable*, *supra* n. 6 at 11-14 (2008) (giving a defense for using historical doctrines in this fashion).

accept the desirability of a secular state.¹⁰

There is, however another advantage to be gained from taking the doctrinal approach that I advocate: to the extent that Na'im wishes to include non-Muslims in the process of negotiating the future of the Shari'a (viii), it is much easier for them to do so in the capacity of historians of ideas or political philosophers. The critical study of historical doctrines encourages a critical distance and objectivity that debate over current political controversies necessarily lacks. Accordingly, if the goal is to provide a principled reconciliation of human rights law to Islam, then we need a framework that is sufficiently abstract to allow for critical discussion without implicating any particular interests. Careful analysis of historical doctrines, I argue, provides a relatively neutral domain compared to the realities of the post-World War II international order where power disparities between non-Muslim and Muslim polities have led to the over-politicization of any discussion involving issues such as Islam and liberalism and Islam and international law.¹¹ Applying an explicit methodology for the determination of the content of Islamic doctrinal commitments, moreover, has the added benefit of reducing the ethical and political dangers that can result from overly results-oriented readings of the Islamic tradition.¹²

AN OVERVIEW OF ISLAM AND THE SECULAR STATE

The structure of *Islam and the Secular State* discloses as much about Na'im's theoretical approach to the problem of the relationship between Islam and modern human rights law as does his explicit discussion of his approach: one that is highly pragmatic, but that is

10. Posting of Saïd Amir Arjomand to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/08/19/preaching-to-the-converted/ (Aug. 19, 2008, 09:28 EST) (entitled *Islam and the Secular State: Preaching to the Converted*).

11. Some commentators have pointed out that Muslim liberals occupy a politically precarious position, a fact that undermines their claims to Islamic authenticity. Lama Abu-Odeh, *The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 808 (2004). An-Na'im has himself made the point that inability of the international system to bind the United States to the norms of international law or to solve the Palestinian problem undermines the very idea of international law, including international human rights law. An-Na'im, *Islam and International Law*, *supra* note 2, at 8.

12. Khaled Abou El Fadl, *The Unique and International and the Imperative of Discourse*, 8 CHI. J. INT'L L. 43, 43 (2007) ("Coherent theoretical stands are often the only safeguard against result-oriented activism. When human rights activists and religious activists act without the restraint of reflective and self-critical pauses, they often end up violating the moral space in which human beings function."). To this risk should be added the presence of anti-Muslim groups who, in support of their conviction that Islam and Muslims constitute an ever-present danger, mine the Islamic tradition seeking only those elements most incompatible with modern sensibilities.

working consistently toward a clear moral end. Na'im constructs an argument based on an eclectic set of sources: sociology of religion, Islamic history, his own conception of Islamic theology, liberal political philosophy, political science and the lived experience of Muslims and non-Muslims sharing the same political space over the last few hundred years. This eclecticism is reflected in the contents of the book's six substantive chapters: the first three of which form the "theoretical" structure of Na'im's argument while the last three consist of various instantiations of how, in his view, his eclectic approach to conceptualizing the relationship of Islam to the values of "constitutionalism, human rights and citizenship" (40) provides a useful normative framework for criticizing the experiences of three different states' attempts at regulating the role of *Shari'a* in their states.

The best way to read the book, however, may not be in the order of the chapters presented by the author. Instead of beginning with Chapter One—*Why Muslims Need a Secular State*—it may make more sense for the reader to begin with Chapter Three—*Constitutionalism, Human Rights and Citizenship*—which lays out Na'im's theory of the state. From a normative perspective, Na'im espouses a liberal theory of the state as legal entity that comes into existence by virtue of a constitution that both empowers the state to govern and limits the kinds of actions it can take. While there can be pluralism in constitutions, this pluralism is not infinite. Instead, all constitutions are bounded by human rights norms because, in his words, "failure to comply with these principles is simply *ultra vires*, beyond the capacity of state institutions." (40) These liberal underpinnings to the state, therefore, are categorical and not amenable to "negotiation," unlike the values of the *Shari'a* whose place in society can be legitimately negotiated through the institutions of the liberal state. Accordingly, a state is not free to have a constitution that establishes discriminatory classes of citizenship, or that, for example, empowers one religion over others. An Islamic state, therefore, at least to the extent it is defined as a state whose purpose is the application of the historical *Shari'a*, could never be a legitimate state.

