

## **Islamic Law And Human Rights: Monologue Or Dialogue?<sup>1</sup>**

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### *Abstract*

This paper discusses how proponents of the Islamic law approach and those of the human rights are putting forward the need for prioritising one over another. I argue that there is a need for a positive narrative of change in the Muslim and non-Muslim worlds. Such narrative can only happen by moving away from prioritising one approach on another and actively promoting a harmonising approach that focuses on the high common values of freedom, justice, and tolerance for all.

Keywords: Islamic Law, Human Rights, Democracy, International Human Rights Law

### *Introduction*

Since the 1970s through the 1990s, the world witnessed a wave of democratisation and openness to human rights spreading over the Eastern European countries. It was interesting to see a doubtful part of the world, much affected by colonialism and violence, meaningfully adopting ideas and practices concerning the universal concepts of democracy and human rights. While the world had been re-emerging from dictatorship, authoritarianism, and the oppressing models to human rights, the Muslim parts of the world had seen little evidence of adopting such 'universal' values. The gap between the Muslim and Arab region from one side and the rest of the world from another side is dramatic. The question that rises is what are the prerequisites of this gap? Does Islam represent a hurdle standing in Muslim states<sup>3</sup> to adopt values of human rights and democracy? In other

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<sup>1</sup> This paper has been originally written for the course of my Master of laws (LLM) in international law at SOAS in 2011. It was revised and readjusted to fit today's world issues that involve the contestations between the adepts of Islamic law and those of human rights. I would like to extend my special words of thanks and appreciation to my Professor Mashood Baderin whose intellectual generosity and advice have encouraged me to publish this paper.

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<sup>3</sup> In this paper, the use of Muslim states refers to the states which constitutions proclaims Islam as the religion of the states, as well as the member states of the Organization of Islamic Community (OIC). It might be argued that some differences in the meanings exists between 'Muslim states', 'Islamic States' and 'Muslim

words, are the Islamic values and law incompatible with the human rights values as set in the international human rights law, including those related to freedom of expression and thoughts?

These questions represent the focus of this paper. To answer these questions, I rely on the academic discussions on the issue among three well-known scholars who extensively analysed the subject of Islamic law and human rights: Abdullah An'Naim's thoughts in his book "*Toward an Islamic Reformation: Civil Liberty, Human Rights and International Law*,"<sup>4</sup> Ann Elizabeth Mayer's views as contained in "*Islam and Human Rights: Tradition and politics*,"<sup>5</sup> and Mashood A. Baderin's study included in "*International Human Rights and Islamic law*."<sup>6</sup> I argue that there is a need for a positive narrative of change. Such narrative can only happen by moving away from prioritising one approach on another and actively promoting a harmonising approach that focuses on the high common values of freedom, justice, and tolerance for all.

I will first discuss the idea of reformation of Islamic Law as proposed by An'Naim (I) before analysing the monologue/dialogue approaches as alternatives suggested respectively by Mayer and Baderin (II). Finally, my argument carries on discussing the need for harmonisation between International human rights and Islamic law in Muslim states (III).

### ***I. Towards Reformation***

Influenced by the Sudanese reformer and Sufi, Mahmoud Mohamed Taha, Abdullahi Ahmad An'Naim wrote his book *Toward an Islamic Reformation: Civil Liberty, Human Rights and International Law*.<sup>7</sup> The context of the book is very significant to An'Naim's thoughts. This context was marked by the aftermath of 1980s and the configuration of the states in the Middle East. Since the 1980s, Islamic thoughts have challenged the definition and the role of the state as the 'legitimate authority.' Such a challenge resulted in an open rivalry between established Arab state institutions and an Islamic base; this is the situation that some authors refer to as a rivalry between Arabism and Islam.<sup>8</sup> According to Christine M. Helms, this rivalry started by the emergence of an "Islamic activism" that challenged the

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world'. This paper uses these three expressions interchangeably in accordance to the given description of Muslim states.

<sup>4</sup> Abdullah Ahmed An'Naim, *Toward An Islamic Reformation: Civil Liberties, Human Rights, And International Law* (New York: Syracuse University Press, 1996).

<sup>5</sup> Ann Elizabeth Mayer, *Islam And Human Rights: Tradition And Politics* (Boulder, Colorado: Westview, 1991).

<sup>6</sup> Mashood A. Baderin, *International Human Rights And Islamic Law* (Oxford: Oxford University Press, 2003).

<sup>7</sup> An'Naim, *Toward an Islamic Reformation*.

