

Introduction

Despite common perceptions to the contrary, there is a dynamic human rights discourse in Muslim thought today. However, there is no consensus among scholars on the question of whether Islam and human rights are compatible. Some Muslim thinkers have embraced the notion of human rights, taking the position that they are basically compatible with Islam. Other scholars argue that contemporary notions of human rights are fundamentally at odds with Islam. Still others see tensions between the two traditions, but believe that they are in no way incompatible with each other. This “harmonistic perspective”¹ acknowledges that although there are differences between Islam and international human rights discourse that can lead to conflicts and tension, “there are concepts, doctrines and tools of interpretation ... that can be used to harmonise the two”.² Of these approaches, this book is concerned primarily with the harmonistic perspective; in other words, the view that Islam can be reconciled with human rights.

The idea of “rights” is not new to Islam. In fact, the concept of a “right” (or in Arabic, *haqq*) can be found in classical and modern Islamic scholarship. The most important sources of rights and obligations in Islam are the Qur’an and the Sunnah (the traditions of the Prophet Muhammad). This means that rights come from a “religious-moral framework where the omission of a duty/right is subject to religious sanction and its commission results in the acquisition of virtue”.³ While, based on this view, God grants rights to human beings, it is human authorities who realise and enforce them in communities. Thus, over time, different Islamic theological and legal schools have developed bodies of jurisprudence and scholarship on rights that have come to different conclusions about what a right is and how it can be conferred.⁴ The idea of “human rights” comes under this wider discourse on “rights” in Islamic tradition.

More recently, since the 1980s, the amount of scholarship on the relationship between Islam and human rights has increased.⁵ There are a number of reasons for this. Human rights are an influential discourse in political, legal, and sometimes even economic circles today, and “as members of the international community ... Muslim-majority states have

not been immune to the influence of these norms and the debates on their implementation".⁶ The number of civil society groups within Muslim-majority states has also grown, which has brought even greater awareness of human rights to many Muslim communities. Thus, "Muslim governments, activists and scholars are ... increasingly interested in the question of whether and how human rights norms should be implemented in Muslim-majority states."⁷

In recent years a number of scholars have emerged who are working to overcome the idea of the "incompatibility" of Islam and international human rights. Some scholars argue that among Muslims, the view that human rights and Islam are incompatible does not actually come from opposition to the concept of human rights itself. Instead, it reflects "a disappointment and protest towards Western hegemony and consequently any ideology that is apparently championed by the Western nations".⁸ Alternatively, it might originate from a perception that the West has double standards when it comes to human rights because it reacts differently to abuses under Muslim-majority, compared to non-Muslim, regimes.⁹ However, there are also legitimate faith-based objections to the idea of human rights. Michael Freeman points out that, for a religious Muslim, submitting to any authority other than the divine law is problematic from the perspective of personal piety.¹⁰ Abdullahi An-Na'im, a prominent Muslim human rights scholar, argues that if adherents of religions (including Islam) are excluded from the human rights conversation, they are unlikely to accept the universal applicability of human rights.¹¹

Focusing on the area of law, Mashood Baderin has argued that international human rights law and Islamic law can be reconciled. However, to achieve compatibility, a number of barriers must first be surmounted. These include Western perspectives of Islamic law as "essentially [a] defective legal system",¹² as well as "hardline interpretations of the *Shari'ah*".¹³ However, Baderin believes the two systems are not antithetical, particularly if human rights can be "convincingly established from within ... Islamic law rather than ... as a concept alien to [it]".¹⁴ Baderin draws on principles from the Islamic legal tradition such as *maslaha* (public welfare),¹⁵ which I discuss further in Chapter 1. Baderin also finds support in modern legal ideas such as the doctrine of the "margin of appreciation"¹⁶ put forward by the European Court of Human Rights. This doctrine refers to "an area of discretion left to the national authority" in international law.¹⁷ According to Baderin, this doctrine might allow for the harmonisation of different societies' "justifiable moral values", by "striking a balance between a right guaranteed

[by international treaty] ... and a permitted derogation”¹⁸ that allows variation at the state level.¹⁹

As I have written previously,²⁰ at the core of many discussions about the compatibility of Islam and international human rights norms is the question of the role of the classical Islamic legal tradition in our contemporary context. In my view, scholars who hold more closely to classical interpretations of Islamic law tend to conclude that modern human rights norms are incompatible with Islamic tradition.²¹ In contrast, scholars who allow more room in interpretation and see Islamic law as flexible and able to evolve are more open to the human rights discourse.²²

These latter scholars perceive that Islamic law offers many values, concepts, and moral principles that can be adapted to construct human rights principles.²³ For example, An-Na‘im argues that Islamic law can be reformed from within to conform to international human rights principles using a reverse process of *naskh* (the abrogation of certain rulings of the Qur’an by others). In this he follows the view of Sudanese scholar Mahmoud Mohamed Taha (d. 1985). An-Na‘im suggests that those parts of the Qur’an that seem to be incompatible with international human rights—almost entirely from the later Medinan phase of the Prophet’s life—could be set aside in favour of the earlier Meccan part.²⁴