This seems to create a moral paradox: the normative values of the liberal state are non-negotiable, yet so are the values of the *Shari'a*. As Na'im puts it, Muslims are always under a moral obligation "to observe *Shari'a* as a matter of religious obligation," whether they are "minorities or majorities." (3) These two sets of normative duties cannot be reconciled in the present, however, because as a historical matter, the *Shari'a* espoused values such as male guardianship of women (*qiwama*), sovereignty over non-Muslims (*dhimma*) and wars of expansion (*jihad*)

which are irreconcilable with the requirements of constitutionalism, human rights and citizenship. (39) Accordingly, Muslims must

reinterpret Islamic sources [doctrines] in order to affirm and protect the freedom of religion and belief [these norms]. This is my position as a Muslim, speaking from an Islamic perspective, and not simply because the freedom of religion and belief is a universal human rights norm that is binding upon Muslims from the point of view of international law. (117)

Why the *Shari'a* is amenable to reinterpretation in a manner to make its doctrines consistent with the non-negotiable norms of the liberal state is essentially the subject of Chapter One—*Why Muslims Need a Secular State*.

Na'im's normative conception of the state, therefore, requires it to be neutral with respect to religion, and that political discourse be motivated by "civic reason." While it is not quite clear what Na'im means by the term "civic reason," it appears intentionally designed to evoke the general values of public reason as espoused by John Rawls and Jürgen Habermas but without necessarily adopting all the philosophical baggage associated with the term. (97) Na'im's use of his own term, civic reason, is indicative of his eclecticism: he is prepared to appropriate various normative strategies to build his argument without necessarily concerning himself with reconciling all the pieces of his argument from a more rigorous philosophical perspective. Nevertheless, it is clear enough what Na'im means by "civic reason": legitimate political discourse must strive to limit itself to arguments that are consistent with the non-negotiable values of constitutionalism, citizenship and human rights, because such limitations are necessary to ensure that politics remains accessible to all citizens. (7)

As a practical matter, Na'im would permit Muslim citizens (or other religious citizens, for that matter) to advance policies that are part of their religious world view, provided that such policies are not grounded exclusively in Islamic religious norms. (7-8) This stance places him squarely outside the consensus of contemporary Islamic political movements who seek to make the state a tool for the promotion of substantive Islamic values, and even many nationalist movements in the Islamic world which supported the adoption of Islam as the state religion even though they reject the notion of an Islamic state or do not apply *Shari'a* as part of their domestic law. It also means, however, that Na'im rejects *laïcité*,¹³ in both its Turkish and French versions, as

13. *Laïcité* is often translated as "secularism," but is a complex doctrine relating to the relationship between the state, the citizen, religion and equality in connection with maintaining a

violations of the principles of the requirement of the state to be neutral toward religion. (41, 203-14)

Na'im's argument is not limited, however, to a normative conception of the state. He also has a positive conception of the state, for which he uses the term "politics." In language that is evocative of James Madison in Federalist no. 10,¹⁴ Na'im conceives of the body politic as being made up of numerous interest groups which, at different times and circumstances, may make alliances with or against one another in order to advance their preferred policies. Politics, being the realm of interest, is subject to the threat that one or two groups could capture the state, thus converting the state into a tool for the advancement of that group's interests, rather than the advancement of the public good. One strategy to prevent this from occurring would be to exclude groups with illegitimate policy goals, e.g., Islamist political parties that lack a sufficiently reformed doctrine of the *Shari'a*, from the political process. Na'im's analysis of the histories of India, Turkey and Indonesia, however, suggests that this is impossible, or even if possible, comes at too high of a price to the non-negotiable values of constitutionalism, citizenship, and human rights. Accordingly, he affirms that religion in general, and Islam in particular, has a legitimate political role to play, even though it—at least to the extent the politically problematic aspects of Islam continue to be affirmed—could threaten the neutrality of the state. Nevertheless, like any other faction, precautions must be taken to prevent it from taking over the state.