<sup>8</sup> Arabism or Pan-Arabism is the movement based on Arab nationalism that was initiated to flight colonialism and foreign involvement in the Arab World. This movement is mainly secular and mostly socialist. It was first used by Sharif Hussein Ibn Ali (Sherif of Mecca) to oppose and seek independence from the Ottoman Empire.

foundation of what can be considered as a legitimate authority in the Arab World. This position has formed the basis for a contestation against established governments in the region and a rationale for revolutionary change.<sup>9</sup> It was clearly demonstrated by the assassination of the then Egyptian President, Anwar Sadat, in 1981, the reconfiguration of Lebanon's confessional state during the 1980s and the execution of Mahmoud Mohamed Taha under order of the Sudanese President Gaafar Nimiery in 1985.<sup>10</sup> Such execution for what the Nimiery's regime judged as blasphemy, raised even more the polemic discussion about freedom of expression in Islam.

An'Naim's book came as a courageous reaction of the author at this hostile context which reformist Islamic thinkers had been facing. An'Naim addressed the crucial issues of *Shari'a* and human rights straightforwardly. He described the bald-faced irreconcilability of the *Shari'a* with the fundamental human rights law in any Islamic state. He criticised contemporary writers' dissimulation who asserted and defended the harmony between the *Shari'a* and contemporary human rights. An'Naim built his arguments by focusing mainly on what he called "the universal principle of reciprocity," which provides that every person must treat others as he or she likes to be treated by them. He tested this focus on what some contemporary Muslim writers failed to legitimise and even set the requirements for. He centred his analysis on four main topics in *Shari'a*: slavery, equality for women, the status of religious minorities (Jews and Christians) in the state of Islam and the utter suppression of other sects and the apostate Muslims. In his analysis, An'Naim clarified that the certain aspects of Islamic law are no longer compatible with the modern aspect of contemporary life. He stated that:

*"Islamic law has to adapt and adjust to the circumstances and needs of contemporary life within the context of Islam as a whole, even if this should involve discarding or modifying certain aspects of historical Shari'a."*<sup>11</sup>

An'Naim founded his argument for reforming Islamic law on the premises of the right of self-determination for Muslim peoples in relation to their Islamic identity and the application of Islamic law, as long as they respect the right of self-determination of others inside and outside the Muslim communities. He uses the word "historical *Shari'a*" to highlight the contextual and human origins of the part of the *Shari'a*: not as the revelation of God and the Hadith, but rather emanating for humans at specific contexts of their lives. He justifies the introduction of Western

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<sup>9</sup> Christine H. Helms, *'Arabism and Islam: Stateless Nations and Nationless States'*, The Institute for National Strategic Studies, July 1990, 3.

<sup>10</sup> Mahmood Mohamed Taha exposed revolutionary thoughts about the second message of Islam. Most of these ideas were included in his book "*the Second message of Islam: Contemporary issues in the Middle East*" (1967) that was translated later from Arabic to English by Abdullahi Ahmed An'Naim. This was a paradoxical book which was a proclamation of reform against the oppressive and despotic regimes in the Muslim world.

<sup>11</sup> An'Naim, *Toward an Islamic Reformation*, 7.

(modern) constitutionalism in non-western countries, including the Muslim states through a moral and empirical basis. He summarised his arguments on constitutionalism by saying that the:

*"conception of modern constitutionalism and its necessary implications reflect, in my view, the consensus of public opinion today, both within and outside the Muslim World."*<sup>12</sup>

While referring to Western constitutionalism, An'Naim mentioned that such reference is not meant to induce Muslims into blind mimesis in reference to the Western models. For him, the Western constitutionalism is not an ideal itself but rather a set of achievements that can be appreciated by Muslims as a contribution to humanity and which "Muslims and other people may adopt and adapt as they deem fit in light of their own religious and cultural traditions."<sup>13</sup>

An'Naim projects the idea for Muslims to be inspired by Western constitutionalism because of a set of arguments that he enumerated in his chapter on *Shari'a* and Modern constitutionalism:

1. the necessity of a sovereign government that has the authority and power to maintain law and order and regulate the socio-economic and political life in a giving state;
2. The existence of a body of rules which determines the structure and the functioning of the government: the constitution;
3. The foundation of the modern constitutionalism sits on the premises of sovereignty and nation-state in its modern understandings.

