THE RULE OF LAW IN ISLAM: BETWEEN FORMALISM AND SUBSTANTIVISM

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Abstract: What has passed as the rule of law in Islam is in fact merely the formal features of legal principle, without considering the substantive basis for law as a moral ideal. This article argues for a more substantive understanding of the rule of law that is sensitive to the *sharīah*'s vision of the good and just society. To this end, the article evaluates the distinction between formal and substantive versions of the rule of law, examining the foundation of that distinction in legal positivism and the notion of the dualism of law and morality. The rule of law in Islam will be seen to by-pass such bifurcation and, by being rooted in the *sharīah*, affirm a harmonious legal continuum between the individual and the state. It will also be shown that the rule of law in Islam is organically connected to the question of pluralism and multiculturalism in the context of the modern nation state. The implication this has for an area of substantive law - namely, human rights - will then be considered.

Introduction

The 'rule of law' is often meant as a contrast to the 'rule of men'. As Aristotle declared, "It is preferable that law should rule than any single citizen," meaning that the guardians of the law must also obey them.¹ In other words, if a society is not governed by the rule of law, it is ruled by human beings, most often kings, emperors, and other types of sovereign. This was the case, for example, in ancient Egypt and China, where the commands of the rulers were binding on the people. Those societies were, in a sense, ruled by human beings – it was a human being (i.e. the ruler) who created the law and then enforced it. But, the problem with the 'rule of men', as Aristotle puts it, is its reliance on the vagaries of the human mind, which one day may say a certain action is permitted, but on another that it is wrong and should be punished. It would be better if society were governed by basic rules, which the people generally agree upon and which bind them as much as they bind the rulers. When a society is governed according to such rules, it is said to be governed by the rule of law; in such cases, it is the law which people rely on, not an arbitrary decree by a single human being. Although there must

necessarily be someone responsible for enforcing the law, this ‘someone’ will also be bound by the rules, which he cannot simply change according to his own desires. The law applies to everyone without exception. A society so governed is described as a nomocracy.

Today this logic verges on the common sense: everybody wants the rule of law because nobody wants rule by man. “Where the rule of law ends, tyranny begins,” declared the English philosopher John Locke.² Indeed, so much are we in agreement on this issue that an English judge, Lord Bingham, described it as “the nearest we are likely to approach to a universal secular religion.”³ But nonetheless, what qualifies as the ‘rule of law’ is disputed. This is demonstrated, for example, by the Nuremberg trials. Set up after the bitter episodes of World War II and the Holocaust, the Nuremberg trials were intended to try Nazi officials. Although it might be considered obvious that these individuals had committed grave crimes, whether they could be punished was controversial. Thus, a court of law can only punish someone for contravening an existing law – as the legal maxim goes, *nulla poena sine lege* (‘no punishment without law’). Consequently, to declare that a crime has been committed, there must be a law that has been violated. Problematically, therefore, under the Nazis the Reichstag (or German legislative assembly) passed laws—known as the Nuremberg laws—authorising and endorsing many discriminatory and morally questionable practices (often explicitly aimed at the German Jews), thereby enabling the Nazi officials to claim during the Nuremberg trials that their actions during the Holocaust were in fact ‘legal’. Consequently, we might ask how, if the Nazi officials did not contravene any existing German law, their guilt could be established? The Nuremberg court’s solution was to pass a set of retrospective laws, criminalising their actions. But, when instances like this happen, it is pertinent to ask whether the rule of law is really operative. Strictly speaking, it was a *violation* of the rule of law – i.e. the passing of retrospective laws – which guaranteed justice in this case. To *uphold* the rule of law, on the other hand, would have meant that the officers were acquitted.

It is for this reason that jurists have distinguished between *two* versions of the rule of law: the ‘thin’ and the ‘thick’. These correspond to the distinction between formal and substantive notions of law. The formal understanding of the rule of law, for example, is not concerned with whether a law is good or bad, but only with enforcing its formal precepts. These include non-retroactivity, the manner in which the law was promulgated, and the clarity of the ensuing norm.⁴ The formal meaning of the rule of law thus does not pass judgment on the actual content of the law. By contrast, those who espouse substantive conceptions of the rule of law seek to go beyond mere formality. Although they accept that the rule of law has formal attributes, they seek to take things further: they appeal to the notion

of ‘substantive rights’ based on (or derived from) the rule of law. These rights are then used to distinguish between ‘good’ laws (i.e. those which comply with those rights) and ‘bad’ laws (i.e. those which do not). As an example of a substantive view of the rule of law, we can take the United Nation’s Secretary General Report, entitled ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’. This document defines the rule of law as that which is consistent with “international human rights norms and standards.” Thus, a country will not be seen to comply with the rule of law, even if it possesses the formal features of law, unless it meets these substantive demands.⁵ In this article, we will argue in favour of this substantive approach to law. First, however, we will more clearly point out the problems with a purely formalist approach.