To protect the state's neutrality against the threat of capture by religion, Na'im appears to adopt two strategies. The first appears to be the optimistic assumption that Islamic political parties, operating in the context of a regime that respects the values of constitutionalism, citizenship and human rights will themselves only make political demands that are consistent with the legitimate political values of the state for pragmatic reasons, or that they will undertake reforms of Islamic doctrines to make them more compatible with these values. While this optimism may be dismissed by some observers as unduly optimistic, Na'im cites the historical examples of Islamic movements in both republican Turkey and Indonesia for the proposition that the proper set of political institutions can "mediate" the inherent tension that exists between the liberal norms of constitutionalism, citizenship and human rights, and the historical norms of the *Shari'a*, both of which—to their

democratic public space. JOHN RICHARD BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 2-3 (2007).

14. The Federalist No. 10, at 40 (James Madison) (Terence Ball ed., 2003).

respective adherents—are equally non-negotiable. In any case, what practical alternative do we have? The only other choice would be self-defeating, perhaps even bloody confrontation, because as Na'im puts it, "I know that if I, as a Muslim, am faced with a stark choice between Islam and human rights, I will certainly opt for Islam." (111)

Although Na'im does not say so explicitly, his account of the *Shari'a*'s normative relationship to the state (none) and its role to politics (significant) seems to assume the existence of an intermediate set of state institutions that do not reflect perfectly normative liberal doctrines regarding constitutionalism, citizenship and human rights, but nevertheless create enough space for genuinely competitive and pluralistic politics. His positive account of the state, therefore, is consistent with Madison's argument in Federalist No. 10: ideally, perhaps, it would be desirable to eliminate the existence of self-interested factions (read: religiously-inspired political movements) from the body-politic, but one can only eliminate such movements by extinguishing liberty, with the result that political life itself would be destroyed, not just factional religious politics. This is what he means, I believe, with his persistent call throughout the book for the state to "mediate" or "negotiate" the role of the *Shari'a* in politics: by reducing it to one of many interest groups in civil society, the state can manage the contradictions between a normative politics that is not in need of religion, and a citizenry for whom religion is one of the most important sources of political inspiration.

Within an actual Madisonian state (in contrast to an ideal liberal state), Na'im must believe that it will be possible for the relatively small but significant set of Islamic doctrines that are in conflict with constitutionalism, citizenship and human rights to be reformed and internalized by religiously observant Muslims. It would seem, therefore, that the legitimate domain of religious politics would necessarily decrease with the passage of time as Muslims, in active interaction with constitutional orders that mediate the relationship of religion to the state, reform traditional Islamic doctrines that are politically problematic to make them more substantively consistent with the moral underpinnings of the liberal state and a liberal international order built on universal human rights. I believe this reading of Na'im's argument is the only way to reconcile his argument that Muslims must revise their non-conforming historical doctrines of the *Shari'a* with his argument that they must do so for what are genuinely Islamic reasons that are unrelated to power disparities between Muslim states and the west.

ISLAMIC OBJECTIONS TO NA'IM'S ARGUMENT

Na'im's argument for the adoption of a policy of mediation by the liberal state with respect to Islam rather than one of confrontation is premised on the assumption that Muslims will reform non-conforming Islamic doctrines sufficiently so that for their own Islamic reasons they would respect the state's religious neutrality. Muslims, of course, must subjectively believe that these doctrinal revisions are genuinely part of (or consistent with) their commitments as Muslims who adhere in good faith to the *Shari'a*.

