SIGNIFICANT EVENTS AND DEVELOPMENTS

'Islam and Constitutionalism':
Interview by the Islamic Culture Foundation (FUNCI), Spain
(12 September 2014, IAIS Malaysia, Kuala Lumpur)

Mohammad Hashim Kamali and Tengku Ahmad Hazri

The following interview was conducted by and at the initiative of the Islamic Culture Foundation (FUNCI), Spain, as part of the latter’s project towards the development of common principles of governance and constitutionalism derived from the Islamic tradition that can be applicable across the Muslim world. The interviewees from IAIS Malaysia were Mohammad Hashim Kamali (Founding CEO), Mohamed Azam Mohamed Adil (Deputy CEO) and Tengku Ahmad Hazri (Research Fellow). We would like to acknowledge and thank FUNCI and our interlocutors, Laura Sisnieaga (Research Coordinator) and Encarna Gutiérrez (Secretary General), as well as Alfonso Casani who oversaw the project subsequently.

Laura: Laura Sisniega (FUNCI, Research Coordinator)
Encarna: Encarna Gutiérrez (FUNCI, Secretary General)
Kamali: Mohammad Hashim Kamali (IAIS Malaysia, Founding CEO)
Azam: Mohamed Azam Mohamed Adil (IAIS Malaysia, Deputy CEO)
Hazri: Tengku Ahmad Hazri (IAIS Malaysia, Research Fellow)

Laura: There seems to be a double message in Islam with regards to human rights. On the one hand, it empowers the individuals with rights as contrasted with the pre-Islamic tribalism heritage of Arabia. On the other hand, Islam also gives a special importance to the community, i.e. the ummah, whose rights in some respects even trump that of the individual. How can these competing rights be balanced, and can the balance be reflected in, say, the charter of rights of a standard constitution?

Kamali: The focus of rights in the sources of Shariah is on the individual. One finds in these sources conceptions such as the rights of God (huquq Allah) and rights of the servants of God (huquq al-‘ibad) but the “rights of the community” (huquq al-ummah) is nowhere to be found. The ummah is a theological and political concept which comes to the picture when there is a clash of interests,
in which case according to a legal maxim, the public interests, the interests of
the plurality, prevail over the individual, but only up to a point. For example, the
essential rights of the individual are sacrosanct, and thus cannot be compromised.

The ummah as such cannot have any rights as Islam as a faith is primarily
addressed to the individual, not the ummah. Faith is a matter of belief and state
of mind, and thus has to begin with the individual. Indeed the language of the
Qur’an itself is addressed to the individual. The idea of ummah in fact is a later
development which came after the Prophet’s emigration to Madinah, and thus
was absent in the first thirteen years of revelation. It is of course an important,
overall and even umbrella concept subsuming all individual Muslims but when
it comes to fundamental rights, their protection is the main focus of the maqasid
al-shariah (objectives of Shariah) such as protection of religion, life, intellect,
wealth and lineage and thus cannot be forfeited.

Islam is not against the basic idea of nation-state. For after all, the Prophet
Muhammad (peace and blessings be upon him!) established the first Arabian state
in Madinah which then became a vehicle and carrier of the teachings of Islam.
Ever since its early beginnings, Islam and state have operated together. Provided
that the nation-state upholds the basic Islamic principles of good government,
equality and justice, there should be no necessary conflict. Islam and nation-state
can thus be expected to be supportive of one another, not the opposite.

It may be said that Muslims today tend to have three bases of identity, and they
do not live in a dichotomous world of dar al-Islam and dar al-harb, but in the
world of the ummah, the nation-state, and their natural homeland respectively.
The first is basically founded on the idea of unity in religion, whereas the second
is a political framework, and the third is rooted in innate human nature (fitrah)
and custom. Muslims today find themselves in these three circles of which the
ummah is the outer circle, whereas the natural birthplace, whether village or town
is the inner circle. In between lies the nation-state. These three circles represent
three levels of loyalty which need not be seen to be necessarily divisive and
conflicting, for they have the potential no less to be complementary and integral.
People can naturally belong to a plurality of circles and have multiple layers of
loyalty. The village and family home often remains as much of a reality today as
it might have been in the past.

The nation-state is the political home and the wider framework where
individuals realise their aims and objectives in life and utilise opportunities
that can exist at this level, not only for personal growth but also for greater and
more effective cooperation with other communities and states. If the Muslim
countries of today decide to take up a plan to have greater levels of interaction
and cooperation, the nation-state can well provide a valuable instrument and
vehicle for it. This remains to be largely a prospect, at present, but there is greater
awareness of the need for wider cooperation in economic, political and other spheres that can substantiate the essence of ideological unity within the ummah.

We should therefore recognise the primacy of the individual while the ummah is only significant if there is a direct clash. Otherwise they can coexist.

