

Human Rights and Islam:
Discursive Traditions in Dialogue

by

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Abstract

In this thesis, I begin with an overview of the existing literature about the compatibility of Islam with human rights standards to uncover two dominant trends: (1) Orientalist and Occidental literature that posits an adversarial and incompatible relationship between the two, and (2) approaches that seek to reform Shari'ah to render it compatible with human rights standards and with broader Western-liberal values. In contrast to these approaches, I argue that a principled reconciliation between Islam and human rights is possible if we conceptualize both of them as discursive traditions that are neither fixed and unchanging nor easily remolded by external pressures. For a constructive synthesis between the two traditions, what is required of proponents of both traditions is a genuine commitment to intercultural dialogue through which they seek to develop a deep and nuanced understanding of the other tradition and to uncover a sense of the incompleteness of their tradition as a stand-alone project. These transformations in orientation will provide the impetus for engaging in an internal 'renewal' of the tradition to which one belongs, enabling both traditions to adapt to the needs of changing times and contexts, leading ultimately to enriching co-existence and collaborative ventures.

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Introduction

The Continued (and Renewed) Relevance of Human Rights in the Muslim World

The 2011 Egyptian revolution began with a mass protest planned for the National Police Day on Tuesday, January 25. The demands of protesters included the end of police brutality, the dismissal of the Minister of Interior, the reinstatement of a fair minimum wage, the end of 40 years of emergency rule, and term limits for the president (Afify, 2011). Leaflets distributed advertising the protest proclaimed the slogan: “I will protest on 25 January to get my rights” (“Security forces,” 2011). The co-founder of the protest, 25-year-old Asmaa Mahfouz, relied heavily on the language of rights to incite Egyptians to join the movement. Described as the “bravest girl in Egypt” for her role in promoting the protests through online media, Mahfouz’s video blog posting received 78,000 hits within days. Within a week, her video had compelled some 25,000 people to attend demonstrations on the “Day of Rage”, which snowballed into hundreds of thousands joining by Friday (Siddiqui, 2011). In her video, Mahfouz passionately proclaims: “We’ll go down and demand our rights, our fundamental human rights. I won’t even talk about any political rights. We just want our human rights and nothing else... Come down with us, and demand your rights, my rights, your family’s rights” (as cited in Siddiqui, 2011).

The evocation of human rights has been a recurrent theme in the protest movements currently sweeping the Middle East, reaching such diverse countries as Tunisia, Egypt, Libya, Syria, Jordan, Bahrain and Yemen. This “Arab Spring” has depended crucially not only on mobilizing a critical mass of domestic support, but also on the endorsement and patronage of the international community. According to UN

High Commissioner, Navi Pillay, the effect of the Arab Spring has been debunking the myth that citizens of the Muslim world are not interested in human rights but have ‘other preoccupations’ (“Arab Spring,” 2011). Pillay interprets their courageous resistance as a reaffirmation of the universality of human rights: “we all want, we all deserve, and we are all entitled to have our rights observed – not partially, not sometimes, not at the whim of dictators or other repressive rulers and authorities, but all of us, all of the time, everywhere (“Arab Spring,” 2011).

Interestingly, the vocabulary of rights has been so ubiquitous in the Middle East uprisings that even some repressive States have sought to quell uprisings and to draw legitimacy to their governments through the evocation of rights. For instance, under pressure from the protests in neighbouring countries, Jordan’s King Abdullah II dismissed the Prime Minister and his cabinet and ordered constitutional reforms to the Kingdom’s 1952 constitution (Greenberg, 2011). In spite of the fact that Amnesty International and Human Rights Watch have condemned Jordan for violently repressing demonstrations and accused Jordanian authorities of beating and torturing prisoners and protesters, the Jordanian government’s website proclaims that Jordan has “consistently been cited by Amnesty International as the country with the best human rights record in the region” (Juchau, 2011).¹ Similarly, the Moroccan regime attempted to diffuse discontent and prevent protests by instituting sweeping reforms including a new democratic constitution comprising a charter on human rights (Morocco’s king, 2011).

