

them independently of the whole. The wounded order has to be set straight or it has to change altogether. Other traditional societies have different means more or less successfully restore the order. . . .

IV. An Indian Reflection

The starting point here is not the individual, but the whole complex conception of the Real. In order to protect the world, for the sake of the protection of this universe, says Manu, He, Svayambhu, the Self-existent, arranged the castes and their duties. Dharma is the order of the entire reality, that which keeps the world together. The individual's duty is to maintain his 'rights'; it is to find one's place in relation to Society, to the Cosmos, and to the transcendent world. . . .

3. Human Rights are not Rights only. They are also duties and both are interdependent. Humankind has the 'right' to survive only insofar as it performs its duty of maintaining the world (*lokasamgraha*). We have the 'right' to eat, inasmuch as we fulfill the duty of allowing ourselves to be eaten by a hierarchically higher agency. Our right is only a participation in the entire metabolic function of the universe.

We should have, if anything, a Declaration of Universal Rights and Duties in which the whole of Reality would be encompassed. Obviously, this demands not only a different anthropology but also a different cosmology and an altogether different theology—beginning with its name. . . .

6. Both systems (the Western and the Hindu) make sense from and within a given and accepted myth. Both systems imply a certain kind of consensus. When that consensus is challenged, a new myth must be found. The broken myth is the situation in India today, as it is in the world at large. That the rights of individuals be conditioned only by their position in the net of Reality can no longer be admitted by the contemporary mentality. Nor does it seem to be admissible that the rights of individuals be so absolute as not to depend at all on the particular situation of the individual.

In short, there is at present no endogenous theory capable of unifying contemporary societies and no imposed or imported ideology can be simply substituted for it. A mutual fecundation of cultures is a human imperative of our times. . . .

V. By Way of Conclusion

Is the concept of Human Rights a Western conception?

Yes.

Should the world then renounce declaring or enforcing Human Rights?

No.

Three qualifications, however, are necessary:

1. For an authentic human life to be possible within the megamachine of the

technological world, Human Rights are imperative. This is because the content of the notion of Human Rights is bound up with and given its meaning by the slow development of that megamachine. How far individuals or nations should collaborate with this present-day system is another question altogether. But in the contemporary political arena as defined by current economic and ideological trends, the defense of Human Rights is a sacred duty. It should be remembered that to introduce Human Rights (in the definite sense, of course) into other cultures before the introduction of technical civilization would amount not only to putting the cart before the horse, but also to making the way for the technological invasion—as if by a Trojan horse, as we have already said. And yet a technological civilization without Human Rights amounts to the most inhuman situation imaginable. The dilemma is excruciating. It makes the two following points all the more important and urgent.

Room should be made for other traditions to develop and formulate their own homeomorphic views corresponding to or opposing Western 'rights'. Or, if these other world traditions should make room for themselves, since no one is likely to make it for them. This is an urgent task; otherwise it will be impossible for non-Western cultures to survive, let alone to offer viable alternatives or even a sensible complement. Here the role of a cross-cultural philosophical approach is paramount. The need for human pluralism is often recognized in principle, but not often practiced, not only because of the dynamism which drives the pan-economic ideology, linked with the megamachine, to expand all over the world, but also because viable alternatives are not yet theoretically worked out.

ABDULLAH AHMED AN-NA'IM, HUMAN RIGHTS IN THE MUSLIM WORLD

3 Harv. Hum. Rts. J. 13 (1990)

Introduction

Historical formulations of Islamic religious law, commonly known as Shari'a, include a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of Shari'a to regulate the behavior of Muslims derives from its moral and religious authority as well as the formal enforcement of its legal norms. As such, Shari'a influences individual and collective behavior in Muslim countries through its role in the socialization processes of such nations regardless of its status in their formal legal systems. For example, the status and rights of women in the Muslim world have always been significantly influenced by Shari'a, regardless of the degree of Islamization in public life. Of course, Shari'a is not the sole determinant of human behavior nor the only formative force behind social and political institutions in Muslim countries.