According to An'Naim, the third requirements for modern constitutionalism seem to constitute a major underlying problem in the *Shari'a*. He stated that:

*"[O]ne of the main issues underlying all the problems with constitutionalism under Shari'a is a certain ambivalence regarding sovereignty. Although is the profound Muslim believe that ultimate sovereignty resides in God, this in itself does not indicate who is authorised to act in the name of the ultimate sovereign."*<sup>14</sup>

An'Naim indicates the divine and ultimate sovereignty in Islam is inherent to God and there are no indications in Islam with regards to who can act in the name of the ultimate sovereign. He pointed out to the fact that this issue had not been problematic during the lifetime of the Prophet Mohammed, but it became a crucial matter after the death of the Prophet and the emergence on how to appoint his successor (Caliph). The *Shari'a* does not contain any indications on how to appoint

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<sup>12</sup> An'Naim, *Toward an Islamic Reformation*, 69.

<sup>13</sup> An'Naim, *Toward an Islamic Reformation*, 70.

<sup>14</sup> An'Naim, *Toward an Islamic Reformation*, 83.

a Caliph. For An'Naim, this is the crucial problematic issue on which he based his approach of deconstructing what he called "historic *Shari'a*". He based his approach on the deconstruction of the predispositions of historic *Shari'a* by centring his point upon the theory of self-determination and reciprocity.

The self-determination that An'Naim aspired for necessitates a new interpretation by modern Muslims. Such new interpretation takes into account the current historical context of the Muslim societies and the need for authoritative laws that protect the right of self-determination of peoples in Muslim states. An'Naim refers to the revolutionary approach of Mahmoud Mohamed Taha. He stated that "the Istadh Mahmoud Mohamed Taha proposed a revolutionary reform methodology," which he referred to as the "evolution of Islamic legislation."<sup>15</sup> An'Naim shows how a new interpretation of the *Shari'a* can use the revolutionary approach of Mahmoud Taha.

For example, in the case of slavery in Islam, An'Naim pointed out that an evolutionary can fill in the gaps of the *Shari'a* with regards to the abolition of slavery.<sup>16</sup> Modern Muslims, using Mahmoud Taha's approach, can re-interpret the *Shari'a* recognition of slavery until today. Such re-interpretation will qualify the *Shari'a* recognition of slavery as part of a transitional legislative system that no longer exist in the Muslim states, and proceed to a new reading of the *Shari'a* that explicitly abolishes slavery. Even though there are claims that slavery is banned in Muslim states and that is not anymore of relevance, An'Naim states that such abolishment of slavery came through secular laws and not an abolishment in the Islamic law. For An'Naim, it is important that Modern Muslims proceed to the abolishment of slavery in the *Shari'a* through an explicit evolutionary re-interpretation of the *Shari'a* texts.

Regarding religious minorities rights and gender equality, An'Naim pointed out that the *Shari'a* does not ban discrimination against these two categories but restricted its scope and reduced its incident instead.<sup>17</sup> He mentioned that looking at the *Shari'a* through a modern perspective, such discrimination, even restricted and reduced, is unacceptable and unjustifiable anymore.

An'Naim started by framing his arguments on the basis of the right of self-determination. Perhaps it may seem obvious for An'Naim what the right of self-determination means; however, a clear definition of what the right means according to the author remains missing. Already, the right of self-determination in international human rights law does not have a crystal-clear definition and its meaning remains polemic at times.

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<sup>15</sup> An'Naim, *Toward an Islamic Reformation*, 34.

<sup>16</sup> An'Naim, *Toward an Islamic Reformation*, 175. In An'Naim's views, even though the Shari'a encouraged the emancipation of slaves such as in verses 9:60, 2:177, 4:92, 58:3, 90:11-13 of the Quran, Shari'a recognized slavery and continues to do without an explicit abolishment.

<sup>17</sup> An'Naim, *Toward an Islamic Reformation*, 175.

Beyond the discussion on the history of the right of self-determination<sup>18</sup>, the right appears in both the 1966 UN Covenants on Human Rights, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>19</sup>. In its modern interpretation, the right of self-determination differs from the other rights of the Covenants because it is not formulated as the right of "every human being", of "everyone" or of "all persons", but rather "the right of all the peoples". Nowak argues that the right does not involve a "human right" but rather a "collective right of peoples".<sup>20</sup> He considers the right of self-determination as "solidarity right" of "the third generation."<sup>21</sup> In his essay *Kinder, Gentler Islam?*<sup>22</sup> An'Naim referred to the modern exercise of the right of self-determination and addressed the ambiguity of the collective 'self.' In his book that this essay is analysing, he does not explain what 'self' means, and to which the modern exercise of the right does not refer to. In other words, the 'self' in the modern exercise of the right of self-determination can only be exercised collectively, but the question remains about what constitute the collectivity. An'Naim omitted necessary clarifications.

