



**Atlantic Council**

RAFIK HARIRI CENTER  
FOR THE MIDDLE EAST

# The Islamic Tradition

AND THE

# Human Rights Discourse

EDITED BY H.A. HELLYER



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## FOREWORD

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### The Islamic Tradition, the Human Rights Discourse, and Rejuvenation: Towards an Islamic Notion of Twenty-First Century Ethics

Dr. H.A. Hellyer

#### The Islamic Tradition and Rejuvenation

Some years ago, I found myself in the midst of a conversation with a mix of Malay, Yemeni, Albanian, and Western Muslims, discussing a new “Islamic car” in a particular country with a Muslim majority. The conversation became rather caustic, because the Islamic car had a rather dubious “Islamically ethical” set of features. This Islamic car’s key features included a compass that directed the passengers toward Mecca for prayer; when the car door opened, the Islamic greeting of peace was electronically uttered; and a space on the dashboard was reserved for the written text of the Quran.

Those present noted that the “Islamic car” emitted as much pollution as any other car; it consumed the same amount of fuel, and so forth. Inadvertently, it struck an apt metaphor for literati referring to much of what passed for modern versions of “Islamization.” When discussions around contemporary rejuvenation of Islamic discourse arise, it appears that this may often be what is described: a type of discourse that is essentially similar to contemporary hegemonic discourse, whatever that might be, but with a veneer of Islamic vocabulary. If the notion of “Islamic values” is somehow meant to be an ethical one, then where are the ethical changes that take place when Islamization occurs? Or are ethical values, whether in Muslim communities or otherwise, often co-opted, resulting in political partisanship, where religious establishments are likewise co-opted, and thus the disconnect between rejuvenation and identity politics is complete?

That notion of rejuvenation is deeply held within the corpus of Islamic tradition—and is often referred to as *tajdid* (renewal) or *islah* (reform). That, in itself, is hardly a revolutionary concept. Indeed, it is constantly raised by governments, political movements, and non-state actors when considering how to advance toward more holistic and beneficial modes of governance and human development in the Arab world in particular,

but among Muslims of majority and minority communities more generally. Indeed, the very word *tajdid* has been instrumentalized in a variety of fashions—usually in ways that are overtly political, at the expense of intellectual and scholarly rigor—which then fails to satisfy the popular authenticity requirement of Muslim communities.

The question, then, for this project, was to identify questions that needed to be asked in order to move forward with sustainable change within Muslim communities. The subject of “Islamic rejuvenation” is an interesting one to consider—and perhaps there is no better place to raise the question than within the theme of modern human rights discourse.

The human rights discourse (HRD) is particularly relevant to Muslim communities worldwide—because it touches on the situation of Muslim communities where they exist as majorities, and it touches on the situation of Muslim communities as minorities. It affects Muslims on every continent in the world and is not limited to one ethnic or racial group. And as the HRD is indelibly intertwined with international discourse more generally, it has an intrinsic effect on policies ranging from public governance to health services, and far beyond.

The focus on faith-based responses to such primordial human concerns may seem somewhat unusual for different audiences, particularly western ones. But while it may be understandable that such reticence exists, and such reticence ought to be engaged with, it does not necessarily follow that such inhibitions should define or frame discussions. Like many communities, Muslim communities, whether as demographic minorities or majorities, take religion seriously—sometimes as identity markers, sometimes as ideational cognitive frames, and at times as both. In discussions with opinion leaders in majority Muslim communities and minority Muslim communities, it was consistently reinforced that if change within Muslim communities takes place, it needs to be presented convincingly as congruent with their ethical frameworks in order to be sustainable. This project took that imperative particularly seriously. After all, if the rights discourse claims universalism of any kind, it ought to then follow that all who would engage with it have the competency to do so irrespective of what power they possess, rather than be forced to communicate in the language of those who have hegemonic political power.

Nevertheless, there is another important reason to examine the human rights discourse (HRD) and its engagement with the Islamic tradition: the human rights discourse has its own broader philosophical claim. The HRD is not one bereft of philosophy or ideational frames—it has a wider cognitive frame at its root, which is based in a modern moment, particularly in the mid-late twentieth century. That raises pertinent questions and queries for Muslim communities more widely, large swathes of which, as noted above, have their own historical tradition when it comes to cognitive frames.

When it comes to Islam and the contemporary, since the beginning of the Prophetic community in the seventh century, Muslim communities have had various internal processes to “update” and “renew,” according to the changing circumstances of the age. Much has been made of the need for Muslims to engage in a “reformation” exercise of sorts—without understanding that such a framework is woefully lacking. The word ‘reformation’ in this regard originates in the Christian Reformation—and that operated according to a certain set of assumptions and circumstances. Very little of that history and background is applicable to Muslim communities. For example, there is no equivalent to a hierarchical ecclesiastical church-like structure for Muslims. Religious authenticity is mediated by expert-peer review—scholastic diversity continuously and consistently engaging in debate and conversation. More nuanced observers raise the notion of *ijtihad* (independent reasoning), but too often even that discussion devolves into the mistaken assessment that the “gates” (i.e., the ability to engage in *ijtihad*) are closed.

*Ijtihad* of various kinds has continued, at different levels, as circumstances and conditions changed. The question is not whether *ijtihad* exists—it is whether it operates at a level that is comparable to the efforts of the likes of scholars such as al-Muhasibi, al-Ghazali, and others in Islamic history. Al-Ghazali, for example, engaged deeply in understanding the intellectual challenges posed by Greek-inspired philosophers, followed by scholarly refutation in part, and incorporation in part, according to the standards and processes established and continually revised by the specialist communities of sages and intellectual dons. Today, it is practically undeniable that such an engagement is sorely lacking in contemporary Muslim discourse—and that has been the case for a considerable amount of time.

The impetus of this project in general—and this volume in particular—was simple: to provide avenues for the exploration of the interchange between the Islamic tradition and the human rights discourse. We have held workshops, conferences, and meetings with rights

activists, religious leaders, public intellectuals, and policy makers all around the world—in Muslim majority communities as well as Muslim minorities; in South Africa and Egypt; in Malaysia and Canada; in the United Kingdom and Singapore; in Europe and North America. In this publication, we have put together some of the most sterling facets that were developed by different contributors over the course of this project. We could not publish all that was acquired, for that would have been a veritable magnum opus on its own. Nor do we claim to have come to definitive and final conclusions. But perhaps, at the very least, there is the beginning of a conversation.

That conversation follows the same pattern as our landmark conference held at the Oxford Centre of Islamic Studies at the University of Oxford (OCIS) in the spring of 2018, where the Mufti Emeritus of Bosnia, Dr. Mustafa Cerić, kindly addressed a multinational audience with a keynote speech (the text of which is included in this volume). This volume begins, as we did in Oxford, with addressing the overall theoretical frameworks that need to be investigated, in terms of understanding the interchange between the Islamic tradition and the human rights discourse. Very different approaches are represented in that regard; one from the perspective of an Islamic studies and legal expert, Canadian-American scholar, Dr. Mohammed Fadel, who has in the past considered these issues with a particular Egyptian focus; in this piece, he goes deeply into theoretical frames that need to be considered when engaging in an interchange between the human rights discourse and the Islamic tradition. Ibrahim el-Houdaiby, a noted Egyptian scholar and author, engages on the issue by examining traditional Muslim methods and mechanisms that might be utilized in engaging with the human rights discourse. Shaykh Seraj Hendricks, one of South Africa’s most famous scholars and an internationally renowned religious leader, posits a framework for further engagement, drawing heavily on a classically trained Azhari scholar of the contemporary era. And Dr. Ahmed Abdel Meguid, an Egyptian scholar in the United States, delves into some of the more philosophical trends that arise from an interaction of these ideational universes.

Our authors move into concrete discussions around how the human rights discourse and the Islamic tradition engage with each other historically and in the contemporary era. American legal scholar, Asma Uddin, offers a contribution on how Islam and Muslims have engaged with the human rights tradition in the last hundred years; British scholar, Dr. Mehrunisha Suleman, provides an in-depth discussion on how medical ethics might learn from the Islamic tradition, while British

scholar Arzoo Ahmed challenges traditional and cultural biases toward women using Islam's history.

This collection then addresses some of the broad geographical diversities of the Muslim world, both as majorities and minorities. By drawing on the Ottoman (Turkish scholar, Dr. Recep Senturk), Malay from Southeast Asia, (legal activist, Azril Amin), European (Rim Sarah Alouane), and North American (Dr. Dalia Fahmy and Arsalan Iftikhar—the first on the how the rise of the far-right impacts the rights of American Muslim communities, and the second on how broader discussions around Islamophobia do the same) perspectives, the collection aims to be comprehensive of the “Muslim Experience” in relation to human rights.

### Reflections and Ruminations

Over the course of the project, it was incredibly clear that for a substantial number of Muslims, Islam has a serious intellectual history and “worldview.” Reflecting the contribution of Professor S. M. Naquib al-Attas of Malaysia—and that such a worldview may well be distinctive as compared to the worldview that the international human rights discourse is originally based upon. Or to put it another way: Islam has an intellectual history that ought to be engaged with and which ought to engage the HRD seriously, in order to establish where the convergences and syntheses can take place. In that regard, Muslims, more generally—and normative Islam, in particular—are not particularly exceptional, even if they might make legitimate claims to distinctiveness, as other worldviews might well make similar, if not identical, claims.

Engagement between those different worldviews is important and vital—and should be pursued as an interaction, as opposed to a Huntington style “clash.”<sup>1</sup>

Indeed, none of the many interlocutors across the religious establishment, activists, or public intellectuals that were involved, contradicted this opposition to such a “clash.” On the contrary, they consistently called for that kind of nuanced engagement; an engagement that neither caricatured nor “essentialized” Islam or the human right discourse. Rather, a type of arrangement that was far deeper in essence, and far more understanding of the types and levels of differences that we were all trying to understand. And to that end, it was rightly noted that the human rights discourse and

the philosophical worldview it emanates from within contemporary liberalism is not without its own internal contradictions. Nor is it a static discourse—the year of 2018 marks the seventieth anniversary of the universal declaration of human rights, after all. The world changes—especially seventy years on.

When considering criticism of the human rights discourse from within Muslim communities, there were and are further critiques. The first was that such criticisms were made using the frames of Western modernity themselves—rather than using intrinsically, authentically, and uniquely Islamic frames of references. In my own work, I have looked particularly at the “Islamic worldview project” of S.M. Naquib al-Attas, which is nothing if not a deep claim to an authentically rooted and contextually relevant Islamic approach in normative Sunnism. But generally speaking, the claims to creating modern and Islamic discourses have been quite wanting—and in the final analysis, bring us to the superficial “Islamic car” result, or worse.

These first considerations were more about framing and theory—but there was a deep practical theme that ought to be repeated again and again. Many in positions of authority—whether in Muslim majority countries or where Muslim minority communities might reside—often cite a note of criticism on possible divergences between the Islamic tradition and the HRD for a rather insidious purpose. That purpose, as identified by many of our interlocutors, was to justify abuses or limit rights for Muslims in majority or minority situations. The perpetrators in that regard might be authorities in Muslim majority states, articulating their opposition to fundamental rights and freedoms using religious vocabulary; or it might be authorities or political figures where Muslim minority populations exist, in order to justify other types of rights violations.

When considering the development of the practical repercussion of these points in many Muslim countries, one of our workshop participants described this kind of phenomenon, quite aptly as, “the effort to Islamize the intrinsically un-Islamizable.” To give an example: torture and police brutality are still repugnant—even when they are sanctioned, unethically, and abysmally, by religious establishments.

That instrumentalization of religion for purposes of partisan politics exists in a variety of contexts—whether

<sup>1</sup> “The Clash of Civilizations?” is an article published in *Foreign Affairs* by Samuel P. Huntington in 1993 available here: <https://www.foreignaffairs.com/articles/united-states/1993-06-01/clash-civilizations>). The article proposes that world politics are entering a new phase, in which the great divisions among humankind and the dominating source of international conflict will be cultural. He argued that future wars would be fought not between countries, but between cultures, and that “Islamic extremism” (sic) would become the biggest threat to world peace. <https://www.foreignaffairs.com/articles/united-states/1993-06-01/clash-civilizations>



implemented by state establishments or by political opposition groups—and more than once, it was suggested in our discussions that doing so brings religion into dispute. The irony, as one of our interlocutors reminded us, is that classical Muslim intellectual authorities of the past, often wrote that it was the duty of the scholastic class to find whatever interpretation of the Islamic canon that could be used to push against the ruler’s engagement in oppression and tyranny—even if there was a legitimate legal interpretation that could allow for that ruler to continue along his oppressive path.

On a practical level, we were also reminded that there is an overarching context in which this discussion is taking place. When it was posed to human rights defenders in a Muslim majority country that if we push aside the human rights discourse, abuses might be more easily enacted, the very clear retort was: “that argument doesn’t work. Since 9/11, the human rights discourse, whether in Muslim majority countries or otherwise, has been pushed to one side when confronted with the security argument. And since the Arab uprisings in 2011, that has only got worse within the Arab world and the broader region.” Any human rights defenders have

now defaulted to using an appeal to security considerations even when making their arguments in support of human rights. Normative appeals to the ethical supremacy of, for example, not torturing people, are put to one side, and the objections are couched more in a counter-terrorism frame—because that is what works.

In trying to have a healthy interchange between the Islamic tradition and the human rights discourse, these candid discussions are solely based on ideas and theories—but in real life, there are consequences and repercussions for huge swaths of Muslims and for humanity in general. Perhaps all would benefit from recalling that looming background as the discussion proceeds. Or ethics can be sacrificed on the altar of political expediency—that is certainly a choice that many have opted for—although it is hardly a genuine one.

In this volume, we did not attempt to finalize conversations—rather, we sought to innovate conversations, raise new questions, inspire original debates, and make unique connections. The future remains open as to where all those might lead.

# INTRODUCTION

## The Islamic Tradition and the Human Rights Discourse

Dr. Mustafa Cerić

**W**e cannot understand human rights without understanding tradition. But we also cannot understand tradition without recognizing human rights as a key component of a living civilization. In *The Nature of Civilizations*, Matthew Melko writes that Islam is one of five living civilizations, alongside the Chinese, Japanese, Indian, and Western civilizations.

We have neither time nor space here to dwell on the substantial meaning of the Islamic tradition (Sunnah), but we see it appropriate to say that the Holy Quran has condemned slavish imitation of the past to be against the free spirit and sound mind:

“And when it is said to them: - Come to what Allah has revealed and to the Messenger, they say: - Sufficient for us is that upon which we found our fathers. Even though their fathers knew nothing, nor were they guided?”<sup>2</sup>.

“And similarly, We did not send before you any warner into a city except that its affluent said: - Indeed, we found our fathers upon a religion, and we are, in their footsteps, following. (Each warner) said: - Even if I brought you better guidance than that upon which you found your fathers? They said: - Indeed we, in that with which you were sent, are disbelievers. - So we took retribution from them; then see how was the end of the deniers”<sup>3</sup>.

I find very useful political theorist Hannah Arendt’s observations on tradition, in which she says, “Undeniable loss of tradition in the world does not at all entail a loss of the past, for tradition and past are not the same, as the believers in tradition on one side and the believers in progress on the other would have us believe...”<sup>4</sup> She adds, “There is a different past from the one handed down by tradition, that tradition is a thread running through the past and connecting selected events, and

that when that thread is cut, casually, the principle of the devolution of effects from causes, is misapplied in the non-natural realm of politics.”<sup>5</sup>

I strongly believe that the venture of Islam—as a final completion of the divine mercy on mankind based on Abrahamic traditions at the dawn of the seventh century CE—was the most radical reformation of religious thought in the history of religions.

Islam cancelled involuntary faith by declaring that there shall be no compulsion in religion. It nullified racial discrimination by proclaiming that there shall be no superiority of an Arab over a Non-Arab, nor a Non-Arab over an Arab, nor black over white, nor white over black man or woman except by good character. It abolished the institution of priesthood due to its use by man as a vehicle for faith manipulation, saying there shall be no mediation in Islam between God and man. Islam renounced filicide, or female infant killing, by declaring that there shall be no slaughter of an innocent infant daughter; and relinquished any notion of inherited guilt of sin by declaring that there shall be no person responsible for the sin of another except for their own because each and every person is born free of sin.

After my experience of genocide against my Muslim people in Bosnia, which I lived and witnessed, I am convinced that the concept of protected persons in traditional Islamic law (dhimmis)—particularly in its historical context, prior to the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration of the Rights of Man and Citizen (1789), and the US Constitution and the Bill of Rights (1791)—was a genuinely praiseworthy idea, for its time, that saved many human lives.

I contradicted the well-known Anglican bishop Nazir-Ali in a declaration at a conference then, and I reiterate the same assertion here: I wish that non-Muslims in my region, the Balkans, had this concept of “protected persons” in their own traditions: so as to respect the rights of Muslims; specifically, their rights to life, faith, freedom, property, and dignity. I wish that they had that concept of protected persons, if only so that I

2 The Quran 5: 14.

3 The Quran 43: 23-25.

4 Hannah Arendt, *Between Past and Future*, (New York: Penguin, 2006), 93.

5 Arendt, *Between Past and Future*, xii.

could ask that it be applied to me, so that I can be sure that the genocide that was visited upon my people, will never take place again.

I do not see it necessary to comment extensively on the Universal Declaration of Human Rights (UDHR); but I must say that the core of it is contained in the five necessary values of human life that must always be protected and upheld, as universally stipulated by Muslim scholars in their theories of Islamic law. But I do wish to make a comment on different attempts thus far by Muslims to create their own Universal Islamic Declaration of Human Rights (UIDHR) document of 1981, and the Cairo Declaration on Human Rights in Islam (CDHRI) of 1990. I do not think that it was necessary for those documents to come about, as my point of view is that the UDHR is already largely compatible with the core of Maqasid al-Sharia, the highest purposes of human understanding of God's Law in Islam.

But I do question why these documents came about, and I am convinced that our collective insecurities have driven us, as Muslims, to that point. On the one hand, we are clear in our sense of self-sufficiency—because we know that we are the heirs of the continuous presence of the divine free spirit in history that has been revealed in the final word of God in the Holy Quran. In so doing, we have tasted historically that sense of self-sufficiency, but we have done so through the enlightening of our minds, via our engaging in intellectual discoveries that were put to the benefit of mankind at large. We rely on God alone, and for much of our history, our worldly power on this earth could find many influential and impactful examples.

But when we lost that worldly power—and there is no question that now, the political power that Muslims enjoy globally is a paltry one compared to centuries gone by—we failed to take stock of our affairs. On the one hand, we dream that we are self-sufficient, but on the other, we can see we do not have strong influence in our participation in global issues, such as the human

rights discourse, which we might have had a couple of centuries ago. We are thus often on the defensive, in what I call a self-imposed cultural insecurity syndrome, which is best illustrated by modern Muslim talk about the *wasatiyyah* (centrism or “moderation”) as an introduction of an Islamic moderation as opposed to an Islamist extremism, or even terrorism.

The Quran states that Allah, God Almighty, made the Muslim community an *Ummatan Wasatan*, (the “moderate nation”), but that doesn't mean that we should be simply moderate, which strikes me as somewhat tepid or unimaginative. The idea of *wasat* is far more than that: in my understanding, it means that Muslims must be in the middle of the one human whole, the core of civilization, in order to connect all parts of human existence in a comprehensive whole for all of humanity to use and benefit. This is what the *Bayt-l-hikmah*, or House of Wisdom, in Baghdad once was; this is what Cordoba once was—the *wasat*, the middle, where all the good of knowledge was collected, integrated, and disseminated all over the world by all people regardless of their faith, race, and nationality.

Thus, *wasatiyyah* should be a Muslim movement of bringing people together, while respecting their differences. The *wasatiyyah* should neither be a flattering that leads us into assimilation, nor a rejection that leads us into isolation. But, it should be an integrative force that leads us into what we have been known for. And we have been known as a self-respectable, good, lovable, useful, reliable, trustworthy, and friendly *Ummah* to humanity, as our good predecessors used to be in their times of self-sufficiency and cultural security.

As Muslims, we must work hard to realize the truth of genuine self-sufficiency; to abandon any sense of insecurity, based on a real presence of authentic security—and locate our right place in the world, where we are champions of the fundamental rights of all people and peoples. That is our right and our duty.



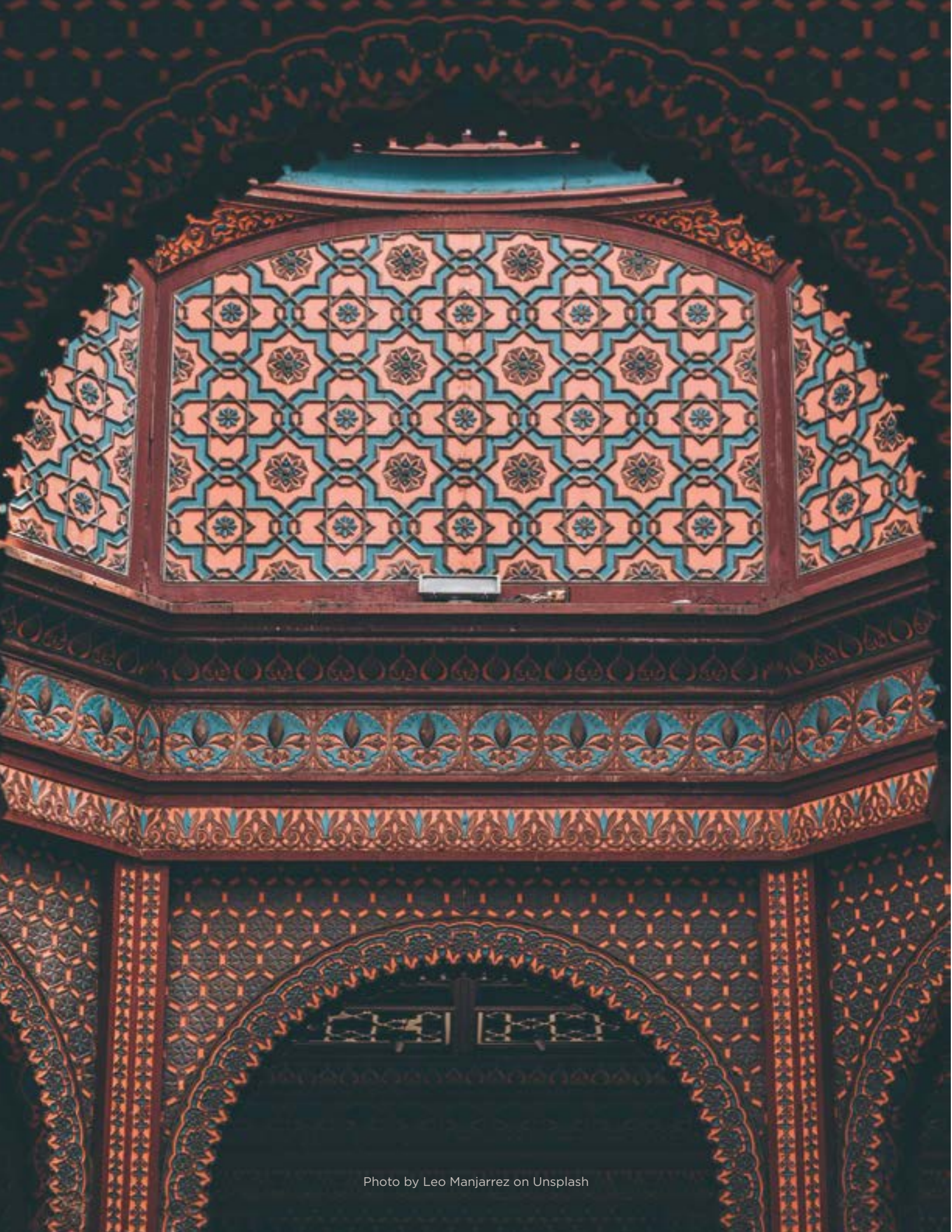


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## SECTION I:

# The Philosophical Framing of the Conversation: Challenges in Definitions and Categories

# LIFE, LIBERTY, AND THE PURSUIT OF ISLAMIC HAPPINESS: ISLAM AND HUMAN RIGHTS

Mohammad Fadel

Many books and articles have been written in the last generation on the relationship of Islam to human rights that one might rightfully wonder whether there is anything important left to be said. As a general matter, literature in this field could be broken down into two broad categories. The first takes an overtly triumphalist/conflict-of-civilizations stance in which the author identifies a particular tradition, e.g., Islam or human rights, as the source of all that is good in the world, and then seeks to describe the other tradition as being bereft of some or even all of the excellences associated with the valorized tradition. The second approach might be described as an apologetic approach in which the author defends the basic goodness of one tradition from the perspective of the valorized tradition, e.g., a human rights-based defense of Islam, or an Islamic defense of human rights.

This essay, however, will take a different tack. Instead of looking at the central issue between Islam and human rights as one of identifying commonalities and conflicts, and then attempting to find principled grounds for the resolution of those conflicts, it will explore why we cannot expect—nor should we desire—a complete reconciliation between Islam and human rights norms. Indeed, such an expectation misidentifies the proper role of human rights and religion in establishing the conditions for flourishing human societies.

One way to understand the at times paradoxical relationship between human rights and religion in general—and Islam in particular—is to think about two rival conceptions of freedom: negative freedom and positive freedom. Negative freedom is the ability of an individual to do and believe what he or she wishes without the interference of a third party. It is freedom that involves the absence of obstacles for an individual. Positive freedom, however, is the ability to actualize one's desires *about one's desires*. The emphasis is on the creation of the right conditions to act on one's own

*ultimate* ends without succumbing to actions that interfere in achieving those ultimate ends, even if those actions are freely chosen.

Both freedoms are valuable, but they are not always in harmony. Frank Lovett, in his entry on republicanism in the *Stanford Encyclopedia of Philosophy*, illustrates the distinction between negative freedom and positive freedom with various examples, beginning with a gambler. Insofar as a person desires to gamble, and to the extent he is neither coerced into gambling nor coercively precluded from gambling, he is *free* to act on that desire, and therefore, to that extent, he possesses negative liberty. But suppose he believes it is bad for him to gamble because he has young kids and knows they need his financial support, and so he desires that he not act upon his impulse to gamble. In this situation, if he acts on his desire to gamble, even though he is acting freely from the perspective of negative freedom, he can nevertheless be described as *unfree* in the positive sense because he is unable to make effective his desire to refrain from gambling and use that money for its true ultimate end, e.g., to buy food and clothes for his kids.<sup>6</sup>

Lovett also argues that reducing freedom to “non-interference in a subject’s desires,” or negative freedom, can also result in certain paradoxes: imagine two slaves, one with a beneficent master and the second with a cruel and arbitrary one. The slave of the beneficent master is permitted to do whatever he wishes, while the slave of the cruel master is forced to perform grueling and tedious tasks with little to no respite all day, each day. From the perspective of negative freedom, the first slave might be described as enjoying significant freedom, especially as compared with the second slave who spends his days and nights doing his master’s bidding. But would it be right to describe the first slave as more *free* than the second slave?

Finally, this paradox is reflected in the politics of communities as well: Imagine an empire that takes a hands-off approach to its conquered territories and, for the

<sup>6</sup> Frank Lovett, “Republicanism,” *Stanford Encyclopedia of Philosophy*, Edward N. Zalta, ed., Spring 2017 Edition, <https://plato.stanford.edu/archives/spr2017/entries/republicanism/>.



Photo by Nourdine Diouane on Unsplash



period in which it rules its colonies, does not interfere in their customs, traditions, or way of life, such that the individuals living under colonial control are effectively free in the negative sense of having the ability to act as they wish. Now suppose that the former colony gains independence from its former imperial masters, and the post-colonial government adopts a series of policies intended to transform social relations through modernization, motivated in part by the desire to prevent a future episode of colonization. In this case, our intuition seems to tell us that to achieve the political goal of effective independence, i.e., *political freedom*, the citizens of the post-colonial state are *positively* obligated to behave in a particular way.

The political freedom of the post-colonial state therefore requires an interference in the negative freedom of its citizens, perhaps in a fashion that is much more heavy-handed than that of the colonial master, such as imposing income taxes or nationalizing certain industries, among other things. Does this make them less free? These examples illustrate the basic structural tension between religion generally, and Islam in particular, with human rights norms. The least controversial human rights, such as those set forth in the Universal Declaration of Human Rights adopted by the United Nations (UN), are largely matters of negative freedom such as freedom of speech, freedom from violence, and freedom of religion.<sup>7</sup>

Islam, as well as other religions, however, is principally concerned with regulating *what* we want, or what political philosophers might call “second-order” desires. A Muslim theologian or jurist, then, if he or she were to read the Universal Declaration’s provisions regarding freedom of religion<sup>8</sup> might be very well concerned that it is in tension with the positive freedom to be a Muslim. Just like the presence of legalized casinos may undermine a person’s positive freedom not to gamble, the possibility of converting to another religion or the option to have no religion at all, in each case *without any political consequences*, makes it more difficult, one might believe, for people to remain faithful to their previous commitment to be *Muslim*. They might also believe that a strong commitment to negative freedom in the context of religion also has an effect on second-order desires, namely, it may cause individuals to believe that religion is not a matter of great importance, for if it were, we would not be free to choose whatever religion

we want. Theologians and jurists might also believe that the negative freedom of religion poses the risk of leading to religious indifferentism, a doctrine of the substantive equality of all religions, regardless of their particular theological and ethical teachings. Such a doctrine threatens the existence of all particular religions such as Islam insofar as it holds there is no relevant difference among religions, either because they are all equally false or all equally true.

These concerns are not to suggest that it is impossible for a committed Muslim to embrace freedom of religion as a principle of negative freedom; however, it does mean that Muslims who do embrace it will be careful to circumscribe it in a manner that does not undermine the Islamic theological claims as to Islam’s truth and its universality. Accordingly, from the internal perspective of Islam, recognition of the freedom of religion as a negative liberty will necessarily be viewed as a matter of finding good reasons to exercise restraint with respect to nonbelievers, rather than affirmatively endorsing the substantive religious choices of non-Muslims as such. Indeed, it may be that in circumstances where Islam coexists with other religions and nonreligious commitments under a robust regime of negative freedom of religion that Muslim religious leaders might become more strident than they otherwise might be in explicitly demarcating theological and ethical differences between Muslims and non-Muslims.<sup>9</sup>

Once we recognize that the tension between human rights and Islam is a special case of tension between negative and positive freedom, we are also in a better position to make another observation about the nature of rights in Islamic law: Islamic law formulates rights instrumentally to further its own substantive conception of the good. For example, Islamic family law formulates a set of rights and duties with respect to the family, not from the perspective of maximizing individual autonomy or individual well-being as such, but rather from the perspective of establishing households that are likely to produce the outcomes that Islam sees as religiously desirable: a reasonably stable household that reproduces and nurtures a new generation of Muslims. Actions that do not further these ends will naturally be rejected as illegitimate from an Islamic perspective. Accordingly, while it may be a reasonable political demand for states to recognize the legitimacy of a Muslim woman’s marriage to a non-Muslim man, it is unreasonable to expect

7 United Nations General Assembly Resolution 217 A, *Universal Declaration of Human Rights* (Paris, December 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/>.

8 UN General Assembly, *Universal Declaration*, Art. 18.

9 This may take place through a willingness to revise what Islam understands to be secondary or tertiary doctrines, but as a result there is a renewed emphasis on what are considered to be primary doctrines.



Muslim religious figures to endorse such marriages from a religious perspective because they would contradict the religious function of marriage.

The foregoing analysis points to an irresolvable tension between Islam—or any other religion or philosophy that seeks to promote a particular way of living as the right or best way to live—and human rights: each system recognizes internal limits on rights that derive from the goals each system is seeking to promote. Because Islam seeks to promote an Islamic way of living, rights are construed in a fashion consistent with those ends, and the use of rights in a fashion that would undermine those ends is necessarily condemned as illegitimate. The same structure is found in the Universal Declaration of Human Rights. Article 29(3), for example, states that “These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”<sup>10</sup> Likewise, Article 30 states “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”<sup>11</sup>

Just as religions such as Islam must adopt a posture of restraint with respect to the political enforcement of their doctrines to secure the kind of international order envisaged by the UN, so too must human rights advocates adopt a restrained understanding of the scope of human rights so that it is clear that it is not an attempt to regulate directly the content of Islam or of any other religious doctrine. Otherwise, freedom of religion could be eviscerated to nothing more than the freedom to hold a particular belief, with no (or an extremely narrow) right to act on those beliefs, a trend we see gaining momentum in Europe, particularly with respect to Islam.

However, this does not mean that Islam is concerned only with positive freedom. Many of its doctrines vindicate the negative freedom of individuals, both against the state and against other members of the community. Where Islamic law recognizes the existence of a right, it is very keen on preserving the right-holder’s exclusive authority to exercise that right, except in cases where the right-holder is deemed to lack sufficient capacity to do so, or some pressing social necessity justifies

interfering in that right.<sup>12</sup> Any source of tension with conceptions of negative liberty associated with international human rights law, therefore, is not because Islam does not recognize individual freedom and is concerned only with duties (as is sometimes claimed), but only because Islam defines the scope of the right differently from international human rights law insofar as it does so from the perspective of the instrumental goals Islam seeks to achieve, both positively and negatively.

