2015 IIIT SUMMER INSTITUTE FOR SCHOLARS

Abstracts

"Not Your Father's Islamic State: Islamic Constitutionalism for Today's *Shari'ah*-Minded Muslims"

Asifa Quraishi-Landes, University of Wisconsin – Madison (asifa.quraishilandes@wisc.edu)

This paper presents a structure for Islamic constitutionalism that is inspired by pre-modern Islamic jurisprudence and Muslim history, yet designed for contemporary realities. This structure is conceptually different from the typical "Islamic state" imagined by modern political Islam movements because it is built on legal pluralism rather than legal centralism. Unlike the centralized European nation-state systems inherited by most Muslim-majority countries, the constitutional structure presented here is built upon the separation of lawmaking power that characterized Muslim legal and political systems for centuries: a separation between (1) *siyasa* laws made by rulers in furtherance of the public good (*maslaha*) and (2) *fiqh* laws articulated by religious legal scholars based on scriptural interpretation and existing in a diversity of legal schools. Understanding *Shari'ah* as an Islamic rule of law (rather than merely a collection of rules) encompassing both *fiqh* and *siyasa*, this paper builds an Islamic constitutional structure on the powerful foundation of legal pluralism represented by the *fiqh-siyasa* bifurcation of law.

There are three essential features of the proposed structure: (1) government 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, available as a voluntary opt-out of government law, and (3) a "*Shari'ah* check" reviewing the Islamic legitimacy of political action should be based on the purposes (*maqasid*) of *Shari'ah*. Together, these three pillars form the essential structure for a system of government that enables Muslims to have *Shari'ah* as the "law of the land," but is not theocratic because it does not allow a state to impose its preferred religious doctrine upon the entire population. It also opens up new solutions to longstanding conflicts between secular and religious forces in Muslim-majority countries today, such as the purported incompatibility of Islam and democracy and apparent conflicts between *Shari'ah* and human rights. These solutions have been missed in global discourses about Islamic government so far because Eurocentric concepts of law (especially religious law) currently dominate the field. This paper challenges these concepts by showing how an Islamic constitutionalism that is not secular and not theocratic is not impossible.

"*Ummah* in the Qur'an and Early Islam: Implications for Modern Pluralist Societies and Citizenship"

Asma Afsaruddin, Indiana University, Bloomington (aafsarud@indiana.edu)

Muslims through time have been accustomed to regarding themselves as constituting "a middle" or "moderate nation/community" (Ar. *Ummah wasat*) on the basis of Qur'an 2:143 which applies this

designation to them. This designation has been enthusiastically adopted by Muslims as an indication of divinely-conferred distinction upon them and as a divine mandate to avoid extremes in one's beliefs and conduct. What is less well-known, however, is that this verse has its parallel in Qur'an 5:66 and Qur'an 3:113 in which righteous Jews and Christians are also described as constituting a "balanced" or "moderate" community" (Ar. *Ummah muqtasida*) and an upright community (Ar. *Ummah qa'ima*) respectively. These Qur'anic perspectives on the *Ummah* are also reflected in the Constitution of Madinah which recognized peaceful and righteous Jews as members of the Madinan community. Such perspectives notably transcend sectarianism and narrow conceptions of communal belonging. The paper will conclude by reflecting on how renewed focus on these more capacious notions of *Ummah* can allow for conceptions of participatory, inclusive citizenship to take root within pluralist polities in the contemporary Islamic world.

"(Re) Reading the Constitution of Madinah: Pluralism and Equality in the Prophetic *Sunnah*"

Muqtedar Khan, University of Delaware (muqtedar.khan@gmail.com)

This discussion seeks to advance a normative political philosophical (re) reading of the Constitution of Madinah. I recognize that even calling that historical document, as a constitution is in itself a rereading. Historical documents when studied in the present are often compelled to speak to contemporary questions and are taken out of context or made sacred. Often contextualization of historical texts makes them less transcendent and also less sacred. So by treating this document as a transcendent document that speaks to all times and ages I am sacralizing it. This conversation will also touch upon some general discussions about the politics of "contextualization" and the use and abuse of Islamic sources in contemporary context. This conversation will also contrast the so-called "*Khilafah* System" with the Constitution of Madinah and draw some critical conclusions about Islamic political thought.