In addition to his reference to the right of self-determination, An'Naim framed his argument for the reformation of historical *Shari'a* upon the consideration that the traditional dispositions of the historical *Shari'a* do not provide for the currents modern human rights and civil liberties for Muslims. He framed the dichotomy of the 'modern' versus the 'traditional' in terms of a clash between the

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<sup>18</sup> The Article 1 (2) of the UN Charter refers to the "principle of equal rights and self-determination of peoples". Reference to the "right" of peoples exists in other instruments: Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, which was the outcome of the UN General Assembly Resolution 1514 (XV) of 14 December 1960; Friendly Relations Declarations in 1970, which is an Annex to the UN General Assembly Resolution 2625 (XXV) of 24 October 1970; The 1975 Helsinki Final Act that was adopted by the Conference on Security and Cooperation in Europe (CSCE) on 1 August 1975; Two Advisory opinions of the International Court of Justice, one regarding the legal consequences for states of continued presence of South Africa in Namibia (1970). The other one is related to the Western Sahara issue (1975).

<sup>19</sup> Common Article 1 of both Covenants ICCPR and ICESCR states that:

1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

<sup>20</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: Engel, 2005), 14.

<sup>21</sup> Nowak, *Commentary*, 14.

<sup>22</sup> Abdullah Ahmed An'Naim, 'A Kinder, Gentler Islam?', *Transition* 52 (1991): 4-5.

'good' and the 'bad'. In other words, An'Naim tag marked historical *Shari'a* as the 'bad', at times, that needs to be transformed into the modern aspect of rights: the 'good'. This approach faces the risks of stigmatising the 'traditional' as something that needs to be transformed. It is necessary to mention that any traditional understanding regarding aspects of religion is not a static truth but rather a construct in continuous change. What can be considered as modern today, could become traditional in the future' and what would be considered as traditional in the past, might be re-adopted as modern at the present. The consideration of the context is very important because the interpretation of religious texts mold and is molded by the context in which the interpretation is taking place.

The discussion of the modern versus the traditional leads me to discuss the consideration by which An'Naim called for an Islamic reformation by Modern Muslims. The question is who can proceed to such reformation while most of the major texts of the *Shari'a* are in Arabic while not all Muslim are Arabs? While An'Naim was concerned by protecting religious minorities' rights, there are some cultural and ethnic minorities in many Islamic states that did/do not speak Arabic, and therefore depended on Arabs interpretation of the dispositions of the *Shari'a*. This is the case of the Berbers in North Africa, the Persians, The Kurdish, the Syriacs, the Armenians, the Turkmans, the Caucasians (Chechens and Circassias), the Moorish in Mauritania, the Ibadis with Indian and African origins in Oman...etc. It is crucial to mention that these groups are considered as minorities not because of their numbers in these countries (no official number are available), but because how these communities are imagined in these states. They are considered as minorities because they are not originally Arabs (and not entirely Muslim Sunni in some cases). More crucial, these groups had no abilities to communicate orally or in writing with other non-Arab groups (who spoke different languages) and with Arabs, but they understood each other's ideographs, because they share the sacred texts of Islam, which existed in classical Arabic only. According to Anderson,<sup>23</sup> classical written Arabic language functioned to create communities out of signs, not sounds and distinct to the imagined communities of modern nations that had "national print-languages" and a different idea of admission to membership.<sup>24</sup> This reality meant that sacred texts of Islam in which communities were imagined "cosmically central and linked to superterrestrial order of power";<sup>25</sup> This is the Islamic *Ummah* that communities among Muslims across the world, imagined themselves as, and who have been depending on Arab speaking Muslims for the interpretation of the sacred Arabic sacred texts of Islam.

An'Naim, who is native Arabic speaker, did not address the consideration of including other members of non-Arab speaking 'minorities' in the Islamic reformation. Such reformation, in its actual meaning and according to An'Naim

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<sup>23</sup> Benedict Anderson, *Imagined Communities: Reflections On The Origin And Spread Of Nationalism* (London: Verso, 1893, 13

<sup>24</sup> Anderson, *Imagined Communities*, 46.

<sup>25</sup> Anderson, *Imagined Communities*, 13.

settings under the discourse of "Modern Muslims", will only add to the power dynamics between Arab and non-Arab native speakers in the re-interpretation of the *Shari'a*. In response to these considerations, other scholars took the burden of addressing the issue of Islamic law and human rights. Professor Baderin Mashood has an innovative perspective that regards Islamic law and human rights through a loop of harmony, rather than clash. His approach was criticised by Ann Mayer.