In this case, however, one might object that even if Islam recognizes individual rights, it does so only in connection with attempting to achieve the happiness of Muslims as a community, and without concern, or with insufficient concern, for the well-being of individual Muslims. One of the functions of Islamic legal theory, however, was to work out why following divine commands was rationally consistent with human welfare. According to one especially prominent theorist, God’s commands must be rationally compatible with human perceptions of their own welfare, not only so that they would *want* to comply with the law, but because God’s intent is that human beings *choose* to follow God’s law.

The idea here is that we rationally decide to restrain ourselves because we understand that doing so furthers our own well-being: by restricting our immediate freedom or happiness, we increase the likelihood of enjoying the freedom to achieve what will make us truly free or happy in the future. This provides an important conceptual bridge between Islamic conceptions of negative freedom and positive freedom: we can achieve our positive freedom—our second-order desires, such as our effective ability to act on our knowledge that gambling is wrong, for example—only if we effectively restrain ourselves in the present from acting on what may be a very real, visceral desire to gamble.

We achieve this through our rational apprehension of the harmful nature of our visceral desire, and how it is inconsistent with our rational understanding of our long-term, real happiness. Politically, this manifests itself in an attempt to make laws that assist people in achieving what are rationally recognized either as positive long-term advantages necessary for their happiness or minimizing what are rationally recognized as obstacles preventing them from achieving happiness.

10 UN General Assembly, Universal Declaration.

11 6 Ibid.

12 7 A twelfth-century Egyptian-Syrian jurist, for example, noted that interference in a person’s right to pursue his private interests is a legal injury (*mafsada*), the effects of which are not usually recognized in the law. In the case of the marriages of minor girls, however, an exception was made out of necessity. This reasoning recognizes the exceptional, and therefore disfavored, nature of minor marriage, and provides a strong Islamic basis for limiting or eliminating minor marriage, but by focusing on improvement of the background social conditions that create the necessity in the first place, rather than the moral depravity of the societies in which these practices take place.

Rules that restrict our freedoms in the present can therefore be understood as necessary pre-commitment devices to maximize the likelihood that we will achieve our long-term goals that we reasonably hope will provide us the happiness we seek.

This points to the paradox of the negative freedom secured by human rights: negative freedom is valuable because it allows us to pursue goals that are valuable to us, but we can achieve those goals only if we restrict our short-term freedom from pursuing other ends, which, although perhaps legitimate in themselves, undermine achievement of our long-term objectives. In other words, negative freedom is not pursued for its own sake. When it is rationally connected to the pursuit of a substantive good that can be achieved only over the long term, it is therefore entitled to the highest degree of respect. When it lacks such a connection, however, there are fewer reasons to honor it.

In the specific context of Islam and human rights, conflicts between negative and positive freedoms center largely around three areas: freedom of expression, and in particular, “blasphemy” (usually expressed in the form of insults to Islam’s prophet); freedom of religion, particularly the right of a Muslim to renounce Islam and adopt another religion (apostasy); and family law. Much of the crude speech directed against the Prophet Muhammad cannot reasonably be understood to have any connection with establishing a substantive good other than expressing the wish that Islam, and by extension Muslims, did not exist. For that reason, such speech is not properly understood as blasphemy;<sup>13</sup> rather, it is actually hate speech, and as such may reasonably be regulated consistently with the terms of the Universal Declaration, which prohibits assertion of a right whose goal is “the destruction of any of the rights and freedoms set forth herein.”<sup>14</sup>

There can be no doubt that genuine and sincere renunciations of Islam, whether by someone born a Muslim

or a convert, must be honored under human rights law. Freedom of religion, including the right to abandon Islam for another religion, does not preclude a state, however, from inquiring into the bona fides of the decision to ascertain that the individual is not seeking solely some legal advantage, either from renouncing Islam or converting to another religion, or from establishing Islam as the state’s religion and providing public instruction in its tenets. Finally, with respect to Islamic family law, while it does not satisfy a formal conception of equality, it certainly aims for a fair distribution of rights and obligations within the family, and it seeks to secure the best interests of children within the family.<sup>15</sup> This does not mean that many historical rules of Islamic family law do not require reform; rather, it is to argue that such reform can be undertaken from the internal perspective of Islamic law rather than its wholesale rejection and replacement on the grounds that it is facially an illegitimate source of law as some would suggest.

Islamic law can be reconciled to human rights law only to the extent that Muslims believe their desire to live as Muslims—and not just “believe in” Islam—individually and as communities will be honored by human rights law. Conversely, human rights law will be comfortable with Islamic law only when it is convinced that Muslims genuinely respect the rights of non-Muslims to equal religious freedom and those of nominal Muslims to reject Islam, and take seriously the cause of gender equality, rather than using Islam as an excuse to defend the status quo. Even so, it is impossible to expect a complete convergence between human rights norms and Islamic norms: human rights norms are almost entirely concerned with securing the autonomy of individuals to make choices for themselves, while Islam is largely about influencing individuals’ choices about how to live their lives. From an Islamic perspective, negative freedom is needed to make compliance with Islam morally meaningful, but securing negative freedom can never be more than a means to the end of pursuing an Islamic conception of happiness.

13 A blasphemous statement would be one that asserts a theological proposition that is not only erroneous, but is degrading to a proper conception of the divinity, such as a claim that God exists in the form of a human body.

14 UN General Assembly, *Universal Declaration*, Art. 30.

15 Many verses in the Quran make explicit appeals to notions of fairness and reciprocity between the spouses. See, for example, *al-Baqara*, 2:228: “The rights of divorced women are substantially equivalent to their obligations” (*wa la-hunna mithu alladhī alayhinna bi’l-marūf*); and, *al-Baqara*, 2:233 (establishing general principle that rights and obligations of rearing infants should be distributed between the father and mother equitably).

# HUMAN RIGHTS FROM AN ISLAMIC PERSPECTIVE: A RESPONSE TO THE CRISIS OF CHRISTIAN HUMANISM FROM MODERNISM THROUGH POST-MODERNISM

Ahmed Abdel Meguid

## Introduction

Since the end of World War II—and specifically after the establishment of the United Nations—most of the literature on human rights claimed to be universal and secularly neutral. As mounting literature in philosophy and social sciences blur the distinction between the secular and the sacred, the deeply Christian—and more specifically Protestant—origins of many concepts often considered secular and universal emerge. The category of the “human” assumed a certain definition or essence of humanity that is inextricably rooted in modern philosophy with its assumptions about human nature and its original state of being which, in turn, are deeply rooted in the protestant re-formulation of Christian ethics and political worldview that was articulated in the modern theory of the state.

I will show that the discourse on human rights is deeply rooted in the Christian conception of the human and its metamorphosis from the Catholic reception of Greek cosmology and natural psychology through protestant humanism. This Christian conception reflects an idealistic commitment. In this vein, I will argue that the challenges of assimilating Muslims in the human rights discourse is not due to religious dogma but is rather deeply rooted in a troubled definition of the human uncritically adopted by the human rights discourse. I will indicate that this problem can be overcome through a new conception of the human inspired by what I will describe as an intermediate Islamic position that avoids extreme idealistic and materialistic positions.

For the sake of simplicity, this paper will exclusively focus on Sunni Islam and its position on the relationship between the ideality of reason and the particularity of material experience in its conceptualization of human nature.

## Greek Philosophy, Christianity, and the Challenge of the Divine Human

Are we abstract minds or material bodies? This is the essential challenge to any definition of the human-being or the human as a category from early reflections on human nature in Greek antiquity to our times. In the *Republic*, Plato identified three parts of the soul: the appetitive, the desiring, and the rational.<sup>16</sup> He then argued that the rational should reign over the other two parts; the image he depicted of the philosopher or the perfect human was of a male human being who completely identifies with reason and overcomes the misguidance of the body.<sup>17</sup> This led many commentators to argue that Plato’s idealism, which has patriarchal tendencies, requires the human to eliminate parts of his humanity to become perfectly human.<sup>18</sup>

Aristotle’s realism attempted to resolve this paradox by arguing for the inseparability of mind and body. However, Aristotle still argued that intellectual excellence is achieved through pure contemplative life of the mind. Aristotle’s ethics, just like his philosophy of science and metaphysics, fell into the paradox of trying to show the inseparability of mind/spirit and the body/matter and at the same time arguing in an implicit agreement with Plato that reason is more essential than the body.<sup>19</sup>

16 Plato, *Plato: Complete Works* (Indianapolis: Hackett Publishing Company, 1997), 435-441.

17 Ibid., 472-480. See also Plato, Books VI and VII, in *The Republic*.

18 See for example, Julia Annas, *Platonic Ethics, Old and New* (Ithaca: Cornell University Press, 2000), 52-71.

19 Aristotle, Book III, in *De Anima* and Aristotle, Book X, in *Nicomachean Ethics*. For a brief exposition of the tension in Aristotle’s theory of the self, see Richard Sorabji, Chapters I and II, in *Self: Ancient and Modern Insights about Individuality, Life, and Death* (New York:

With the advent of Christianity, the Platonic conundrum was perpetuated, if not radicalized. The towering examples of this Christian Platonism are Saint Augustine, and the leading figure of scholastic Christianity, Saint Thomas Aquinas. In the *Confessions*, Augustine devotes a considerable part of his personal narrative to his struggle with his bodily desires mostly manifested in his desire to get married. He identifies his discovery of Christianity with his discovery that the truth lies in the ideal nature of reason and its concepts without which there will be no knowledge of the world versus the material world that is unreal.<sup>20</sup>

Notwithstanding his Aristotelianism,<sup>21</sup> Aquinas' theory of human nature and philosophy of law reflect a deeply Platonic commitment. Consider his philosophy of law. According to Aquinas there are four levels of law: the eternal, the natural, the divine, and the human (king's) law. The latter two conspire to maintain the dominion of the sacred or the ideal over the secular or the profane and material through an approximation of the natural law that only church fathers have access to through their spiritual and intellectual devotion. The rise of Protestantism maintained the same orientation but from a humanized perspective.<sup>22</sup>

### The Metamorphosis of Christianity from Medieval Catholicism to Modernity and Post-Modernity

Immanuel Kant's critical philosophy serves as an exemplary model of Protestant humanism. Kant was concerned with defining the legitimate limits of the different uses of reason by rational agents. He argued that our experience is constructed in the theoretical use of reason according to categories that synthesize sense intuitions represented in terms of spatial and temporal dimensions. Any possible, knowable object of experience is constructed according to the strict synthesis of the categories. Kant even argues that our consciousness of our own psychic states constructs us

strictly as objects of experience and hence knowledge. Hence, Kant labels this sense or representation of the human being as the empirical ego.<sup>23</sup>

But Kant identified another use of reason, namely the moral. In this use, rational agents, humans included, can think of themselves as purely rational agents free of bodily (spatial and temporal) representations. This is both the essence of human freedom and morality according to Kant.<sup>24</sup> For Kant, all moral maxims should be purely intelligible and based strictly on their logical universalizability to every other rational agent. For example, a promise is binding because the concept of promise analytically implies that it is binding apart from any condition surrounding the fulfillment of such a promise. In respecting his rationality, the human rational agent is positively free and transcendent to the mechanical order of nature.

This is the holy/moral essence of the human being. However, Kant plunged himself into an unresolvable dichotomy. While the moral maxims of action determining social and political behavior should be determined in complete abstraction from bodily and material experience, the action based on such maxims will take place in this material world and will hence be represented just like any other phenomenon mechanically. The chasm between the two modes through which any human being can represent himself is almost unbridgeable. This unbridgeable chasm manifests itself perfectly in his theory of rational religion. In *Religion within the Boundaries of Mere Reason*, Kant argues that the image of Christ as the Son of God qualifies Christianity as a religion to be the system of faith most capable of being reconstructed according to the values of enlightenment. Humans strive to become divine as much as they try to freely follow the maxims of reason.<sup>25</sup> But humans, by Kant's admission, can be conscious of themselves both as moral agents and as objects in the world, or as he puts it in the *Metaphysics of Morals* as both a holy and natural being. The divine human is too abstract as a model for humanity.<sup>26</sup>

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Oxford University Press, 2008).

20 Saint Augustine, Book II and IX-XII, in *Confessions* (New York: Oxford University Press, 2009).

21 Despite the Aristotelian turn in scholastic Christianity, which was partially inspired by Arabic and Muslim re-interpretations of Aristotelianism when they were translated and assimilated in the late 12th Century CE, the Platonic tendency continued to prevail over Christianity.

22 St. Thomas Aquinas, *Summa Theologica*, 94-97.

23 Immanuel Kant, Introduction and The Transcendental Deduction, in *Critique of Pure Reason* (New York: Cambridge University Press, 1999); see also Immanuel Kant, First and Second Introductions, in *Critique of the Power of Judgment* (New York: Cambridge University Press, 2001).

24 Immanuel Kant, Introduction to the *Critique of Practical Judgment*, in *Practical Philosophy* (New York: Cambridge University Press, 1999).

25 Immanuel Kant, Parts III and IV of *Religion Within the Boundaries of Mere Reason*, in *Religion and Rational Philosophy* (New York: Cambridge University Press: 2004).

26 See Immanuel Kant, Introduction to the 'Doctrine of Virtue' in the *Metaphysics of Morals*, in *Practical Philosophy* (New York: Cambridge



This paradoxical dichotomy is precisely what Michel Foucault famously described in the *Order of Things* as the troubled birth of the modern human who paradoxically becomes the ground of all sciences because the world is constructed according to the categories of his reason; but precisely because of this reason he becomes the most interesting object of knowledge and hence the rise of modern human and social sciences.<sup>27</sup> Circumventing this paradox, European romanticism constructed the modern human in terms of the purely free, enlightened subject. G.W.F. Hegel and the romantics escaped the Kantian paradox by reducing the human to pure, ideal freedom, recreating Christian idealism from a humanistic, historical perspective. This newly constructed human was the archetypal subject of the nineteenth century nation state.

The disbelief in metaphysics and the idealism of reason following World War II and the collapse of nineteenth century romantic nationalism made the protestant European subject redefine the way it wants to mask the unresolvable paradox of his humanity. The post-World War II Protestant European subject redefined himself in terms of bodily, material freedom not a lofty, rational freedom as that of Kant and Hegel did. The human as a category is redefined in terms of aspects and interests mostly related to the body, its desires, and, of course, sexuality. Emphasis on sexuality and bodily freedoms in contemporary human rights discourse and activism is an immediate result of the failure of the idealistic resolution of the crisis of protestant humanism from the late nineteenth through the mid-twentieth century. Ironically, bodily freedoms are treated with a form of sanctification very similar if not identical with the same idealism with which Protestantism presented and defended its nineteenth century idealism.

### Difficulties and Challenges in Assimilating Muslims and Non-Western European Protestants Based on Christian Humanism

The above paradox explains the contradictions in the colonial and post-colonial use of the discourse on human rights. In striving toward the rational ideal, the Protestant colonizing subject represents the colonized as mere objects who are not fully human because of their concern either with material things or due to their passionate belief compared to his civilized skepticism about any maxim of action or conviction not fully justifiable from the perspective of his abstract rationalism.

What the Protestant colonizing subject never questions is to what extent has their own paradoxical way of understanding humanity been resolved. Commitment to beliefs that do not square with the newly constructed essence of Protestant Christian humanism would be dismissed as savage, just like the pluralism of Islamic law was dismissed by European colonialists as anarchical. Moreover, it was considered as lacking the uniformity that qualifies Islamic law to merit “dignity” of the nation state and the constitutional foundation of the nation-state based on universal reason.<sup>28</sup>

Similarly, individual human rights were only recognized in so far as those humans were recognized citizens of a recognized nation state. In this vein, the sanctions imposed on certain nations cannot be deemed a case of human rights violations. Paradoxically, certain choices like a passionate belief in certain practices and sets of convictions can be seen as anti-human according to the yardstick of the skeptical secular human who fulfills the criterion of “citizen” in a liberal state. Further, there are certain rights and choices that may be deemed dispensable if they contradict with aligning a certain society with the values of the human-citizen who can serve as a recognized subject of a recognized nation state.<sup>29</sup>

### Islam’s Intermediary Orientation and Muhammad the Everyday Human

One of the most understudied areas in Islamic intellectual history is its theory of human nature, not only as was produced by the class of philosophers (*falāsifa*) who wrote critical receptions of Greek philosophy but among philosophical theologians (*mutakallimūn*), and Sufis, especially philosophical Sufis (*sufīyya mutafalsifūn*) like Ibn al-‘Arabī and legal scholars. More importantly no one questioned whether there are binding threads connecting their positions with each other. The binding thread among all these sciences was the commitment to find a solution to the question of whether or not the human is purely a mind or a body through subtle balance between the two natures. This radically contrasts with the Christian idealistic position on human agency that furnished the ground of the contemporary human discourse and informed its change from the modern through the post-modern era.

As per the famous philosopher, historian and sociologist ‘Abd al-Rahmān Ibn Khaldūn (d. 1406), the philosophical theology of (*kalām*) is concerned with the

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University Press, 1999).

27 Michel Foucault, Chapter 9 and 10, in *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage Book, 1994).

28 Wael Hallaq, Chapters 7 and 8, *Introduction to Islamic Law* (New York: Cambridge University Press, 2009).

29 Talal Asad, Chapters 4-6, in *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

duties of the heart/reason or the six articles of faith in Islam (the belief in God, His Angels, His Scriptures, His Prophets, Judgment Day, and destiny).<sup>30</sup> Historically, a spectrum of schools developed to address the intricacies of these six metaphysical concepts; however, three main trends among these schools prevailed: (1) the rationalists who tend towards idealism, (2) the traditionalists who tend towards literalism and empiricism, and (3) the dominant school, which took an intermediate path between rationalism and traditionalism. The intermediate position was represented by Ash'arī and Māturīdī schools of Sunni Islam.

In describing the Ash'arī school the leading intellectual historian and theologian 'Abd al-Qāhir al-Baghdādī (d. 1037) interestingly wrote that while the rationalist schools and the philosophers following the Greek tradition gave precedence to reason, the Ash'arī school gave precedence to the senses.<sup>31</sup> Al-Baghdādī did not mean that Sunni Ash'arī thinkers were radical materialists. To the contrary, most of the leading figures of this school took a highly critical attitude toward the materialism of the traditionalist. What he meant is that they took the balance between reason and senses very seriously toppling the bias of philosophy toward the ideality of formal rationality inherited from classical antiquity and early Christian theology. This is rather clear in the psychology of Abū Hāmid al-Ghazālī (d. 1111). Despite agreeing with Aristotle that reason is the light and that it is higher than the senses, al-Ghazālī argued that the balance between reason and the senses—or the world of light and that of darkness—is what is required for a perfect human. In radical contrast with Augustine's confession, al-Ghazālī does not call for a flight from the world of materiality. Rather human perfection exists through a balance between materiality and rationality.<sup>32</sup>

Islamic law takes this balanced view of human nature and its perfection more seriously *in concreto*. The encyclopedic legal scholar and prolific theologian Abū al-Ma'ālī al-Juwaynī (d. 1085) argued in his massive *Gyāth al-Ummam fī Iltiyāth az-Zulam* that defending the pluralism of legal schools, which correspond to different rational tendencies among people, is the main task that defines the essence of the sovereignty of the ruler of the society. For instance, he criticized the famous Abbasid Caliph al-Ma'mūn (d. 833), not for persecuting

the Sunni theologians even though al-Juwaynī was one of them; rather his criticism of al-Ma'mūn was for his insistence on imposing a particular school of thought on the public.<sup>33</sup>

According to al-Juwaynī, Islamic law (*fiqh*) is the body of rulings that represent the attempt of interpreting the rational universal maxims delineated in the Quran in the historical context. The rational hermeneutical spectrum represented by the four schools of Islamic law represent different attempts at striking a balance between the universal validity of these maxims and the specificity of the historical context in which such maxims are applied. It is this *balance* that kept, as Hallaq recently pointed out in agreement with al-Juwaynī, the Caliph for assuming any divine authority vis-à-vis the divinity of the King in medieval Christianity. The caliph is meant to protect and guard the legal and judicial pluralism rather than align with the institution incarnating God's power to ensure the execution of God's providence.

### III. Conclusion: Recommendations

The history of Christianity and its metamorphosis from the Catholic reception of Greek cosmology and natural psychology through protestant humanism explains many of the paradoxes of human rights discourse. It explains the radical dichotomy between idealism and materialism with a tendency toward pure idealism. Taking the Islamic intermediate position seriously can offer a fresh perspective on the conception of human rights. Upon thorough scrutiny it may be revealed that Islam has a completely different set of priorities. The following is recommended to start developing a Muslim-based human rights discourse:

1. Training offered by human rights organizations to human rights activists cannot only focus on social criticisms in the last few decades. Most of the theories of social and cultural criticism produced post-World War II reflect the crisis mentioned above without examining its roots and more importantly its western historical and religious specificity. This should be radically changed. Activists and specialists should be briefly trained on the problems embedded in such theories that supposedly ground the concepts of rights and freedom they advocate and the challenges they face. This

30 'Abd al-Rahmān Ibn Khaldūn, *Al-Muqaddima*, ed. 'Abd as-Salām ash-Shadādī (Casablanca: Dar al-Funūn wa al-Adāb, 2005), VII, 23-37.

31 'Abd al-Qāhir al-Baghdādī, *Usūl al-Dīn* (Istanbul: Matba'at al-Dawla, 1928), p.10-12.

32 Abū Hāmid al-Ghazālī, *The Niche of Lights*, trans. David Buchman (Provo: Brigham Young University Press, 1998), 32.

33 Ahmed Abdel Meguid, "Reversing Schmitt: The sovereign as a functional guardian and the peculiarity of the Islamic state of exception of in al-Juwaynī's dialectical theology," *European Journal of Political Theory*, <http://journals.sagepub.com/doi/abs/10.1177/1474885117730672>.

could be easily arranged in collaboration with experts in philosophy and other fields of humanities.

2. There should be more training not only in Islamic sciences per se—given their vastness and complexity let alone the mastery of the Arabic required for approaching them. Rather, training for activists in the field of human rights working in Muslim countries should consider the general characteristics of the Islamic perspective on the human and how it contrasts with the Protestant Christian perspective. This should also reset the priorities of such activism and its working agenda.
3. More emphasis should be placed on reviving Sunni *kalām* with a special focus on its intermediary orientation. This will be a rather challenging task. The traditionalist and rather dogmatic way of teaching *kalām* in most of the leading Sunni institutions like al-Azhar in Cairo precludes such a creative revival. Hence, I recommend using civil society organizations and independent educational centers in collaboration with qualified academics to undertake this task. Human rights activists, Muslim scholars, and journalists could all benefit from learning the fundamentals of *kalām* and how to use it creatively to address contemporary problems.
4. In the wake of the mounting criticism against the centralism and despotism of the modern state, one way to challenge restrictions on civil society and activism from an Islamic perspective is to revive the culture of pluralism in resolving domestic conflicts. Through proper training on Islamic law and its pluralistic structure, civil society organizations can promote training on and reviving already present methods for resolving civil conflicts. This can start by encouraging members of local communities to choose a legal school based on their personal orientation and then revive the methods of managing differences among different followers of the legal schools. This can be achieved without any conflict with state laws as long as it remains restricted to personal and civil rather than criminal conflicts.
5. Another legal and cultural convention that human rights activist should be educated on and strive to educate and promote in Muslim countries is the limited role of the sovereign. The sovereign, usually known as the Imam in Islamic literature, restricted himself to the defense and maintenance of the pluralism of the Sharia-governed society. The sovereign power and executive power of the state should have minimal roles in resolving domestic conflicts. In contradistinction from the modern liberal framework where the state may legally intervene in every aspect of the private life of the citizen, the Islamic frame of legal pluralism with its deeply decentralized orientation protects the intellectual and physical freedom of the individual through independent judiciary practices and schools that functions independent of the state and accommodate the different thinking orientations of individuals in the society.
6. Finally, another important cultural point inextricably related to the practice of *kalām* legal pluralism is the ethics of difference and debate. A whole genre exists in the Islamic tradition under the title the ethics of research and debate (*ādāb al-baḥth wa al-munāzara*). This genre should be revived as a basis for social dialogue and debate. Promoting, through civil society organizations, the idea embedded in Islamic history that all legal and theological opinions are rational judgments and not sacred impositions should serve as solid basis for accepting the culture of debate and accepting difference in society. Such promotion should be facilitated through reference to this well-established literature in the Islamic tradition instead of introducing the culture of debate and accepting difference and critical thinking as a western discovery.

# HEALING THE RUPTURE BETWEEN “ISLAMIC” AND “WESTERN” HUMAN RIGHTS

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By Asma T. Uddin

**H**uman rights are in danger in lesser or higher degrees in every nation in the world. Among these nations, majority-Muslim ones are regularly called out for a range of human rights violations, the most common perhaps being violations of gender equality and religious liberty. There is a range of reasons for this weak state of human rights. Authoritarian states—unfortunately common in the majority-Muslim world—too often manipulate religion to curtail rights. Supporting their cause is an entrenched philosophical and theological opposition to international human rights. According to this opposition, international human rights norms are inherently Western, Christian, or otherwise foreign to Islam, and might even be a colonizing tool used to control Muslims.

This dichotomy, however, is unnecessary and, more fundamentally, historically and philosophically false. There is nothing essentially “Western” about human rights, particularly if Western is meant to denote exclusivity. Existing scholarship demonstrates an Islamic foundation from which one can make a robust argument for human rights.

An early advocate of this idea of an inherent conflict was the Muslim journalist and activist Syed Abul A'la Mawdudi, who not only rejected the human rights standards at the United Nations (UN) as hopelessly Western, but also constructed a set of “Islamic” human rights based on the Quran and the traditions of the Prophet Muhammad.<sup>34</sup> This sort of rejection and proposal of a separate articulation of human rights is at the root of human rights declarations like the 1981 Universal Islamic Declaration of Human Rights and the 1990 Cairo Declaration of Human Rights. Both of these documents explicitly condition human rights on the sharia, though neither defines the scope, the framework, nor the methodology for understanding the sharia.<sup>35</sup>

Even those majority-Muslim states that have signed onto international human rights instruments like the International Covenant on Civil and Political Rights (ICCPR) still argue against the relevance and applicability of those rights in a Muslim context. The UN General Assembly adopted the ICCPR in 1966 as part of the International Bill of Human Rights, which also includes the Universal Declaration of Human Rights and another treaty protecting economic, social, and cultural rights. Countries that sign on to the treaty may state particular reservations, that is, they may specify aspects of the treaty that they will not comply with. Aside from such reservations, signatories are bound by the treaty’s terms, which provide broad protection for the right to life, freedom of religion, speech, and assembly, and the right to due process.

Indonesia is a signatory to the ICCPR and is bound by the treaty’s religious freedom provisions, which among other things states that “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” In other words, speech and actions reflecting religious belief can be circumscribed only where absolutely necessary. Despite being a signatory, Indonesia has failed to uphold those protections in its legal decisions, with judges expressing doubts about the religio-cultural relevance of the ICCPR to Indonesian society.

For example, in a 2010 case challenging the Indonesian Blasphemy Act, the Indonesian Constitutional Court largely disregarded the fact that ICCPR’s Article 18 pertaining to freedom of religion or belief is legally binding on Indonesia. The Blasphemy Act makes it unlawful to “intentionally, in public, communicate, counsel, or solicit public support for an interpretation of a religion . . . that is similar to the interpretations or activities of an Indonesian religion but deviates from the tenets of that

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34 Heiner Bielefeldt, “‘Western’ versus ‘Islamic’ Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights” *Political Theory* 28, No. 1 (Feb. 2000), <http://insct.syr.edu/wp-content/uploads/2013/03/Beilefeldt.2000.Cultural-Relativism-Critique.pdf>, 90-121.

35 “Universal Islamic Declaration of Human Rights,” Alhewar, September, 19, 1981, <http://www.alhewar.com/ISLAMDECL.html>; “Cairo Declaration of Human Rights,” fmreview, August 5, 1990, <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/cairo.pdf>



religion.”<sup>36</sup> The purpose of the act is to protect against “deviant” interpretations of religion and to protect believers from offensive statements about their faith. The act is an obvious violation of the ICCPR’s broad protection for the right to interpret and speak freely about one’s faith free from state control, yet the Indonesian court had no qualms about deriding these aspects of the treaty. In particular, it stated that these protections are inherently in conflict with the ethos of a religious, and specifically Muslim, society.<sup>37</sup>

Other states enter reservations at the outset. Pakistan ratified the ICCPR in June 2010 but then entered reservations to a number of the provisions, including Article 3 on gender equality and Article 18 on freedom of religion or belief. For both, Pakistan insisted that the right was applicable only to the extent it was “not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.”<sup>38</sup>

Many majority-Muslim states have also entered reservations to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), a treaty adopted by the UN in 1979 that is dedicated to eradicating discrimination against women. Of the fifty-four members of the Organisation of Islamic Cooperation that ratified CEDAW, only twenty-nine ratified it without reservations.<sup>39</sup> Not all of these reservations are based on sharia, but some are. Libya’s reservations encapsulate those: “[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah.”<sup>40</sup>

Given this opposition to international human rights that is furthermore reflected pragmatically in religion-based reservations to human rights treaties and relevant judicial opinions, a central question to human rights advocacy and policy is how to break the impasse.

## Healing the Rupture

### Challenging Essentialist Conceptions of Human Rights

The solution is no doubt complex and multifaceted, but a first step is to question the foundational assumption of human rights as solely Western and therefore foreign to Islam. Human rights did not result organically from Occidental history and culture, nor is the Occidental tradition the exclusive basis for human rights. Human rights reformers must challenge the essentialist conception of human rights as Western and also highlight authentic Islamic bases for the same rights.

In his piece “*Western versus Islamic Human Rights Conceptions?*,” the United Nations Special Rapporteur on Freedom of Religion or Belief Heiner Bielefeldt disputes essentialist claims about human rights as Western. He argues that, while the “historic breakthrough” of human rights took place in North America and Western Europe, a multiplicity of motifs—“humanitarian, emancipatory, egalitarian, and universalistic”—led to the development of modern human rights. This multiplicity counters an idea of a monolithic Occidental tradition and reveals the different, at times antagonistic, movements that are part of that tradition.

Among the motifs typically credited as central to the development of international human rights is the idea of “spiritual unity of all humanity.” The Bible reflects this principle in its idea of all humans as created in the image of God. The principle can also be found in Stoic philosophy. Marcus Aurelius, the Roman emperor and prominent Stoic author, explained that all human beings are tied together not by physical bonds but by their common spirituality. The Protestant Reformation, too, emphasized spiritual equality.

But as Bielefeldt points out, none of these sources are without their contradictions. For example, St. Paul selectively interpreted the Biblical idea of human equality, actively upholding legal inequality, i.e., slavery: “Let every man abide in the same calling wherein he was called” (1 Corinthians 7:20). Thomas Aquinas justified

36 Blasphemy Act, art. 1.

37 Asma T. Uddin, “The Indonesian Blasphemy Act: A Legal and Social Analysis” in *Profane: Sacrilegious Expression in a Multicultural Age*, ed. Grenda Christopher S. Grenda, Chris Beneke, and David Nash (University of California Press, 2014), <http://www.jstor.org/stable/10.1525/j.ctt7zw3fb.13>, 223-48.

38 *Pakistan’s Reservations to the International Covenant on Civil and Political Rights*, Democracy Reporting International, July 2010, [http://democracy-reporting.org/newdri/wp-content/uploads/2016/02/dri\\_briefing\\_paper\\_4\\_-gop\\_reservations\\_on\\_iccpr.pdf](http://democracy-reporting.org/newdri/wp-content/uploads/2016/02/dri_briefing_paper_4_-gop_reservations_on_iccpr.pdf).

39 *Cedaw and Muslim Family Laws: In Search of Common Ground*, Musawah, April 2012, [http://www.musawah.org/sites/default/files/CEDAWMFLReport2012Edition\\_1.pdf](http://www.musawah.org/sites/default/files/CEDAWMFLReport2012Edition_1.pdf).

40 Ibid.

slavery as a necessary consequence of the original sin. Aurelius, too, failed to challenge slavery.

And while the Protestant Reformation emphasized spiritual equality, one of its major figures, Martin Luther, was “anxious not to conflate” spiritual equality with legal equality. Religious liberty was also a contested notion—until the 1960s, the Catholic Church and other Christian churches openly and harshly rejected religious liberty as one of the “grave errors of the modern era.”<sup>41</sup>

Moreover, other cultures can and have produced concepts akin to international human rights. Numerous scholars, for example, have found roots for human rights in Islamic sources. Mohammad Hashim Kamali, in particular, provides a detailed and compelling account in his book series, *Fundamental Rights and Liberties in Islam*. His *Freedom of Expression in Islam* volume presents evidence for a broadly construed freedom of expression, such as the Quranic encouragement of productive debate, the centrality of “freedom of opinion” in Islamic political thought, and hadith that teach that no one is beyond criticism and that an individual has the fundamental right to argue his or her concerns to religious and political leadership. Kamali’s scholarship also covers apostasy and blasphemy, making a compelling case from Islamic foundational texts that modern-day anti-blasphemy and anti-apostasy laws in several majority-Muslim states are not in any way essentially Islamic.