The Formal Conception of the Rule of Law

Purely formal conceptions of the rule of law bear affinity to legal positivism because, “the formal conception of the rule of law, and the desire to keep legal questions separate from broader issues of political theory in deciding what the content of the law actually is, fit naturally together.”⁶ Joseph Raz, a leading contemporary advocate of legal positivism, maintains that the rule of law is just *one* of the virtues by which a legal system should be judged, and thus should be construed as distinct from democracy, justice, human rights and other means of evaluating the merits of the law. Consequently, “the law [...] may institute slavery without violating the rule of law.”⁷ This is because law per se may only be reflective of one’s political preferences or leanings.

The Austrian economist and philosopher, Friedrich Hayek, a strong critic of the purely formal view of law, has criticised what he calls the ‘rationalist’ or ‘constructivist’ understanding of the origins of law – namely, that it “proceeded from the will of a legislator who rationally studied the problems of society and devised a law to establish what he thought was a better social order.”⁸ Rather, for Hayek law precedes legislation (i.e. the will of the legislator). Legislation, he says, appeared relatively late in human history. Social order (as achieved by law) was therefore not the result of top-down rational planning, but rather “occurred spontaneously through the interactions of hundreds or thousands of dispersed individuals who experimented with rules, kept the ones that worked, and reject[ed] those that didn’t.”⁹ According to Hayek, societies have their own norms, values and principles, which then become the law. To think that laws can be made by merely passing legislation reeks of social engineering, itself borne of the conceit that the legislator can somehow anticipate all the implications that ensue from making such laws. Such a conceit stands at the heart of historical episodes like the French and Bolshevik Revolutions, both attempts to remodel

and reconstruct society along ‘rationalist’ and ideological lines. The net result, however, was not order but tyranny and totalitarianism. Not surprisingly, Brian Tamanaha argues that “formal legality has more in common with the idea of rule *by* law than with the historical rule of law tradition.”¹⁰ In fact, formal legality is a matter of rules: when theorists like Jürgen Habermas try to link legality with democracy, they invoke the idea of living by laws of one’s own, as articulated by thinkers like Immanuel Kant and Jean-Jacques Rousseau.

According to Hayek, to preserve the rights and liberties of the people we should recognise that laws can only be generated in a society which creates its own norms, not through legislative intervention. In fact, legislation can have a deleterious and paralysing effect on the laws generated by a society. This is because self-generated norms regulate societies from within and guarantee self-determination, while legislation is control by a centralised body with only limited knowledge of social reality. It is best that societies are governed by rules that they themselves generate and which have kept them together for generations. We can thus better understand society in the sense described by Edmund Burke, as “the partnership of the living, the dead and the yet to be born,”¹¹ than in the cries of Karl Marx that “the tradition of all dead generations weighs like a nightmare on the brains of the living.”¹² The role of legislation should be to simply codify existing norms, not create and shape moral rules. One should therefore adopt the approach of the ‘legal peripheralists’, not the ‘legal centralists’.

A possible criticism of this view highlights discontinuities in the evolution of law – that is, to the fact that some societies have had their legal systems destroyed, dismantled or reformed. Francis Fukuyama argues that such discontinuities can only be explained via the intervention of political authority, not as a result of Hayek’s spontaneous order.¹³ For instance, the English common law system – which Hayek admired so much – was not the result of spontaneous order. On the contrary, it was “law of a fundamentally different sort,” evolved from the legal reforms of King Henry II (r. 1154-89) after the Norman Conquest (1066). The reforms he introduced “changed forever the relationship of the King to Church, State and Society.”¹⁴ As we will see later, an analogous situation also exists in Muslim societies, where colonial authorities introduced substantial legal reforms and breaks with tradition. At this juncture, however, it is sufficient to note that Fukuyama’s criticism is only valid when the foundations of a legal system have been completely destroyed – something which is actually quite rare. Societies generally preserve, to a greater or lesser degree, elements of their past; even when many old bonds have been destroyed, societies are able to reconstitute themselves.

But notwithstanding its shortcomings, the formalist school of thought has exerted considerable influence over contemporary debates surrounding the rule of law. The distinction between formalism and substantivism is not purely

theoretical, but “of crucial importance in determining the nature of the specific legal precepts which can be derived from the rule of law.”¹⁵ The substantive approach renders law inseparable from broader discussions of justice, morality, and ethics. This is why formalists refuse to place too much emphasis on the substantive dimension, fearing that to do so would import all the baggage of subjectivism and personal preferences. More particularly, however, the formalist school has attracted so much support because of the prevalence and centrality of the modern state. The state is the primary actor when it comes to the rule of law, as can be seen from the fact that law can only be enforced by the state as the only body which can legitimately exercise violence against the people. Indeed, the formalist features of law (including an independent judiciary, government accountability, and due process) are almost exclusively state-centred.