¹ Analyst James Juchau notes: “The saddest part of all this is that the Jordanian governments website is not lying—it does have one of the best human rights records in the Middle East” (Juchau, 2011). Unfortunately, comparing Jordan to other states in the region hardly vindicates Jordan’s poor human rights record.

This choice of language by both citizens and governments of Muslim states and the corresponding acknowledgment and recognition that their struggle for dignity and rights has received from media, institutions and governments outside the Middle East tell of the increasing internationalization of human rights, which have become the shared contemporary language of progressive politics and demands for social justice across the globe. However, when it comes to considering human rights in the context of the Muslim world, discussions and debates about the compatibility of Islam with international human rights have been ongoing and diverse and continue to be marked by considerable tensions.² One important tension that frequently resurfaces in the context of the Middle East uprisings is the question of what citizens of Middle Eastern and North African countries really mean when they use the language of human rights. Using a shared language is a double-edged sword – you may use it so that others understand you, but

² There is a wide range of literature analyzing the compatibility of Islam and human rights. See for example: A. An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (1987); M. Monshipouri, *Islamism, Secularism and Human Rights in the Middle East* (1998); M. A. Baderin, *International Human Rights and Islamic Law* (2003); A. Mayer, *Islam and Human Rights: Tradition and Politics* (2006); A. Sachedina, *Islam and the Challenge of Human Rights* (2009); B. Tibi, *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations* (1994); H. Bielefeldt, *Muslim Voices in the Human Rights Debate* (1995); H. Bielefeldt, "'Western' versus 'Islamic' Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights" (2000); J. Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982); M. Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic law and International Human Rights Law" (2007); A. Chase, "Liberal Islam and 'Islam and Human Rights': A Skeptics View" (2006); D. Brumberg, "Islam is Not the Solution (or the Problem)" (2005); K. Abou El Fadl, "The Human Rights Commitment in Modern Islam" (2003).

they might also understand you in the way that *they* use the language and not in the way that *you* intended to use it. So, when the language of rights is employed by a citizen in a predominantly-Muslim state, are they necessarily also demanding liberal-democratic governance, secularism and the abandonment of religion in the public sphere (as well)? Or is such an interpretation based on the projection of our Western sensibilities on others?³ One of the contentions that I will defend in this thesis is that it is imperative that people from different socio-cultural contexts be given the space they need to explain their challenges, demands and aspirations, in their own way, even, and especially, when using an international language such as that of rights.

Nonetheless, these contemporary revolutions and the attempts in their wake to transition to democratically-inspired rights-protecting states clearly establish the continued relevance of this topic, both for proponents of human rights and adherents of

³ Throughout this thesis, I will use the terms ‘Western’ and ‘non-Western’, ‘Muslim world’ and ‘non-Muslim world’, ‘modern’ and ‘pre-modern’ etc. in loose ways to capture general phenomena or trends that are dominant in particular geographical locals or cultural civilizations. Yet I also readily acknowledge that amorphous concepts like “the West” and the “Muslim world” do not exist as homogeneous, monolithic entities and thus that use of such discursive constructions necessarily includes generalizations, stereotypes and disregard of the wide range of diverse approaches within each of those terms. Placing terms like ‘Western’ and ‘Islamic’ in ontological opposition is also overly simplistic in that there is both overlap and divergence between them, which makes it difficult to isolate ideas and concepts within one or the other category. Do the similarities and differences really exist, or are these simply posited or even imposed? At what point should differences and divergences be considered worthy of warranting the designation “Western” as opposed to “Islamic”? Throughout this thesis, I will endeavour to draw attention to the considerable diversity and overlap within and among these terms and more broadly within the Islamic and human rights traditions.