### Emphasizing Muslim Impact on Modern Human Rights Instruments

Another part of the narrative about human rights as a Western construct relates to the drafting process of human rights instruments such as the ICCPR and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which was passed by the UN to outline the full scope of human rights specifically pertinent to freedom of religion.<sup>42</sup> Muslim actors were part of the process and their participation impacted the final draft of these human rights provisions. This fact must be remembered to effectively push back against allegations that modern human rights are entirely a foreign imposition on Muslim states.

One example of the impact of Muslim state representatives is Article 18 of the ICCPR, which, again, covers freedom of religion or belief. 18(1) reads:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The “have or adopt a religion” is the direct result of a negotiation with majority-Muslim states, such as Egypt and Saudi Arabia; these states contested the unequivocal right to “change” one’s religion because they feared such language would encourage atheism and provide cover for missionary work. The vague “have or to adopt” language that is now in the ICCPR emerged as a compromise between majority-Muslim states on the one hand and, on the other, non-Muslim state representatives who wanted an explicit right to change one’s religion.

Muslim negotiators also impacted the final language of Article 18(2): “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Instead of focusing on the right to change religions, the provision emphasizes the prohibition on governments from coercing individuals to adhere or not to adhere to a particular religion.<sup>43</sup> Because this position is in line with Quran 2:256, “There is no compulsion in religion,” it was easily accepted by the representatives of majority-Muslim states.

In addition to the ICCPR, the 1981 Declaration on Religion or Belief also has the imprint of Muslim actors. Article 1(1) of the declaration reads:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

As with the original versions of Articles 18(1) and (2) of the ICCPR, the original version of Article 1(1) was more

41 Heiner Bielefeldt, “‘Western’ versus ‘Islamic’ Human Rights Conceptions?” *Political Theory* 28, No. 1 (2000), <http://insct.syr.edu/wp-content/uploads/2013/03/Beilefeldt.2000.Cultural-Relativism-Critique.pdf>, 90-121.

42 United Nations General Assembly Resolution 36/55, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55 (November 25, 1981), <http://www.un.org/documents/ga/res/36/a36r055.htm>.

43 Khaliq, U. 2012. Freedom of religion and belief in international law: a comparative analysis. In: Emon, A. M., Ellis, M. and Glahn, B. eds. *Islamic Law and International Human Rights Law*. Oxford: Oxford University Press, pp. 183-225.



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explicitly protective of the right to change one's religion. The lack of express reference in the final, adopted language was necessary "to ensure the support of Muslim states . . . which was crucial to the Declaration's adoption."<sup>44</sup>

### Rooting Human Rights Activism in Sharia

As described briefly above, many majority-Muslim states enter reservations to human rights treaties on the basis of sharia. This practice is, however, becoming less frequent; changing politics in some states is making it more difficult for governments to hide behind religious law. Instead, they now point to domestic law that may or may not incorporate sharia elements.<sup>45</sup> To the extent sharia is even invoked, it is to make the point that Islamic law and international human rights are in consonance with one another.<sup>46</sup> A continued focus on this consonance is critical to moving the human rights conversation forward.

Compatibility between sharia and human rights is at the center of much human rights activism by Muslim groups in majority-Muslim states. Consider, for example, Musawah, a civil society organization founded in February 2009 in Kuala Lumpur, Malaysia. The group brings together "[nongovernmental organizations], activists, scholars, legal practitioners, policy makers and grassroots women and men from around the world" in what it calls a "global movement of women and men who believe that equality and justice in the Muslim family are necessary and possible."<sup>47</sup> Musawah's work is entirely premised on the promise of a robust conception of human rights that is authentically Islamic. There has also been important reform in Muslim family law, for example, in Morocco where activists have successfully used religious arguments to liberalize the law.<sup>48</sup>

In the religious liberty space, Islamic scholars like the India-based Maulana Wahiduddin Khan, Mauritanian scholar Shaykh Abdallah Bin Bayyah, and others are actively engaged in scholarship that roots the ICCPR

and the Universal Declaration of Human Rights in Islamic tradition. Among other issues, Khan has actively pushed back against narratives that punishment for blasphemy is Islamically justified: "It is tantamount to defamation of Islam to say that Islam cannot give a reason-based response, and that is why it endeavors to inflict physical punishment on those who make any kind of negative remark against the Prophet."<sup>49</sup>

Shaykh Abdallah bin Bayyah, on his part, convened a group of more than two hundred religious scholars in January 2016 to discuss the rights of religious minorities in majority-Muslim states. At the conclusion of the summit, the scholars issued the Marrakesh Declaration, which aligned the principles of the ICCPR with Prophet Muhammad's treatment of minorities, as reflected in his Charter of Medina. Bin Bayyah's engagement is ongoing, as he now holds conferences and roundtables across the world centered on the declaration and its effective implementation.

### Recommendations

Policy makers should help facilitate awareness of (1) Muslim involvement in the articulation of international human rights norms; and (2) viable Islamic scholarly arguments that support a robust conception of human rights. This awareness can be facilitated at the local, national, and international levels through educational curricula and media programming. To help translate the scholarship into concrete steps, policy makers can work with local human rights experts and religious scholars to identify problematic laws, the purported religious bases for the laws, and how traditional scholarship can be brought to bear in changing those laws. In working on these issues, policy makers must be careful to work with indigenous groups already engaged in relevant initiatives and to expand the range of participants to include youth, women, and others traditionally excluded from such work.

44 Ibid.

45 Ann Elizabeth Mayer, "Islamic Reservations to Human Rights Conventions: A Critical Assessment," *Recht van de Islam* 15 (1998), [http://www.verenigingrimo.nl/wp/wp-content/uploads/recht15\\_mayer.pdf](http://www.verenigingrimo.nl/wp/wp-content/uploads/recht15_mayer.pdf), 25-45.

46 Ibid.

47 "About Musawah," Musawah, <http://www.musawah.org/about-musawah>

48 John Hursh, "Advancing Women's Rights Through Islamic Law: The Example of Morocco," *Berkeley Journal of Gender, Law & Justice* (September 29, 2012): 257.

49 Maulana Wahiduddin Khan, "Blasphemy and The Islamic Way," *Times of India*, January 10, 2011, <http://www.cpsglobal.org/content/blasphemy-and-islamic-way>. See also Khan's response to violent protests against Salman Rushdie: Maulana Wahiduddin Khan, "A Conversation With: Maulana Wahiduddin Khan," *New York Times*, January 27, 2012, <https://india.blogs.nytimes.com/2012/01/27/a-conversation-with-maulana-w-khan/>.



SECTION II:  
Islamic Tools for Defining and Practicing  
Human Rights

# ISLAM AND THE MIDDLE WAY: TOWARDS A CONSTRUCTIVE ENGAGEMENT WITH THE HUMAN RIGHTS DISCOURSE

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Shaykh Seraj Hendricks

*“And thus we have appointed you as a middle nation, that you may be witnesses over other people.”<sup>50</sup>*

In the Quran, the concept of a “middle nation” presupposes a “middle way”—an orientation meant to characterize the Muslim community as inheritors of the Prophetic message. This orientation, if correctly applied, would typify how Muslim communities would engage with the human rights discourse in the twentieth and twenty-first centuries, whether they are Arabs, Iranians, Europeans, South Asians, Southeast Asians, Africans, or otherwise. That discourse, after all, has its own orientation, or perhaps we might call it a “worldview.”

But what is the middle way? In religious terms, the middle way is best conceived as a theocentric condition in which a relational, but dynamic, balance exists between God, society, the individual, and the universe. This condition finds its fruition in the so-called vertical plane of spirituality and the horizontal plane of the human’s earthly condition. In Islamic terms, humans are conceived as theomorphic beings (of God’s nature)—and thus their sense of responsibility ought to be a function of this divine commitment.

“Whosoever engages a good cause,” says the Quran, “will have the reward thereof, and whosoever engages in an evil cause will bear the consequences thereof.”<sup>51</sup> This theocentric and multidimensional scheme of religious activity provides humans space within themselves to balance social, psychological, and spiritual conditions in order to find equilibrium. “Indeed,” says the Quran, “We have sent our messengers with clear proofs, and revealed with them the Scripture and the Balance that humankind may observe right measure [justice].”<sup>52</sup> Here the reference to “may observe”

implies a dynamic and active engagement in human attempts to establish “balance” in their lives.

Thus, the middle way is not merely a static ideal but is—in and of itself—both a vitalized and dynamic way of being. It is not a matter of pure intellection as it is one of attitude and orientation. While the concept of the middle way may be epistemically informed with ideas of justice, fairness, clemency, mercy, compassion, love, respect, and tolerance, it remains more vitally and more integrally an ontological condition. Through the cultivation and internalization of the aforementioned qualities and virtues, humans are able to imbibe that productive dynamism of that middle way mentioned in the Quran.

## The Integrals of Human Relations

Understanding the *middle way* became crucial to conceptualizing how Muslims, given to an Islamic worldview, might engage with the human rights discourse—and how Muslims might further policies in law or education as a result. The iconic Egyptian scholar, Muhammad Abu Zahra, extrapolated ten vital integral values that are essential to a harmonious social, political, cultural, and religious understanding of human relations based on his readings of the Muslim religious canon and in line with the need to maintain a living and dynamic form of normative Islam. Abu Zahra’s work represents an excellent attempt to make explicit certain guidelines, summarized below, that are endemic throughout the Islamic tradition:

### 1) Human Dignity

Human dignity is not meant to preserve a particular race, nation, or any particular class of people. The Quranic verse, “And We have bestowed honor upon all the children of Adam”<sup>53</sup> is quite emphatic about this.

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50 Yusuf A Ali, *The Holy Quran: Translation and Commentary* (Durban: Islamic Propagation Centre International, 1946); The Quran, 2:143.

51 The Quran, 4:85.

52 The Quran, 57:25.

53 The Quran, 17:70.

This verse—and others like it—are manifestly evident in the various Prophetic traditions (ahadith) as well.

### 2) All Human Beings Constitute a Single Community.

“O people, We have created you male and female and made you into nations and tribes that you may come to know one another (not that you may despise one another). Indeed, the most honored in the sight of Allah is the most righteous amongst you.”<sup>54</sup>

“O people reverence your Lord Who created you from a single essence and created of like nature the mate; and from them two scattered forth countless men and women. Reverence Allah about whom you ask and demand so much; and reverence the wombs that bore you; for Allah ever watches over you.”<sup>55</sup>

There are other verses (ayat) that could be mentioned from the Quran that would make these points clear as well. These two, nevertheless, exemplify the notion that humanity comes from a single essence, and thus unjust discrimination between human beings cannot be viewed as justified. Rather, differences between individuals may be seen as a way for people and peoples to know each other, not so that they might despise one another.

### 3) The Importance of Human Cooperation

The Quran states, “Assist one another in righteousness and piety; but do not assist another in wrongdoing and rancor.”<sup>56</sup>

The idea of cooperation in Islam is not confined to Muslims. This is evident from two well-known incidents. The first occurred in Mecca before the Prophet Mohamed received his revelations, and the other occurred during the Madinah period.

The former incident is referred to as the *Hilf al-Fudul* (or Alliance of the Virtuous). This alliance of notables in Mecca was established at the house of Abdallah ibn Jud’an to support a foreign merchant whose Meccan client had refused to pay him for merchandise he purchased. The alliance succeeded, and the merchant received his payment. The Prophet Mohamed was

present at this gathering. Many years later—during the days of his Prophethood—he recalled this incident in the company of his companions and said, “I was present at the house of ‘Abdalla ibn Jud’an when this alliance was formed. I was overjoyed with the formation of this alliance (to assist the victim of injustice) and had I been invited to the same during the days of Islam, then I would have responded.”<sup>57</sup>

The latter event is embodied in what is often referred to as the Constitution (or Charter) of Madinah. This charter, or socio-political code, was drawn up during the first year of the Prophet Mohamed’s arrival to Madinah. At the time, the socio-political environment in Madinah was extremely unstable. For many years, wars had raged between the two main Arab tribes of the *Aws* and the *Khazraj*. Even the two “mother” tribes of the Jews—the *Banu Nadhir* and *Banu Quraiza*—had been engaged in seemingly endless internecine conflicts. Due to the urgent need for stability and cooperation within that anarchical society, the Madinah charter was born. For years, the Madinah charter succeeded in maintaining stability and peace amongst the once warring factions.

### 4) Tolerance and Respect

The Quran states, “Good and evil can never be equal. Repel evil with what is better, than indeed, he between whom and you were enmity would become as if he were an intimate friend.”<sup>58</sup>

Elsewhere the Quran says, “We created not the heavens and the earth, and all that is between them, except for just and truthful ends; and indeed, the Final Hour is surely coming, so overlook any human faults with gracious forgiveness.”<sup>59</sup>

Here, we are reminded in God’s Divine word that forgiveness and forbearance are superior qualities for the human being to uphold. Even where faults are involved, so too is tolerance recommended.

### 5) Freedom

Abu Zahra addresses three important concepts when it comes to freedom. First, he notes the natural right of any individual to personal and individual freedom.

54 The Quran, 49: 13.

55 The Quran, 4:1.

56 The Quran, 5:2.

57 Muhammad Abu Zahra, (n.d): *al-‘Alaqa al-Dawliyyah fi l-Islam*, Dar al-Fikr al-‘Arabi, 25.

58 The Quran, 41:34.

59 The Quran, 15:85.

From the Islamic point of view, he observed that true freedom is contingent on the individual's ability to emancipate themselves from the shackles of prejudice and unbridled desires.<sup>60</sup> In the absence of the latter, personal freedom loses much of its meaning. This perspective finds its resonance in many verses of the Quran. In one short verse the Quran states, "Those will prosper who purify themselves"<sup>61</sup> namely from all forms of bigotry, prejudice, malicious envy, hatred, etc.

Second, he discusses the evident freedom of religion and belief. To this end there are numerous directives in the Quran. Amongst them are the following:

- There shall be no compulsion in religion.<sup>62</sup>
- Had it been the wish of your Lord, then all of humanity would have believed. Do you (Mohammad) then wish to coerce people into becoming believers?<sup>63</sup>
- To you your religion, and to me mine.<sup>64</sup>
- And if they turn away (from Islam), then know that We have not sent you as a guardian over them. Your duty is but to convey the message.<sup>65</sup>

Third, he explores the universal right of self-determination, which is discussed in relation to the question of freedom of religion and belief in Islam.

Abu Zahra references a telling moment of 'Umar ibn al-Khattab while on a diplomatic mission in Jerusalem. He was close to the Church of the Holy Sepulcher when it was time for one of the five mandatory prayers. He chose to perform the prayer outside the church. On being asked whether it was prohibited to perform the prayer inside the church, his response was, "No. It is not. But I am afraid that ignorant Muslims would come after my time and declare the church a mosque on the grounds that I performed my prayer inside the church."<sup>66</sup>

Because of these and many other similar incidents, the quote, "We have been commanded to leave them free to practice their beliefs" was considered—in classical Muslim scholarship—as a matter of Islamic consensus.<sup>67</sup>

### 6) Moral Excellence

The concept of moral excellence encompasses the entirety of humanity, regardless of race, color, or creed. According to Abu Zahra,<sup>68</sup> the importance of maintaining moral excellence and integrity is underscored by the Quranic verse, "And fight those in the way of God (only) those who fight you. But do not transgress (any limits) for God does not love those who transgress."<sup>69</sup> The Quran emphasizes that during times of war, transgressions are more likely to occur. The question that begs itself, therefore, is that if transgressions are prohibited during times of warfare, then would the prohibition not be greater during times of peace and stability?

For contemporary Muslim scholarship, it is this kind of evidence that highlights the gravity and depravity of modern-day radical groupings, such as, *inter alia*, Boko Haram in Nigeria, the infamous so-called "Islamic State" (ISIS) in Iraq and Syria, and al-Shabab, the Somali extremist group. In a positive sense, it is also clear that respect of fundamental rights for all is intrinsic to the Islamic worldview, which lays down an excellent basis for future engagement with the human rights discourse.

### 7) Justice

The word justice is the third most mentioned word in the Quran. According to Naqvi,<sup>70</sup> it occurs more than a thousand times; the most mentioned word in the Quran is Allah followed by the word knowledge.

The Quran is emphatic about this concept, to the point where it states, "Do not allow the hatred of others

60 Muhammad Abu Zahra, (n.d): *al-'Alaqa al-Dawliyyah fi l-Islam*, Dar al-Fikr al-'Arabi, 27-28.

61 The Quran, 87:14.

62 The Quran, 2:256.

63 The Quran, 10:99.

64 The Quran, 109:6.

65 The Quran, 42:48.

66 Abu Zahra, (n.d): *al-'Alaqa al-Dawliyyah fi l-Islam*, Dar al-Fikr al-'Arabi, 30.

67 Ibid.

68 Ibid, 33.

69 The Quran, 2:190.

70 Syed Nawab Haider Naqvi, *Ethics and Economics: An Islamic Synthesis* (UK: The Islamic Foundation, 1981), 86.



against you to cause you to swerve from justice. Be just, for that is closer to piety.”<sup>71</sup>

According to Abu Zahra,<sup>72</sup> one of the Prophets’ principal roles was to disseminate justice amongst their respective people. This view is supported by the Quran where it states, “We have sent (all) our apostles with clear signs and sent down with them the Book and the Balance so that people may stand firm in justice.”<sup>73</sup>

To further imprint the imperative nature of justice, the Prophet Mohammed in a rare moment of invoking retribution upon another said: “O God, he who takes charge of an affair of the affairs of my community (ummah) and treats them severely, be severe towards him. But he who takes charge of an affair of the affairs of my community and acts graciously towards them, be gracious towards him” (Sahih Muslim).

## 8) Mutual and Equitable Treatment of One Another

According to the following hadith, “Engage and treat others in a manner in which you yourself wish to be engaged and treated”<sup>74</sup> exemplifies the importance of mutual and equitable treatment and attitude towards others.

However, bigotry, prejudice, exclusivity, and hostility—phobias in a variety of shapes and hues—appear to have emerged as the hallmarks of large tracts of humanity, evident in those who harbor a visceral hatred of Islam and some Muslims who mistake the grist for the wheat, from the Islamic point of view—the exoteric contingencies for the cardinal verities. It is one thing to maintain a detached and confident distance from objective criticism; it is quite another to collapse an entire worldview—founded upon a universal edifice of purposive spirituality—into an obscurantist pit of regressive rigidity.

The Quranic response to such internecine and inter-faith hatred and hostility is quite emphatic:

Had it not been for God’s repelling some people by means of others, monasteries, churches, synagogues, and mosques, wherein the name of God

is oft mentioned, would assuredly have been destroyed. God will certainly aid those who aid His cause. Indeed, Allah is full of Strength, Exalted in Might.<sup>75</sup>

## 9) Fulfilment of Promises and Transactions

The breaking and revoking of contracts, promises, treaties, and transactions already made is severely frowned upon by Islam. Once again, these do not apply only to Muslims. This notion asks for a Muslim’s promises and commitments to any person, regardless of race, color, creed, or nationality, to be upheld.

The Quran states:

And fulfil the covenant of God when you have made a covenant, and do not break your oaths after you have confirmed them. Indeed, you have made God your surety, and God has knowledge of all things.<sup>76</sup>

The Prophet Muhammad also said, “Have I not informed you about who the best of you are? The best of you are those who fulfil their promises and contracts.”<sup>77</sup>

## 10) Love, Mercy and the Prevention of Corruption and Immorality

The Sahaba (companions of the Prophet Mohammed) once said to the Prophet, “O Messenger of God, you speak so much about mercy, but we are merciful towards our spouses and our children.” To this, the Prophet replied, “(Understand) that this is not the only form of mercy I speak about. The mercy I intend is one that embraces all creation.”<sup>78</sup>

At the macro level, the Quran strongly advocates caution, particularly with respect to those whom Muslims might regard as their enemies.

The Quran states:

It may be that God will bring about love and friendship between you and those whom you regard as your enemies. For God has power over all things; and God is Forgiving, most Merciful.

71 The Quran, 5:9.

72 Muhammad Abu Zahra, (n.d): *al-'Alaqa al-Dawliyyah fi l-Islam*, Dar al-Fikr al-'Arabi, 34-35.

73 The Quran, 57:25.

74 Abu Zahra, (n.d): *al-'Alaqa al-Dawliyyah fi l-Islam*, Dar al-Fikr al-'Arabi, 36.

75 The Quran, 22:40.

76 The Quran, 16:91.

77 Abu Zahra, (n.d): *al-'Alaqa al-Dawliyyah fi l-Islam*, Dar al-Fikr al-'Arabi, 41.

78 Sayyid Muhammad Al-Maliki, *al-Insan al-Kamil*, (Jeddah, 1990).

God does not forbid you from respecting those who do not declare war against you because of your religion; nor those who drive you out of your homes, to deal kindly and justly with them.

God only forbids you with regard to those who fight you because of your faith and who expel you from your homes, from turning to them for friendship and protection. Indeed, it is those who turn to them (under these circumstances) who commit a grievous wrong.<sup>79</sup>

### Conclusion

In the twenty-first century, there is a vast scope to re-excavate a wholly universalist paradigm within a normative and rooted Islamic discourse. Despite the abuses visited upon Muslim communities via colonialism and different types of imperialism, there remains a need within the Muslim world to emerge from a blighting parochialism that has imprisoned them since the early days of colonialism—and partially as a result of it. Muslim rulers themselves are hardly innocent in that regard, while we simultaneously must recognize that various Muslim communities are abused from within and most certainly from without. The correct understanding of the Muslim identity, historically and normatively,

is predominantly ethical and spiritual in nature, and not national and ethnic.

But these kinds of normative ethical imperatives become entrenched through one avenue—*tarbiya*,<sup>80</sup> a type of educational enterprise that must become embedded within Muslim education modes as they are already implicit within those modes. Given the challenges of the twenty-first century, *tarbiya* must become explicit, from a young age onward within Arab societies, but also amongst other—within all Muslim educational structures, so that the “Islamic Worldview” (as per the works of the distinguished Malaysian scholar, S. M. Naquib al-Attas) is deeply and widely embedded. Only once *tarbiya* is explicitly stated and implemented, Muslims will be able to engage effectively and constructively with the human rights discourse, from a perspective that is rooted within their own ethical universe. If that is done, then a constructive and thorough critique of the human rights discourse can be carried out, while simultaneously upholding values that are common. Thus, as societies and communities, we might ensure that injustice and abuse, whether carried out by non-Muslims or by Muslims themselves, are diminished, and preferably eradicated. And as the sages and scholars of the Muslims have always insisted: God, alone, knows best.

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79 The Quran, 50:8-9.

80 *Tarbiya* is Arabic for linguistic derivative of the word Rabb (Lord). Colloquially, it means “to raise,” and it denotes a comprehensive process of personal progress, whereby an individual grows spiritually, intellectually, and socially to achieve a godly life.

# RIGHTS IN ISLAMIC LEGAL WORKS

Ibrahim El-Houdaiby

To write about human rights in Islam is to deliberately step into a minefield. Like other Islam-related topics, it is an activity that involves using a limited conceptual language to represent an “other” that speaks a different language and “articulate[s] itself conceptually, socially, institutionally and culturally in manners and ways vastly different from those material and non-material cultures that produced modernity and its Western distinct traditions.”<sup>81</sup> In the field of rights, the modern episteme assumes the nation-state to be the ultimate form of organized collective life and the defender of rights. It therefore conceptualizes these rights through the language of law (read: state law), the leitmotif of the modern humans. The state, so central to today’s conceptions, was simply absent from the legal thinking of Muslim jurists writing between the eighth and nineteenth centuries. Not only did this absence contribute to a different understanding of law, but it also, and perhaps consequently, gave rise to a different language through which rights were articulated. Attempting to comprehend this conception of rights through a distinctly modern (and largely Latin) academic language therefore entails significant hardships. Notwithstanding these hardships, the stakes of such an activity remain high.

For many of today’s Muslims—who constitute around 24 percent of the world’s population—Islam and its

sharia<sup>82</sup> remain an important source of religious and moral authority. These Muslims, however, live in modernity,<sup>83</sup> through which they relate to their tradition and are forced to negotiate their way between these different languages in their pursuit of a good, moral life. This is a negotiation that leads to a variety of outcomes, ranging from full endorsement of the status quo and subordinating Islam with its sharia, to resorting to sheer violence to restore “Islamic order.” Also at stake is preserving a platform, an alternative worldview from which to critique the modern condition and identify its shortcomings, and pave the way for material and spiritual survival, while appreciating the achievements of the collective struggles and human beings.

This paper will outline the foundations of Muslim legal scholars’ (fuqaha, sing. faqih) conception of rights,<sup>84</sup> and identify a set of important questions and points of contention. It highlights some of the possible implications of the fuqaha’s conceptions, especially in the fields of criminal law and the “war on terror,” where that usually dismissed perspective can help improve the state of human rights.

## The Foundations of Rights in Islam

At the heart of fuqaha’s conception of rights is the theological conception of God as both omnipresent

81 W. Hallaq, *Sharia: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009).

82 The term “sharia” is often (mis)translated as Islamic law. This translation is problematic in many ways. Importantly, as Hallaq argues, “the very use of the word law is a priori problematic; to use it is to project, if not superimpose, on the legal culture of Islam notions saturated with the conceptual specificity of nation-state law, a punitive law that, when compared to Islam’s jural forms, lacks (note the reversal) the same determinant moral imperative” (see Hallaq, *Sharia*, 2).

83 The term “modernity,” with its twin terms “modernization,” “modern,” etc., are admittedly problematic and mean different things for different scholars. In this paper, I use the term to designate the ensemble of technologies and institutional organization that originated through the (uneven) interaction between Europe and its colonies, particularly in the nineteenth century. For the purpose of this paper, the most important material manifestation of modernity is the modern state.

84 While reflecting mainstream views in the *Shafi’i* legal school (one of the four main Sunni legal schools), the paper relies primarily on the works of the late medieval Egyptian jurist Ibrahim al-Bajuri (1786-1861). In the words of Spevack, he was an “archetypal scholar,” a learned *Shafi’i* jurist, Ash’ari theologian, and *Naqshbandi* Sufi of an authoritative voice within Sunni Islam’s discursive tradition. As such, his life and works were “normative, exemplifying what many of the major premodern Sunni scholars and institutions stood for.” Further, al-Bajuri was *Shaykh al-Azhar* from 1847 until his death in 1861. His works (mostly commentaries on works of earlier scholars, written between 1807 and 1822) outlived those of his contemporaries, “especially in *Shafi’i* fiqh and Ash’ari Usul al-din.” His magnum opus, the 1842 *Hashiya ‘ala sharh ibn al-Qasim al-Ghazzi ‘ala matn Abi Shuja’* (A gloss on Ibn al-Qasim al-Ghazzi’s commentary on Abu Shuja’s text) was written at the cusp of the modern era, at a time when traditional schools of *fiqh* and theology were still “taken as the norm, before major reformist tendencies had spread to the degree that they did shortly thereafter.” In many ways, it is the seal of the traditional genre of *fiqh* manuals, and was followed only by the likes of Abduh and al-Afghani challenging this entrenched tradition to its core at a time when its very unity was dismembered. In his manual, al-Bajuri operates “within a connected tradition whose pedagogy dictates that one study and be firmly rooted in the tradition, yet also offer a service to his contemporaries by clarifying, or in some cases, challenging, the works of previous authors.” His is therefore not merely a voice within the tradition, but rather a highly authoritative one. See A. Spevack, *The Archetypal Sunni Scholar: Law, Theology and Mysticism in the Synthesis of al-Bajuri*, PhD Dissertation, Boston University, 2008. While al-Bajuri’s *Hashiya* serves as the primary legal reference for this short paper, it is supplemented by other (and earlier) legal works, from the *Shafi’i* and other legal schools, to fill in theoretical gaps whenever necessary. Notably, however, the exclusive focus of this paper is the fuqaha’s conception of rights, which is only one (albeit an important one) of Islam’s discourses. A somewhat different conception could be traced through Sufi discourses.

and the sole and ultimate owner of the universe. In Chapter 5, verse 120, the Quran states that to God “belongs the dominion of the heavens and the earth and whatever is within them.”<sup>85</sup> Far from rhetorical, this theological conception entails rights. While human ownership and rights are taken seriously by fuqaha, even a quick survey of fiqh manuals makes clear that God’s dominion places real restrictions on property rights.<sup>86</sup> Ownership by humans is understood to be contingent, temporary, and entailing the right to dispose—only within the dictates of God’s ownership. And so unlike the Euro-Christian God of enlightenment, sited apart in the supernatural, there is no space in the fuqaha’s conception for “nature” as profane material. Rather, it is produced, owned, and continuously sustained by God. God, in other words, is the real and ultimate owner, while humans are designated by Quran as viceroy (2:30).

From this theological conception follows the legal categorization of rights into the “rights of God” (huquq Allah) and the “rights of humans” (huquq al-‘Adamiyyin). And because God’s dominion is all-encompassing, the former category subsumes the latter. Legal discussions of homicide are a case in point. In conceptualizing the crime, jurists insist that the culprit transgresses three times. He violates God’s right by damaging His creation; violates the victim’s right by taking their soul, and violates their kin’s right by depriving them of their existence.<sup>87</sup> A transgression on the rights of another human, that is, is at the very least a double violation of rights: it entails the violation of the immediate sufferer’s rights but also a violation of the rights of God as both creator and the lawgiver.

The name given to the fuqaha’s category of rights of humans can be misleading. It does not represent a universal set of rights, but rather legal claims made by certain individuals against others’ violations and transgressions on their property (mal) or selves (anfus, sing. nafs). Only the injured and their legal representatives can claim these rights. Successfully proving a violation in court usually results in financial and/or corporal compensation/punishment. It is a domain of legal claims that allows (but does not encourage) the plaintiff to pursue compensation or punishment with dispute and avarice (al-mukhasama wal-mujadalah),<sup>88</sup> and therefore necessitates a meticulous weighing of individuals’ claims against one another.

This legal domain is juxtaposed to two others. First (and, significantly, of less importance) is the de facto domain of sultan law,<sup>89</sup> concerned primarily with the maintenance of public order and therefore expandable in moments of crisis, posing a potential threat to human rights. Scholars argue, however, that sultan law code was only “absolute with regard to the ruler himself and his men,”<sup>90</sup> and historical studies make clear that the expansion of this legal domain was always exceptional: it was limited to instances of “civil strife,” short-lived, and concerned primarily with restoring the peace.<sup>91</sup> Notably, the fuqaha’s discussions of this domain are largely restricted to attempts to circumscribe it.<sup>92</sup> Equally important is the fact that rights were not defended only by the state, for the law (if sharia could ever be translated as law) was not necessarily tied to the ruler or the central authority.<sup>93</sup> As such, even at moments of exception, basic rights remained intact.

85 Unless otherwise stated, translations from Quran and *fiqh* manuals are the author’s.

86 Examples of these restrictions on ownership rights include, but are not limited to, a. *shuf’a* (sale contract preemption), which restricts the owner’s right to dispose of his land and/or share in partnership; b. inheritance laws, which define heirs’ shares irrespective of their or the deceased’s will, with the latter’s power to dispose being restricted to one-third of his estate; c. *zakat* (obligatory wealth tax), a share of property automatically transferred to the poor’s ownership at the end of the financial year; and d. Quranic and Prophetic restrictions on the domain of the ownable, leaving some life essentials, including water, for example, communal.

87 I. al-Bajuri, *Hashiyat al-Shaykh Ibrahim al-Bajuri ‘Ala Sharh al-‘Allama ibn-Qassim al-Ghazzi ‘Ala Matn Abi-Shuja’* (Beirut; Dar al-Fikr, 1994), v. 2: 291.

88 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 4-6.

89 Unlike *fiqh*, sultan law remains significantly undertheorized. As Stilt notes, there is no equivalent of *usul al-fiqh* for *siyasa* or sultan law “although some jurists did attempt to sketch out, descriptively and normatively, constitutional structures of authority.” See Kristen Stilt, *Islamic Law in Action: Authority, Discretion and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011), 205.

90 W. Hallaq, *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament* (New York: Columbia University Press, 2014), 68.

91 See, for example, Stilt, *Islamic Law in Action*, Chapters 7-9.

92 Kristen Stilt notes that while the “methodologies used by the jurists are fairly well-documented in the literature of *usul al-fiqh* . . . For the rulers, the methodology of *siyasa*-based power can best, and perhaps only, be understood by studying what rulers actually do, since the writings that do attempt to define the power of the rulers were written by jurists, whose goal was typically to circumscribe it.” See Stilt, *Islamic Law in Action*, 37.

93 Hallaq argues that throughout its historical existence, sharia was primarily a communal law, and that rather than permeating from the ruler to the community, it was a grassroot system that “took form and operated within the social universe and, more importantly, within the moral community; the Sharia as law and culture travelled upward with diminishing velocity to affect, in varying degrees and forms, the modus operandi of the minimal ‘state.’” See W. Hallaq, “What Is Sharia?” *Yearbook of Islamic and Middle Eastern Law*, 12 (2005), quote from 159.