I conclude that human rights advocates in the Muslim world must work within the framework of Islam to be effective. They need not be confined, however, to the particular historical interpretations of Islam known as Shari'a. Muslims are

obliged, as a matter of faith, to conduct their private and public affairs in accordance with the dictates of Islam, but there is room for legitimate disagreement over the precise nature of these dictates in the modern context. Religious texts, like all other texts, are open to a variety of interpretations. Human rights advocates in the Muslim world should struggle to have their interpretations of relevant texts adopted as the new Islamic scriptural imperatives for the contemporary world.

A. Cultural Legitimacy for Human Rights

The basic premise of my approach is that human rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society. Insofar as these standards are perceived to be alien to or at variance with the values and institutions of a people, they are unlikely to elicit commitment or compliance. While cultural legitimacy may not be the sole or even primary determinant of compliance with human rights standards, it is, in my view, an extremely significant one. Thus, the underlying causes of any lack or weakness of legitimacy of human rights standards must be addressed in order to enhance the promotion and protection of human rights in that society.

... This cultural illegitimacy, it is argued, derives from the historical conditions surrounding the creation of the particular human rights instruments. Most African and Asian countries did not participate in the formulation of the Universal Declaration of Human Rights because, as victims of colonization, they were not members of the United Nations. When they did participate in the formulation of subsequent instruments, they did so on the basis of an established framework and philosophical assumptions adopted in their absence. For example, the pre-existing framework and assumptions favored individual civil and political rights over collective solidarity rights, such as a right to development, an outcome which remains problematic today. Some authors have gone so far as to argue that inherent differences exist between the Western notion of human rights as reflected in the international instruments and non-Western notions of human dignity. In the Muslim world, for instance, there are obvious conflicts between Shari'a and certain human rights, especially of women and non-Muslims.

... In this discussion, I focus on the principles of legal equality and non-discrimination contained in many human rights instruments. These principles relating to gender and religion are particularly problematic in the Muslim world.

...

II. Islam, Shari'a and Human Rights

...

A. The Development and Current Application of Shari'a

To the over nine hundred million Muslims of the world, the Qur'an is the literal and final word of God and Muhammad is the final Prophet. During his mission from 610 A.D. to his death in 632 A.D., the Prophet elaborated on the meaning of the Qur'an and supplemented its rulings through his statements and actions. This

information came to be known as Sunna. He also established the first Islamic state in Medina around 622 A.D. which emerged later as the ideal model of an Islamic state. ...

While the Qur'an was collected and recorded soon after the Prophet Muhammad's death, it took almost two centuries to collect, verify, and record the Sunna. It remained an oral tradition for a long time during a period of great turmoil in Muslim history, some Sunna reports are still controversial because of both their authenticity and relationship to the Qur'an.

Since Shari'a is derived from Sunna as well as the Qur'an, its development as a comprehensive legal and ethical system had to await the collection and authentication of Sunna. Shari'a was not developed until the second and third centuries of Islam.

Shari'a is not a formally enacted legal code. It consists of a vast body of jurisprudence in which individual jurists express their views on the meaning of the Qur'an and Sunna and the legal implications of those views. Although most Muslims believe Shari'a to be a single logical whole, there is significant diversity of opinion not only among the various schools of thought, but also among the jurists of a particular school. ...

Furthermore, Muslim jurists were primarily concerned with the formulation of principles of Shari'a in terms of moral duties sanctioned by religious consequences rather than with legal obligations and rights and specific temporal remedies. They categorized all fields of human activity as permissible or impermissible and recommended or reprehensible. In other words, Shari'a addresses the conscience of the individual Muslim, whether in a private, or public and official, capacity, and not the institutions and corporate entities of society and the state.