But, while the formal features of the rule of law are therefore desirable, they cannot be pursued to the neglect or expense of substantive considerations – in particular, the evaluation of the content (or substance, as opposed to form) of the law. The latter presupposes a ‘higher’ standard by which actual practices can be measured. In the Islamic context, this standard is the *sharī‘ah*, which has certain values and principles as part of its vision of social order. At the same time, the *sharī‘ah* also recognises the fact that different societies will have their own distinctive understanding of the good society, which will influence and shape the formal features of their law. It is this respect for pluralism that renders the *sharī‘ah* hospitable to many different cultures. To demonstrate this more fully, we will now explore the theoretical suppositions of Islamic law in more detail.

The Theoretical Basis of the Rule of Law in Islam

We should assert at the very outset that a fundamental feature of the rule of law in Islam is that it *begins with the individual*, i.e. when the individual judges *himself* by the Law that has been divinely revealed by God, the *sharī‘ah*. This feature goes a long way towards offering an alternative insight into contemporary constitutional thought, which tends to see the rule of law as a principle of government. We do not, of course, discount the importance of the latter: there is ample evidence for it in both the Qur’an and *Sunnah*, as well as in the Islamic scholarly literature. What we wish to point out here, however, is that in Islam there is an intimate connection between the rule of law as a constitutional principle, and the rule of law in the sense of the individual’s self-governance. Indeed, Islamic cosmology envisions humanity and the universe as reflective of each other: man is a ‘miniature cosmos’ (*al-‘ālam al-ṣaghīr*)¹⁶ and his social order an extension of that human macrocosm – a principle Muhammad Iqbal well understood when he argued that the state is but “an effort to realise the spiritual

in a human organisation.”¹⁷ In other words, just as man, as an individual, is God’s vicegerent (*khalīfah*), so too society reflects this vicegerency, as demonstrated by usage of the word *khalīfah* to designate the Muslim polity. Yet, in English *khalīfah* has been translated in two different ways: as ‘vicegerent’ when referring to the individual in relation to God, and as ‘caliph’ when politically understood. In the original sense of the word, however, *khalīfah* is used to designate both concepts. This English-based linguistic bifurcation creates a conceptual schism where there should be none; the two meanings of the word are intimately linked. In Sufi discourse in particular, the Prophet Muḥammad is seen as the Universal Man (*al-insān al-kāmil*), embodying the whole cosmos in its perfection. The Prophet is thus the one who has truly realised and perfected his vicegerency (*khalīfah*). By the same macrocosmic extension, the social order which he established is deemed to be the best. Muslims are thus enjoined to live in accordance with the *Sunnah* (precedent) of the Prophet.

That the rule of law in Islam begins with the individual is further underscored by the fact that in Islam the accountability of government (*muḥāsabat al-ḥukkām*) is actually an extension of self-accountability or self-judgment (*muḥāsabat al-naḥs*). The primary addressee in self-accountability is the conscience of the individual: “Read your book and your own soul is sufficient as a reckoner against you on this Day” (17:14) and “Nay, (but every) man is a witness over himself” (75:14). The sharī‘ah, and unlike man-made laws, makes no distinction between the private and the public, in the sense that it is applicable in both areas of human life; the fact that others may not observe one’s wrong-doing does not detract from one’s responsibility, for the Qur’an states that individuals “may hide (what they do) from the people, but they cannot hide it from God [...] His knowledge encompasses all that they do” (4:108). Indeed, the Qur’an repeatedly reminds us that “God sees whatever you do,” that “God is aware of your actions” and “God is watchful over you” (3:156, 2:234, 4:1).¹⁸

It could be argued, however, that the above perspective only works within a homogenous Muslim community, in which the authority of the sharī‘ah is accepted by all. It would not be applicable to a situation where there is pluralism and a diversity of sources. Nevertheless, two pivotal features of the sharī‘ah suggest otherwise. Firstly, the sharī‘ah is only one amongst many principles God uses to govern the cosmos. Secondly, the sharī‘ah does not assume a vacuum of norms in human society prior to its arrival. Rather, it actively seeks to promote, encourage and cultivate pre-existing norms. Indeed, this second feature is an extension of the first: it is precisely because there is theological recognition of the manifold ways by which the universe (including human society) is governed that the sharī‘ah validates non-shar‘īah aspects of human life as furthering the values espoused by sharī‘ah.¹⁹