Islam. In discussions about human rights, religion cannot be disregarded as irrelevant or insignificant because of the strong influence it exerts on belief and behavior in any given society. Some scholars have suggested that this is particularly important in Muslim societies, where Islam continues to play a significant role in the social, political and legal affairs of Muslim states, in both the private and public spheres.⁴ Tad Stahnke and Robert C. Blitt (2004) maintain that at least half of predominantly Muslim States have constitutionally proclaimed Islam as the official State religion, recognized Islamic law as part of State law, or provided for the establishment of State courts that apply Islamic law. Heiner Bielefeldt (1995) also notes that Islamic law marks family structures in the Islamic world,⁵ and an adaptation of Islamic criminal law is applied in a few Islamic countries today. Along with this domestic influence in individual states, Muslim states have also adopted regional instruments that make reference to Islam as a relevant factor

⁴ For discussion of the role that religion continues to play in the legal and governmental structures of Muslim states, see A. An-Na'im "Islam and human rights: Beyond the universality debate" (2000); M. A. Baderin, "Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives (2007); T. Stahnke and R.C. Blitt, "Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries" (2005); H. Bielefeldt, "Muslim Voices in the Human Rights Debate" (1995).

⁵ See L. Abu-Odeh, "Modernizing Muslim Family Law: The Case of Egypt" (2004), for an interesting discussion of the dynamics of family law reforms in modern Egypt. Abu-Odeh notes that when law was replaced by European legal systems in the mid-nineteenth century, most areas of law were secularized, with the exception of family law. For this reason, the preservation of Islamic law in the area of family law came to symbolize the 'last bastion' of the inherited Islamic legal system, which has led to considerable resistance to any form of renewal or reform in that area.

in the human rights discourse in the Muslim world (Baderin, 2007, p. 2).⁶ In spite of these factors, some commentators have dismissed discussions about Islam and human rights as a mere “distraction from insightful dialogue on key political issues... a practical impediment to building new political constructs” which places “overemphasis on Islam’s centrality in Muslim societies” (Chase, 2000, p. 21). A slightly different but similar approach is espoused by those who claim that Islam is neither the solution nor the problem *per se* to political and social problems in the Muslim world, including human rights, but rather, the political, social and economic contexts better explain the status of human rights in any given society.⁷

While political, soacial and economic circumstances are certainly important factors for upholding rights in the Muslim world, and can be even more important than religion in some situations, it is important to note that in the Muslim world, Islamic law and legal principles continue to play an influential role in domestic law, and in regional and international instruments. Beyond the narrow conceptualization of *Shari’ah* as a rigid legal code, as an encompassing discursive tradition that incorporates a moral code, a

⁶ See for example the Charter of the Organization of Islamic Conference (OIC) (1974), the OIC Cairo Declaration on Human Rights in Islam (1990), the Arab Charter on Human Rights (1994), and the OIC Covenant on the Rights of the Child in Islam (2005).

⁷ See for example D. Brumberg, “Islam is Not the Solution (or the Problem)” (2005) where he argues that naming Islam as the solution exaggerates the extent to which Islam shapes the political identity of Muslims. See also A. Chase, “Liberal Islam and ‘Islam and Human Rights’: A Skeptics View” (2006), who argues for re-contextualizing the place of Islam in human rights discourses in the Middle East because it is the political, social, and economic context that explains the status of human rights in the Muslim world, and Islam is neither responsible for rights violations nor is it the core basis for advancing rights.

cultural ethos, an intellectual heritage, and a socio-legal culture, *Shari'ah* continues to influence the ways in which Muslims understand themselves, how they make sense of the world, the choices they make as individuals, and the decisions taken at the societal level.

Unfortunately, Muslim states are among the countries with the poorest human rights records in the world today.⁸ Yet, paradoxically, more than any other instrument perhaps, human rights can be utilized to address some of the Muslim world's most pressing concerns if it can be successfully localized and integrated into the cultural and religious ethos of Muslim societies. Furthermore, within international human rights forums, discussions have been raised regarding the relationship and impact of Islam generally, and Islamic law specifically, on the application of human rights law in Muslim States (Baderin, 2007, p. 3).⁹ Within academic circles, vehement debates regarding these same questions are ongoing, cutting across a variety of disciplines, including law and legal theory, political philosophy, anthropology and Islamic studies. For these reasons, the question of the compatibility of Islam and human rights needs to be analyzed insofar as it continues to represent an impediment to the successful absorption and localization of the

⁸ Why this may be the case is not in the subject of this inquiry, although other scholars have proffered various explanations. Daniel Price conducted a study that compares 23 predominantly Muslim states and a control group of non-Muslim developing nations, while controlling for other factors that affect human rights practice. In his article "Islam and human rights: A case of deceptive first appearances" (2002) he analyzes his findings to conclude that Islamic-based governments have a statistically-insignificant relationship with the protection of rights.

