

Revisiting the Discourse on Islam and Human Rights

*Dr. Muhammad Mushtaq Ahmad**

1. Islamic Conception of Rights

Secular humanism has an altogether different worldview from that of Islam. The two are, rather, poles apart. Muslim jurists derive all laws from the Covenant that each and every human being concluded with Allah.¹ They call it dhimmah and attach all obligations to this dhimmah (ثبت فى الذمة is the phrase they generally use). This dhimmah gives legal capacity to human beings which is of two kinds: capacity for acquisition of obligation (اهلية الوجود) and capacity for performance (اهلية الاداء).

The basis (مناط) for the former is “being human” (انسانية), while the basis for the latter is “intellect”²(عقل). By virtue of the former, a human being obtains certain obligations and rights. An insane person, therefore, has some rights though he cannot perform them as he lacks intellect. Even an embryo has this capacity and resultantly has some rights, such as the right to life, paternity, inheritance and so on.³

Islamic law (حكم شرعى) is known through the “address of Allah” (خطاب الله); Allah is the Lawgiver (حاكم); human being is the subject of the law (محكوم عليه); Allah alone has that authority which the law has given him.⁴ As a necessary corollary, Allah’s laws are immutable and, hence, the rights given by His law to a person are “inalienable” as no one has the authority to snatch them. Even the ruler has to establish that his decision does not violate any of the immutable laws of God and does not encroach on any of the inalienable rights of individuals.⁵

From this perspective, Muslim jurists developed the idea of “rights of God” which denoted two things: immutable laws of God and inalienable rights created by the law for individuals. This wider doctrine of haqq Allah (حق الله) covered the whole of the Shari’ah. In this wider sense, even the inheritance law and the

* Director-General, Shariah Academy, International Islamic University, Islamabad, Pakistan.

law of divorce are called hudud Allah in the Qur'an.⁶

There is an intricate and comprehensive mechanism for categorizing rights and then preferring one right to the other. When Muslim jurists worked on this mechanism they came up with an elaborate explanation in the form of the theory of the maqasid al-Shariah (مقاصد الشريعة) - higher objectives of Islamic law).

Thus, Imam Ghazali not only explains the three layers of the maqasid – i.e., darurat (ضرورات), hajat (حاجات) and tahsinat (تحسينات) - but also explains that among the darurat the priority order is: din (religion), life, progeny, intellect and wealth. He also explains that each of these maqasid has two faces: promotion and protection. One is positive (ايجابى) and the other is negative (سلبى). The system has to create environment for establishing and promoting these values and it has to punish those who attack these values.⁷

Importantly, the values identified by Imam Ghazali are promoted by all legal systems but it is their priority order which differs from system to system. No right can be understood in isolation. It always has other rights competing with it. Every system has its own priority order for resolving conflicts between competing rights. Capitalistic democracy will, for instance, prefer liberty to equality while socialistic polity will do just the opposite.

Take the example of illicit sexual relationship in English law. If a person coerces another it is called rape which is a crime. Adultery, which is consensual, is a tort or civil wrong against the right of the “aggrieved” husband. But if none of the partners is married to someone else and their relationship is consensual, the law does not deem it a legal wrong.

So much for consent! And why call rape a crime? Because it attacks the basic value of the system – consent. Hence, it is a public wrong, an attack on the whole community. In Islamic law, on the other hand, adultery is also a crime and so is fornication which involves two unmarried partners. Hence, in Islamic law consent is not the yardstick.

2. Human Rights Discourse in the West

The whole discourse on human rights is based on the belief that a human being is his own master. Thus, here he is not the subject of the law (محکوم علیہ); rather, he is the lawgiver (حاکم). Rousseau's paradox of freedom is an exposition of this belief; how man is the حاکم as well as محکوم علیہ at one and the same time. "Man was born free but is everywhere in chains now."

The Treaty of Westphalia 1648 formally declared the demise of the Holy Roman Empire and created a new order in Europe – the nation-state system. This system presumed that state was an individual writ large. In legal parlance, state was deemed a "legal person".

