

Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights¹

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Islamic societies, like African ones, generally do not place a high value on the protection of human rights. An-Na'im argues that human rights need to be perceived as culturally legitimate in order for them to be given more than lip service. Since countries are largely left unsupervised in terms of the protection of the human rights of their own citizens, the leaders must be persuaded that the human rights of all their citizens are deserving of equal respect. But in Islamic cultures a deep division exists between those who are Muslim and those who are not, as well as between men and women. As long as these divisions exist, appeals to universal human rights will continue to clash with deeply held cultural and religious views.

Although Islam is often discussed in the contexts of North Africa and the Middle East, in fact the majority of Muslims live outside this region. The clear majority of the Muslims of the world live in the Indian sub-continent.² The Muslim population of Indonesia alone is equal to the combined Muslim population of Egypt and Iran, the largest countries of the so-called Muslim heartland of North Africa and the Middle East. In terms of percentage to the total

population, Muslims constitute 97% of the total population of Pakistan, 82.9% of that of Bangladesh and 80% of that of Indonesia. While Muslims constitute slightly less than half the population of Malaysia, Islam is perceived as an important element of Malay ethnicity which receives special protection under the constitution.³ As we shall see, Pakistan has been struggling with the meaning and implications of its purported Islamic identity since independence. Bangladesh also appears to be heading in the same direction. It is therefore important to consider the Islamic dimension of human rights policy and practice in South and Southeast Asia.

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It is important to note that Islamic norms may be more influential at an informal, almost subconscious psychological level than they are at the official legal or policy level. One should not therefore underestimate the Islamic factor simply because the particular state is not constituted as an Islamic state, or because its legal system does not purport to comply with historical Islamic law, commonly known as Shari'a.⁴ Conversely, one should not overestimate the Islamic factor simply because the state and the legal system are publicly identified as such. This is particularly important from a human rights point of view where underlying social and political attitudes and values may defeat or frustrate the declared policy and formal legal principles.

This chapter is concerned with both the sociological as well as the legal and official impact of Islam on human rights. The chapter begins by explaining the paradox of declared commitment to human rights, on the one hand, and the low level of compliance with these standards in daily practice, on the other. It is my submission that this paradox can be understood in light of the competing claims of the universalism and relativism of human rights standards. It is my thesis that certain standards of human rights are frequently violated because they are not perceived to be culturally legitimate in the context of the particular country. To the extent that political regimes and other dominant social forces can explicitly or implicitly challenge the validity of certain human rights norms as alien or at least not specifically sanctioned by the primary values of the dominant indigenous culture, they can avoid the negative consequences of their violation.

Such analysis would seem to suggest the need for establishing cultural legitimacy for human rights standards in the context of the particular society. However, this enterprise raises another problem. If indigenous cultural values are to be asserted as a basis of human rights standards, we are likely to encounter "undesirable" aspects of the indigenous culture. In other words, while it may be useful to establish cultural legitimacy for human rights standards, certain elements of the indigenous culture may be antithetical to the human rights of some segments of the population. This chapter will illustrate the dilemma of cultural legitimacy for human rights in the Islamic tradition.

THE HUMAN RIGHTS PARADOX

1988 marked the fortieth anniversary of the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on the 10th of December 1948.⁵ Several U.N. and regional human rights conventions have since been ratified as binding international treaties by scores of countries from all parts of the world.⁶ At the domestic level, many human rights receive strong endorsement in the constitutional and legal system of most countries of the world. Moreover, human rights issues are continuously covered by the news media as a supposedly important consideration in national and international politics.

Despite these formal commitments to human rights, and apparently strong concern with their violation, there is a mounting crisis in practical compliance with human rights standards throughout the world. Gross and consistent violations of human rights in many countries are

recorded daily. Activist groups and non-governmental organizations continue to charge almost every government in the world of involvement or complicity in violating one or more human rights in its national and/or international policies.⁷