The second legal domain juxtaposed to the rights of humans is that of the rights of God. This domain is distinguishable from others in at least two ways. First, it is much broader in scope. It covers two main fields: His rights as sovereign<sup>94</sup> lawgiver, namely upholding the sharia (referred to in legal works as the pure right of God, *haqq Allah al-mahdh*<sup>95</sup>), and His rights as creator. This latter category is primarily concerned with the protection and respect of His creation, and since He is the creator of all, it encompasses the entire universe, leaving no room for “unprotected,” exploitable, profane nature. Not all creation is equally *muhtaram* (worthy of protection), however.

Two key criteria seem to define proprieties. First is the *mukallaf*'s<sup>96</sup> observance of others' rights. Transgressing on this front leads to a temporary lift of protection, allowing those others to use all necessary measures to defend their rights.<sup>97</sup> The second criterion is relative privilege, with both Quranic and *fiqh* discourses emphasizing the rights of the underprivileged. The Quranic language in encouraging charity is a case in point. In doing so, Quran either calls upon believers to “loan Allah a goodly loan” that He may repay in many multiples (2:245), or asserts God's ownership of all wealth, and firmly commands those who possess it to give to those who do not (24:33)—a language that had far-reaching impact on the *fuqaha*'s legal thinking. Importantly, it meant consistently privileging necessities<sup>98</sup> of the vulnerable over property rights.

Take, for example, the case of starving individuals. While *fuqaha* unequivocally declare the individual's right (and, in some cases, obligation) to defend one's property (or the property of others) against theft and destruction, including using proportionate violence that might entail killing the aggressor in defense of self, others, or property, they exempt starving individuals. In fact, they declare with equal assertion that it is the starving individual's right to take the food she needs, that the owner has no right to resist this starving individual, and that if he does, he is in a state of violation of the creator's (and ultimate owner's) dictates and is fully liable for the consequences of his violence. If he injures or kills the starving individual while defending his property, he is culpable in accordance with homicide law.<sup>99</sup> And so whenever redistributive mechanisms (e.g., *zakat*, *waqfs*, and charity) fall short of providing for life essentials, the *fuqaha* assert the needy's right to these essentials without resorting to the ruler.

Noteworthy is the fact that these rights are not limited to humans. Animal and human rights—both instances of God's creation—are conceptualized in somewhat similar terms in various chapters of *fiqh* manuals. In the discussion of sale contracts, *fuqaha* stress the impermissibility of selling a young colt without its mother, for such a transaction would lead to prohibited separation (*tafriq muharram*) between mother and child.<sup>100</sup> Legal discussions of the right to water are another example. Even in the rare occasions in which water is assigned to someone (*mukhtas bi-shakhs*),<sup>101</sup> *fuqaha* define several

94 God, in this context, is sovereign in the Schmittian sense. He defines both the scope of law and exceptions thereto. His rule, in one important sense, is arbitrary; for, as Quran makes clear, “Indeed, Allah ordains what He intends,” (5:1); “He is not questioned about what He does, but they will be questioned,” (21:23), and “Allah decides; there is no adjuster of His decision” (13:41). The work of the *fuqaha* could be understood as attempts to define and limit the scope of this sovereign power, and to allow more space for negotiation among people in different communities, using their social norms, to define their laws.

95 See, for example, the legal discussion on the difference between a confession to theft and a confession to illicit sex. While the latter confession is fully retractable with no consequences (as discussed below), the former, entailing transgressions against both the creator and the property owner, is more complicated. Retracting the confession drops the corporal punishment (God's right), but not the property owner's right. Even upon retracting the confession, therefore, the said property is owed by the confessor to the property owner. See I. al-Bajuri, *Hashiyat al-Bajuri* v. 2, 4-8; S. al-Bujayrami, *Hashiyat al-Bujayrami 'Ala al-Iqna'*, v. 3, 143-145.

96 The *mukallaf* is the subject of sharia. In theological literature, *mukallafs* are those who are a. of legal age (*al-baligh*), b. compos mentis (*al-'aqil*), c. with sound senses, at least hearing or seeing (*salim al-hawas wa-law al-sam' aw al-basar faqat*), or d. have received the call to Islam (*balaghat hu al-da'wa*). (See, for example, I. al-Bajuri, *Hashiyat Shaykh al-Islam Ibrahim al-Bajuri 'Ala Matn al-Sanusiyya Fi 'Ilm al'Tawhid* (Cairo: Mostafa al-Halaby, 1955), p. 14.) In *fiqh* literature, however, the subject of *taklif* is the compos mentis Muslim who is of legal age. And whereas most contemporary literature reduces *taklif* to legal capacity, the notion (as defined by mainstream premodern Muslim jurists) implies both obligation and legal capacity.

97 For example, it is permissible (and sometimes obligatory) to stop others damaging property using proportionate levels of violence. Harming others (i.e., the aggressor) is permitted out of necessity; and while the individual defending her/others' property should observe the proportionality of violence, she is not liable for whatever she destroys even if she kills the aggressor. If the aggressor is an animal, however, she is responsible for paying its owner the equivalent of its value. See I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 466-469. Another example is *al-kalb al-'aqrur*.

98 It should be noted that “necessity” is a technical term in *fiqh* works. It is not just a state of “need,” but is rather a state in which not satisfying this need can lead to serious harm.

99 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 267.

100 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 1, 507.

101 They are rare instances because the general rule is that water is permitted (*mubahah*) for everyone. Water resources such as rivers, water springs in mountains, rain, etc., cannot be owned, and people should have equal access to these resources (*al-nas tastawi fi-ha*). A prophetic hadith, repeatedly quoted by the *fuqaha*, stipulates that people are equals and have equal access to water, food, and fire (*al-nas shuraka' fi thalatha: al-ma' wal-kala' wal-nar*) and are partners in three things: water, herbage, and fire. See, for example, I. al-

instances in which cattle cannot be denied access to this water, including when this water is proximate to pastoral fields (*bi-jiwar kala' mubah tar'ah al-mashiya*), as long as this does not lead to damaging the owner's agricultural produce.<sup>102</sup>

If God the creator steps in for the vulnerable, compromising the rights of the privileged in important ways, God the lawgiver demands much less, at least in this life. Violations of His law that do not involve violations of others' rights (*haqq Allah al-Mahdh*) are hardly punishable in practice. If the domain of rights of humans (with the allowance of the pursuit of punishment/compensation with dispute and avarice) is on one end of the spectrum, God's right as sovereign lawgiver (i.e., in instances in which no other rights are involved) is on the other end. It is in these cases that the legal maxim stating that "God's rights are based on forgiveness, seeking an exit from punishment, and not pursuing the aggressor" (*al-musamaha . . . wa al-dar' wal-satr ma-amkan*),<sup>103</sup> marking the second distinguishing criterion for rights of God from rights of humans, is most manifest.

Take the case of an extramarital consensual sexual relationship, in which God's right as lawgiver (i.e., His prohibition of such relationships) is violated, but no abuse is involved. In this case, the more serious punishment possibly awaits unrepentant violators of law on the day of judgment. Escaping punishment in this life, however, is much easier. Only two kinds of evidence could prove this violation in court, namely confession and the testimony of four upright trustworthy eyewitnesses offering identical testimonies. If the latter is practically impossible except in cases of public sex (given sharia's strict prohibition of spying and entering private places without prior permission), *fuqaha* have consistently discouraged the former, arguing that it is recommended for individuals to not confess, and for judges to discourage them from confessing, and, if they do, to encourage them to retract these confessions, and

hence allow more space for "seeking an exit from punishment" in a manner consistent with their conception of the lawgiver's mercifulness.<sup>104</sup>

It is in light of these legal categories (governed by significantly different premises, ranging from the pursuit of forgiveness and seeking an exit from punishment, to avarice in the pursuit of compensation and retaliation) that sharia's procedural law is best understood. Unlike state law, which utilizes different medical and scientific discourses to produce truth-narratives that weigh more than verbal testimonies, sharia and its *fiqh*, in both procedural and substantive terms, sometimes work to conceal this truth. This is the case, most importantly, when God's rights or corporal punishments are at stake, and even the slightest doubt (*shubha*) therefore suffices to halt the punishment.

In these cases, as mentioned above, only confession and testimony suffice as evidence in court. The criteria for a witness to qualify as upright ('*adl*) and therefore have one's testimony admitted are significantly difficult to match.<sup>105</sup> Sharia's unequivocal prohibition of spying<sup>106</sup> further restricts the scope of court testimony. Confession, as mentioned above, is retractable with no legal consequence in the case of God's rights. In the case of rights of humans, and while retraction does not nullify the confession, strict measures are taken to protect the confessor against compulsion. Significantly, one's very imprisonment at the time of the confession suffices as evidence of compulsion that disqualifies the confession upon one's claim.<sup>107</sup>

This procedural law was one of the first targets of the "reform" project initiated in the colonial period, with both "Muslim reformers" and colonial officers calling for relaxing the evidentiary criteria to allow for broader application of the law. In colonial India, for example, British officials—"baffled by the leniency of Islamic criminal law and by the loopholes that often precluded

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Bajuri, *Hashiyat al-Bajuri*, v. 2, 58.

102 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 60.

103 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 6.

104 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 5.

105 Jurists list at least ten criteria for the witness, including being morally upright, avoiding major sins, not insisting on (i.e., repeatedly committing) minor wrongdoings, maintaining *muru'a* (respect, i.e., refraining from provocative or hurtful behavior, including, for example, eating in the streets, where hungry passersby would be hurt by the sight of food), and others. They list other criteria for the testimony itself. Most importantly, it is valid only if the witness is called by the court to testify, whereas a volunteer witness's testimony is dismissed, except in the case of the pure rights of God, where it is considered to be a form of *hisba*. See, for example, I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 659-665.

106 Ghazali insists that even the *muhtasib*, assigned by the ruler to "command good and forbid evil," has no right to interfere if the wrongdoer "conceals the wrongdoing [by keeping it] behind closed doors." The "appearance" of wrongdoing from behind closed doors, however, means it is no longer concealed. Ghazali's examples of this *zuhur* (appearance) include loud voices, etc. See A. al-Ghazali, *Ihya' Ulum al-Din*, v. 4, 598.

107 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 8.

the infliction of what they saw as adequate punishment for serious criminals<sup>108</sup>—initiated the reform project. Their stance, not unlike the French counterparts in Algeria, fellow nationals in Egypt, or Muslim reformers of the late nineteenth century, to name a few, stemmed from a modern, state-centric episteme that failed to capture the fuqaha’s theoretical and legal categories and the habitus in which they exist. The success of their project therefore meant nothing less than the obliteration of this habitus.

### Implications and Tensions

The fuqaha’s conceptualization of rights differs from (secular) human rights in at least two ways.

First, and through emphasizing God-qua-creator rights, it somewhat blurs the distinction between the human and nonhuman, allowing for a more serious inclusion of the latter in the domain of rights. In this conception, the environment cannot be reduced to mundane material without powerful advocates in legal debates, nor can animal rights be framed as a separate issue. Second, and notwithstanding the important role of (sharia-trained) judges in settling disputes over rights, the state (or, more generally, central political authority) appears in this conceptualization as an afterthought, unlike the secular human rights discourse in which the state is (more or less) the source<sup>109</sup> and defender of rights.

The distinction between rights as citizen (i.e., rights tied to political authority) and human rights becomes increasingly blurred (if it does not completely collapse), and the discussion of rights therefore becomes

less alienated from practice. Rights as conceptualized by the fuqaha were both broader in scope, and based on laws that are less dependent on rulers in their application. This is why, as Hallaq argues, “despite the inescapable cruelties of human life and its miseries (which obviously are not the preserve of premoderns only), Muslims, comparatively speaking, lived for over a millennium in a more egalitarian and merciful system and . . . under a rule of law that modernity cannot fairly blemish with critical detraction.”<sup>110</sup>

Notwithstanding the aforementioned egalitarianism, mercifulness, and rule of law throughout the course of an entire millennium, it remains somewhat alien from practice, and falls short of responding to key challenges in today’s world. The reason is rather straightforward: unlike Europe, which “lives somewhat more comfortably in a present that locates itself within a historical process that has been of its own creation”<sup>111</sup> and therefore encounters a different set of challenges, the fuqaha’s conception sits today in a world it played no significant role in shaping, and therefore shares very little of its thematic.<sup>112</sup>

Bringing the fuqaha’s thematic into the modern world therefore poses significant challenges on different fronts. Importantly, it faces difficulties in conceptualizing the human body; difficulties that manifest themselves on two fronts. First is the domain of sexual rights. While policing sexuality has radically changed with the rise of the modern state,<sup>113</sup> and while court records reveal a far more relaxed treatment of sexual violations than the rather draconian punishment in the letter of law,<sup>114</sup> the fuqaha’s conception allows no room for a right to

108 R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2009), 106.

109 In his work on human rights, Talal Asad points to “a basic assumption about ‘the human’ on which human rights stand: Nothing essential to a person’s human essence is violated if he or she suffers as a consequence of military action or of market manipulation from beyond his own state when that is permitted by international law. In these cases, the suffering that the individual sustains as citizen—as *the national of particular state*—is distinguished from the suffering he undergoes as a *human being*. Human rights are concerned with the individual only in the latter capacity, with his or her natural being and not civil status. If this is so, then we encounter an interesting paradox: the notion that inalienable rights define the human does not depend on the nation-state because the former relates to a state of nature, whereas the concept of citizen, including the rights a citizen holds, presuppose a state that Enlightenment theorists called political society.” See T. Asad, *Formations of the Secular*, 129.

110 W. Hallaq, *The Impossible State*, 110.

111 W. Hallaq, *The Impossible State*, 3.

112 In his *Nationalist Thought and the Colonial World*, Chatterjee distinguishes the “thematic” from the “problematic.” He defines the former as “an epistemological as well as ethical system which provides a framework of elements and rules for establishing relations between elements[;] the problematic, on the other hand, consists of concrete statements about possibilities justified by reference to the thematic.” See P. Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (Minneapolis: University of Minnesota Press, 1986), 38. By applying this distinction to the topic at hand, we find that most approaches to Islamic human rights are premised on a full compromise of fuqaha’s thematic, and operating entirely from within the thematic of the modern state and the contemporary human rights discourse, with mild attempts to “Islamize” it. See, for example, Y. al-Qaradawi, *Kayf Nata’amal Ma’ al-Quran al-Azim* (Cairo: Dar al Shorouk, 1999). The fuqaha’s thematic, that is, is (almost entirely) lost in contemporary debates. This is to a large extent due to the rupture caused by the nineteenth century colonial encounter, and the “Islamic reform” movement that followed.

113 See, for example, L. Kozma, *Policing Egyptian Women: Sex, Law and Medicine in Khedival Egypt* (New York: Syracuse University Press, 2011).

114 Semerdjian notes that in the Ottoman Aleppo, for example, “court records [were] reluctant to use explicit or even standard juridical

explicitly engage in an extramarital sexual relationship, and maintains a heteronormative<sup>115</sup> stance. Because of the theological foundation of rights, fuqaha's conception allows very little room for disposing of one's body in a manner that violates the lawgiver's dictates.

Modern medicine and the way in which it altered understandings and possibilities of the human body also leads to significant difficulties. This is manifest on three fronts. First is the question of abortion. While agreeing that abortion is "forbidden after ensoulment (literally 'the inbreathing of spirit') which is held . . . to occur after 120 days of gestation," premodern fuqaha consistently allow expansive leeway to anchor the decision to the parents' consciousness and not the law as implemented by the executive.<sup>116</sup> Second is the question of organ transplantation. Not only does it deal with technically and morally difficult questions, including defining the moment of death, considering the different socioeconomic factors involved in organ flight, and calculating medical risks on donors, but also, and perhaps more importantly, it encounters what modern medicine takes to be an obsolete understanding of the human body.<sup>117</sup> Third is the question of sex reassignment surgery. While contemporary legal scholars in both Sunni and Shia traditions have issued fatwas (nonbinding legal opinions) authorizing such operations in some situations,<sup>118</sup> they are yet to fully address the implications, and the debates over such issues are far from mature. These and other technological and

scientific "discoveries" continue to pose serious challenges to the classical fuqaha's conceptualization of the human body and rights tied thereto.

Another domain of contention has to do with the aforementioned sultan law. This domain of law, previously constituting a thin layer of temporary legislation with very little (if any) impact on the "law of the land," was radically transformed with the coming of modernity and its paradigmatic state. It grew both in scope and thickness, and became more permanent, allowing for the organization and government of collective life through central political authority. This, in turn, led to circumventing the fuqaha's conception of rights in terms of source, scope, and means of claiming.

Take, for example, the rights of the nonhuman. While allowing for (potentially) more extensive legislation protecting both the environment and animals, the acceptance of this thickened law and its conflation with sharia in state law left no room for meaningfully claiming rights, individually or collectively, without the authorization of the executive. No rights can be meaningfully and legally defended against the executive.

Another question stemming from the modern government of collective life is that of data collection and state surveillance. Clearly infringing on the sharia-stipulated right to privacy, such practices are commonly justified by the need to protect the public against organized

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language . . . to describe the crime of *zina*" (95). Refraining from using explicit language allowed to *fuqaha* and *qadis*, as well as members of the community, to distance themselves from the very narrow domain in which violations of rights of God as lawgiver are punishable. As such, "prostitutes, as well as other violators of societal norms concerning sexuality, did not receive the draconian punishment mandated in Islamic juridical writing. Instead, their punishment was to be banned from living in the neighborhood where the crime took place" (94). Prostitutes, attempting to defend themselves against this verdict, often appeared before court, and—also avoiding explicit language which would count as a legal confession—"confessed to wrongdoing, and vowed to pursue a change of lifestyle of their accord" (114), hence clearing their records from claims made by neighbors, who also had to refrain from using explicit language to avoid the sharia punishment of *Qathf* (false accusation of sexual violation). See E. Semerdjian, *Off the Straight Path: Illicit Sex, Law and Community in Ottoman Aleppo* (New York: Syracuse University Press, 2008).

- 115 This is not to suggest that same-sex desires and practices did not exist, nor that they were particularly condemnable in a way qualitatively different from the condemnation of heterosexual nonmarital relationships. Rather, and given the very different kind of policing, it is the category of homosexual that did not exist. See, for example, K. Rouayheb, *Before Homosexuality in the Arab-Islamic World 1500-1800* (Chicago: University of Chicago Press, 2009); J. Massad, *Desiring Arabs* (Chicago: University of Chicago Press, 2007).
- 116 M. Katz, "The Problem of Abortion in Classical Sunni Fiqh," in J. Brockopp (ed.), *Islamic Ethics of Life: Abortion, War and Euthanasia* (Columbia, South Carolina: University of South Carolina Press, 2003), 30-31. Katz argues that while none of the schools of *fiqh* allows abortion, *fuqaha* were "perfectly aware that women might know of their own pregnancy long before the legal requirements for proof of a fetus could be fulfilled" and that therefore what was more at stake was "one's relationship to God as the author of life and provider of sustenance for all living things" (33-34), and that a basic feature of the *fuqaha's* discussion of rights "is their high level of tolerance for ambiguity and complexity, which avoids absolutist simplifications of the intricate moral issue raised by fetal life" (45). In light of the above outlining of the *fuqaha's* conceptualization of rights, it could be argued that this ambiguity and indecisiveness stems from the ambiguous status of the fetus. *Fuqaha* have conceptualized the status as progressing gradually towards "fully realized and fully protected human life. However, it is less clear precisely what the criteria for full humanity (and this full legal protection) might be" (31). As such, treatment of the question oscillates between the meticulous investigation to defend rights of humans, and the forgiveness characterizing the pursuit of the rights of God. This was not a pressing question for classical fuqaha, however, for abortion was conceived more as accidental or caused by third-party violence than a deliberate choice of the mother/parents.
- 117 See, for example, S. Hamdy, *Our Bodies Belong to God: Organ Transplantation, Islam and the Struggle for Human Dignity in Egypt* (California: University of California Press, 2012).
- 118 For a discussion of these fatwas, their reasoning, and their implications, see, for example, M. Alipour, "Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas," *International Journal of Transgenderism* 18, no. 1, 2016: 91-103.



crime and terrorist attacks. And while ethical and legal critique of such practices on sharia grounds can be developed fairly easily, to reject these practices wholesale is to ignore the necessity of maintaining peace and protecting the anfas and mal protected by sharia. The technologies facilitating both mass destruction and violence, and surveillance, are products on a different worldview that does not sit well with the fuqaha's episteme and that of the world in which they operated.

Providing a platform that allows for turning the anthropological gaze onto our contemporary understanding of rights, meaningfully bringing the fuqaha's episteme into the modern world, therefore requires more than "unearthing" their conception of rights or moral resources. Even if the modern condition is at odds with this episteme, it is a reality that could be neither ignored nor wished away.

## Conclusions and Recommendations

The fuqaha's conception of rights is therefore evidently alien to today's world. They do not, however, belong to a distant past that needs to be transcended, nor are they mere objects of academic studies. Rather, they are sophisticated interlocutors whose legal theory can improve the state of rights in contemporary Muslim-majority countries, and the world at large, on various fronts.

First is the revision of criminal law to (at least) restrict the application of capital punishment. In Egypt, for example, where state law follows in many cases the substantive rules of sharia, hence conflating both bodies of law,<sup>119</sup> capital punishment takes place in the name of sharia. Yet criminal courts follow a radically different process. Unlike sharia's qadi courts, however, they admit forensic and circumstantial evidence (inadmissible in a qadi court, which relies solely on confessions and eye witnesses); revoke the deceased's legal heirs' Islamic right to pardon (encouraged by sharia and Islam's other discourses); and utilize different investigative and interrogative methods to assess the suspect's culpability. Ironically, capital punishment is issued only after consulting the state-appointed mufti, and it is this

Islamic façade that allows for the continued expansion of the practice. Removing the punishment's Islamic façade and building on fuqaha's strictness and high evidentiary requirements to prove such crimes allows for restricting the application of capital punishment. Building on the experience of premodern Islamic legal systems, with the sharia/siyasa divide, modern investigative sciences can be utilized to establish culpability that still falls short of evidentiary criteria stipulated by sharia to apply corporal punishment.

Second is the fuqaha's keenness on ensuring the confessor's free will. Throughout their discourse, legal scholars highlight the importance of choice in all legal actions. For example, they insist that compulsion does not entirely suspend taklif (legal capacity/obligation),<sup>120</sup> and that taklif persists as long as the compelled has apparent choice.<sup>121</sup> And yet despite their keenness on expanding taklif's scope, the fuqaha accept a person's imprisonment as shubha (legal doubt/uncertainty) that suffices to validate one's retraction of confession. Adopting this position preempts security forces' attempts to force detainees to confess to certain acts and crimes, and encourages a more dignified treatment of prisoners, especially with jurists' unequivocal condemnation of using physical violence against detainees, calling it "absolutely forbidden"<sup>122</sup> regardless of its justification.

In relation to the political system is the question of (militant) rebellion, including that of violent, religiously motivated actors. While such actions are legally condemned by fuqaha, they are much more lenient towards aggressors than they are towards highway robbers, despite the crime being somewhat similar. The reason is that, unlike robbers, the former actors are trying to fulfill what they think of as a moral obligation. In the fuqaha's conception (not tied to the state-centric understanding of law and order), these militants are (albeit wrongfully) trying to right the wrongs of the political leadership, namely injustice and corruption. Unlike the case of highway robbers (qutta'), fuqaha stress several restrictions on fighting bughah. They are not to be fought unless the rebellion is armed, and it is forbidden to fight them (yahrum qitaluhum)

119 See, for example, H. Agrama, *Questioning Secularism*, especially the introduction.

120 H. al-Attar, *Hashiyat al-Attar 'ala Sharh al-Jalal al-Mahalli 'ala Jam' al-Jawami' fi Usul al-Fiqh al-Shafi'i* (Beirut: Dar al-Kutub al-'Ilmiyya, 2009), 195.

121 Al-Ghazali, for instance, argues that whereas in most cases the mukrah who is under threat is allowed to obey his compeller (*mukrih*), some of his acts are still prohibited. If he was ordered to kill, he must refrain, even if he feared being killed (*in ukriha 'ala al-qatl jaz an yukallaf tark al-qatl li-annah qadir 'alayhi wa-in kan fi-hi khawf al-halak*), because a. he still has a choice, and b., as al-Mahalli argues, he has no right to prioritize his life over another's (*li-iytharihi nafsahu al-baqa' 'ala mukafa'atih allathi khayarahu baynahuma al-mukrah . . . fa ya'tham bil-qatl min jihat al-iythat la al-ikrah*). See A. al-Ghazali, *al-Mustasfa fi 'Ilm al-Usul* (Baghdad: Dar al-Muthanna, 1970), 90; and H. al-Attar, *Hashiyat al-Attar*, 193.

122 S. al-Bujayrami, *Hashiyat al-Bujayrami 'Ala al-Iqna'*, v. 3, 145. Al-Bujayrami states that "with regards to beating [detainees]: it is absolutely forbidden" (*qa-amma al-darb fa-haram mutlaqan*).

before sending a messenger/mediator to listen to their complaints.

If it is an instance of injustice (*mathlama*), the ruler (or the messenger/mediator if empowered) should fix it. If they have rebelled based on a specious argument that resembles a valid one (*shubha*), learned, trustworthy scholars should clear it. If they do not provide any explanation for their military rebellion, the messenger/mediator should inform them that if they insist on their position, they will be fought. If all reconciliation attempts fail, the *bughah* fleeing the battlefield should not be sought, their injured fighters and prisoners of wars should not be killed,

prisoners should be held only until the war is over (*yuhbas hatta tanqadi al-harb*), and their property, including their weapons, should not be confiscated, but should be kept aside until the war is over and then given back to them, and should not be used until then.<sup>123</sup>

Besides being morally superior to contemporary approaches, taking more seriously the concerns of such actors (rather than simply assuming they are motivated by a desire to destroy and a hatred of freedom), and upholding their rights in the war on terror, dismantles the intellectual and material base for radicalization more effectively.

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123 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 470-478.

# ADAMIYYAH (HUMANITY) AND 'ISMAH (INVIOABILITY): HUMANITY AS THE GROUND FOR UNIVERSAL HUMAN RIGHTS IN ISLAMIC LAW

Dr. Recep Şentürk

Dr. Recep Şentürk is the president of Ibn Khaldun University (IHU) in Istanbul, Turkey. He has researched human rights as a visiting scholar in the Faculty of Law at Emory University, Atlanta (2002-2003). He continued his research on human rights as a guest of the British Academy in the Faculty of Social Sciences and Law at Oxford Brookes University, and he has lectured on the same topic in various universities in the United Kingdom. He has written extensively on the concept of pluralism and Islam and on Islam and human rights. In this brief interview, he discusses human rights through the prism of “humanity.”

**1. How would you describe the engagement between the Islamic tradition and the human rights discourse?**

A legal maxim in Islamic law states, “the right to inviolability (*Ismaḥ*) is due for humanity (*adamiyyah*).” This right to inviolability includes inviolability of life, property, religion, mind (freedom of expression), family, and honor. All Hanafi (a rite of Islamic jurisprudence)<sup>124</sup> jurists uphold this perspective, as do “universalist” jurists in other rites of Islamic jurisprudence.

Thus, according to this perspective, simply being human is sufficient to possess human rights regardless of innate, inherited, and gained attributes such as sex, religion, race, and nationality.

**2. You have dedicated a lot of time to researching the farewell speech of the Prophet Mohammed. What lessons do you think exist for governments and communities (Arab communities, non-Arab communities, majorities, minorities) more generally, including civil society, in terms of that**

**farewell speech, and the upholding of fundamental rights?**

The well-known farewell sermon<sup>125</sup> of the Prophet Mohammed (571-632) laid the foundation of universal human rights in Islam in 621 at the square of Arafat in the desert of Arabia near Mecca to a large group of believers who gathered there for the annual pilgrimage. Three declarations in this sermon laid out the very foundation for freedoms as guaranteed by Islamic law, and are relevant to human rights today:

The first statement: “O People, just as you regard this month, this day, this city (i.e. Mecca) as inviolable (*haram*), so regard the life, property and honor of everyone as inviolable (*haram*).”

The second statement: “O People, it is true that you have certain rights with regard to your women, but they also have rights over you.”

The third statement: “O People, all mankind is from Adam and Eve. An Arab has no superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab; a white has no superiority over a black, nor does a black have any superiority over a white; [none have superiority over another] except by piety and good action.”

The first statement is about the universality of human inviolability. The second and third statements are about an explanation of that inviolability and are about gender equality and racial equality respectively. They settle three major constitutional or legal principles for today’s law and the policy makers in Muslim communities worldwide.

Islam recognizes the right to inviolability of life, property, and honor without any distinction based on inherited or innate qualities such as race, gender, class,

<sup>124</sup> The Hanafi school (*Madhab*) is one of four schools of law or religious jurisprudence (*fiqh*) in Sunni Islam. It is considered the oldest and amongst the most liberal. The name is derived from its founder, Imam Abu Hanifa, and the madhab spread during the Abbasid Empire. The Sunni-Hanafi madhab is essentially non-hierarchical and decentralized.

<sup>125</sup> Dr. Z. Haq, “The Last Sermon of Prophet Muhammad,” E-books on Islam and Muslims, 1990, last accessed June 25, 2018, <http://www.cyberistan.org/islamic/sermon.html>.

or religion. Islam grants men and women equal fundamental rights; it sees them as equal before the law and accepts that they have rights with respect to each other. Islam strictly bans racial discrimination.

Muslims allude to the sayings of the Prophet Mohammed, or *hadith* (pl. *ahādith*), which has binding power in Islamic law. Thus, the farewell sermon of Prophet Mohammed is not an ordinary speech or preaching. *Hadith* is considered to be the second source of Islamic law after the Quran.

The statements in the Farewell Sermon of the Prophet Mohammed are supported by his many antecedent and subsequent statements, and by actions recorded in the *hadith* literature. Furthermore, the first source of Islamic law, the Quran, also has many verses to the same effect. My purpose here is not to provide a survey of the Quranic verses and the relevant *ahadith* but merely to focus on the contemporary implications of the farewell sermon on human rights.

Muslim communities all over the world—Arab governments, non-Arab governments, minority communities and majority communities, in Europe, in Asia, all Muslim communities all over the world—should candidly identify these legal principles and attempt to actualize them in whatever way they can.

**3. Building on the former response, are there particular issues pertaining to gender rights that you think are particularly emphasized, and what sort of policies in different Muslim majority and minority communities ought to be implemented in that regard?**

*Adamiyyah*<sup>126</sup> is the foundation for human rights in Islam. The farewell sermon of the Prophet Mohammed testifies that humanity is not about any inherited, innate, or acquired qualities. Therefore, gender equality is well-established in Islam at the level of fundamental rights or human rights.

**4. Could you reflect on how the Ottoman experience—which was multicultural, multiethnic, multi-religious—has lessons for us today, worldwide, for Muslim majority communities and Muslim minority communities? Including the Arab world and non-Arab world?**

This legacy of Ottoman practice and reforms are forgotten by Muslims today, and the question of what to do with the old *dhimmi*<sup>127</sup> status and the *dhimmi* tax, or *jizya*, lingers in modern Muslim discourse. For contemporary Muslim thinkers and policy makers, there is a lot to learn from the late Ottoman legal reforms. In particular:

- A. Slavery is not legitimate nor applicable: everyone ought to be free.
- B. The *dhimmi* status is not legitimate nor applicable: all citizens are equal.
- C. The *jizya* tax is not legitimate nor applicable: all citizens should pay equal amount of taxes regardless of their religion.
- D. The constitutional system is entirely compatible with Islamic principles.
- E. The parliamentary system is entirely compatible with Islamic principles.
- F. The election of non-Muslims to parliament is entirely compatible with Islamic principles.
- G. Electoral democracy is entirely compatible with Islamic principles.

The Ottoman Empire was a cosmopolitan empire. So was the Mughal Empire in India. Thus, these two experiences are excellent examples of the universalism of human rights in Islam.

The Ottoman experience—along with the Andalusian experience—provide us with admirable examples of how Jews and Christians were treated, and by extension, they provide an understanding of how they ought to be engaged with in the contemporary era, if genuine Islamic principles are applied. Likewise, the Mughal experience in India provides an example of how the Buddhists and Hindus were treated under Islamic regimes.

For example, the Mughal experience demonstrates beyond doubt the universalism of Islamic law and human rights in Islam. Hindus and Buddhists are not considered People of the Book, i.e., they do not belong to a monotheistic Abrahamic religion, yet they were given the same rights Christians and Jews were given in other parts of

<sup>126</sup> *Adamiyyah* is literally humanity, derived from Arabic descendants of Adam, the first human.

<sup>127</sup> *Dhimmi* is a person living in a region overrun by Muslim conquest who was accorded a protected status and allowed to retain his or her original faith.



the Muslim world at that time. Similarly, Zoroastrians in Iran were granted fundamental rights although they did not follow an Abrahamic monotheistic religion.