⁹ This has occurred in the Human Rights Committee under the UN human rights system, before the European Court of Human Rights under the European regional human rights system, and before the African Commission on Human and Peoples' Rights under the African regional human rights system (see Baderin, 2007, pg. 3).

idea of human rights into the cultural and social fabric of majority Muslim countries. In this thesis I begin from the assumption that “while Islam is not the sole factor for ensuring the realization of human rights in Muslim states...it is a significant factor that can be constructively employed as a vehicle for improving the poor human rights situation in predominantly Muslim states” (Baderin, 2007, p. 4). Considering the context of Muslim countries described above, it is evident that efforts that seek to promote and protect of human rights in the Muslim world must necessarily take the impact and role of Islam into account, be it positive or negative.¹⁰

Globalized Localism to Cosmopolitan Project

Considered from another perspective, as a project that aspires to universality, human rights discourse needs to come to terms with some of the underlying concerns and tensions that continue to fuel debate about its relevance and legitimacy as a shared international standard and set of universal norms. In relation to its compatibility with non-Christian traditions, many of the concerns have to do with the history of the human rights corpus, and the way in which its birth in a specific historical context has continued to impact its form and substance. Human rights are marked by Enlightenment values, and

¹⁰ Today, Muslims comprise an estimated 20% of the total world population. The ‘Muslim world’ may be perceived narrowly in the geographical sense to denote predominantly Muslim states, or more broadly to include the Muslim Diaspora of minority communities living in non-Muslim states worldwide. For the purpose of this thesis, I will focus my discussion on Muslim states, although much of my analysis is equally relevant to Muslim minorities, who have to grapple with many of the same tensions related to rights. For more on the distinction between predominantly Muslim states and the Muslim Diaspora, see M. A. Baderin, “Islam and human rights: Selected essays of Abdullahi An-Na’im” (2010); T. Ramadan, *Western Muslims and the future of Islam* (2004).

continue to be undergirded by and tied to specific ideologies, such as liberalism and secularism, that parade as false universals. The human rights corpus has also had a complicated history – which included defending slavery, promoting colonialism and excluding women and non-whites from the category of ‘human’.

While the founding of the United Nations is often described as the dawn of a new, peaceful global order, through which states sought to ensure that the likes of the Holocaust and World War II would never be repeated, critical scholars like historian Mark Mazower and legal scholar David Kennedy are increasingly analyzing the complex and at times contradictory history and achievements of the UN and its concomitant humanitarian projects. Mazower (2008) describes the original intent of the founding of the UN as the adaptation and defense of the needs of empire – whether the British Commonwealth or the United States – in an increasingly nationalist age. He argues that the basic premises of the UN were inconsistent, and its core ideas, such as upholding sovereignty while aspiring to global governance, are irreconcilable. Since its founding to the present day, the UN has only marginally evolved into a “global club of national states, devoid of any substantial strategic purpose beyond the almost forgotten one of preventing another war” (Mazower, 2008, p. 27).

In his analysis of the politics of international human rights and humanitarian intervention, David Kennedy (2005) catalogues the risks, costs, and unanticipated consequences of human rights activism and realizing humanitarian governance in the world. He includes such things as viewing the problem and the solution too narrowly in one sense and too generally in another, promising more than it can deliver, doing more to produce and justify violations than to prevent and remedy them, and being limited by its

relationship to Western liberalism. To this day, human rights continue to be enforced unevenly and selectively in the service of the economic and geopolitical interests of the most powerful states, often through the cooptation of international institutions like the UN. These facts have led to widespread negative perceptions about human rights in the non-Western world, including the Middle East and majority-Muslim countries.

Unfortunately, these aspects of the human rights project have been largely ignored in discussions about human rights and Islam, and so the ensuing debates have often been simplistic, decontextualized and willfully inattentive to history.

