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Commentary to ‘Shari‘a and the Modern State’ and ‘Narrating Law’

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The essays by Anver M Emon (Chapter 2) and Kathleen Cavanaugh (Chapter 1) provide an excellent, not to say fascinating, introduction to the present volume. To someone who, like myself, is not so familiar with Islamic law these essays constitute a most helpful summary of topics with which all lawyers in modern society, and others too for that matter, ought to acquaint themselves.

First, a point of clarification: the comments that follow should be read in light of the fact that my background is in the continental legal system. It may very well be that someone with a common law background would focus on other elements. An interesting question in this context is to what extent there are similarities from a legal technical point of view between the common law—in which case-law plays a very important role and where there are often references to judge-made law—and the role of *fiqh* (see below) in Islamic law.

More importantly, because of my experiences in the field of public international law in later years, it is obvious that I read the essays through that prism.

In Chapter 2, Anver Emon starts out by stating that the challenge is less about learning about Islamic law in a disciplinary vacuum, but instead to explore what it can and does mean. On several occasions he emphasises that the prevailing unit of governance today (the modern nation state as opposed to the premodern period of imperial rule) exists in a legally pluralist context that requires fundamental consideration about questions of authority and legitimacy in both law and politics. He also indicates that the juxtaposition of the elements discussed is designed to shift the debate from the contents of the law to the dynamics of legal ordering.

This is a very important point of departure, in particular since the essay reveals that Islamic law and its different elements are more complex than someone from a different legal tradition might realise.

A key clarification is that it is highly misleading to suggest that Islamic law is constituted by the Qur’an and traditions of the Prophet without further recourse to techniques of juristic analysis that allowed the law to remain socially responsive without at the same time undermining the legal tradition’s authority.

Another interesting theme running through the essay is that the basic function of the *hadith* (a saying, act, or tacit approval attributed to the Prophet) was not so much

history-writing but history-making; contemporary phenomena were projected back in the form of *hadith* in order to mould the community on a certain spiritual, political, and social pattern. It is said that both the Qur'an and *hadith* occupy an undeniable position of authority within Islamic law. It is obvious, however, that they alone do not and cannot, given their finitude, define for all times and for all situations the relevant Islamic legal ruling.

I am sure that this is a highly contested issue. While many would adopt this position, more traditionally minded Muslims would reject it and state that the methods of *hadith* analysis allow for a determination of what the Prophet said and what was a later addition.

A striking element in the presentation is the focus on the interpretive role of jurists. Their legal rulings, called *fiqh*, represent the doctrine of Islamic law developed over centuries. A very important point made in the essay and which was also confirmed to me by others at the Salzburg seminar is that if one wants to determine a rule of Islamic law, one will often start with a *fiqh* treatise of one or another school of Islamic law, rather than with the Qur'an or *hadith*.

In my opinion, the elements referred to here are extremely important if one views Islamic law in an international law context. Also, someone who believes that governance should by definition be secular must accept that religion plays an important role in the administration of many societies in the world. The question is how best to develop a system of governance that protects those governed and guarantees them the fundamental human rights that are now widely recognised by the international community.

Anver Emon's essay brings to mind the Roman saying '*ubi societas ibi jus*' (where there is a society there is law). It is obvious that, in many societies, in the beginning this law was to a large extent based on religion. But as societies developed and new phenomena required further rule-making, the secular elements gradually became predominant. This is not to say that religion does not also play an important role in the legislative work in modern societies. Furthermore, there are common features in different religions, and those may be reflected in international law as it has developed through custom and treaty law.

The law will continue developing; this process is a constant companion to humankind. And it is certainly not confined to the national level only. On the contrary, in the future we will see an ever-increasing interconnection between national and international law.¹ The question is how this development will evolve and to what extent there is preparedness at the national level to reach out and find common ground—also across religious and cultural borders.

To a stalwart supporter of the idea that the progressive development of international law² should be encouraged, it is interesting to note that the essay contains

¹ See H Corell, 'The Increased Interconnection between International and National Law and the Need to Coordinate the Legislative Process in the Future' in S Muller, S Zouridis, L Kistemaker, and M Frishman (eds), *The Law of the Future and the Future of Law* (Torkel Opsahl Academic EPublisher), freely accessible as e-publication (ISBN 978-82-93081-27-2), available at <http://www.fichl.org/fileadmin/fichl/documents/FICHL_11_Web.pdf>.

² Cf Art 13 of the Charter of the United Nations.

many elements that suggest that there would be a greater preparedness within the Islamic community to participate in this process than is sometimes believed. It is my firm conviction that, basically, the aspirations of human beings are very similar all around the world. However, it is clear that the development will take longer in certain regions than in others.