"The Fiduciary Structure of *Sunni* Public Law"

Mohammad Fadel, University of Toronto (mohammad.fadel@utoronto.ca)

Legal modernity in the Muslim world is characterized by the rise of the state whose characteristic activity is the transformation of society through, among other things, the transformation of law by replacing traditional doctrines and institutions of Islamic law with positive law promulgated by the states themselves. Many scholars, Muslim and non-Muslim, have cast doubt on the Islamic legitimacy of these reforms. This article challenges the arguments that cast doubt on the legitimacy of positive law from the perspective of Islamic law, and develops a framework for assessing the legitimacy of positive law based on well-established doctrines of substantive law already present in the historical doctrines of *Sunni fiqh*. It argues that positive law should be understood as an expression of public will, and not scriptural interpretation, and therefore, that its legitimacy is grounded in how effectively it represents the public will rather than fidelity to revelation as determined by the interpretive principles of *usul al-fiqh*.

"*Maqasid al-Shari'ah* and 'Islamic' Constitutions"

author**Jasser Auda, *Maqasid* Institute, UK (jasser.auda@hotmail.com)**

What does it mean to have an "Islamic" constitution? And what does this entail in the articles of the constitution itself. This presentation discusses the concept of "Islamic constitutions" in light of the recent debates during the "Arab Spring" and classifies approaches to this question. The Egyptian debate over *"mabade' al-Shari'ah"* (*Shari'ah* Principles) is taken as a case study and the relationship between *"mabade' al-Shari'ah"* and *"maqasid al-Shari'ah"* is discussed. The presentation concludes that *maqasid al-Shari'ah* could form a common ground between various opinions on the matter, a much needed common ground against the counter-revolution.

"Early Modern Constitutionalism in Egypt and Iran"

author**Mina E. Khalil, University of Pennsylvania (mikhalil@sas.upenn.edu)**

The earliest articulations of modern Middle East constitutions in the late nineteenth and early twentieth centuries appear to be aspirational to, rather than actually constituting, a new 'liberal democratic' political order in spite of the labels that may otherwise be attributed to them. Nevertheless, they earlier constitutions are worth studying in order to point to continuities or discontinuities within normative legal systems in the Middle East. They are also worth studying because even if they did not bring about a complete transformation of existing political systems as monarchial autocratic rule still persisted, they nevertheless enshrined the significant legal and social changes that came prior to them in the Ottoman and Qajar dynasties during the early and mid-nineteenth century. Finally, these documents even if they may not have transformed the lives of many living in these Middle East states, including women and some religious minorities, they are still reflective of a milieu in which political and legal elites in the early twentieth century experimented with liberalism—a milieu that in fact exhibited more liberal and secular (if not Western) inclinations than the political systems that preceded them or even those that would later shape the Middle East.

Still, the composition of political elites who influenced the drafting of these early constitutions was also not the same across the Middle East. The constitutional politics of Egypt and Iran, the largest Arab *Sunni* and Persian *Shi'a* nations, respectively, were influenced by different kinds of political elites—with the religious scholars (the *'ulema*) playing a larger role in the drafting of Iran's 1906 Constitution than they did in Egypt's 1923 Constitution. While Egyptian and Iranian political elites both confronted imperial powers, at times defiantly and at other times sycophantically, while drafting their first constitutions, the constitutional monarchies that they struggled to erect were also shaped by the their own self-interests, personalities, and political philosophies as much as by their nations' different cultures and political histories.

Therefore, this paper will aim to compare the Iranian Constitution of 1906 and Egypt's 1923 Constitution in the context of their socio-political histories and the Middle East legal systems in which they emerged. The first part ("Towards a Constitutional Theory") will examine the theoretical underpinnings of these early Middle East constitutions in light of the theories of Muslim

government that preceded them. The second part ("Political Actors in the Drafting") will compare the political forces and their actors that drove the drafting of these early constitutions, pointing to both similarities and differences in the composition of Iranian and Egyptian political elites in the late nineteenth and early twentieth centuries. The third part ("Constitution Design in the Text") will analyze the texts of both these early constitutions in order to compare their constitutional designs in light of their unique political actors and their ideological leanings. The final part brings together this three-part comparison to draw some conclusions about this early stage of Middle East constitutionalism.