Laura: Yes, agreed, but the ummah is still a very interesting concept particularly when one contrasts it with its opposite. In Europe today for example, there is excessive individualism at the expense of society. The concept of ummah, even as a theoretical and abstract idea, may be instrumental towards attaining some common objectives transcending individual interests.

Kamali: The primacy attached to the individual via the concept of fundamental rights in no way vitiates the importance of ummah, for this latter concept is grounded in the Qur’an and hence fundamental to Islamic theology and law. Nor should there be clash between ummah, nation and nationality. The nascent Muslim community in Madinah, for example, has a distinctive status relative to the rest of the ummah – even the Maliki school of Islamic jurisprudence recognises the doctrine of *ijma’ ahl al-madinah* (consensus of the people of Madinah) as a source of law because Madinah was where the Prophet and his Companions lived. It was their adopted homeland, and what came to be known as Sunnah had much to do with customary practices of the people of Madinah.

Of course the notion has its difficulties but they mainly feature when there is a conflict. Islam as a pragmatic religion recognises the customs of society. Concepts such as constitutionalism, state laws and the nation-state have been widely accepted, almost universally. The Muslim world too has adapted itself accordingly, applying the nation-state model for over a century and has even adopted written constitutions. These have become the prevailing ‘*urf* (custom) as it were of the present generation of Muslims, which is a recognised basis of law and judgment in Islam. Custom that is not in conflict with the text can also qualify the text and extend its meaning to new situations.

Laura: But the idea of nation has its disadvantages as seen in Libya for example, where people are discriminated based on their nationality. So the concept of ummah can function as a basis for unity, even at an abstract level. I agree that participation and interaction in the international scene may require communities to constitute themselves as nation-states, but to avoid the dangers of the idea of nationality, can a synthesis nevertheless be effectuated between the ummah and the nation-state?

Kamali: Yes, I think so; the world in fact is moving in that direction. Regional integration is underway such as the European Union and the African Union. That
may bring us closer to the universalism inherent in the notion of ummah but if it is to acquire more concrete form, a lot more needs to be done. In principle it is possible to have constitutional recognition that the nation is a reality but part of a larger entity which is the ummah. It would be desirable to move in that direction as it can bring greater unity and cooperation based on an entrenched principle of the scripture and history of Islam. But that is unfortunately a far-cry from the present. The Arab world is disunited; the Arabs speak of the ummah but can, for example, Saudi Arabia and Iran be persuaded to become one ummah and to reflect this principle in their constitutions? As an idea though, it is a forceful and beneficial one but more work needs to be done.

Laura: How do we reconcile diversity with stability? There is great diversity and disagreement in the Shariah – between schools, groups and even individuals, but there is also a need to implement a legal system which is stable yet supportive of the diversity.

Kamali: To understand how Shariah and politics can coexist, we must first understand the meaning of Shariah. The Subcontinent scholar, Abu al-A’la Maududi once posed the question, “What is the real Shari’ah?”, to which he replied, initially, that it refers to “the Qur’an and Sunnah”. But that was too broad so he specified it as “the decisive injunctions of the Quran and Sunnah”. That is the real Shariah, without any reference to the madhahib or other things. So Shariah can be visualised as a cluster of injunctions and decisive rulings.

Does this come into clash with politics? Are there mechanisms by which Islam’s respect for diversity and disagreements can be constitutionally enshrined? There is already in the constitutions of Muslim states the recognition of Shariah in different ways. In Egypt the Shariah is the “principal source of legislation” while in other countries, different phrases and clauses have been adopted. But Shariah has also historically co-existed with other forms of law, like the administrative decrees of the caliphs and rulers, the positive law (qanun), and authoritative custom (‘urf) of society. These are even recognised by the Shariah, just as the Shariah also recognises the ulu al-amr (people who are in authority), which indicates its recognition for political leadership.

The idea of madhhab (school of law), is not Qur’anic but a later development three centuries after the revelation. There is in any case the concept of ijma’ (consensus) in Shariah. If we take the much larger entity of the text, the madhahib and others, some very basic collection of rulings and say that this is what is in common among the madhahib, we can come together and unify the madhahib over the substance of what they have in common and give it recognition as such. So it is possible that you can think of uniting these various interpretations and
madhahib by reference to the decisive injunctions of the Quran and the Sunnah and narrow down the scope of diversity and disagreement. To do this would require not only the existence of political will but a strong spirit also of ummatic unity on the part of the ulama and scholars.

Laura: What are the boundaries of government authority and power? Does the concept of Islamic state offer any clue as to where the limits of state authority are?