This legal person was presumed "sovereign" and presumably the sovereign could do no wrong! Interference in the "internal affairs" of a state was deemed prohibited.⁸ The "law of nations" could talk only to these fictitious persons, not to individual human beings. Oppenheim published the first edition of his classic treatise on international law in 1905 and declared in it unequivocally: states, and only states, are the subjects of international law.⁹

The first half of the 20th century saw two brutal wars that killed millions of people in the name of nationalism. Individuals who committed these atrocities were hiding behind the "corporate veil" of the state. For holding them responsible this corporate veil had to be pierced.¹⁰ Hence, from 1945 onward one can see international law trying to talk to individuals. Resultantly, human rights law and international criminal law came into existence. Gradually, individuals have become subjects of international law, though still not on equal footing with states. Similarly, state's sovereignty is facing erosion but it still retains some of its force.

Emphasis may be shifting from fictitious persons to real persons, from states to individuals, but the fact remains that the system is based on the values upheld by the West, values which it propagates as "universal". Nation-state system came into existence in Europe in a particular context as a result of the force of

events.

From 1648 to 1856, this system was enforced only on European Christian nations, more particularly the former Holy Roman Empire. In 1856, when Turkey - a Muslim but still semi-European entity, was acknowledged some rights via the Treaty of Paris, for the first time the system was extended beyond the limits of the former Holy Roman Empire.

Half a century later, Japan was allowed entry into this exclusive club. Oppenheim talking in the first decade of the 20th century asserted that USA being an extension of the Christian Europe was part of the system while Abyssinia, though Christian, was not civilized enough to become part of it!

Oppenheim mentioned three conditions for entry of others into this system: it must reach a minimum threshold of civilization; it must give consent to all the conditions for entry into this club; and other members of the club must allow its entry.

Thus, after WWI, mandate system was envisaged by the Covenant of the League of Nations so that the European mandate powers civilize the uncivilized Asia and Africa – White Man's burden! After WWII, the mandate territories gradually got independence and each one of them became a nation-state! What joke! Thus, the system was transplanted in the rest of the world. In the process, European Christian values became universal!

The 20th century also saw the brutal war of ideas – capitalism vs communism, liberty vs equality. Significantly, both Adam Smith and Karl Marx were Europeans and both disdained revelation presuming humans as their own masters. They shared a lot in common but still they differed on conclusions.

Resultantly, the second half of the 20th century saw two different conceptions of human rights – one propagated by the capitalist bloc and the other by the communist bloc. Thus, the UN had to come up with two separate Covenants on human rights: International Covenant on Civil and Political Rights (to please the capitalist bloc) and International Covenant on Economic, Social and

Cultural Rights (to please the communist bloc).

The demise of the Soviet Union in 1991, however, resulted in a one-dimensional approach to human rights. The former communist and socialist so happily joined hands with the capitalist bloc that one is reminded of the famous Persian couplet:

من تو شدم تو من شدى من تن شدم تو جان شدى
تا كس نه گويد بعد ازين من ديگرم تو ديگرى

I have become you, and you me, I am the body, you soul
So that no one can say here after, that your are someone and me someone else

This, however, proved the point that despite the outward differences the essence of the two approaches to human rights was the same.

3. Discourse on Islam and Human Rights: What needs to be done?

Now what is the place of Islamic law in this scheme of the things and what are the options available to Muslims?

Muslims did not enter into this system on the basis of their free will. The system has been imposed on them. But things have changed since then. Today, we have 57 member states of the Organization of Islamic Cooperation. The UN has 193 member states. 57 out of 193 is a great number. More particularly when one looks at the fact that at least one-fourth of humanity claims to be Muslims. Some of these states, such as Turkey, Pakistan, Malaysia and KSA, play significant role in world politics. Some Muslim minorities, such as in India and UK, are more active than many so-called Muslim states. Muslim world is abundant with great resources. And Islamic law continues to assert its role. Gone are the days when people would be ashamed of the various aspects of Islamic law.

Muslim youth in particular want Islamic law to play a dominant role at global level. It is, therefore, high time to get rid of the colonial baggage and present Islamic law as an alternate – and much better – system. This system should at

least be granted the right to claim universalism in much the same way as the Western international law claims to be.