"Integrating Constitutions into Islamic studies Courses: Crucial but Overlooked Primary Sources"

Andrea L Stanton, University of Denver (andrea.stanton@du.edu)

This paper argues for the pedagogic value of incorporating constitutions from Muslim-majority and –plurality countries into Islamic studies courses as assigned reading for lectures, class discussions, and/or essay assignments. It suggests specific historical and contemporary constitutions to use, themes to present, organizing questions to ask of students, using case studies from the modern Middle East that include the 1906, 1979, and 1989 Iranian constitutions; the pre- and post-revolution Tunisian constitution; the pre-, post-, and subsequent Egyptian constitutions; and the Baathist and proposed post-Assad Syrian constitutions. It considers the structure of "late-stage" constitutions as much longer, more detailed, and more complex documents than those of the 18th and 19th centuries, and suggests that these documents be read less as actual roadmaps of a state's operation than a compendium of the ideals to which the state and its people are expected to aspire. With that in mind, it proposes that Islamic studies courses using constitutions as primary sources might most productively focus on four key areas: whether the constitution outlines an official religion for the state (and, if so, what it says about citizens of other religious backgrounds); whether it lists a required religious affiliation for the head of state; what role the constitution outlines for religion in the state's legal and judicial system; and what other elements in the constitution, whether at the level of rhetoric and phrasing or foundational values, bear marks of religious influence. It concludes by suggesting that a careful study of pre- and post-revolutionary constitutions in Islamic studies courses, and particularly those on contemporary Islam, helps students discover and analyze continuities and ruptures in such fundamental issues as the treatment of Islam as a state religion and the religion of the head of state, as well as less visible but equally crucial issues like gender equity, the status of minority populations, the formation and powers of the legal and judicial systems, and the role of the state in promoting social and economic justice, at home and abroad.

"Rethinking Tradition and the *Maqasidi*-Turn in Islamic Political Thought: The Tunisian Ennahda Movement between Genealogy, Heritage, and the State"

David H. Warren, University of Manchester (david.warren@postgrad.manchester.ac.uk)

The pragmatism demonstrated by Rashid al-Ghannushi and the leadership of the Tunisian Ennahda movement in the years following its electoral success in October 2011 has led to a vibrant debate

over the relationship between Islamic concepts from the *fiqh* tradition and political practice. This paper contributes to this debate on two levels. First, it will highlight that academic approaches to "tradition" in the case of Tunisian political Islam fail to distinguish between what Samuli Schielke calls "tradition-as-genealogy" and "tradition-as-heritage." This paper will use this distinction and also draw on Hussein Ali Agrama's description of the "secular power" of the state. I argue that the recent emphasis the Ennahda leadership places on the *maqasid al-shari'ah*, what I call the "*maqasidi-*turn*,*" is less an alternative to "secularism" but rather a manifestation of one of the increasingly limited options made available by the state's power over religion.

"Embracing the Challenge: Religious Discourse Responding to the 'Citizenship' Hype"

Gianluca Paolo Parolin, The American University in Cairo, Egypt. (gparolin@aucegypt.edu)

Ever since the controversial constitutional amendments of 2007 in Egypt, 'citizenship' has become one of the buzzwords of constitutional texts in the region, featuring prominently in the post-2011 Constitutions of Morocco, Tunisia and Egypt. The fuzziness of the concept—already exposed by an Egyptian MP during the parliamentary reading of the amendments in 2007—keeps going unaddressed, thus raising the question of its scope.

After briefly introducing the contexts in which "citizenship" appeared in the constitutional texts of the three countries, I will advance a couple of hypotheses as to how to possibly construe it. Identifying the roots of citizenship's fuzz does not cast any light on its current buzz, let alone the intentions behind awarding it such a dignified status in post-2011 constitutions.