## II. Monologue Or Dialogue?

Mashood Baderin introduces a new way in looking into the relationship between international human rights and Islamic law. He provides his views under a microscopic analysis of the Islamic law in relation to the human rights as contained in the two 1966 building blocks of the international human rights law: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Mashood's analysis is contained in his book "*International Human Rights and Islamic Law*." I will focus on Mashood's arguments and approach from one side, and the critiques that were laid on his publication by Ann Elizabeth Mayer. I chose to look into Baderin arguments through Mayer's critiques. Mayer's views on the relation between International Human Rights and Islamic law are included in her book entitled: "*Islam and Human Rights*."

Baderin's new way of looking at the Islamic law tackles the important question: to what extent Islamic law can be interpreted in the light of the international human rights law and vice versa? He set his arguments on the basis of the core virtue of the universalism of human rights. In doing so, he arrives to the conclusion that Islamic law and human rights are different with regards to their scopes; however, they do not establish a general clash against one another. Baderin argues that:

*"The differences can be meaningfully discussed and the noble ideals of international human rights realised in the Muslim world if the concept of international human rights can be convincingly established from within the themes of Islamic law rather than expressing it as a concept alien to Islamic law".<sup>26</sup>*

Baderin's approach aims to promote a conceptual harmonisation between the philosophy of both Islamic law and international human rights through the accommodation of the principle of justification. Through this principle, Baderin sought a paradigm shift from "the traditional hardline interpretations of *Shari'ah* and also from the exclusionist interpretation of international human rights law."<sup>27</sup>

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<sup>26</sup> Baderin, *International Human Rights*, 6.

<sup>27</sup> Baderin, *International Human Rights*, 6.



The context of Mashood's work coincided with the dramatic clash of paradigms between acts conducted in the name of Islam and those carried out through the use of the International human rights discourses. The 9/11 attacks on the world trade center, the war on Afghanistan, the invasion of Iraq, the ethnic cleansing of Muslim Kosovars by the Serbs, the brutal intervention in Kosovo, the torture acts in Iraq and Guantanamo Bay... just to cite a few, all these events were carried out in way or another either in the name of Islam or through the use of human rights or humanitarian discourses, mainly based on the right to protect.<sup>28</sup> From one side, there was a clear language of "violent extremism" and "terrorism" that was used against those who attacked the West in the name of Islam.<sup>29</sup> From another side there was similar language of "hate of Islam" that was used by Muslims to describe the West attacks on Muslim countries and their innocent peoples in the name of human rights,<sup>30</sup> especially the use of Chapter 7 of the UN Charter on use of force.

This clash of paradigms has led not only to a clash between Muslim states and the West, but also led to the discrimination against Muslims in Western states and against non-Muslims in the Muslim states. We witnessed special immigration measures in the United States and European Union countries against members which native countries are Muslim states.<sup>31</sup> At the same time, we witnessed the maltreatment and even execution of non-Muslims in some Muslim States. This situation has led to two separate literatures and policy recommendations on the matter that treat Islam and human rights as hardline enemies. An example of authors of this kind of literatures is Ann Mayer who criticised Mashood's harmonising approach to Islamic law and human rights.

Ann Mayer considers herself as a "backer" of human rights.<sup>32</sup> She worked for various non-governmental organisations (NGOs) in various parts of the world, including in Muslim countries. When reviewing Baderin's book on *International Human Rights and Islamic Law*, she wrote:

*"Tendentious and sometimes even careless, this literature typically portrays Islam in a distorted fashion, claiming that it is either the cause of human rights abuses or their cure.*

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<sup>28</sup> Eric A. Heinze, *Humanitarian Intervention and the War in Iraq; Norms, Discourse, and State Practice*, HSDL, 2006.

<sup>29</sup> Caroline Mala Corbin argued in "Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda", *Fordham Law Review* 86 No. 2 (2017), that critical race theory helps understand the production of stereotypes, such as the one of the 'Muslim terrorist.' The theory also explains the 'white privilege' of avoiding the terrorist label.

<sup>30</sup> On the Muslim anger against Iraq War see *A Year After Iraq War: Mistrust of America in Europe Ever Higher, Muslim Anger Persists*, The Pew Research Center, 16 March 2004.

<sup>31</sup> Muzaffar Chishti and Claire Bergeron, *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape*, Migration Policy Institute, 8 September 2011.

<sup>32</sup> Ann E. Mayer, 'Review: An-Naim, Abdullah A, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law*', *AJIL* 99, No. 1 (January 2005), 303.

