From Silver to Gold: The Next 25 Years of Law and Religion

The Future of Law, Religion, and Human Rights
“The ‘Law and Morality’ of Human Rights in Islamic Societies”
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Thank you very much, and if I may, add my voice of welcome to all our guests. I am part of the Law and Religion Center here at Emory Law School. In that capacity, I welcome you all, and I think also I will, not to show lack of appreciation, but also the problematic of my being part of the Law and Religion Program at Emory. So it’s a real privilege and challenge for me to be part of this wonderful Center of Excellence.

And the challenge -- I may begin by highlighting that because it is relevant to what I am going to say --the challenge of “representing Islam” because although we are often cited, I mean we as Muslims, are often cited as part of the Abrahamic family and part of the Western legal tradition and religious traditions, there is a little ambiguity about the way in which we are a part of this and who are the “we” who are part of this.

I’m very glad that I am following Dr. Johansen’s remarks earlier this morning because let me be very clear and personal. There is a very long tradition. I’m a Muslim and I’m a lawyer and I try to be a scholar. But in the Muslim tradition there is a hesitancy and inhibition about speaking the name of Islam. You wouldn’t guess it from the way that now Muslims are holding force all over, speaking in the name of Islam so categorically and without any hesitation. But in fact the religious command is not to speak in the name of Islam or not to present yourself as speaking in the name of Islam. And I think that inhibition, I’m sure also exists in other religious traditions.

So how can one, and again in an American legal environment where lawyers are very confident about what the law is and which is often what they think it is but they never qualify it in that way, how can one who is a Muslim claim to speak about something that is “Islamic” in a legal environment and also in a very public American environment as well?

The second aspect of this also is the extreme diversity of Islamic societies, in historical terms as well as in contemporary terms. Muslims make about one fifth of the total world population. About 20 percent of the total global population are Muslims. But the ways in which they are Muslim are extremely different and varied and complex, and again the question of Islamic identity and what that means.
The third element of my challenge is the post colonial, in the sense that I am from Sudan. I grew up in Sudan, lived all my life in Sudan, and now am speaking from a highly prestigious and very powerful American institution, but also with a lot of ambiguities about what that means for parts of the world to which I still remain part of or belong to, and in whose name I’m supposed to speak.

I think there is an ambiguity about Islamic, the term “Islamic” we use so frequently. In fact, if you travel in certain parts of the world you will see all sort of things--Islamic this, Islamic that, Islamic Laundry, Islamic Butchery. So the term is really diluted and confused by the ways in which people tend to use it. And that is not different from applying it to the Islamic societies in my title. So what is Islamic about? This is why it is beyond the demographic of personal identification as Muslims. And what does that identification mean? Also that’s ambiguous.

And I think the question of fidelity to Sharia, the assumption that Muslims are committed to the upholding of the principle of Sharia, is also a very ambiguous and also often exaggerated notion. As I said, I’m glad to follow Professor Johansen’s remarks earlier this morning because in relation to my title, Sharia is both less a modern law—it is not law in the sense that state law is law, yet it can be profoundly more binding on Muslims than law can ever be. Yet for it to have a legal dimension you have to have the agency of the state. When the agency of the state is implemented or brought in the picture to make Sharia legal, in the modern sense of the term, how much does Sharia remain the religious law of Islam and how much is it transformed into something else, something different?

Professor Johansen’s very, very, very enlightening remarks this morning showed the real ambiguity of the sense in which we talk about Islamic law. And we say Islamic law but what we are talking about really is the role of Islam or some sort of Islamic jurisprudence in relation to and within the context of the modern legal system of so called nation-states or territorial states.

So is it about Sharia really or is it about the legal systems and political régimes of the various countries, where Muslims are the majority? And the two cases that he cited of Egypt and Pakistan showed that really the way in which Islam or Islamic law or Sharia is at issue is really very marginal and very ambiguous. For example, he cited the Egyptian scholar and Deputy of the Constitutional Court, Dr. Sherif, who assessed that Sharia is above the law but below the Constitution. What does that mean really and what makes Sharia above the law if it is below the Constitution? Whatever power and authority Sharia has, as we see in the case of Iran for example, is really very ambiguous in relation to the legal system of a modern territorial state or nation-state. So if Sharia is to be above the law, why not above the Constitution? What is the sort of legal authority that Sharia has to be above the legal system of the country in question and yet below the constitution of the country in question?