While the ideal of human rights has been embraced by peoples and societies across the globe, this does not imply that human rights in their current form should be conceptualized as fixed principles that simply require implementation, as the “only” and “final answer” to stemming human suffering and defending the powerless. This sense of moral and legal certitude must be displaced by opening up the human rights corpus to critical voices from the Third World that have been actively seeking inclusion: “counterhegemonic human rights discourse and practice have been developing, non-Western conceptions of human rights have been proposed, cross-cultural dialogues on human rights have been organized... [the] central task is transforming the conceptualization and practice of human rights from a globalized localism into a cosmopolitan project” (Santos, 2002, p. 46). I contend that the human rights corpus can realize the ideals of difference and diversity by reimagining itself as a discursive tradition that is capable of evolving from its Eurocentric roots and present entanglement with Western-liberal values into a truly inclusive, universal, and cross-cultural project.

From Two to Three Dimensions of Universalizing Human Rights

In human rights literature, scholars often speak of two implicit (and sometimes explicit) dimensions of the process of promoting and protecting human rights universally: the ‘politico-legal’ dimensions and the ‘socio-cultural’ dimension. The politico-legal dimension is a top-to-bottom approach that focuses on the legal obligations of the state to protect international human rights norms and uphold the UN Declaration and related Conventions and Protocols. This is achieved through the implementation of political and legal policies, the establishment of relevant public institutions for the protection of rights, and the accountability of States and their heads to the international community. Some of the factors that are essential for successful realization of rights in the political and legal domains include good governance, political will, justice, good faith, and judicial independence (Baderin, 2007, p. 8).

On the other hand, the ‘socio-cultural’ dimension is a bottom-to-top approach that relates to “education, information, orientation and empowerment of the populace through the promotion of a local understanding of international human rights norms and principles” (Baderin, 2007, p. 6). A universal human rights project should not be about universalizing a particular cultural model; its prevailing objective should be “the imagination of norms and political models whose experimental purpose is the reduction if not the elimination of conditions that foster human indignity, violence, poverty, and powerlessness” (Mutua, 2002, p. 5). The socio-cultural dimension, which encompasses the work of anthropologists and human rights activists, focuses on generating cultural legitimacy and political will at the grassroots level: “where the populace are themselves not informed or aware of their rights, or where they see human rights strictly as a foreign idea, they are often unable to challenge any violations of their human rights by the State

or question any of such violations hinged on cultural or religious grounds” (Baderin, 2007, p. 9). To this end, the socio-cultural dimension facilitates the localization of international human rights at the grassroots level by creating links with relevant social and cultural values, norms and structures that already exist within different societies, establishing the moral and justificatory attributes of human rights in the local ‘language’ (used figuratively) and challenging negative cultural relativist arguments used by some states to justify rights violations (Baderin, 2007, pp. 6-7; Mutua, 2002, p. 5). Nelson Mandela is quoted to have said: “If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language that goes to his heart,” to which Baderin adds: “If you talk to a man in a language he or she doesn’t understand, that goes nowhere” (as cited in Baderin, 2007, p. 7).

A third dimension, which can be placed mid-level in between the politico-legal and socio-cultural dimensions, relates to conceptual discussions about human rights as an idea or a project. In contrast to focusing on rights as legal instruments (politico-legal dimension) and rights practices in local contexts (socio-cultural dimension), this third dimension, which I term the ‘abstract-conceptual dimension,’ is concerned with how rights are understood and internalized within one’s existing socio-political context and then either embraced or rejected by diverse cultures and societies.

While all three dimensions are complementary and must be simultaneously pursued for the effective realization of human rights, in this thesis I will focus primarily on the conceptual-abstract dimension. The politico-legal dimension has generally received the most attention in the literature owing to the traditional state-centric and positivist nature of international law and human rights. The political and legal

instruments necessary to the protection of rights, such as the ratification of international Conventions, are largely formally ‘in effect’ in Muslim States, however the obstacles to their successful realization exist at the conceptual and local grassroots levels. The socio-cultural dimension is also very important and can be a powerful tool for justifying rights locally. For this reason, I will touch on this dimension where I discuss the existence of certain concepts in the Islamic tradition that are similar to contemporary human rights, seeking thereby to facilitate a “bottom-up” approach that pushes commitment to rights from the grassroots up to the level of the state.