Till the 19th century, international law was deemed to be based on the consent of the sovereign states. This consent could be explicit or implied. Hence, two sources of international law: treaty and custom. In the 20th century, however, a third source was acknowledged, namely, “general principles of law recognized by civilized nations.”¹⁴

What does this mean in practical terms? International courts and tribunals continue to rely on principles of English common law or French civil law and the use of the principles of Islamic law is almost non-existent. Very rarely, a reference is made to some ideas but that too reflects a very superficial approach (such as equating *istihsan* with equity).

At the time of the law-making, very little effort is made to incorporate the ideas coming from Islamic law. For instance, the only major contribution by Muslim states to the Convention on the Rights of the Child is in the form of the provisions about *kafalah* as alternate to adopting a child. The blame here, of course, lies on Muslim states that do not perform active role in this regard.

One option used by many states at the time of signing a treaty is to put reservations on some of its provisions. Pakistan, for instance, ratified the Convention on Elimination of Discrimination against Women “subject to the Constitution of Pakistan”.

This reservation is vague and useless because one has to specify the provisions on which one is putting reservation. More importantly, whenever a Muslim state puts reservation on the basis of Islamic law, other parties to the treaty call such reservation as “discriminatory”, thus, equating Islamic law with discrimination!

The option of blanket approval of all ideas coming from the West and accepting international law on the face of it is no more viable. Not only because it did not get acceptance in the Muslim world but also because it did not satisfy

the West. The differences in the two systems are so obvious that they cannot be ignored or marginalized.

The proper way, therefore, is to face the reality. We have to recognize the differences first and only then we will be able to resolve them. The differences are not negligible. They are essential.

Hence, the first step should be to allow both the Western and Islamic notions of human rights the claims of universality and let the people choose any of the two alternatives at their own free will. Fair and free competition between the two systems should be made possible. None of the systems should override the other by the use of force.

Till that free and fair competition is made possible, till Islamic law is allowed the equal claim of universality, we may continue searching for كلمة سواء between the two systems but this must not be at the cost of ignoring or undervaluing the differences. No meaningful dialogue can occur if the essential differences are denied. Both sides have to come out of the state of denial.

Islamic law from day one has been addressing the Individual and no corporate veil ever shielded individuals from its address. Western international law has gone a long way toward addressing individuals directly and it had to pierce the corporate veil of the state. International human rights law and international criminal law are, therefore, acceptable to Islamic law - at least at the conceptual level. Direct address to the individual - imposing on him obligations and recognizing for him rights - can, thus, become the foremost كلمة سواء between the two systems and it can become a solid foundation for a meaningful dialogue.

If such a dialogue ever takes place, it will not bear fruit unless two realities are recognized: that the values of the two systems are different; and that the priority order of the various values in the two systems is also different.

God knows best!

Notes and References:

¹ See for a detailed description of the Covenant and its implications for law and jurisprudence: Imran Ahsan Khan Nyazee, *Legal Maxims* (Islamabad: Federal Law House, 2013), 99-115.

² Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1994), 89-102.

³ *Ibid.*, 109.

⁴ *Ibid.*, 48-68.

⁵ A very famous tradition of the Prophet, peace be on him, gives the basic principle of Islamic law in this regard: “No obedience to any creature in disobedience to the Creator!” (Musnad Ahmad). A great Hanafi jurist Imam Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi has given the principle as: “The ruler does not have the authority to relinquish the right of the individual” (Mabsut (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1997), vol. 10, 139).

⁶ Imam Sarakhsi in his *Usul* mentions 12 categories of huquq Allah, one of them being the specific hudud punishments! (*Usul al-Sarakhsi* (Lahore: Maktabah Madaniyyah, n.d.), 1:131-132.

⁷ See for a detailed exposition of the theory of Imam Ghazali: Nyazee, *Theories of Islamic Law*, 220-260.

⁸ See, for instance, Article 2 (7) of the UN Charter, 1945.

⁹ L. Oppenheim, *On International Law* (London: Longman, 1905), 19.

¹⁰ This was done for the first time in Nuremberg and Tokyo Trials.

¹¹ Oppenheim, *On International Law*, 33-34.

¹² *Ibid.*, 34.

¹³ *Ibid.*, 31-32.

¹⁴ See Article 38 of the Statute of the International Court of Justice.