Conference, Symposium, and Panel Reports

Constitutions and Pluralism in Muslim States and Societies

The Summer Institute for Scholars 2015, held at the IIIT headquarters in Herndon, VA, from June 8-21, brought together a group of scholars to address "Constitutions and Pluralism in Muslim States and Societies." In order to present as many of their ideas as possible, the wide-ranging and thought-provoking comments of the chairs and the discussants are not recounted here.

Special Panel 1. "Early Islam on Constitutions and Pluralism."**Asma Afsaruddin** (Indiana University, "Ummah in the Qur'an and Early Islam: Implications for Modern Pluralist Societies and Citizenship") focused on the Muslim belief, based upon Q. 2:143, that they are a "middle" or "moderate nation/community." However, Q. 5:66 and Q. 3:113 have applied this particular designation to righteous Jews and Christians, respectively. She said that these Qur'anic perspectives are also reflected in the Constitution of Madina. After this she argued, buttressed by citations from leading classical scholars, how this initial understanding went from inclusivism to exclusivism, which is the case today. **Muqtedar Khan** (University of Delaware, "Revisiting the Constitution of Madinah: Religious Pluralism and Political Equality in Islam") mentioned that his perspective has changed since the Arab Spring, especially as regards the Constitution of Madinah. He is less impressed with the Islamist arguments; rather, he raised a variety of questions: Is the will of God active? Is this document really a constitution, for the latter is a modern concept. He opined that Muslims are trying to bend this document in order to present it as democratic in the modern sense. Also, he wondered if this supposed constitution was more of a treaty between the Muslims of Makkah and Yathrib excluding all others (article 1) and that the Muslims and Jews were separate parallel ummahs (article 25).

Special Panel 2. "Islamic Constitutions and Legal Theory." **Mohammad Fadel** (University of Toronto, "The Fiduciary Structure of Sunni Public Law") began by saying that the traditional view of what has come to be known as

"positive law" is mistaken, for Muslims have always made laws, not all of which are grounded in the sacred texts. He also disputed the western contention that this is "a concession to reality" by remarking that *uṣūl al-fiqh* is not a comprehensive legal theory, but rather a set of guidelines on how to devise legitimate laws. In other words, it creates the standards for the legitimate exercise of positive law (*fiqh*). He then explained, basing himself on al-Mawardi's *Al-Aḥkām al-Sulṭānīyah*, that (1) the contractual formation of public life is the caliph (agency relationship), (2) the formation of state/caliphate (the public's ensuing obedience is obligatory and thus those who do not give it may be fought until they submit), and (3) the caliph must only exercise his powers for the community's benefit and not for his own (relationship of reciprocity with the community, which means that when "coercion" is justified it cannot be considered "force."). These "relationships" mean that all man-made laws not based on divine law must be obeyed because they are legitimate. **Jasser Auda** (Maqasid Institute, "*Maqāṣid al-Sharī'ah* and 'Islamic' Constitutions") contended that the major problems today are authoritarianism (military and paramilitary), tyranny (tribal, especially Arab), and dictatorship (political combined with religious tyranny [*wilāyat al-faqīh*]). He explained how each of them use the Shari'ah to corrupt both the larger and civil societies, brainwash the (especially Arab) masses, and condemn any popular uprising as un-Islamic. Auda opined that the backbone of the next wave of revolution will be for the Shari'ah's concepts (i.e., justice) instead of literalism. He took the Salafis to task for placing the wording over the meaning and ignoring the separation of justice, power, and the fair distribution of resources because such things are "not Islamic." He views the *maqāṣid al-Sharī'ah* as an "emancipatory project," for objectives come before words. What he would like to see is a rethinking of the civil state, one that is not run by the military, in which power is monopolized, and in which religion plays the role of ethics.

Special Lecture and Discussion. Asifa Quraishi-Landes (University of Wisconsin-Madison, "Not Your Father's Islamic State: Islamic Constitutionalism for Today's Shari'ah-Minded Muslims") presented a structure for Islamic constitutionalism that is built of legal pluralism rather than legal centralism. The three essential figures of her proposed structure are that (1) governmental political action must be based on the public good as determined by democratic means, (2) a diverse marketplace of *fiqh* and other religious law should exist in a parallel legal realm and be available as a voluntary opt-out of government law, and (3) a "Shari'ah check" that reviews the Islamic legitimacy of political action should be based on the *maqāṣid al-Sharī'ah*.