This is a normative task of Islamic justification, and Na'im sets out to provide that Islamic justification in Chapter One—*Why Muslims Need a Secular State*—and Chapter Two—*Islam, the State and Politics in Historical Perspective*. He appears to provide at least three Islamic arguments for the proposition that Muslims should support a religiously neutral state rather than a state that takes as its purpose the application of the *Shari'a*. One of the arguments is normative (and explicitly theological). The second argument, although epistemological, “sounds” in Islamic theology, and thus raises profound theological implications. The third argument is historical. I will describe each argument below, followed by an “orthodox” response to his argument.

Religious Freedom

Na'im begins his argument with a very strong statement emphasizing that adherence to Islam must be voluntary in order for it to be Islamically normative, and that only a state that is neutral with respect to religion can guarantee the background conditions of a free and voluntary acceptance of Islam. An Islamic state, however, would provide political and material inducements to adhere to Islam, corrupting the voluntary nature of the choice to be Muslim. (1) Traditional notions of Islamic law and theology would agree with Na'im that only a free and voluntary decision to follow Islam is morally relevant, and accordingly, individuals generally cannot be coerced into becoming Muslims.¹⁵ Na'im, however, goes beyond traditional Islamic teachings regarding the pre-condition of voluntariness for conversion to Islam to argue that voluntariness is a morally required element in all religious acts. (8) Accordingly, a state that applied the *Shari'a* would necessarily be coercing individuals into acting in accordance with religious dictates, something that destroys the religious significance of the act.

15. Fadel, *The True, the Good and the Reasonable*, *supra* note 6, at 31-35.

While orthodox theologians and jurists would no doubt agree with Na'im that the entry into Islam must be free and voluntary, they would disagree that the rule recognizing the validity of only free conversions to Islam necessarily requires that compliance with its detailed rules must be similarly voluntary. In fact, they could very well argue that coercive application of Islamic law is rightful because the act of accepting the truth of Islam, by necessary implication, also entails acceptance of the rightness of its rules.¹⁶ Punishing a failure to obey those rules in this case would be consistent with the Muslim's moral integrity because coercion is being applied in a manner consistent with his own moral convictions. His failure to comply does not represent a genuine conviction, but only a present desire that is inconsistent with those convictions. Accordingly, coercion of Muslims into following Islamic law is conceptually no different from Odysseus' decision to lash himself to his ship's mast to prevent him from heeding the Sirens' call, an act that saved himself, his ship and his crew, despite his fervent desire to go to them once he actually had heard their voices. This is not the case with a non-Muslim of course because the non-Muslim does not accept the truth of Islam. For the non-Muslim then, coercion with respect to following the rules of Islam—all things being equal—would violate the non-Muslim's moral integrity, and therefore is not generally allowed by Islamic law.¹⁷

An Islamic State is Rationally Incoherent

Na'im also argues that the idea of an Islamic state—to the extent it is understood to be a state that applies the Shari'a on the theory that it is God's law—is rationally incoherent. The incoherence of the project of an Islamic state is a result of the fact that human beings do not have direct access to the *Shari'a's* rules. Rather, all rules that human beings attribute to the *Shari'a* are in reality the product of human interpretive effort that inevitably leads to numerous disagreements and controversies

16. An eleventh-century Muslim jurist made precisely this point in a treatise on public law. ABU AL-HASAN ALI B. HABIB AL-MAWARDI, *AL-AHKAM AL-SULTANIYYA* 69 (Dar al-kutub al-'ilmiyya 2000).

17. Fadel, *The True, the Good and the Reasonable*, *supra* note 6, at 61-65 (discussing medieval debates regarding when it is permissible to coerce non-Muslims to comply with Islamic law). Note, however, that while it is possible to show why enforcement of religious rules coercively with respect to believers does not necessarily violate their religious freedom, it requires one to assume, counter to all evidence, that believers are all well-trained theologians who have thoroughly assimilated the doctrines of Islamic theology and ethics. To the extent that such an assumption is unjustifiable, one could construct an argument on Islamic theological grounds that in such circumstances, there is no religious basis to enforce religious law as religious law. Space constraints, however, do not permit me to develop the details of such an argument here.

over the precise contents of the *Shari'a*. In addition, any attempt by a state to apply the *Shari'a* necessarily requires it to select some subset of the rules falling under the category of the *Shari'a*. The result is that what is enforced in all cases is not the *Shari'a*, but rather the political will of the regime that chose to apply one interpretation of the *Shari'a* rather than another. Na'im thus takes the relative indeterminacy of the *Shari'a*'s rules as categorical evidence that is impossible to have a state based on religious law because at the critical point of enforcement politics does the work, not religious truth.

