DOI: 10.22034/ISJ.2023.411015.2053

International Studies Journal (ISJ)
Vol. 20, No. 2 (78). Fall 2023
Reseived Date: 2023/5/23
Accept Date: 2023/8/12
Article Type: Original Research
PP: 21-50

فصلنامه مطالعات بین‌المللی
سال ۲۰، شماره ۲ (۷۸)، پاییز ۱۴۰۲
تاریخ دریافت: ۱۴۰۲/۳/۲
تاریخ پذیرش: ۱۴۰۲/۵/۲۱
نوع مقاله: علمی- پژوهشی
صفحات: ۵۰-۲۱

Islam and the Rule of Law

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Abstract

The rule of law entails that government and the laws it makes serve the public good and facilitates equal opportunities. The requirement that the state conform to the rule of law puts substantial limits on governmental power which serves to protect citizens from arbitrary action or the imposition of unjust laws. The 'law' referred to in the rule of law concept is thus not whatever issues from legislatures and courts, but rather 'a particular kind of restraint on the use of force' or arbitrary power. It is not an 'imaginary' used by the government towards their equally imagined ends and imposed on the people. Likewise, the rule of law is not the sole prerogative of the government but requires the commitment of its citizens to adhere to and uphold the rule of law. Therefore, in rule of law societies corruption is not prevalent and does not impinge on the daily life of the individual. The inception of the rule of law in Islamic societies arose from the fact that God's Laws were supreme, not the laws made by any man, or group of men, whatever his/their position. Is a return to the rule of Law possible for Muslim societies?

Keywords

Rule of Law, Islam, Good Governance, Accountability, Ottoman Empire, Colonialism

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Article Link: https://www.isjq.ir/article_178713.html?lang=en

"There appears to be widespread agreement, traversing all fault lines, on one point and one point alone: that the rule of law is good for everyone. Among Western states this belief is orthodoxy" (Tamanaha, 2004).

Introduction

The rule of law, for the purpose of this article, limits arbitrary governmental power and ensures fairness, equality and justice in society (Bingham, 2011, 1-2). Therefore, no person or class of people is deemed above the law (as is still the case in many developing societies) and opportunities are not reserved for or usurped by the rich and powerful. Thomas Fuller enunciated the point succinctly in 1733: 'Be you never so high, the law is above you' (Denning, 1977, 762). The rule of law thus creates stability and order built on legal checks on government and the maturation of a society into realising the wisdom and benefits of limiting arbitrary power and embracing equality, fairness and justice (Weingast, 2010, 28.)

I specifically refer to the description of the rule of law set out by the United Nations:

The Rule of Law refers to 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. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency (Report of the Sec.Gen. UN Doc. S/2004/616,4).

The rule of law entails that government and the laws it makes serve the public good and facilitates equal opportunities. The requirement that the state conform to the rule of law puts substantial limits on governmental power which serves to

protect citizens from arbitrary action or the imposition of unjust laws. The 'law' referred to in the rule of law concept is thus not whatever issues from legislatures and courts, but rather 'a particular kind of restraint on the use of force' or arbitrary power (Hayek, 1976, 55). Law is a system of rules and principles of justice 'regulating the conduct of persons towards others, applicable to an unknown number of future instances and containing prohibitions delimiting boundaries or the protected domains of all persons and organised groups' (Hayek, 1979, 100).

Therefore, using law to serve the whims or aims of those in power, however benign such power may be (both brutal and benign uses of power being readily demonstrable in Muslim Societies) has no place under the rule of law. The rule of law must take root and be embraced by the society, evoking a general commitment to it by every member thereof. It is not an 'imaginary' used by the government towards their equally imagined ends and imposed on the people (May, 2014). Likewise, the rule of law is not the sole prerogative of the government but requires the commitment of its citizens to adhere to and uphold the rule of law. Therefore, in rule of law societies corruption is not prevalent and does not impinge on the daily life of the individual.

Tom Bingham points out that the idea of the rule of law can be traced back to Aristotle, translating the passage referred to as stating: 'It is better for the law to rule than one of the citizens', and continues: 'so even the guardians of the laws are obeying the laws' (Bingham, 2011, 3). I emphasise this aspect of the rule of law (requiring leaders and those in power to be subject to the same laws as everybody else and accountable for their actions) because my research suggests that this is the most difficult element of the rule of law to address in most Muslim (and developing) societies and which impedes many of the other aspects, featured in the UN description above, from being practiced or enforced. If Government accountability were in proper function and order, many of the other

aspects of the rule of law would have a greater chance of being in force, than if not (Weingast, 2010)

The absence of a proper and functioning concept of the rule of law in a society is likely to create a rich few and a poor mass; we see this all over Africa and Asia where the government is not a government for the people but a private company of the elite. Inequality, inequity, lawlessness, injustice and social imbalance is rife thus creating a disabling environment for proper economic development. Many top executives have little credible education, and equally many among the highly educated are jobless. In several third world countries the poor have become faceless and the moral responsibility towards them tossed aside at the high cost of fracturing social harmony. These developing societies are faced with the hard truth that the restoration of socio-economic equilibrium is more economically expensive than sharing what you have with the have-nots. Thus, we turn to examine the rule of law in Islam.