Kamali: Well, I think this idea of Islamic State, what it means actually and exactly, is not a matter of consensus. There is no consensus about what an Islamic state is like. There are different approaches and ideas, the fundamentalist will have one idea, but people of different orientations may understand what Islamic state actually means differently. Unless we have that, we cannot be sure. To say for example that this state, Pakistan is founded according to Islam and Shari’ah, Afghanistan too, but Bangladesh is not, or Iraq is not - so we cannot say this unless we have a categorical concept or definition of what Islamic state means. That said, we do have a certain flexibility in our understanding of Islamic State. We do not have a model, or organised format of a state. What we are talking about is a set of principles, and if you have a clear idea of those principles, whether it is justice, consultation, consensus, equality, accountability, leadership and so on. Principles that are essential to the identity of an Islamic polity need to be recognised; if you have those then you can say that a state is Islamic, that it is according to Shari’ah. We don’t have that specific definition, but only principles. Yet there is some flexibility in the understanding of many of these principles. The idea of justice is essential, consultative government is essential, the idea of some kind of commitment to the protection of the basic rights of the people, the sanctity of the property of people, their basic freedoms and equality. Those are the ideas that will come in the order of priority. You might mention the maqasid, at least the essential maqasid. They are high up. They will come in the first order of principles that the state must fulfill in order to be designated as Islamic.

Laura: So I understand that this set of principles can sometimes be materialised in a constitutional text, for example, or through other practical means of realisation.

Kamali: It would not be unthinkable for a constitution to recognise this and to articulate it. A constitution (of Afghanistan for example) should specify what an Islamic republic means. It should have some basis of the assurance that Afghanistan is say an Islamic Republic. Then you can have the basis of an answer to people, such as the Taliban in the case of Afghanistan, who tell you: “we want a Shari’ah State”. And I say to them “what do you mean? We already have what
you might be thinking of, but may be your idea of Shari’ah is not really that. You may be after power.” So I think that you have to have this eventually in your constitution to be able to address some of these wild claims, unfounded claims. The general public is not well informed, but if the constitution addresses the matter and clarifies existing ambiguities, then you will have some assurance and and authoritative basis on which to reject unwarranted claims.

**Encarna:** This is the aim of this project: we want to see if there is a possibility to establish some of these principles that all the ummah and the nation-states could agree on. We want to see if there are certain principles that cannot be denied by any government, any sect or any interpretation of Shari’ah; a minimum common agreement to start working on.

**Kamali:** Perhaps you might think that it is a good idea for this project to come up with a set of principles. The Shari’ah is of course divided into ‘ibadat, mua’malat and other areas of the law. ‘Ibadat and ‘aqidah are not really a part of what we are talking about. Yes, the constitution must recognise ‘ibadat and ‘aqidah as bases of the Islamic identity of state, but the state has very little role other than regulating [and] administering them. So the state is not really a religious idea; it is a civilian idea. Al-Qaradawi and others will tell you this as well.

**Laura:** You have already talked a little about shura, but I was wondering if you wanted to add something else about it, as it is a subject that interests me quite a lot, with regards to democracy.

**Kamali:** I think it is an important concept. Quite a few books have been written on it. There are at least two verses in the Quran on shura, but some say that shura is not binding, and I think that scholarship has taken this, that despite the primacy of this concept to the state and to democracy, to know the people’s place in the polity. Still they hang on to the idea that this is not compulsory but only recommended or even optional. We should recognise this as a necessary ingredient and an important pillar of an Islamic state. It is a consultative, participatory state as a whole, not just to have a consultative assembly or majlis al-shura. We can also bring into the picture the idea of bay’a, the pledge of allegiance. The two together come close to the idea of electoral procedure.

**Laura:** Could this diversity play a role as checks and balances between different schools? Or is it difficult to keep this diversity inside a nation-state? There are two ways of organising authority: centrality (one institution that issues all norms) or diversity (many institutions that can issue those norms). How do we balance them?

**Kamali:** Islam stands for diversity within unity. There are two concepts in
Islamic jurisprudence: one is the idea of disagreement and diversity, *ikhtilaf*. That has a role because it is another name for *ijtihad*. You have to be free to take a different line, disagreement is perfectly acceptable provided it is reasonable; but no community can live its life permanently through disagreement. Then there is the concept of *ijma’*, or consensus. We must visualise that *ijma’* is a more authoritative concept. We recognise diversity, but not on its own as such. If it would lead us to some kind of unity and agreement on principles, then that is the kind of diversity that is recognised in Islam. But in my personal view, the Muslim world today is in much greater need of consensus and unity than it is of disagreement. There is so much disagreement, very little unity. We ought to recognise that disagreement would not help us a great deal.

**Laura**: Notwithstanding the disagreements within the Muslim ummah, do you think it is nevertheless possible to establish, say an international tribunal of Shariah consisting of representatives from each school as a step towards unity?