The assumptions aren’t that implicit in the title. Law and morality is an assumption of distinction between law and morality which is, of course, in the Western legal tradition. It might correspond to something equivalent or similar in Islamic legal tradition but it is not the same. Because I think that the notion of law and Sharia is not the same as law and morality because there is a “legal definition” of Sharia. There are aspects of Sharia that pretend or proclaim to be legal principles. But they are legal principles only through the agency of the state. If they are in the
speculation of the interpretation of duties that these are legal principles but they do not become operational in the modern legal state’s system except through the agency of the state.

And the other aspect also of my talk is about human rights, and again human rights as law and human rights as morality. And there is a difference. In relation to human rights as law, there is also, I think, a dimension of human rights as international law and human rights as domestic law. The premise of human rights is to create a frame of reference whereby legal systems and constitutional orders can be judged in terms of established international norms. But those established international norms do not become part of the legal system of the country in question except through the agency of the state itself.

So the paradox in the human rights law is a paradox of self regulation by the state that these standards are supposed to regulate the conduct of the state but can only operate through the agency of the state. Because international norms do not become legally binding before domestic course except through the constitutional and legal and political mechanisms of the state in question. How would you expect the state to incorporate international law in a way that limits its own jurisdiction and authority territorially within its own country in a way that corresponds to international obligations? But ultimately human rights violations can only happen underground in real time and space. So it is someone doing something to someone else or failing to do something to someone else that triggers the legal obligation of the state to protect human rights. So what I’m saying here is that there is an ambiguity in relation to human rights that we have to acknowledge regarding legal systems.

And then human rights as morality. And here the question becomes is it the morality of Sharia as an ideal (and I prefer to use the term Sharia rather than Islamic law because it’s not an accurate translation), is it the ideal of Sharia or is it the actual morality of the society in question because the same are not identical or corresponding. That is, the morality of Muslims is not always necessarily the morality that is prescribed by the ideal of Sharia.

So if it is a morality of the society in question, in what sense is it Islamic? Who decides what is Islamic and what is not about it? And I think by contrasting some societies that we are familiar with, we might see the point in the sense that through that area is supposed to be an Islamic state or Islamic country, Islamic society -- Iran is supposed to be an Islamic state, Islamic country -- but yet they are very different in what Islamic means to both of them.

Senegal is an Islamic country in a sense but it is a secular estate. Is Pakistan, is it an Islamic society? Is it an Islamic state, and in what sense? So the point is really that the morality that I mentioned, I would rather focus it on the society in question rather than on the ideal of Sharia. Because there is no agreement on what the ideal of Sharia is as you have seen with the Jewish tradition in particular this morning.

So basically I think that working within the parameters of my title, what I see here is the dialectic or the relationship between law and human rights. Whereby human rights become law only through the agency of the state and yet human rights are supposed to regulate what can be or cannot be law. And morality influences law but also again through the agency of the state and influences popular conceptions of human rights which may not necessarily coincide with the
international norms of human rights. That is, international norms are defined by international treaties which are negotiated among the states, but they are not likely to have practical implications or practical application except through the motivation and through the mobilization of political forces within society. So for human rights to have an impact on law, it has to be through somehow in cooperation, into popular consciousness, into social commitments.

Those social commitments are influenced by Sharia but by many other factors as well. So I would like also to emphasis once again that we should not take Islamic society or society where Muslims are the majority as coincidental with a fidelity to Sharia. So we have these two. I think in a way you can think of, and I don't know to what extent this has come across in our deliberations, you have the state dynamic and the state dimension and you have the social dimension. And between the two, both human rights and law are supposed to be negotiated or mediated through notions of morality. But what is the morality and how is it articulated? Whose morality it is? That is also a dynamic process of social and political and economic factors as well.

I come to this point in terms of what I see in terms of projections for our research agenda for the Center for the Study of Law and Religion and also our social and public engagement agenda. For the research agenda I think that we need to engage in clarifying the relationship between Sharia and the secular state. And this may not have been said so explicitly, but I think it was implicit in Professor Johansen’s remark this morning, that the state is secular. It is never Islamic. There is no Islamic state -- any where -- neither historically nor contemporarily nor in the future because it is conceptually impossible for the state to be religious. The state is a political institution that cannot have religion.