1. Islam and the Rule of Law

The rule of law in Islam is not a subject widely written on. Yes, there are those who have addressed the subject of constitutionalism and democracy in Islam and refer to texts as ancient as Ibn Khaldun's writings on good governance, but none of them address the rule of law as defined herein. Ibn Khaldun's expression and perspectives on good governance is divergent from the rule of law as herein defined and discussed which is also a distinct subject from democracy and constitutionalism. Though the rule of law may comprise democracy and constitutionalism, it cannot be to be lumped together with them. Here we are concerned with the rule of law – and not with democracy (https://www.econstor.eu/bitstream/10419/178616/1/ile-wp-2018-13.pdf p8). A nation can adopt both a constitution and democratic forms but grossly violate the rule of law, Malaysia being a prime example. For the purpose of this article, I

shall treat the rule of law as distinct from constitutionalism, democracy or good governance per se.

Therefore, as no Muslim nation today can be described as a rule of law jurisdiction in line with the UN description set out above, our endeavour will be to establish whether the concept of the rule of law exists in Islam and whether this is corroborated by historic practice. I refer mainly to the writings of a few other authors, who have written on the subject.

However, I must also address the fact that in the view of many Muslims, lay and scholars alike, the rule of law is associated with the West, and is otherwise perceived as a Western invention; an 'external' imposition on, or a desirable element that should be adopted by the Muslim world from the West. This is indicated in the writing of Khaled Abou-el Fadl, as we shall note later in this chapter. It is also evidenced in a recent publication (Esmaeili et al., 2017, 63-84) on the rule of law vis a vis Islam that also makes this assumption.

However, it is interesting to note that the rule of law as referred to in the above UN description was non-existent in either Western or Islamic history. Slavery, the subjugation of women, torture, racism and racial segregation etcetera existed both in the West and in Islamic history well into the 20th Century. To therefore simply dismiss that the concept exists in Islam because of slavery or the poor treatment of women but to accept that it was discovered by Aristotle knowing full well the limitations of democracy in Athens and the abuse of other human beings, including but not limited to slaves, women and children, that took place in the West for centuries after Aristotle and well into the 20th century is illogical. Why can it be said to have existed in Western history, and not in Islamic history?

Likewise, to affirm that the concept of the rule of law exists in Islam through evidence of historic practice and application, is not to "celebrate" the rule of law

in Islam, romanticise Islamic history or deem the rule of law an Islamic concept. It is simply to acknowledge that the concept is firmly rooted in Islam even though comparison of historic practice to modern day standard and application leaves much to be desired as Timur Kuran has pointed out (Kuran, in James J. Heckman et al., 2010). The Rule of Law is no more Western than the concept of Justice is, as justice is firmly rooted in Islamic teachings evidenced by the Quran, the practice and sayings of the Prophet Mohammed and countless historic accounts, regardless of whether Muslim societies today are or have been just or unjust. Likewise, though the concept of justice endures, its forms and expressions today differ widely from those of the past yet we cannot say justice did not exist in the past any more than the same can be said for the rule of law. At the time of the Prophet Mohammed, owning slaves did not offend justice or the rule of law (slavery is expressly allowed and provided for in the Quran) yet not a single Muslim country today defends slavery on account of the Quran or Mohammed's practice. One can easily compare this with examples from the UK, a rule of law jurisdiction which can be traced back to the Magna Carta, yet serfdom and the subjugation of women existed long after the Magna Carta. It was not until 1919 that the law allowed women above the age of 30 who owned property (theirs or their husband's), to vote. It was not until 1928 that all women above the age of 21 were allowed to vote. Yet no credible person will deny the historic existence and application of the rule of law in the UK, even whilst openly admitting it's deficiencies.

Returning therefore to the rule of law in Islam, the inception of the rule of law in Islamic societies arose from the fact that God's Laws were supreme, not the laws made by any man, or group of men, whatever his/their position. This even applied to the Prophet Muhammad as evidenced by the instances when the Qurān corrects him as having made an error of action or judgement (Quran, Ábbasa). Every man and woman was/is equal before God.

Wael Hallaq notes that "Justice and Equality" are the very emblem of Islam, both being central to the rule of law (2003, 1708).

During the time of the Prophet Muhammad and his Companions (khulafā' arraŝhidīn) scholars and legal jurists had no position. They did not, in fact, exist. The leader held ultimate control even though he delegated responsibilities to judges (who sometimes also acted in the capacity of governors) in far off lands under the rule of Islam. The Prophet and his Companions were deemed rightly guided by God and are reported not to have abused their power or act arbitrarily. Rather, they, as "rightly guided representatives of God", acted to check any excesses or abuse of power in Muslim societies. They were also trusted to ensure that the law applied equally and fairly to everyone. The Prophet Muhammad was seen as solely implementing the rule of law by ensuring fairness, equality, due process and checking the abuse of power wherever it manifested. This was because, in Muhammad, the roles of the head of state, judge and legal scholar were merged into one person.

Any disputes between the ruler and the ruled were taken before the judiciary to be resolved. Likewise, any dispute between fellow citizens, whatever their status or standing. Equality before the law was therefore also practiced and embodied by the Prophet Muhammad when he said, for instance: 'By God, if it was Fatima who stole, I would cut off her hand' (Fatima was Muhammad's daughter) It was also evidenced in history by the treatment of non-Muslims in judicial disputes. Timur Kuran notes: "… for most of Islamic history Muslim-governed states treated religious minorities quite well by the prevailing global standards. In Spain under the Moors and in Ottoman Turkey, lawsuits that pitted a Muslim against a Christian or Jew frequently ended in favour of the latter; for certain periods the Islamic court registers show no evidence of systematic discrimination in adjudication on the basis of religion." (Kuran, in James J. Heckman et al., 2010). The egalitarian spirit upon which Islam was first founded

also ensured that no man or person was ever arbitrarily subjected to another and no person could act in abuse of position or power without risking (and on occasion) being ousted.