Paper Session 1. Mina E. Khalil (University of Pennsylvania, "Early Modern Constitutionalism in Egypt and Iran") contended that Saad Zaghloul, Makram al-Baig (a Copt), and similar people were only able to produce aspirational constitutions due to political realities. But they were important, because they (1) aspired to limit abuses of power, (2) enshrined significant legal and social changes that had been taking place under the Ottomans and Qajars, and (3) were reflective of political and legal elites, who were more secular, western, and liberal that their predecessors. After reviewing the growth of constitutionalism in both countries, which he said was negotiated by men and that was not based entirely on divine revelation, he concluded that both efforts can be characterized as "secularizing constitutional monarchies." These early constitutions grew out of the masses, which the rulers and ulama saw as a threat to their control over the Islamic legal system. **Andrea Stanton** (University of Denver, "Integrating Constitutions into Islamic Studies Courses: Crucial but Overlooked Primary Sources"), a "social historian who teaches in the religion department," focused on how American students see Islam as a foreign religion and Muslims as "out there" somewhere and how teaching does not change this. She expounded upon her attempts to give them the resources to oppose this view by teaching the long history of constitutionalism in the Islamic world via foundational/normative legal documents, early constitutions that were not imposed but were the results of indigenous movements, and to show that this region's history is part of a global wave and thus "in conversation with" global trends. She focused on Iran's constitutional history from 1906 to 1989, as well as on similar histories in Tunisia, Egypt, and the Baathist and proposed post-Assad Syrian constitutions.

Paper Session 2. David Warren (University of Manchester, "Rethinking Tradition and the *Maqāṣidī* Turn in Islamic Political Thought: The Tunisian Ennahda Movement between Genealogy, Heritage, and the State") discussed Ennahda's recent emphasis on the *maqāṣid* instead of the Shari'ah, which is a change. He related that modern life, including religion, is regulated by the state. He sees tradition both as heritage and as genealogy, the latter of which causes shifts not through the tradition but through an Islam-western synthesis. One is not better than the other, just different. Ennahda refers more to Ibn Ashur (d. 1973): The state limits what religion can be. Concessions were made in the interest of democracy (e.g., the Shari'ah). Religious concepts (*maqāṣid*) are symbols and thus can acquire new meanings. In other words, they can accommodate liberal democracy. Moreover, the tradition can be mined for new meanings. **Gianluca Paolo Parolin** (The American University

in Cairo, "Embracing the Challenge: Religious Discourse Responding to 'Citizenship' Hype") is interested in the post-9/11 constitutions in Morocco, Tunisia, and Egypt in terms of how they define citizenship and with a focus on the Egyptian thinker and judge Tariq al-Bishri. He divided the Egyptian debate into three phases: (1) In the 1920s, citizenship meant religious equality. This was an outgrowth of nationalism, not really of colonialism. It resonated with Hassan al-Banna and became a very polarizing discourse; (2) accommodation (until early 2000). The religious discourse at this time was challenging the pan-Arabist project (until the 1960s) and claiming that nonreligious affiliation belonged to the "Era of Ignorance (e.g., the Salafis) The second state of this phase was filled with such questions as whether *dhimmah* still exists, should the *jizyah* tax be collected, and can non-Muslims hold public positions; and (3) the counterchallenge. For example, during the early 2000s Gamal Mubarak used citizenship to challenge the religious discourse. This spilled over into various constitutional amendments and was reflected in the re-publication of earlier works from the 1970s-90s. Al-Bishri locates his ideas in the religion. History is important in terms of national community. Affiliations have to be transcended without obliterating them.

Paper Session 3. Mark Gould (Haverford College, "Double Consciousness: Full Inclusion for the Muslim American!"), who studies the legitimation and motivation of actions instead of dogma, as well as the differences and not the commonalities among the world's various religions, sought to construct ideal types of commitment by basing himself of Abdolkarim Soroush and Abdulaziz Sachedina. Among his propositions about Islam were the following: (1) God's actions or expectations constitute justice; (2) Islam has no concept of absolute justice and a weak notion of human fallibility; (3) revelation trumps reason, which blocks democratic procedures and universal values; and (4) Islam is particularistic in nature and thus only tolerates the People of the Book. According to him, none of these realities can be found in Christianity. He further opined that Catholicism, due to its belief that God was in the Church, blocked democracy, and that Protestantism enabled one to have a direct relationship God. He closed by saying that some value commitments may have different consequences in different situations. **Laurens de Rooij** (Durham University, "State Building and Religious Pluralism in Indonesia and Malaysia") traced the history of Islam's spread in Malaysia and Indonesia and pointed out some differences between them. For example, he maintained that in Southeast Asia Islam was associated with wealth, power, and class; that resources made the local kings wealthy and self-sustaining; that coastal Islam was less spiritual

