SCTIW Review

Journal of the Society for Contemporary Thought and the Islamicate World

ISSN: 2374-9288

March 1, 2016

Anver Emon, Mark Ellis, and Benjamin Glahn, eds., *Islamic Law and International Human Rights Law: Searching for Common Ground?* Oxford University Press, 2012, 416 pp., $42.50 US (pbk), ISBN 9780199641451.

Many points of conflict can be found along the long history of the interaction between the Islamicate world and the West. From the Crusades, to colonization, and to the recent revolutions and interventions in the Middle East, it would not be controversial to state that the relationship has been fraught with suspicion, misunderstanding, and violence. This difficult history was further complicated by the events of September 11, 2001. In many ways, the terrorist attacks against the United States was a watershed moment after which a never-ending War on Terror was initiated and military interventions in Iraq and Afghanistan precipitated the destabilization of the Middle East leading to greater violence and civilian loss of life. As has been the case historically, each moment of conflict results in a surge in scholarship to explain the events. Newly-minted experts and public figures with shallow experience born of necessity produce quick bestsellers and make the talk show rounds. On the other hand, scholars whose life work has been devoted to the field offer a more nuanced understanding of these events and the relationships between the Middle East and West—to speak very generally—by looking at commonalities and shared interests as well as differences and the causes of conflict. While many fields have become indispensable in producing such knowledge, legal thinking has been prominent in both domestic and international responses. From radical new interpretations of the international laws of war, human rights, and humanitarian intervention to the use of Islamic law as justifications by the Islamic State (IS), law itself has been deployed repeatedly as a framework that explains as well as a mode of reaction to the events that continue to unfold.

With this backdrop, questions about the relationship between legal families and development continue to be raised both by skeptics in the West as well as by radical Islamists in the Muslim world. In spite of the clash of civilizations theory being largely discredited, the appeals to classical Islamic law by groups like Al-Qaeda and IS and the debate about whether these groups are "Islamic" have revived the theory which surfaces again and again is subtle ways. For if the IS is Islamic, then surely it cannot be compatible with secular, universalist international laws. Without fully answering the "Islamic" question (What is "Islamic"?), concerns continue to be raised about compatibility of Islam and "_____." The problem is only comprehensible if one takes up its assumptions about difference and by taking both Islam and whatever is juxtaposed against it as mutually exclusive. For instance, the question of compatibility of Islam and human rights can only be

understood by assuming Islam to be immutable with a fixed set of premodern laws and norms in contrast to secular international law. And the very formulation of the question invokes a set of further oppositions: Islam v. modernity, Islam v. democracy, and Islam v. human rights. Islam in the equation stands as the "problem" while all that appears in opposition might be the solution or at the very most a *telos* to which Islam can aspire. In this context, the volume of essays in *Islamic Law and International Human Rights: Searching for Common Ground?* seeks to engage legal scholars in a nuanced exploration of both Islamic law and international human rights without begging the question of the conflict or incompatibility. Rather than searching for common ground through a comparative method in which differences are acknowledged and commonalities are highlighted, it seeks to "clear ground" and present essays on particular topics (freedom of speech, freedom of religion, gender, and minority rights) that have been flash points between Islamic law and human rights.

The sections contain a pair of essays that present a perspective from within the tradition of Islamic law or human rights as a mode of exploring the approaches to the issues within the doctrinal fields without concluding with a competitive normative hierarchy. That is to say, the essayists are not tasked with nor do they prioritize arriving at a conclusion about how the two fields can be harmonized and which law will give way to the other. Rather the goal, as stated by the editors, is to foster a deeper understanding of the traditions, histories, and possibilities in both international human rights and Islamic law. The approach is genealogical; scholars delve into the history and context of the fields in which they write to offer insights to the reader of how these histories have developed into their current forms. And in many ways, this is a much more satisfying approach than attempts to reconcile current iterations of human rights and Islamic law which could easily lead to the apologetic glossing over of troubled pasts and differing interpretations. Furthermore, taking context seriously makes for a richer discussion across the topics and within the subsections themselves. The result is that the volume presents a more nuanced picture that gets past the "clash of civilization" script pitting universal secular rights against religious values and norms. However, in doing so, it also points up the problems in both human rights and Islamic law that have allowed both to be used in illiberal and disciplinary ways.