**Kamali**: Well, it should be possible if we could have an effective Organization of Islamic Cooperation (OIC), if we could have an effective Arab League council, if we had an authoritative body that could take important decisions and there is a mechanism that can put some clout behind those decisions. Then I think it is important that we work towards that and remove the levels of disagreement towards some kind of [agreement on] the important principles.

**Laura**: What do you think about Islam and human rights after the Arab Spring? In countries like Tunisia and Egypt, there appears to be tensions between human rights groups and Islamic movements, each appropriating human rights and Islamic discourses respectively. Can this dichotomous and dialectical approach be overcome towards greater constitutional consensus?

**Kamali**: Yes, I have actually written a little on Shariah and human rights, and on Islam and human rights. The general tendency in my own writings and those that have sat in conferences with me is that they are not in opposition or contradiction; the commonalities are much stronger between human rights and Islam. One ought to recognise that the basic rights of individuals are recognised both in Islam and human rights. Human rights are actually an authoritative concept. It is gaining traction among Muslims. There is interest to make recognition of human rights as an obligation of the state so as to implement the Universal Declaration of Human Rights, to the extent that it does not conflict with the principles of Islam. The idea is that they are not contradictory concepts, there are commonalities between the two. Nevertheless, tension exists, with regards to women, freedom of religion, and maybe one or two other areas. These are quite well known. As
far as I can tell, a large number of Muslim as well as some western scholars have tried to minimise rather than maximise these. I have written a book on freedom of expression in Islam and my conclusion is that freedom of religion is a normative principle of the Quran. The punishment by death for apostasy is not there in the Quran and times have changed. I have looked at history: there was a time for it but now I think we should try to minimise the differences, some of the rights, like the right to equality of women, have gained greater recognition. I think it is advisable to highlight and increase the commonalities. I don’t say that there will be one hundred per cent agreement- people do not expect that either. We can look at the Universal Declaration of Human Rights and then look at Shari’ah and identify specifically, not in an expansionist way but in a reasonable way, the similarities and differences.

**Laura:** In Europe today, democracy is on the decline. There is cynicism towards it due to various problems such as corruption and rampant individualism among others. Do you think there is something that Islam can offer towards the renewal of democracy in Europe?

**Kamali:** The first thing that comes to mind that Islam can contribute to the European idea of democracy is to bring a greater awareness of ethics and giving them recognition in law and government. But ethics in this sense would entail some recognition also of religion in politics, as a great deal of ethics originates in religion, and that may also bring us closer to recognition of metaphysical truth. This may depart in turn from the Enlightenment conception which draws a hard line of separation between religion and state. Modern liberal democracy as we know it today is heir to the Enlightenment philosophy which posits secularism as the best option. This is something that Islam can moderate.

We still share with Europe the idea of government as a civilian rather than religious institution. Al-Qaradawi in his book, *Min Figh al-Dawlah fi’l-Islam* (On Public Law in Islam) developed the idea that the Islamic conception of government is civilian, not theocratic.

But Islam can also contribute to the greater recognition of religion as a reality in people’s lives. The separation of religion and state is not so black and white or even realistic in Europe. When someone commits something contrary to religion, even in Europe he is taken to task. The distinction between religion and politics should of course be kept, but there should be sharing of values. Electoral democracy itself has proven to be problematic. In almost every election in developing countries there are claims of fraud, rigging, etc. In the last decade or so, hardly any election in Muslim countries is spared from such claims, and the matter will not end there.
In fact Europe has already accepted one aspect of Islam without question: Islamic banking and finance has now been taken by Europe and the United States. Similarly the halal industry is finding a niche in these markets. So there is recognition of Islamic contribution although it may be selective and vary in line with the general climate of relations between countries and regions.

One other thing that Islam can contribute to democracy in Europe is the recognition of local context. Islam recognises culture and custom ('urf). In history also, when a certain region was conquered, like in the time of 'Umar al-Khattab who conquered Jerusalem and some parts of Syria, he left the customs of these places unchanged so long as they did not conflict with the principles of Islam. This comes close perhaps to the idea of multiculturalism, the recognition of customs and cultures of people as an aspect of diversity that Islam recognises. Then there is a degree of support in Islam for consensus-based politics. You have already raised reservations about democracy that certain aspects of electoral democracy should be revised. We ought to move to the idea—and it is an Islamic idea—of consensus based politics, rather than counting of votes and dictatorship of majority. These are some of the areas perhaps where Islamic ideas and institutions can add value.

So we are actually exchanging ideas and practices. If in the realm of democracy, there is an openness of kind, such exchanges might be the ways. Maybe my colleagues can comment if they have any thought, whether we can see aspects of Islam that would be worth bringing into the picture in the context of merging European thought with Islamic thought in some other ways. Perhaps there are ways—what would that be? I said consensus, ethical core and reducing this black and white distinction between religion and politics.