Subsequently, a separation of power became more defined in that the judge/qāḍī played the role of resolving disputes, pronouncing judgement and administering the law. The Caliph/ruler played a minimal role in this quasi-judicial administrative role. The Caliph was not, however, above the law, nor did he have the power to issue law or judgements. The Caliph was himself subject to the laws and customs of the land, as passed down from previous generations and as built up through precedent in what was known as sunan.

In the 8th/9th century AH a separate class of legal scholars and jurists became established. This facilitated the independence of religious and legal scholars (ʿulamāʾ and fuqahāʾ) which shielded them from dominance and control by the secular leaders (caliphs, sultans and shahs). A real separation of powers was thus sustained that limited the discretion of the rulers and protected the people to a significant extent from arbitrary control. Hallaq notes: "It was this reality [of the separation of power] – which made the approval of the men of law indispensable to the acts of politics – that gave formative Islam what we call today the rule of law." In this sense one can also say that the advent of the rule of law concept rode on the back of the separation between 'church' and 'state' as the authority of the fuqahāʾ and ʿulamāʾ independent of the political leaders only gained legitimacy with the people/citizens due to the increasingly secular nature of the governors (Hallaq, 2003, 1708).

Therefore, from the 8th – 9th century, the law was the distinct domain of the judges and scholars, not the Caliphs/rulers. The rulers exercised broad executive powers and could make rules supplementary to the Sharīʿah, however, their legitimacy and survival were dependent on the support of the scholars as the keepers of the only law that commanded the 'civic reverence' of the people.

Whilst previously the Caliph was both the ruler and judge, possessing broad knowledge of Islam, now the roles were separated, and partly because the judges and scholars had carved out a distinct identity of piety, upright character and ascetic leanings that made the people respect them. Judges were usually and sometimes famously noted for their independence from political control (Abou El-Fadl, 2004, 16). Even the torture of Ahmad ibn Hanbal, the founder of the Hanbali school of law, is an ironic illustration of the rule of law in action, in that a scholastic authority refused to bow to political pressure for personal gain which is reported to have inspired many muslims.

This is not to say that there were no incidences of executive control upon the judiciary or arbitrary exercise of power, but according to Hallaq these were more a rare occurrence and far from the norm:

Politics was subsidiary to law and entirely subservient to it. This is a fact of paramount importance, dictating much of what happened between the rise of Muhammad and the early nineteenth century. The Caliph and Sultan saw themselves, and were seen by all others, as subject to the holy law of God. And sure enough, notwithstanding the occasional violation, both rulers and their agents took this divine superiority for granted and as a rule conducted themselves in accordance with its dictates. If there is one inalienable feature of the Muslim body politic and legal culture it is the prevalence of the rule of law, with the political sovereign accepting without challenge the supreme authority of the divine law and hence that of the jurists and judges-custodians of the law and its interpreters as well as the civic leaders of the Muslim communities wherever they were present. No ruler or political might could challenge the divine law and its spokesmen. The rich, the powerful, and the poor, from sultan to pauper, all stood as equals in the presence of the humble, informal Muslim court to receive judgment. There were no special rules for the mighty, and none could question their eternal submission to the law of God. The Law was deemed to stand above anything human.

It appears therefore that aspects of the rule of law like the separation of powers and supremacy of the law were established early in Islamic history. The jurists (ʿulamāʾ) performed a wide range of economic, political, and administrative functions and, most importantly, acted as negotiators between the ruling classes and the laity, while they legitimated and often explained the rulers to the ruled, as well as explained the rules to the ruled. The jurists also used their moral weight to thwart tyrannous measures and at times led or legitimated rebellions against the ruling classes. 'The post-formative centuries of Islamic history suggest that rulers generally preferred to maintain an equation in favour of compliance with the religious law, since compliance was the means by which the ruling elite could garner the sympathies, or at least tacit approval, of the populace' (Hallaq, 2003, 1708).

On balance, if there was any pre-modern legal and political culture that maintained the principle of the rule of law so well, it was the culture of Islam.

Khaled Abou el-Fadl also writes on the centrality of the rule of law to Islam, both conceptually and historically. He refers to the well-known Muslim historian and sociologist, Ibn Khaldūn (d. 784/1382), stating that he would have classified all political systems into three broad types. The first being a natural system that reflects a primitive state of nature which is an uncivilised system of lawlessness and in which the most powerful dominates and tyrannises the rest. The second is a dynastic system which according to Muslim jurists is tyrannical as well as they are laws issued by a king or prince. The third (and superior) system is the Caliphate which is based on the Sharīʿah law.