The Ottomans established a diversity “management system” called the millet system,<sup>128</sup> which may serve as a source of inspiration even today. In my opinion, in the age of globalization, the most pressing problem is diversity management. The millet system was based on semi-autonomous religious communities brought together under the Ottoman caliph sultan. During the classical period, 1520–1566, these religious communities included major millets: the Islamic millet under the caliph sultan in Istanbul, the Orthodox millet under the Orthodox patriarch in Istanbul, and the Jewish millet under the chief rabbi also based in Istanbul. The followers of the non-Muslim millets were called *dhimmi* and the tax they paid was called *jizya*.

In 1856, the millet system came to an end as the Ottoman Sultan abolished the *dhimmi* status and the *jizya* tax by a royal decree and introduced universal citizenship for everyone under Ottoman rule. The institution of slavery was abolished in 1847 by Sultan Abdul Majid. The reforms in Islamic law and the political system were based on policy advice by a group of scholars, headed by the Ottoman *Sheikh al-Islam*—the foremost scholar of Islamic law in the Ottoman domain during that time.

In 1879, the Ottomans adopted a constitutional and parliamentary system with the approval of Ottoman *ulama* (religious scholars) and had several elections prior to the military defeat of the Ottomans in 1918. The Ottoman parliament, which included Christian and Jewish members, was closed by the British army after it invaded Istanbul.

### 5. **What are the biggest challenges for Muslims as they seek to rejuvenate Islamic discourse, whether in the Arab world, Muslim minority communities, or elsewhere? How do those challenges relate to the human rights discourse?**

First, the long and rich conceptual and practical legacy of universal human rights in Islamic law and history are not known today to Muslim intellectuals and policy makers. This prevents the human rights discourse from being properly grounded in an Islamic worldview. The heritage of Hanafi jurisprudence is very valuable in this regard.

Second, there is no longer a middle class in some Muslim-majority countries. If there is no middle class in a society, there is no group that can then stand up for human rights. Therefore, Muslim communities across the world should develop that middle class.

Third, there is no rule of law or due process in some Muslim-majority countries, which is a challenge that we must overcome if we are to rejuvenate the Islamic discourse.

Fourth, some Muslim countries are economically and politically dependent on other countries and are not self-sufficient.

Last, some of the powerful Western countries at times disregard human rights violations and at times even support them in the Muslim world. By doing so, they make the human rights discourse lose its power and legitimacy in the eyes of Muslim populations and thus undermine any Muslim effort to promote them.

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128 The millet system, derived from the Arabic word for “nation,” was a form of decentralized governance utilized by the Ottoman Empire. It allowed non-Muslims, under Muslim rule, to use their own (religious) laws. The purpose was to allow minorities under the Ottoman rule a sense of autonomy.





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SECTION III:  
Contemporary Conversations  
and Muslim Perspectives

# GENDER AND WOMEN'S RIGHTS IN ISLAM

Arzoo Ahmed and Dr. Mehrunisha Suleman

Islam's rich tradition of scriptural guidance on equality between the sexes and examples of such equality have commonly been in practice within Muslim societies from the inception of Islam. Such teachings and practices have sought to end discrimination and provide societal inclusivity for men and women. Yet there are a plethora of problematic gender attitudes and norms across Muslim communities and societies today. Religion, at times, is weaponized to perpetuate gender inequalities. It is necessary not only to look back into history to understand the changing nature of gender roles but also to imagine the future of what healthier societies, with a more harmonious balance of gender equality, would look like. Islam offers tools for reimagining gender equality in an enriching and holistic way.

## Gender Equality: The Human Rights Context

The United Nations' (UN's) Universal Declaration of Human Rights does not mention gender; however, article 2 states that "everyone is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind . . . such as . . . sex . . ." <sup>129</sup>

Although the term "gender" is not employed directly, the declaration refers to equal rights for men and women, often translated in practical terms to "gender equality." This became recognized in the Millennium Development Goals, representing a shift in focus from women in development (see the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women)<sup>130</sup> to gender and development, which was more than simply a change in terminology. Much of these efforts came as a response to sex- and gender-based discrimination, with policy

reforms focusing exclusively on the multilayered and deep-set discrimination faced by women across the world and throughout the ages in the domestic and public spaces, focusing on patriarchy and an analysis of power structures.

Discussions relating to gender within the contexts of health, education, employment, and other civil rights and freedoms often center on equality of access and opportunity. They also acknowledge the needs and priorities of different groups, in this case, men and women, from a human rights perspective. Through a policy of gender mainstreaming, countries have integrated a gender perspective into the preparation, design, implementation, monitoring, and evaluation of policies and regulatory measures in order to combat discrimination and promote equality between the sexes.<sup>131</sup>

## Right to Life and Protection of Life: Sex-Based Reproductive Discrimination

Sex-based discrimination in the form of favoring the birth of boys is a serious concern across several countries. A Pakistani nonprofit says it found 345 dead newborns—99 percent of whom were girls—dumped in garbage piles in Karachi.<sup>132</sup> A study from the Oxford Institute of Population Ageing highlights a "son preference" in Pakistan and states the country needs to address "inequitable gender norms that uphold the perception that sons are more valuable than daughters."<sup>133</sup> In her book *Endangered Daughters: Discrimination and Development in Asia*, anthropologist Elisabeth Croll writes that this "son preference" coupled with "daughter discrimination" has led to millions of missing girls in India and China.<sup>134</sup> Medical anthropologist Marcia Inhorn, quoting the figure of a million abortions in China each year, suggests that "it

129 United Nations, *Universal Declaration of Human Rights*, December 10, 1948, <http://www.un.org/en/universal-declaration-human-rights/>.

130 United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, December 18, 1979, <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>.

131 See "What Is Gender Mainstreaming," European Institute for Gender Equality, <http://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming>.

132 Fakhar Durrani, "Karachi Becoming a Killing Field for Newborn Girls," *The News*, April 25, 2018, <https://www.thenews.com.pk/print/309162-karachi-becoming-a-killing-field-for-newborn-girls>.

133 Melanie Dawn Channon, "Son Preference and Family Limitation in Pakistan: A Parity- and Contraceptive Method-Specific Analysis," *International Perspectives on Sexual and Reproductive Health* (2017).

134 Elisabeth Croll, *Endangered Daughters: Discrimination and Development in Asia* (New York: Routledge, 2000).



is plausible that abortion is being used as a primary method for sex selection,”<sup>135</sup> or female feticide.

Modern technologies are facilitating gender-based reproductive discrimination in the Middle East. Many couples are opting to use preimplantation genetic diagnosis (PGD), a procedure that screens for genetic abnormalities but that can also be used for sex selection. Family-balancing policies allow sex selection using PGD—where male embryos are selected. Inhorn underscores the importance of PGD due to the high prevalence of genetic diseases, but expresses concern that it is increasingly being used solely for sex selection, with boys chosen over girls.<sup>136</sup> Reports from fertility clinics in Jordan and the United Arab Emirates (UAE) demonstrate a rising trend of couples turning to in vitro fertilization for gender selection. According to one fertility clinic in the UAE, 95 percent of couples using the clinic for gender selection want a boy.<sup>137</sup>

### Right to Be Recognized as Equal Members of Society: The Limited Expression of a Specific Gender

In societies like Afghanistan, the stigma associated with being female is deeply rooted in an ancient practice where girls are raised as boys. This phenomenon, known as *bacha posh*, demonstrates the limitations surrounding the expression of a particular gender in the public sphere, and the need for females to transition to a male gender identity in order to function and participate in society. This “third gender” facilitates access to education, employment, and a presence in society for women who would otherwise be absent if they retained their initial gender identity. The “girls raised as boys” are able to enter society freely and seek an education as well as employment. However, they are eventually forced to revert to being women in their late teens, and in some cases at twenty years of age, causing them to express confusion and resistance to the

way of life that comes with the transition back to their birth gender.<sup>138</sup>

This reality touches upon questions of autonomy and freedom of expression within the Islamic and human rights frameworks. Women are afforded fewer freedoms, with their place restricted to the domestic sphere, and an inability to participate equally within society. The value of females in such contexts is measured relative to males who are seen as more economically productive. It is significant to note the influence of economics and social order in perpetuating social stigma around gender. Inequalities are thus often exacerbated by structures specific to global labor markets, manufacturing, and financial capital. The consequence of the latter factors is that the measure of success against which human beings are judged leads to persistent inequality. This is particularly the case between the sexes, where a person’s net worth is measured in terms of economic output.

### Right to Be Remembered: The Role of Missing Historical Narratives and Public Spaces

History plays a critical role in setting precedents, inspiring customs, and contributing to our heritage and sense of self, from racial, religious, cultural, geographical, and gender-based perspectives.<sup>139</sup> History, however, has been transmitted such that all perspectives are not equally prevalent. The superiority of one gender over another is a common feature of historical record, with women often portrayed in literature, religion, and other forms of historical narrative as the intellectually inferior counterparts, playing few meaningful roles in the progress and story of societies.<sup>140</sup>

Public spaces—both physical and professional, historical and contemporary—and their gender constitutions send a powerful message about inclusivity or exclusivity. They are also important for shaping perceptions and individuals’ aspirations. Today, only a quarter of

135 Frank van Balen and Marcia C. Inhorn, “Son Preference, Sex Selection, and the ‘New’ New Reproductive Technologies,” *International Journal of Health Services* 33, no. 2 (2003): 235-52.

136 Ibid., 245-47. Inhorn describes the ethical challenges of using PGD in societies where there is a son preference.

137 Asmaa al Hameli, “Couples in the UAE Use Gender Selection to ‘Balance Families,’” *The National*, November 25, 2014, <https://www.thenational.ae/uae/health/couples-in-the-uae-use-gender-selection-to-balance-families-1.444714>.

138 Jenny Nordberg, “The Afghan Girls Raised as Boys,” *The Guardian*, September 22, 2014, <https://www.theguardian.com/lifeandstyle/2014/sep/22/girls-boys-afghanistan-daughters-raised-as-sons-puberty-bacha-posh>.

139 Joan Wallach Scott, *Gender and the Politics of History* (New York: Columbia University Press, 1999).

140 Mary Beard, *Women & Power: A Manifesto* (Profile Books, 2017); and Ferris Museum of Sexist Objects, “Women Portrayed as Animals/Beasts,” <https://ferris.edu/moso/objectification/womenasanimals/index.htm>.

professors in academia are female.<sup>141</sup> And between 30 to 50 percent of mosques in the United Kingdom do not offer facilities or a prayer space for women.<sup>142</sup> UN Peacekeeping reports that in 2017 women constituted only 22 percent of the 16,507 civilians working in peacekeeping missions.<sup>143</sup> Women have always been a part of the human story and have played a significant role in their communities, in academia, and in other areas of society. This history is largely absent from our collective consciousness and educational curricula, and the impact of this missing narrative is visible and now becoming more recognized. For example, there are growing concerns about the disparities in wages, career progression, and recognition through awards between men and women. These factors impact how men and women identify with their gender and the subsequent pride and respect that is afforded to each. The missing narrative also creates a vacuum in society today, where women feel less welcome and less able to participate across different spaces in society.

### Gender and Islam: Historical and Current Trends

It may appear as though gender equality is a foreign import to Islam, with any emphasis on it the result of external forces pressuring Muslim communities to reform attitudes and practices related to widespread gender inequality and discrimination. However, from the inception of Islam, issues surrounding gender equality have been of central concern and focus within scripture and prophetic practice, and the paradigm that was constructed for Muslim societies. The expanding field of Muslim feminism<sup>144</sup> and academic Muslim feminist critiques present and address gender inequalities specifically through the lens of Islam and Muslim cultures. These are further complemented by development and

policy reform initiatives, which deliberate on gender discrimination within Islamic law and Muslim cultures.

In the Islamic narrative, equality between the sexes is affirmed from the point of creation, with humanity originating from a single man and a single woman: “People, We have created you male and female, and appointed you races and tribes, that you may know one another. Surely the noblest among you in the sight of God is the most God-fearing of you.”<sup>145</sup> People are granted the highest form of equality—spiritual equality—such that there is no difference among them on account of their sex, race, or social status. Men and women, treated primarily as humans, are recognized as complete beings with the responsibility to fulfill their physical, emotional, intellectual, and spiritual needs, duties, and potential, while keeping their higher purpose in life at the core of their personal and communal vision. Human flourishing, above and beyond gender roles, in this life and the hereafter, is the language that is adopted in the Quranic narrative.<sup>146</sup>

The brutal practice of female infanticide, mentioned above, mirrors the pre-Islamic practice of burying baby girls alive, which was prohibited in the Quran at the earliest stages of revelation.<sup>147</sup> The right to the protection of life is one of the first principles of sharia, within the Maqasid framework,<sup>148</sup> and is in harmony with the human right to life—the right to exist and be valued without discrimination on the basis of sex. The sex selection practices resulting from a preference for boys—whether for social status or economic benefit or a belief that it is better to abort girls who will be sexually harassed in societies like India’s—point to a grave abuse that Islam and the human rights framework must challenge.

Though male stories and actors dominate the history of Islam, Islamic history has recognized and embraced

141 Simon Baker, “Data Bite: Share of Female Professors Now Virtually a Quarter,” *Times Higher Education*, January 19, 2018, <https://www.timeshighereducation.com/data-bites/data-bite-share-female-professors-now-virtually-quarter>.

142 Remona Aly, “UK Mosques Must Make Space for Women—Not Turn Us Away,” *The Guardian*, February 19, 2018, <https://www.theguardian.com/commentisfree/2018/feb/19/british-muslim-women-open-mosque-initiative>.

143 United Nations Peacekeeping, “Women in Peacekeeping,” last accessed July 18, 2018, <https://peacekeeping.un.org/en/women-peacekeeping>.

144 See the following works: Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1993); Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur’an, Hadith, and Jurisprudence* (London: Oneworld Publications, 2006); Kecia Ali, *Marriage and Slavery in Early Islam* (Massachusetts: Harvard University Press, 2010); Ziba Mir-Hosseini, Mulki al Sharmani, and Jana Rumminger, *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (London: Oneworld Publications, 2014); Fatema Mernissi, *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society* (Bloomington: Indiana University Press, 1987); Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (Oxford: Oxford University Press, 1999); and Amina Wadud, *Inside the Gender Jihad: Women’s Reform in Islam* (London: Oneworld Publications, 2006).

145 Quran, 49:13, <http://corpus.quran.com/translation.jsp?chapter=49&verse=13>.

146 For examples from the Quran, see 4:1, 4:124, 7:189, 16:97, 33:35, and 42:26.

147 Quran, 81:8-9, 17:31.

148 Maqasid al-Sharia is a branch of Islamic knowledge that answers the purpose of sharia, or Islamic law. It aims to preserve the faith, life, progeny, intellect, and wealth of Muslims.

the importance of both men and women from the early and formative period and throughout the centuries that followed. This tradition flourished before the human rights discourse, in which there was an emphasis on the necessity and presence of each gender within both the domestic and public spaces. Islam emphasizes that each individual is required to fulfill their God-given potential and duties towards God, themselves, their families, and their communities. Such Islamic principles can be used to challenge gender discriminatory attitudes and practices, while offering a more positive approach to how individuals ought to be valued and included in different spaces and dimensions of life. In the Quranic paradigm, men and women are described as “garments for one another” (Quran 2:187) and each individual has a value by virtue of being human, and a duty to protect and care for the other.

Examples of Muslim women making significant contributions to society occurred before women had the right to vote, were employed in companies, or enrolled in universities. For instance, in the seventh century, Ash-Shifa bint Abdullah, literate in an illiterate age, was skilled in medicine and involved in public administration. She was appointed as an inspector of the market in Medina. In the eighth century, Amirah bint Abd al-Rahman intervened in a court case in Medina and prevented a miscarriage of justice by presenting textual evidence from religious sources forcing the judge to overturn his decision, without requiring a second opinion. The oldest university in the world, Al-Qarawiyyin in Fez, was founded in 859 AD by a woman, Fatima Al-Qarawiyyin. Twelfth-century female scholar Zaynab bint al-Kamal taught more than four hundred books of hadith to thousands of students. Also in the twelfth century, Fatimah bint Sa'd al Khayr began her scholarly journey at the age of four in China, traveling over three thousand miles.<sup>149</sup>

Hadith scholarship sheds a more positive light on the history of Islam. Dr. Mohammed Nadwi's forty-volume encyclopedia, *Al-Muhaddithat*,<sup>150</sup> captures over 9,500 biographies of female scholars of hadith. It could be argued that the study and narration of hadith carried less authority than, for instance, the study and teaching of Islamic law. However, what is captured within this recently unearthed history is more significant than the type of scholarship or authority that women exercised, as is demonstrated by the examples that follow.

These stories form part of a collection that provides examples of the ways in which, over the last 1,400

years, men and women shared spaces of learning and education and traveled extensively in their pursuit of knowledge when the only means of travel were camel or horseback, and when women of knowledge were revered as much as men of knowledge. This history includes stories of Muslim women invited to teach in the most prestigious chairs, and paints a picture of spaces where barriers of segregation disappear. In many ways, this history is a paradox and paints a picture contrary to the many segregated Muslim societies that exist today, where women are prevented from seeking an education and from spaces of worship, and where there are fewer female scholars and minimal professional female role models.

## Recommendations

Gender-based discriminatory attitudes and practices can limit freedom of movement and the right to participate in society. Education is required to address such a gender-based social stigma through, for example, curricula in schools, community and public education programs, as well as workplace training. Nationally, policies of inclusion need to be created and implemented to overcome gender-based discrimination, which can limit the value of individuals and opportunities afforded to them by way of education and employment. Initiatives are also required to challenge and address cultural norms that help create a hostile environment towards women in the public sphere, such that individuals feel unable to enter society with their whole sense of self.

In societies where there is a stigma attached to female births, educational programs challenging cultural norms that afford greater value to males over females are required. Such programs can draw upon religious and human rights teachings to emphasize the value of human life, and in particular the value that females add to society. Women who give birth to girls in societies where females may be endangered ought to be offered extra support to prevent the practice of female infanticide. In countries where reproductive technologies are heavily relied upon, closer monitoring must be put in place to ensure that sex-selection policies are not employed in a discriminatory fashion. Governments could also establish monitoring policies for infanticide and take legal action against those engaging in such practices. As for countries where there is significant gender imbalance, governments ought to be concerned about

<sup>149</sup> See Mohammad Akram Nadwi, *Al-Muhaddithat: The Women Scholars in Islam* (Oxford: Interface Publications, 2007), for further details of the biographies of these women and others.

<sup>150</sup> Ibid.

demographics and potentially incentivize female births to help redress the imbalance.

The educational impact of critically engaging with history, with the positive and less positive aspects, can be a tool for challenging cultural perceptions related to gender. Efforts should be made to seek out stories of women who shaped history, and those stories should be integrated into educational curricula and shared to create positive role models for both women and men. Fostering a sense of pride for the contributions of women and celebrating them in the public space is an important step, one that can bring a greater sense of balance within our collective consciousness as it relates to gender.

More emphasis needs to be placed on recognizing the value of men and women, with their similarities and differences, and their uniqueness as human beings, so that each person feels empowered within their domestic and public lives to participate fully and flourish as individuals as part of a greater whole. Such a vision built upon the consideration of men and women

as individuals, with something unique to offer, could cultivate new insights for how we reimagine gender-inclusive societies. In 2018, a statue celebrating a female suffragette, Millicent Fawcett, was added to Parliament Square in the United Kingdom,<sup>151</sup> which had previously celebrated only notable male figures. Recognition and acts of remembrance have a powerful psychological influence on how we value different members of society. Women of the past deserve to be recognized, and celebrated in the public space, as much as men. It is through such celebration and collectively owning these histories that respect for the genders will reach a desirable balance.

At a more practical level, gender-sensitive policies need to be implemented to ensure that spaces of education and opportunities for employment within communities and societies are not exclusively reserved for individuals of a particular gender. In societies where stigma is attached to one gender, greater efforts need to be made to create safer societies and to challenge repressive norms that create an unwelcoming environment.

<sup>151</sup> Mayor of London, "Historic Statue of Suffragist Leader Millicent Fawcett Unveiled," London Assembly, April 24, 2018, <https://www.london.gov.uk/press-releases/mayoral/historic-statue-of-suffragist-leader-unveiled>.



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# ISLAM, HEALTHCARE ETHICS, AND HUMAN RIGHTS

Dr. Mehrunisha Suleman and Arzoo Ahmed

## INTRODUCTION

Until recently, medical practitioners had been the principal decision makers within the clinical context globally. This authority was often linked to their superior knowledge, training, and experience in disease pathologies, management, and prognosis. More recently, however, the moral authority of health services and health service personnel, particularly doctors, is on the decline.<sup>152</sup> This is as a result of recent and historical breaches in ethical conduct<sup>153</sup> that enraged the public and health professionals alike, who are calling for better regulation over the medical community. These violations stimulated a paradigm shift in the moral thinking about the rights and responsibilities of both medical practitioners and patients within contemporary medical ethics. Such shifts run alongside globalized efforts to protect individual freedoms and rights.<sup>154</sup>

These transformations are in keeping with Islamic teachings, whose Hippocratic Oath-equivalent (based on the teachings of the Quran and sayings of Prophet Muhammad) insists that medical practitioners serve “all of mankind, poor or rich, literate or illiterate, Muslim or non-Muslim, black or white with patience and tolerance, with virtue and reverence, with knowledge and vigilance.”<sup>155</sup> Exhortations towards the embodiment of virtues and respect for human persons are central to Islamic understandings of the rights and responsibilities of all, including patients and practitioners.

However, despite the work that has been accomplished thus far in contemporary medical ethics in deriving, applying, and reviewing ethical principles, many protocols and the practitioners who apply them fail to take into consideration a key human right. The pertinence of religious pluralism, cultural differences, and

moral diversity that pervade different societies<sup>156</sup> may be overlooked in existing guidance and practice. This chapter will present a summary of some of the Islamic rights of medical practitioners and patients that are currently under-supported within the contemporary medical ethics discourse. A recognition and reinvigoration of supporting patients’ and practitioners’ rights to practice their faith would assist in upholding human rights, especially those ensuring religious and cultural freedoms for all, as articulated in Article 18 of the United Nations’ Universal Declaration of Human Rights, or UDHR. Such a course of action is widely applicable across contexts: where Muslims are majorities, such as in the Arab world, where Muslims exist as demographic minorities, such as in the United Kingdom—indeed, all around the globe.

## ISLAMIC RIGHTS OF MEDICAL PRACTITIONERS

### Protection of Faith & Life and Conscientious Objection

Islam provides its adherents with a moral road map for their personal, social, and professional spheres. Muslims receiving and providing healthcare thus navigate carefully whether their practice within their professional sphere is in keeping with the sharia (Islamic law). The ethico-legal framework delineated by Islam’s normative sources juxtaposes with global health priorities, secular healthcare systems, and patient preferences. Such factors may require Muslims to navigate between multiple moral spheres.

For example, two key principles exhorted within the Islamic tradition are the “protection of faith” and “protection of life.” These are the first two of five objectives of Islamic Law (Maqasid al-Sharia).<sup>157</sup> Upholding these objectives is central to the Muslim practitioners’ moral obligations and may manifest in their conscientious

152 Kurt C. Stange, “Power to Advocate for Health,” *Annals of Family Medicine* 8.2 (2010): 100-107.

153 Robert Jay Lifton, “Doctors and Torture,” *New England Journal of Medicine* 351, no. 5 (2004): 415-416.

154 United Nations, *Universal Declaration of Human Rights*, adopted December 10, 1948, [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

155 Ibrahim M. Khan, “Oath of Hippocrates Updated by Muslim Physicians,” *Plastic and Reconstructive Surgery* 83, no. 3 (1989): 579-580.

156 Chris Durante, “Bioethics in a Pluralistic Society: Bioethical Methodology in Lieu of Moral Diversity,” *Medicine, Health Care and Philosophy* 12, no. 1 (2009): 35-47.

157 The other three are protection of intellect, progeny, and property.

refusal to participate in emerging medical interventions. For instance, legislation permitting assisted dying has transformed normative ethical practices within healthcare.<sup>158</sup> Such transitions are a result of the shifts described above, with growing emphasis in healthcare on the patient's rights to autonomy or "self-rule"<sup>159</sup>; the latter, having roots in the liberal tradition, emphasizes individual freedom.<sup>160</sup> Muslim practitioners may experience moral dissonance when considering respect for a patient's wish to end their life, for example, with that of their own moral right to protect life and their own faith.

Additionally, emerging challenges related to genetic technologies, the status of the embryo, and embryonic storage, research, and disposal all raise critical moral problems for Muslim medical practitioners. While devoted to the generation of knowledge and therapeutic interventions, they are committed to preserving faith and life and ensuring they are not complicit in moral infringements defined by their faith, similar to adherents of Christianity and other faith traditions.

### Policy Suggestions

Although conscientious objection is a recognized practice within healthcare,<sup>161</sup> little is known about the impact of this practice on the training and career progression of Muslim healthcare professionals (related to Maqasid principles 3 and 5). With growing calls to reassess the moral status of conscientious objection within the medical practice,<sup>162</sup> more research and engagement is necessary from faiths like Islam to evaluate the transformative interaction between the rights of medical practitioners and patients as well as the moral demands of emerging medical interventions on adherents of the faith. Empirical research in Muslim-majority and Muslim-minority settings is necessary to evaluate whether Muslim practitioners can conscientiously object to participating in interventions they deem to be infringements of their faith. It would be pertinent to assess the nature of their objections and the extent to which those objections are rooted in faith. It would also

be important to analyze whether such practitioners are supported in their actions or if they face stigma or untoward repercussions.

Such research can be used to inform the prevailing medical ethics discourse<sup>163</sup> as well as accepted medical practice to ensure the rights of medical practitioners wishing to observe their faith commitments are respected.

## ISLAMIC RIGHTS OF PATIENTS

### Protection of Faith at the End of Life

Ensuring that patients can make informed decisions about their care and that their religious and spiritual needs are met has seen growing importance within contemporary medical ethics over recent years. Such a value is in keeping with the Islamic rights of patients to practice their faith in a state of health or illness. Understanding faith communities' religious and spiritual needs as they interface with the healthcare setting, however, is poorly understood. The biomedical paradigm of understanding health and disease is the prevailing epistemic model within healthcare.<sup>164</sup> George Engel's<sup>165</sup> pioneering paper revolutionized research and practice within biomedicine away from biological reductionism to one that incorporates social, psychological, and behavioral dimensions of illness. Yet there is currently little scope for accommodating patients' metaphysical commitments within the existing biomedical framework. The healthcare context is rarely a sterile and controlled environment; commonly it consists of plurality, diversity, uncertainty, and fragmentation. Healthcare providers, patients, and families who interact within such a context—be that within an institution or in the community—display not only biomedical parameters of symptoms and disease, but also individual and sociocultural histories, languages, values, and beliefs.

158 G. Bosshard et al., "A Role for Doctors in Assisted Dying? An Analysis of Legal Regulations and Medical Professional Positions in Six European Countries," *Journal of Medical Ethics* 34, no. 1 (2008): 28-32.

159 R. A. Hope, Julian Savulescu, and Judith Hendrick, *Medical Ethics and Law: The Core Curriculum* (New York: Elsevier Health Sciences, 2008), 40.

160 John Stuart Mill, *On Liberty* (London: Longmans, Green, Reader, and Dyer, 1869).

161 Mark R. Wicclair, *Conscientious Objection in Health Care: An Ethical Analysis*, (New York: Cambridge University Press, 2011).

162 Julian Savulescu, "Conscientious Objection in Medicine," *BMJ: British Medical Journal* 332, no. 7536 (2006): 294; Ronit Y. Stahl and Ezekiel Emanuel, "Physicians, Not Conscripts—Conscientious Objection in Health Care," *New England Journal of Medicine* 376, no. 14 (2017): 1380-1385.

163 Although there is a substantial discourse on conscientious objection, most of the literature is based on the Christian tradition. There is a paucity of research and literature from the Muslim perspective.

164 This model of health and disease focused on physical systems where an understanding of illness was limited to individual physical symptoms and disease pathology.

165 George L. Engel, "The Need for a New Medical Model: A Challenge for Biomedicine," *Science* 196, no. 4286 (1977): 129-136.

For example, within palliative and end-of-life care, evidence suggests there is a schism between the current model of care and the health needs of religious-ethnic minority populations like Muslims. Such evidence includes reports that point to an unmet need among Muslims of palliative and end-of-life-care services. This is reflected in poor uptake of advanced care planning and hospice services, including community-based services and on-site care. Reports also suggest that services are not adequately equipped to provide care for religious-ethnic minorities, whose spiritual needs are central to their end-of-life care.<sup>166</sup> Healthcare professionals may encounter such beliefs and practices when caring for Muslim patients and families. Without a deep understanding of such commitments, however, tensions may arise in clinical care settings and decision-making. For example, Muslims believe in a life after death and consider death not as an end but a transition.

Many Muslims are devoted to ensuring that this transition is completed in accordance with their spiritual commitments, which include particular beliefs around what constitutes a “good” death, the role of suffering at the end of life, and the spiritual significance of the proclamation of faith by the dying. The Prophet Muhammad said: “Prompt your dying ones to say there is none worthy of worship except Allah” (La ilaha illallah).<sup>167</sup> Such traditions signify the importance of reciting the testimony of faith at the time of death and its significance within Muslim understandings of a good death alongside the recitation of the Quran and positioning of the dying towards Makkah.<sup>168</sup> These beliefs are manifest in the healthcare setting as expressed choices, namely reluctance around the acceptance of pain relief, particularly opiate use at the end of life. Such commitments and wishes may be discordant with the prevailing practices of keeping a patient as comfortable as possible and healthcare professionals’ own assurances to providing evidence-based care.

## RECOMMENDATIONS

- Improving religious literacy within the healthcare policy and practice settings, and adapting training on diversity and equality and unconscious bias such that these can offer specific guidance on religious-ethnic populations, may be a step towards equipping staff with the necessary awareness and skills to better understand and in turn accommodate patients’ religious commitments. Such training ought to include demographic data on religious-ethnic populations and up-to-date social science research, such as that conducted by Tayeb et al.<sup>169</sup> on patients’ religious commitments and preferences.

### Right to Healthcare

There are many verses in the Quran and sayings of Prophet Muhammad<sup>170</sup> emphasizing health and well-being as a blessing and illness as a test. The sources exhort the status of the ill, saying that those who are sick have the right to be cared for and those who are in a position to do so have a duty to care for them. Illness and disease within an Islamic worldview are understood as suffering incurred by believers as a means of spiritual cleansing where religious transgressions are manifest as ailments, or a means of elevating the devotee. The Prophet Muhammad explained: “There is no disease that God has created, except that He also has created its treatment”<sup>171</sup> and that “it is cured with the permission of God.”<sup>172</sup>

Within an Islamic paradigm, therefore, the sick have a right to healthcare and those in a position to offer the care, through resources, skills, and time, are duty-bound to provide it. Imam Ghazali deemed the provision of healthcare a *fard kifaya*,<sup>173</sup> an obligation on an entire community that can be discharged by a few. These may include individuals and institutions that

166 Natalia Calanzani et al., *Palliative and End of Life Care: For Black, Asian and Minority Ethnic Groups in the UK*, King’s College London, Cicely Saunders Institute, June 2013, [https://www.mariecurie.org.uk/globalassets/media/documents/who-we-are/diversity-and-inclusion-research/palliative-care-bame\\_full-report.pdf](https://www.mariecurie.org.uk/globalassets/media/documents/who-we-are/diversity-and-inclusion-research/palliative-care-bame_full-report.pdf).

167 Sunan an-Nasa’i, Book 21, Hadith 9, last accessed May 31, 2018, <https://sunnah.com/nasai/21/9>.

168 Mohamad A. Tayeb et al., “A ‘Good Death’: Perspectives of Muslim Patients and Health Care Providers,” *Annals of Saudi Medicine* 30, no. 3 (2010): 215.

169 Ibid.

170 Sahih Bukhari, Book 75, Hadith 2, last accessed May 31, 2018, <https://sunnah.com/urn/52930>; and Sahih Bukhari, Book 81, Hadith 1, last accessed May 31, 2018, <https://sunnah.com/bukhari/81/1>.

171 Sahih Bukhari, Book 76, Hadith 1, last accessed April 28, 2018, <https://sunnah.com/bukhari/76/1>.

172 Sahih Muslim, Book 39, Hadith 95, last accessed April 28, 2018, <https://sunnah.com/muslim/39/95>.

173 Aryn B. Sajoo, *Muslim Ethics: Emerging Vistas* (New York: IB Tauris, 2008), 109.

comprise a holistic healthcare system, such as health-care professionals, policy makers, and state-level funding levers, such as social health insurance policies.