*Baderin leans in the direction of portraying Islamic precepts as sufficient to ensure virtue, harmony and benevolence.*"<sup>33</sup>

To be able to clearly understand how she qualifies Mashood's arguments, Mayer mentioned in her book on *Islam and Human Rights* that:

*"A deep cleavage has resulted between the idealistic focus on the proponents of Islamization, who tend to envisage Islamic Law as the Utopian solution to all problems, and the focus of Muslim human rights activists, who are concerned with the practical obstacles to democratisation and the institutional deficiencies that must be addressed to secure human rights protections."*<sup>34</sup>

In analysing the two citations, it seems that Mayer qualified the work of Baderin among the first category of the "proponents of Islamization" who did not critically assess the government reliance on Islam, as she did. She wrote on her review that

*"I have written critical assessments of governmental reliance on 'Islam' to justify policies of discrimination, persecution and repression. Though Baderin takes an opposing stance, he fails to engage – but, instead, in my view distorts – what I have actually written".*<sup>35</sup>

What strikes me in Mayer's position is her understanding of the cleavage between an Islamic idealism and human rights activism in Muslim States. I consider that Mayer did not go deeper in understanding such cleavage. Only a profound analysis of the socio-political history of the Muslim world reveals that two notions have defined the essence of statehood in the region: Arabism (or pan-African nationalism)<sup>36</sup> and Islam. Political extremists have built their distortions on the basis of these two ideas that have brought about either stateless nations or nationless states<sup>37</sup> in Muslim societies. This political distortion impacted the acceptance and adoption of human rights in these societies.

Mayer rejected what she called the Islamic human rights scheme. Such a scheme sporadically contains the dispositions included in documents such as the Universal Islamic Declaration of Human Rights (UIDHR), the Azhar Draft Constitution, the Iranian Constitution, Mawdudi and Pakistani law affecting religious freedom, the Cairo Declaration and the Saudi Basic law, the Afghan and Iraqi constitutions, and the International Religious Freedom Act of 1998...etc.

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<sup>33</sup> Mayer, 'Review', 303.

<sup>34</sup> Mayer, *Islam and Human Rights*, 199.

<sup>35</sup> Mayer, 'Review', 303.

<sup>36</sup> I am focusing here on the Middle Eastern and African Muslim states. South and Southeast Asian Muslim states have also been affected by a distortion of a nationalist movements and an Islamic base.

<sup>37</sup> I borrowed the expressions 'stateless nations' and 'nationless states' from Helms, *Arabism and Islam*.

According to Mayer,<sup>38</sup> the Islamic human rights scheme is shaped by the conservative views of its authors who have negative resentments towards the Western model of freedom. She gave examples on how the Islamic human rights scheme failed in guaranteeing and protecting the human rights of religious minorities for example. She mentioned the Section 7 of the Preamble of the UIDHR to point out at "the religious bias in the system" of the Declaration; the Arabic version of this section refers to the commitment to a society where all people believe that Allah alone is the master of all creation.<sup>39</sup> Mayer considers that such commitment is an attempt to convert the entire society to Islam, which is not compatible with the dispositions of freedom of religion as contained in the International human rights law.<sup>40</sup>

Mayer's approach fits perfectly what Watson described as the presumption of perfection of the International human rights law. Watson pointed out that there is a tendency among some scholars which considers the assumption that the current international human rights law is faultless and perfect with everything else being fine-tuned to uphold such assumption.<sup>41</sup> Baderin considers Mayer's position as monological rather than dialogical.<sup>42</sup>

In time when there is a need for paradigm reconciliation between the Islamic perspective of human rights and the International human rights mechanisms, Mayer has furthered the distortion between these two approaches to human rights. This distortion can only be consequential in societies that are already divided by the need for a system of human rights intrinsic to their peoples and communities, and the power of the international universal system of human rights which remains extrinsic to Muslim states. The importance of a dialogical approach for achieving a common understanding of human rights was one of the outcomes of the Council of Europe conclusions at the inter-regional meeting prior to the 1993 World Conference on Human Rights at Strasbourg. These conclusions of the Council of Europe stated that:

*"We must go back to listening. More thought and efforts must be given to enriching the human rights discourse by explicit reference to other non-Western religions and cultural traditions. By tracing the linkage between constitutional values on the one hand and the concepts, ideas and institutions which are central to Islam or Hindu-Buddhist tradition or other traditions, the base of support for fundamental rights can be expanded and the claim to universality vindicated. The Western World has no monopoly or patent on basic human rights. We must embrace cultural diversity not at the expense of universal minimum standards."*

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<sup>38</sup> Mayer, 'Review', 202.

<sup>39</sup> Mayer, 'Review', 179.

<sup>40</sup> Mayer, 'Review', 180.

<sup>41</sup> Watson, J, S, *Theory and Reality in the International Protection of Human Rights* (Ardsley, New York: Transnational Publishers, 1999), 15.

<sup>42</sup> Baderin, *International Human Rights*, 4.