An interesting element in this context is the observation in the essay that the image of Islamic law today suffers from a discontinuity with its past. It is said that this discontinuity is brought on by the era of colonial rule and the relatively recent rise of the modern Muslim state in an international system of sovereign states.

Against this background, Anver Emon highlights two features that stand out most prominently and which must be kept in mind when discussing Islamic law today: (1) the emphasis on source-texts and *fiqh* treatises as definitive of what Islamic law is and requires; and (2) the plurality of legal authorities that operate upon the state, such that Islamic law is only one among multiple legal traditions that operate within and upon a state whose legitimacy often consists of a delicate, and often politically fraught, balance of all relevant traditions.

I believe that these elements must be kept in mind if we are to ‘clear the ground’ for a constructive debate. Equally notable is the observation that modern lawyers in Muslim states that apply Islamic law do not often study Islamic law in the fashion once taught in the Islamic law colleges in the past, but instead take a few courses on the topic, while focusing on a ‘secularized’ legal curriculum for the most part.

In discussing the modern story of Islamic law, Anver Emon concludes that modern reforms have led to a pluralism of legal traditions (Islamic, European, international) in a modern administrative state that exists alongside other equal and sovereign states in an international system of global governance. In my view this ought to bode well for a dynamic development in the future. However, for this kind of pluralism to come true, it needs to be affirmatively accounted for within an Islamic context, including its different components, such as commitment to law, theology, spiritual mysticism, etc.

In Chapter 1, Kathleen Cavanaugh begins by pointing to two sets of complementary legal frameworks: international human rights law and international humanitarian law. Taking the post 9/11 landscape and the ‘war on terror’ as a point of departure, she points to the sad development in which the narration of international law has in a sense ended up in a state of exception.

In my view, this represents one of the most tragic experiences in the legal field in later years. This is all the more sad since the main responsibility for this development has to be laid at the feet of certain Western democracies.

By way of example the defence policy announced by the US administration in September 2002, expressing the intention to employ pre-emptive self-defence, flies in the face of the UN Charter:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To

forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.³

The 'war on terror' is a dangerous misnomer that constitutes a disservice not only to the country where the term was invented but also to the world at large. Traces of this misnomer have spread in wide circles, and even crept into the manner in which resolutions by the UN Security Council are formulated and applied.⁴

Basically, terrorism is a crime that should be addressed through law enforcement. Reference could in this context be made to the following quotation from the Madrid Agenda, adopted on 11 March 2005 by the Club of Madrid (an organisation of former heads of state and government in democratic states) to remember and honour the victims of the terrorist attacks in that city the year before on the same day:

Democratic principles and values are essential tools in the fight against terrorism. Any successful strategy for dealing with terrorism requires terrorists to be isolated. Consequently, the preference must be to treat terrorism as criminal acts to be handled through existing systems of law enforcement and with full respect for human rights and the rule of law.⁵

It is therefore an extremely serious fact that, as Kathleen Cavanaugh puts it, the current and pressing needs of international security against 'terrorist' threats defy norms codified decades ago. The confusion created by moving the fight against terrorism from the area of law enforcement to an armed conflict conception has caused great damage to the norms carefully negotiated—as should always be remembered—against the backdrop of two world wars fought among 'civilized' nations. This disorder simply must be remedied.⁶

Addressing narrating law through the 'other', Kathleen Cavanaugh maintains that the discussion opens up several interesting analytical points of departure and suggests a narration of modern international law (the colonial present) that cannot be separated from the historical, cultural, economic, and political backdrop of the European colonial project.

Addressing narrating human rights in treaties, Kathleen Cavanaugh points to one of the most crucial issues in this field, namely the importance of challenging the perception that the development of these rights and principles was somehow exclusive to the 'West'. In fact, Muslim states (and indeed other Asian states) participated fully in the drafting of the Universal Declaration of Human Rights. To this could be added that, when the votes were cast in the General Assembly on

³ Available at <<http://www.georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html>>.

⁴ See H Corell, 'Reflections on the Security Council and Its Mandate to Maintain International Peace and Security' in O Engdahl and P Wrange (eds), *Law at War—The Law as it Was and the Law as it Should Be* (Koninklijke Brill BV, 2008), 68–72, available at <<http://www.havc.se/res/SelectedMaterial/20080901corellonunsecuritycouncil.pdf>>.

⁵ Available at <<http://www.summit.clubmadrid.org/agenda/the-madrid-agenda.html>>.

⁶ See A M Salinas de Friás, K L H Samuel, and N D White (eds), *Counter-Terrorism: International Law and Practice* (Oxford: OUP, 2012). See also H Corell, 'Was the Killing of Osama bin Laden Legal?' in (2011) 5 *Advokaten* (June 2011), available at <<http://www.havc.se/res/SelectedMaterial/20110623osamabinladen.pdf>>.