In the context of sharī‘ah as a ‘divinely revealed’ corpus of knowledge, theologians attribute the law-giving character of God to His Attribute of Will (*al-irādah*). Divine Will manifests itself in two ways: the Law-giving Will (*al-irādah al-shar‘iyyah*, also known as *al-irādah al-dīniyyah*, or Religious Will) and the Cosmic Will (*al-irādah al-kawniyyah*).²⁰ The effect of these Attributes differs. In the case of the Cosmic Will, this is the law of the cosmos, or ‘laws of nature’, also described as *sunnat Allāh* (God’s Way). In the case of the Law-making Will, this manifests itself in the form of revealed religion and sacred Law (i.e. the sharī‘ah). According to Syed Muhammad Naquib al-Attas:

though [the Muslim] lives and works within the bounds of social polity and authority and contributes his share towards the social good, and though he behaves as if a social contract were in force, his is, nevertheless an individual contract reflecting the covenant his soul has sealed with God; for the covenant is in reality made for each and every individual soul.²¹

By the “individual contract,” al-Attas is referring to the primordial Covenant (*al-mīthāq*) that every individual seals with God before he is brought into this world. Similarly, Abdal-Hakim Murad argues that:

Muslims, in their engagement with non-Muslim participants in society, are... intensely *mukallaḥun*, ‘charged’ before God to bear witness in the flux of God’s creation to the primordial unity and ethical perfection which, like all humanity, they beheld before enfleshment – the day of *alastu bi-rabbikum*, ‘Am I not your Lord?’ (7:172).²²

Towards a ‘Substantive’ Rule of Law in Islam

That the sharī‘ah is the basis of the rule of law in Islam is reflected in contemporary literature on constitutionalism in Islam. For example, in illustrating the Islamic basis for various constitutional principles, scholars have alluded to various verses from the Qur’an, as well as from the hadith literature reflecting the *Sunnah* of the Prophet. The principle of non-retroactivity, for example, is recognised when the Qur’an declares, “We do not punish any people before We send a messenger” (17:15), and “when We intend to destroy a town We first send our commandment to its transgressors, and when they turn away from Our commandment, then We punish them” (17:16). It also recognises the principle of legality (28:59, 5:95, 8:38, 4:22-23), which finds juridical expression in the principle of *ibāḥah* (permissibility).²³ The sharī‘ah further acknowledges limits to the authority of the ruler and the latter’s accountability to the people.²⁴

But, an inherent risk with such claims is that they raise the implicit question of whether the *sharī'ah* conforms to these standards, rather than the other way around. In fact it is precisely because the *sharī'ah* is measured against these existing standards that some have seen it to be '*underdeveloped*', or deficient relative to modern common or civil law systems.²⁵ To start with, who or what actually defines these principles to be those of constitutional provisions? Of all the many possible principles that one can imagine, why are these singled out as those necessary for a society to be considered under the rule of law?

Yet another problem that arises from positing the *sharī'ah* as the basis for the rule of law is the problem of regimes or legal systems that do not comply with *sharī'ah* demands. For instance, countries like France and Turkey, which forbid public displays of religion, such as the wearing of the headscarf for Muslim women (except under specific circumstances, such as in state-run institutions in the case of Turkey, or of a certain variety, such as the *burqa* and alike in the case of France). Are these two countries not considered to be under the rule of law?

All these issues in fact boil down to the distinction between 'formal' and substantive' rule of law. Ultimately, a great deal of the literature on the rule of law in Islam has been concerned only with its formal components, in effect minimising the *sharī'ah*'s vision of social order. Although, and as discussed, there is nothing objectionable about the formal approach to the rule of law, is the mere fulfilment of formal features, without enquiring into the actual content of the law, sufficient? We think not, for law is the art of living together, the science of human relations. The sacred law of Islam, the *sharī'ah*, envisions a social order that is based on justice. There is no point having an independent judiciary, or clear and accessible law, if the law itself is repressive. Certainly, *sharī'ah* cannot be understood in isolation from the social reality in which it operates. The whole fabric of society, including its norms, practices, conventions and institutions, must be taken into account when understanding how the *sharī'ah* is lived and experienced in the lives of Muslims. A great deal of this belongs to the realm of the 'unwritten' and 'informal', perhaps leading to the misunderstanding by the German sociologist, Max Weber, who once alluded to what he – now proverbially – called irrational *Kadijustiz* (kadi justice) based on apparently 'arbitrary' rulings and judgments – these were verdicts made by reference to the formal standards of law only.²⁶ This highlights the dangers of a strictly formalist conception of law.