### RECOMMENDATIONS

Islamic ethical teachings on the obligation to protect life and to ensure care for the sick resonate with UDHR Article 25.<sup>174</sup> Such teachings can be made central to the policies and practices of governments of Muslim-majority countries that seek to uphold Islamic ethical values. This can be achieved through the establishment of universal access to healthcare. In particular, governments and policy makers ought to ensure distributive justice to safeguard against the enhancement of inequalities through infrastructural changes and the myriad possibilities for treatment offered by advancing medical technologies. This can be achieved by ensuring that those who are most in need and/or face barriers to accessing care, such as those in remote areas or extreme poverty, are proactively identified and cared for. For example, nation states can ensure a ring-fenced national Waqf (endowment) fund towards free healthcare for individuals and families from lower socioeconomic backgrounds, migrant communities, those with disabilities and learning needs, women, children, and the elderly. Additionally, given the rising healthcare costs globally, healthcare funding for those in need ought to also be allocated from national zakat funds.

### Right to Privacy

The cornerstone of patient trust in the medical practitioner and the healthcare profession is the assurance of privacy.<sup>175</sup> A patient's right to privacy and a healthcare professional's responsibility to ensure confidentiality is integral to medical ethics. Biomedicine, however, has transformed dramatically in recent decades. Encounters with healthcare are no longer limited to the individual patient-doctor interface. Nor is information about the patient limited to a case file in a single computer or filing cabinet.

With the advent of population health records, human genetic studies, and big data institutes, governments and corporations now have unprecedented access to individual and population-level data. The public and professionals alike are enthralled by the promise of revolutionizing research through the establishment of such large datasets, and the potential for developing personalized therapies. However, there are pressing ethical questions around privacy and ownership. Individuals making decisions about offering their genetic data for research today are not simply making a personal choice. Their existing relatives as well as future generations co-own the information they provide.

Within Islamic ethics, privacy and trust are greatly emphasized,<sup>176</sup> particularly in relation to the protection of future generations (related to Maqasid, principle 4). The Quran reads: "O you who believe! betray not the trust of God and the Messenger, nor misappropriate knowingly things entrusted to you."<sup>177</sup>

### RECOMMENDATIONS

More engagement is required from the Islamic scholarly sphere as well as policy makers, public health professionals, and the health industry to assess the moral and legal implications of the collection, storage, and use of big data. This can be achieved through government-level commitments to funding interdisciplinary meetings, research, academic publications, reports, public engagement, and outreach. Such commitments are applicable in Muslim-majority contexts, such as various Middle Eastern states and South Asian countries including Pakistan and Bangladesh—as well as in Muslim-minority contexts, such as those that exist across Europe and North America.

Faith traditions like Islam that emphasize the virtue of privacy may offer much needed guidance and layers of complexity to the existing bioethical discourse on the levels and types of protections that ought to be observed when handling population-level and/or genetic data.<sup>178</sup> Governments should ensure appropriate

174 UNHR Article 25, 1, states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." See "Article 25: Right to an Adequate Standard of Living" in *Universal Declaration of Human Rights*, via Claiming Human Rights, A joint project of the National Commissions for UNESCO of France and Germany, adopted December 10, 1948, [http://www.claiminghumanrights.org/udhr\\_article\\_25.html](http://www.claiminghumanrights.org/udhr_article_25.html).

175 Alan G. Johnson and Paul R.V. Johnson, *Making Sense of Medical Ethics: A Hands-On Guide* (New York: Oxford University Press, 2007), 101.

176 Fatimah Abdullah, "Teaching Islamic Ethics and Ethical Training: Benefiting from Emotional and Spiritual Intelligence," *International Journal of Humanities and Social Science* 2, no. 3 (2012): 224-230.

177 Quran 8:27, last accessed April 29, 2018, <http://corpus.quran.com/translation.jsp?chapter=8&verse=27>.

178 Saied Nazari Tavaokkoli, Nasrin Nejadsharvari, and Ali Ebrahimi, "Analysis of Medical Confidentiality from the Islamic Ethics Perspective," *Journal of Religion and Health* 54, no. 2 (2015): 427-434.



expert (including diverse actors such as faith leaders) and public engagement is carried out when determining the level and types of governance processes and assurance that ought to be implemented when setting up and running big data institutes. Given the unknowable negative implications that may be incurred by future generations, the precautionary principle ought to be observed.

### Protection against Exploitative Practices with Growing Research in Muslim Contexts

The globalization of clinical trials has resulted in an increase in research being conducted in low- and middle-income countries (LAMICS). The majority of the fifty-seven Organisation of Islamic Cooperation<sup>179</sup> countries fall within the bracket of LAMICS. Muslim-majority countries in the Southeast Asia (SEA) region, such as Indonesia and Malaysia, have become popular localities for industry- and government-sponsored trials. The latter are increasing in popularity because the trial process has been found to be cheaper, with faster recruitment of participants.<sup>180</sup> However, some authors suggest that one reason for the outsourcing of clinical trials is to avoid the rigorous governance mechanisms present in source countries.<sup>181</sup> In addition to the SEA region, the Middle East has also become a popular site for research due to good infrastructure, increased investment in the medical sciences, and burgeoning economies.<sup>182</sup> Research shows that countries in the Middle East also operate with fewer restrictions and so are popular with pharmaceutical companies to trial<sup>183</sup> new and untested drugs.<sup>184</sup>

Islamic ethical teachings emphasize the protection of the weak and vulnerable. Although medical research is necessary for the generation of knowledge and the development of novel preventative and therapeutic interventions, these should not be prioritized over the safety and interests of research participants.

## RECOMMENDATIONS

The increase in clinical trials in the LAMICS emphasizes the need for source and host governments to ensure that host sites have robust governance processes in place. The establishment of research ethics governance systems that can successfully oversee research and its development requires both intellectual and infrastructural investment. Islamic teachings that stress protections for the weak and vulnerable would provide an essential component to such guidance and practices.

Another important consideration is that recent work on global biomedical ethics has transformed dramatically, considering not only challenges in consent procedures<sup>185</sup> related to biomedical research, but also more subtle questions relating to exploitation, the need for research to be responsive to local population needs, and the sustainability of research. Currently it appears that there is little engagement from the Islamic scholarly sphere on such pressing moral challenges, and suitable institutions and individuals ought to be supported to engage with such discussions. For example, countries that conduct biomedical research ought to have in parallel a department specialized in bioethics research, including the training and establishment of scholars who are experts in offering Islamic perspectives on the complex questions posed by global health research.

More work needs to be done to enhance global governance efforts to ensure the safety of participants and populations in host countries, such as the establishment of an international legal standard for research ethics. Additionally, a global fund to support legal proceedings against misconduct may enable countries to pursue legal action against industry and research institutions that fall foul of international standards, without fear of undue financial burdens. It would be particularly advisable for Muslim communities with disproportionately high levels of wealth, such as specific Arab states in the Gulf, to contribute significantly in this regard.

179 The organization was formed to promote cooperation between countries with an Islamic identity. It identifies its mandate as: “the collective voice of the Muslim world. It endeavors to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world.” See “History,” Organisation of Islamic Cooperation, [https://www.oic-oci.org/page/?p\\_id=52&p\\_ref=26&lan=en](https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en). The organization’s mandate has been extended to embrace cooperation in the matter of health as well.

180 Gross Amess and Hirose Mimoko, “Conducting Clinical Trials in Asia,” Pacific Bridge Medical, March 1, 2007, [http://www.pacificbridgemedical.com/publications/asia/2007\\_conducting\\_clinical\\_trials](http://www.pacificbridgemedical.com/publications/asia/2007_conducting_clinical_trials); Seth W. Glickman et al. “Ethical and Scientific Implications of the Globalization of Clinical Research,” *New England Journal of Medicine* 360, no. 8 (2009): 816-823.

181 30 Volnei Garrafa et al., “Between the Needy and the Greedy: The Quest for a Just and Fair Ethics of Clinical Research,” *Journal of Medical Ethics* 36, no. 8 (2010): 500-504.

182 Kermani F., “How to Run Clinical Trials in the Middle East,” *SCRIP* (2010): 1-8.

183 Often, it involves testing existing drugs for their efficacy on other diseases and/or trials of new and untested drugs.

184 Ghaith Alahmad, Mohammad Al-Jumah, and Kris Dierickx, “Review of National Research Ethics Regulations and Guidelines in Middle Eastern Arab Countries,” *BMC Medical Ethics* 13, no. 1 (2012): 34.

185 Benjamin Freedman, “Scientific Value and Validity as Ethical Requirements for Research,” *IRB* 9, no. 6 (1987): 7-10.

### Conclusion

The discussions above emphasize the ever-increasing ethical concerns that pervade healthcare. As biomedical ethics is only one of many worldviews for understanding and responding to such ethical challenges, faith traditions like Islam play a key role in further elaborating these challenges and providing novel local and global responses to them. From their inception—through the Quran, traditions of the Prophet, and scholarly engagement—Islamic values have remained pertinent to the field of health and wellbeing. These Islamic values interact with and raise ethical questions within the biomedical sphere at multiple levels, including research, development, and the practice of medicine. These values and concerns have been shown to be not only

complementary but also essential in ensuring that the field of biomedical ethics remains conscious of and responsive to religious pluralism, cultural differences, and the moral diversity that pervade societies globally.

Faith traditions like Islam—and the beliefs and practices associated with them—offer much needed guidance on how we ought to think about professionalism, end-of-life care, rights to healthcare and privacy, and exploitation. These specific cases demonstrate the need for symbiosis between religious and biomedical scholarship. The cases also highlight that equipping our collective consciousness through other ways of knowing and practicing, beyond biomedicine, may help us develop a more holistic vision of health and illness and how it is we ought to organize healthcare globally.

# HUMAN RIGHTS IN THE MALAY WORLD<sup>186</sup>

Azril Mohd Amin

## Background

**H**uman rights as a concept can be viewed as controversial—what might appear to be a right to some is not necessarily so apparent to others and, indeed, different worldviews might have different priorities. Human rights are often thought of as a set of principles that guarantee minimum human dignity; they are also the subject of disagreement and varying interpretations. Of note is the conflict between the aspirations of many human rights advocates and what many Muslims consider to be Islamic ideals. Is there any hope for the reconciliation, where they do have different conclusions, of the aspirations of human rights advocates with the aspirations of religious teachings, in particular those of Islam?

This paper sets out to explain how the Malay Muslim world implemented and made sense of human rights, how human rights are conceived and practiced in the modern nation state that is Malaysia, and lastly how the Centre for Human Rights Research and Advocacy (CENTHRA),<sup>187</sup> as part of the Malaysian Alliance of Civil Society Organisations (MACSA), is working to improve the status of human rights in Malaysia.

## Universalism vs. Cultural Relativism

Human rights are derived from a European understanding of Judeo-Christian ethics that in turn were secularized during the Renaissance and Reformation. From the sixteenth to the eighteenth centuries, these were known as natural rights emanating from natural law. Today, they are known as human rights and have become legal rights enshrined in international law, such as in the Universal Declaration of Human Rights (UDHR).

The origins of the UDHR as a document can be traced to political landmarks in European and American history,

such as the Magna Carta of the United Kingdom (1215), the French Declaration of the Rights of Man (1789), and the US Bill of Rights (1791). Notwithstanding the UDHR's primarily Western origin, some—among them the Office of the United Nations High Commissioner for Human Rights—hold that human rights as encapsulated in the UDHR are universal, meaning they apply to every human being. Cultural relativists, however, object to universalism and argue that human rights are culturally dependent, and that no moral principles can be applied to all cultures. They argue that human rights are not the only way to guarantee humanism, and that the values of Asia and Islam should be equally important to those of Europe on the humanistic approach. They argue that culture is a source of moral rights and the basis of differentiation and distinction, and any existence of policy and consciousness has a very close relationship with the local history and culture and, hence, must take these into account. In this context, universalism is seen by cultural relativists as a form of new imperialism.<sup>188</sup>

The division of the principles of the UDHR into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in a way reflects the schism between universalism and cultural relativism. In the Cold War era, the universal versus culture debate was predominantly between the communist world, which championed economic and social rights, and Western democracies, which concentrated more on civil and political rights. While that debate collapsed with the demise of the Soviet Union, some of its themes survived. Now, debates take place primarily in an economic context between developed and less-developed countries, or alternatively in a religious context between the West and Islam.<sup>189</sup>

## The Intellectual Basis for Cultural Relativism

The intellectual basis of a cultural relativist approach to human rights may be found in AJM Milne's book *Human Rights and Human Diversity: An Essay in the Philosophy*

<sup>186</sup> Paper presented at the Islamic Tradition, Human Rights Discourse, and Muslim Communities Conference organized by the Atlantic Council at the Oxford Centre for Islamic Studies, Oxford, United Kingdom, on May 5, 2018.

<sup>187</sup> CENTHRA ([www.centhra.org](http://www.centhra.org)) is a founding member of the Malaysian Alliance of Civil Society Organisations in the Universal Periodic Review process, or MACSA.

<sup>188</sup> "Universalism and Cultural Relativism in Human Rights International Law Essay," *Lawteacher.net*, May 2018, <https://www.lawteacher.net/free-law-essays/international-law/universalism-and-cultural-relativism-in-human-rights-international-law-essay.php?vref=1>.

<sup>189</sup> Dr. Gyan Basnet and Mansoor Hassan Albalooshi, "Human Rights Debate: Universalism versus Relativism," *Eurasia Review*, June 27, 2012, <https://www.eurasiareview.com/27062012-human-rights-debate-universalism-versus-relativism-oped/>.

of *Human Rights*, published in 1986. Milne argues that the drafters of the UDHR failed to consider the diversity of cultures and worldviews and instead settled on a universal standard.<sup>190</sup> Noting the importance of cultural differences, the American Anthropological Association (AAA) criticized the UDHR even while it was drafted in 1947. In its Statement on Human Rights,<sup>191</sup> submitted to the UN Commission on Human Rights responsible for drafting the UDHR, the AAA stated:

It is a truism that groups are composed of individuals, and human beings do not function outside the societies of which they form a part. The problem is thus to formulate a statement of human rights that will do more than just phrase respect for the individual as an individual. It must also take into full account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound.<sup>192</sup>

The AAA also postulated that the West's history of colonizing and evangelizing other cultures made the West problematic to reference—at least in as far as the recognition of universal human rights were concerned. They proposed that the UDHR be drafted with reference to three principles,<sup>193</sup> namely respect for individual differences including a respect for cultural differences, acceptance that no technique of qualitatively evaluating cultures has been discovered, and recognition that standards and values are relative to the cultures from which they are derived. These principles, however, were not implemented by the UN Commission drafting the UDHR, leading to criticism from cultural relativists.

## HUMAN RIGHTS IN MALAYSIA

Rohaida Nordin, in her research paper *Malaysian Perspective on Human Rights*,<sup>194</sup> states that the interpretation of human rights in Malaysia favors a localized Asian approach based on the Confucian tradition rather than on Western tradition.<sup>195</sup> This is not quite true as Malaysia's approach is Islam-based, and not Confucian in origin.

Nonetheless, under the previous Tun Dr. Mahathir-led administration, human rights were viewed as a conflict between Western and Asian values and an attempt to undermine the sovereignty of former colonies of the West, including Malaysia. Because of this, Malaysia prefers to deal with issues relating to human rights on a case-by-case basis and within its own domestic jurisdiction, resisting international monitoring and refusing to become a party to most international human rights instruments.<sup>196</sup>

Malaysia's highest law is the Federal Constitution. Article 3(1) provides that Islam is the religion of the federation. Thus, all human rights principles in Malaysia must take this fact into account. The Federal Constitution is also the source of human rights law in Malaysia. Part II of the constitution enshrines rights under the heading of “fundamental liberties,” which are basically another term for human rights. Among the rights recognized are the rights to life and liberty (Article 5), equality (Article 8), freedom of speech, thought, and expression (Article 10), and religion (Article 11).

As a federation of previously independent Malay Muslim Sultanates, Malaysia is a multiethnic and multi-religious country, and is the perfect showcase of why a universalist approach to human rights cannot function effectively. The sheer diversity of beliefs alone would render the approach unworkable. Understanding the different belief systems at play, it quickly becomes apparent that one needs to approach human rights from a cultural relativist standpoint to achieve their successful realization within Malaysia.

The Malaysian Constitution does this by providing appropriate limitations on the granting of human rights. Article 5 on the right to life and liberty, for example, while generously interpreted to include the right to livelihood and quality of life,<sup>197</sup> limits this to “so far as permitted by law.” This article enables the application of the death penalty, which advocates argue is necessary to deter serious crime such as drug trafficking and murder. Still, that is not to say that laws are not routinely amended to better reflect the ideals of right to life.

190 A.J.M. Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (The Macmillan Press, London, 1986): 3-4.

191 “Statement on Human Rights,” *American Anthropologist New Series* 49, No. 4 (October-December 1947), [https://www.jstor.org/stable/662893?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/662893?seq=1#page_scan_tab_contents), 539-543.

192 Ibid, 539.

193 Ibid, 541-542.

194 Rohaida Nordin, “Malaysian Perspective on Human Rights,” *Jurnal Undang-undang* (2010): 14.

195 Ibid, 19.

196 Ibid, 21.

197 *Lee Kwan Woh v. Public Prosecutor* (2009), 5 MLJ 301, Federal Court of Malaysia.



Recently, the Malaysian cabinet agreed to amend the law on drug trafficking to render the death penalty discretionary and not mandatory for drug traffickers.<sup>198</sup> This has been enacted in the form of an amendment to the Dangerous Drugs Act of 1952,<sup>199</sup> and although criticisms remain on who gets to exercise this discretion (i.e., the public prosecutor vis-à-vis the court),<sup>200</sup> this is nonetheless a positive step forward from a human rights perspective.

As another example, the principle of equality as enshrined in Article 8 of the Malaysian Constitution has been amended in practice to protect historically persecuted groups. While the law sounds ideal on paper, critics argue that complete equality in treatment, absent affirmative action or positive discrimination, would render the spirit of the equality clause meaningless. This argument relates to the history of the indigenous peoples of Malaysia, the Bumiputera Malays, and the injustices visited upon them in the pre-independence era. It is to this end that the constitution also recognizes affirmative action for this group in the form of Article 153, established to remedy these past injustices due to a legacy of colonialism. It is on this basis that the New Economic Policy, which is a set of affirmative action regulations, was promulgated in 1970 and continues to operate to this day.

Freedom of speech, thought, and assembly are also limited by various laws, with the justification that previous incidents such as the 1969 racial riots resulted in untold suffering for Malaysians and the devastation of property, lives, and the economy. As a result, the Sedition Act was amended in 1970 to include Section 3(1)(f), effectively protecting the fragile racial and religious harmony that exists in Malaysia today.

Malaysians do enjoy the right to peaceful assembly as guaranteed by the Peaceful Assembly Act of 2012, enacted by the government to replace the Police Act of 1967, which required police permits for public rallies. Unlike the Police Act, the Peaceful Assembly Act merely requires notice, which is a vast improvement on the previous position.

Malaysia's perspective on human rights is that they must be in line with local cultures and norms, and in line with Islam's position as the religion of the Malaysian federation. Subject to this, human rights may

be realized as far as it is possible without contravening such norms. The alteration of Malaysian laws to approach synergy with the demands of the human rights discourse has been seen in recent years, with slow but steady liberalization about certain laws pertaining to restrictions on speech and assembly.

### IMPROVING THE STATE OF HUMAN RIGHTS IN MALAYSIA

Improving human rights in Malaysia, while ensuring that their values and norms are adhered to in accordance with the cultural relativist worldview, is a constant challenge. Fortunately, various civil society organizations (CSOs) have been established to meet this need, such as the Center for Human Rights Research and Advocacy (CENTHRA).

CENTHRA's mission obtained a much-needed boost between July and September 2017 when the Ministry of Foreign Affairs held consultations with several local civil society organizations—including CENTHRA—to explore a variety of human rights concerns in Malaysia. Human rights practices in the country had come under scrutiny following Malaysia's participation in the Universal Periodic Review (UPR), a process for regularly evaluating the human rights practices of UN members initiated by the UN General Assembly in 2006.

Throughout the consultative sessions, the progress and implementation of human rights measures in Malaysia were discussed and the various CSOs in question were encouraged to be forthright about their concerns and to identify current and future challenges.

Upon the conclusion of the consultative sessions, various CSOs in attendance, including CENTHRA, decided it was in their common interest to unite and form a coalition of CSOs with the aim of studying, as well as advocating, human rights issues in Malaysia for the UPR process for many years to come. CENTHRA, together with representatives from other CSOs, announced the formation of the Malaysian Alliance of Civil Society Organisations in the UPR process.

The collective stand within MACSA is that any recommendation accepted and implemented by Malaysia—in addition to upholding international human rights

198 "Malaysia Moves Closer to Scrapping Mandatory Death Penalty for Drug Traffickers," Reuters, August 7, 2017, <https://www.reuters.com/article/us-malaysia-lawmaking-death-idUSKBN1AN17C>.

199 Via the Dangerous Drugs (Amendment) Act 2017.

200 Kasthuriraani Patto and Ramkarpal Singh, "Proposed Amendments to the Dangerous Drugs Act, 1952—Kasthuriraani Patto and Ramkarpal Singh," *Malay Mail*, November 24, 2017, <http://www.themalaymailonline.com/what-you-think/article/proposed-amendments-to-the-dangerous-drugs-act-1952-kasthuriraani-patto-and>.



## The Islamic Tradition and the Human Rights Discourse

instruments such as the Universal Declaration of Human Rights of 1948, the Cairo Declaration on Human Rights in Islam of 1990, and the ASEAN Human Rights Declaration of 2012—must also be in tandem with Malaysia's own laws and customs, particularly the Federal Constitution as well as the constitutions and positions of the states within the federation.

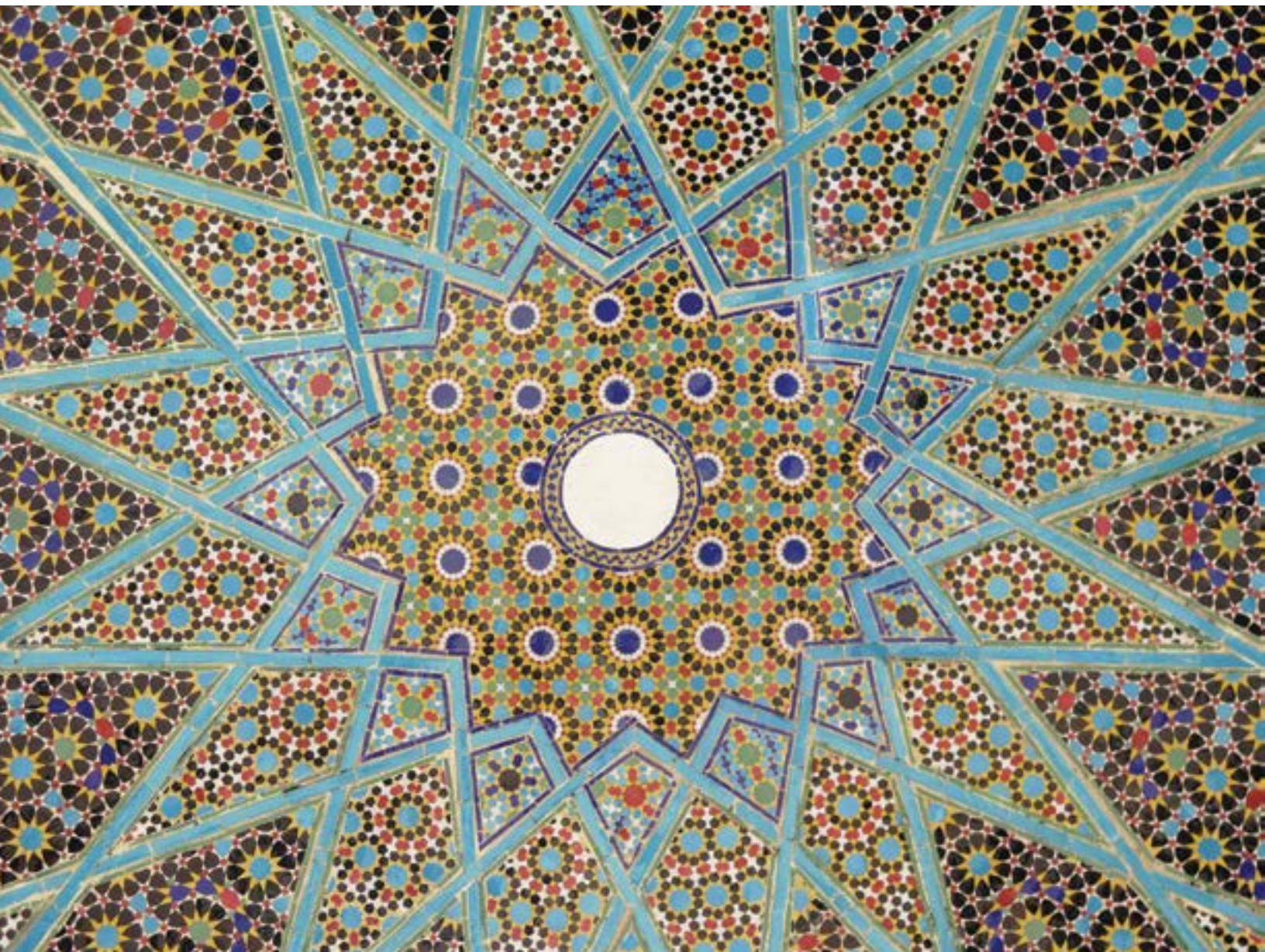
### CONCLUSION

The question of what constitutes human rights depends firmly upon whether one is inclined to the universalist view that human rights must be applicable to all despite their chiefly Western origin, or that modifications are in order given the same. The Malay world is very

much influenced by the Islamic conception of human rights. Malay customs follow Islamic law and tradition, which emphasize balance between the greater good and individual exercise of rights.

Human rights as practiced in contemporary Malaysia are those derived from its highest law, the Federal Constitution. The constitution recognizes the need to balance rights with responsibilities and safeguards to ensure they are not abused, that the greater good of society takes precedence over the individual exercise of rights, and lastly that any right must consider local values and norms. This is thought to be the ideal solution as this provides for maximum possible exercise of rights by any individual without endangering society.

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## SECTION IV: Case Studies in the West



# ISLAM, MUSLIMS, AND RELIGIOUS FREEDOM IN EUROPE: A TEST OF FAITH

By Rim-Sarah Alouane

## Introduction

The Muslim presence in Europe signals a substantial cultural change for Western societies that are now coming to terms with a permanent, visible Muslim population. Considering the tumultuous history between the Islamic world and Europe, the reality of European Muslim communities represents an important point of inflection. In the past, conversations were framed as *Islam versus the West*, but that has transformed into *Islam in the West*, and as we move from first- and second-generation immigrants to native-born Muslims, the conversation will shift focus to the *Islam of Europe*, if not an emerging European Islam.

Historically in Europe, religion and its derivatives played a crucial role in the process of secularization and in achieving the right to religious freedom. Thanks to this specificity, and to the definition of the boundaries of religious expression within a secular society, the right to religious freedom came to exist.<sup>201</sup> It has thus been able to separate, or at least differentiate, European states from their religious institutions, while ensuring the primacy of the former over the latter. Islam in Europe is taking root within this legal tradition, with consequences that transcend European borders and influence strategies for differentiation between religious and secular. As a result, European secularism has secured the religious freedom of Muslims but conditions their relationship with states of origin by making the religious legal model built in the aftermath of the treaties of Westphalia in 1648<sup>202</sup> both a common paradigm and a status quo. In other words, by

interrupting the current modern religious freedom paradigm, the presence of Muslims in Europe has ignited a debate on the exact nature of religious freedom within Europe's societal model, which was previously thought to have been settled.

The presence of Muslims in Europe and the development of Muslim community networks shattered the rigidities of the "implicit norms"<sup>203</sup> of the Westphalian model. However, European law regarding religious freedom struggles to incorporate both individual manifestations and the unique structure of transnational Muslim communities. The crisis of the European right of religious freedom in the face of Islam is the consequence of its exercise—or of the demand for exercise—by individuals and groups who are members of a religion or culture that did not participate in the religious peace process of 1648 and the constitutional initiative of the post-World War II world today. This calls into question the purported universalist automatism of the political paradigm that has governed Europe to date<sup>204</sup>

To illustrate the dynamics of European law on religious freedom regarding Islam, consider the classical distinction between the modern state-centric model of the right to religious freedom and the contemporary individual-centric model of the same right, having been developed through post-World War II constitutionalism in order to conform national legal systems to international human rights law.<sup>205</sup> This essential distinction shows how the treatment of Muslims in Europe exposes the inevitable hybrid nature of European law to religious freedom (both modern and contemporary), which reveals tensions and defines religious freedom as an absolute personal and community right guaranteed by and for a plural political community.

201 Philippe Portier, "State Regulation of Religion in Western European Countries" in *Politics of Religion in Western Europe: Modernities in Conflict?*, ed. François Foret and Xavier Itçaina (Milton Park, Abingdon, Oxon: Routledge, 2011), 93-107.

202 The treaties of Westphalia helped establish the foundation of the modern day state in Europe. The treaties, which took four years of negotiation, brought an end to two major wars: the 30-year Roman Empire war (1618-1648) and the 80-year Dutch-Spanish war (1568-1648); Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *The International History Review* 21, no. 3 (1999), 569-591.

203 Richard Mohr, "The Christian Origins of Secularism and the Rule of Law," in *Law and Religion in Public Life. The Contemporary Debate*, ed. Nadirsyah Hosen and Richard Mohr (London-New York: Routledge, 2011), 34-51.

204 Sarah Carol and Ruud Koopmans, "Dynamics of Contestation over Islamic Religious Rights in Western Europe," *Ethnicities* 13, no. 2 (2013), 165-190.

205 Monika Wohlrab-Sahr and Marian Burchardt, "Multiple Secularities: Toward a Cultural Sociology of Secular Modernities," *Comparative Sociology* 11, no. 6 (2012), 875-909.



### Navigating through the Processes of Secularization, *Laïcité*,<sup>206</sup> and the Traditional European State-Church Models

Before the arrival of Muslim immigrants, the old systems of state-church relations were being pushed aside by the rise of secularism. The arrival of new Muslim immigrants, however, reactivated the old framework by those seeking to use it as an instrument of public security and for the perceived defense and elevation of the role of churches in Europe, if only from a cultural lens.<sup>207</sup> This process can be broken down into three successive phases in the relationship between Europe and Islam in the post-World War II era.

In the first phase, which lasted into the 1970s, Muslims in Europe were described as a “non-ethnic religious minority.”<sup>208</sup> They were primarily immigrant workers whose right to religious freedom was irrelevant to the management of their presence.<sup>209</sup> In the second phase, which lasted until the 1980s, immigrants were seen primarily as Muslims (as opposed to being connected to their country of origin) and were increasingly seen through the European lens of religious freedom. The third phase, which continues to this day, was triggered when Muslims were perceived as a threat to Europe, and the right to religious freedom became increasingly used as a policing tool to enforce social cohesion and the security of nation-states. Although Muslims do benefit from European laws protecting religious freedom, this has not put an end to the debate around the place of Muslims in Europe. Rather, it has brought it to a head, as religious demands emanating from Muslims are shared by Europeans of other faith traditions. Muslim demands have shifted from that of a specific right to a more global desire for active citizenship, which aims to integrate the Muslim cultural and religious identity of new Europeans into the public sphere.

In the wake of calls for religious freedom for Muslims, the various statuses recognized for traditional churches

and extended to Muslims have found a new political relevance. However, achieving the goal of integration through the right of religious freedom requires Muslim community institutions and leaders to explicitly adhere to the most symbolic values and principles of contemporary constitutional and liberal democracies: secularism, human rights, nondiscrimination, gender equality, gender diversity, and the French notion of “living together,”<sup>210</sup> used by the European Court of Human Rights (ECtHR) in Strasbourg in *S.A.S v. France*<sup>211</sup> to uphold the law banning the full-face covering in public.

This is an important transformation if one compares this requirement with those of the liberal modernity in the nineteenth century. The latter demanded that churches respect only the main normative implications of the values enshrined by the states. Secular states certainly fought the ideological dogmas put forward by religions, in particular Catholic dogmas, but without seeking to challenge their specifically religious legitimacy. Today, on the contrary, the enjoyment of a right to genuine religious freedom requires adherence, loyalty, and sometimes even religious sanction of mainstream societal gains and the transformation of religious groups into constitutional religions, if not civil religions.

With regard to Muslims, this approach is usually justified by two apparently simple pieces of data, both quantitative and temporal: Muslims are too numerous and are too recent to ask for exemptions from current understandings of religious freedom, including such things as minaret and hijab bans. However, the fear of excesses linked to the supposed slippery slope argument of abuses of reasonable religious accommodation betrays an essentialist vision of Islam and Muslims. It transforms the right to religious freedom into a guarantee to preserve the place of the majority as well as an instrument of assimilation. Religious freedom would be no more than a simple stage, which, by separating and attempting to laicize the different religions, would

206 We understand the concept of *laïcité* as used in France as the “rejection of the political role of religion and as an obligation of the state to be indifferent toward religion.” Rim-Sarah Alouane, “Freedom of Religion and the Transformation of Public Order in France,” *The Review of Faith and International Affairs* 13, no. 1 (2015).

207 Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010).

208 Maleiha Malik, “Progressive Multiculturalism: The British Experience” in *European Multiculturalism Revisited*, ed. Alessandro Sijj (Zed Books, 2010), 52.