This glaring disparity between apparent commitment in theory and poor compliance in practice is what may be called the paradox of human rights. On the one hand, the idea of human rights is so powerful that no government in the world today can afford to reject it openly.⁸ On the other hand, the most basic and fundamental human rights are being consistently violated in all parts of the world. It is therefore necessary to understand and resolve this paradox if human rights are to be respected and implemented in practice. As correctly stated by Jenks: "The potentially tragic implication of this paradox is the ever-present danger that the denial of human rights may, as in the past, express, permit and promote a worship of the State no less fatal to peace than to freedom; by failure to make a reality of the Universal Declaration of Human Rights and United Nations Covenants of Human Rights we may leave mankind at the mercy of new absolutism which will engulf the world."⁹

One obvious explanation of the dichotomy between the theory and practice of human rights is the cynical manipulation of a noble and enlightened concept by many governments and politicians in all countries of the world. It may therefore be said that this is merely the current manifestation of an ancient phenomenon in human affairs. However, without disputing the historical validity of this analysis, one can point to the other side of the coin as the concrete manifestation of another ancient phenomenon in human

affairs, namely the capacity of people to assert and realize their rights and claims in the face of adversity and cynicism. From this perspective, what is therefore significant is not the cynical abuse of the human rights idea, but the fact that oppressive governments and ambitious politicians find expressing their support of human rights useful, if not necessary, for gaining popular support at home and legitimacy abroad. This tribute paid by vice to virtue is very significant and relevant to future efforts at bridging the gap between the theory and practice of human rights.

In order to hold governments to their declared commitment to human rights, it is essential to establish the principle that human rights violations are not matters within the exclusive domestic jurisdiction of any state in the world.¹⁰ Under traditional international law, national sovereignty was taken to include the right of each state to treat its own subjects in whatever manner it deemed fit. Consequently, it was perceived to be unwarranted interference in the internal affairs of a sovereign state for other states to object to or protest any action or policy of that state towards its own subjects. The Charter of the United Nations (UN) apparently endorsed these notions. Article 2.7 expressly stated that the Charter does not "authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter." Other authoritative statements of international law continue to emphasize the traditional definition of national sovereignty. For example, these notions feature prominently in the 1970 UN Declaration on Principles of Inter-

national Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.¹¹

However, Article 2.7 of the UN Charter stipulates that the principle of non-interference in matters essentially within the domestic jurisdiction of any state shall not apply to UN action with respect to threats to the peace, breaches of the peace and acts of aggression. It could be argued that serious and consistent violations of at least some fundamental human rights constitute a threat to international peace and security, and are therefore within this exception to the "essentially domestic jurisdiction" clause of the UN Charter. In other words, since serious and consistent violations of certain human rights constitute a threat to international peace and security, the UN can act against the offending state because the matter is beyond the "essentially domestic jurisdiction" of the state. It may also be possible to construe some of the language of the above cited 1970 UN Declaration on Friendly Relations as permitting international action in promoting and protecting at least some fundamental human rights.

Despite its problems, national sovereignty appears to be necessary for the exercise of the right of peoples to self-determination. In any case, it is too strongly entrenched to hope for its total repudiation in the foreseeable future. Nevertheless, it is imperative to overcome national sovereignty objections to international action for the protection and promotion of human rights without violating the legitimate scope of such sovereignty. "The renunciation of intervention [in the internal affairs of states] does not constitute a policy of nonintervention; it involves the

development of some form of *collective intervention*."¹²

In order to support this position, it is necessary to repudiate any plausible argument which claims that action in support of human rights violates the national sovereignty of the country. It has been argued, for example, that the established international standards are not consistent with the cultural traditions or philosophical and ideological perspectives of the given country.¹³ It is not enough to say that this argument may be used as a pretext for violating human rights because such manipulation would not be viable if there is no validity to the argument itself. In other words, this argument is useful as a pretext precisely because it has some validity which makes the excuse plausible. It is therefore incumbent upon human rights advocates to address the element of truth in this argument in order to prevent its cynical abuse in the future.

THE LEGITIMACY DILEMMA

If we take the UN Charter and the Universal Declaration of Human Rights as the starting point of the modern movement for the promotion and protection of human rights, we will find it true that the majority of the peoples of Africa and Asia had little opportunity for direct contribution to the formulation of these basic documents. Since the majority of the peoples of these two continents were still suffering from the denial of their collective human right to self-determination because of colonial rule and foreign domination at the time, they were unable to participate in the drafting and adoption processes.¹⁴ It is true that some of the representatives of the older, mainly Western, nations were

sensitive to the cultural traditions of the unrepresented peoples,¹⁵ but that could have hardly been a sufficient substitute for direct representation.

