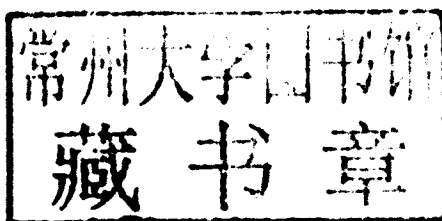


Abdullahi An-Na'im,
edited by Mashood A. Baderin

Islam and Human Rights

Selected Essays of Abdullahi An-Na'im



ASHGATE

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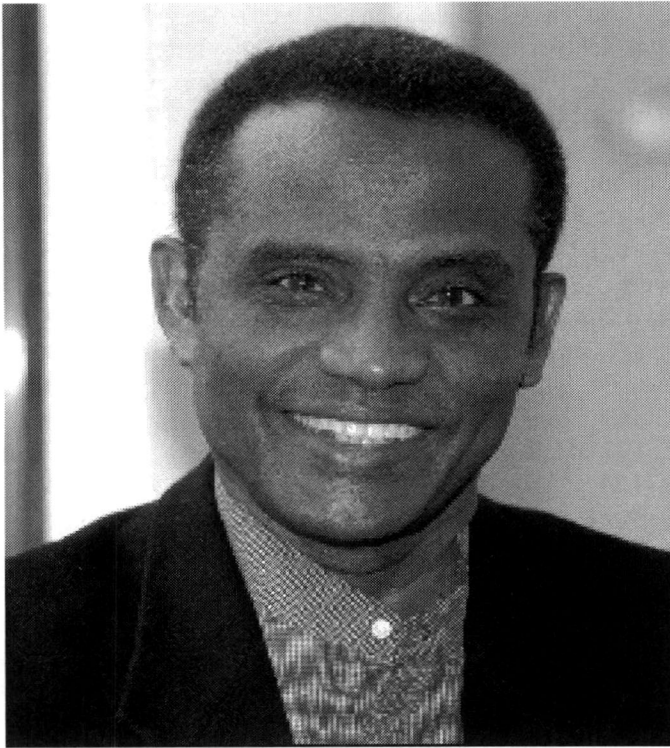
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Series Editor's Preface

Collected Essays in Law makes available some of the most important work of scholars who have made a major contribution to the study of law. Each volume brings together a selection of writings by a leading authority on a particular subject. The series gives authors an opportunity to present and comment on what they regard as their most important work in a specific area. Within their chosen subject area, the collections aim to give a comprehensive coverage of the authors' research. Care is taken to include essays and articles which are less readily accessible and to give the reader a picture of the development of the authors' work and an indication of research in progress.



Abdullahi An-Na'im

Abdullahi Ahmed An-Na'im is Charles Howard Candler Professor of Law at Emory University in Atlanta, Georgia, USA.

He holds an LLB (Hons) University of Khartoum, Sudan, 1970; LLB (Hons) and Diploma in Criminology, University of Cambridge, England, 1973; and PhD in Law, University of Edinburgh, Scotland, 1976. His previous positions include Associate Professor at the University of Khartoum, Sudan until 1985; Visiting Professor of Law at the University of California at Los Angeles, 1985-87; Ariel F. Sallows Professor of Human Rights at the University of Saskatchewan, Canada, 1988-91; Olof Palme Visiting Professor at Uppsala University, Sweden, 1991-92. He served as Executive Director of Human Rights Watch/Africa from 1993 to 1995 before joining the Faculty of Emory Law School in 1995.

In February 2009, An-Na'im received an Honorary Doctorate from the Universite Catholique de Louvain (UCL, Louvain-la-Neuve) and Katholieke

Universiteit Leuven (K.U. Leuven, Leuven), Belgium. He also serves as Global Legal Scholar at the Law School, University of Warwick, UK (Sept. 2007 to Aug. 2010); and Extraordinary Professor at the Centre for Human Rights, Faculty of Law, University of Pretoria (Jan 2009 to December 2010).