The above-mentioned example of post-Holocaust Nuremberg justice also demonstrates how formal arrangements may hide other values, that there is more to law than what is written in legal codes and judicial precedents. In any legal tradition, there is always a meta-legal principle which constitutes the basis of that legal tradition. The formal features themselves are expressions of moral principles which can be very subjective and thoroughly dependent on the moral order of

that particular society. It is this moral order, over and above state legislation or coercive imposition of order, which actually underpins much of social cohesion.

As a result, we maintain (and in line with Hayek) that the best way to secure the rule of law is by promoting self-governance—that is, of allowing individuals, society and institutions to essentially govern themselves. This perspective is designated by the concept of liberty, i.e. that individual liberty is better safeguarded if the state rolls back and legislates only in general terms, leaving most of the detail to private actors. This essentially entails the recognition of local custom, an approach which has parallel in Islamic jurisprudence (*uṣūl al-fiqh*). In Islam, custom (‘*urf*’) is recognised as one of the sources of *sharī‘ah*.²⁷ As noted, *sharī‘ah* does not operate in a vacuum, nor was it meant to. Indeed, the importance of custom is enshrined in the Islamic concept of *dhimmī*, a term traditionally applied to non-Muslims living under Muslim rule, and derived from *dhimmah*, meaning ‘protection’.

In contemporary literature, *dhimmah* is often construed as a form of discriminatory practice by which non-Muslims living in Muslim lands are treated as ‘second class citizens’. In reality, however, *dhimmah* was an early attempt to deal with the problems of multiculturalism and legal pluralism. This is not commonly understood, however, because we are used to believing that a single polity should be governed by a single law. But historically, the practice of legal homogeneity and uniformity was not as prevalent as it is today, for the simple reason that societies tended to have their own local values and practices which bound them together – a feature which, as we have seen, Hayek recognised as reflecting the continuity of tradition. In many cases, these values and practices included mechanisms for arbitration and resolution of disputes. It was respect for this legal and judicial autonomy of the people that brought about the concept of *dhimmah*, so that the theological sanctification of diversity and pluralism could find juridical expression. In other words, and unlike later European colonialism, early Muslim territorial conquests did not bring about the imposition of a single law on all citizens. Instead, it was preferred to let communities live by their own laws, as that which had governed them for generations. So much respect was there for this legal autonomy that Muslim jurists even tolerated practices which they themselves regarded as abominable. An example of this can be seen with regards to Zoroastrian marriages among kin, e.g. mothers marrying sons, brothers marrying sisters. Ibn Qayyim al-Jawziyyah (d. 1350), a Ḥanbalī jurist, expressed his repugnance towards these practices but nevertheless defended the rights of Zoroastrians to continue in them, even under Muslim rule.²⁸

Given all this, to what extent, then, was the Egyptian thinker, Muḥammad Salīm al-‘Awā’ (b. 1942), correct when he reasoned that *dhimmah* came to an end with the onset of colonial rule? Certainly, *dhimmah* is essentially a means of granting legal autonomy to different people within a single polity, something

anathema to Western legal thought. Legal pluralism and multiculturalism are thus contemporary efforts to institutionalise *dhimmah*, but with one major difference: the modern incarnation of *dhimmah* posits the state as the basis for accommodation.

Are Human Rights Adequate for Substantive Rule of Law?

In the earlier sections of this article, we saw that law precedes legislation and that we need to accord greater precedence and priority to substance than form. We have also seen that, in order to undermine the positivist view of law and restore the substantive moral-spiritual foundation of the *sharīʿah*, the rule of law needs to move beyond the state-centred paradigm, towards greater self-governance within the framework of the law, in a manner which assures a limited state. Now we will closely examine the implications of these conclusions in the context of an area regarded as intrinsic to issues of legal substance: human rights.

That human rights are commonly recognised as a central component of the rule of law is easily gauged from various international documents and academic commentaries. At the international level, for example, the aforementioned United Nations Report, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', defines the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are *consistent with international human rights norms and standards*" (emphasis added).²⁹ Commentators opine that "the most common substantive version includes individual rights within the rule of law,"³⁰ a feature discernible from theorists like Ronald Dworkin.³¹

However, this position does not mean Muslim criticisms of human rights should be altogether dismissed – at least, not without considering the basis behind such disapproval. Omar Jah and Omar Kasule, for example, criticise human rights as "secular values and therefore intended for a secularly conceived man."³² They also draw on the fact that "the bureaucratic system of administering justice which is prevalent in [Muslim] countries and which the colonialists and their agents imposed on Muslims was not known in Islamic civilisation."³³ The Malaysian Muslim public intellectual, Chandra Muzaffar, likewise advanced a similar critique based on Islamic spiritual and moral values, but with a view to Islam's engagement with other civilisations based on shared religious and spiritual principles. Chandra's approach strikes at the very core of contemporary human rights – namely, at the very concept of 'human' – and takes to task the rights-centred paradigm while insisting that in the Qurʾan rights, responsibilities, roles and relationships are closely intertwined.³⁴ Thus, human rights based on secular values and principles are inconsistent with the worldview of Islam, a

worldview that includes both this world (*al-dunyā*) and the next (*al-ākhirah*).³⁵ These approaches echo the Qur’anic affirmation that the neglect of God will bring about a deconstruction of the nature of man: “And be not like those who forgot Allah so He made them forget themselves” (59:19). Conversely, by the remembrance of God, He will remember man – “So remember Me; I will remember you” (2:152).