Azam: My perspective resonates with Prof Kamali’s. Maybe electoral democracy has to be selectively applied, like in the Middle East for example. In Malaysia, we do recognise the Parliamentary setup with the practice of election as part of the process of democracy. In fact the Islamic Party of Malaysia (PAS) recognises this setup. This is something that perhaps can be accepted, so we may produce practices in some Muslim countries which differ from each other.

Hazri: You are probably aware that, historically, Islamic law developed outside the context of nation-states, as opposed to the Westphalian nation system of Europe, where legal system developed within the context of the nation-state. One important contribution Islamic law could make to Europe is to make it realise that the nation state has its limits and the idea of a legal system predicated on the nation state is itself dwindling. We have seen this in the case of Europe, for example. The idea of a constitution of Europe did not materialise, precisely because the idea of
the nation-state was so entrenched. The project towards the unification of Europe failed precisely because of that, so, in other words, the boundaries between the nation states have crumbled and Europe is now realising that it is in need of a legal system, a legal order (which is methodologically sophisticated) that goes beyond the boundaries of the nation states. That, historically, was realised by Islamic law and Islamic law was able to organise itself and did achieve stability, as you mention in your paper, through the doctrinal schools. These doctrinal schools are basically independent of nation states. This is precisely one of its flexibility and it’s also one of its strengths, and I think that, as global events unfold, there is a possibility and a prospect that what has historically been the practice in Islamic law will in the future be the practice of global society, as the nation state system itself crumbles. So Europe needs to realise this early on.

Laura: Yes, I agree with you there. Indeed, in some ways Europe is heading towards a scenario which was in fact the historical reality of Muslim societies. Europe now realises the artificiality of the division fostered by the nation-state system and the need to forge universal fraternity transcending state borders—an idea which had long since been present in Islam.

Encarna: In Europe we have only managed to come to an agreement when it comes to financial issues. So ultimately, the European Union is merely an economic community. It’s the same that we’ve seen when it comes to innovation, or rather a new approach in Shari’ah. When it comes to financial things, in certain countries which are very restrictive, like Saudi Arabia, they accept new point of views, they change, etc.

We have also seen, like you have said, the limits of the nation state concept in Europe. Taking in this account the doctrinal schools from the Islamic point of view, which would be the mechanism to control the utilisation of a specific doctrinal school to go against the principles of Shari’ah, of consensus, democracy and freedom? How can we prevent the government from using a specific doctrinal school to implement tyranny or dictatorship?

Hazri: There are two aspects to the issue – firstly, the need for mechanisms to function as effective checks on the power of the state, and secondly, the instrumentalisation of religion, or specific doctrine or school, in justifying abuse of power.

As far as the first point is concerned, means of countering the power of the ruler are in fact diffused across the social spectrum, and assume a variety of forms. To start with, prevention is better than cure, and to that end, philosophers, theologians and jurists alike have deliberated on the essential qualities and traits of a ruler. These function as moral and ethico-religious guidelines for believers—
the rich and the poor, the elite and the laymen alike—as to whom they should entrust as the *ulu al-amr* (literally, “those in charge of affairs”, a Qur’anic term in 4:59).

Of course in some cases, leadership is imposed from above against the people’s will, in which case there will be *de facto* rather than *de jure* government, by-passing the moral and normative pronouncements as aforementioned. But even then, the scholars dwelled at some length on the conditions permitting outright rebellion: a great deal of them seems to be concerned with the dangers of anarchy and lawlessness and thus assign some form of recognition even to such government, albeit not without coming up with measures by which change can nevertheless be effectuated without disrupting social harmony.

Apart from prevention, even when rulers have transgressed the boundaries of Shari’ah, again the moral imperative is operative: the greatest jihad, according to the Prophet (peace and blessings be on him) is to speak truth to an unjust ruler. Similarly he counseled that if a person sees wrong being done, he has to change with his hands, or if not possible, with his words, or even if this is not possible, then at least rejection with his heart.

These arguments point to the fact that the concern for justice, as befitting its primacy in the Qur’an itself, begins even at the level of the individuals who can act collectively as “the people”, by means of moral principles that should be followed.

Apart from individuals, institutional mechanisms—although some informally—are also in place to check state power. During much of Islamic history, the abuse of power by the rulers was curbed and curtailed among others by the ‘ulama (scholars) in their various capacities: as representatives of the community in issuing *fatwas* as to whether or not the ruler should be obeyed or whether the ruler still has legitimacy from the standpoint of the Shari’ah, as *de facto* lawyers interceding on behalf of wrongly arrested or punished individuals, and as judges (who are themselves appointed from among the ranks of the ‘ulama). That was until the arrival of colonialism and the onslaught of Western modernity in the Muslim world which disrupted the institutional balance of power between the scholars and rulers, apart from initiating radical socio-political and education reforms which ruptured continuity with some of the traditional practices.