A budding body of literature on citizenship had preceded the enactments and is now burgeoning. Under the heading of citizenship go various trends that show both historical peaks and quite distinct local interests. The paper focuses on how the religious discourse in Egypt addressed the issue of citizenship since the 1920s. After identifying three main phases of the debate (the challenge, accommodation and counter-challenge), the paper presents an instance of a creative engagement with both Islam's texts and traditions, and contemporary constitutionalism.

"Double Consciousness: Full Inclusion for the Muslim American!"

Mark Gould, Haverford College (mgould@haverford.edu)

Christianity, because it is rooted in principles, and in a sense of right reason that has been understood to be accessible to all people, has facilitated the development of civil religions, which constitute social values that are more general than denominational precepts and are thus able to encompass and include diverse religious traditions. Islam, whose adherents were more tolerant than those of Christianity for much of its history, created a space for other religions, but only within the context of the implementation of the precepts constitutive of *Shari'ah*; this place entailed second-class "citizenship" for non-Muslim peoples of the book and even less officially-authorized inclusion for other non-Muslims, and thus is unacceptable in the contemporary world.

While Christianity facilitated a universalism that, in time, but not at all times, made possible the inclusion of diverse groups within a set of general social values that transcended denominational convictions and thus within pluralistic civil societies, Islam articulated a universalism that facilitated the inclusion of diverse groups within a specific, religiously constituted *Ummah* that was regulated by a set of precepts, but it was an exclusionary universalism that did not facilitate the full inclusion of non-Muslims within the larger society. In Christianity universalism trumps particularism, while, in Islam, particularism trumps universalism; the former facilitates full inclusion of the other, while the latter is a barrier to such inclusion.

Given this analysis, the question I pose here is whether it is possible for Islam to be incorporated into a civil religion that transcends denominational conviction, and whether the incorporation of Muslims within this civil religion may facilitate the development of Islam in a way that fosters a genuine reciprocity between Muslims and others. Such a development will require the development of a "double consciousness" among Muslim-Americans, a "double consciousness," without Du Bois's ambivalence, that involves the positive affirmation of both one's own convictions and a more general set of principles, a civil religion, which might be generalized from one's own and from other creeds.

"State Building and Religious Pluralism in Indonesia and Malaysia"

Laurens de Rooij, Durham University, England (laurens.de-rooij@durham.ac.uk)

This paper shall offer an example of how in various instances Indonesia and Malaysia, in dealing with pluralism, may offer a (Muslim) example for other states to follow by engaging people based on secular values and Islamic ideals simultaneously. Indonesia is not only the world largest Muslim country but like Malaysia it also has a history of colonialism, a diverse culture and a diverse population. This paper will argue by using historical examples and the political context that the relationship between Islam and (secular) democracy in Malaysia and Indonesia today, is the result of trying to incorporate Islamic or Muslim values into secular governance. Malaysia is more diverse in culture and population, but its plurality of religious traditions has affected modernizing transformations during the twentieth and early twenty-first centuries. The influence of the minority religions on socio-economic policies is a notable example. The socio-religious climate of Malaysia and its various ethnic groups have all contributed to economic and in turn political developments within the nation. This paper will explore the links of how the religious environments of Indonesia and Malaysia has directly affected and continues to shape the social, economic, political discourse of the country.

"The Relationship of the Islamic Community and the State of Bosnia and Herzegovina: Recent negotiations for an agreement to facilitate freedom of religion for Muslims"

Dževada Šuško, Institute for Islamic Tradition of Bosniaks, Bosnia and Herzegovina (dzsusko@gmail.com)

Bosnia and Herzegovina is considered as a pluralist society with Muslims, Orthodox, Catholics and Jews living for centuries together. However the transitional democratic state of Bosnia and Herzegovina does not equally treat the religious communities. While the Catholic Church and the Serb Orthodox church have signed agreements with the state which guarantee basic human rights for the practitioners of their religions, for years the Islamic Community tries to reach an agreement with the state. Such an agreement would ensure and protect individual and collective rights for Muslims, such as employees' right to perform the obligatory prayers, protect headscarf wearing women in the job market, ensure halal food etc. In this regard the weak rule of law and discriminatory contents of the Constitution of Bosnia and Herzegovina play a significant role. The European Convention for the Protection of Human Rights is incorporated in the constitution and the Law on Freedom of Religion in Bosnia and Herzegovina was ratified in 2004 but still none of them is equally applied. With the help of documents, this paper will examine the draft proposal of the Islamic Community suggested to the state of Bosnia and Herzegovina, analyze the reasons for rejection, compare it with the already signed agreements of the Catholic and Orthodox Church, inform about current status of the negotiations, and seek the justification within legal sources. Additionally, press accounts are included to show the response in the public sphere.