There are twenty-four contributors to the volume making it a lengthy read. Rather than assessing each of the essays which space will not permit, this review focuses on how the book advances its central purpose of promoting dialogue and clearing ground by focusing on the subsections and the broader themes that run through the book. The volume starts with two essays that orient the reader to the respective fields of international human rights law and Islamic law. These two essays give a quick and simplified history of the field for those who are on unfamiliar ground. They are clearly not aimed at experts. That is to say, an Islamic law scholar is unlikely to learn anything new or interesting in Anver Emon's chapter because it is not intended for Islamic law scholars but for those who have no background in the discipline. Taken for its intended purpose, it is an excellent digest of the mainstream narrative of Islamic legal history and Islamic law's evolution. For the newcomer, it provides a necessary minimum background that allows greater entrée into the subsequent essays. International human rights scholars, on the other hand, may find Kathleen Cavanaugh's critical approach a thought-provoking challenge to the dominant narratives of international law with which they are familiar. Given that the audience is more likely to be familiar with rudiments of international law, this essay can go further than simply the basics. While she describes the structure and substance of regional and international human rights and these will be nothing new to the expert, Cavanaugh also raises critical questions about the stability

and universality of human rights and the unceasing state of exception that is the War on Terror—a set of questions that continues to be raised throughout the volume and that have continued to perplex international law scholars. Proceeding from this basic orientation, the contributors to the book explore four topics: freedom of speech, freedom of religion, gender, and minority rights. Each subsection contains two essays by a human rights scholar and an Islamic law scholar followed by commentaries. The commentaries might connect the two lead essays but not all of them do, leaving the reader to make these connections for herself.

The second section of the book contains essays on the freedom of speech. Nehal Bhuta's contribution masterfully points to a number of complexities in the regulation of speech in Europe and the different legal formulations of the right in the United Nations instruments and the European Convention on Human Rights. Carrying forward a theme raised by Cavanaugh and Emon, Bhuta underscores the role of the state and its power to circumscribe the freedom of religion. Through doctrines like "the margin of appreciation" or deference in U.S. parlance, judiciaries legally sanction encroachments on freedom of religion. The state has discretion that can be quite broad and in some respects inconsistent. A classic example of this is the banning of headscarves as proselytism in the Swiss *Dahlab* case in contrast to sanctioning the public display of crosses in school in the Italian *Lautsi* case as a part of tradition. Bhuta demonstrates that in spite of regional and international protections for freedom of religion, states must balance these rights against the greater good and public order. As Bhuta cogently concludes: "The idea of toleration offered as justification for secularism is a repressive tolerance concerned to keep certain symbols 'in their proper place' because of their putative threat to civil order and fundamental political values" (142-143).

In contrast, Intisar Rabb's chapter in this section takes a historical approach to argue that political speech was largely protected by Muslim rulers in the premodern period. For the non-expert, this chapter is likely to shed light on current debates about blasphemy and apostasy which have garnered a great deal of attention of late. The chapter draws distinctions between speech acts that were political versus those that were personal. Given that the political community was defined through religious membership, the rules about blasphemy and apostasy have a political meaning that has been lost with the rise of the modern state. Rabb notes that Islamic jurists had to determine whether the speech amounted to a repudiation of "citizenship" and posed an internal political threat. Yet, for the most part, political speech was given more protection than socio-religious speech such as defamation and accusations of sexual misconduct. Rabb claims that in the modern period, these traditions have been flipped. Muslim majority countries are repressive towards political speech that would have been protected in medieval Muslim states and the rules on blasphemy have been extended to cover non-Muslim populations with serious consequences. Rabb offers a key insight into the rise of apostasy and blasphemy as a tool of political control in the repressive postcolonial state.