However, more than this, abstracting the debate about the compatibility of the Islamic and human rights traditions to a conceptual level and developing a framework for a constructive encounter, as I will do in this thesis, helps clarify the essential elements and understandings that are lacking in a strictly politico-legal or socio-cultural encounter between the two traditions. A simple discussion of the storied histories, contemporary challenges and future aspirations of both traditions enables us to identify both the tensions and potentialities that exist for a synthesis between the two traditions. By clarifying ambiguities at abstract levels, we may allay fears and insecurities about the Other, remove perceived tensions, and approach situations of actual conflict with a sense of mutual respect and understanding. All of these objectives depend on, as they contribute to, the work done at the socio-cultural and politico-legal dimensions.

Towards a Meaningful Encounter: My Approach & Chapter Breakdown

My goal in undertaking this project is to find the most constructive and promising avenue to establish human rights within the social and cultural fabric of predominantly Muslim societies so that they can be more effectively realized in the political and legal realms. However, in contrast to other projects with a similar goal, in this thesis, I seek to assess the possibility of effectively tapping into the legitimizing power of the *Shari'ah* in Muslim world, which I believe is a requisite and empowering means, and not an obstacle, to this realization.

This thesis is not designed to respond to those authors who vilify the philosophy, conceptualization, formulation and application of human rights policy among Muslims. Similarly, this paper will not engage in an exhaustive treatment of what have been designated as specific areas of 'conflict' between human rights and *Shari'ah*.¹¹ I do hope that this project will provide a framework within which more constructive and meaningful discourse on specific issues that concern both the Islamic and human rights traditions can take place, as well as act as a stepping stone towards building bridges of understanding between the two discursive traditions. I believe that addressing these preliminary issues can go a long way in mitigating perceived and actual tensions and conflicts between the two traditions. I will also endeavour to provide brief illustrative examples of how adherence to the proposed framework can assuage some of the concerns about the compatibility of Islam with human rights.

¹¹ The four areas that are most-often cited as 'conflict areas' between Islam and human rights are: women's rights, rights of non-Muslims, rights to religious freedom and criminal law.

Towards this end, I will begin by setting the terms of reference for a meaningful dialogue between the human rights and Islamic traditions, as between equals, with respect for the identical universality of their respective values, but in which there is still an willingness to be open to mutual enrichment and eventually to becoming true partners in action (Ramadan, 2005, p. 5). I summarize these terms of reference into four key criteria or imperatives that are essentially shifts in orientation, each of which must be accepted by both proponents of human rights and Islam if they are interested in intercultural dialogue:

1. From completeness to incompleteness;
2. From essentialisms to deep and nuanced understanding;
3. From rigidity and positivism to discursive traditions; and,
4. From assimilation and conceptual manipulation to maintaining distinctive identity, conceptual integrity, and cultural pluralism.

In **chapter 1**, I will further detail these four principles that are necessary for a constructive and positive encounter, and eventual synthesis, between the human rights and the Islamic tradition, and which I will argue are absent in dominant approaches and reform efforts. I will also elaborate on how I will conceptualize the terms ‘Islam’ and ‘human rights’, with particular emphasis on the need to conceive of both concepts as discursive traditions. Placing an emphasis on *discursive* denotes that they are neither overly rigid/unchanging, and on *tradition* implies that they are not easily remolded by pressures exerted by external forces, and thus that they remain true to their respective fundamental principles while adapting to changing times and circumstances through their own internal mechanisms for renewal and evolution.

In **chapter 2**, I will discuss the historically dominant approaches to the discussion of Islam and human rights, which has been heavily informed by Orientalism (in the West) and more recently, its mirror image, Occidentalism (in the Muslim world). These approaches posit an adversarial and hostile relationship between Islam and human rights, based on essentialisms and espousing a vantage point of superiority to the Other. When evaluated according to the four criteria I have set out for synthesizing the two discursive traditions, it is evident that Orientalism and Occidentalism are severely deficient by almost every standard.