To be clear, the superiority of the third system is not because it is a Caliphate or because it is based on the Sharīʿah as a specific law, but because of the concept of the rule of law (as we have observed in the preceding paragraphs) that it entrenches in that society and under which the society functions. The third system based on the Sharīʿah, fulfils the criteria of justice and legitimacy and

binds both the governed and the governors alike (Abou El-Fadl, at www.jstor.org/stable/25818128, accessed 20/06/2021). Because the government was bound by a higher law that may not be altered or changed, and because the government may not act whimsically or outside the pale of law, the Caliphate system was superior to any other (Barakat, 1985, 119). Muslim scholars, like Ibn Khaldūn, considered the Islamic political system as a challenge to the world. While all other polities were deemed doomed to despotic governance, and their laws individualistic and whimsical, the Caliphate system of governance was superior because it was based on the rule of law; that is a law that stood higher than, and checked, those that ruled. Whether as a matter of historical practice this assumption was justified or not, the material point was that classical Muslim jurists exhibited a distinct aversion to whimsical or unrestrained government. A government bound by Sharīʿah was considered meritorious in part because it is a government where human beings do not have unfettered authority over other human beings, and there are limits on the reach of power. This is not to say that we should therefore yearn for a return to the caliphate system of eras gone by, and on which point I agree with Timur Kuran (Kuran, in James J. Heckman et al., 2010, 71-89), because as lofty as their practices may appear to be in historical terms of embodying the rule of law, they fall far short of current acceptable standards of adhering to the rule of law today. One could similarly say that no matter how great the achievement of the Magna Carta or Great Britain's historic strides towards the rule of law, it is folly to advocate the return to Monarchial rule today in reminiscence of the greatness of the British Empire.

By the time the 'modern era' of Islam was initiated by the Ottoman and Safavid empires, along with the Mughal empire to the East, the rule of law seems to have been diluted in that, to a much greater extent than in the past, the state and its law became dominant and significant in the lives of virtually all people. The rulers exercised greater personal authority to make and enforce law

(Cleaveland and Bunton, 2018, 39-40). In terms of constitutionalism, the political class and the legal class continued to operate in a rough balance of power, with the sultans and shahs' observant of and subservient to the Sharīʿah. The Sharīʿah courts were more independent of political control and less open to corruption and abuse of discretion than the state tribunals. Sharīʿah courts tended to operate consistently and predictably with its particular combination of Sharīʿah government statutes and custom relating to time and place (Zubaida, 2003: 70). In this sense, one again notes the centrality of a well-functioning and independent judiciary to the implementation of the rule of law. Thus, it is said: "Judicial independence and the rule of law no doubt represented two of the most striking features of traditional Islamic cultures" (Hallaq, 2010: 1708).

Today, however, Muslims looking at their own states see clearly that power, not law, is structuring political, economic and social relations. They simultaneously see that their states are broken. And the collective memory of the Muslim world still remembers that the classical Islamic state was one that governed through law and was governed by the rule of law. So what happened? How did the practice of the rule of law, including government accountability, independence of the judiciary and a thriving civic society that was reflected in flourishing Islamic societies in an Islamic Empire to be reckoned with, come into disarray? More specifically, how did the rule of law vanish in Muslim societies, seemingly impossible to reestablish?

According to Wael Hallaq, in the 19th and 20th centuries, dominated by European colonialism which resulted in the widespread introduction of Western legal codes and institutions and the relegation of the ʿulamā' to the periphery of the political legal system, the rule of law as it had previously existed broke down. The modern era marked the erosion of the rule of law in Islamic societies and by the 20th century when the Ottoman Empire was disbanded, corruption, greed, lawlessness and abuse of power were vices not unknown in Muslim societies. He

explains that: "having codified the law on the basis of Western legal models, and having virtually decimated the infrastructure of the traditional legal profession, the nation state jettisoned Islamic law altogether and reigned supreme as the unchallenged centre of legal and political power." Structurally, the marginalisation of the ʿulamā' removed an effective check on the power of secular rulers. As a result, it has been noted that modern Arab constitutions are used to consolidate power, not distribute it (Brown, 2002, 161-180). Additionally, despite the views of many reformers that modernity required the adoption of European-style codes and laws, the new legal frameworks, especially constitutional structures, were, and still are, often seen as foreign and illegitimate. As a result of these historical developments, the rule of law remains undernourished in the modern Islamic Middle East (Welton, 2007: 169).

Even whilst accepting Hallaq's historic narration that establishes the rule of law in Islam, we must separate historical facts from opinion. I cannot dispute his accuracy as a historian but having accepted the historic facts I disagree with the reasons he gives for the dismal condition of the rule of law in Muslim societies today. He lays the blame on colonisation, and the Westernisation that came in its wake, including the importation of Western legal codes that alienated the hitherto legal professionals (judges, scholars and the learned jurists) in Muslim societies. Somewhere in his narrative he includes two sentences that explains how European colonisation came to be: by invading an Empire already in decline and yet by which means the rule of law in Muslim societies came to, 'its near-total decimation in the nineteenth and early twentieth centuries'. Must we not also enquire into why the Ottoman Empire was at the point of collapse in the 19th and early 20th century? Is it not possible that the collapse of the Ottoman Empire was in fact due to a general lack of rule of law? An empire with upstanding rule of law application, and that was hitherto a flourishing civilisation, does not suddenly find itself at the point of collapse and easily invaded by another

civilisation? Decay and rot must have set in within the Ottoman empire that ate at the rule of law and the independence of the judiciary thus finally bringing it to the point of collapse and leaving it open to the colonial efforts of the West (Ottoman Empire - The Decline of the Ottoman Empire, 1566–1807 | Britannica, last accessed on the 24th of June 2021). This is not a new narrative, history books are replete with the decay, vice and corruption that had set in, in the Ottoman empire that finally brought it to its knees. Timur Kuran writes of the numerous illustrations from the Ottoman era as to the compromise of the rule of law through political leaders buying off judges or exploiting their differences (Kuran, 2010, 74).

