Legal Reform

Reviving Human Rights in the Muslim World

Muslim countries are the bête noire *of the Human Rights Movement. Problems in these countries range from a denial of democratic rights to restrictions on speech, movement, and education. A drastic example comes from Afghanistan, where the Taliban, in their pursuit of "the perfect Islamic state," have exiled women from public life. Less known is the damage the Taliban are also inflicting on Afghan men. An eyewitness recounts*

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from Kabul the following story, which captures the texture of human rights violations there and the miseries to which they give rise: "Recently, a man was arrested for not growing a beard. His wife and infant child were left unattended at home. The woman finally had to leave her house, with the infant in her arms, to purchase a loaf of bread. She was detected by the Talibans and was beaten mercilessly because her flowery skirt showed accidently from under her chador. The woman lost her sanity. She ran home, where she was boiling meat, and splashed hot water on her assailants. They killed her on the spot, in front of her child."

Incidents like this one, as well as the rape laws in Pakistan which punish the victim, the Algerian civil war which continues to claim the lives of thousands of men and women, and the personal status codes (family laws) which reduce the woman to a ward, all have caused many in the West to ask: "Why is Islam so violent, so different, and so oppressive?" In fact, it is this concern about Islam which underlies many of the recent discussions in the West about "the clash of civilizations" and makes the West less hesitant about the use of force in Muslim countries. This same concern has also led Western non-governmental organizations (NGOs) to support efforts for the secularization of laws in Muslim countries, particularly personal status codes, and the establishment of Western-style democracies.

These efforts will be frustrated, and improvements in the human rights situation will be delayed in Muslim countries, so long as action for change is not based on a proper understanding of the nature of the problems and the people involved. Thus, it is important to remember that all three Abrahamic religions were revealed, and most other religions originated, in the East. Muslims take spirituality very seriously and would be willing to put up with a great deal of pain and suffering rather than abandon this fundamental disposition. Additionally, many Muslims have an intuitive belief that it is not religion which is at fault, but those in power. Consequently, they continue to search for the spiritually acceptable solution. In the meantime, Western NGOs offer no more than lightly-modified Western secular solutions, sometimes thinly disguised with religious rhetoric.

Origins of the Crisis

The roots of the human rights crisis in the Muslim world are ancient. They are also directly related to the issue of democracy and political legitimacy. Political legitimacy in the Muslim state was lost soon after the death of Prophet Muhammad and the four rightly-guided *khalifahs* (caliphs). At that historical moment, the Umayyad Dynasty rose to power not through free *bay'ah* (the form of voting practiced then) but by

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the combined use of sheer force and deceit. Soon thereafter, they further marginalized the will of the people by establishing a hereditary monarchy. Muslim scholars who argued throughout the ages that such a system was antithetical to basic Islamic principles suffered severe retribution. Ultimately, most scholars, weary of the oppressive state machinery and committed to the stability of the Muslim society, opted to abandon the sphere of politics and turn their attention to other matters.

With the decline of Islamic democracy based on the twin principles of *bay'ah* and *shura* (consultation), authoritarianism became increasingly entrenched and patriarchal thinking flourished. Women, who had played a major role in the early Muslim society, gradually were distanced, then excluded, from the centers of power. For example, 'Aisha, the learned wife of the Prophet, intervened in a battle that divided Muslims after the Prophet's death. Her intervention failed, formally marking the decline in her political power. Zainab, the courageous granddaughter of the Prophet, watched her family being massacred by the Umayyads. Despite her difficult circumstances, Zainab managed to condemn the Umayyad caliph in a face-to-face, heart-wrenching public speech in his palace. Other examples, though less salient, abound. While many women became distinguished scholars, as evidenced by major male scholars who studied under them, their numbers dwindled over time and their voices eventually were muffled.