Other scholars propose an approach that draws on the concept of *maqasid al-shari’a* (purposes of the Shari’a or Islamic law). The *maqasid* approach focuses on identifying the essential goals or objectives of the Shari’a, such as the promotion of human welfare and the prevention of harm, which can be used to approach contemporary issues. The *maqasid* approach, in its more systematic form, is often traced back to the fourteenth-century Andalusian jurist Abu Ishaq al-Shatibi (d. 790/1388), who believed that God’s original intention when revealing the Shari’a was to protect the religious and ordinary interests of human beings.²⁵ Modern scholars have seen in the *maqasid* perspective a “holistic approach for realising the appropriate and benevolent scope of Islamic law”.²⁶

A key issue that arises in the debate on Islam and human rights is whether Islamic law can accommodate a conception of rights similar to that found in the international human rights discourse. Those commentators who argue that Islamic law and international human rights law are fundamentally incompatible often suggest that Islamic law comes from a duties-based paradigm where duties are emphasised over rights.²⁷ Others, however, argue that giving effect to human rights necessarily imposes certain duties, whether on the state or individuals.²⁸ Still others suggest

that more recognition of the duties arising from human rights can only be beneficial for international human rights law.²⁹

The discourse on whether Islam and human rights are compatible is a critically important one. It is related to the broader concern about whether human rights are indeed universal and has important ramifications for those in the Muslim world who do not experience the freedoms and entitlements that other people around the world take for granted.³⁰ Islam is a pervasive influence legally, socially, and culturally in Muslim states; thus, as I have argued elsewhere, “the relationship between Islam and human rights needs to be clarified for human rights norms to be accepted and implemented in the Muslim world”.³¹

In my view, international human rights law, as articulated by instruments such as the Universal Declaration of Human Rights, can be harmonised with Islamic law. The goal, as I see it, is not necessarily to develop an alternative “Islamic” rights framework but to foster participation in the global discourse. However, it is important for Muslims to have the opportunity to re-frame universal rights in such a way that reflects the contexts and values that are most relevant to them. This way of conceptualising the human rights discourse is probably important for many religious traditions, not just for Islam. It is crucial for people of different religious traditions and cultures to be able to conceptualise human rights in ways that are meaningful to them.

The theologian and former UN Special Rapporteur on freedom of religion or belief Heiner Bielefeldt argues that human rights should not be seen as a “yardstick” for measuring cultures and religions generally.³² Nor, indeed, are they an all-encompassing “way of life”, nor even “the highest manifestation of ethical spirit in human history”.³³ However, because they rely on the idea that human beings deserve equal respect, they affirm the principle of human dignity, which has roots in many cultures and religious traditions.³⁴ For this reason, they have the potential for “significant influence on the self-perception of societies and cultural or religious communities in a way that extends beyond law and politics”.³⁵ In my view, this approach will lead to the promotion of human rights in any religious community, including in Muslim communities across the globe.

ABOUT THIS BOOK

This book is written to introduce some of the key debates surrounding the compatibility of Islamic law (or Shari’a) and human rights and how Muslims today are responding to those debates with a view to reconciling

the human rights discourse with Islamic norms and values. Given the range of topics it covers, it is not practical to deal with each topic in great depth or to discuss how this reconciliation might work in relation to every right this book covers. However, the topics covered provide the student and the general reader with a sense of how both international human rights law and Islamic law deal with each issue, the challenges they are facing in dealing with the issue, and some suggestions for reconciliation between the two. The book is expected to be accessible for the student and the general reader. As it proposes ways by which tensions can be addressed, readers will also be exposed to the potential that exists within Islamic tradition for the generation of new ideas in this space.

Specifically, the book aims to:

- Identify and reflect on some of the key issues in the discourse on Islam and human rights;
- Explain briefly the emergence and development of human rights and Islamic law within their respective historical contexts and highlight key influences and sources of authority;
- Highlight the plurality of approaches, responses, and understandings of human rights among Muslims and Muslim-majority states;
- Critically assess some arguments which suggest that Islam and international human rights are fundamentally incompatible;
- Discuss some Muslim-majority states' engagement with the international human rights system and the contributions of Muslim states towards the development of alternative human rights systems; and
- Reflect on the contemporary challenges that Muslim-majority and "secular" states are experiencing when promoting and protecting human rights.

The book consists of eleven chapters, each of which contains a "case" or "extract" to assist readers and students to think through a core issue related to the topic of the chapter.

The first two chapters establish a conceptual framework understanding international human rights law and Islamic law, and the perspectives on human rights that have emerged in each tradition. Chapter 1 describes the most important Islamic textual sources of authority and presents an overview of Islam's legal framework, including the tools and methodologies that are regularly used in legal reasoning. Chapter 2 addresses the fundamental question: what are human rights? It also provides an overview of the development of the international human rights discourse,

from its inception in the context of natural law theories to its codification in the aftermath of the Second World War.