Whatever may have been the historical status of Shari'a as the legal system of Muslim countries, the scope of its application in the public domain has diminished significantly since the middle of the nineteenth century. Due to both internal factors and external influence, Shari'a principles had been replaced by European law governing commercial, criminal, and constitutional matters in almost all Muslim countries. Only family law and inheritance continued to be governed by Shari'a. ...

Recently, many Muslims have challenged the gradual weakening of Shari'a as the basis for their formal legal systems. Most Muslim countries have experienced mounting demands for the immediate application of Shari'a as the sole, or at least primary, legal system of the land. These movements have either succeeded in gaining complete control, as in Iran, or achieved significant success in having aspects of Shari'a introduced into the legal system, as in Pakistan and the Sudan. Governments of Muslim countries generally find it difficult to resist these demands out of fear of being condemned by their own populations as anti-Islamic. Therefore, it is likely that this so-called Islamic fundamentalism will achieve further successes in other Muslim countries.

The possibility of further Islamization may convince more people of the urgency of understanding and discussing the relationship between Shari'a and

human rights, because Shari'a would have a direct impact on a wider range of human rights issues if it became the formal legal system of any country.

I believe that a modern version of Islamic law can and should be developed. Such a modern 'Shari'a' could be, in my view, entirely consistent with the standards of human rights. These views, however, are appreciated by only a minority of contemporary Muslims. To the overwhelming majority of Muslims today, Shari'a is the sole valid interpretation of Islam, and as such ought to prevail over any human law or policy.

B. Shari'a and Human Rights

In this part, I illustrate with specific examples how Shari'a conflicts with international human rights standards. . . .

The second example is the Shari'a law of apostasy. According to Shari'a, a Muslim who repudiates his faith in Islam, whether directly or indirectly, is guilty of a capital offense punishable by death. This aspect of Shari'a is in complete conflict with the fundamental human right of freedom of religion and conscience. The apostasy of a Muslim may be inferred by the court from the person's views and actions deemed by the court to contravene the basic tenets of Islam and therefore be tantamount to apostasy, regardless of the accused's personal belief that she is a Muslim.

The Shari'a law of apostasy can be used to restrict other human rights such as freedom of expression. A person may be liable to the death penalty for expressing views held by the authorities to contravene the official view of the tenets of Islam. Far from being an historical practice or a purely theoretical danger, this interpretation of the law of apostasy was applied in the Sudan as recently as 1985, when a Sudanese Muslim reformer was executed because the authorities deemed his views to be contrary to Islam.³

A third and final example of conflict between Shari'a and human rights relates to the status and rights of non-Muslims. Shari'a classifies the subjects of an Islamic state in terms of their religious beliefs: Muslims, *ahl al-Kitab* or believers in a divinely revealed scripture (mainly Christian and Jews), and unbelievers. In modern terms, Muslims are the only full citizens of an Islamic state, enjoying all the rights and freedoms granted by Shari'a and subject only to the limitations and restrictions imposed on women. *Ahl al-Kitab* are entitled to the status of *dhimmi*, a special compact with the Muslim state which guarantees them security of persons and property and a degree of communal autonomy to practice their own religion and conduct their private affairs in accordance with their customs and laws. In exchange for these limited rights, *dhimmi*s undertake to pay *jizya* or poll tax and submit to Muslim sovereignty and authority in all public affairs. . . .

³ . . . The Salman Rushdie affair illustrates the serious negative implications of the law of apostasy to literary and artistic expression. Mr Rushdie, a British national of Muslim background, published a novel entitled, *The Satanic Verses*, in which irreverent reference is made to the Prophet of Islam, his wives, and

leading companions. Many Muslim governments banned the book because their populations found the author's style and connotations extremely offensive. The late Imam Khomeini of Iran sentenced Rushdie to death *in absentia* without charge or trial. . . .

Under this scheme, non-Muslim subjects of an Islamic state can aspire to the status of *dhimmi*, under which they would suffer serious violations of human rights. *Dhimmi*s are not entitled to equality with Muslims. [Economic and social illustrations omitted.]