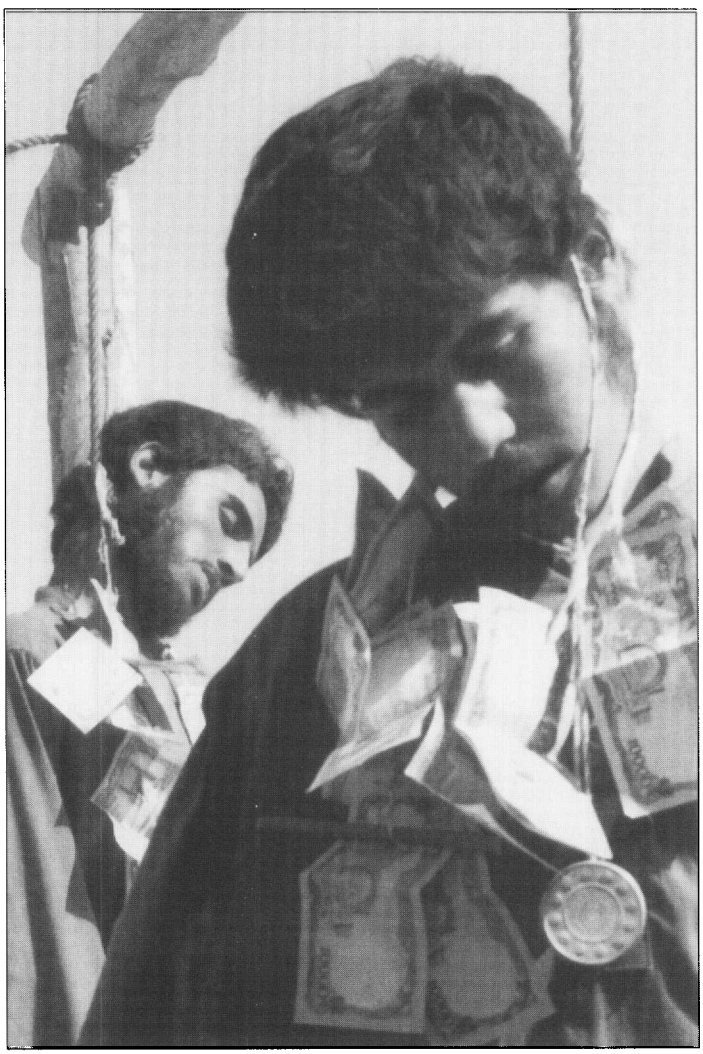
Ultimately, juristic interpretation of family laws became so restrictive as to reduce the woman to a ward and deny her the right to execute her own marriage, the right to work outside her home, and the right to travel unaccompanied by a male. The denial of the right to work was particularly outrageous given the fact that Khadija, the first wife of the Prophet, was an active businesswoman who employed the Prophet and later proposed marriage to him. These juristic interpretations derived more from patriarchal social custom than they did from Qur'anic principles. In fact, at times, the jurists' very understanding of Qur'anic principles was colored by their social milieu.

Re-examining Islamic Law

Fortunately, however, our "global village" has become more supportive of democratic changes in government, and patriarchy has been unmasked and discredited. The time is thus ripe for Muslims finally to accomplish what centuries of internal oppression and subsequent colonialism have prevented them from accomplishing. This effort is aided by the fact that there is no central religious authority in Islam which is charged with interpreting religious texts. Every Muslim, male or female, is entitled to such an interpretation so long as he or she satisfies two conditions: piety and knowledge.

This fact is illustrated by the story of the old woman in a mosque who challenged a proposed law by Caliph Omar on the basis that it conflicted with the Qur'an. The Caliph asked her

Fundamentalist regimes in Afghanistan and other Muslim countries have been accused of numerous human rights violations.



to elaborate. She provided clear Qur'anic evidence in support of her argument. Omar then promptly declared to those in the mosque: "The woman is right and the Caliph is wrong." Thus, not even the rightly-guided Caliph Omar was the final arbiter on matters of religion. The Qur'an says: "If you disagree on a matter, refer it to God and his Prophet." The final arbiter is therefore not a jurist or a ruler, but the Qur'an itself and the *sunnah* (example) of the Prophet. What is therefore needed for Islamic jurisprudential reform is a new generation of Muslims, well-versed in their religion, who would re-examine earlier juristic interpretations in light of Qur'anic verse.

There are other sources of change provided by the juristic tradition itself. For example, a basic Islamic juristic principle is that laws change with changes in time and place. Clearly this principle has important limitations, since the basic tenets of Islam are not subject to change. This principle is exemplified by the historical precedent of the great Imam al-Shafi'i, who upon departing from Iraq to Egypt, changed his jurisprudence to one more suitable for the Egyptian society. In today's world, we are centuries away from the era in which al-Shafi'i lived. We in the West are also thousands of miles farther away from both Iraq and Egypt. Imam al-Shafi'i himself would be astounded to discover that modern-day jurists are clinging to his old views and the views of other Imams who have been dead for centuries.

It is important to realize that part of this juristic inflexibility we suffer from today has its roots in the colonial experience. Colonialists made a concerted effort at weakening the tie of the colonized people to the language of the Qur'an. The most salient example of such policies is provided by Algeria, where whole generations grew up speaking French. As a result, the attachment to Islam became for many a sentimental and not an intellectual one. They could no longer comprehend or even read the Qur'an and related literature. Thus they were restricted to emulating their parents and grandparents. This state of affairs was true in many Arab as well as non-Arab countries, where the mastery of difficult religious texts became limited to a few. As a result, rigidity set in and medieval jurisprudence enjoyed longevity at the expense of twentieth century Muslims. For this reason, a good religious education is necessary today for women and men who are interested in re-examining existing laws to determine the suitability of these laws to our time and place.

Another major traditional principle which is a powerful agent for change is that of *maslaha*, or the public interest. The basic argument is that the Supreme Lawgiver provided us with laws that further the public interest. When special circumstances arise so that a law will no longer serve, indeed may even harm, the public interest, then jurists may suspend that law until conditions return to the earlier state. Again Caliph Omar provides us with a historical precedent for the application of this rule. In a year of famine, he suspended punishment for theft. His view of course was that scarcity and necessity had sufficiently changed circumstances as to render punishment against the public interest.