209 Rim-Sarah Alouane, “Re-evaluating *Laïcité* in Light of France’s Historical Treatment of Muslims,” *Ethnicities* (2015), 6.

210 Living together is a French principle that vaguely defines citizens’ open interpersonal relationships derived from the French resolution of “fraternité.” This concept was used by the French government to ban the veil in France, and in 2014, the European Court of Human Rights accepted it. See Alexandria Weller, “The Future of ‘Living Together’: An Analysis of the European Court of Human Rights’ *S.A.S. v. France*,” *North Carolina Journal of International Law* 41, <https://www.law.unc.edu/journals/ncilj/issues/volume41/the-forum/-----the-future-of-living-together-an-analysis-of-the-european-court-of-human-rightss-sas-vfrance/>, 105.

211 *S.A.S. v. France*, 43835/11, July 1, 2014. For further developments, see Erica Howard, “S.A.S. v. France: Living Together or Increased Social Division?” *EJIL: Talk!*, July 7, 2014, <https://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/>; Osmanoğlu & Kocabaş v. Switzerland, 29086/12, January 10, 2017, \$98 & \$100.

tend to secularize them and reduce their impact within a homogeneous civil society.

This project, supported by strong state interventionism, involves the creation of a compliant clerical leadership and the definition of forms, structures, and contents of a compliant “European Islam.” In this sense, the Austrian Islam Law of 2015,<sup>212</sup> the agreement of the Danish political parties against religious preachers of May 2016,<sup>213</sup> and, in general, the efforts made throughout Europe for the training of Muslim religious leaders or the opening or management of mosques, among other examples, basically renew the practices of the old jurisdictionalism and the tradition of national churches. This means that, to obtain full citizenship in the European context, Muslims must first metabolize the acquired rights of modern secularization and register their individual and associative religious demands within the framework of ecclesial organizations representing a type of religiosity seen as nonthreatening by the state. Using this process of the domestication of religion, the European right to religious freedom has been able to organize a space that keeps religions away from the political arena. Today, the domestication of religion is still justified by its proponents as necessary for the management of a plural society, albeit with strong autonomy at all levels. Thus, religious freedom is no longer a system governing an individual’s right to worship as they choose, but rather a box in which religious institutions and expressions are firewalled from governing structures.

The issue of the integration of Muslims and Islam in Europe has revealed the political character of the right to religious freedom and brought to light the political and polysemous character of state deliberations and individual behavior. It does so by highlighting the

tensions between the security and authority needs of the state and the human rights needs of individuals.<sup>214</sup>

### Finding a Place for Islam in Europe

These tensions and challenges highlight Europe’s difficulty in accepting the multidirectional nature of globalization, as nation-states react by instituting policies dedicated to protecting and defending borders in both a security and culture context. It is with this perspective that one must consider the precautions imposed on the Treaty on the Functioning of the European Union, which “as amended by the Lisbon Treaty gave considerably more weight to the principles of subsidiarity, proportionality, and national identity,”<sup>215</sup> as well as the position of the European Commission that considers that only religious and nondenominational groups already recognized at a national level can be part of the dialogue.<sup>216</sup>

This same defensive attitude is even more evident with regard to supranational judicial bodies, in particular the ECtHR. The court’s constant reminder to respect the state’s margin of appreciation<sup>217</sup>—especially in matters of religious freedom—is now a constant, which has been extended to decisions of the Court of Justice of the European Union (CJEU) in Luxembourg, for example, when it ruled in *Achbita v. G4S* on the discriminatory effects of the ban on wearing headscarves in the workplace by a Muslim employee, leading to her dismissal. The CJEU ruled in *Achbita* that “direct discrimination” is not constituted if a firm has an internal rule banning the wearing of any political, philosophical, or religious sign. In so doing, the firm equally limits the manifestation of all beliefs without distinction. In dismissing a claim of direct discrimination, the CJEU underlined that there was no information showing

212 On March 31, 2015, after three years of negotiations, an Austrian law was approved. The Austrian Islam Law defined the rights and obligations of Muslim communities, especially the right to practice Islam, in order to protect their right of being both Muslim and Austrian; Bundesministerium für Europa, *Federal Law on the External Legal Relationships of Islamic Religious Societies*, ERV\_2015\_1\_39, March 31, 2015, [https://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Integration/Islamgesetz/Islam\\_Law.pdf](https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Islamgesetz/Islam_Law.pdf).

213 On May 31, 2016, the four political parties in Denmark came to an agreement with the Danish government on establishing a national sanction list that banned religious preachers who undermine Danish laws and values. On December 27, 2016, the Danish Immigration Service published a list with six banned preachers; five of whom were Muslim and one an American Evangelist. See “Entry Ban for Certain Religious Preachers: A New National Sanction List,” *Ny i Danmark*, February 5, 2017, <https://www.nyidanmark.dk/en-GB/News-Front-Page/2017/11/Entry-ban-for-certain-religious-preachers-%E2%80%93-a-new-national-sanction-list>.

214 See, for example, the Burkini Affair: Conseil d’État, Ordinance 402742, 402777, *Ligue des droits de l’homme et autres*. See also Rim-Sarah Alouane, “The French Council of State on the Burkini – Part 2: Upholding Religious Freedom,” Oxford Human Rights Hub, October 18, 2016, <http://ohrh.law.ox.ac.uk/the-french-council-of-state-on-the-burkini-part-2-upholding-religious-freedom/>.

215 Theodore Konstadinides, “The Constitutionalisation of National Identity in EU Law and Its Implications,” *SSRN Electronic Journal* (2013), doi:10.2139/ssrn.2318972.

216 European Ombudsman, “Decision of the European Ombudsman in His Inquiry into Complaint 2097/2011/RA against the European Commission,” Decision on January 25, 2013, §48, <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/49026/html.bookmark>.

217 The margin of appreciation is a doctrine developed by the ECtHR when examining whether a member state has violated the European Convention on Human Rights. It implies that a member state is allowed to a degree of discretion, subjected to ECtHR supervision, when it takes legislative, administrative, or judicial action in the area of a convention right. See further: Andreas Follesdal and Nino Tsereteli, “The Margin of Appreciation in Europe and Beyond,” *The International Journal of Human Rights* 20, no. 8 (2016).

that Ms. Achbita was treated differently than other employees.<sup>218</sup>

### The Painful Integration of European Islam: The Driving Force for a Transformation of Secularism and Laïcité?

Despite their resistance, European nation-states are experiencing a profound change in mechanisms of exercising sovereignty, and emerging European Islam is facing weakened state-church models. Contemporary, horizontal, and individual-centered constitutionalism tends to deinstitutionalize the right to religious freedom, moving from religious denominations as external legal orders to the state and religious associations as private expressions of civil society. This same constitutionalism tends to distort the right to religious freedom by absorbing into freedoms of conscience, opinion, and association, and the principles of equality and nondiscrimination.<sup>219</sup>

The private character of modern secularism is used to refer to the separation of religious institutions from the state as well as to their progressive autonomy in strictly theological dimensions. This privatization was based on the awareness of religious otherness and, often, on a perception of religion as being fundamental and backwards in nature. On the contrary, the contemporary privatization of secularism refers to religious organizations incorporated in civil society and recognized as carrying a public interest. This form of “public” privatization erodes the preexisting legal and social consensus with respect to religious exceptions and intrinsically the right to religious freedom itself, increasingly seen as unjustified privileges. Professor and political scientist Olivier Roy notes that religious communities are left with three options:

1) To withdraw into the private sphere for individuals, or to the ‘ghetto’ for communities (Amish, Lubavitch), 2) To acknowledge the divorce and to claim, for mainstream churches, ‘clerical exemptions’ and ‘consciousness objection,’ 3) [To] reformulate religious norms in a way that is acceptable by the secular rationality, in a word, to ‘reform’ religion (a constant call addressed to Islam, but also to the Catholic Church).

The first option is what French laïcité requests. The second is a defensive reaction from faith communities that turns religious freedom into freedom of the Church (religious liberty), or from any specific community requesting the right to be different. The third option is probably the most popular in terms of public opinion, because it explicitly requests religions to reform themselves in order to be in accordance with secular values.<sup>220</sup>

As has been said about constitutional religions, recognition of this public role might require additional domestication of religious denominations to ensure that they abide by values shared by much of society. But this recognition underlines the difficulty of accepting religious lifestyles that are perceived as violating human rights. When these religious customs are interpreted in light of a rationality inspired by radical secular partisans, or rather illiberal liberals who become intolerant, they are used against individuals and minority groups under the myth of a state supremacy that is refractory to any form of religious accommodation.<sup>221</sup>

## Conclusion

Both modern and contemporary forms of secularism presuppose the political sovereignty of the state to ensure the effectiveness of rights. On one hand, contemporary secularization strongly erodes the borders of states and religious communities. But it is difficult to imagine both the complete evaporation of legal normativity that has developed in religious autonomous community contexts and a political authority capable of ignoring the religious orientation of these lawmakers. Consequently, it is also difficult to envisage the disappearance of a European right to religious freedom. Thus, the tension between the new horizons drawn by constitutional religions and rights detached from all religious specificity and the legacies of the modern right specific to religious freedom will still mark legal history and politics. While the foundations of the right to religious freedom in Europe have seemingly been set in stone for generations, the ongoing question of Muslims in Europe will play a significant role in defining the right’s future.

218 Court of Justice of the European Union, C-157/15 Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding/G4S Secure Solutions, March 14, 2017, § 30.

219 For instance, the European Union Agency for Fundamental Rights report of 2016 does not refer once to religious freedom, but refers to equality and discrimination on the grounds of religion or belief. See <http://fra.europa.eu/en/publication/2016/fundamental-rights-report-2016>.

220 Olivier Roy, *Rethinking the Place of Religion in European Secularized Societies: The Need for More Open Societies*, Robert Schuman Centre for Advanced Studies, European University Institute, March 2016, [http://cadmus.eui.eu/bitstream/handle/1814/40305/RSCAS\\_Research\\_Project\\_Conclusion..pdf?sequence=3&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/40305/RSCAS_Research_Project_Conclusion..pdf?sequence=3&isAllowed=y), 9.

221 Roy, *Rethinking the Place of Religion in European Secularized Societies*.

## Q & A: The Rise of Islamophobia

*Hariri Center staff interviewed Mr. Arsalan Iftikhar about the Human Rights challenges facing Muslims in the United States today. From bullying to hate crimes, Mr. Iftikhar paints a clear picture of parochialism toward Muslims using statistics and data. He postulates that the ongoing bias toward Muslim Americans does not allow them the space to engage in fruitful discourse around Islam and human rights.*

*Mr. Iftikhar is an international human rights lawyer, founder of TheMuslimGuy.com and senior fellow for The Bridge Initiative at Georgetown University. He is author of *Scapegoats*, which President Jimmy Carter called “an important book that shows Islamophobia must be addressed urgently.”*

**1. In your book, *Scapegoats*, and in your media commentary, you are outspoken about the challenges facing Muslim Americans. What are some of these issues?**

I am quite concerned about the increase of bullying against young Muslims in the United States today. One tends to see spikes in bullying against Muslim students after major terrorist attacks like the Boston Marathon bombing, the San Bernardino office shooting, or the Orlando nightclub shooting. I am not sure how one can expect members of the Muslim youth community in general to contribute to a wider discussion around the rejuvenation of Islamic discourse when they are constantly under this kind of pressure. Those kinds of rejuvenation discussions require a healthy environment for discussion, debate, and education in Islam. When they are basically spending a disproportionate amount of energy defending something as basic as their identity as Americans, how can we expect them to rise to the challenge of engaging in a real discussion around Islam and human rights?

The *Washington Post* in 2016 reported<sup>222</sup> on a survey of young Muslims that found that nearly one-third of Muslim students from third to twelfth grade

in California said that, “they had experienced insults or abuse at least once” because of their Islamic faith. Similarly, this survey also found that at least one in ten Muslim students stated that they have been physically harmed by a classmate because of their religion, and the same figure (10 percent) felt that a teacher had mistreated them because of their Muslim identity in the past. To reiterate—if Muslims feel their identity is under attack, then they are just going to go into defense mode, rather than pushing the envelope in terms of engaging in creative discourse for Islam.

According to another survey conducted in California, *Newsweek* reported<sup>223</sup> in October 2017 that Muslim students were “twice as likely” to be bullied as non-Muslim students in general. This found that over one-fourth (26 percent) of Muslim students surveyed stated<sup>224</sup> that they had been victims of cyber-bullying at some point in the past. Another 57 percent of Muslim students polled admitted that they had seen their peers make disparaging comments about Islam or racist statements about Muslims online. Finally, nearly 40 percent of young Muslim females reported having their *hijabs* (or headscarves) yanked off their heads.

Since many of the bullied young Muslim students in America are born in the United States, I am concerned that we are going to have an entire generation of young Muslims who are native-born citizens of this land feeling like strangers in their own country because of the rise of Islamophobia and anti-Muslim bullying. Can we expect such a psychology to give rise to creative, exciting discourses around Islam and the challenges of the day? It is not impossible—and certainly, when there are challenges, a lot of creative energies must be forced to emerge—but it does make it harder for the community at large.

**2. What policies do you think need to be implemented, from a federal or state level, in the United States vis-à-vis Muslim Americans?**

With the rise of Islamophobia across the United States, I earnestly believe that state and federal prosecutors

<sup>222</sup> Donna St. George, “During a School Year of Terrorist Attacks, Muslim Students Report Bullying,” *Washington Post*, last updated June 14, 2016, [https://www.washingtonpost.com/local/education/during-a-school-year-of-terrorist-attacks-muslim-students-report-bullying/2016/06/14/1b066a44-3220-11e6-8758-d58e76e11b12\\_story.html?utm\\_term=.0402ef2d7415](https://www.washingtonpost.com/local/education/during-a-school-year-of-terrorist-attacks-muslim-students-report-bullying/2016/06/14/1b066a44-3220-11e6-8758-d58e76e11b12_story.html?utm_term=.0402ef2d7415).

<sup>223</sup> Beatrice Dupuy, “Muslim Children Twice as Likely to Be Bullied, New Report Finds,” *Newsweek*, last updated October 31, 2017, <http://www.newsweek.com/more-half-muslim-students-are-bullied-new-report-finds-698023>.

<sup>224</sup> Deepa Bharath, “53% of Muslim students surveyed in California say they’ve been bullied over religion,” *Orange County Register*, last updated October 30, 2017, <https://www.ocregister.com/2017/10/30/53-of-muslim-students-surveyed-in-california-say-theyve-been-bullied-over-religion/>.



need to do a better job prosecuting hate crimes<sup>225</sup> against Muslims and Islamic institutions across America in a more vigorous manner. We often see bias-motivated attacks against Muslims not being prosecuted as hate crimes, even though it is quite easy to see the strong possibility of a bias motivation in many of these cases.

According to a 2016 report<sup>226</sup> from the Federal Bureau of Investigation (FBI), the number of assaults against Muslims in the United States “easily surpassed” the modern peak reached after the 9/11 attacks, with 127 reported victims of aggravated or simple assault in 2016, compared to 93 reported victims in 2001.

In September 2015, twenty-two-year-old Iranian-American engineering student Shayan Mazroei was brutally murdered by self-described white supremacist Craig Tanber outside a Southern California bar. During the court proceedings it was revealed that on the night of Mr. Mazroei’s murder, the white supremacist’s girlfriend confronted<sup>227</sup> the young Iranian engineering student, spitting on him several times and calling him an Arab and terrorist before luring him into a back alley, where her white supremacist boyfriend stabbed him in the chest killing him.<sup>228</sup>

The lead prosecutor in this case, however, decided not to prosecute the murder as a hate crime because he thought it might compromise his ability to win a murder conviction.

The triple-murder of three American Muslim students at the University of North Carolina-Chapel Hill in February 2015 is another high-profile murder that was never classified as a hate crime. They were brutally executed in their own home by their forty-six-year-old neighbor, Craig Hicks, who was arrested for the triple murder of twenty-three-year-old Deah Barakat, his wife, twenty-one-year-old Yusor Mohammad, and her sister nineteen-year-old Razan Abu-Salha.

The murderer, Craig Hicks, once allegedly shared<sup>229</sup> an anti-Muslim screed on social media, writing, “When it comes to insults, your religion [Islam] started this, not me. If your religion [Islam] kept its big mouth shut, so would I.”

Although most people agreed that this was clearly an anti-Muslim hate crime, the murderer’s wife bizarrely suggested that this brutal triple murder was simply because of a long-standing parking dispute between her husband and the three young Muslims whom he murdered in cold blood.

Those are merely two examples of bias-motivated crimes against Muslims that were never legally classified as hate crimes within the American judicial system. Therefore, as a matter of policy (and common sense), it is incumbent on state and federal prosecutors to use their discretionary prosecutorial powers to charge crimes against Muslims and Islamic institutions as bias-motivated hate crimes. As long as hate crimes against Muslims, Arabs and/or South Asians are only prosecuted as common crimes, racist criminals will be emboldened to continue these hate crimes with relative impunity.<sup>230</sup>

### 3. **There has been a trend toward populism in the United States. Would you say this has affected Muslim Americans—and if so, what would you advise opinion formers more widely to do?**

All minorities and people of color have been negatively impacted by the rise of white supremacist ultra-nationalism during President Donald Trump’s administration. In terms of policy, I believe that policy makers (city, local, state, and federal) have an increased responsibility to further improve protections on minority houses of worship, especially synagogues, temples, and mosques. As anti-Semitism and Islamophobia continue to grow with the rise of neo-Nazi white supremacists in the United

225 According to the FBI, “[a] hate crime is a traditional offense like murder, arson, or vandalism with an added element of bias. For the purposes of collecting statistics, the FBI has defined a hate crime as a ‘criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.’ Hate itself is not a crime—and the FBI is mindful of protecting freedom of speech and other civil liberties.”

226 Katayoun Kishi, “Assaults against Muslims in U.S. surpass 2001 level,” Pew Research Center, last updated November 15, 2017, <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>; Federal Bureau of Investigation (FBI), Information Services, “About Hate Crime,” 2016, <https://ucr.fbi.gov/hate-crime/2016/hate-crime>.

227 Scott Moxley, “Wrongful Death Trial Begins for Orange County White Supremacist’s Stabbing of Iranian American,” *Orange County Weekly*, last updated October 24, 2017, <https://www.ocweekly.com/orange-county-jury-hears-competing-arguments-over-who-is-liable-for-iranian-americans-murder-8517276/>.

228 “The Life and Death of Shyan Mazroei,” *Now This*, <https://nowthisnews.com/videos/news/the-life-and-death-of-shayan-mazroei>.

229 Matt Knight and CNN Wire, “Three Muslim students shot to death in apartment near UNC Chapel Hill,” WTKR, last updated February 11, 2015, <http://wtkr.com/2015/02/11/three-muslim-students-shot-to-death-in-apartment-near-unc-chapel-hill/>.

230 In the United States, hate crime penalties differ by state but the punishment generally has the effect of maximizing penalties for criminal conduct.

States today, we have seen an uptick in attacks on Jewish, Muslim, Hindu, and Sikh houses of worship.

In August 2012, a white supremacist named Wade Michael Page walked into a Sikh gurdwara (temple) and slaughtered six congregants in a cold-blooded act of domestic terrorism.<sup>231</sup> A few years later, in April 2014, another white supremacist killed three people at a Jewish community center in suburban Kansas City and later told<sup>232</sup> a newspaper that “I wanted to make damned sure I killed some Jews or attacked the Jews before I died.”

In terms of Muslim houses of worship, according to CNN,<sup>233</sup> there were at least sixty-three publicly reported attacks against mosques in the United States between January 2017 and June 2017 alone. According to those numbers, that equates to at least two mosques attacked every week in the first six months of Trump’s presidency compared to fifty-five attacks in all of 2015.<sup>234</sup>

With this increase in attacks on minority houses of worship, it is imperative for policy makers to ensure adequate law enforcement protections for them around the country. Additionally, state attorneys and federal prosecutors need to use their prosecutorial discretion to amplify felony charges against individuals who attack minority houses of worship by adding a hate crime indictment to their charge sheets. This would automatically multiply prison sentences for those people convicted of bias-motivated violence and hopefully deter some attacks on minority houses of worship in the future.

If that sort of policy is taken seriously, then the energies that are deployed by Muslims to simply protect their basic rights under the American constitution can be diverted to wider concerns, like discussions on what the Islamic tradition might be able to contribute to society through the engagement of the human

rights discourse. But what I see instead is the strong possibility that Muslim Americans will see the human rights discourse as simply “not applicable”—that their fundamental rights are being questioned, and that the same human rights discourse that is meant to protect those rights is simply not being applied fairly to them.

#### 4. **On the media front, what are the challenges you see for Muslim Americans? How should they be addressed?**

It is important to note that most US media coverage on Islam and Muslims today occurs through a primarily “religio-security” lens. Unlike other demographic groups in America, we often see meta-narratives about Muslims that perpetuate the myth that Muslims are a monolithic entity. For instance, stock photos of Muslims used in media stories usually depict either women in headscarves and/or men with long beards, thus perpetuating a stereotype that Muslims are somehow inately different or foreign from the general population.

The media’s double standard on defining terrorism is also a major issue that Muslims face today. The most recent example is the March 2018 serial bomber in Austin, Texas who targeted primarily African-Americans, trying to instill terror among the city’s African-American population. However, when a twenty-three-year-old conservative Christian white man was found to be the serial bomber, even Texas Governor Greg Abbott fell short<sup>235</sup> of calling him a terrorist. Strangely, we also saw many media outlets try to make excuses for the white serial bomber by pushing humanizing narratives about him being a nerdy young man who came from a “tight-knit, godly family,”<sup>236</sup> which would never happen if the bomber were a Muslim.

In a March 2017 piece<sup>237</sup> for the *Washington Post*, researchers from Georgia State University pointed to

231 “Sikh Temple Killer Wade Michael Page Radicalized in Army,” Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/intelligence-report/2012/sikh-temple-killer-wade-michael-page-radicalized-army>.

232 “Kansas City JCC Shooter Sentenced to Death,” *Jerusalem Post*, last updated November 11, 2015, <http://www.jpost.com/Diaspora/Kansas-City-JCC-shooter-sentenced-to-death-432637>.

233 Nancy Coleman, “On average, 9 mosques have been targeted every month this year,” CNN, last updated August 7, 2017, <https://www.cnn.com/2017/03/20/us/mosques-targeted-2017-trnd/index.html>.

234 Christopher Ingraham, “American mosques — and American Muslims — are being targeted for hate like never before,” *Washington Post*, August 8, 2017, [https://www.washingtonpost.com/news/wonk/wp/2017/08/08/american-mosques-and-american-muslims-are-being-targeted-for-hate-like-never-before/?utm\\_term=.08dc7ac45e03](https://www.washingtonpost.com/news/wonk/wp/2017/08/08/american-mosques-and-american-muslims-are-being-targeted-for-hate-like-never-before/?utm_term=.08dc7ac45e03).

235 Megan Cerullo, “Texas authorities waffle on ‘terrorist’ label for Austin bomber,” *NY Daily News*, last updated March 21, 2018, <http://www.nydailynews.com/news/crime/texas-authorities-waffle-terrorist-label-austin-bomber-article-1.3888730>.

236 Twitter Post, *New York Times*, March 21, 2018, 2:53 PM, “The Austin bombing suspect was a quiet, “nerdy” young man who came from a “tight-knit, godly family,” said Donna Sebastian Harp, who had known the family for nearly 18 years,” <https://twitter.com/nytimes/status/976532172344561665>.

237 Erin M. Kearns, Allison Betus and Anthony Lemieux, “Yes, the media do underreport some terrorist attacks. Just not the ones most people think of,” *Washington Post*, last updated March 13, 2017, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/13/yes-the-media-do-underreport-some-terrorist-attacks-just-not-the-ones-most-people-think-of/?utm\\_term=.f9ab61d090d6](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/13/yes-the-media-do-underreport-some-terrorist-attacks-just-not-the-ones-most-people-think-of/?utm_term=.f9ab61d090d6).

an exhaustive study on media coverage of terrorism<sup>238</sup> that highlighted this double standard against Muslims. According to their research, they found that American news media does “not cover all terrorist attacks the same way” and that they give “drastically more coverage” to attacks by Muslims compared to non-Muslims. This study found that between 2011 and 2015, Muslims perpetrated only 12 percent of terrorist attacks, but they received nearly half (44 percent) of the media coverage of terrorist attacks even though 88 percent of terrorist attacks at the time were predominantly committed by white Christian men.

**5. You have mentioned in different ways that the Muslim American community needs role models—sometimes you have mentioned Muslim figures overseas. What sort of leadership qualities do you think they need, particularly in the arena of promoting the upholding of fundamental rights?**

Regardless of whether you label them “role models” or “leaders” or “mentors” or any other terminology you may use, I think it is essential that people seek out experts within these fields. For example, a religious scholar is not a human rights lawyer and a human rights lawyer is not a religious scholar. If a person is searching for spiritual guidance, they should probably turn to someone who has credibly established normative religious training in their background. On the other hand, if people are searching for social or political

leadership, they should probably turn to civic leaders who specialize in those areas, and not to people from the religious pulpit.

In the age of social media, we can listen to diverse voices on a myriad of topics affecting our global community today. Since the nexus of international law, UN [United Nations] treaties, and each country’s own constitution will differ, anyone who is interested in human rights issues should seek out civic leaders who specialize in that field within the context of their specific country or region. At the end of the day, any believer in fundamental human rights will protect the rights of every single human alive, especially those who have different races, religions, ethnicities, and/or socioeconomic backgrounds from their own.

In terms of policy recommendations *for* Muslim Americans—and to a large extent, for Muslims who live as demographic minorities writ large, and even perhaps for Muslims more generally—credible, established, normative religious training is crucial for rooted answers when it comes to religion. Likewise, credible training is necessary for understanding the human rights discourse. If we have people who can marry the two—or a group of people who can pool their expertise—then we have something very exciting. But all of that is going to be stunted in some way, if Muslims are constantly being pushed into firefighting for their basic rights, as established by the American constitution and the laws of the countries in which they live.

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<sup>238</sup> E.M. Kearns, A. Betus, and A. Lemieux, “Why Do Some Terrorist Attacks Receive More Media Attention Than Others?” *Justice Quarterly*, Forthcoming, via SSRN: <https://ssrn.com/abstract=2928138> or <http://dx.doi.org/10.2139/ssrn.2928138>.

# THE RISE OF THE ALT-RIGHT: UNDERSTANDING THE SOCIOCULTURAL EFFECTS OF MAINSTREAMING ANTI-MUSLIM SENTIMENT

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Dr. Dalia Fahmy

## Introduction

There are scores of abuses of fundamental freedoms and human rights worthy of investigation within Muslim-majority countries, including in the Middle East, and far beyond. Nevertheless, there are also important and pertinent issues vis-à-vis the communities where Muslims exist as demographic minorities. This is no less relevant in a country such as the United States—which is important in and of itself and to Muslim communities worldwide—owing to its political and economic power, which impacts those communities on a regular basis. Understanding the mainstreaming of anti-Muslim rhetoric, which aims to marginalize Muslim American communities, is thus a relevant and deeply significant issue for Muslim communities everywhere.

The gradual and extensive shifting of anti-Muslim rhetoric from the margins of American life to its political mainstream is the product of a symbiotic relationship between a tight network of anti-Muslim interest groups and a corresponding faction of willing politicians in need of grassroots exposure. Coupled with a mutually beneficial relationship with the conservative wing of the national media, anti-Muslim messaging is amplified.

The most prominent vehicle for this political and rhetorical movement's penetration into much of the Republican Party and, by extension, much of US politics, has been Barack Obama's eight-year presidency—punctuated by the 2008 and 2012 presidential elections, as well as (and in particular) the 2010 mid-term congressional elections. These three election cycles demonstrate a rise and fall trajectory that seems to characterize the intensity of racist, anti-Muslim politics as a mechanism by which political candidates benefit

by participating in fomenting anti-Muslim sentiment in the run-up to an election, which then subsides after the election takes place. The 2008, 2010, and 2012 elections are useful in that they help highlight the lifespan of a trend that has done less to change the national political tenor than it has to set a permanent electoral tendency where more Americans vote for politicians who espouse anti-Muslim sentiment.

## Three Elections and Their Correspondence to Anti-Muslim Politics

The following elections demonstrate the mechanism by which political candidates have benefitted from fear mongering at the expense of Muslims by participating in fomenting anti-Muslim sentiment in the run-up to an election. And while from within the political establishment anti-Muslim politics often subsides after the election takes place, the resultant rise in Islamophobia has lasting social effects.

### 2008 Presidential Election

Barack Obama's candidacy provided an opening for a specific network of right-wing groups to ally themselves with the increasingly radical wing of the Republican Party by fueling anti-Muslim rhetoric. The anti-Muslim rhetoric was an attempt to counter Obama's internationalist appeal—combined with the Illinois senator's worldly background and non-white skin—which symbolized a new chapter in the United States' societal evolution that certain segments of the conservative movement feared. Thus, rumors of the future president's religion and beliefs, through the cumulative effect of several organized processes, began to make their way from the margins into its mainstream.

The strategy was multipronged. The documentary film *Obsession: Radical Islam's War against the West* was distributed to more than twenty-eight million voters



in swing states.<sup>239</sup> Rumors of Barack Obama’s “Muslim faith”<sup>240</sup> have been around since he made his keynote speech at the 2004 Democratic National Convention, but the matter became an actual election cycle issue for many, prompting Obama’s campaign to launch the now-defunct FighttheSmears.com. The site clarified everything from smears regarding his religion to the so-called birther conspiracies, alleging he was not born in the United States, and as a result ineligible to run for the US presidency. This matter is, of course, indicative of a deeper anti-Muslim sentiment, since the idea of a Muslim president seemed threatening to US national identity.<sup>241</sup> In January 2007, *Insight Magazine* (now defunct), an outlet owned by the same company as the conservative newspaper the *Washington Times*, published a story saying Hillary Clinton campaign associates unearthed evidence that from the ages of six to ten, Obama had attended a Wahabbi-oriented madrasa that taught the most intolerant form of Islam. The rumor was never substantiated, but made it onto Fox News, *The Glenn Beck Program*, and the *New York Post* before CNN sent a journalist to Indonesia to investigate the matter.<sup>242</sup> Furthermore, Erick Stakelbeck, a personality on a right-wing evangelical network who worked as a senior writer and analyst on Steven Emerson’s notoriously anti-Muslim Investigative Project on Terrorism, wrote in the lead up to the election about how Muslims are Arabizing and Islamizing the United States.<sup>243</sup>

### 2010 Midterm Congressional Elections

The 2010 midterm elections marked the point where the network of anti-Muslim interest groups seems to have reached their full influence in US politics from an electoral standpoint, though external circumstances

favored their rise. Two parallel events helped buy the relationship between members and groups in the Islamophobia network and their willing Republican politicians: the “ground zero mosque” hysteria and the national campaign to ban sharia law at the state level.

In December 2009, the *New York Times* published a front-page story on the approval of the Cordoba Project, or the Park51 community center.<sup>244</sup> Pamela Geller published a post on her blog, *Atlas Shrugs*, on the same day, claiming the project amounted to a “victory mosque” for radical Islamists to celebrate their win on 9/11. She referred to the project as the “ground zero mosque,” a term that would catch on at a national level even though it is neither located at ground zero nor really a mosque. During this time before the 2010 midterms, both Richard Spencer, president of the National Policy Institute, a white supremacist think tank, and David Horowitz, editor of *FrontPage Magazine*, an online right-wing political website, contributed to multiple articles a day on *Jihad Watch* and *FrontPage Magazine*, respectively, that focused on exposing matters like Obama’s “radical Islamist agenda.”<sup>245</sup> Right after the midterm elections, the David Horowitz Freedom Center published a pamphlet called *Obama and Islam* detailing Obama’s supposed plans to “appease Islamic supremacism” and countries like Iran.<sup>246</sup>

In November 2010, Oklahoma became the first state in the United States to pass a state-level constitutional amendment (State Question 755) banning the practice of sharia law in the state. Though the courts eventually struck down the law, this was the beginning of a nationwide movement that helped politicians present an anti-Muslim rhetoric to their base.<sup>247</sup>

239 The Clarion Fund (now the Clarion Project), which received around \$17 million from the Donor Capitals Fund in 2008, used much of that money to make and distribute the documentary film *Obsession: Radical Islam’s War against the West* to more than 28 million voters in swing states. See Justin Elliott, “Mystery of Who Funded Right-Wing ‘Radical Islam’ Campaign Deepens,” *Salon*, November 16, 2010, [https://www.salon.com/2010/11/16/clarion\\_fund\\_obsession\\_dvds](https://www.salon.com/2010/11/16/clarion_fund_obsession_dvds).

240 Jim Rutenberg, “The Man behind the Whispers about Obama,” *New York Times*, October 12, 2008, <https://www.nytimes.com/2008/10/13/world/americas/13iht-13martin.16893087.html>.