10 December 1948, all Islamic states participating voted in favour of the resolution, except for Saudi Arabia which abstained.⁷

Focusing on 24 states in the Middle East and Africa, and the non-Arab states of Iran and Afghanistan, Kathleen Cavanaugh provides an interesting overview of the status of ratification or accession to a number of core human rights treaties. Noting that nearly all these treaties allow for states to make reservations, declarations, or provide interpretations, she concludes that states in the Middle East have engaged these facilities to a significant extent. Of particular importance are the ones that apply Islamic formulas to limit rights, either through a declaratory statement or specifically attached to a particular core right.

Whether the reservations and declarations make the treaty commitment conditional subject to domestic law or to Shari'a standards, they constitute a sad feature in the field of human rights treaties. During my tenure in the United Nations, I received on behalf of the Secretary-General numerous communications of this nature. The depositary has only one option. He has no other choice but to register such documents.

It should be noted, however, that such reservations or declarations almost invariably provoke objections from other states parties to the treaty in question. Such objections could be along the following lines:

In the view of the Government of—, a statement by which a State Party purports to limit its responsibilities by invoking general principles of internal law may create doubts about the commitment of the reserving State to the objective and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. Under well-established treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations. For these reasons, the Government of—objects to the said reservations made by the Government of—.

It is obvious that at the international level it is the international human rights narrative that must serve as a point of departure. The problem lies in finding a common ground between two traditions with different histories, and which are built upon different presumptions about the individual in society. In my opinion, the reservations against the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) represent a particular problem in view of the fact that empowerment of women is one of the most important elements in our efforts to create good governance for the future.

Kathleen Cavanaugh also discusses the Charter-based system for the protection of human rights and related procedures and regional systems. On a positive note, attention should be drawn to the fact that, since 1998, 20 out of 24 Middle Eastern states have accepted requests for visits from thematic rapporteurs. At the same time

⁷ Numerous publications exist on the Universal Declaration of Human Rights. In this context reference could be made to Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights—A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers, 1999).

it is obvious from the presentation that there are serious tensions at the interface of Shari'a, at least as it is codified, and international human rights law.⁸

What the two contributions demonstrate is that the reasoning that interfaces with the doctrines of international law and Islamic law 'has left the rules of each lost in the rhetoric of the actors that control that discourse'.⁹ This very much coincides with my own reflections, based in particular on my experiences during my ten years as the UN Legal Counsel.

As indicated, this volume is dedicated to exploring conflicts that arise when human rights law and Islamic law differ. Let me in this brief commentary broaden the perspective to see whether the question could not be discussed also in terms of tradition in a religious guise, mainly reflecting the attempts by a few to exercise control and exert power over the many, as compared to the society that we now see gradually emerging where increased access to information via the Internet and other sources provides the right conditions to encourage mass movements for freedom.

The focus of my farewell lecture to the United Nations on 24 February 2004 was on the prospects for the rule of law among nations.¹⁰ One point of departure in the address was the following:

There is a tendency among some States to criticize others for not respecting international rules on human rights. Unfortunately, this criticism is often all too well founded. But in order for a State to criticize others with legitimacy, that State must pay attention to its own observance of human rights.

In preparing the lecture, I had reflected on St. Matthew 7:3 (see below). Surely, something similar must be found in other religious or philosophical sources. I had asked colleagues in the UN Office of Legal Affairs of different creeds to assist me. Our common effort produced the following quotations that I presented to the audience:

And why beholdest thou the mote that is in thy brother's eye, but considerst not the beam that is in thine own eye?

Holy Bible, Matthew 7:3

Not the faults of others, nor what others have done or left undone, but one's own deeds, done and left undone, should one consider.

50th Stanza from the Dhammapada (The Path of Wisdom)

Believers, let not a group of you mock another. Perhaps they are better than you. . . . Let not one of you find faults in another nor let anyone of you defame another.

Holy Qur'an, Chapter 49:11 (Al-Hujarat)

You see in others what you actually see in yourself.

The Guru Dronacharya in Mahabharata

I went in search of a bad person; I found none as I, seeing myself, found me the worst.

⁸ See also S Mahmoudi, 'Islamic Approach to International Law' (April 2011) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008–2011) <<http://www.mpepil.com>>.

⁹ See Chapter 1, Section F.

¹⁰ 'Prospects for the Rule of Law Among Nations', available at <http://www.untreaty.un.org/ola/legal_counsel3.aspx>.

Kabir, Saint Poet of North India

I wonder whether there is any one in this generation who accepts reproof, for if one says to him: Remove the mote from between your eyes, he would answer: Remove the beam from between your eyes!

Talmud: Baraitha: Rashi (1050–1115 CE) quoting Rabbi Tarfon

It is easy to see the faults of others, but not so easy to see one's own faults.