So the state is secular, and yet it is supposed to relate to and embody and implement and incorporate principles of Sharia, which is supposed to be divine. And again I’m grateful for Professor Johansen to have made the point that Sharia is jurist law and as such it is not divine. In fact I would make it very clear: Sharia cannot be divine. And that’s a dimension of how we use terms without clarifying what we mean by them. When we say that Muslims, many Muslims would say, most Muslims would say, I’m sure many Muslims in this room, would say, Sharia is divine. But when you come to think of it, really what do you mean by divine? In what sense can it be divine? When it is a product of human agency, human interpretation? For a so called divine liberation to enter into human comprehension in a way that relates to human experience, how can it still remain divine? And what do we mean by that?

So I think this is a field we need to clarify. And to be brief, my position on that is to say, and to calling again the inhibition I should have as a Muslim in speaking so categorically, but I don’t have a choice but to speak categorically for my own convictions. My conviction is that the state cannot be Islamic. Sharia cannot be enforced by the state as such. That is, when the state enacts Sharia principles into state law, it is no longer Sharia. It becomes the political rule of the state. And what makes it law is the coercive authority of the state, not the so-called divine authority of Islam. But that is a field that we need to clarify, scholarly and theoretically.

The second aspect of which I see, and I don’t see how we can do it without coming to my third item or dimension, is to deepen commitment to constitutionalism, citizenship and human rights.
Because since we are dealing with law and the state law, and very much as Professor Johansen also emphasized, that we have to take very seriously the notion of constitutionalism and the notion of citizenship. And then we are talking about Muslims who are citizens, not Muslims who are Muslims. That is, our relationship to the state is defined by our citizenship not by our religious affiliation. And it’s very dangerous really to link relationship to the state to religious affiliation because then that brings in the whole notion of who decides who’s a Muslim and who’s not.

And Pakistan was mentioned as an example. In 1953, in Pakistan there was a very high level constitutional commission that was charged by defining who is a Muslim. And that constitutional commission concluded that it’s impossible to define who is a Muslim in Pakistan. So how can you relate any sort of citizenship to religious affiliation? I would rather therefore say my affiliation, my relationship to the state is as a citizen. What it means for me to be a Muslim and how I relate to other Muslims is none of the business of the state. It is my business in relation to other citizens. And human rights and constitutions are to safeguard that. We need to deepen that commitment and clarity of these identities.

Finally I come to the point about what I call the public policy engagement of the Center, because I think my colleagues individually may have that commitment, but whether we can institutionally have that commitment to make our scholarship relevant to public policy and social policy. So unless we can be able to act institutionally in that capacity, which I doubt very much because of the nature of American academia and in relation to a variety of other limitations, I would rather keep it personal. That is my personal commitment as a Muslim lawyer from Sudan at Emory is to make my scholarship relevant and to actually take it into the public domain and make it part of public debate about current issues.

That I do as an American citizen at this point in the American public space, and yet my sympathies, my affiliations, my experience would resonate with many African and other Islamic societies which are also in this post colonial paradox, this sort of predicament, of having to make sense of the state system that they did not invent which was imposed on them through colonial experiences. But that is the only way that they can make sense of their identities as Muslims, as citizens in relation to constitution, in relation to human rights, and so on in their own respective societies. That is the sort of agenda that I would bring forward.

But finally I would conclude, and I think that my chair is getting a bit nervous about this, but I would conclude by this: We have been talking, especially yesterday I noticed several times, we speak of American experiences and American context as if it is the global norm, and it is not -- by far. And I think we have heard a very powerful and moving presentation from Dean Howard Hunter, who to me remains Dean Hunter even if he’s President of Singapore Management University. Dean Hunter who gave us a very, very sobering sense of where the United States stands in the world today and how much we have fallen behind and below the level of our commitments, constitutional and moral and religious and otherwise.

That charge is a charge for me personally, as a Muslim-American by challenging very much the hyphenated notion. So I refuse to be a Muslim-American. I’m a Muslim. I’m an American but I
am not a Muslim-American. The two types of identities do not really match or fit in each other. And I would call on each of us to see how that resonates within our own scholarship and as our own social engagement. Thank you very much.