Na'im's radical skepticism as to the possibility of attaining knowledge (in contrast to mere opinions) regarding the content of the *Shari'a* represents a self-conscious rejection of traditional Islamic distinctions between aspects of the *Shari'a* that are known without the need for the skills of legal interpretation, e.g., the sinfulness of drinking grape wine or engaging in fornication (known as the "necessary elements of religion" or rules based on "unequivocal texts"), and those rules that do, e.g., whether drinking intoxicating beverages other than grape wine is also sinful (known as "the speculative elements of religion" or rules based on "equivocal texts"). (13-14) Rejection of this distinction, however, does more than make the idea of an Islamic state incoherent: it makes the very idea of Islam as a communal religion incoherent, since there would be no objective basis on which Muslims could even decide whether someone was a Muslim. It is unlikely that Na'im would really go so far in his skepticism as to deny the existence of any genuine (meaning, pre-interpretive) Islamic doctrines. Otherwise, his argument for Islamic recognition of human rights law, which he states is grounded in the Islamic principle of reciprocity (*mu'awada*), would be trivial because any Muslim would be justified in arguing that no such doctrine exists. (127)

A more defensible position to attribute to Na'im might be that no aspect of the *Shari'a* that is legal in the modern sense of the term could be deemed to form part of the necessary elements of religion. Accordingly, any attempt to apply Islamic law will always involve a choice by a political actor; whether that actor is an agent of the executive or the judicial branch. As a result, it is not the *Shari'a* that is being enforced but rather the political judgment of the relevant decision maker.

This argument, to be correct, however, assumes that the only coherent sense in which the *Shari'a* could be applied is in situations where its application does not require any human judgment. It is clear that Sunni Muslims, however, reject this proposition as a matter of their

theology. For them, religious obligation can arise simply by virtue of reason, interpreting revelatory sources, coming to the conclusion on the preponderance of the evidence that to act (to refrain from acting) is morally obligatory (morally prohibited). From the perspective of practical ethics, the obligation to act (refrain from acting) is the same whether the evidence for the obligation is based on unequivocal or only probable evidence. The epistemology of the moral obligation is relevant only to the question of whether dissent may be tolerated with respect to that particular issue: if the evidence is unequivocal, then dissent is not tolerated, but where it is merely probable, then dissent is legitimate.¹⁸

But even in cases where dissent is Islamically legitimate, it would be overly hasty to conclude that a judge called upon to adjudicate a dispute between two Muslim litigants who each holds a legitimate but contrary view of what the *Shari'a* requires in their case cannot resolve that case in accordance with the *Shari'a*. If all the *Shari'a* requires is that the dispute be resolved using revelatory sources rather than a particular or substantively “correct” interpretation of those sources then the judge can be fairly said to have applied the *Shari'a* to resolve the dispute to the extent she applies those sources to the facts at hand in good faith and with integrity. For example, one can reconcile the legitimate role judgment plays in the interpretation of the *Shari'a* with the obligation to rule by the *Shari'a* and not by human laws, by taking a proceduralist rather than substantive view of the *Shari'a*: a position which is in fact the one that prevailed among Sunni Muslims in the pre-modern era.¹⁹

A similar analysis applies to prospective law-making: the existence of legitimate disagreement as to the content of what the *Shari'a* requires with respect to the adoption of general policies does not necessarily mean that to speak of adopting policies pursuant to the *Shari'a* is incoherent. It would be perfectly coherent to recognize any prospective state policy as being in accord with the *Shari'a* if it is in conformity with a legitimate interpretation of the *Shari'a*. Na'im's concern that such an approach would violate the individual religious freedom of dissenting Muslims could be addressed by allowing dissenting Muslims a certain right to opt out of such rules. In fact, pre-modern Islamic law did recognize such an opt-out right but only where conformity with

18. For a general account of the role of probability in Sunni moral and legal thought, see Aron Zysow, *The Economy of Certainty* (1984) (unpublished Ph.D. dissertation, Harvard University).