He is the author of *Islam and the Secular State: Negotiating the Future of Shari'a* (Indonesian 2007, English 2008); *African Constitutionalism and the Role of Islam* (2006); and *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (1990) (translated into Arabic, Indonesian, Russian and Farsi). His edited publications include *Human Rights under African Constitutions* (2003); *Islamic Family Law in a Changing World: A Global Resource Book* (2002); *Cultural Transformation and Human Rights in Africa* (2002); *The Cultural Dimensions of Human Rights in the Arab World* (in Arabic, 1994); *Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (1992); *Human Rights in Africa: Cross-Cultural perspectives*, with Francis M. Deng (1990). He has also published more than sixty articles and book chapters on human rights, constitutionalism, Islamic law and politics.

Introduction

Abdullahi An-Na'im's Philosophy on Islam and Human Rights¹

"I am proposing the principles of constitutionalism, human rights and citizenship, which can work only when they enjoy sufficient cultural and religious legitimacy to inspire and motivate people to participate in organized and sustained political and legal action. An Islamic discourse is essential for legitimizing the necessary strategies for regulating the public role of Islam. At the same time, that discourse cannot emerge or be effective without the security and stability provided by the secular state."

- Abdullahi An-Na'im.²

The relationship between Islam and human rights forms an important aspect of contemporary international human rights discourse. Current international events and the increasing public role of Islam in modern Muslim states have made the subject more relevant than ever. Many international human rights courses around the world now cover issues relating to Islam and human rights. Some universities and academic centres have specific postgraduate courses or modules on the subject. The importance of the subject as a specific theme in general human rights discourse is portrayed by the volume of literature currently available on its different aspects. Professor Abdullahi Ahmed An-Na'im is one of the leading scholars and contributors on the subject. In fact, he remains one of the most cited authorities in the subject area. His contributions on the subject span more than three decades during which he has engaged with almost every topical issue on the subject. He has been described as one of the non-Western jurists from "the South" "who have made substantial contributions to the theory and practice of human rights" generally.³ It is therefore a great honour to be commissioned to compile and write an introduction to a selection of his

1 This introductory chapter and revision of manuscript for this volume was completed during my professorial visit to the Faculty of *Syariah* and Law, Islamic Sciences University of Malaysia, Malaysia in December 2008. I thank the University for the opportunity and for the facilities provided, which enabled me to complete this work during the period. I particularly express my gratitude to the Dean of the Faculty, Professor Dr. Abdul Samat Musa, and to Mohammad Nizam bn Awang and Ahmad Anis bn Muhammad Fauzi for their kind hospitality during the period.

2 A.A. An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008) p. 44.

3 W. Twining, "Human Rights: Southern Voices; Frances Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi" (2007) 1 *Law, Social Justice & Global Development Journal (LGD)* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/twining at p. 3. (Last accessed 16 December 2008)

scholarly essays on the subject. This single volume brings together, coherently, his thoughts as developed on the subject over the years. It will provide easy access and convenience to students, academics, researchers, practitioners, policy-makers and all those interested in this important subject area.

The quotation at the top of this introductory chapter is taken from An-Na'im's latest book, *Islam and the Secular State: Negotiating The Future of Shari'a*, which he describes as "the culmination of my life's work, the final statement I wish to make on issues I have been struggling with since I was a student at the University of Khartoum, Sudan, in the late 1960s".⁴ While the quotation summarises, succinctly, his ultimate standpoint on Islam and human rights in modern Muslim states, the evolution of that standpoint can only be better appreciated and understood through the reading of his scholarly writings over the years. Thus, for a comprehensive insight into his general philosophy on the subject, this volume presents sixteen of his scholarly journal essays published between 1986 and 2006 illustrating the progression and consistency of his arguments over a period of twenty years. The essays are presented herein, not chronologically, but coherently, in a way that takes the reader on a scholarly journey through An-Nai'm's general philosophy on Islam and human rights in a consistent way. In essence, this volume cuts across twenty years of An-Nai'm's expressed thoughts on a complex subject before his ultimate arrival at the standpoint portrayed in his quotation cited at the beginning of this introductory chapter.

It is important to state that this prologue is not intended to be a critical analysis or a critique of An-Na'im's work contained herein. Rather, it presents the work "as it is", providing a brief summary of each of the essays contained in the volume and identifying in the process, what I consider to be the main elements of his general philosophy on the subject. Based on their content, the essays are grouped into four parts as follows.