Chapters 3 and 4 consider two key developments in the discourse on Islam and international human rights. Chapter 3 focuses on the efforts made by Muslims to engage with the international human rights system and reflects on the “Islamic” human rights instruments that have been developed in recent years as alternatives to international human rights instruments. Chapter 4 considers the controversial argument put forward by Samuel Huntington that differences between “civilisations” would be a fundamental source of conflict in the future. Arguments such as Huntington’s, including some from Muslims, have had important ramifications for the discourse on human rights, with some arguing that Islamic conceptions of rights are fundamentally different to modern conceptions and therefore irreconcilable with them.

Chapters 5 and 6 shift the discussion to the state context, and consider how modern nation states—both Muslim-majority and “secular” states—are responding to the challenges of religion, governance, and the protection of all citizens’ human rights. Chapter 5 asks whether there is one particular model that is best for realising human rights. If this is the case, is it possible that “Islamic” models of governance can promote and protect human rights? This chapter also considers the beneficial elements of democracy as a system of governance and whether Islamic norms and democracy are in fact compatible. Chapter 6 also looks at governance, but explores a number of different frameworks for managing the relationship between religion and the state. It reflects on how these impact the practice of human rights and religious freedom in various states.

The final five chapters of the book focus on substantive areas of rights. Each chapter presents an overview of a right or set of rights as conceptualised under international human rights law, including key elements of the right and the main instruments and provisions that elaborate it. The chapters then set out Islamic conceptions of the rights, emphasising areas of common ground and key challenges or tensions. Each chapter concludes with a brief assessment of the compatibility of Islamic and international law in that area, and potential strategies for moving the discourse forward. The substantive rights that are addressed in this book are those that are commonly cited in discussions about Islam and human rights and are arguably areas where the greatest challenges exist in finding common points between the two traditions. These rights or sets of rights include: the rights of women and non-discrimination (Chapter 7); the rights of the child (Chapter 8); freedom of expression (Chapter 9); freedom of religion (Chapter 10); and the regulations governing armed conflict (Chapter 11).

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NOTES

1. See Mashood A. Baderin, "Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives", *Muslim World Journal of Human Rights* 4(1) (2007): 12.
2. See Abdullah Saeed, "Review Article" in *Islam and Human Rights*, Abdullah Saeed (ed.) (Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, 2012).
3. Ebrahim Moosa, "The Dilemma of Islamic Rights Schemes", *Journal of Law and Religion* 15(1/2) (2000–2001): 193.
4. Moosa, "The Dilemma of Islamic Rights Schemes", 194.
5. Ann Elizabeth Mayer, "The Islam and Human Rights Nexus: Shifting Dimensions", *Muslim World Journal of Human Rights* 4(1) (2007): 2.
6. Saeed, "Review Article".
7. *Ibid.*
8. Farrukh B. Hakeem, M.R. Haberfeld, and Arvind Verma, *Policing Muslim Communities: Comparative International Context* (New York: Springer, 2012), 45–6.
9. Hakeem, Haberfeld, and Verma, *Policing Muslim Communities*, 46. See also Abdullahi A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, NY: Syracuse University Press, 1990), 159.
10. Michael Freeman, "The Problem of Secularism in Human Rights Theory", *Human Rights Quarterly* 26 (2004): 377.
11. Abdullahi A. An-Na'im, "The Interdependence of Religion, Secularism, and Human Rights", *Common Knowledge* 11(1) (2005): 61.
12. Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2005), 11.
13. *Ibid.*
14. *Ibid.*, 6.
15. *Ibid.*
16. *Ibid.*
17. Wing-wah Mary Wong, "The Sunday Times Case: Freedom of Expression versus English Contempt-of-Court Law in the European Court of Human Rights", *New York University Journal of International Law and Politics* 17 (1984): 58.
18. Baderin, *International Human Rights*, 231. See Yourow, H.C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996) p. 13, citing Wong, W.M., *ibid.*, 35 at 58.
19. Baderin, *International Human Rights*, 6.
20. Saeed, "Review Article".
21. *Ibid.*
22. *Ibid.*
23. Hakeem, Haberfeld, and Verma, *Policing Muslim Communities*, 45.
24. An-Na'im, *Toward an Islamic Reformation*, 52–7.
25. Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni uṣūl al-fiqh*, (Cambridge: Cambridge University Press, 1997), 168.
26. Hakeem, Haberfeld, and Verma, *Policing Muslim Communities*, 49.
27. Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights", *American Political Science Review* 76(2) (1982): 306–7.

28. Mashood A. Baderin, "Human Rights and Islamic Law: The Myth of Discord", *European Human Rights Law Review* 2 (2005): 174–5.
29. Jason Morgan-Foster, "Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement", *Yale Human Rights and Development Law Journal* 8 (2005): 115–16.
30. Baderin, "Islam and the Realization of Human Rights", 1.
31. Saeed, "Review Article".
32. Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate", *Human Rights Quarterly* 17(4) (1995): 588.
33. Ibid.
34. Ibid, 589.
35. Ibid, 588.