It is widely known that colonisation took place through force, so no blame on the part of those colonised is being imputed for such occurrence, but a logical analysis of the Ottoman Empire reveals that a thriving society with robust application of the rule of law would not have easily collapsed and fallen prey to colonisation. Therefore, Muslim societies must at least accept part of the responsibility for the corrosion of the rule of law and their downfall. Since vice, corruption and overall decay of an empire is incompatible with an independent judiciary and a strong application of the rule of law concept, then it is plausible to assume that at the time of the collapse of the Ottoman Empire, neither the rule of law nor the principles that flow from it were in proper application.

It is also accepted fact that colonisation was successful in most countries because a segment of the local rulers cooperated with the colonial occupiers and accepted positions of power and the remuneration that came with it in exchange for subduing the population through these ‘local rulers’. This is fact in Iran as well as in the Arab Middle East. The Arab Revolt that began in 1916 led to the further decline of the Ottoman Empire. The growing nationalist sentiments in the Arab parts of the Ottoman Empire led to them gladly accepting the promises of support from the British in establishing a United Arab Emirates, which was

among the reasons the Ottoman Empire was even further weakened before its final collapse in WWI (Fromkin, 1989).

The question therefore still begs an answer: why is colonialism to blame for the historical and continued demise of the rule of law in Muslim societies? It can easily be agreed that colonialism was bad and had very negative effects on Muslim societies (just as it did on all other societies that were colonised) without necessarily blaming it for the demise of the rule of law in Muslim societies. Hallaq himself admits and writes of the eventual co-dependence between the caliphs or rulers of the day and the judges and legal scholars. The caliphs needed the judges and legal profession to garner legitimacy with the people whereas the judges and rest of the legal profession needed the ruling elite to fund and support their efforts. Hallaq even goes as far as saying that the success or failure of a doctrinal school of law depended on whether it was supported by the ruling elite. And since the ruling elite, like any political entity that survives on maintaining power, would not support another entity that does not in turn serve and support it, the co-dependence is indisputable. So how can it be that the caliphs and ruling elite of the Ottoman empire fell into vice and corrupt practices without such vice and corruption also affecting and corrupting the offices of judges and the legal profession? And if we are to assume that the judges and legal profession remained staunch in upholding the rule of law, why didn't the operation of the rule of law function to overthrow the corrupt caliphs and elect another/others who served the people and upheld the rule of law?

It appears that it was in fact the decline and dwindling state of the rule of law in the Ottoman Empire that led to its downfall, allowing the colonisation efforts of the West to succeed. It is thus not colonisation that led to the 'decimation' of the rule of law in Muslim societies but rather the lack of rule of law in the Ottoman Empire that led to colonisation. Muslim societies are not victims of the West but victims of their own lack of good governance and rule of law which

has led to their current reality (Palmer, 1992).

Even if we are to accept Wael Hallaq's narrative of blaming the West for colonising the Ottoman Empire and for the Westernisation and consequential decimation of the Islamic legal tradition and the rule of law, colonialism ended more that half a century ago. Given the concept of the rule of law is so firmly rooted in and central to Islam as it evolved from the time of Prophet Muhammed until the 19th century, as presented by Hallaq, why have Muslim societies not made a concerted effort to reinstate the rule of law into their societies? Especially if historical facts point to evidence that the rule of law underpinned Muslim societies, characterised by the independence of the judiciary and a thriving civil society that both laid the foundation for and resulted in flourishing societies. If Muslims are frustrated at the state of affairs in their nations and societies, why not make effort towards re-establishing the principles of the rule of law (which encompasses supremacy of the law, equality, the independence of the judiciary and checks against arbitrary rule or exercise of power)?

Timur Kuran offers a different perspective, one less positive of the rule of law in Islamic history than that offered by Hallaq, but acknowledging its application nonetheless (Kuran, 2010, 78). According to Kuran, though the rule of law found application in Islam's history, its application was compromised even at the height of the Islamic Empire. He emphasises the fact that laying down a principle is not synonymous with putting it into practice and notes that the Ottoman Empire provides abundant examples of the compromised application of the rule of law. In his treatment of the subject, his definition of the rule of law is much wider than Wael Hallaq's and his analysis more balanced. He sets out the rule of law as comprising government accountability, equal access to justice and the political process, efficient judicial and political systems, clear laws, generally stable laws, and the protection of fundamental human rights. He then sets out to assess: "To what extent does Islamic law, in theory and in practice, conform to

these principles?" (Kuran, 2010, 78). As pertains to government accountability, he writes:

"A central concept in Islamic political thought is that an Islamic ruler must not only enforce Islamic law but obey it strictly himself. The legitimacy of his rule depends critically on his adherence to the sharia. If he fails to uphold Islamic law through either his policies or his personal life, he must be deposed. Centuries before the issuing of the English Charter of Liberties (Magna Carta) in 1215, in Islamic thought the law was considered a force above government and independent of the whims of individual rulers. In principle, Muslim rulers were accountable for their actions. … Precisely because Muslim rulers were accountable under Islamic law, Feldman (Feldman, 2008) considers Islam's traditional form of government to have provided, for a while, a version of the rule-of-law."

He concludes that for purposes of modern day application of government accountability, "both the historical record and contemporary patterns suggest that the balance of power implied by the concept of rule-of-law cannot be achieved simply by declaring government accountable to the ulama. Major constituencies will try to frustrate any attempt to increase the powers of religious functionaries."