I. Islam between Universalism and Secularism

Universalism is considered to be at the heart of human rights today, while the modern nation-state is considered more often in secular terms. This literally puts Islam between universality of human rights and secularity of the modern nation-state particularly in modern Muslim states. Read together, the five essays in this part reflect An-Na'im's perception of the position of Islam in relation to the considered universality of human rights and secularity of the modern nation-state.

4 A.A. An-Na'im, *supra*, note 2 above, at vii.

The usual starting point of human rights discourse is the question of its universality. The first United Nations (UN) human rights instrument adopted in 1948 is called Universal Declaration of Human Rights (UDHR), which clearly indicates that the international human rights agenda was meant to be a universal one from the beginning. Yet, there have been two persistent questions in that regard since the concept of universal human rights was mooted under the UN system. The first question is, what do we mean by universality of human rights?, and the second is, how can that universality be achieved? It is on record that one of the earliest questions posed to the UN Commission on Human Rights, then drafting the UDHR, was the statement submitted to the Commission by the American Anthropological Association (AAA) on 24 June 1947 about the proposed universality of human rights and how that would be achieved. The AAA had observed then that:

Because of the great numbers of societies that are in intimate contact in the modern world, and because of the diversity of their ways of life, the primary task confronting those who would draw up a Declaration on the Rights of Man is thus, in essence, to resolve the following problem: How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America? ...Today⁵ the problem is complicated by the fact that the Declaration must be of world-wide applicability. It must embrace and recognize the validity of many different ways of life. It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of vast numbers of human beings.⁶

Although the UDHR has, today, established itself as an instrument of great influence globally, those questions have not been fully subdued in international human rights discourse and, in relation to the socio-cultural and politico-legal influence of Islam in Muslim societies, they remain part of the fundamental questions in the Islam and human rights discourse.

⁵ That was in 1947 when the statement was issued, but this question has not fully disappeared from international human rights discourse even today.

⁶ See American Anthropological Association, 'Statement on Human Rights' (1947) 49 *American Anthropologist*, pp. 539–43, at pp. 539 and 542–3. Cf. the 1999 AAA Declaration on Anthropology and Human Rights available at: <http://www.aaanet.org/stmts/humanrts.htm> [29/12/08] and K. Engle, "From Scepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999" (2001) 23 *Human Rights Quarterly*, No.3, pp. 536–59, for an analysis of the two Statements.

This volume thus opens with an essay first published in 1994 by An-Na'im entitled "What do we mean by universal?" in which he articulates his views on the universality of human rights in relation to Islam. The essay was written in the context of the 1990 Salman Rushdie affair and the consequent *fatwa* of Iran's Ayatollah Khomeini against Salman Rushdie. An-Na'im is certainly a universalist and a staunch believer in the universal nature of human rights as is reflected in the first paragraph of this essay where he states that "[h]uman rights ought, by definition, to be universal in concept, scope and content as well as in application: a globally accepted set of rights or claims to which all human beings are entitled by virtue of their humanity and without distinction on grounds such as race, gender or religion" (p. 120). He also notes, however, that "[y]et there can be no prospect of the universal application of such rights unless there is, at least, substantial agreement on their concept, scope and content" (p. 121). Thus, his philosophy on the universality of human rights, as he manifests in this essay and consistently restates at appropriate points in all his other writings, is what may be described as a philosophy of cross-cultural universality. I identify this as the first element of his general philosophy on Islam and human rights. In relation to Islam, he reflects this philosophy of cross-cultural universality in the last paragraph of the essay wherein he concludes that "There are potentially powerful and vigorous constituencies for universal human rights worldwide – including the Islamic world. But those constituencies can never be mobilised in a global project on purely Western liberal notions of individual civil and political rights. Along with other rights and new formulations of familiar rights, all human rights will only command genuine universal respect and validity through discourse and dialogue" (p. 128). Between the first paragraph earlier quoted and this last paragraph of the essay, An-Na'im clearly articulates his views on the different paradoxes raised by the question of universality in theory and practice. He emphasises throughout the essay that the dialogue for cross-cultural universality must be "undertaken in good faith, with mutual respect for, and sensitivity to, the integrity and fundamental concerns of respective cultures, with an open mind and with the recognition that existing formulations may be changed – or even abolished – in the process" (p. 122).