Moreover, there are also severe limits to an appreciation of human rights as a basis for the substantive rule of law. We recall how international human rights standards are seen to be central components of the rule of law. However, what is meant by such ‘standards’ are usually official documents, charters and conventions like the ‘Universal Declaration of Human Rights’, the ‘International Covenant on Civil and Political Rights’ (ICCPR) and the ‘International Covenant on Economic, Social and Cultural Rights’ (ICESCR). States are said to comply and commit to human rights standards if they ratify these documents. If, on the other hand, they accept some provisions while rejecting others – that is, when a “unilateral statement, however phrased or named, [is] made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”³⁶ – they are said to make ‘reservations’ with regards to human rights. But by taking this view, one is in effect treating human rights as synonymous with, if not exhausted by, the official declarations and charters – something which parallels the identification of law with legislation and judicial precedents. As seen, the substantive theory of law, particularly the one envisioned by Hayek, purports to reject this position. It is also something which has devastating consequences for pluralism and multiculturalism.

We may then ask: if human rights are to be treated as synonymous with, and exhausted by, international human rights charters, should they not be regarded as a mere formal demand rather than a substantive one? That states officially ratify such documents is no guarantee that they will actually follow them. Nor should a refusal to ratify be taken as proof of a lack of commitment to human rights; it is perfectly possible that different societies will have, and closely adhere to, their own vision and philosophy of human rights not included in international treaties. Indeed, there are alternative formulations of human rights, including the ‘African Charter on Human and People’s Rights’, the ‘Universal Islamic Declaration of Human Rights’ and the ‘Cairo Declaration on Human Rights in Islam’. At the very least, these initiatives, which have all been recognised either globally or regionally, have succeeded in bringing distinctive philosophies into the global arena. For instance, the African Charter was purposely drafted to reflect the region’s long-standing critique of European human rights as rooted in individualism, which militates against African culture, which sanctifies collectivism.

Yet these efforts remain top-down – the principal actors remain the state. It is ultimately the world's states which, through the actions of their officials, draft these charters, ratify them, amend them, implement them and enforce them. This is hardly conducive to the realisation of the rule of law as we earlier envisaged it. In particular, if the rule of law in Islam begins at the personal level, it needs to go beyond the strictly legal. This fact is testified to by a contemporary human rights scholar, Connor Gearty, who, in a speech at the London School of Economics (LSE), said:

Human rights does seem to need to be based on truth, on being right, and on knowing we are right. The very term 'human rights' is a strong one, epistemologically confident, ethically assured, carrying with it a promise to the hearer to cut through the noise of assertion and counter-assertion, of cultural practices and relativist values, and thereby to deliver truth.³⁷

Seen this way, it is not charters, legislation or, indeed, state commitment to international treaties alone that should qualify as efforts towards, or commitments to, human rights. Rather, it should also be the values and virtues promoted at the individual and personal level. These include spiritual disciplines that aim towards mastery of one's lower self – the conquest of desire, overcoming of anger and hate, purification of the heart and so on. This is because, and as we have seen, the rule of law in Islam begins with the self, when the individual rules himself. An implication of this, however, is that conceptions of human rights will be as varied and diverse as the people themselves and the traditions they follow. Moreover, a single practice within a given tradition is rarely an isolated one, but is firmly connected to a seamless network of other rights, responsibilities, roles and relationships. The alteration of that practice will therefore inevitably have wide-reaching affects.

