"STATE AND RELIGION---BANGLADESH AND PAKISTAN--- RESPONSES TO THE CHALLENGE OF CHANGE"

Speaking Notes of
Dr. Kamal Hossain*
Provo, Utah, 4 October 2010

It is with a sense of joy that I welcome this opportunity to speak in a forum where such a wide range of participants diverse in terms of faith, ethnicity, intellectual and cultural backgrounds, have assembled together to debate some of the most critical and complex issues which we face in our societies and indeed across the globe. The twentieth century, from which we are emerging, may well be perceived by posterity as the crossroads century, where the horrors of the two world wars, of the Holocaust, of institutionalized racial and gender discrimination had brought home to the world's people the imperative of change. The challenge of change confronted newly emerging national states—where those who were passive subjects sought to transform themselves into empowered citizens, women and the racially discriminated aspired for equality and justice, as did the poor and the economically exploited. A global consensus for change committed itself to a world free from fear and free from want. This would call for critical roles to be played by religion and law, both of which would be indispensable in shaping the goals and providing the values which would be needed for formulating and implementing strategies for change. This in turn would call for a conscious shared effort to learn form the past of the abuse of religion and lawn and this instrumental use by those who sought to do so to serve their self-centred interests, and to maintain control and domination over those who were powerless and vulnerable.

Given the constraints of time to focus on three specific issues in the sphere of religion and law, I would also narrow my focus by reference to the theme of this session: "Islam in contemporary legal systems." The first issue is that of the clash of civilizations issue which projects Islam, and the West in a state of confrontation and potential conflict. The second issue is that of secularism and the secular state---in particular in societies where Muslims form the majority of the population or where they are a significant minority. The third is the issue of individual responsibility of Muslims and the role of the state in relation to *Shari'a.*

On the first issue, which has manifested itself as Islamophobia in certain parts of the world, I would like to share with you the views of a distinguished Christian historian, Karen Armstrong, who writing

after 9/11, expressed those views:

> "...many in the West have come to believe that, as Samuel P. Huntington had predicted, there is indeed a clash of civilizations because their religion renders Muslims unfit for modernity. Many are convinced that "Islam" somehow compels Muslims to commit acts of terror and violence, that it applauds suicide bombers, and that it is inherently incompatible with liberal, Western democracy. This is understandable, since most Americans and Europeans have very little understanding of either Islam or the political conditions that have contributed to our present perilous predicament."

She then proceeds to make some insightful comments:

> If we are indeed fighting a "war against terror" we need accurate information. We cannot afford to remain in ignorance because the stakes are now too high. It is bital to know who our enemies are, but it is equally important who they are not. Only a tiny proportion of Muslims take part in acts of terror and violence. If our media and politicians continue to denigrate Islam, accepting without question the stereotypical view that has prevailed in the West since the time of the Crusades, we will eventually alienate Muslims who have no quarrel with the West, who are either enjoying or longing for greater democracy, and who are horrified by the atrocities committed in the name of their faith. We urgently need to build bridges with the Islamic world. I can think of few projects that are more crucial at the present time."

This issue was addressed by a commission set up in response by a request from the Commonwealth Summit to explore initiatives to promote mutual respect and understanding among its members not only because of their intrinsic value but that of contributing to restraining and removing the group-based violence and terrorism that have become such pernicious features of the contemporary world. I had the privilege of being a member of this commission headed by Nobel laureate Amartya Sen and ten other members including Nobel laureate Wangri Mungi of Kenya; the mayor of Sydney; and a former secretary of state of Northern Ireland, who is a professional psychiatrist. I would commend some of the findings and recommendations of our report entitled, "Civil Paths to Peace." (2007)

> "Acts of terrorism and homicide are, of course, criminal activities calling for effective security measures, and no serious analysis of group violence can fail to begin with that basic understanding. But the analysis cannot end there, since many social, economic and political initiatives can be undertaken to confront and defeat the appeal on which the fomenters of violence and terrorism draw to get active foot soldiers and passive sympathizers. The process of recruitment is a battle for people's minds, making crucial use of turbid sentiments and crude reasoning. Cultivated disrespect

of target groups as well as engineered misunderstanding of the ways
of the world are integral parts of the process of instigating and sustaining
violence. This is why the battle against terrorism and group violence has
to go much beyond policing criminal activities and confronting military
challenges---important though they are. (p. 5)

"Furthermore, these cultural theories have tended to presume that the
groups so identified will inevitably clash. The Commission categorically
rejects this claim. There is simply no substantial evidence for it. Millions
of people may be represented as being either part of the 'Islamic world' or
'the West' (to take two examples of such cultural categories), but
neither Muslims nor Westerners think, act of believe as one. (p 24)