"Emerging Human Rights Discourses in Post-Uprising Egypt"

Melek Saral, University of Zurich, Switzerland (melek.saral@uzh.ch)

The uprisings in the MENA region have not only caused the demise of old regimes, but also provided a context, as well as an impetus for the enhancement of human rights in the region and opened a fruitful discursive platform of human rights. However, the characteristics and developments of the emerging human rights discourses are not clear and empirically under-researched.

This paper looks at the development of human rights discourses in Egypt with a particular focus on constitution making process, and aims to reveal the main patterns of prevalent human rights discourses in post-uprising Egypt. Applying the method of Critical Discourse Analysis it addresses the following questions: How do the human rights discourses develop in Egypt undergoing transition through the course of the Arab Uprising and what are the main characteristics of human rights discourses in post uprising Egypt.

"Islamism between Moderation and Hegemony: Politics of Constitution Making in Turkey, Tunisia, and Egypt"

Etga Ugur, University of Washington, Tacoma (ugur@uw.edu)

Turkey, Tunisia, and Egypt initiated a formal process of constitution-making in 2011. In all of these three Muslim-majority countries Islamist parties assumed lead roles in this critical stage of regime transition. However, the process led to very different outcomes and witnessed very different strategies by Islamist parties. Turkish Justice and Development Party (AKP) led formation of a parliamentary committee with principles of equal political representation and unanimity vote on each article. The process failed to produce a consensus document after two years and the committee was dissolved in late 2013. After a tug of war between the military-bureaucratic establishment and the Muslim Brotherhood affiliated Freedom and Justice Party (FJP), Egypt passed a constitution in late 2012. However, the Islamist rule was halted in mid-2013 as a result of social protests and a military take-over. Egypt has a new constitution and a new military regime in place and Muslim Brotherhood is strictly excluded from politics. Tunisian Islamist party, Ennahda, has navigated its way through the rough waters of the constitutional process and succeeded in leading the way for a compromise and the process resulted in an inclusive constitution. Tunisia has passed a critical stage of its democratic transition and is in the midst of a peaceful transfer of power after its parliamentary and presidential elections in late 2014. Ennahda remains a moderate Islamist party and is still one of the most potent political forces in the country.

What explains variation in Islamist parties' political behavior? Turkey's Islamist employed a strategy of delaying constitution-making to ensure it has the maximum leverage over the process. I will call this *politics of hegemony*. Egyptian Islamists felt that they were in a historical point of "use or lose it" in shaping the future of the country's politics and played a game of chicken vis-a-vis the army and the secular civil society activists. I will call this *politics of confrontation*. The Tunisian Islamists demonstrated pragmatism and moderation in the constitutional process, which can be called *politics of compromise*. This paper argues that political context constrains and enables Islamist actors to act in hegemonic, confrontational, and pragmatic ways. Understanding the contours of the political context is key in understanding political strategy of Islamist actors. The balance of power between three key arenas of the polity, the state, political society, and civil society, is a first step to understand the political context. The paper offers a comparative analysis of the three countries along key variables in the political context: praetorian military, electoral hegemony, organized labor, bourgeois support, and cooperation among Islamic actors. The study contributes to and bridges the literatures on constitution-making, regime transitions and Islamist politics.