### III. The Harmonisation

This is the line that Mashood Baderin took in his analysis contained in his book on *International Human Rights and Islamic law*.<sup>43</sup> The aim of the book is the breaking of the traditional barriers between the 'Western perspective' of human rights that established priorities of Western values and the hardline interpretations of the *Shari'a*, which have been used by some governments in Muslim states as an excuse for their human rights violations. Baderin started with two main starting points. First, he rejected the pretext of cultural relativism by which some governments in Muslim states use to abuse human rights. Second, he questioned the universality of the universalism of human rights; a universalism within which Islamic law enjoys very little prestige and has no normative value.<sup>44</sup> Also, he pointed out that based on morality and substantive justice are vital principles of both Islam and international human rights, the harmonisation of the two approaches needs to be accommodated. He argued that such accommodation needs to be advanced through the use of the principle of justification. Accordingly, Baderin pressed forward two mechanisms by which the harmonisation between the hardline interpretations of the *Shari'a* and the exclusionist one of the international human rights law can be maintained: the contemporary Islamic doctrine of *Maslaha* and the European human rights doctrine of the 'margin of appreciation'.<sup>45</sup>

Discussions of *Maslaha* have been omnipresent in the Islamic jurisprudence since late 13<sup>th</sup> century. Such discussion re-emerged in the Hadith studies and policy recommendations during the contemporary period. Literally *Maslaha* indicates a source of something good and favorable. Since it is impossible to translate into English, its closest meaning is 'welfare', 'well-being' and/or 'social wealth'.<sup>46</sup> Regarding the European doctrine of the 'margin of appreciation', it is considered to constitute a means by which governments of the EU member states are conferred a privilege to balance between the rights of the individual with those impinging the public in general. When there is a conflict between collective (public) security with individual human rights, it is permitted to the state organs to determine whether the act is within the margin of appreciation; in which case the state can violate that individual's human rights without being held liable for the violation.

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<sup>43</sup> Baderin, *International Human Rights*.

<sup>44</sup> Baderin, *International Human Rights*, 12.

<sup>45</sup> Baderin, *International Human Rights*, 6.

<sup>46</sup> Felicitas Opwis observed that sometimes it is referred to *Maslaha* as 'public interest'. He pointed out that such translation is only accepted when it concerns the permissibility of the political authority to issue rulings that concur with the public good within the sphere of politics (*siyasah*). Otherwise, when a Mufti gives a legal ruling under the doctrine of *Maslaha*, it is usually based on the considerations of a single private case, and not with reference to 'public interest'. See Felicitas Opwis, 'Maslaha in Contemporary Islamic Legal Theory', *Law and Society* 12, No. 2 (2005): 183.

Public interests and the right of others may sometimes demand some persons to be incarcerated and treated humanely (ICCPR, Articles 9, 10-2, 10-3), such dispositions clash with the presumption of innocence under Article 10(2)(a). Under Islamic law, and according to Baderin,<sup>47</sup> the *habs ihtiyati* refers to the preventive confinement pending investigation, which can be compared to the incarceration under the Article 9 of the ICCPR. He added that the condition of the ICCPR Article 10(1) to "treat with humanity and with respect for the inherent dignity of the human person" can be compared to the Prophet Muhammad order to Muslims in relation to prisoners of war at the battle of Badr to "take heed of the admonition to treat prisoners fairly."<sup>48</sup> Also, Baderin mentioned that there is Muslim jurists who agree that prisoners must be treated humanely and that the state is responsible for ensuring food, clothing, medical care and other essential needs to the prisoners.<sup>49</sup>

One of the most polemic topics of the human rights in Muslim states is the Islamic criminal punishment, especially the *hudud*. The Islamic punishments known as *Hudud* are generally prescribed for six offences under the traditional Islamic law. These punishments include: amputations of a hand (for theft) cross amputation of the hand and the foot or banishment (for rebellion or armed robbery), stoning to death (for adultery), one hundred lashes (for fornication) forty to eighty lashes (for intoxication), and execution to death (for apostasy). The Human Rights Committee (HRC) has been ordering Muslim states to abolish the *Hudud*. Baderin argues that the *Hudud* in most of Muslim states is in desuetude. However, such punishments are not explicitly abolished.<sup>50</sup> Baderin considers that there is a reinstatement of Islamic law in many Muslim countries which will reconcile the *hudud* punishments and the demands of HRC for their prohibition.<sup>51</sup> Baderin believes that through the use of the *Maslaha* and within the procedural shield of the Islamic law that the issue of *Hudud* will be indirectly addressed according to the requirements of International human rights law.