In **chapter 3**, I will discuss more constructive approaches to this debate, which aim to reconcile the two traditions. I will focus my evaluation on the reform methodologies developed by three contemporary Muslim legal-political scholars whose work has received widespread interest: Abdullahi An-Na'im, Abdulaziz Sachedina and Khaled Abou El Fadl. As in chapter 2, I will demonstrate how the absence of several of the principles for a meaningful encounter outlined in chapter 1 make for impoverished and problematic reform efforts.

In **chapter 4**, I will outline an approach that I argue is faithful to the principles of a constructive encounter between the human rights and Islamic traditions and which endeavours to avoid the pitfalls of the approaches described in chapters 2 and 3. What is required of both traditions is that they undergo an internal renewal or revival that will enable their coexistence and mutually complementary relationship, while still allowing them to remain faithful to their fundamental principles and internal standards of coherence.

The human rights tradition requires a renewed sense of openness and willingness to evolve, built on a realization of the fragmentary and experimental nature of its current corpus. In approaching other traditions, the goal of the human rights corpus should not be to achieve philosophical congruence at the level of foundations and first principles, nor should it be the projection and imposition of its particular philosophical commitments, like liberalism, unto other traditions with which it seeks to co-exist. Rather, the aim should be the development of an ‘overlapping consensus’ in which rights are a thin, minimalist theory that act as a shared language of social justice and contemporary political instruments for stemming injustice. Conceived as such, human rights are not only compatible with any and all religious traditions, but they are in fact complemented by religions that address ontological and epistemological questions beyond the purview of rights.

For the Islamic tradition, the promise of human rights may address some of the most pressing concerns of citizens of Muslim states in the contemporary state-centric era. The challenge however is to localize rights in majority-Muslim societies using the available cultural tools familiar to the people. To this end, a “bottom-up” approach should be espoused, which shows that fundamental principles of the Islamic tradition in fact reinforce and support the idea of rights protections. By taking steps towards the development of an Islamic basis for human rights, rooted in the conceptualization of Islam as a discursive tradition, the Islamic tradition is able to countenance the need for social change while maintaining continuity of essential aspects of orthodoxy and orthopraxy. Furthermore, the Islamic traditions must renew its internal discursive processes to divest itself of discriminatory and inequitable opinions and currents within

the tradition, which is an important avenue towards mediating perceived and actual tensions between the two traditions.

Finally, I will conclude by re-contextualizing the theoretical approach take in this thesis within the broader socio-economic and political context in which the encounter between the Islamic and human rights traditions is taking place. I will also consider what emancipatory discourses and political projects lie 'beyond rights' that may be more effective in certain contexts to realize justice and put an end to human suffering.

Chapter 1: Developing a Framework for Intercultural Dialogue

How should the encounter between Islam and Human Rights be approached?

Discussions and debates about the compatibility of human rights and Islam often describe an encounter between two traditions, two worldviews or even two separate universes. Yet despite this characterization, they seldom begin by considering terms of reference to guide this encounter towards achieving mutual understanding, respect, and collaboration.¹² However, setting such a road map seems germane to both the human rights and Islamic traditions. The human rights tradition is part of a larger tradition of liberal humanism and legal and moral philosophy in which much ink has been spilt about rational coherence in argumentation, debate and intercultural dialogue.¹³ In the Islamic tradition, there has always been a concern about methodology, to the extent that it was considered a prerequisite of debate to have a mastery of several sciences, including

¹² It seems obvious perhaps that avoiding this step is to the detriment of the Islamic tradition since, as the entity with less ‘cultural power’, it is often pressured by force of circumstance to conform and reform to match Western liberal values and institutions and may face difficulty maintaining its distinct identity amidst pressures of assimilation. As Michael R. James argues, in intercultural dialogue oftentimes “arguments are not won simply by the force of the better argument but also by the force with which one argues” (James, 1999, p. 597).