19. Baber Johansen, *Truth and Validity of the Qadi's Judgment. A Legal Debate Among Muslim Sunnite Jurists from the 9th to the 13th Centuries*, 14 *RECHT VAN DE ISLAM* 1 (1997).

government policies would require an individual to commit a sin. Otherwise mere moral disagreement with the government's policy did not excuse an individual from his duty to comply with lawful government policies.²⁰ In this case, obedience is not due because the government's interpretation of the *Shari'a* is deemed correct: if it were the individual would not have a right to opt out; rather, the duty to comply arises out of another legal principle of the *Shari'a*—the duty to obey lawful commands of the government so long as obedience does not entail sin. Accordingly, prospective orders of the government were not called judgments (*ahkam*) in contrast to the decisions of judges. Rather, they were called acts of state (*tasarruf bi-l-imama*), a classification that emphasized the discretionary nature of the acts in question and one that recognized the right of subsequent governments to revise or repeal such acts of state within the limits of Islamic legality.²¹

Accordingly, allegations that the idea of an Islamic state is conceptually incoherent are dependent on very specific idiosyncratic conceptions of what Islamic commitments require: both with respect to the epistemology of the *Shari'a*, i.e., that it is unknowable, and substantive, i.e., only when one is following what one subjectively believes the *Shari'a* requires is one acting in an Islamically ethical fashion.

The Idea of an Islamic State Lacks Historical Islamic Legitimacy

Na'im devotes Chapter Two to the proposition that even before the colonial interregnum in the Islamic world Muslims did not establish governments in which religion and state were fused. Instead, Muslim governments were headed up by politicians who, even though they were Muslims, used their power to further the ends of the state. For the most part they did not claim religious legitimacy except in the sense that they protected and promoted Islam. In this capacity, they negotiated with the religious scholars regarding the role of the *Shari'a* in the state's governance. The religious scholars maintained their independence from the state thus giving them the distance from power necessary to allow

20. Fadel, *The True, the Good and the Reasonable*, *supra* note 6, at 58 n. 234.

21. The medieval jurist and theologian, Abu Hamid al-Ghazali, in fact uses a policy dispute between the first two Sunni caliphs regarding whether public resources should be distributed equally or on the basis of individual merit as evidence that in those areas of life not regulated by a definitive rule of revelation, the views of all qualified interpreters of the law are equally valid. ABU HAMID MUHAMMAD B. MUHAMMAD B. MUHAMMAD AL-GHAZALI, *AL-MUSTASFA FI 'ILM AL-USUL* 353-54 (Muhammad 'Abd al-salam 'Abd al-Shafi' ed., 1992). He did not conclude, however, that neither caliph was therefore precluded from resolving the policy dispute; rather, each caliph was free to follow the policy that he thought was best.

them to act as an effective check against the tendency of rulers to abuse their powers, whether in the name of religion or for other reasons.

While seductive, this objection would be unpersuasive to orthodox Sunni Muslims and categorically rejected by orthodox Shi'i Muslims. The reason this is so is that raw experience is not normative absent some normative theory that makes history morally significant. This is often described as the familiar "is/ought" fallacy. In this case the fact that Muslims historically have separated religion from the state but permitted religion to play a role in politics is not logically sufficient to ground a normative argument that they should continue to do so. One can imagine, for example, a Sunni Islamist follower of Sayyid Qutb or Abu al-A'la al-Mawdudi who rejects the separation of religion and state advocated by Na'im as dismissing the historical practice of pre-modern Muslim polities as mere evidence of a failure resulting from insufficient commitment to Islamic teachings rather than as evidence of an Islamic normative ideal.