Urfan Khaliq's chapter that starts off the section on freedom of religion covers much of the same ground as the prior discussion on freedom of speech. It provides a broad overview of the international and regional jurisprudence on freedom of religion to once again demonstrate the variation of interpretation of what is understood to be a universal right. Abdallah Saeed's chapter on apostasy in particular underscores Rabb's observations that religious belonging was coextensive with political membership. Thus, apostasy in premodern Islamic societies was, in some cases, considered to be a repudiation not just of the faith but also of the political community. Such a repudiation could endanger the community in ways familiar to us as acts of treason and oath-breaking. However, in modern states with largely

secular laws, apostasy has been used perversely to govern citizens as Malik Imtiaz Sarwar contends has happened in Malaysia in Chapter 12. Through the use of "Muslim" as a political identity, a raft of laws can be instituted to regulate the citizen by governing family formation, property, and other rights based on religious belief.

Ratna Kapur's essay starting off the section on gender points to an increasingly important and troubling development in the reconfiguration and interpretation of international human rights that in some respects mirrors the development of modern Islamic laws. Since the inauguration of the War on Terror, human rights, and very specifically women's rights, has been used as a justification for armed intervention. As Kapur notes, universal conceptions of women's rights are deployed repeatedly to discipline the "Other" woman. But the rights as articulated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) rely on both gender essentialism—assumptions that all women share some experience because of their biology—and also cultural essentialism. The rights are not neutral. This is most clearly demonstrated by the European Court of Human Rights' decision in the *Layla Şahin* case in which the court simple settled on a single interpretation of veiling as oppressive to uphold the veil ban in Turkey. In order to come to that conclusion, the court had to assume a particular ideal of "non-oppression" which was, of course, informed entirely by Western, liberal, cultural and political views. The potential for "women's rights as human rights" to be used perversely to discipline "Other" women is most starkly demonstrated by Kapur's discussion of the uniform civil code in India. In the context of a large, pluralistic legal landscape that includes both a secular legal structure but religious personal law adjudicated by secular courts, Kapur shows that secularism itself is non-neutral; it incorporates a religio-cultural valence that often remains uninterrogated. Equality in India is defined by the ruling Hindu Right as being treated the same as Hindu women. As a result, the scrutiny of Muslim minorities and the demands for its change or progress is in reality a call for assimilation with the majority. While the majority's gender inequality problems are obscured, the minority's problems are made more prominent in relief. Secularism, rights, and gender equality then become "techniques of governance as well as power informed by majoritarianism" (289). The point to be taken, as Justice Sandra Day O'Connor argues in Chapter 16, is one that in spite of its universalist ambitions, human rights at the region and country-level cannot escape the cultural or political context in which it works. And, indeed, that context sometimes throws up barriers to advancing women's rights.

Ziba Mir-Hosseini's essay explores the emerging discourse of gender equality within various Muslim societies. Focusing on family law, which is the legal area to which most modern Islamic law is confined, Mir-Hosseini explores the hybrid nature of family law post-codification and the emerging literature on women's rights produced by Islamic publishing houses. It is in family law that many of the gender battles are fought and the balances and trade-offs between traditionalists and modernists become apparent. Although many Muslim majority countries have acceded to CEDAW, they have also cabined the Convention's reach through reservations based on religious values. But a cursory comparison between countries shows that there is no uniform set of rules governing Islamic family law. The reservations are better explained as political choices rather than religious requirements and permits Tunisia to ban polygamy while giving Pakistan grounds to maintain its legality. Against the backdrop of a resurgence of Islamic conservatism in a number of states, the Malaysian organization Musawah was formed to reclaim gender justice within the Islamic framework. It remains to be seen how well articulating gender equality through an Islamic framework will

work given that, like all religions, Islam has a long history of gender inequality and much of the legal jurisprudence simply assumes a naturalized subordination of women. Musawah's work attempts to demonstrate that there is no inherent conflict between women's rights/human rights and Islam but with its focus on Muslim family law, the question remains as to how to create gender equality across religious communities in a heterogeneous state. As Lynn Welchman asks in her commentary, what is defined as a "Muslim family?" (318). The recent efforts to reform family law in the Middle East underscores the political and legal importance of articulating women's rights. If we take for granted that a state's choices of law reform are more political than religious, how far theological reinterpretations of gender jurisprudence can take such reform remains to be seen.

