Book Review

International Human Rights and Islamic Law

The relationship between Islamic law and international human rights law has fascinated lawyers from both the Muslim and the non-Muslim world for the last few decades. The enchantment is on the rise. There are three major approaches as to how to implement international human rights law in Muslim states. First, there are the secularists who argue that international human rights law should supersede outdated Islamic law doctrines. Secondly, there are the Islamic fundamentalists who want to apply Islamic law as they understand it, leaving no room for the application of international human rights law. Thirdly, there are those who believe that it is possible to reconcile Islamic law and international human rights law. Reconciliatory scholars have offered different schemes on how to achieve the desired outcome. For example, An-Na‘īm\(^1\) argues for cross-cultural dialogue, whereas I argue for recapturing the original intention of the Koran, the primary source of Islamic law, of human freedom and equality through reinterpretation to achieve greater compatibility with international human rights standards.\(^2\)

Baderin follows the reconciliatory approach. He offers a two-pronged scheme to reconcile Islamic and international human rights law. On the international human rights level, he argues for the installation of the doctrine of “margin of appreciation” followed by the European Court of Human Rights. On the Islamic legal level, he contends for the utilizations of Islamic law doctrines of “maqasid al-Shariah” (overall objective of Shariah) and “maslahah [al-mursala]” (public interest) in the interpretation and application of Islamic law in Muslim states. He asserts that his scheme will guarantee the enforcement of international human rights in the Muslim world.

Baderin’s effort as a reconciliatory scholar is commendable. It is, however, my sincere and candid belief that Baderin’s approach is seriously flawed and cannot be implemented. If we follow his approach, we will see greater breaches of human rights in the Muslim world rather than their enjoyment. In addition, it will undermine the progress already made by the international human rights movement. My view is based on the following arguments.

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The doctrine of margin appreciation is a double-edged sword. Its application will yield different outcomes depending on the laws of a particular state to which it is applied. Its application by the European Court of Human Rights might be useful for a mainly secular, democratic, and politically homogeneous Europe. Its application, however, on the diverse global level might bear undesirable results. For example, Turkey is a Muslim country but its constitution is based on a secular ideology. Recently, Turkey banned students with beards and wearing the headscarf from attending lectures and taking examinations. Relying on the doctrine of margin of appreciation, the European Court of Human Rights upheld Turkey’s prohibition of the headscarf in the universities in the case of Sahin (2005). Let us assume that Baderin’s argument is accepted and international human rights bodies such as Human Rights Committee start applying the doctrine of the margin of appreciation. Under the consistent application of this principle, it has to condone the laws of Saudi Arabia prohibiting women from driving, stoning people to death for adultery and fornication in Pakistan, excluding female testimony in certain cases, the death penalty for apostasy in Egypt, restricted movement of women and polygamy in Iran and Afghanistan, female genital mutilation in certain Muslim cultures etc. If the Human Rights Committee does not follow the principle consistently, upholding Turkey’s secular laws but denying the concession to Iran or Saudi Arabia, the majority of Muslim states might withdraw from or will not ratify the International Covenant on Civil and Political Rights, 1966. This will be a serious blow to the human rights movement.

Maslahah al-mursala roughly translated as “public interest” is (a) a peripheral Sunni doctrine and (b) a very fluid concept. It is peripheral as Shia jurists do not approve of it. The Maliki School, one of the four schools of classical Sunni Islam, founded it and the rest of three schools disagree on different aspects of it. The most important point is that as a principle, maslahah is applicable to those areas, which are not covered by the Koran and Sunnah, i.e. laws shall be made in those areas in a way, which is in public interest. Most of the Islamic rules, which conflict with human rights standards, are attributed to the Koran and the Sunnah. Some instances are gender inequality, freedom of religion, unequal treatment of non-Muslims in some respects and punishments such as chopping off hands for theft etc. This is where Baderin’s approach becomes problematic in two respects (a) maslahah is not applicable and (b) invoking margin of appreciation would do no good.

Maslahah as a concept is very fluid and might mean different things for different Muslim states. For instance, in Saudi Arabia, it is considered in the public interest to prohibit women from driving as they believe that this gives them the freedom of movement, which in turn is suspected of increasing the chances for immoral conduct. In Iran, women are strictly segregated. They can only do certain jobs such as teaching or nursing. For the Taliban in Afghanistan, the objectives of the Sharia and the welfare of women was to ban them from schools, dismiss them from jobs and ensure that no male doctor could attend a female patient. These harsh laws, now the subject of severe criticism, will be shielded under the margin of appreciation.

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