On the other hand, it is hard to imagine an orthodox Shi'i Muslim's reaction to Na'im's historical evidence other than "What further proof is needed for a divinely-inspired Imam?" According to orthodox Shi'a theology, the need for an infallible imam is not something derived in the first instance from experience. Rather, the infallible Imamate is a part of their doctrine of theodicy, i.e., that God's justice and goodness makes it inconceivable that He would not provide human beings an infallible source of religious guidance and justice. Accordingly, even a relatively positive history of the institutional separation of religion and the state might not be relevant to an orthodox Shi'i Muslim.²²

Similarly, it is also incorrect to assert that responsibility for the ideal of an Islamic state can be laid exclusively at the feet of post-colonial conceptions of the territorial state as applied to Muslim communities. (10) Islamic law, as Na'im frequently points out when discussing the contradictions between historical *Shari'a* and contemporary norms of international human rights law, creates a hierarchical system of rights with Muslims enjoying the highest degree of legal protection, followed by non-Muslims living permanently under Islamic rule (*dhimmis*), followed by non-Muslims living temporarily under Islamic rule (*musta'mins*), and finally, non-Muslims living under

22. AL-HASAN B. YUSUF B. ALĪ (known as Ibn ul-Muṭahhar al-Hillī), 'AL-BĀBU 'L-HĀDĪ 'ASHAR: A TREATISE ON THE PRINCIPLES OF SHĪ'ITE THEOLOGY 62-68 (William McElwee Miller trans., Royal Asiatic Soc'y Gr. Brit. & Ir. 1958) (explaining that the obligation to have an imam who combines religious and political knowledge and who is immune from sin is rationally necessary by virtue of God's inherent goodness).

the rule of hostile regimes (*harbis*) who had no rights under Islamic law. This was not a simple matter of discrimination; rather, it was a manifestation of the fact that only Muslims were full citizens of the state. Even a cursory reading of one of the several works attributed to the early Hanafi jurist Muhammad b. al-Hasan al-Shaybani on international relations would confirm that he conceived the polity as being the polity of the Muslims, not the polity of all individuals living in the state's territory.²³

CONCLUSION

In critiquing Na'im's Islamic argument for the desirability of a secular state, I do not intend either to belittle the importance of such a project or to give the impression that such a project is impossible. Instead, I only wish to make the following point: Muslims have a long tradition of theological, ethical and legal reasoning. It is implausible to believe that they will forget the teachings of this tradition as they struggle to reconcile their religious convictions with a system of governance rooted in a liberal system of human rights. Instead of viewing this tradition as a burden, I believe it is important for Muslim reformers such as Na'im to tap into the resources of this tradition to make the case for a secular state based on liberal norms.

I will briefly give two examples illustrating how greater attention to these historical doctrines could be useful to Na'im. One of Na'im's arguments against an Islamic state is based on a hermeneutic theory: human understandings of the *Shari'a* are always contextual, suggesting an almost infinite plasticity to how revelation can be read. But, as discussed above, this argument would not only make the project of an Islamic state unintelligible, it would also make any communal experience of Islam impossible. What Na'im's theory instead requires is an account of revelation's language that grants the existence of a body of stable meanings in the normative sources of Islam that are ascertainable through close reading, but at the same time takes into account human experience in the interpretation of revelation. Such a theory, in fact, is not so different from the one already developed by pre-modern Muslim scholars of *usul al-fiqh* who took the view that the plain meaning of

23. For example, the early Hanafi jurist Muhammad b. Hasan al-Shaybani's regular use of terms like "obligation of the Muslims (*dhimmat al-muslimin*)," "the Muslims' ruler (*imam al-muslimin*)," and "the Muslims' power (*mana'at al-muslimin*)" in the course of his explanation of the rules governing treaties and international relations suggests a normative conception of the state as being an instrumentality that belongs exclusively to the Muslims. MUHAMMAD IBN AHMAD SARAKHSI, SHARH KITAB AL-SIYAR AL-KABIR LIL-IMAM MUHAMMAD IBN AL-HASAN AL-SHAYBANI (1st ed., Dar al-Kutub al-'Ilmiyya 1997).