Many more African and Asian countries subsequently achieved formal independence and were able to participate in the formulation of international human rights instruments. By ratifying the UN Charter and subscribing to the specialized international instruments which incorporated and elaborated upon the Universal Declaration of Human Rights, the emerging countries of Africa and Asia were deemed bound by those earlier documents in addition to the subsequent instruments in which they participated from the start. Thus, the vast majority of the countries of Africa and Asia can be seen as parties to the process by which international human rights standards are determined and formulated. Nevertheless, this official and formal participation does not seem to have achieved the desired result of legitimizing international human rights standards in the cultural traditions of these peoples. This failure is clearly illustrated, in my view, by the lack of sufficient popular awareness of and support for these standards among the majority of the population of the countries of Africa and Asia. Given this lack of awareness and support for the international standards, it is not surprising that governments and other actors are able to evade the negative consequences of their massive and gross violations of human rights throughout Africa and Asia.

It is my submission that formal participation in the formulation and implementation processes by the elites of African and Asian countries will never achieve practical respect and protection for human rights in those regions unless

that participation reflects the genuine consensus of the population of those countries. I would further suggest that the peoples of these regions have not had the chance to develop such consensus by reexamining their own cultural traditions in terms of universal and international human rights. It seems that the elites of these countries have come to the international fora where human rights standards were determined and formulated without a clear mandate from their own peoples.

As an advocate of international human rights, I am not suggesting that the international community should scrap the present documents and start afresh. This would be an impracticable and dangerous course of action because we may never recover what would be lost through the repudiation of the present instruments and structures. What I am suggesting is that we should supplement the existing standards and continue to develop them through the genuine participation of the widest possible range of cultural traditions. In furtherance of this approach, it is incumbent on the advocates of human rights to work for legitimizing universal standards of human rights within their own traditions.

However, this approach presents us with the other horn of the dilemma. Almost every existing cultural tradition (including philosophical or ideological positions) in the world has some problems with respect to the full range of fundamental human rights. Generally speaking, for example, whereas the liberal tradition(s) of the West have difficulties in accepting economic, social and cultural rights and in conceiving of collective rights such as a right to development, the Marxist tradition has similar difficulties with respect to civil and political rights.¹⁶

More specifically, prevailing notions of freedom of speech under the Constitution of the United States, for instance, may protect forms of speech and expression which advocate racial hatred in violation of the international standards set by the Covenant for the Elimination of All Forms of Racial Discrimination of 1965.

The main difficulty in working to establish universal standards across cultural boundaries is the fact that each tradition has its own internal frame of reference and derives the validity of its precepts and norms from its own sources. When a cultural tradition relates to other traditions and perspectives, it is likely to do so in a negative and perhaps even hostile and antagonistic way. In order to claim the loyalty and conformity of its own members, a tradition would normally assert its own superiority over, and tend to dehumanize the adherents of, other traditions. This tendency would clearly undermine efforts to accord members of other traditions equality in status and rights, even if they happen to live within the political boundaries of the same country.¹⁷

Nevertheless, I believe that all the major cultural traditions adhere to the common normative principle that one should treat other people as he or she wishes to be treated by them. This golden rule, which may be called the principle of reciprocity, is shared by all the major traditions of the world. Moreover, the moral and logical force of this simple proposition can easily be appreciated by all human beings of whatever cultural tradition or philosophical persuasion. If construed in an enlightened manner so that the "other" includes all other human beings, this principle is capable of sustaining universal standards of human rights.

In accordance with this fundamental principle of reciprocity, I would take universal human rights to be those rights which I claim for myself, and must therefore concede to others. The practical implications of this fundamental principle would have to be negotiated through the political process to develop consensus around specific policies and concrete action on what the majority or other dominant segment of the population would accept for itself and would therefore have to concede to minorities and individuals. Although theoretical safeguards and structures may be devised to ensure the constitutional and human rights of all individuals and groups, the ultimate safeguard is the goodwill and sense of enlightened political expediency of the majority or other dominant segment of the population. Unless the majority or dominant segment of the population is persuaded to respect and promote the human rights of minorities and individuals, the whole society will drift into the politics of confrontation and subjugation rather than that of reconciliation and justice.