But what kind of contribution can Islam bring to this dialogue towards the realisation of a cross-cultural universality of human rights? An-Na'im identifies that in "[r]eading the Qur'an and *Sunna*, one will find authority for liberalism as well as conservatism, and Muslim history gives clear examples of both tendencies". This matter, he argues "is determined by the choices Muslims make, and the struggle they wage in favour of their choices, in their own historical context" (p. 125). Thus, for Islam to be able to make a meaningful contribution to the dialogue for cross-cultural universality of human rights,

Muslims must, in the view of An-Na'im, choose liberal interpretations of Islamic sources to make Islamic law amenable to modern international relations and human rights. He develops this point further in the next essay, which serves as the basis for the second element of his general philosophy on Islam and human rights.

The second essay, "Islamic Law, International Relations, and Human Rights: Challenge and Response", was first published in 1987. In it An-Na'im proposes "solutions to the drawbacks of historical *Shari'a* from a religious rather than secular perspective, because Muslims do not separate the religion of Islam from the law of Islam" (p. 318). He argues here that a reformation of Islamic law through a modern interpretation of the *Shari'a* would work better for the advancement of human rights in Muslim states than a secular approach. He observes, *inter alia*, in that regard that "because *Shari'a* signifies the positive law of historical Islam, its general principles continue to bind and motivate Muslims" (p. 319) and that the appeal of the *Shari'a* amongst the majority of Muslims makes it imperative for it to be "authoritatively reformed from within the Islamic traditions and in ways acceptable to Muslims themselves, [o]therwise, such reform would lack legitimacy and practical viability" (p. 319). He also notes, however, that "although Muslims will not accept secular reforms to their religious law and practice, they have made some concessions to the demands of constitutionalism and the rule of law in national and international relations" (p. 319). He summarizes his arguments in this essay to the effect that "for Islamic states, smooth and successful transition to complete secularism is neither likely nor desirable because Muslims are obligated to live in accordance with Islamic law" (p. 320). However, in his view, "[f]ulfilling that obligation by re-introducing historical *Shari'a* would be disastrous for international relations and human rights" (p. 320). He therefore proposes that "the Muslims' religious duty may be satisfied by applying a modern version of Islamic law that is consistent with peaceful international relations and respect for human rights" and that "[t]his modern version will [still] be Islamic *Shari'a* because it will be derived from the fundamental sources of Islam, without being identical in every respect to historical *Shari'a*" (p. 320).

An-Na'im then goes on, in this essay, to analyse the historical *Shari'ah* and the Medina model of the Islamic state, arguing at the end of that analysis that "[m]odern jurists must not confine Islam to [historical] *Shari'a*", noting that if they do so it would unjustifiably condemn Islam "to *Shari'a*'s contextual limitations and deem it incapable of responding to changes in the physical and social environment that are, according to Muslim belief, willed and manifested by God Himself" (p. 323). He also critically examines the theory of international relations under the *Shari'a*, discussing the traditional concept of *jihad* and its implications to modern theory of international relations and human rights. He

emphasises in the end that while “*Shari’a*’s [historical] view of civil liberties compared favourably with civil rights under Roman and Persian law prevailing at the time...criticism and strong objection must be raised to any attempt to reintroduce historical public *Shari’a* today because it is inconsistent with prevailing human rights standards” (p. 331). But he also argues conversely that “[w]hile this Article criticizes historical public *Shari’a* as being inconsistent with prevailing human rights standards, it does not unqualifiedly endorse those standards that originated with the western liberal tradition” (p. 332). Rather he proposes solutions from within Islam, stating that a “legitimate and lasting constitutional and legal order that can address modern international relations and domestic human rights must develop from within Islam” (p. 333), for which he argues that the best solution must be based on the methodology of his late mentor *Ustadh* Mahmoud Mohamed Taha, who was executed in Sudan in 1985 for the alleged offence of apostasy under Sudanese law then.⁷ An-Na'im consistently proposes *Ustadh* Mahmoud Taha's methodology as the best means of transforming Islamic law to meet the standards of modern human rights and international relations in all the essays contained herein as well as in his other major works on the subject. This may be described as the philosophy of internal reformation of Islamic law based on the methodology of his mentor *Ustadh* Mahmoud Mohamed Taha, which I identify as the second element of his general philosophy on Islam and human rights.

