RFCS

RESEARCH PROGRAMME IN THE STUDY OF MUSLIM COMMUNITIES OF SUCCESS

Commentary Series

Islamic Legal Values in Secular Societies

Professor Mohammad Fadel

University of Toronto Faculty of Law

Introduction

Muslims are commonly told that to overcome social and economic backwardness, they must accept secularism. At the same time, however, Muslims are often told that Islam does not recognise the distinction between the secular and the religious. If true, this places Muslims in front of an impossible Hobson's choice: either they remain faithful to their religion, and accept backwardness, or they pursue progress and abandon their religion. Posing the relationship of secularism to Islam in this manner is not only mistaken, it is also dangerous insofar as it suggests that there is an existential and zero-sum conflict between Islam and modernity. Given the dramatic consequences of this all-too-common belief, however, we should be careful before we endorse it.

> One reason to be cautious about making such stark judgments is not only that Islam includes many interpretations, but also that secularism entails numerous interpretations and manifestations, not all of which are equally problematic from an Islamic perspective.

Casanova (1951) and The Three Modes of the Secular in Modernity

Jose Casanova, for example, a prominent sociologist of religion at Georgetown University, identifies three different modes of the secular in modernity. The first is what he calls institutional differentiation. The second is what he calls the privatisation of religion. The third is what he calls the marginalisation of religion. When secularism is broken down into these three dimensions, we are in a better position to take a more calibrated approach to the question of Islam and secularism by investigating Islam's relationship to each of these three different modes of the secular. [1]

According to Casanova, while secularisation in the third sense – the marginalisation of religion as a social phenomenon – was taken to be an inevitable part of modernity by post-World War II social scientists, the persistence of religions and religious adherence in manifestly modern societies like the United States and South Korea has called into doubt the inevitability of "religious decline" hypothesis. In fact, according to Casanova

[1] Casanova, J. (2007). Rethinking secularization: A global comparative perspective. In Religion, Globalization, and Culture (pp. 101-120). Brill.

upon consideration of the evidence, far from the decline of religion being a universal consequence of modernity, it turns out to be a parochial feature of Europe and European civilization for reasons that Casanova theorises are unique to it. As for the second sense of secularisation – the privatisation of religion – Casanova describes in his studies numerous societies in which religions have played prominent public roles, including, the Catholic Church and the role it played in assisting the transition from communism to democracy and stabilising commitments to human rights and democracy in various Latin American countries. It is only the first sense of secularisation – institutional differentiation – that Casanova argues is truly a universal feature of modernity.

Institutional differentiation is the process by which various different social domains – the market, politics, science, and the university, for example – attain practical and moral autonomy and are able to develop, legitimately, according to the internal rationality of each domain without religion imposing its own norms on the activities constituting that domain. In other words, the market develops along the lines suggested by market rationality, the university along the lines required for the pursuit of knowledge, and science through the discipline of observation, experimentation, and peer-review, etc., without the institutional forces of religion exercising an effective veto over the activities of these different domains. For Cassanova, the only dimension of the secularisation hypothesis which is a universal feature of modernity is institutional differentiation.

Islam and the Secular: Considering Institutional Differentiation

It makes sense then to ground any discussion on Islam and the secular on the question of institutional differentiation.

> Here, I would argue that Islamic law – *fiqh* – far from hindering institutional differentiation of various social spheres, acts as a catalyst in affirming the autonomy of different social spheres. Islamic law does so by regulating these various domains using different kinds of rationality in recognition of the moral autonomy of these different spheres of social life. (Mohammad Fadel)

Works of Islamic law conventionally came to be divided into four parts: ritual *('ibāda);* the law of the household, i.e., marriage, divorce, custody and financial support *(al-nikāḥ, al-ṭalāq, ḥaḍāna, and nafaqa);* commercial transactions; and crimes and torts *(ḥudūd, jināyāt, qiṣāṣ).* Ritual law was distinguished from other domains of law by both its aim – to draw close to God *(al-taqarrub)* – and by its means – the requirement that it be accompanied by a proper inward psychological state consistent with that aim – the intention *(al-niyya).* Indeed, many acts of worship, e.g., daily prayer, or entering the special status known as *iḥrām* when one performs the pilgrimage, are also singled out by the requirement that the worshipper be in a state of ritual purity by performing a washing (known as *wuḍū'* or *ghusl*) before performance of the ritual.