THE LEGITIMACY DILEMMA IN THE MUSLIM CONTEXT

When I consider Shari'a as the historical formulation of my own Islamic tradition I am immediately confronted with certain inadequacies in its conception of human rights as judged by the above stated principle of reciprocity and its supporting arguments. In particular, I am confronted by Shari'a's discrimination against Muslim women and non-Muslims and its restrictions on freedom of religion and belief. Unfortunately, most contemporary Muslim writings on the subject tend to provide a

misleadingly glowing view of Shari'a on human rights without any reference to the above cited problematic aspects of Shari'a.¹⁸ Moreover, some of those Muslim authors who are willing to candidly state the various features of conflict and tension between Shari'a and current standards of human rights tend to take an intransigent position in favor of Shari'a without considering the prospects of its reconciliation with current standards of human rights.¹⁹

It is true that Shari'a had introduced significant improvements in the status and rights of women as compared to its historical contemporaries between the seventh and nineteenth centuries A.D.²⁰ Under Shari'a, Muslim women enjoy full and independent legal personality to own and dispose of property and conclude other contracts in their own right. They are also guaranteed specific shares in inheritance, and other rights in family law. However, Shari'a did not achieve complete legal equality between Muslim men and women. Whereas a man is entitled to marry up to four wives and divorce any of them at will, a woman is restricted to one husband and can only seek judicial divorce on very limited and strict grounds. Women receive only half a share of a man in inheritance, and less monetary compensation for criminal bodily harm (*diya*). Women are generally incompetent to testify in serious criminal cases. Where their testimony is accepted in civil cases, it takes two women to make a single witness.²¹ Other examples of inequality can be cited. In fact, the general rule of Shari'a is that men are the guardians of women, and as such have the license to discipline them to extent of beating them "lightly" if they fear them to become unruly.²² Consequently, Shari'a holds that Muslim women may not hold any office

involving exercising authority over Muslim men.

Similarly, Shari'a granted non-Muslim believers, mainly Christians and Jews who submit to Muslim sovereignty, the status of *dhimma*, whereby they are secured in person and property and permitted to practice their religion and regulate their private affairs in accordance with their own law and custom in exchange for payment of a special tax, known as *jiziyah*.²³ Those classified by Shari'a as unbelievers are not allowed to live within an Islamic state except with a special permit of safe conduct, known as *aman*, which defines their status and rights.²⁴ If the residence of a *musta'min*, an unbeliever allowed to stay within an Islamic state under *aman*, extends beyond one year, some Shari'a jurists would allow him to assume the status of *dhimma*. However, neither *dhimma* nor *aman* would qualify a non-Muslim to full citizenship of an Islamic state or guarantee such a person complete equality with Muslim citizens.²⁵ For example, Shari'a specifically requires that non-Muslims may never exercise authority over Muslims.²⁶ Consequently, non-Muslims are denied any public office which would involve exercising such authority.

The third example of serious human rights problems with Shari'a indicated above is freedom of religion and belief. It is true that *dhimma* and possibly *aman*, would guarantee a non-Muslim a measure of freedom of religion in that he would be free to practice his officially sanctioned religion. However, such freedom of religious practice is inhibited by the limitations imposed on non-Muslims in public life, including payment of *jiziyah*, which is intended by Shari'a to be a humiliating tax.²⁷

Another serious limitation of freedom of religion and belief is the Shari'a law of apostasy, *ridda*, whereby a Muslim would be subject to the death penalty if he should repudiate his faith in Islam, whether or not in favor of another religion.²⁸ Some modern Muslim writers have argued that apostasy should not be punishable by death.²⁹ However, this progressive view has not yet been accepted by the majority of Muslims. Moreover, even if the death penalty is abolished, other serious consequences will remain, such as the possibility of other punishment, confiscation of the property of the apostate and the nullification of his or her marriage to a Muslim spouse.³⁰ In contrast, non-Muslims, including Christians and Jews, are encouraged to embrace Islam. Whereas Muslims are supported by the State and community in their efforts to proselytize in order to convert non-Muslims to Islam, non-Muslims are positively prohibited from undertaking such activities.