241 *FrontPage Magazine* published an article in January 2008 by Daniel Pipes that “confirmed” Obama had practiced Islam at one point in his life. See Daniel Pipes, “Confirmed: Barack Obama Practiced Islam,” *FrontPage Magazine*, January 7, 2008, <http://www.danielpipes.org/5354/confirmed-barack-obama-practiced-islam>.

242 “CNN Debunks False Report about Obama” CNN.com, January 23, 2007, <http://edition.cnn.com/2007/POLITICS/01/22/obama.madrasa/>.

243 5 Erick Stakelbeck, “Ohio No Stranger to Radical Islam,” CBN News, October 22, 2007, <https://www.investigativeproject.org/529/ohio-no-stranger-to-radical-islam>.

244 Ralph Blumenthal and Sharaf Mowjood, “Muslim Prayers and Renewal Near Ground Zero,” *New York Times*, December 8, 2009.

245 Faiz Shakir, “Islamophobia Network’s David Horowitz Responds to ThinkProgress by Calling Us ‘Fascistic,’” Think Progress, August 26, 2011, <https://thinkprogress.org/islamophobia-networks-david-horowitz-responds-to-thinkprogress-by-calling-us-fascistic-e52edd7d2967/#.mkx30noI9>.

246 David Horowitz and Robert Spencer, “Obama and Islam: The Freedom Center’s New Pamphlet Sheds Light on the Dangers of Obama’s Islamophilic Outreach,” *FrontPage Magazine*, December 23, 2010. <https://www.frontpagemag.com/fpm/79909/obama-and-islam-david-horowitz>.

247 Jacob Gershman, “Oklahoma Ban on Sharia Law Unconstitutional, US Judge Rules,” *Wall Street Journal*, August 16, 2013, <https://blogs.wsj.com/law/2013/08/16/oklahoma-ban-on-sharia-law-unconstitutional-us-judge-rules/>.



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Former Republican Majority Leader Newt Gingrich made sharia law his project. After years of promoting the issue, in September 2015, “he told the audience at a Value Voters Summit in Washington, D.C., ‘We should have a federal law that says Sharia law cannot be recognized by any court in the United States.’ Such a law will let judges know, Gingrich went on, that ‘no judge will remain in office that tried to use Sharia law.’ These words prompted a standing ovation from the crowd.”<sup>248</sup> As of 2011, twenty-three states had considered bills banning sharia. The movement aimed to insert anti-Muslim rhetoric into the American political fabric, primarily by using the platform of right-wing state-level politicians. Regardless of the chances of actually passing the law, this rhetoric has already been given a chance to penetrate the mainstream of American politics.

## 2012 Presidential Election

As 2010 marked a climactic year for the influence and political success of the Islamophobic network’s working relationship with willing Republican members of Congress, events in 2012 demonstrated the limits of this political movement. It should be stressed, however, that the ultimate goal and effect of this relationship has not always necessarily been electoral. Rather, the cumulative result of fear has laid a kind of rhetorical, grassroots groundwork to facilitate the movement of anti-Muslim bigotry from the margins of American life to the main arena of its politics.

Though 2012 shows the limits of the material or electoral usefulness of this bigotry—primarily through the rebuke of conspiratorial accusations by mainstream

248 Wajahat Ali, Eli Clifton, Matthew Duss, Lee Fang, Scott Keyes, and Faiz Shakir, “Fear Inc.: The Roots of the Islamophobia Network in America,” *American Progress*, August 26, 2011, <https://www.americanprogress.org/issues/religion/reports/2011/08/26/10165/fear-inc/>, 97-98.

conservative Republicans like John McCain—the rise and election of Donald Trump is the latest example of how this rhetoric is now ready to be used or exploited at any time by aspiring politicians or their more experienced colleagues. As the anti-Muslim network aspired to use their rhetoric at higher levels of the political horse race, the sheer absurdity of their claims began to catch up with their electoral ambitions.

In short, the movement of anti-Muslim rhetoric into American politics has been made possible by a political climate altered by the tragedy of 9/11. Suspicion of Muslims has become commonplace across the political board, but particularly within the GOP, which, according to an August 2012 poll by the Arab American Institute, has an overwhelmingly negative view of Islam and Muslims.<sup>249</sup> But this rhetoric of “creeping jihad” or “stealth jihad” has led to the demonization of a certain group of people, intended to create wedge issues that can then be used to exact a political and electoral result.

### The 2016 Election and Trump’s Vehicle: Right-Wing Racism, Islamophobia, and Conspiracies

In March 2011—in a series of TV appearances over a period of six weeks—Trump shared his suspicions that Obama was not born in the United States. This riled up much of the Republican base—which was galvanized by all the dog-whistling undertones of the issue—and was Trump’s first attempt to test the waters of being a reality TV star cum politician. The experiment even propelled him in early polls of the Republican field of candidates for the 2012 election.<sup>250</sup> According to a Gallup poll, the percentage of Americans who believed Obama was “definitely” born outside of the United States rose from 38 percent to 47 percent during that period.<sup>251</sup> This was the case *after* Obama—president of the United States—eventually chose to address the fringe conspiracy by releasing his long-form birth certificate to the public. Trump pushed the issue so hard that he even reached out to fringe figures on the right who published tracts about Obama’s non-American birth; one of them even shot up to the top of Amazon sales charts.<sup>252</sup>

Such was the atmosphere created by Donald Trump at a time when the United States was experiencing a resurgence in anti-Muslim paranoia. He *started* his intrusion into US electoral politics that way, entering US politics by using the vehicle of right-wing (later, “alt-right”) conspiracies imbued with Islamophobia. Since the birther mantra had run its course in April 2011 (after Obama released his birth certificate), Trump dropped the issue. By then, he had taken up a significant spot in the US political arena and imagination.

Trump began to cultivate Republican figures and influential right-wing social circles leading up to the 2012 election. He eventually decided not to seek the Republican nomination, but had changed the political culture and discourse in both Washington, DC, and around the country by raising a far-right, anti-Muslim conspiracy that had been debunked. It provided Trump with the basic ideological and political foundation for his 2015-16 campaign and eventual presidential win. Trump gradually but overtly pushed a fringe right-wing conspiracy into the mainstream as more formal Republican circles were willing to humor him and take his donations. He even convinced the Mitt Romney campaign to accept his endorsement (in the form of a highly public press conference) in 2012, further legitimizing his place as a political figure in the United States.<sup>253</sup>

Donald Trump clinched the US presidency on November 8, 2016. Trump’s unexpected win signified a major shift in the Republican base from “mainstream, Rockefeller conservatism” to a set of unabashedly far-right values that can be summed up as alt-right. His rise was orchestrated and made possible by a coalition of actors that fed and exploited the anger of the white working class, its litany of perceived sociopolitical grievances and deprivations (and it was not just the working class), as well as the increasing cohesion and solidification of such sentiments into a corresponding political and, more importantly, electoral constituency. All this would go on to have highly significant consequences for outside perceptions of Islam and Muslims.

The influence of formerly marginalized figures such as the alt-right figure Steve Bannon on the Trump

249 The Arab American Institute, “The American Divide: How We View Arabs and Muslims,” August 22, 2012, <https://www.scribd.com/doc/103694579/The-American-Divide-Zogby-Poll>.

250 Asley Parker and Steve Eder, “Inside the Six Weeks Donald Trump Was a Nonstop ‘Birther,’” *New York Times*, July 2, 2016, <https://www.nytimes.com/2016/07/03/us/politics/donald-trump-birther-obama.html>.

251 Lymari Morales, “Obama’s Birth Certificate Convinces Some, but Not All, Skeptics,” Gallup, May 13, 2011, <http://news.gallup.com/poll/147530/obama-birth-certificate-convinces-not-skeptics.aspx>.

252 Parker and Eder, “Inside the Six Weeks Donald Trump Was a Nonstop ‘Birther.’”

253 Maggie Haberman and Alexander Burns, “Donald Trump’s Presidential Run Began in an Effort to Gain Stature,” *New York Times*, March 12, 2016, <https://www.nytimes.com/2016/03/13/us/politics/donald-trump-campaign.html>.



campaign, as well as the American and global alt-right, is one of the major reasons for the further mainstreaming of anti-immigrant and anti-Muslim rhetoric from both Trump and the political culture he emboldened. Steve Bannon, former executive chairman of the alt-right *Breitbart News*, was named the chief executive of Trump's 2016 presidential bid in August of that year. After the election he served as White House chief strategist in the administration during the first seven months of Trump's term. This orientation—one that tests the boundaries of political discourse, where incendiary commentary and coverage of sociopolitical issues have helped evolve a fruitful incubator for alt-right activities<sup>254</sup>—became mainstream.

The sociocultural effects on the wider country of this gradual process of mainstreaming anti-Muslim sentiment culminated briefly for about a month after the 2016 election, when 1,094 hate crimes were recorded by the Southern Poverty Law Center (SPLC) in thirty-four days.<sup>255</sup> (For context, the Federal Bureau of Investigation [FBI] recorded 6,121 hate crimes for the entire year of 2016, a five-year high).<sup>256</sup> Three hundred and fifteen of these were anti-immigrant attacks and 112 were explicitly anti-Muslim.<sup>257</sup> Thirty-seven percent of the total number were committed by individuals who directly referenced Trump or his campaign.<sup>258</sup>

The background to these numbers is equally troubling, with hate crimes in the United States rising 10 percent from 2014 to 2016.<sup>259</sup> Anti-Muslim incidents also rose from 154 in 2014<sup>260</sup> to 307 in 2016.<sup>261</sup> Moreover, the number of hate groups, primarily made up of white

nationalist or far-right groups, rose from 782 in 2014 to 917 in 2016, almost a historic high.<sup>262</sup> The SPLC reports that “The most dramatic growth was the near-tripling of anti-Muslim hate groups—from thirty-four in 2015 to 101 last year [2016].”<sup>263</sup>

In other words, since the Trump campaign started in mid-2015, a dramatic rise in hate crimes and hate groups accompanied the duration of the election cycle and leading up to his election. Near the end of 2015, a YouGov/HuffPost poll showed that 58 percent had an “unfavorable opinion” of Islam and only 17 percent had a favorable one.<sup>264</sup> These trends follow the increased Islamophobic rhetoric in the United States and are strong signs that the movement of alt-right rhetoric into the sociocultural and political mainstream had a tremendously negative effect on perceptions of Islam and Muslims.

### The Muslim Ban

Trump's initial executive order, signed on January 27, 2017, one week after taking office, signaled the final stage of the mainstreaming of anti-Muslim sentiment—political policy and a constitutional test, banning citizens of Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen from entering the United States for at least ninety days (including green card holders). Refugees were banned for 120 days and Syrian refugees were banned indefinitely.<sup>265</sup> “We don't want them here,” said President Trump, referring to Muslim extremists.<sup>266</sup> Both the executive order and the speech accompanying it helped galvanize a highly problematic and increasingly

254 Hatewatch Staff, “Breitbart Exposé Confirms: Far-Right News Site a platform for the White Nationalist ‘Alt-Right,’” Southern Poverty Law Center, October 6, 2017, <https://www.splcenter.org/hatewatch/2017/10/06/breitbart-expos%C3%A9-confirms-far-right-news-site-platform-white-nationalist-alt-right>.

255 Hatewatch Staff, “Update: 1,094 Bias-Related Incidents in the Month Following the Election,” Southern Poverty Law Center, December 16, 2016, <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

256 Federal Bureau of Investigation, “2016 Hate Crime Statistics Released,” November 13, 2017, <https://www.fbi.gov/news/stories/2016-hate-crime-statistics>.

257 Hatewatch Staff, “Update: 1,094 Bias-Related Incidents in the Month Following the Election.”

258 Ibid.

259 Reuters, “U.S. Hate Crimes Rise for Second Straight Year: FBI,” November 13, 2017, <https://www.reuters.com/article/us-usa-hatecrime-fbi/u-s-hate-crimes-rise-for-second-straight-year-fbi-idUSKBN1DD2BA>.

260 Azadeh Ansari, “FBI: Hate Crimes Spike, Most Sharply against Muslims,” CNN, November 15, 2016, <https://www.cnn.com/2016/11/14/us/fbi-hate-crime-report-muslims/index.html>.

261 Reuters, “U.S. Hate Crimes Rise for Second Straight Year: FBI.”

262 Southern Poverty Law Center, “Hate Map,” 2018 (scroll down to see graph, 1999-2017), <https://www.splcenter.org/hate-map>.

263 Southern Poverty Law Center, “Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right,” February 15, 2017, <https://www.splcenter.org/news/2017/02/15/hate-groups-increase-second-consecutive-year-trump-electrifies-radical-right>.

264 Peter Moor, “Most Americans Dislike Islam,” YouGov US, December 9, 2015, <https://today.yougov.com/news/2015/12/09/most-americans-dislike-islam/>.

265 BBC, “Trump's Executive Order: Who Does Travel Ban Affect?” February 10, 2017, <http://www.bbc.com/news/world-us-canada-38781302>.

266 Sarah Pulliam Bailey, “Trump Signs Order Limiting Refugee Entry, Says He Will Prioritize Christian Refugees,” *Washington Post*, January 27, 2017, [https://www.washingtonpost.com/news/acts-of-faith/wp/2017/01/27/we-dont-want-them-there-trump-signs-order-limiting-refugee-entry/?utm\\_term=.62f875aacfc4](https://www.washingtonpost.com/news/acts-of-faith/wp/2017/01/27/we-dont-want-them-there-trump-signs-order-limiting-refugee-entry/?utm_term=.62f875aacfc4).



hard-right political base. Crucially, the executive order stated that if “the religion of the individual is a minority religion in the individual’s country of nationality,” then he/she would be admitted.<sup>267</sup> That essentially limits the targets of these countries to Muslims only.

Though the “Muslim ban” was stopped by a federal court order before reemerging after a number of changes and iterations, the initial move from the White House to push such a thinly veiled and uncompromising anti-immigrant policy dovetailed perfectly with the Trump campaign’s proclamations to get tough on terrorism, excessive immigration, and crime.

In keeping with his essentialist world view, Trump reiterated throughout his campaign that radical Islam was on a par with some of the greatest evils of the twentieth century, like Nazism. Trump introduced the idea of registering all Muslims in a massive database,<sup>268</sup> as well as the possibility of closing down certain mosques.<sup>269</sup> His rhetoric accusing Muslims of trying to impose sharia law throughout the West seems lifted from the list of talking points of the “Islamophobia industry,” and had already been a long-established mantra by Bannon.<sup>270</sup> *New York Times* journalists explain this Trump-Bannon vision of Islam versus the West in a February 2017 article, not long after Trump signed the first iteration of the Muslim ban:

This worldview borrows from the ‘clash of civilizations’ thesis of the political scientist Samuel P. Huntington, and combines straightforward warnings about extremist violence with broad-brush critiques of Islam. It sometimes conflates terrorist groups like Al Qaeda and the Islamic State with largely

nonviolent groups such as the Muslim Brotherhood and its offshoots and, at times, with the 1.7 billion Muslims around the world. In its more extreme forms, this view promotes conspiracies about government infiltration and the danger that Shariah, the legal code of Islam, may take over in the United States.<sup>271</sup>

It is perhaps not strictly a coincidence then that twenty-three pieces of legislation were introduced at the state level in 2017 to ban the practice of sharia in eighteen states.<sup>272</sup> Forty-three such bills were introduced from 2010 to 2017.<sup>273</sup> Such anti-sharia campaigns, which produce caricatures of Islamic law and Islam itself, can be found to originate from efforts within the Islamophobia industry in post-9/11 United States.<sup>274</sup> These efforts are meant to spread fear of Islam and Muslims by portraying their values as completely alien to that of the Judeo-Christian West. Again, the West versus Islam binary so central to Bannon’s worldview can be located in such campaigns and efforts.

Likewise, according to a Reuters/Ipsos poll conducted not long after the executive order was initially announced, 48 percent of surveyed Americans agreed with the ban while 41 percent were opposed.<sup>275</sup> Around the same time, a poll conducted by the conservative Rasmussen Reports showed 57 percent in support of the ban and 33 percent opposed.<sup>276</sup> Yet, in February 2017, a Pew survey showed that on a scale of 0 to 100 (with 100 being the warmest and most approving), Islam scored a 48 for a large sample size of Americans. Though still behind most major religions, a score of 48 was higher than the 2014 score of 40. As is almost always the case with these issues in the United States, the scoring broke down quite visibly along partisan

267 White House, “Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States,” January 27, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>.

268 Jenna Johnson and Abigail Hauslohner, “‘I think Islam Hates Us’: A Timeline of Trump’s Comments about Islam and Muslims,” *Washington Post*, May 20, 2017, [https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm\\_term=.081f8ace1955](https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.081f8ace1955).

269 Susan Milligan, “Trump to Muslim World: Fighting Terror Is about Good against Evil,” *US News and World Report*, May 21, 2017, <https://www.usnews.com/news/national-news/articles/2017-05-21/trump-to-muslim-world-fighting-terror-is-about-good-against-evil>.

270 Scott Stump, “Donald Trump: Brussels Is ‘Catastrophic,’ Waterboarding Paris Suspect ‘Would Be Fine,’” *Today*, March 22, 2016, <https://www.today.com/news/donald-trump-responds-brussels-attacks-it-s-very-dangerous-city-t81716>.

271 Scott Shane, Matthew Rosenberg, and Eric Lipton, “Trump Pushes Dark View of Islam to Center of U.S. Policy-Making,” *New York Times*, February 1, 2017, <https://www.nytimes.com/2017/02/01/us/politics/donald-trump-islam.html>.

272 Ed Pilkington, “Anti-Sharia Laws Proliferate as Trump Strikes Hostile Tone toward Muslims,” *Guardian*, December 30, 2017, <https://www.theguardian.com/us-news/2017/dec/30/anti-sharia-laws-trump-muslims>.

273 Ibid.

274 ACT for America, “State Legislation,” 2018, <http://www.actforamerica.org/statelegislation>.

275 Chris Kahn, “Exclusive: A Third of Americans Think Trump’s Travel Ban Will Make Them Safer,” Reuters, January 31, 2017, <https://www.reuters.com/article/us-usa-trump-immigration-poll-exclusive/exclusive-a-third-of-americans-think-trumps-travel-ban-will-make-them-safer-idUSKBN15F2MG>.

276 Rasmussen Reports, “Most Support Temporary Ban on Newcomers from Terrorist Havens,” January 30, 2017, [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/january\\_2017/most\\_support\\_temporary\\_ban\\_on\\_newcomers\\_from\\_terrorist\\_havens](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/january_2017/most_support_temporary_ban_on_newcomers_from_terrorist_havens).

lines: in the 2017 survey, Republicans gave a score of 39 while Democrats gave 56.<sup>277</sup> It is also possible that the obvious increase in alt-right activism and Islamophobia resulted in an oppositional reaction. According to the Atlantic's Emma Green, who also refers to Pew data published in August 2017,

Almost half of respondents said someone had reached out to express support for their religion within the past year, compared to 37 percent in 2011 and 32 percent in 2007. Admittedly, these performances of alliance and optimism can be fraught; Muslims might prefer seamless acceptance to handshakes and earnestness from well-meaning neighbors.<sup>278</sup>

Additionally, the Pew data cited above show that, compared with 2007 and 2011 numbers (when Pew last surveyed American Muslims), experiences of concrete anti-Muslim discrimination toward Muslims do not seem to have fluctuated much under Trump. But this finding seems to be contradicted by hate crime numbers released by the FBI in the past two years or so, which show a dramatic increase. That hate crime statistics for Muslims are almost always underreported<sup>279</sup> should also be taken into account, as well as the fact that Muslims—predominantly people of color—also experience racial attacks/discrimination that are statistically categorized separately from religious discrimination. The fact that a large number of protesters came together in multiple cities across the United States to protest the Muslim ban was a much more encouraging sign, and perhaps the strongest, most media-saturated example of Americans trying to counter the rise of Trump.<sup>280</sup>

## Conclusion and Recommendations

Religious liberty has always been at the heart of the American vision of democratic freedom, emerging from within the civic framework provided by the US Constitution. However, rising anti-Muslim sentiment questions the place of specific religious groups in American life. The Muslim American community faces extreme and difficult challenges from institutional,

social, and economic discrimination. Their fundamental freedoms and human rights are thus in question, as they face complex challenges from the US mainstream that are hard to combat for the simple reason that these challenges come from stereotypes perpetuated through the highest echelons of the political establishment. From religiously motivated discrimination and attacks on existing and proposed Islamic centers to misguided congressional hearings, Muslims in the United States are being unfairly targeted simply for exercising their basic constitutional right to religious liberty.

The attempt to conflate all of Islam with extremist violence by disseminating misinformation and distortions about Islam and American Muslims leads to a rise in discrimination against American Muslims and those perceived to be Muslim, attacks on American Muslim institutions, and protests against the building of mosques in local communities.

The rise in now mainstream anti-Muslim sentiment not only tests the long-established patterns of intercommunity relations, but hinders intracommunity growth and negotiation that is essential to Islamic rejuvenation as called for in this volume.

To this end, the use of othering and marginalization as a tool to achieve power has not been critiqued in the West as it has in the rest of the world, nor have its long-term implications for community growth and development been analyzed. Thus, there are several ways this can be achieved:

- The interactive nexus of interest groups-media outlets-political figures must be addressed in the United States. Power and influence networks should not be able to use the media to scapegoat a community for political gain.
- Standards for the treatment of minorities and marginalized communities need to be identified and formalized globally, tied to the United Nations' Universal Declaration of Human Rights. Such standards should be designed within communities through guidance from their leaders to lead to the

277 Pew Research Center, "Americans Express Increasingly Warm Feelings toward Religious Groups," February 15, 2017, <http://www.pewforum.org/2017/02/15/americans-express-increasingly-warm-feelings-toward-religious-groups/>.

278 Emma Green, "How Much Discrimination Do Muslims Face in America?" *The Atlantic*, July 26, 2017, <https://www.theatlantic.com/politics/archive/2017/07/american-muslims-trump/534879/>.

279 Abigail Hauslohner, "Hate Crimes Reports Are Soaring—But We Still Don't Know How Many People Are Victimized," *Washington Post*, November 17, 2017, [https://www.washingtonpost.com/news/post-nation/wp/2017/11/17/hate-crimes-are-soaring-but-we-still-dont-know-how-many-people-are-victimized/?noredirect=on&utm\\_term=.6a7917362e41](https://www.washingtonpost.com/news/post-nation/wp/2017/11/17/hate-crimes-are-soaring-but-we-still-dont-know-how-many-people-are-victimized/?noredirect=on&utm_term=.6a7917362e41).

280 Emanuella Grinberg and Madison Park, "2nd Day of Protests over Trump's Immigration Policies," CNN, January 30, 2017, <https://www.cnn.com/2017/01/29/politics/us-immigration-protests/index.html>

creation of universal standards for implementation in all nations.

- Reporting and data collection are then needed to evaluate the treatment of minority communities, not just in the developing world but particularly in the West.
- Arab and Muslim governments engaging and dealing with the United States must also be fully aware of this phenomenon, for two major reasons. The first is that Muslim-majority state governments often invite and engage with elements of the Islamophobia industry for projects within their own borders, without necessarily knowing that these elements are involved in such a network. In so doing, they inadvertently support this industry and then those in this industry continue to marginalize Muslim communities in the United States.
- Arab and Muslim-majority state governments often engage with those same elements to further their relationships with powerful actors within the United States itself—which, again, leads to the support of the wider networks, and thus contributes to the marginalization of Muslim American communities. Arab and Muslim governments ought to be supporting ways to increase political participation in their own societies and in the United States, so as to safeguard them from further rights abuses—rather than support elements that would be opposed to this.
- Each minority community must continue to engage not only in creating counter narratives, but in telling their own stories. For example, the contributive legacy of Islam in the United States is vast. Conversely, media should work towards normalizing the portrayal of minorities, rather than demonizing them.
- Finally, several statements from Muslim religious leaders have been developed with a renewed commitment to protecting minority rights in Muslim-majority countries; the same is not expected for groups such as Christian Evangelicals in the United States. A universal commitment to norms and values cannot be expected if the relationship is not bidirectional. Collectively moving towards a future based on pluralism is not possible without credible commitments.

## ABOUT THE EDITOR

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A British scholar and author focusing on politics, religion, and security studies in the West and the Arab world, **Dr. H.A. Hellyer** is a nonresident Senior Fellow at the Rafik Hariri Center for the Middle East at the Atlantic Council and Associate Fellow in International Security Studies at the Royal United Services Institute in London. Following the 2005 London bombings, he was appointed as Deputy Convenor of the UK Government's Taskforce on tackling radicalisation, and served as the Foreign & Commonwealth Office's first Economic and Social Research Council Fellow as part of the 'Islam' & 'Counter-Terrorism' teams. Dr Hellyer was also appointed adjunct full Professor at the Centre for Advanced Studies on Islam, Science and Civilisation in Kuala Lumpur, Malaysia, and is included in the annual global list of 'The 500 Most Influential Muslims' in the world ('The Muslim 500') & the "Power 100". Dr Hellyer's insights on current events in the Arab World, Europe, and Muslim communities worldwide are regularly sought by the international media networks such as CNN, BBC and Al-Jazeera, with several hundred op-eds for publications like the Washington Post, Foreign Policy, the New York Times, the Guardian, Mada Masr, the Globe and Mail, the National, al-Jazeera and Daily News Egypt.

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Dr Hellyer's degree in law was read at the University of Sheffield School of Law, with an advanced degree in international political economy at the University of Sheffield's Department of Politics. He completed a multidisciplinary PhD at the University of Warwick as an Economic and Social Research Council scholar, and researched Islamic thought with traditionally trained specialists in the UK, Egypt, Malaysia and South Africa. [www.hahellyer.com](http://www.hahellyer.com)

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- **Ibrahim el-Houdaiby** is a PhD candidate in the Department of Middle Eastern, South Asian, and African Studies at Columbia University. He is a graduate of the American University in Cairo, he holds a BA in Political Science (2006), and an MA in Political Science and Development Studies (2013). In 2010, He earned a diploma in Islamic Studies from the High Institute of Islamic Studies. Currently, Mr. el-Houdaiby's research focuses on political theory, legal theory, Islamic thought, and economic history. He is a former senior researcher at House of Wisdom Foundation for Strategic Studies, a lecturer at AMIDEast Cairo, and columnist for *Shorouk* newspaper. He was also a Research Fellow for both the European Think Tank for Global Action (FRIDE) and the German Council on Foreign Relations (DGAP).
- **Shaykh Seraj H. Hendricks** is an internationally recognised leading scholar of normative Sunni Islam, based in Cape Town, South Africa. He is Resident Shaykh of the Zawiyah Institute in Cape Town, and holder of the Maqasid Chair at the International Peace University of South Africa. Shaykh Seraj studied the Islamic sciences for more than a decade in Mecca, graduating from the Umm al-Qura University, and particularly with the distinguished al-Sayyid Muhammad b. 'Alawi al-Maliki. Shaykh Seraj was actively engaged in the anti-apartheid struggle in South Africa prior to completing his studies in Mecca. He holds an MA (Cum Laude) on Sufism in the Cape region of South Africa, and is completing his PhD at the University of South Africa (UNISA). Shaykh Seraj was previously head of the Muslim Judicial Council's Fatwa Committee and a lecturer in Islamic law at the Islamic College of Southern Africa (ICOSA). Currently, he is a member of the Stanlib Shari'ah Board, Hakim (Chief Arbitrator) of The Crescent Observer's Society and a lecturer in the Study of Islam at the University of Johannesburg (UJ). He has been listed consecutively in the Muslim500 from 2009 to 2018.
- **Dr. Recep Şentürk** completed his undergraduate education in the Faculty of Theology at Marmara University (1986). He then did his postgraduate degree in Sociology in the Faculty of Letters at Istanbul University (1988) and became an assistant in the same department (1988-1989). He pursued his PhD in Sociology at Columbia University, New York (1998). Between 1998 and 2007, he was a researcher at the Center for Islamic Studies (ISLAM). He has been the director of the Alliance of Civilizations Institute (ACI) since it was founded. Also, he has been the general coordinator of the Istanbul Research and Education Association (ISAR) in Istanbul for seven years (2009-2016). Currently, he is the president of Ibn Khaldun University (IHU) in Istanbul.

- **Ms. Arzoo Ahmed** is the Director of the Center for Islam and Medicine, an interdisciplinary initiative addressing emerging moral challenges at the intersection of science, religion, and society. Her work at the center brings together professionals, academics, Imams, and religious scholars to explore the interaction of faith values in healthcare. Ms. Ahmed holds a BA in Physics and an MPhil in Medieval Arabic Thought from the University of Oxford and MPhil in Medieval Arabic Thought at the Oriental Institute. She has an 'Alimiyyah degree in traditional Islamic studies, which she was given under the supervision of Shaykh Akram Nadwi and is currently studying on the philosophy MA program at King's College London. Ms. Ahmed manages the publication of *Al-Muhaddithat*, a 40-volume encyclopedia on the history of female Muslim scholars, and is a participant on the University of Cambridge's Senior Faith in a Leadership program at St George's House.
- **Dr. Mehrunisha Suleman** is a post-doctoral researcher at the Center of Islamic Studies, University of Cambridge. Her research involves an ethical analysis of the experiences of end of life care services (EOLC) in the UK from Muslim perspectives. Dr. Suleman holds a DPhil in Population Health from the University of Oxford and a BA in Biomedical Sciences Tripos from the University of Cambridge. She also holds a medical degree and an MSc in Global Health Sciences from the University of Oxford. Dr. Suleman has worked with Sir Muir Gray on the Department of Health's QIPP Right Care Program. She is an expert for UNESCO's Ethics Teacher Training Program and was awarded the 2017 National Ibn Sina Muslim News Award for health. She has an 'Alimiyyah degree in traditional Islamic studies, which she was given under the supervision of Shaykh Akram Nadwi at Al Salam Institute in 2013.
- **Mr. Azril Mohammed Amin** co-founded and co-chairs the Malaysian Alliance of Civil Society Organizations in the United Nations Human Rights Council's Universal Periodic Review Process (UPR) abbreviated as MACSA, which is a coalition of forty-eight civil society organizations with the specific aim and objective to investigate, as well as advocate, human rights issues in Malaysia for the UPR Process. In 2014, he founded and became the chief executive of the Center for Human Rights Research and Advocacy (CENTHRA), a full-fledged research and advocacy outfit focusing on issues of Islam and human rights. In 2013, he founded and led the Muslim UPRo delegation, a coalition of sixteen major Islamic civil society organizations (ICSOs), to Malaysia's 2nd Universal Periodic Review at the 25th session of the United Nations Human Rights Council in Geneva, Switzerland. Mr. Mohammed has been a practicing lawyer since 2000.
- **Ms. Rim-Sarah Alouane** is a PhD candidate and a researcher in Comparative Law at the University Toulouse-Capitole in France. Her research focuses on religious freedom, civil liberties, constitutional law, and human rights in Europe and North America. She has presented her findings before peers at the Harvard-Stanford International Junior Faculty Forum at Harvard Law School (2013), the World Congress of the International Association of Philosophy of Law and Social Philosophy at Georgetown Law School (2015), and was a guest speaker at Georgetown University (2015), UT Austin (2016), Université Paris 1- La Sorbonne (2017), and Emory University (2017). Her recent publications include: "Macron's Fake News Solution Is a Problem" (Foreign Policy, 2018), "French Muslims Stuck in the Middle: Responding to Religious Freedom in France's Presidential Elections" (The Berkeley Forum, 2017), "The French Council of State on the Burkini" (The Oxford Human Rights Hub, 2016), *God, the Pencil, and the Judge: Exploring the Paradoxes Regarding Protection of Freedom of Religion and Expression in France*, (Brill: Religion & Human Rights, 2016).
- **Mr. Arsalan Iftikhar** is an international human rights lawyer, global media commentator and author of the book *SCAPEGOATS: How Islamophobia Helps Our Enemies and Threatens Our Freedoms* which President Jimmy Carter called "an important book that shows Islamophobia must be addressed urgently." Mr. Arsalan is also a faculty member at Georgetown University Edmund A. Walsh School of Foreign Service where he researches and writes about Islamophobia as a senior fellow for The Bridge Initiative. Arsalan is also a national advisory board member for the John C. Danforth Center for Religion & Politics at Washington University in St. Louis, he has been an adjunct professor of religious studies at DePaul University, and is a member of the Asian American Journalists Association (AAJA) and Reporters Without Borders. Additionally, Arsalan was also awarded the 2013 Distinguished Young Alumni Award from Washington University School of Law in St. Louis.
- **Dr. Dalia Fahmy** is an Associate Professor of Political Science at Long Island University where she teaches courses on US foreign policy, world politics, international relations, military and defense

policy, causes of war, and politics of the Middle East. She is a senior fellow at the Center for Global Policy in Washington DC, is a visiting scholar at the Center for the Study of Genocide and Human Rights, and UNESCO Chair at Rutgers University. Dr. Fahmy wrote *The Rise and Fall of The Muslim Brotherhood*

and *the Future of Political Islam* (forthcoming with Lynne Rienner), *Illiberal Intelligentsia and the Future of Egyptian Democracy* (Oneworld Publishers), and *International Relations in a Changing World* (Kendall Hunt Publishers).





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