Understanding Islam as *dīn* (religion) also helps illuminate our discussion. According to the famous 'ḥadīth of Gabriel', *dīn* comprises three components: *islam* (submission), *īmān* (belief) and *iḥsān* (spiritual excellence).³⁸ In the framework of Muslim scholarly tradition, this corresponds to the three-fold *naqlī* (revealed/transmitted) sciences of *fiqh* (law), *'aqīdah* (belief) and *taṣawwuf* (spirituality, also known as Sufism). These reflect the concerns of the body, mind and spirit respectively. Religion thus integrates the three so that they are harmonious with each other; just as actions should be guided by thought – meaning, on the basis of correct knowledge of the principles of right and wrong – engaging in spiritual and devotional exercises intensifies one's knowledge about such principles. From this perspective, the exercising of 'right' is *simultaneously* the fulfilment of 'responsibility'.³⁹ For instance, if someone speaks out against

state injustice, they are exercising their right to speak while also fulfilling their responsibility to uphold justice. As declared in another ḥadīth, “Whoever from amongst you sees evil should change it by his hand. If he is unable to do so, then he should change it by his tongue (by speaking against it). If he is unable to do that, then he should reject it in his heart; and that is the weakest degree of faith.”⁴⁰ Moreover, when the Prophet was asked, “What is the most virtuous struggle?” he replied, “A word of truth in front of a tyrannical ruler.”⁴¹ There is also another ḥadīth, “Faith has sixty or seventy branches, the best of which is to declare there is no God but Allah, the lowest of which is to remove something harmful from the road.”⁴²

But if human rights are conceived of as being deeply embedded within the religious, ethical, intellectual and spiritual dimensions of society, what value are we to assign to official or formal human rights documents and charters whose ratification has always been taken as an index to human rights commitment? The answer is by turning to the distinction between formal and substantive notions of the rule of law.

Conclusion and Recommendations

We conclude this article by suggesting that:

- The rule of law should move beyond the state and beyond the principle of government
- The rule of law should be given a substantive rather than formal grounding
- The distinction between substantive and formal versions of the rule of law should be reformulated in terms of aspiration and the means towards realising that aspiration
- Individuals, NGOs and civil society should re-conceptualise human rights so that they are sensitive to local conditions (in particular different socio-cultural and political settings). This point in turn calls for an explicit understanding of state ‘reservations’ to international human rights treaties as merely formal or procedural reservations
- Human rights treaties and/or international agreements should not be seen as standards for the rule of law, but as avenues or outlets by which substantive understandings of the rule of law may receive recognition. They can also be used as a common platform by which different nations and cultures may cooperate towards similar objectives
- To circumvent the law-morality dualism inherent to the original formulation of formal and substantive rules of law, the primacy of a Shariah-based moral order hinging on individual self-governance should be emphasised.

Notes

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1. Aristotle, *The Politics*, (London: Penguin, 1981), 226.
2. John Locke, *Two Treatises of Government*, Book II, Ch. XVIII, section 202.
3. Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011), 174.
4. Paul P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* 467 (1997).
5. See also the "Declaration of Delhi," available online at http://en.wikisource.org/wiki/Declaration_of_Delhi (accessed on 8 June 2012).
6. Paul P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* 467 (1997).
7. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 2009, 2nd Edition), 221.
8. Cited in Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: Farrar, Strauss and Giroux, 2012), 251-3.
9. Cited in Ibid, 251-3.
10. Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 96.
11. Edmund Burke, *Reflections on the Revolution in France*.
12. Karl Marx, *The 18th Brumaire of Louis Bonaparte* (np: CreateSpace Independent Publishing Platform, 2015), 15.
13. Fukuyama, *The Origins of Political Order*.
14. John Hudson, "Common Law – Henry II and the Birth of a State," *BBC History*, available online at http://www.bbc.co.uk/history/british/middle_ages/henryii_law_01.shtml (accessed on 9 May 2012).
15. Craig, "Formal."
16. Osman Bakar, "Cosmology," in: John L. Esposito et al. (eds.), *Oxford Encyclopedia of the Modern Islamic World* (New York: Oxford University Press, 1995), 1:322-28.
17. Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Selangor: Masterpiece Publication, 2006), 182.
18. Mohammad Hashim Kamali, *Citizenship and Accountability of Government: An Islamic Perspective* (Cambridge: Islamic Texts Society, 2011), 237-41.
19. A concrete example in which Shari'a accommodates values of non-Shari'i origins can be seen in how the Chinese Islamic scholar Liu Zhi recasted the science of *fiqh* (jurisprudence) in Confucian terms. Liu Zhi's affinity to Sufism