IV. A Case Study: The Islamic Dimension of The Status of Women

The present focus on Muslim violations of the human rights of women does not seem peculiar to the Muslim world.⁴ As a Muslim, however, I am particularly concerned with the situation in the Muslim world and wish to contribute to its improvement.

The following discussion is organized in terms of the status and rights of Muslim women in the private sphere, particularly within the family, and in public fora, relating to access to work and participation in public affairs. This classification is recommended for the Muslim context because the personal law aspects of Shari'a, family law and inheritance, have been applied much more consistently than the public law doctrines.⁵ The status and rights of women in private life have been significantly influenced by Shari'a regardless of the extent of Islamization of the public debate.

A. Shari'a and the Human Rights of Women

The most important general principle of Shari'a influencing the status and rights of women is the notion of *qawama*. *Qawama* has its origin in verse 4:34 of the Qur'an: 'Men have *qawama* [guardianship and authority] over women because of the advantage they [men] have over them [women] and because they [men] spend their property in supporting them [women]'. According to Shari'a interpretations of this verse, men as a group are the guardians of and superior to women as a group, and the men of a particular family are the guardians of and superior to the women of that family.

For example, Shari'a provides that women are disqualified from holding general public office, which involves the exercise of authority over men, because, in keeping with the verse 4:34 of the Qur'an, men are entitled to exercise authority over women and not the reverse.

Another general principle of Shari'a that has broad implications for the status of women is . . .

It is difficult to distinguish between Islamic, or rather Shari'a, factors and extra-Shari'a factors affecting the status and rights of women. The fact that women's human rights are violated in all parts of the world suggests that there are universal social, economic, and political factors contributing to the persistence of this state of affairs. Nevertheless, the articulation and operation of these factors varies from one culture or context to the next. In particular, the rationalization of discrimination against the denial of equality for women is based on the values and customs of the particular society. In the Muslim world, these values and customs are supposed to be

Islamic or at least consistent with the dictates of Islam. It is therefore useful to discuss the Islamic dimension of the status and rights of women.

⁵ The private/public dichotomy, however, is an artificial distinction. The two spheres of life overlap and interact. The socialization and treatment of both men and women at home affect their role in public life and vice versa. While this classification can be used for analysis in the Muslim context, its limitations should be noted. It is advisable to look for both the private and public dimensions of a given Shari'a principle or rule rather than assume that it has only private or public implications.

and rights of Muslim women is the notion of *al-hijab*, the veil. This means more than requiring women to cover their bodies and faces in public. According to Shari'a interpretations of verses 24:31, 33:33,⁶ 33:53, and 33:59⁷ of the Qur'an, women are supposed to stay at home and not leave it except when required for an urgent necessity. When they are permitted to venture beyond the home, they must do so with their bodies and faces covered. *Al-hijab* tends to reinforce women's inability to hold public office and restricts their access to public life. They are not supposed to participate in public life, because they must not mix with men even in public places.

... In family law for example, men have the right to marry up to four wives and the power to exercise complete control over them during marriage, to the extent of punishing them for disobedience if the men deem that to be necessary.⁸ In contrast, the co-wives are supposed to submit to their husband's will and endure his punishments. While a husband is entitled to divorce any of his wives at will, a wife is not entitled to a divorce, except by judicial order on very specific and limited grounds. Another private law feature of discrimination is found in the law of inheritance, where the general rule is that women are entitled to half the share of men.

In addition to their general inferiority under the principle of *qawama* and lack of access to public life as a consequence of the notion of *al-hijab*, women are subjected to further specific limitations in the public domain. For instance, in the administration of justice, Shari'a holds women to be incompetent witnesses in serious criminal cases, regardless of their individual character and knowledge of the facts. In civil cases where a woman's testimony is accepted, it takes two women to make a single witness. *Diya*, monetary compensation to be paid to victims of violent crimes or to their surviving kin, is less for female victims than it is for male victims.