The final section of the book contains essays on minority rights. Anver Emon's chapter on *dhimmi* rules explores the classical Islamic jurisprudence on religious minorities to challenge both the apologist position that asserts Islam was benevolent towards minorities as well as those who assert that Islam persecuted minorities. As is expected, neither of these positions completely captures the various approaches of the different schools of law to religious pluralism. As Emon describes, non-Muslims were given protections through contractual arrangements that gave them *dhimmi* status. Reading this section with the sections on speech and religion together, the genealogical approach offers some insight into how Islamic legal traditions have evolved to deal with minorities and pluralism. The essays demonstrate that even premodern Islamic societies had to govern a diverse population. Particularly after Islam expanded to the Indian subcontinent and beyond, Muslim rulers had large numbers and sometimes even majorities of non-Muslim subjects. Thus, some degree of accommodation was inevitable. However, in the modern period, postcolonial states conferred citizenship not on religious grounds but on the grounds of national affiliation within the geographically determined state defined by borders. The legal use of apostasy and blasphemy in modern states, as the authors point out, works a change in their historical interpretation by classical jurists. And indeed, these raise serious concerns with regard to international commitments to human rights conventions. But the legal rules on *dhimmis* are not similarly present in the majority of states with large Muslim populations. Emon's only example of the application of these rules in the present comes from Saudi Arabia, one of the few states that claims to adhere to classical Islamic jurisprudence as its legal system. The result is a question left largely unanswered: what do these rules tell us about minority rights in modern states with Muslim majorities that have largely secular legal systems? Perhaps the specter of *dhimmi* rules haunts modern law and practice but it is not made clear what the traces are and how they affect minorities. Rather, as Richard Goldstone points out in Chapter 20, there is discrimination based on religion and minority status even if there is formal equality and there are explicit *shari'ah* repugnance provisions in a number of constitutions in Muslim majority states. What is less clear is the link between these modern realities and the *dhimmi* rules. And also what is obvious is that other modern states suffer similar problems with pluralism and minority rights including Israel, India, and, as mentioned in a number of essays, France, Switzerland, and Italy.

Errol Mendes's contribution on international law and minorities reminds us that minority subordination has led to a great number of conflicts both internally and internationally. Mendes traces the move from ambiguity to greater coherence in terms of minority rights particularly with the emergence of indigenous groups as international actors and the rise of civil society. Mendes acknowledges that a universal approach is yet to be agreed upon and that this is a cause for concern. A further cause for concern is that posed by many critical international scholars in this volume: in a period of waning sovereignty for

Third World states, the rise of minorities as rights-holders at the international level may be yet another basis for intervention by stronger states. And these same states can deny even the existence of minorities (for instance, France) while actively subordinating them with relative impunity.