Admittedly, those mechanisms have not altogether disappeared so that even at present we see traditional scholars playing their role. For instance, during the Arab Spring, Yusuf al-Qaradawi issued an opinion on the permissibility of revolt against Muammar al-Qaddafi in Libya. In Syria there was a debate: on the one hand, Ahmad Badr al-Din Hasoun and Said Ramadan al-Buti defended Bashr al-Assad, while on the other hand, Muhammad al-Yaqoubi fiercely condemned the Assad regime and stood as one of the earliest ‘ulama to support the popular uprising in...
Syria in 2011. But even Hasoun’s and Buti’s support was qualified: they did not endorse some of the brutalities of the Assad regime but only cautioned against what they perceived to be a worse alternative to “reforming within”, namely falling prey to the geopolitics of “divide-and-conquer” and anarchy spearheaded by foreign intervention. And in Egypt, some quarters evinced confidence in the institutional and scholarly authority of al-Azhar University that there were even calls for its role to be constitutionally enshrined.

What I’ve said thus far nevertheless assumes a religious context, and this if I understand correctly, is the second concern underlying your question, namely, the use of religion, or at least religious doctrine or school in the perpetration of injustice. The fear is that, when religion is invoked, the act of injustice would then have the veneer of legitimacy and validity, if not piety. But this again, is the peculiar concern of modern societies living in modern states in which the multiple centres of authority as found historically have been centralised if not uniformised under the purview of the state. Some Muslim states today have adopted Islam as the official religion or even a specific madhhab as the official legal school of the state. Relative to the long history of Islam, this development can be said to be quite late, only in the 16th century when the Ottoman Empire adopted the Hanafi school as its official school, although admittedly, theologically it was even much earlier, in the ninth century when the Abbasid caliph al-Ma’mun elevated the Mu’tazili school as the caliphate’s official theological doctrine.

Yet none of these developments should be construed as assigning either the state or its organs with the fiat authority to speak on behalf of Islam. At best, the institutionalisation of religious practices should be understood as facilitating the administration and governance of society whose moral order is shaped by the Shariah as mentioned earlier, of course among other norms such as custom and statutes. The role of individuals as I’ve said earlier, and the ummah (throughout the world, not just the Muslims living in the polity, especially in our globalised world) in ensuring justice is always attained, is not diminished by the institutional facilitation of Shariah through the state.

What this implies therefore, is that the mechanisms of preventing injustice can be various, as I said at the very beginning. There can be state or non-state measures to achieve that objective. At the state level, in the contemporary world, many Muslim states have adopted the three-tiered model of governance found in the West, namely the division of government into the executive, legislature and judiciary. It is the checks and balances underpinned by a principle of separation of powers between them that ensured no one body predominates, giving it leeway and excessive power. But even then this has not prevented societies applying them, Muslim and others alike, from lapsing into constitutional crisis, as when the three bodies could not work together, when say the court declares
unconstitutional every piece of legislation issued by the legislature, or when parliament enacts law repealing judicial decisions, if not revoking their authority together. Consequently, Muslim societies adopting this practice may be open to the same risks.

Since the 19th century, written constitutions have also been adopted by Muslim states. At the beginning the intent was less to control and limit executive authority than to centralise political authority, to assert sovereignty and statehood and to express ideological intentions, which can be seen in the earliest constitutions of Tunisia, Egypt and the Ottoman Empire. But later constitutionalist motives seem predominant, as can be seen in the constitution making processes after the Arab Spring, although aberrations can still be detected. In a way a constitution can be a mechanism to prevent tyranny and secure limited government, but this will not work if there is no commitment from the people and the state itself and the constitutional will only amount to nothing more than “parchment promise”. Some countries establish constitutional courts towards that end, such as Egypt’s Supreme Constitutional Court, but this will not solve the problem if such court is equally populated by pro-regime faction among other possibilities.

However, I think there is one peculiar feature in the constitutional drafting process in the Muslim world, not just Arab countries, but even elsewhere, such as in Malaysia, which carries a latent possibility to be developed into genuine measure of constitutionalism. That feature is the on-going debate on the place of Islam in the constitution or the state. It is interesting that such debates have generated considerable body of literature in the various jurisdictions. There are some common themes in all these states but there are also distinctive, local narratives that can be identified, signifying that there is unity in diversity when it comes to debates on Islam and the constitution throughout the Muslim world.

These debates could have been the foundation of a new corpus juris—the closest civil equivalent may be the discipline called “conflict of laws”—which studies how Shariah can be applied in the constitutional and legal makeup of modern nation-states.