- (which in this article we identify with the *ihsānī* [spiritual excellence] dimension of *dīn* [religion] according to the ḥadīth of Jibril [pbuh]) enabled him to see the rituals of Islam as “manifestations of morality and social harmony” and thus he perceived “*ibadah* and *adab* as expressions of Principle, or universal justice, order and law”, which also manifest themselves in Confucianism. For further discussion, see Alexander Wain, “Islam in China: The Han Kitab Tradition in the Writings of Wang Daiyu, Ma Zhu and Liu Zhi, with a note on their Relevance for Contemporary Islam”, *Islam and Civilisational Renewal*, Vol. 7 No. 1 (January 2016), 27-46.
20. Ibn Taymiyah, *Majmū‘at al-fatāwā* (Cairo: Dār al-Ḥadīth, 2006), 4:492-493. The author would like to acknowledge and thank Mohd Fariz Zainal Abdullah for his help with this reference.
 21. Syed Muhammad Naquib al-Attas, *Prolegomena to the Metaphysics of Islam: an Exposition on the Fundamental Elements of the Worldview of Islam* (Kuala Lumpur: International Institute of Islamic Thought and Civilization (ISTAC), 2001), 64.
 22. Abdal-Hakim Murad, *Qur’anic Truth and the Meaning of Dhimma* (Dubai: Kalam Research & Media), 8. Available online at http://www.kalamresearch.com/images/documents/dhimma_final.pdf (accessed on 8 June 2012).
 23. Mohammad Hashim Kamali, *Shari’ah Law: An Introduction* (Oxford: Oneworld, 2008), 187-188.
 24. Mohammad Hashim Kamali, “Constitutionalism and Democracy: An Islamic Perspective”, *Islam and Civilisational Renewal*, Vol. 2 No. 1 (October 2010), 18-45, especially 24-25. Kamali highlights among others, the government’s need to abide by consultation and consensus, the limits to legislature to enact only what is obligatory and unlawful according to Shari’ah, and the fact that legislature cannot enact laws contrary to Shari’ah.
 25. Hossein Esmaeili, ““The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World,” available online at <http://www.law.uconn.edu/files/Esmaeili.pdf> (accessed on 8 June 2012). Esmaeili assesses the rule of law in Islam by the standards laid down by the Australian legal theorist, John Finnis.
 26. Wael Hallaq, *Shari’a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 373. To take but one example, the *Hidāyah* of Burhān al-Dīn al-Marghinānī (d. 1197). Charles Hamilton’s eighteenth-century translation into English is not from the original Arabic text, as he translated it from a Persian translation and left out many chapters relating to rituals.
 27. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society: 2003), 369-83.
 28. Cited in Sherman A. Jackson, “Shari’ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and Pluralism,” *Fordham International Law Journal*, 27, no. 1 (2003): 105-6.
 29. “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General to the Security Council (S/2011/634),” 12 October 2011, available online at http://www.unrol.org/files/S_2011_634EN.pdf (accessed on 8 June 2012).
 30. Tamanaha, *On the Rule of Law*, 102.

31. For example, Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).
32. Omar Jah and Omar Kasule, "Human Rights in Islam: Judicial Rights, Sanctions and Penalties," *Al-Shajarah* [Kuala Lumpur] 8, no. 1 (2003), 99.
33. *Ibid*, 103 n. 40.
34. Chandra Muzaffar, *Rights, Religion and Reform: Enhancing Human Dignity through Spiritual and Moral Transformation* (London and New York: Routledge, 2002), chapter 4, "Judging Asia: Assessing Human Rights Conditionality", 46.
35. *Ibid*, 91.
36. United Nations General Assembly, Law Commission, "Third Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur. Addendum: Recapitulatory Annex to the Guide to Practice" (1998), available online at http://untreaty.un.org/ilc/documentation/english/a_cn4_491_add6.pdf (accessed on 8 June 2012).
37. Conor Gearty, "To Work Its Magic: Human Rights Need Certainty", *The Independent*, 15 November 2005, available online at <http://www.independent.co.uk/opinion/commentators/conor-gearty-to-work-its-moral-magic-human-rights-need-certainty-515397.html> (accessed on 7 April 2011).
38. *Sahih al-Bukhari*, Vol. 1, Bk. 2, No. 48.
39. Significantly, the Arabic equivalent of 'right' is *haqq*. Mohammad Hashim Kamali observed, "In Qur'anic terminology, *haqq* is interchangeable with duty (*wajib*). Although *haqq* can mean a right as opposed to an obligation (Qur'an 51:19), the Qur'an does not distinguish either as the dominant meaning. Occasionally, *haqq* denotes the Muslims' ultimate victory and salvation as a certain outcome (Qur'an 10:103, 30:47). In addition it can mean in the cause of justice (*bi al-haqq*) and the truth (*al-haqq*) (Qur'an 2:42). These and other similar usages lead al-Bahiy to conclude that *haqq* is inextricably linked with justice and benevolence (*'adl wa ihsan*) and that they are the ultimate values sought wherever *haqq* appears in the Qur'an." See Mohammad Hashim Kamali, "Fundamental Rights of the Individual: An Analysis of *Haqq* (Right) in Islamic Law", *American Journal of Islamic Social Sciences*, Vol. 10 No. 3 (Fall 1993), 340-366 at 343.
40. *Sahih Muslim*.
41. *Musnad Ahmad*, 18449.
42. *Sahih Muslim*, 35.