The express requirement of a subjective intention to perform a **devotional act** represents a bright-line marking off worship from other social domains of Muslim life, especially that of the market. Commercial acts, in contrast to devotional acts, impose no subjective requirements on market participants at all. Rather, they are only required to conform to the objective, i.e., outward requirements necessary to enter into the particular transaction intended, whether it be a sale (*bay'*), lease (*ijāra*), partnership (*sharika*) or investment contract (*muḍāraba*). Unlike worship, which has as its aim drawing close to God, the aim of commercial contracts is conventionally assumed to be profit (*ribḥ*), and contracting parties are therefore entitled to act in a self-regarding way. Indeed, they are conventionally assumed to seek the maximisation of their own gains. Accordingly, jurists interpret commercial relations using the assumption that parties are dealing at arm's length, with each party seeking to maximise his own gain. They express this difference using the term *mushāḥḥa* or *mukāyasa*, which reflects the bilateral nature of commercial contracting, with each party seeking its own gain through its interaction with the other, who is doing thing. The assumption that parties are legitimately self-regarding is therefore constitutive of market relations in the same way that the domain of worship is constituted by the subjective aim of drawing close to God.

By contrast, the **law of the household** is characterised by different motivations that jurists describe as the assumption of generosity. They use the terms *mukārama* or *musāmaḥa* to describe the motivations of parties involved in household contracts. While parties are assumed to be self-regarding in the market, they are assumed to be motivated by the good of the household within the domain of family relations. Accordingly, contractual obligations are interpreted in a spirit consistent with the ends of maintaining a harmonious household rather than maximising the gains of each party to the contract, while at the same time ensuring that the basic rights of all parties are respected. One can describe relations within the household as constituted by individuals

who pursue their individual happiness while striving to assure the happiness of the other members of that household. The household is established through marriage with this aim, and it is dissolved by the various modes Islamic law provides for the dissolution of marriage when it fails to satisfy these aims. But in neither case are the parties legitimately entitled to pursue only their own interests as they are in the market. **Criminal law and tort law** is that domain that recognises our vulnerability as bodies to external aggression and therefore acts to deter antisocial behavior that would prevent us from pursuing our duty to honor our Creator (ritual law), pursue our private gain (commercial law) and form households (family law) and compensate us for injuries to our bodies and lives (diya) and property (ḍamān) in those cases when the law fails in deterring antisocial conduct, or we inadvertently suffer a severe injury to our body or destruction of our property.

Conclusion

As this brief discussion makes clear, Islamic law is highly-consistent with Casanova's theory of secularisation as institutional differentiation.

> While Islam often acts as a public religion, both insofar as it organises public acts of worship such as the five daily prayers, the weekly Friday noon congregational prayer, and other communal acts of public worship, Islam also cultivates the privatisation of religion. (Mohammad Fadel)

Historically, the privatisation of religion in Islam was manifested both in its encouragement of believers to go beyond the minimum requirements of the law and seek out spiritual excellence (*iḥsān*), but also institutionally through the Sufi brotherhoods (*ṭarīqa*). Indeed, Casanova himself held out the great Muslim theologian, jurist and Sufi Abū Ḥāmid al-Ghazālī's desire to remain aloof from rulers as a paradigmatic representative of religion's almost natural desire to pursue privatisation of devotion rather than to take on a public role.

It is only the third conception of secularisation – secularisation as the decline of religious observance – that we see a true conflict between Islam and secularism. For Casanova, however, this mode of secularism is particular to Europe and is based on a certain theory of history that he class stadialism. It posits that religion, while appropriate for a prior period of human history, is replaced by science in modernity. This, however, is ideology, and not science, and so is not a necessary part of the constitution of modernity. Accordingly, from Casanova's perspective at least, to posit an essential contradiction between Islam and secular values requires adoption of a highly-contested ideology of secularism that is not required by the structural features of modernity.

> "Both Muslims and non-Muslims should therefore take care before casually concluding an irreconcilable contradiction exists between Islam and secularism (Mohammad Fadel)"

Casanova's analysis suggests such claims – whether made by Muslims or non-Muslims – are essentially ideological rather than analytic and should therefore be treated with a high-degree of suspicion.

About Author

Professor Mohammad Fadel is a full Professor at the University of Toronto Faculty of Law, having joined in January 2006. He wrote his doctorate dissertation on legal process in medieval Islamic law at the Univarsity of Chicago, focusing on Maliki fiqh. He was admitted to the Bar of New York in 2000 and practiced law with Sullivan & Cromwell LLP, working on corporate finance transactions and securities-related regulatory investigations. He has also served as a law clerk to judges in the United States Court of Appeals and District Court. Professor Fadel has published numerous articles in Islamic legal history and Islam and liberalism and is currently working on a book project based on his dissertation - "Adjudication in the Maliki Madhhab: a Study of Legal Process in Medieval Islamic Law" - which is a scholarly monography on the Maliki School of law and its basic institutions, from both a historical and jurisprudential perspective.

About RPCS

The Research Programme in the Study of Muslim Communities of Success (RPCS) is developed as part of Muis' efforts in advancing religious thought leadership for the future. The programme seeks to develop contextualised bodies of knowledge on socio-religious issues that are typical for Muslim communities living in secular states and advanced economies. The RPCS focus will be on developing new understanding, interpretations and application of Islamic principles, values and traditions to contemporary issues and challenges.