revelatory texts is to be given effect, but only presumptively, i.e., until a sufficiently strong countervailing factor is identified. These countervailing considerations could be rational in the case of theological questions, e.g., God's attributes,²⁴ but they can also be experiential as demonstrated by arguments of twentieth-century Muslim jurists' interpretations of *jihad*,²⁵ and more generally by the juristic principle that changed social circumstances often justify revising legal doctrine,²⁶ even in circumstances where the rule is based on an explicit text of revelation.²⁷

With respect to the precise normative position Na'im advocates—the separation of religion from the state or the rejection of the religious character of government generally—this is an essential feature of Sunni doctrine as evidenced by their inclusion of the imamate in books of theology.²⁸ That does not constitute the commitment to religious neutrality that is Na'im's desideratum, but it does emphasize the point he is trying to make: that the state should not be thought of as a divine instrumentality. In some respects, pre-modern Islamic jurists were willing to go even further than Na'im in denying the religious basis of political decision-making. For example, Na'im is willing to grant that during the Prophet Muhammad's lifetime, but especially in Madina, religious and political leadership were fused. (53) For many Muslim jurists, however, the Prophet Muhammad was understood to have acted in different capacities, sometimes as a secular law-giver, and other times as prophet acting on behalf of God. When acting in a political capacity,

24. Nicholas Heer, *The Priority of Reason in the Interpretation of Scripture: Ibn Taymiyyah and The Mutakallimun*, in LITERARY HERITAGE OF CLASSICAL ISLAM 181-95 (Mustansir Mir ed., 1993).

25. Many twentieth-century Muslim jurists engaged in "jihad-revisionism," arguing that earlier scholars based their doctrines of aggressive *jihad* on the assumption that the default relationship between states was war. Because of the introduction of international organizations and the spread of international law, that factual presumption is no longer warranted, thereby requiring a revision of the legal rules governing international conflict so that only defensive war is permissible. In this connection, see MUHAMMAD ABU ZAHRA, *AL-'ALAQAT AL-DAWLIYAH FI AL-ISLAM* (al-Dar al-Qawmiyya li-l-Tiba'ah wa-l-Nashr 1964); WAHBA AL-ZUHAYLI, *AL-'ALAQAT AL-DUWALIYYA FI AL-ISLAM: MUQARANAHA BI-L-QANUN AL-DAWLI AL-HADITH* (Mu'assasat al-Risala 1981); Mahmud Shaltut, *A Modernist Interpretation of Jihad: Mahmud Shaltut Treatise Koran and Fighting, in Jihad in Classical and Modern Islam: A Reader* 59-102 (Rudolph Peters ed., 1996).

26. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* 285 (1991) (noting that legal reasoning often incorporate conditions that prevailed at the time of their formulation, and accordingly, if those circumstances change, legal reasoning must be updated in light of those changed circumstances).

27. *Id.* at 288 (stating that the general terms of a revelatory text can be qualified by custom in certain circumstances).

28. Mohammad Fadel, *Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law* 39, n. 8 (1995) (unpublished Ph.D. dissertation, University of Chicago).

his decisions were binding only by virtue of his political position, not his prophetic one.²⁹

Despite my dissatisfaction with the Islamic justification Na'im provides for his version of secularism, I believe the book overall provides a very practical way to move forward. Of course, in real life, it is not always the case that theoretical coherence is a prerequisite for political progress. I believe Na'im makes very persuasive practical arguments in favor of a secular state that will appeal to many religious Muslims who are simply seeking a way to live their lives as more or less traditional Muslims within the framework of a modern nation state. Na'im makes it clear that this is institutionally possible without violating the fundamental rights of either Muslims or non-Muslims, even if his theoretical arguments do not make clear why this is the case. Once the practical institutions are in place, however, there will be plenty of time for theoretical reflection and justification.

29. Sherman A. Jackson, *From Prophetic Actions to Constitutional Theory*, 25 INT'L J. MIDDLE E. STUD. 71, 74 (1993).