Now this point relates to two points that we’ve discussed earlier, namely the “internationalism” of the ummah as opposed to the provincialised outlook of nation-state with its nations, and the fact that Islamic law historically developed outside the context of the state. By developing such corpus juris, these two characteristics can be given fuller recognition, although that would merit an in-depth discussion in its own right.

**Encarna**: We are actually looking for a possibility to achieve a perfect system, so that there is no misuse of the powers of the government. But, as you know, this is very difficult. We wanted to know if there is a possibility of thinking of
a mechanism of prevention in the constitutional document. Which would be the mechanism to prevent this from happening? Is there even a theoretical possibility, a concept coming from Shari‘ah, that could prevent the misuse of a specific interpretation? For example, it is not possible in the United States. Theoretically, it is, but at the end citizens can’t, or at least, don’t do it. Is it possible, from an Islamic point of view to find another point of view which would be more effective?

**Kamali**: These mechanisms and procedures are generally left to the people themselves through consultation and agreement-based solutions. This is the subject of the Islamic public law principle of *siyasah shar‘iyah* (judicious policy, or Shariah-oriented policy) providing scope and flexibility for new initiatives by the authorities which are harmonious to the spirit and purpose of Shariah. It is the primary duty of the state to ensure that essential Islamic principles are duly observed but the problem starts when the state itself becomes unjust. In Islamic history, there was no idea of constitutionalism. What existed was a set of commitments—to justice, to the authority of the ruler—but when things went wrong, there was no mechanism like a constitutional tribunal, or a constitutionally prescribed impeachment procedure, to try the head of state. What happened was lawlessness (*khuruj* - mutiny), challenging the authority of the state often leading to internal strife and violence.

In present times, such mechanism exists in a number of ways. In Iran, there is a Council of Guardians, and even above that, the Public Interest Council (*shura-e maslahat*). We should recognise an authoritative council or body that consists of Islamic scholars and constitutional law experts which can function as the final arbitrator in the event of disagreements in the community or conflicts between the organs of state.

However, that would be for the people to come up with consultative proposals. The state, according to the Hanafis, is a matter of good management, public interest (*maslahah*), consultation (*shura*), consensus (*ijma‘*) and independent legal reasoning (*ijtihad*). These are basically civilian, not theological concepts. These doctrines really give you an idea that the people are authorised to come up with control mechanisms. Whatever mechanism that seems best and effective, that would be acceptable. Perhaps some kind of council would be an idea that the constitution itself recognises, at times when there is conflict, like what happened in Afghanistan recently. In Afghanistan, you have these two candidates. They were disagreeing even after the elections. That scenario is still unfolding I suppose: this is the recipe for total breakdown and chaos. So if you have an authoritative tribunal, it may be a Supreme Constitutional Court like in Egypt, Turkey and many other countries, that have the authority to issue the final conclusion or command. That is a question of finding a mechanism which cannot be based in
Laura: As you have argued, democracy assumes a cultural context. How do you think the Asian model of Islam and democracy can contribute to the development of democratic systems in the Arab world, some of which are still under construction? The Arab world itself seems not very aware of the Asian model of Islam.

Kamali: There are many good aspects of culture and custom in the Muslim world which is so diverse. If we were to look to Indonesia, to Malaysia, to the Arab World, to North Africa, Turkey, and many other places, you will find that there is a great deal of diversity, very good aspects of culture. It requires a study. I would say if I were to be asked, what we can learn from Southeast Asia, I think, one example would be Indonesia - they are open to the voice of people, to the voice of the community. Religion is recognised but there is a civic component which is quite strong. It’s not a totally doctrinaire approach to state and politics. We have the value system and a set of principles in Islam, but you contextualise them. What is notable of Indonesia is that they tend to have a softer version of Islam, and I think I would go for that because the fundamentalist interpretations, the hard line interpretations of Islam, have not done a good service to the people or to Islam. Islam itself recognises people’s welfare, their authority, their values, their customs to the extent that in one hadith (it is said): “What the Muslims consider to be good is good in the eyes of God” – “Muslims” of course [are here referred to] in their totality, in terms of their consensus. And I think it’s hard to specify. Some of the very ugly aspects of Jordanian, Afghan and Turkish honor killings have nothing to do with Islam. It is really a travesty of all values. But there are other good values in all these places, certain things are very good. We can try to identify and recognise them.