At the end of his assessment on whether Islamic law satisfies the core principles of the rule of law, he notes that: "three broad themes stand out. First, the early development of Islamic law involved a panoply of institutions that served these principles. For each principle we can identify one or more early Islamic institutions that were meant, at some level, to promote it. Second, the institutions in question were not flawless as measured by long run success in sustaining the rule-of-law. Over time they lost effectiveness. Finally, the relevant Islamic institutions now tend to be out of date. Hence, Islamic law, as it is now understood, does not offer an efficient variant of the rule-of-law."

Whilst I agree with Kuran, including the fact that the application of the rule of law in Islamic history was flawed and wanting, his conclusion simply states the obvious: the fact that historic forms of expression of the rule of law and the means through which it was achieved, no matter how briefly the balance sought lasted, are grossly inadequate today. We no longer use camels and horses for transportation today, neither do we have to use historical forms and structures of practicing and maintaining the rule of law. After all, during the Prophet's time, he ruled alone whilst today government has evolved to comprise three arms and many offices within them in line with the practice of modern government all around the world. The application of the rule of law was very different even between the time of Muhammad and after the 8th/9th Century. This demonstrates the capacity and room for evolution and change. The same should be the case for the Rule of law in Muslim societies today; its application should reflect modern global standards and there is nothing in the teachings of Islam that contradicts this. After all, if all muslim societies have banned slavery in line with modern global human rights practices despite the fact that the Quran explicitly approves of its practice, why should the adoption of modern rule of law practices and institutions be limited to historic Islamic practices or forms? In his writing on Awqaf in Islamic history vis a vis the modern version of Awqaf, Timur Quran demonstrates first hand that the evolution of institutions and how they are run, is crucial for their survival and success. He also underscores the detrimental effect of a negative legacy or the lack of a positive past to emulate that causes past negative modes of operating to be replicated and perpetuated (Kuran, 2016, 448-449).

When one studies the rule of law in England, one usually begins in history, citing amongst other circumstances and events, the Magna Carta despite the fact that it was essentially a bargain between the landed gentry and the Crown. Yet, the Magna Carta is not to be hailed today as an applicable instrument of modern

day rule of law template. Likewise in Islam, one can easily admit the fact that historical forms and modes of ensuring the application of the rule of law, as Kuran examines and concludes, are woefully wanting by today's standards and present day states' needs. Advocating a return to the "caliphate" reminiscent of the past is not a viable option of re-instating the rule of law just because prominent scholars in history like Ibn Khaldun, deemed it superior to alternative historic forms of governance. The yard stick for Muslim societies today should be present day forms of implementing the rule of law in line with acceptable global standards.

2. The Rule of Law: Concept v Form

The rule of law is a concept. In essence, the rule of law concept sets out a higher law or higher principles than that which the government enacts and to which the government is accountable. The rule of law is not about the application of the Shariah law today as it did in the early history of Islam. It does not reside in the office of the ʿulamā', the qāḍī or the legal forms of historical Islam like the Caliphate. The rule of law is about government accountability, non-arbitrary exercise of power, checks and balances, equality, fairness etc. It is important therefore that we clearly separate the concept from the forms that give it expression in any given age or at any given time. We have established that the concept of the rule of law existed in Islam right from its inception. Therefore, Muslims should not lament the death of the rule of law in their institutions because their traditional structures of governance were dismantled. If the institutions and profession/s that gave expression and life to that concept were 'decimated' to use Hallaq's word, then the concept can be re-instated through fresh institutions and rebuilding the profession/s that express it today. If this were not true, Germany would never have recovered from the havoc wreaked in WWI and by Hitler in WWII. And Germany's recovery did not take place overnight

nor does the rest of the world give it an easy time over what Hitler and the German people did. Yet the rule of law was re-established and Germany is today one of the strongest rule of law countries and a thriving society in almost all senses of that word. The recently published book by John Kampfner makes this point clearly (Kampfner, 2021, 21-54).

A key difference between Muslim societies and Germany is that most Muslim societies operate under a victim mentality, as alluded to by Hallaq's narrative of colonisation and Westernisation. They are fixated on history and associate the rule of law with the caliphate system, traditionalist ʿulamā' and the shariah. On this basis therefore the rule of law in Islam cannot exist except through regression to historic forms of governance, which is absurd. Why can it not today be expressed through a democratically elected parliament, independent judiciary and an executive that operates within checks and balances to minimise arbitrary exercise of political power and equal access to justice? If indeed the rule of law was 'decimated' by colonisation and Westernisation, why has it not been given functional expression in Muslim societies after colonisation ended? Not one single Muslim nation or society enjoys the operation of the rule of law for the benefit of its people. Hallaq, Abou el-Fadl, Timur Kuran, all admit to this. Germany and the German people, on the other hand, never played/play the victim card. It is a nation of tough, resilient people committed to applying the ideals of democracy and the rule of law to their societies. A commitment which has made them continue to thrive. Yes, they were supported by the USA and other European allies in re-building their nation, but, by today's standards, the Arab world is wealthy enough to fund its own return to the rule of law if it had and demonstrated the political will to do so. Instead the average visitor to the Middle East is dazzled by their marvellous transformation into high technology societies with advanced infrastructure and displays of wealth but is dismayed once the general lack of rule of law becomes apparent by, for instance, having a slight

brush up against the "law" or the authorities.