It is this principle of *maslaha*, however, which has been used by some Muslim scholars in the past to limit the education of women. These scholars argued that since education may result in the corruption of the morals of women, it is wiser to avoid such harm to society. This state of affairs is especially troubling since the Qur'an advocates learning and since the Prophet clearly stated that "education is the duty of each Muslim, whether male or female." In fact, those who like to emulate the Prophet may do well to remember that he hired a teacher to educate his wife. How can the Taliban ignore this overwhelming religious evidence in favor of educating women?

Clearly what is needed here are better educated Muslims, for ignorance is no longer bliss, especially under authoritarian rule. These are only some principles of change and precedents in Islamic jurisprudence. The literature abounds with them. When properly understood and unleashed, they can provide a very powerful weapon against oppression and ignorance and for the furtherance of human rights. The Taliban's insistence on beards for men and drab clothes for women will then be revealed as arbitrary. Pakistani rape laws will be revealed as contrary to Islamic law, and personal status codes which marginalize women will become indefensible.

In fact, a Muslim state has no religious authority to decree a personal status code. Because of the absence of a central religious authority, Muslims are directly responsible to God for their own choices. Furthermore, the Prophet encouraged *ijtihad* (exerting one's intellect to arrive at the correct religiously-based solution or interpretation). Consequently, hundreds of schools of thought blossomed in the first few centuries of Islam. Being individually accountable to God, Muslims chose in their personal lives that school of thought which they found most suitable or convincing. Thus a person may have chosen to follow the Maliki school of thought, while his wife may have chosen the Shafi'i one. These schools of thought differed sometimes quite significantly. It therefore was important in marriage contracts, for example, to specify the jurisprudence governing the contract. This choice of law often decided a woman's rights with regards to executing the marriage, having a monogamous marriage, and exiting that mar-

riage at will.

With the rise of Western influence in the Muslim world, modern Muslim states decided to follow the example of some Western countries by codifying family law. They often first specified an official school of thought, then adopted the principle of *takhayur*. Under this principle, the state permitted itself the right to discard some of the laws in the adopted school of thought in favor of ones borrowed from other schools.

Usually, the selected provisions were more patriarchal than the discarded ones. As a result, many of these codes became increasingly oppressive. The time has come to reassess this departure from prior practice. Since marriage contracts are a variety of civil contracts in Islam, prospective spouses should be able to specify the choice of law in their contract which best approximates their beliefs and the familial relation they desire. The state should stop regulating family life, except to a minimal necessary extent. It should instead revive the earlier tradition of freedom of belief and freedom of contracting.

Catalysts of Change

Western Muslims can serve as the moving force behind the winds of change in the Muslim world. So far, Muslim policymakers in the East have hidden behind religion to justify oppressive cultural choices. But Islam does not belong to any one region. It is a world religion which is committed to diversity. In fact, the Qur'an states that God created us male and female, nations and tribes, so that we come to know each other. Thus Islam's approach to diversity is a welcoming one which opens the door for all cultural variations to bloom, so long as they do not contradict the basic tenets of the religion. For this reason, scholars of past were able to supplement their religious laws with customary ones from their cultures. In time the distinction between the two faded, and people began viewing obsolete customs as part of the religious tradition. Consequently, today they are not willing to question these customs, as oppressive as they may have become.

American and European Muslims are not bound by the customs of other nations. The immigrants among them have an unprecedented opportunity to sift among the various practices and traditions they brought with them from their respective countries. The indigenous ones have the advantage of a whole new perspective. Together, they can dispose of those practices and traditions related to custom or culture. They can then reassess the jurisprudence of the remaining ones with a fresh perspective. This fresh perspective, friendly to Western society, technology, and constitutional liberties, will be better able to develop that Islamic jurisprudence which was suppressed long ago by tyrants and despotic monarchs. Finally, the democratic beliefs and practices of Medina, the first Muslim society, will be allowed to blossom in American and European Muslim thought and communities.

While Muslims in the United States are unhappy about practices such as racial and religious discrimination, they generally do believe that they can exercise their freedom of thought and speech without fear of repression or execution. This fact renders the United States a most suitable platform for the development of Islamic jurisprudence for the New Information Age. The process has indeed begun, and many US Muslim scholars have developed bits and pieces of that jurisprudence which has then been transmitted to Muslim countries in various ways, such as through speaking tours.

No doubt the reception abroad is not always friendly. There are of course those who cling to the old ways and understandings either to protect their own turf or as a security blanket in a rapidly changing world. Yet US Muslim jurisprudence is receiving some warm welcome as it complements the work of select progressive Muslims abroad. This reception is not totally coincidental, since that jurisprudence relies both on established tradition and progressive jurisprudence produced in places such as Egypt and Lebanon. For this reason, it is realistic to hope that US Muslim jurisprudence will ultimately result in legal change in some Muslim countries.

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These solutions for change in the human rights climate in Muslim countries will not come easily. But unlike secular efforts and solutions, the masses of Muslim women and men are more likely to support them. They will see in them a genuine effort at reform derived from their own tradition and history and not motivated by Western ideological hegemony. Under this scenario, human rights in Muslim countries will prosper, and ages of conflict, violence, and suffering, together with Samuel Huntington's thesis about the clash between the "West and the Rest," will be put to rest. H