... These overlapping and interacting principles and rules play an extremely significant role in the socialization of both women and men. Notions of women's inferiority are deeply embedded in the character and attitudes of both women and men from early childhood.

C. Muslim Women in Public Life

A similar and perhaps more drastic conflict exists between reformist and conservative trends in relation to the status and rights of women in the public domain. Unlike personal law matters, where Shari'a was never displaced by secular law, in most Muslim countries, constitutional, criminal, and other public law matters have come to be based on secular, mainly Western, legal concepts and institutions.

⁶ [O Consorts of the Prophet ...] And stay quietly in your houses, and make not a dazzling display, like that of the former Times of Ignorance; and establish regular prayer, and give regular charity; and obey God and His Apostle. And God only wishes to remove all abomination from you, ye Members of the Family, and to make you pure and spotless.

⁷ O Prophet! Tell thy wives and daughters, and the

believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested. And God is Oft-Forgiving, Most Merciful.

⁸ Polygamy is based on verse 4:3 of the Qur'an. The husband's power to chastise his wife to the extent of beating her is based on verse 4:34 of the Qur'an.

Consequently, the struggle over Islamization of public law has been concerned with the re-establishment of Shari'a where it has been absent for decades, or at least since the creation of the modern Muslim nation states in the first half of the twentieth century. In terms of women's rights, the struggle shall determine whether women can keep the degree of equality and rights in public life they have enjoyed under secular constitutions and laws.

Educated women and other modernist segments of society may not be able to articulate their vision of an Islamic state in terms of Shari'a, because aspects of Shari'a are incompatible with certain concepts and institutions which these groups have taken for granted, including the protection of all human rights. To the extent that modernists seek the protection and promotion of human rights in the Muslim world, they must take into account the Islamic dimension of the political and sociological situation in Muslim countries, a modernist conception of Islam is needed.

V. Islamic Reform and Human Rights

Islamic reform needs must be based on the Qur'an and Sunna, the primary sources of Islam. Although Muslims believe that the Qur'an is the literal and final word of God, and Sunna are the traditions of his final Prophet, they also appreciate that these sources have to be understood and applied through human interpretation and action. ...

A. An Adequate Reform Methodology

The basic premise of my position, based on the work of the late Sudanese Muslim reformer *Ustadh* Mahmoud Mohamed Taha, is that the Shari'a reflects a historically-conditioned interpretation of Islamic scriptures in the sense that the founding jurists had to understand those sources in accordance with their own social, economic, and political circumstances. In relation to the status and rights of women, for example, equality between men and women in the eight and ninth centuries in the Middle East, or anywhere else at the time, would have been inconceivable and impracticable. It was therefore natural and indeed inevitable that Muslim jurists would understand the relevant texts of the Qur'an and Sunna as confirming rather than repudiating the realities of the day.

In interpreting the primary sources of Islam in their historical context, the founding jurists of Shari'a tended not only to understand the Qur'an and Sunna as confirming existing social attitudes and institutions, but also to emphasize certain texts and 'enact' them into Shari'a while de-emphasizing other texts or interpreting them in ways consistent with what they believed to be the intent and purpose of the sources. Working with the same primary sources, modern Muslim jurists might shift emphasis from one class of texts to the other, and interpret the previously enacted texts in ways consistent with a new understanding of what is believed to be the intent and purpose of the sources. This new understanding would be informed by contemporary social, economic, and political circumstances in the same way that the 'old' understanding on which Shari'a jurists acted was informed by the then prevailing circumstances. The new understanding would

qualify for Islamic legitimacy, in my view, if it is based on specific texts in the application of other texts, and can be shown to be in accordance with the Qur'an and Sunna as a whole.

For example, the general principle of *qawama*, the guardianship and authority of men over women under Shari'a, is based on verse 4:34 of the Qur'an.