Gautama Buddha (563–483 BCE)

The first half of the night, think of your own faults, the second half, the faults of others when you are asleep.

Chinese proverb

I submitted that learned theologians and philosophers would probably have views about this kind of comparison. But to me it was important that the quotations were contributed by my own staff. I maintained that this comparison proves again the point that the Secretary-General often makes, namely that there are very similar thoughts in the religious and philosophical sources that guide people all over the world. I ended on the following note:

Freedom of religion is a fundamental human right. This freedom entails not only the right to freely manifest one's own religion but also the obligation to respect others when they manifest theirs.

The values upon which international law is based are often similar to the values expressed in different religious sources. But it is important that we do not mix religion and the secular here. International law should be acceptable to all people, and this is precisely why the United Nations as one of its first measures adopted the Universal Declaration of Human Rights.¹¹

Having read the essays by Anver Emon and Kathleen Cavanaugh, I made a corresponding examination of another verse in the same chapter of the Bible, Matthew 7:12, which reads: '*So whatever you wish that others would do to you, do also to them, for this is the Law and the Prophets*'. The examination produced a similar result. The Islamic analogue I found was: '*Do good to others as you would like good to be done to you*' (*hadith*; Ali ibn Abi Talib, 4th Caliph in Sunni Islam, and first Imam in Shia Islam).

I am fully aware that criticism can be directed against exercises of this nature. Some are even prepared to refer to them as 'rubbish'.¹² This verdict is of course easy to pronounce from the comfort of an academic institution. However, there is a serious lesson to be learnt here from all those who suffer from conflict or repression.

For someone who in the course of his duties has had to meet with children in Sierra Leone who have had their hands and feet cut off and discuss their plight with the dignified traditional chiefs in that country, the picture is different. The same impression remains after my visits to the killing fields in Cambodia and the meetings with the modest non-governmental organisations in that country to listen

¹¹ Adopted by General Assembly resolution 217 A (III) of 10 December 1948.

¹² Cf Chapter 1, Section C.

to their grievances. A closer involvement in the Middle East would surely have added similar reactions.

What I have found as a common denominator among people who have been subjected to violations of this nature is a deep sorrow over what happened to them, accompanied by the question of why other human beings could be so cruel. To these people 'the Golden rule', which can be traced in many other sources than the ones just referred to, carries an important message. It is those whose rights have been violated who fully understand the meaning of this universal rule of humanity. We should learn from them.

It is important to bear in mind the reality that religion, be it Islam, Christianity, Judaism, or other, plays an important role in the lives of millions on the globe and will continue to do so. Anver Emon also points to Shari'a as a historical tradition that remains very much part of contemporary debate across the world.

It is therefore vital to demonstrate that there are common features in the religious and philosophical sources. It is critical to convince those with an open mind that there are these common features. The problems that we encounter are mostly generated by fundamentalists. Those are found in all camps and will always present a challenge to those who are charged with establishing good governance.

However, this being said, I believe that religion should be kept to the personal sphere. Governance has to embrace all citizens and residents in a given nation state and should therefore be secular. In addition, it should be based on international standards, in particular in the field of human rights, construed in good faith and not in the state of exception that we have experienced lately.

Looking to the future, this is all the more important since globalisation means that people will be moving around in the world in a way that we have never experienced before. And competition over space and scarce resources will increase in a manner that may entail tremendous risks.

Let me also reiterate my firm conviction that democracy and the rule of law are preconditions for international peace and security. As I said in my farewell address to the United Nations, I believe that human beings have one thing in common, irrespective of the circumstances in which we live: the yearning for freedom. The events during the Arab Spring are yet another testimony to this.

What is necessary for the future is to establish good governance. Two indispensable components for good governance are democracy and the rule of law. In this context the interaction between religion and culture at the national level on the one hand and international law, in particular in the field of human rights, on the other is a very important ingredient. All of this must be explained already at the grassroots level and in particular to the younger generation. As a matter of fact, this element should be one of the most prominent topics in school curricula all over the world. Could there be a more central question for future research?

Anver Emon asserts that many of the authors in this volume recognise that at the heart of both Islamic law and international law lies the aim and aspiration to regulate and order, or in a word, to ensure good and right governance. In my view this is the very point—what it is all about. And it should be at the heart of all national and international law.

In this discourse it is crucial that we engage in a frank and self-critical debate in all societies. And the directive must be to speak law to power. That this is necessary can also be concluded from the acknowledgement by the InterAction Council of Former Heads of State and Government in their 2008 Communiqué ‘that the challenges mankind faces must be addressed through multilateral solutions within a rule-based international system’.¹³

¹³ Available at <<http://www.interactioncouncil.org/final-communicu-29>>.