3. Resisting the Rule of Law

Barry Weingast points out that the resistance to the rule of law in developing countries is a paradox, especially since the institutional technologies for providing the rule of law are relatively well-known and easy to transplant (Weingast, 2010). He provides a useful explanation as to why this resistance to (and lack of) the rule of law persists, which we will return to shortly. What is more challenging still is to restore the spirit of the rule of law in Muslim societies such that it is a concept that everyone embraces and is willing to apply its principles.

Why is there such a strong resistance to establishing the rule of law in Muslim societies today? Colonialism cannot be to blame. The more likely reason may be a general lack of education, misinformation, victim mentality and a perception that the rule of law and the principles it entails are 'Western'. Most honest, well-educated, open-minded and intelligent Muslims will admit to the fact that the great majority of the Muslims in the world are 'taught' Islam through a combination of rote learning, indoctrination and simply observing the behaviour, manner and speech of those around them, especially their parents and extended family. They will also admit that in most Muslim societies (All Muslim societies I have ever lived in, observed or studied) misinformation about the true nature and teachings of Islam prevails. It takes one to deliberately set out to learn the true nature of Islam and what it actually teaches and the principles central to it, to learn the truth about Islam and its teachings. The fact that most of Islamic law is contained in the Qurān and other sources in Arabic is also problematic as a great majority of Muslims do not read, understand or speak Arabic.

The victim mentality we refer to is far more prevalent in that Muslims tend to blame the West for most of the ills in the world including what is happening

to them, and their societies, regardless of how despotic and brutal their own leaders may be and how much they may personally contribute to the problems they face. They revel in the glory of their history and remain stuck in their reminiscences of how 'great' the Islamic Civilisation was. Little attention is paid to how Muslims societies today can revive that sense of greatness, not in terms of 'glory' but in maintaining well-functioning rule of law societies, with a strong respect for human dignity and an equally strong sense of civil society, that flourish once more as they did before. And lastly, the perception that the rule of law, like democracy, is Western, results in the tendency of Muslims to reject or regard it with suspicion (https://www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law). This is indicated earlier in reference to modern constitutions being viewed as foreign and illegitimate (Welton, 2007, 169). It is also indicated by Abou el-Fadl's explanation of why Muslim societies reject democracy (Abou El-Fadl, 2007, 251-253).

Khaled Abou el-Fadl writes that democracy is compatible with Islam and that the principles of democracy are embedded in the theory of Islam. He opines that it is irrelevant whether democracy is 'Western' as long as it is compatible with the concept of Islam and opines that it is the most effective system of government in helping Muslims serve the most pertinent moral values of Islam. I would like to extended the above argument as follows: The rule of law cannot take root and function in any other system than a true democracy. We have no example to contradict this statement. Given that the rule of law is indispensable to a true democracy, and a democracy without the rule of law is a farce, it is logical to assume that it is in fact in the best interests of Muslims societies to be effective democracies with functioning rule of law. Likewise, since no other form, system or concept of government can uphold the rule of law (which we have already established is rooted in Islam) and since the rule of law is essential if Muslim societies are to thrive once again, then it seems democracy would be compatible with Islam.

Abou el-Fadl, argues that, '[…] in essence, I would argue that a democracy offers the greatest potential for promoting justice, and protecting human dignity, without making God responsible for human injustice or the infliction of degradation by human beings upon one another' (Abou El-Fadl, 2007, 253). Yet, he acknowledges that amongst the reasons Muslims reject democracy is because it is Western and not wanting to be like the 'other' (Western) counterpart, confirming the point we made earlier. Could it be that Muslims do the same as pertains to the rule of law?

There is no book or academic writing that examines why Muslim societies resist the rule of law. We can, however, assume that since most Muslim societies are governed by undemocratic systems, a majority of Muslims do not have a meaningful say or choice in whether they would like their governments to operate under the rule of law or not. It is also logical to think that anyone who understands the rule of law and the benefits that flow from it will wish to have it operate in their societies for their benefit. Two issues arise for consideration; one of acculturation and the other of the type and maturity of the society in question.

The issue of acculturation pertains to the fact that the majority of Muslims have lived in non-rule of law societies, be they rich or poor nations, for generations that they know no other way of existence. Therefore, even if offered the free choice of whether to live in a rule of law society, they still revert to ways and manners that are fundamentally contrary to the rule of law. This is the main reason for the clash between immigrants and the rest of the population, in most Western societies. The culture and way of life that most Muslim immigrants are accustomed to is fundamentally contrary to the rule of law that they find living in rule of law societies strange. Initially, their behaviour often conflicts with the rules and ethos of the societies they immigrate to until they get 'integrated' into the new rule of law society they are living in. Sometimes the integration does not occur until the second or third generation of these immigrant communities come

into full autonomy. Along this vein, Timur Kuran writes of the "persistence of historical political patterns." In examining the institution of waqf in history and its modern day version in the Middle East, he notes that a lack of accountability to beneficiaries and non-democratised forms of governance persists even today because the Middle East has no legacy of mass participation in service provision or civil society or democratic governance. This past legacy has been transplanted to modern organisations (Kuran, 2016, 448-449).