Baderin used the same arguments of *Maslaha* and the ideas of the reinstatement of Islamic law in many Muslim countries to address the issue of inequalities between men and women in Islamic law. Mayer rejected Baderin's approach of addressing the issue of women's rights through the use of an Islamic margin of appreciation.<sup>52</sup> Regarding women's covering, Baderin speaks of the choice of women between two Islamic jurisprudential views: the Shafi'i and the Hanbali school that holds that women must veil up their whole person in public, or the Hanafi and Maliki school that allow women to expose their faces, the hands up to the wrist and feet up to the ankles.<sup>53</sup> I consider such choices as a segregation against women that have gone beyond the respect of the public morality of the state. While

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<sup>47</sup> Baderin, *International Human Rights*, 92.

<sup>48</sup> cited in Baderin, *International Human Rights*, 92.

<sup>49</sup> Baderin, *International Human Rights*, 92.

<sup>50</sup> Baderin, *International Human Rights*, 85.

<sup>51</sup> Baderin, *International Human Rights*, 85.

<sup>52</sup> Mayer, 'Review', 304.

<sup>53</sup> Baderin, *International Human Rights*, 66.

morality is a construct that is shaped by the context and those in power (and vice versa), it is difficult to hold that such morality is set the standard of any given country where women are far from being represented. This is for example the case of Iran, Afghanistan, Yemen and Saudi Arabia, just to cite a few.

The discussion of the examples above shows that the use of the *Maslaha* or Islamic margin of appreciation can lead to mixed results. While the outcome of the approach can result in more protection of the right holder (e.g. *hudud and habs*) in harmony with the disposition of the international human rights, the *Maslaha* is very questionable in reference to its application to protect women's rights and their freedom in Muslim states, as example. In his study '*Maslaha in Contemporary Islamic Legal Theory*',<sup>54</sup> Opwis pointed out that contemporary Muslim jurists have applied either a holistic approach of *Maslaha* similar to the one adopted by Al Shatibi<sup>55</sup> and the Moroccan jurist Allal Al Fassi, or espoused a more restrictive model of *Maslaha* similar to that of Al Ghazali and Al-Razi. If the first group advocated changing the methodology of hermeneutics of Islamic law to make it fit the prerequisites of the modern nation-states, the second group, more conservative, aimed at preserving a restrictive and traditional structure of Islamic law as much as possible.<sup>56</sup> Baderin's use of *Maslaha* falls into the dilemma of both schools of contemporary models of *Maslaha*; on one hand his approach seems to be desperately restrictive (the case of women's dress code). On the other hand, his thoughts show a significant flexibility.

### Conclusion

The history of the state in the Muslim world is the product of the contention between the security of state authority and the wishes of Muslim societies. This history is marked by painful failures of unmet objectives, false promises and lost aspirations for democracy and human rights. In this paper, I started by mentioning the crisis in which Muslim states are mired; their crisis is general and profound. The crisis reflects the paradox of hopes for democracy, human rights and progress, on one side, and accumulated deceptions, on the other. The Muslim world desperately needs a positive narrative for change. Narratives of democracy and human rights, like those projected in the region through pre-established Western models, are negatively perceived by many Muslim societies. Also, the projection of such models gives ground to Muslim states to restrict the adoption and the guarantee of human rights in the name of their attachments to what they constructed as being the values of Islam.

The crucial work of scholars in building alternative solutions to this crisis, as contained in this paper, demonstrates the difficult task to adequately and consensually tackle the prerequisites of the human rights crisis in the Muslim states.

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<sup>54</sup> Opwis, 'Maslaha', 182-223.

<sup>55</sup> Al Shatibi theory of law is very noticeable in the thoughts of Mahmoud Mohamed Taha even though Taha did make no reference to Al Shatibi or to any other Muslim scholar that Taha may have been inspired by.

<sup>56</sup> Opwis, 'Maslaha', 222.

Abdullah An'Naim, Mashood Baderin and Ann Mayer exhibited a fascinating intellectual dialogue and dynamics on how to prioritise one or harmonise between International Human Rights Law and Islamic Law. The analysis of their books demonstrates how these scholars broke the barriers between the proponents of the two disciplines of law.

The critiques that I included indicate the intense dialogue between the two approaches: Islamic law and the international to human rights. These critiques show that prioritising one approach on another only provides a distortion and backlash that negatively impact the adoption of a developed approach to human rights in Muslim states. There is a need for a harmonising approach to the idea of human rights values, which focuses more on the human essence of the people in the Muslim and non-Muslim world, and which can be justified by common values for people to live in a country in which fear, prejudice and insularity are substituted by the global Islamic and human rights values of freedom, justice, and tolerance.