An-Na'im's proposition for the internal reformation of Islamic law is taken further in the third essay, “A Kinder, Gentler Islam?” first published in 1991. In this essay, he argues essentially for a kinder, gentler interpretation of the Islamic sources. The essay is framed in the context of right to self-determination and principle of reciprocity. Here, An-Na'im focuses on “the need to transform the historical traditions of Muslim peoples in ways that would enable them to exercise their legitimate rights to self-determination without violating the rights of others” (p. 4). He identifies with the fact that Muslim peoples have the right to choose an Islamic definition of their self but argues that this should not be by reference to what he calls “historical *Shari’a*”; a point he made in the previous essay and consistently reiterates in other essays contained in this volume and throughout his writings. He proposes here that self definition by Muslims must be properly clarified and updated, for which he asserts again that “the Islamic tradition must undergo its own reformation and develop a modern conception of *Shari’a* that can be implemented today” (p. 8). He again acknowledges that the norms of “historical *Shari’a*” were far more enlightened and humane than corresponding principles and conceptions of its time, but argues that most of those norms cannot stand up to the minimum standards of

7 See Chapter 11 “The Islamic Law of Apostasy and its Modern Applicability: A Case from The Sudan” in this volume.

modern human rights, which are universal and must be enjoyed by everyone including Muslims. He therefore makes it clear that his “criticisms are not ... addressed to *Shari'a* in its own proper historical context but rather against those who wish to resurrect dated concepts and principles and implement them under radically transformed domestic and international conditions” (p. 11).

In An-Na'im's view it is possible, indeed imperative, “to develop a new version of *Shari'a* based on a modern interpretation of the sources of Islam” (p. 11) in ways that would promote a kinder, gentler Islam. He states: “Far from advocating the abandonment of the Islamic tradition, I am calling on Muslims to achieve their own ‘reformation’ in order to transform their tradition into a viable and just ideology for their modern exercise of their right to self-determination” (p. 11). He then goes on to elaborate on his proposed methodology of transforming this tradition, which is again the methodology of his late mentor *Ustadh* Mahmoud Mohamed Taha. He argues “In the Muslim belief that I share, Islam is perfect and eternal from God's point of view, but in the affairs of the world, it is open to competing interpretations and practical policies reflecting the moral and intellectual capabilities of its adherents and their need to adapt to changing material and political conditions” (p. 11). He continues, “In the formula I propose, the constant part of the Islamic tradition is the texts of its divine sources while the interpretation and implementation of those sources must now be transformed” (p. 11). To illustrate his arguments against the application of “historical *Shari'a*” he cites Sudan as an example of where “efforts on behalf of a misconceived Islamic identity seeking to implement historical *Shari'a* ... led to a total deadlock politically and contributed to the militarization of the entire country” (p. 15). He asserts that the ideal would be to ensure the right of Muslims “to self-determination in terms of an Islamic identity without violating the right of self-determination of others” (p. 16). Failing that, he states in conclusion that he “as an Arabized Muslim whose loyalty is to the cause of justice and peace for all Sudanese, would rather live in a secularised Sudan than in one ruled by totalitarian Islamic *Shari'a*” (p. 16), thereby introducing a refined argument for secularism which appears to be a departure from his previous position that secularism may lack legitimacy and practical viability for his proposed reforms in Muslim societies.⁸ This refined position of secularism is pursued further by him in the next essay.

The fourth essay, “Re-affirming Secularism for Islamic Societies” was first published in 2003. His argument in this essay is against the background of the debate “about whether a new system of government that is both Islamic and democratic can be built as some kind of model for the [Middle East] region” (p. 36) after the overthrow of Saddam Hussein's Ba'athist regime in Iraq. He first identifies that “the central issue that must be debated among Iraqis

8 See Chapter 2 in this volume.