The second issue pertains to the nature of Muslim societies as a whole, since they are all still developing societies, we will apply Barry Weingast's theory to them (Weingast, 2010, 32). He explains that developing countries prove so resistant to the rule of law due to the maturation level of the society, the social structure, and how the issue of violence is sought to be resolved within that structure. According to Weingast, developing societies are often still natural state societies (with variations on a spectrum from fragile to basic to mature). Natural state societies have a particular approach towards controlling or reducing the problem of violence which necessarily counters the operation of the rule of law and instead embraces a system where the powerful dominate the weak and arbitrariness prevails as different groups move up into positions of power and others move down. Natural states have dramatic adjustments in rights and privileges, often expropriating the assets and privileges of some elites and granting them to others. In such societies, the lofty promises of yesterday evaporate by tomorrow and the essential requirement of continuity that makes the rule of law functional and important for its application in any given society, is absent. In natural state societies trust is non-existent and cooperation is rare. Natural state societies use limited access to control violence, hence limiting access to rights, organisations, economic competition, and even political competition that is essential for a free and open society. Only the elite members of the dominant coalition have access to private organisations and this access

remains a privilege. Rivalry and self-serving behaviour at the expense of others is prevalent. Limited access is contrary to the rule of law and it engrains inequality, arbitrariness and privilege and even the violence it keeps at bay, is never failsafe.

For a society to be a rule of law society, Weingast argues, it must transition from a natural state to an open-access order which sustains open entry to political and economic organisations.

Open access orders sustain open entry to political and economic organisations. As a result, they exhibit political and economic competition, and this competition supports order and prevents violence. Competition and open access in each system reinforces competition and open access in the other. In contrast to the natural state, all citizens have the ability to form contractual organisations and to use the state's courts to enforce the organisation's contracts. Open access also creates and sustains a rich civil society. To be an open access order, all citizens must be equal; that is, the state must treat them impersonally. […] Equality, incorporation of citizenship, and policies for sharing all lower the demand for crippling redistribution that might destroy an open access order. This observation parallels the argument that all successful constitutions limit the stakes of power (Weingast 2006, 32).

To answer the question more directly, Weingast says:

Natural states have many of the same institutions as open access orders, such as parties, elections, markets, and judiciaries. Why do they work differently in open access orders? The answer is that natural states have limited access to organisations, lack competition, and lack a perpetual state. Limited access to organisations and the creation of privilege hinders markets. While natural states may have some markets, these markets are hindered by cumbersome restrictions, far more so than in open access orders. Legal systems in these states typically fail to enforce contracts or mediate disputes among individuals and organisations

based on rule of law principles. Indeed, most natural state judiciaries are just another form of corrupt rent-generating organisations. Finally, the absence of a perpetual state means that the state itself hinders markets with arbitrary action.

Therefore, unlike Hallaq's narrative of colonisation, Weingast provides a more satisfactory answer to the question as to why Muslim societies are so resistant to the rule of law: Muslim societies are yet to mature politically and transition from natural state societies into open access orders. Instead of thinking forward into how to become more mature sophisticated societies, most Muslim societies are still reminiscing their thriving civilisation of the past when all other societies around them were simply in a worse state of nature. Therefore, instead of yearning for a return to a Caliphate system or the order maintained by the ʿulamāʾ and qāḍī acting as a check on the Caliph, Muslim societies must instead seriously invest in developing their natural state societies into open-access societies.

Hallaq's argument, by extension, would allow every country that was colonised to blame colonialism for its dismal rule of law state that consequently causes the poor socio-economic conditions prevalent in most of these African and Asian societies. And this is not to downplay the abhorrence of colonisation and the ills it wrought on colonised societies. Quite the contrary. However, to argue that the reason Muslim societies today do not have the rule of law is colonisation and the Westernisation of their legal codes, and worse still, that they will forever more not have the rule of law because their legal profession was relegated to the periphery in the 19th and 20th centuries, is absurd. More importantly, it robs Muslims of any sense of self-determinism towards their freedom or future. It also absolves Muslim societies of any self-responsibility for what has happened and is happening in their societies. Likewise, to imply that we must return to the pre-20th century cultural expressions and legal forms is equally absurd. Muslim societies must look forward in matters of governance

and the rule of law just as they have advanced themselves in technology, infrastructure and means of wealth acquisition.

Conclusion

The question still remains: Why has the Muslim world today jettisoned the rule of law instead of re-incorporating it into the nation state? Is it because the rulers of most Muslim majority nations still hunger for power and control? Is the population of Muslim majority nations are politically immature and readily accede to control? Or a combination of the two? Yet, how is a population to become mature if it is always shackled with overbearing leaders who manipulate and control them? No clear answers yet exist but Muslim societies must rise to the task of addressing these questions.

Almost all governments at the helm of Muslim societies are not transparent but rather they are corrupt and heavy-handed. Their citizens live in conditions of reasonably high fear and are generally deprived the opportunity to mature as a society. As a result of the high levels of inequality and low levels of trust, both in their governments and in each other, civil society and the sense of civic duty is very poor (Wilkinson, 2005: 30). It is thus rare to find citizens founding and running their own socio-economic organisations to the benefit of society. Charities, endowments, scholarships and other philanthropic organisations created and run by private citizens and corporations in countries like the U.K, USA, Sweden, Canada, Australia and New Zealand, are generally the sole prerogative of the government in most Muslim societies, all of which are not spared the negative effects of corruption, mismanagement, nepotism and cronyism. All this must change and be replaced by the effective application of the rule of law in Muslim societies if indeed a return to the glory days of Islam is to be realised. It is not the caliphate system of government or sharia law that is the missing factor, but the effective application of the rule of law in Muslim societies.

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