All of the above features of discrimination against Muslim women and non-Muslims and restrictions on freedom of religion and belief are part of Shari'a to the present day. Those aspects of discrimination against Muslim women which fall within the scope of family law and inheritance are currently enforced throughout the Muslim world because Shari'a constitutes the personal law of Muslims even in those countries where it is not the formal legal system of the land.³¹ Discrimination against non-Muslims and the Shari'a law of apostasy are enforced in those countries where Shari'a is the formal legal system. For example, Article 13 of the Constitution of the Islamic Republic of Iran expressly classifies Iranians in terms of their religious or sectarian belief.

By the terms of this Article, Baha'is are not a recognized religious minority, and as such are not entitled even to the status of second class citizens under the principle of *dhimma* explained above. Moreover, as recently as January 1985, a 76-year-old man was executed for apostasy in the Sudan.³²

What is more significant for our present purposes, however, is the fact that all of these and other aspects of Shari'a are extremely influential in shaping Muslim attitudes and policies even where Shari'a is not the formal legal system. In other words, so long as these aspects of Shari'a are held by Muslim legislators, policy makers and executive officials to be part of their cultural tradition, we can only expect serious negative consequences for human rights in predominantly Muslim countries, regardless of whether or not Shari'a is the basis of the formal constitutional and legal system of the land. . . .

Conclusion: Revised Agenda for the Human Rights Movement

Thus, if we are to bridge the gap between the theory and practice of human rights in the contemporary world, we must all be ready to shed or modify those preconceptions which seem to obstruct or frustrate the efficacy of international cooperation in the field of human rights. This would require a modification of the concept of national sovereignty in order to enhance the principle of international accountability for violating human rights. The international community must firmly establish, as a matter of international law and, as well, of practice, that violations of universal human rights are not matters of "essentially domestic jurisdiction." The legal framework for such action can easily

be established under the UN Charter and existing international and regional human rights instruments. What may be lacking is the political will among states to relinquish their traditional national pride in favor of the international rule of law.

Another concept that needs to be modified is the cultural conception of the term "right." In the Western liberal tradition, rights are primarily entitlements or claims which the individual person has against the state. This conception has led many Western governments and human rights advocates to deny human rights status to claims which they deem to be too vague or not amenable to enforcement against the state, such as economic rights and collective rights to development. Non-Western cultural traditions, in contrast, not only conceive of such claims as human rights, they insist that they must be granted that status. Some of the human rights treaties and literature already reflect a broader conception of rights than originally envisaged by liberal theory. However, there is little evidence to show that this is more than a token concession by liberal governments. The developed countries of the world should not expect other peoples of the world, including the Muslim peoples, to examine and re-evaluate their cultural and philosophical traditions in the interest of more genuine respect for and greater compliance with international standards of human rights *unless* they (the developed countries) are willing to examine and re-evaluate their own cultural traditions.

It is my submission that these and other related considerations must now be injected into human rights discourse at official, scholarly and popular levels of debate and action. It is not difficult, for example, to develop the appropriate for-

mulations and implementation mechanisms and procedures for collective claims or entitlement as human rights which do not necessarily correspond to the established Western notion of "right." For this course of action to be useful, however, the existing human rights standards and mechanisms for their enforcement must be opened up for new ideas and influences. The process of definition, formulation and implementation of universal human rights must be genuinely universal and not merely Western in orientation and techniques.

In conclusion, the dilemma of cultural legitimacy must be resolved if the glaring disparity between the theory and practice of human rights is to be narrowed. To achieve this end, human rights advocates need to undertake a massive educational effort, drawing on all the religious and other normative resources of each community in support of universal human rights. They must build from the immediately local, through the national and regional levels, towards greater international cooperation in the promotion and protection of human rights. Greater emphasis must be placed on the role of grass-roots non-governmental organizations and the role of indigenous mechanisms for enhancing the cultural legitimacy of human rights.

NOTES

1. A first draft of this chapter was prepared under a grant from the Woodrow Wilson International Center for Scholars, Washington, D.C. The statements and views expressed herein are those of the author and are not necessarily those of the Wilson Center. I have prepared the final draft of this chapter while holding the position of Ariel F. Sallows Professor of Human Rights at the College of Law, University of Saskatchewan, Canada in 1989-90.
2. For statistics on Muslim peoples and their percentages of the total population of all the coun-