

as to dull them with fatigue. Imam al-Ghazali used the word *irhaaq*, dullness of intellect, which is caused by suppressing the child with excessive learning and depriving him of play time. The child is entitled to good education as well as an enabling environment in which to learn ethical conduct (*adab, tarbiyah*). This combined approach to learning and *tarbiyah* is likely to preclude taking a facile approach to physical punishment and caning.

Notes

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Islam, the Rule of Law and Human Rights

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If one wishes to restore the substantive moral-spiritual foundation of the *shari‘ah*, one must start from the premise that law precedes legislation and that the rule of law needs to go beyond any state-centred paradigm and engage greater self-governance. Human rights is one area that has always been regarded as an intrinsic component of the rule of law as can be gauged from various international documents and academic commentaries.

The United Nations Report of the Secretary-General on “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).¹

However, Muslim critics of human rights law consider that it is derived from “secular values and intended for a secularly-conceived man.”² Omar Jah and Omar Kasule have described *huqūq al-‘ibād* (rights of the servant (of God)) as tantamount to “the opposite of human rights”. They stress 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.”³ Human rights based on secular values and principles are diametrically opposed to Islam and are inconsistent with the worldview of Islam, a worldview that includes both this world (*al-dunyā*) and the next world (*al-ākhirah*).⁴ The Qur’ān affirms that the neglect of God will bring about deconstruction of the nature of man itself and instructs, “And be not like those who forgot Allah so He made them forget themselves” (59:19). Where they deconstruct God, they will, ultimately, deconstruct man. Conversely, by the remembrance of God, He will remember man, “So remember Me; I will remember you” (2:152).

Criticisms of human rights law have also been advanced by the Malaysian-Muslim public intellectual, Chandra Muzaffar, with a view to enhancing Islam’s engagement with other civilisations based on shared religious and spiritual principles. Like Omar Jah and Omar Kasule, Muzaffar also takes Enlightenment philosophy to task, and his critique strikes at the core of human rights, the concept of the “human” through stressing that in the Qur’an an individual’s rights, roles, responsibilities and relationships are closely intertwined.⁵ But such criticisms are not unique to Islam or Muslims. For example, the rule of law is foreign to ancient China, ruled by the emperor. However, this did not give way to the arbitrary justice, anarchy or civil strife so often associated with the absence of the rule of law. Chinese society upheld certain checks on the power of the emperor, although not themselves derivative of law. Traditional Chinese doctrine considered it to be bad policy to enact laws. Laws cannot take into account the infinite variety of possible situations. A strict, mechanical application of law was therefore apt to adversely affect a man’s innate sense of justice. Similarly, in Japan, life’s essentials are the rules of behaviour (*giri-ninjo*) for each type of personal relation established by tradition and founded on the feelings of affection (*ninjo*) uniting those in such relationships.

Yet there are other limits to viewing human rights as substantive rule of law. While international human rights standards are seen to be central components of the rule of law, such standards are usually enshrined in official documents, charters and conventions, like the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights (ICCPR). States comply and commit to human rights standards if they ratify these documents. If they accept some provisions but reject others, they register “reservations” with regards to human rights: “a unilateral statement, however phrased or named, 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.”⁶ This in effect treats human rights as synonymous with official declarations and charters – paralleling the

identification of law with legislation and judicial precedents that was rejected by the substantive theory as envisioned by Hayek, with devastating consequences for pluralism and multiculturalism.

We may then ask: if human rights are synonymous with human rights charters, might they not then be regarded as a mere formality rather than a substantive matter of justice? That states officially ratify such documents is no guarantee that they will actually follow their provisions, but equally their refusal to ratify them need not be proof of a lack of commitment to human rights. Different societies may have their own vision and philosophy of human rights that may not be enshrined in international treaties. There have of course been alternative formulations recognised either globally or regionally, such as 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. These initiatives have succeeded in bringing their distinctive philosophy to the global level: the African Charter, for example reflects the region's long-standing critique on European human rights as rooted in individualism, which militates against an African culture sanctifying collectivism. Yet these charters remain top-down with the state the principal actor and state officials drafting, ratifying, amending, implementing and enforcing them. Is this conducive towards the realisation of the rule of law as envisaged at the personal level – where rule of law begins in Islam? Connor Gearty, a contemporary human rights scholar, speaking recently 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.⁷

It is not the charters, legislation or indeed state commitment to international treaties alone that should qualify as commitment to human rights, but also the values and virtues promoted at the individual, personal level, including spiritual disciplines that aim towards mastery of one's lower self. In Islam rule of law begins with the self, when the individual rules himself by the Law, i.e., the *sharī'ah*. The implication here is that human rights are varied and diversified; a single practice within a given tradition is rarely an isolated one, but is firmly connected to seamless networks of rights, responsibilities, roles and relationships within that tradition, and the alteration of one aspect will inevitably affect the rest. A state may not commit itself to particular international human rights treaties, but may defend its record by pointing out countless human rights initiatives of civil society groups and religious institutions.

What has been called positive human rights is a response to the predominant thinking which recognises only negative human rights, i.e. for the state to *refrain* from doing something rather than taking positive steps. We agree with the positive approach but stress that it need not be only the duty of the state but also that of individuals and groups.

According to the famous ‘*ḥadīth* of Gabriel’, *dīn* (religion) comprises three components of *islām* (submission), *īmān* (belief) and *iḥsān* (spiritual excellence). Of course there are bound to be overlaps between them given that they are all complementary and interrelated.

From this perspective, the exercise of right is *simultaneously* the fulfilment of responsibility. One who speaks out against state injustice is exercising his right to speak but at the same time fulfilling his responsibility as declared in a *ḥadīth*, “He who sees a wrong committed by a person should rectify it with his hand; if he cannot do this, he should do it with his tongue; if he cannot do this, then he should reject it with his heart; but verily, that is the weakest degree of faith.” In other *ḥadīths*, “the greatest jihad is speaking truth to an unjust ruler,” and “Faith has seventy branches; the least of it is the removal of obstruction from the path.”

Notes

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- 1. “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 8 June 2012).
- 2. Omar Jah and Omar Kasule, “Human Rights in Islam: Judicial Rights, Sanctions and Penalties,” *Al-Shajarah* [Kuala Lumpur] 8, no. 1 (2003), 99.
- 3. *Ibid.*, 103, n. 40.
- 4. *Ibid.*, 91.
- 5. 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.
- 6. 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 8 June 2012).
- 7. 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 7 April 2011).