"Terror attacks carried out in the name of a particular identity inevitably
have the potential to polarize societies. Sadly, counter-terrorism
strategies can themselves exacerbate this polarization. The threat of
terrorism following 9/11 fostered particular resentment of perceived
migrants in many countries, particularly migrants of Muslim origin.
The response of many Muslims was to retreat from public discourse at
exactly the moment that more Muslim voices were needed. When new
security measures are imposed quickly following a terror attack, without
due debate, discussion and sensitivity, this can further divide people
at a time when more engagement is what is required. (pp 22-3)

"Those communities perceived to share an aspect of their identity with
the perpetrators are then particularly vulnerable. Increases in hate-related
violent attacks against minorities are extensively documented for all
countries that have experienced terrorism. Efforts to protect and
reassure minority communities---who often feel acutely vulnerable---that
are carried out through community policing strategies and dialogue with
community leaders, have greatly helped. But the problem could be
better mitigated by a response which simultaneously consults with minority
community groups a civil society about the short and long-term consequences
of all aspects of counterterrorism action at the same time as taking reasonable,

well-conceived and well-communicated security measures, both internal and external." (p 23)

On the next issue, of the secular state, I would like to share with you the experience of two countries in which I was deeply involved. Pakistan---of which I was a citizen and had been elected in 1970 to the constituent assembly to frame the constitution for Pakistan, a project which had failed as that assembly was never able to meet. The central government unleashed a war against the majority of the population of Pakistan, which lived in its eastern wing which then emerged as the sovereign state of Bangladesh in 1971. I then became involved in the drafting of the constitution of Bangladesh, where we opted for the establishment of a secular state. The constitution in Bangladesh was adopted on 4 November 1972, and it incorporated secularism as one of its basic principles. Article 12 of the 1972 Constitution had provided as follows:

> "12. The principle of secularism shall be realized by the elimination of---
> (a) communalism in all its forms;
> (b) the granting by the State of political status in favour of any religion;
> (c) the abuse of religion for political purposes;
> (d) any discrimination against or persecution of, persons practising a particular religion."

The constitution was suspended in the wake of a coup on 15 August 1975 and Martial Law was proclaimed. Pursuant to the Martial Law Proclamation references to "secularism" were deleted in the Preamble and Article 12 was deleted in its entirety. The changes made constituted the Fifth Amendment to the Constitution. It was the general opinion among jurists that the Fifth Amendment had defaced the constitution beyond recognition and destroyed the fundamental pillars upon which the state of Bangladesh was founded.

The consensus for a secular state had emerged from the experience of the gross abuse of religion by the ruling group which had used religion to divide and discriminate and finally sought to suppress the legitimate claims to equality and justice by force. A democratic movement extending over two decades was sustained by the commitment to democracy and a secular state. Parliamentary democracy was restored in 1990, but the restoration of the secular state had to be achieved through both a democratic movement and through a bold and enlightened judgement of the judiciary which in 2005 held that basic principles of the constitution could not be abrogated by martial law decrees. Article 12 was declared to be restored and this was approved by the highest appellate court just two months ago. I was informed over the telephone this morning of a successful invocation of Article 12 in a judicial review matter before the Supreme Court which held that to compel a women to where a burqa by force was a

violation of this constitution and principle. The challenge that still remains to be seen through the courts is that of an amendment made in 1988 which sought to establish Islam as a state tradition by introducing a new Article 2a in the following terms:

> 2A. The state religion: The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic."

The validity of this amendment has been impugned in a writ petition. After the Fifth Amendment has been held to be unconstitutional, the Eighth Amendment becomes manifestly inconsistent with the restored Article 12 and this with the basic structure of the Constitution.

The experience of continuing as an Islamic state in Pakistan has not been without cost under the military government of General Ziaulhuk. Constitutional amendments in 1980 established a federal *Shari'a* court, to examine and decide whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Qur'an or the sunna (the *Shari'a*). In 1990, the federal *Shari'a* court delivered a judgement which was affirmed by its appellate bench in December 1999 holding that:

(1) All prevailing forms of interest, either in banking transactions or in private transactions, fall within the definition of *riba*.
(2) Any interest stipulated in government borrowings acquired from domestic or foreign sources is *riba* and clearly prohibited by the Qur'an.
(3) The present financial system, based on interest, is against the injunctions of Islam as laid down in the Qur'an and sunna and in order to bring it in conformity with *Shari'a* it has to be subjected to radical changes.
(4) All other laws, or provision, considered in the judgement and held to be contrary to the injunctions of Islam shall cease to have effect from 30 June 2001.