One of the most important themes that emerges from the volume is the pluralism of both international and Islamic law. Anyone familiar even superficially with Islamic legal history is aware that there is no singular system with coherent rules. From the first century of Islam's existence, there have been different strands of thought eventually forming different schools of law each with dominant and dissenting views. In addition, the experience of colonization, importation of legal codes, and the hybridization of law in the modern states have resulted in even greater legal fragmentation. Thus, to speak of "Islamic law" is problematic and only ever a shorthand that must assume its own inaccuracy. Refreshingly, a number of contributors to the volume have provided a similar messy account of human rights which is often presented as a coherent and universal body of laws. Even while some, like Mark Ellis in Chapter 4, argue that international human rights is a set of universal norms that cannot be derogated from because of this universality, other scholars demonstrate that universality to be a legal fiction in practice. By this I mean that from the outset negotiations over the language of the various conventions and declarations in the international human rights canon was diplomatically open to interpretation. Consensus could only be reached in this way. Further, some human rights instruments allow states to explicitly vary meaning through reservations and statements of interpretation. The inevitable result is variation at the domestic level of reception and application of human rights norms, at the regional level with human rights courts and conventions that reflect the norms of member states, and in the international frameworks at the international level. Though some human rights advocates chastise majority Muslim countries for cultural relativism, the genealogical approach taken in the volume underscores the relativism in human rights law as well. Of course, this is not to deny that human rights *aspire* to be universal. Rather it is to point out the fact that states vary their human rights practices for different reasons. On one hand, Muslim states have reserved their right to vary based on religion and culture, on the other, a number of states in both the Global North and South have begun to do the same for political reasons. The demands of national security and the ongoing state of exception that is the War on Terror has allowed states that have otherwise been champions of universal human rights to abrogate several international commitments. That is to say, these states have not used cultural or religious justifications for reservations to derogate from their human rights obligations. However, since the inauguration of the War on Terror, they have increasingly relied on national security to justify their violations or to suspend their obligations. The result has been a sort of political analogue to cultural relativism that therefore undermines the claim of the universality of human rights. Indeed, in the current political climate, the very question of a shared notion of "human"—the very foundation of human rights universalism—has begun to be questioned once again. In sum, the law, whether it be Islamic or international, is indeterminate. It is open to interpretation and can be the justification for disciplining internal (Muslims and minorities) or external groups (extremist states and organizations). This key point is explicitly addressed in some of the essays.

Given the timing of the volume and its structure, it is clear that it is a response to questions that have become increasingly pressing since the advent of the War on Terror. But the subsections indicate that the concerns are driven primarily by an already existing conflictual framework regardless of the efforts to disavow this from the outset. Even though the authors have tried to "clear" ground or find "common" ground, the topics covered in

the volume are reflective of a particular set of anxieties about Islam that emerged in the West most clearly after the terror attacks on September 11, 2001. What topics might have been prompted by the concerns of Muslims and Muslim states after the armed intervention and ongoing violence in Iraq, Libya, Afghanistan, Pakistan (and now Yemen and Syria)? Certainly subsections addressing politicization of human rights and its failure to constrain the use of force in the Middle East, the use of human rights as justification, and the use of national security and terrorism to derogate from international commitments would have been welcome. Relatedly, rather than exploring how human rights has been used in the Middle East, a majority of human rights scholars in the volume confine it to its European and U.S. instantiations. Apart from Kapur's and Mir-Hosseini's essays, few of the other essayists take up human rights in Muslim majority states either as a tool of governance, a mode of political engagement, or as a legal field.

While for non-experts, the chapters on Islamic legal history are excellent overviews providing readers a way to understand these topics beyond the apologies and polemics, the question of their relevance to modern adjudication and legislation is never fully explored. Given the broken histories of Islamic legal development and the structure of the modern state, the connection between past and present has to be explicated. It may be important to understand the nuances of classical Islamic thought on apostasy, blasphemy, and religious minorities, but these rules exist in the modern through the political choices and interpretations of the state, its institutions, and its leaders. As Justice Sherif of the Egyptian Supreme Constitutional Court notes:

> [W]hat is most worthy of attention is how the debates on Islamic law and human rights all too often miss the mark by imagining a problem that does not really exist….[t]he place of Islamic law in the modern world is quite delimited, and indeed, mediated, by the state. Consequently, when we talk about Islamic law and international human rights law, we cannot take for granted that the Islamic law at issue falls within the governing devices of a state, whether in the form of legislation, constitutions, or court decisions. (115)

These points notwithstanding, the volume is a welcome effort to foster greater knowledge about the nuances of international human rights and the complexity of Islamic law and will be of interest particularly to those working in both fields.

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Citation Information

Choudhury, Cyra Akila, Review of *Islamic Law and International Human Rights Law: Searching for Common Ground?*, *SCTIW Review*, March 1, 2016.
http://sctiw.org/sctiwreviewarchives/archives/992.

ISSN: 2374-9288