And we have the idea of political parties, which is not integral to the Islamic conception of state as such, although Ibn Taymiyyah and others have spoken in support of people’s right of association and their formation of parties that promote good and prevent what is to be rejected and evil. We don’t recognise political parties as such. Maybe this is something we can take further if it is deemed the best way now to articulate some of the Islamic ideas more effectively. You have in the Qur’an the basic idea of ‘promotion of good and prevention of evil’. But promoting good and preventing evil by individuals poses problems; organised parties and associations can be more effective and better organised. So you might recognise that this Qur’anic concept can be more effectively implemented by organised party structures. This may be a way of injecting the European
democratic system into our conception of the state in Islam. As to what different communities can contribute, there are ways, but it has to be studied. We cannot simply come up with this value or that value. It has to be a research-based effort.

**Laura:** One final question: has your experience in redacting the constitution of Afghanistan changed your perception on the role of Islam in the state? In particular, how you dealt with issues like the locus of sovereignty. How do you face this kind of challenge and how do you apply in this practical context your theoretical ideas on Shari‘ah and constitutionalism?

**Kamali:** We made a special effort. I was in the Constitution Commission of Afghanistan. Every country has its own set of priorities at a certain juncture of its history. Constitutions are all like that. Constitutions are changed because circumstances change. And this was a set of circumstances we sat together to construct a new constitution for Afghanistan. At that time it was soon after the 25 years of the war involving the mujahidin and the Russian invasion. And Afghanistan had the world’s largest refugee population. These were some of the issues that we were facing. And there was a strong component of Islam because we thought that we owed it to Islamic platforms and movements that ousted the Russians. So we thought that we should give Islam a clear recognition, [so an] Islamic Republic came into being. There are 17 references to Islam in the constitution of Afghanistan. But there was also the idea of inclusivity. There were many times that people split, but they need to heal their wounds, to come together and unite for a new future. There were some new developments: we recognised the Shi’a madhhab for the first time as a valid madhhab. This was a big development for the constitution of Afghanistan, even for today’s Sunni countries, although Shi’is may be a minority but we need unity and the effort that can bring the people closer together. It was one of the ways that we thought was needed, after 25 years of war, fighting the Russians and so on, to bring our people closer together. We did recognise that: it was a step toward unity. It was a good move as it so happens in Afghanistan we do not to this day have a Sunni-Shia problem that has plagued some other parts of the Middle East.

Then we also imposed a quota in the Constitution for women’s participation in government and in parliament. There was a new provision. From every province of Afghanistan, there must be two members of parliament. That brought 68 women to parliament as a requirement of the Constitution. I thought it was unprecedented. Even now in Afghanistan 27% of the parliamentarians are women, even Europe cannot match that. It is so unrealistic though given the wider scale of problems facing women in that country, but it is quite a significant step. In the Constitution, we had this idea of inclusivity, and there was
recognition of the Universal Declaration of Human Rights and recognition of international standards of justice. I think that the Afghan constitution stands out for some of these features. I think some of them are worth considering for other Muslim countries as well. But, of course, Afghanistan has not practiced much of what we have done. There has not been an effective government ever since. Much of the Constitution remains. There is no effective rule of law or effective government, unfortunately. I think rule of law is something which is not really quite well-recognised. The sanctity of this principle merits greater visibility, greater commitment and recognition in Muslim countries. We talk about it in the Constitution, a lot of things, fundamental rights, liberties of the people, wonderful chapters in all Muslim constitutions, but how much of it is reality? And I think these are some of the challenges and some of the gains but as I said, these were my experiences some of which are clearly related to circumstances that surrounded us.

As for sovereignty which you mentioned, we had no dispute over this subject in the Constitution of Afghanistan. I know this has given rise to much debate in the Constitution, for instance, of the neighbouring Pakistan, but in Afghanistan, in almost all of its Constitutions, sovereignty (hakimiyat) is declared to belong to the people. This is also the position in the current Constitution.

Seminar on Gender and Islamic Legal Reform
(Kuala Lumpur, 9 December 2014)
Tengku Ahmad Hazri

On 9 December 2014, IAIS Malaysia hosted two academics from the University of British Columbia, Canada, for the Seminar on Gender and Islamic Legal Reform, namely, Dr Rumee Ahmed (who presented on “Islamic Legal Reform: A View from Within”) and Dr Ayesha Chaudhury (“The Great Muslim Gender Debate: Learning to Disagree Agreeably”).

The challenge of Islamic law reform, claimed Rumee Ahmed, lies in the fact that Islamic law is embedded in a wider realm of ideas. Consequently, law is connected to “rules of concomitance”—to exegesis, to theology, to spirituality, among others—rendering a challenge to a single law to be a challenge to the entire conceptual narrative. A legal ruling rarely applies in a vacuum but instead is arrived at by bringing together suppositions from a variety of parts in the same whole narrative. This can be readily illustrated by tracing the evolution of Hanafi legal thought towards prisoners of war. By strict interpretation of Surah al-Anfal (8:67-69), taking such prisoners is impermissible. But if that is the case, then how