... This verse presents *qawama* as a consequence of two conditions: the advantage over and financial support of women. The fact that men are generally physically stronger than most women is not relevant in modern times where the rule of law prevails over physical might. Moreover, modern circumstances are making the economic independence of women from men more readily realizable and appreciated. In other words, neither of the conditions—advantages of physical might or earning power—set by verse 4:34 as the justification for the *qawama* of men over women is tenable today.

The fundamental position of the modern human rights movement is that all human beings are equal in worth and dignity, regardless of gender, religion, or race. This position can be substantiated by the Qur'an and other Islamic sources understood under the radically transformed circumstances of today. For example, in numerous verses the Qur'an speaks of honor and dignity for 'humankind' and 'children of Adam', without distinction as to race, color, gender, or religion. By drawing on those sources and being willing to set aside archaic and dated interpretations of other sources, such as the one previously given to verse 4:34 of the Qur'an, we can provide Islamic legitimacy for the full range of human rights for women.

Similarly, numerous verses of the Qur'an provide for freedom of choice and non-compulsion in religious belief and conscience.⁹ These verses have been either de-emphasized as having been 'overruled' by other verses which were understood to legitimize coercion, or 'interpreted' in ways which permitted such coercion. For example, verse 9:29 of the Qur'an was taken as the foundation of the whole system of *dhimma*, and its consequent discrimination against non-Muslims. Relying on those verses which extoll freedom of religion rather than those that legitimize religious coercion, one can argue now that the *dhimma* system should no longer be part of Islamic law and that complete equality should be assured regardless of religion or belief. The same argument can be used to abolish all negative legal consequences of apostasy as inconsistent with the Islamic principle of freedom of religion. [Discussion omitted of mechanisms and methods within Islam for development and reform.]

... The ultimate test of legitimacy and efficacy is, of course, acceptance and implementation by Muslims throughout the world.

B. Prospects for Acceptance and Likely Impact of the Proposed Reform

... Governments of Muslim countries, like many other governments, formally subscribe to international human rights instruments because, in my view, they

⁹ See, for example, verse 2:256 of the Qur'an which provides: 'Let there be no compulsion in religion: Truth stands out clear from error ...' In verse 18:29

God instructs the Prophet: 'Say, the Truth is from your Lord. Let him who will, believe, and let him who will, reject [it]'.

human rights idea an important legitimizing force both at home and abroad.

Nevertheless, the proposed reform will probably be resisted because it challenges the vested interests of powerful forces in the Muslim world and may upset established traditional political and social institutions. These forces probably will seek to restrict opportunities for a genuine consideration of this reform.

Consequently, the acceptance and implementation of this reform methodology will require a political struggle within Muslim nations as part of a larger general struggle for human rights. I would recommend this proposal to participants in the struggle who champion the cause of justice and equality for women and non-Muslims, and freedom of belief and expression in the Muslim world. Given the importance of Islamic legitimacy in Muslim societies, I urge human rights advocates to claim the Islamic platform and not concede it to the traditionalist and fundamentalist forces in their societies. I would also invite outside supporters of Muslim human rights advocates to express their support with due sensitivity and genuine concern for Islamic legitimacy in the Muslim world.

QUESTIONS

1. Pannikar and An-Na'im suggest two very different approaches to the questions of how to understand divergences among cultures with respect to human rights issues and how to go about finding common ground. How would you describe them? Does either or both appear helpful in resolving contemporary disputes over, say, gender discrimination or capital punishment?

2. Pannikar appears to follow his challenge to the notion of universal human rights with the observation that human rights are imperative 'within the megamachine of the modern technological world'. Compare Cover's references (p. 343, *supra*) to the 'almost unique mastery of violence' of the modern state and of 'communal resistance to the Behemoth'. What do you understand these observations to mean? Do they amount to a distinctive modern justification for a human rights system that would displace religious or regional norms?

NOTE

Consider the following observation in Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), at 96:

It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and by