"Muslim Judges in Secular Courts: The Role of Islam on Judicial Decision-Making in Malaysian Court for Children"

Mohd Al Adib Samuri, Universiti Kebangsaan Malaysia (al_adib@ukm.edu.my)

Children who are in conflict with the law in Malaysia will be processed in the Court for Children, which is based on English Common law and international convention and not the *Shari'ah* law. As a predominantly Muslim country, the majority of the children and the judges in this court are Muslim. Due to the Islamization policy, the Malaysian government tends to promote Islamic values in the government system even though Malaysia is a secular country. The issue is to what extent is the role of Islamic faith in judicial decision-making in cases related to child offenders in Malaysia. This research interviewed 11 Muslim judges in the Court for Children across 10 states in Malaysia on the application of theories of punishment in that particular court. This article finds that Muslim judges

are intentionally inserting Islamic beliefs and worldview in their judgments and orders toward Muslim child offenders. Even though there is no direct intervention by the government in the court for the implementation of Islamic policy, the judges have been agents for the Islamization policy due to their background and legal training. Some judges were also found to be Islamizing specific orders in the Child Act 2001 in order to rehabilitate offenders. Some of the judges believe that Islamic criminal justice is the best rehabilitation model in dealing with these children without prejudice to the best interest of the child. These findings are significant to imply that the Islamization policy by the Malaysian government has been indirectly influencing Muslim judges, despite the secular law setting, in order to uphold justice in society.

"*Shi'a 'Ulema* and the Pakistani Constitution: Navigating Between Pluralism and an Islamic State"

Mashal Saif, Clemson University, SC (mashalsaif@gmail.com)

This paper examines debates among Pakistani *Shi'a 'ulema* over how the Islamic Republic of Pakistan should balance its constitutionally declared Islamic identity with a commitment to religious pluralism and minority rights. Even though Pakistani *Shi'as* constitute 15-20% of the Pakistani population, they are frequently targeted and victimized by *Sunni* militants because of their religious beliefs. Consequently, many *Shi'as* value religious pluralism; at least to the extent that it protects their minority sect. A pressing concern for *Shi'a 'ulema* is whether the religious tolerance and pluralism they seek can be achieved in a self-declared Islamic state.

The first half of this paper provides a historical and theoretical background to the Pakistani constitution, the problem of minoritization and pluralism, and the victimization of the *Shi'a* sect. Drawing on extensive fieldwork among Pakistani *Shi'a 'ulema*, in the second half of the paper, I highlight two divergent approaches by *Shi'a 'ulema* to the question of how to balance minority rights and pluralism with the state's constitutionally declared religious identity.

The first approach is evidenced in the views of Qibla Sahib, an esteemed scholar at one of the largest *Shi'a* seminaries in Lahore. Qibla argues that religious tolerance and pluralism in Pakistan are impossible as long as the state constitutionally proclaims an Islamic identity and undertakes Islamization measures. Qibla asserts that the Pakistani state's Islamic identity is testimony to its alignment with Sunnism, and even occasionally *Sunni* militantism. Advocating for secularism, Qibla details the bloodbath that characterizes Pakistani metropoles. He describes the *Shi'a* massacre in Karachi and Lahore and finally asserted, "Individuals who have attempted to Islamize the country have done nothing concrete that would please the populace…It is better for us if there is secularism in Pakistan...It is only in secularism that humans are accorded the right to truly live…"

In sharp contrast to Qibla, the *Shi'a 'alim* Zaidi Naqvi, who presides over madrasas in Islamabad, advocates a commitment to the state's Islamic identity. However, he does not appear to view the state's constitutionally declared identity as having a significant positive or negative impact on religious tolerance. Instead, he places the responsibility for sectarian harmony on the citizenry and blames their divisive sectarian affiliations. Commenting on the lack of pluralism in Pakistani society, he critiques sectarian identitarianism. Naqvi asserts, "Our biggest flaw or weakness … is that we are more *Shi'a, Sunni, Barelwi, Deobandi,* or *Wahhabi,* than we are Muslim."

My close reading of the views of Qibla Sahib and Zaidi Naqvi, has made three distinct contributions. 1) It has explored the complex relationship between Pakistan's Islamic identity, religious pluralism and minority rights as it plays out in debates on the Pakistani constitution. 2) My work has highlighted the dynamism and heterogeneity of Pakistani *Shi'a 'ulema's* discourses and, 3) My examination has filled the important lacuna of providing an ethnographic account of contemporary Pakistani *Shi'a* scholars – a group that has historically received very little attention in scholarly work.