than interior Islam, which was influenced by travelers and Sufism); that Sufism was close to the region's former Hindu and Buddhist beliefs; and, finally, with mutual travel, especially for the hajj. He said that the very strong communal ethnic ties found in Malaysia are not present in Indonesia, that Indonesia is more inclusive than Malaysia, and that Malaysia pits ethnic communities against each other. Despite this, however, he postulated that these two countries can offer an alternative example of development to the Middle East and North Africa, one that does not involve the United States or Europe. **Dževada Šuško** (Institute for the Islamic Tradition of Bosniaks, "The Relationship of the Islamic Community and the State of Bosnia and Herzegovina: Recent Negotiations for an Agreement to Facilitate the Freedom of Religion for Muslims") focused on how the Catholic and Serb Orthodox churches have signed agreements with the state that guarantee their members' basic human rights, and why the Muslims have failed to do so. Thus, the latter still have no state guarantees in terms of their individual and collective rights (e.g., employees' rights to observe their prayers, wear a headscarf, and have access to halal food). She attributes this, in large part, to the weak rule of law and the discriminatory contents of the state constitution. The Muslim community's draft proposal, which was rejected, was compared with its Catholic and Orthodox counterparts and the current status of negotiations was presented.

Paper Session 4. Melek Saral (University of Zurich, "Emerging Human Rights Discourses in Post-Uprising Egypt") stated that al-Azhar came under state control in 1961 by law and enjoys the confidence of many Egyptians. It is also seen by NGOs as a partner for promoting human rights. Its position is largely restricted to Shari'ah principles. On the other hand, the Muslim Brotherhood considers human rights to be a major duty of the state. Morsi talked of rights for all without mentioning any of the restrictions. Once the Muslim Brotherhood came to power, two major questions came to the fore: (1) what would the role of Islam be in society and (2) how would human rights be implemented? The ensuing debate was mainly about the scope and impact of the Shari'ah on the people's basic rights and freedoms, not the Shari'ah as law. **Etga Uğur** (University of Washington-Tacoma, "Islamism between Moderation and Hegemony: Politics of Constitution Making in Turkey, Tunisia, and Egypt") reflected upon the three different outcomes of the formal constitution-making process in the three countries. He attributed the results to the three policies followed: (1) Turkey followed the politics of hegemony, meaning that it delayed the process long enough to ensure that Ankara would have the maximum leverage over the process; (2) Egypt applied the politics of confrontation,

which reflected the Islamists' view that they were in a historical "use it or lose it" situation as regards both the army and secular civil society activists and decided to go for it; and (3) Tunisia took the politics of compromise route, which called for pragmatism and moderation during the constitution-making process.

Paper Session 5. Mohd Al Adib Samuri (National University of Malaysia) spoke on "Muslim Judges in Secular Courts: Legal Pluralism in Adjudicating Orders for Child Offenders in Malaysia") discussed the "Islamization of secular law in Malaysia." Based on his interviews of eleven Muslim judges in the Court for Children across ten states, he found that they are intentionally inserting their Islamic beliefs and worldview into their judgments and orders toward Muslim child offenders. Thus even though Malaysia is officially a secular country, judges are serving the state's Islamization policy due to their background and legal training. Some of them believe that Islamic criminal justice is the best rehabilitation model available and have therefore been Islamizing specific orders in the Child Act of 2011 to rehabilitate offenders. According to him, these findings are significant, because they imply that the government's Islamization policy has been indirectly influencing Muslims judges, despite the secular law setting, in order to uphold justice in society.
Mashal Saif (Clemson University, "Shi'ah Ulama and the Pakistani Constitution: Navigating between Pluralism and an Islamic State") focused on the state's identity as regards minority rights. For example, just how significant is the constitution and are minority rights and pluralism possible in a nation-state, especially in a liberal democracy? After providing a historical and theoretical background to the Pakistani constitution, the problems of minoritization and pluralism, and the victimization of the Shi'ah, she detailed the results of her on-site fieldwork. This consisted of interviewing two of the community's esteemed scholars: Qibla Sahib and Zaidi Naqvi. Sahib argues that religious tolerance and pluralism in the country are impossible as long as the state constitutionally proclaims an Islamic identity and undertakes Islamization measures. He links this with Sunni militancy and says that secularization would be better for his community. Naqvi, on the other hand, advocates a commitment to the state's Islamic identity but holds the citizens responsible for ensuring sectarian harmony, which they can accomplish by overcoming their divisive sectarian affiliations.

Jay Willoughby
AJISS
Herndon, VA