The Court also indicated measures which were needed to be taken and the infrastructure and legal framework to be provided in order to have an economy consistent with the injunctions of Islam.

The Government announced that is would carefully consider the judgement, but meanwhile all laws currently applicable to financial contracts, agreements and transactions would continue to remain in force as before until new laws were framed to replace them by June 2001.

This type of crisis brings to the fore the issue of the role of Muslims as citizens who are part of a state committed by consensus to the principles and institutions of constitutionalism, human rights, and citizenship. Conservative jurists make the claim that *Shari'a* must be coercively imposed by the state and more so when they authority to interpret *Shari'a* is assumed by a group of persons, albeit claiming themselves to be learned in Islamic jurisprudence to lay down interpretations, claiming infallibility.

This has been boldly challenged by contemporary Muslim jurist like An-Naim who has in his recent work, "Islam and the Secular State" (2008) argues powerfully thus:

"In order to be a Muslim by conviction and free choice, which is the
only way one can be Muslim. I need a secular state. By a secular state I
mean one that is neutral regarding religions doctrine, one that does not
claim or pretend to enforce *Shari'a*—the religious law of Islam—simply
because compliance with *Shari'a* cannot be corrected by fear of state
institutions or faked to appease their officials. This is what I mean by
secularism in this book, namely, a secular state that facilitates the possibility
of religious piety out of honest conviction. My call---for the state, and
not society, to be secular is intended to enhance and promote genuine
religious observance, to affirm, nurture, and regulate the role if Islam
in the public life of the community. Conversely, I will argue that
the claim of a so-called Islamic state to coercively enforce *Shari'a*
repudiates the foundational role of Islam in the socialization of children
and the sanctification of social institutions and relationships. When
observed voluntarily, *Shari'a* plays a fundamental role in general legislation
and public policy through the democratic political process. But I will
argue in this book that *Shari'a* principles cannot be enacted and enforced
by the state as public law and public policy solely on the grounds that
they are believed to be part of *Shari'a*. If such enactment and enforcement
is attempted, the outcome will necessarily be the political will of the state
and not the religious law of Islam. The fact that ruling elites sometimes
make such claims to legitimize their control of the state in the name of Islam
does not mean that such claims are true.

Faizhur Rahman writing in 1982 had anticipated the difficulties which now present Muslims with the issue of adopting an approach which can facilitate change. Thus:

"The question of who should interpret law has been acute in Islamic societies
because...law (fiqh) has been the result of the work of private lawyers, while
in the later medieval centuries government-particularly the Ottoman government
--had to promulgate laws on issues not covered by the *shari'a* law. Although the

state-made law was basically sanctioned by certain general principles in the *shari'a* law itself, nevertheless a dichotomy of the sources of law was unavoidable, and this process paved the way for the secularisation of law in several Muslim countries--- most systematically in Turkey. With the introduction of parliamentary institutions, law-making had become the business of lay parliamentarians, but there were large-scale protests from the 'ulema' and their supporters that law-making must be vested in 'ulema' institutions. For centuries, however, law-making in the 'ulema' institutions had been stagnant, and it was no longer feasible to reverse the new arrangements."

Another contemporary Muslim thinker, Soedjatmoko, from Indonesia, who was rector of United Nations University, argues that cutting across the many faces of Islam is a recognition that it is a religion of personal responsibility. Truth is not just a cognitive matter; it is not passive. Truth is true only when it is acted upon. From this concept flows many important social implications for the role of Islam.

Like all processes of change, the religious insurgence, he argues, manifests itself in both backward-looking and forward-looking directions. It can deny neither its historical roots nor its continuing commitments and aspirations. Careful and critical questioning may contribute to the forward thrust. The questions most pertinent for each religion can be identified only by looking at the specific contemporary context in which each religion lives.

Soedjamoko recognised the enormity of the task involved in formulating a response to the challenges now confronting Muslim societies that is consonant with Islamic norms and Islamic experience.

The approach urged by him is that the response should "not only be legalistic or normative but should also take into account the variety of historical experiences of Islamic communities in the world, be they majority or minority groups," and one must keep in view "the problems of coexistence and tolerance – not only between Islam and other religions but also within the varieties of Islamic cultures – at what appears to be higher levels of religious intensity." (10)

His wise concluding observation was that "in Islam as elsewhere, (it is true) that a people is defined by its history as well as its aspirations for the future. The case that moulds the basic values of cultures prefigures, to a certain extend, the manner in which we perceive and decide future options. Flexibility in dealing with the future hinges on the extend to which we are either prisoners of our past or creative

inhibitors of it." It is from the creative inheritors that we can seek responses 'relevant to the survival and growth of the human community in pluralistic and peaceful coexistence." (11)