¹³ For more on conditions of intercultural dialogue emerging from the Western academic context, see: W. Kymlicka, *Multicultural Citizenship* (1996); J. Tully, *Strange Multiplicity* (1995); M. R. James, “Critical Intercultural Dialogue” (1999); J. Rawls, “The Idea of an Overlapping Consensus” (1987); S. Benhabib, *Situating the Self* (1992).

grammar, rhetoric, logic, and a specific branch of logic that addresses the compartment of dialectic and argumentation (*adab al-munadharah*) (Yusuf, 2011).¹⁴

Thus it would seem natural to approach this encounter by setting certain criteria to ensure that dialogue proceeds under conditions that both parties can accept as fair, and according to which suggested solutions may be assessed. I have summarized what I believe are the necessary conditions for a genuine intercultural dialogue between human rights and Islam into four key criteria. Genuine and critical intercultural dialogue is only possible if proponents of both human rights and Islam accept and satisfy these four imperative shifts in orientation:¹⁵

1. From completeness to incompleteness
2. From essentialisms to deep and nuanced understanding
3. From rigidity and positivism to discursive traditions
4. From assimilation and conceptual manipulation to maintaining distinctive identity, conceptual integrity, and cultural pluralism

¹⁴ For an overview of the disciplines of Islamic logic, including the Islamic theory of argumentation, see B. L. Deborah, “Logic in Islamic Philosophy” (1998); O. Leaman, *An Introduction to Classical Islamic Philosophy* (1986).

¹⁵ I have chosen to rely on general conditions for intercultural dialogue that can be located across various cultural matrices rather than relying on a meta-theory such as that developed by Rawls or Habermas, which is squarely located in Western-liberal philosophy.

1. From completeness to incompleteness.

In “Toward a Multicultural Conception of Human Rights”, Boaventure de Sousa Santos develops five conditions for a progressive multiculturalism in the field of human rights. He describes this first condition in the following way:

Cultural completeness, the starting point, is the condition prevailing before intercultural dialogue starts. The true beginning of this dialogue is a moment of discontent with one’s own culture, a sense that it does not provide satisfactory answers to some of one’s queries, perplexities or expectations. (Santos, 2002, p. 55)

He goes on to explain the benefits of a new orientation of ‘incompleteness’:

This sensibility is linked to a vague knowledge of and an inarticulate curiosity about other cultures and their answers. The moment of discontent involves a pre-understanding of the existence and possible relevance of other cultures and translates itself into an unreflective consciousness of cultural incompleteness. This individual or collective impulse for intercultural dialogue and thus for a diatopical hermeneutics starts from here. (Santos, 2002, p. 55)

The contrasting approach, which currently prevails in this debate, is that of ‘cultural closure’ that springs from a feeling of completeness and superiority to the Other. After

all, if a culture or civilization considers itself complete, it has no interest in entertaining an intercultural dialogue (Santos, 2002, p. 54).¹⁶

In approaching a discussion about Islam and human rights, proponents on both sides must generate this sense of the incompleteness of the concept they are advancing. This involves leaving absolutist and fundamentalist positions that claim a monopoly on the truth in favour of a new vulnerability and self-reflectiveness and willingness to admit the shortcomings and failures of the tradition one is representing. This is assisted by the very process of debate and dialogue, which is itself an opportunity to become aware of one's blind spots, which frequently only arise when directly confronted by positions that draw on different background assumptions (Flynn, 2010, p. 14).

While both proponents of human rights and Islamic law must make transition towards 'incompleteness', it is important to note that the obstacles to doing so differ. Proponents of Islamic law, who may already feel embattled by a colonial history and ongoing Western imperialism, may fear that in acknowledging the validity and usefulness of human rights, they are also turning against their faith in favour of 'man-made constructs imposed by the West'. This need not be the case however, because where one conceptualizes rights as political instruments that can be utilized to achieve goals shared

¹⁶ 'Cultural Completeness' here can connote many things including 'perfection', that no other culture is better; 'superiority', that by comparison all other cultures are defective; or, 'sufficiency', that one's culture contains enough resources such that there is no need for openness the insights of other cultures. For the purpose of this work, I conceive of 'completeness' in the third sense. In other words, the incentive for intercultural dialogue exists where a given culture recognizes that there is something to be gained from engaging in open dialogue with another culture.

by religious traditions (e.g.: justice and peace) and where one traces concepts similar to rights within the tradition, it is clear that synergy and synthesis is possible, and that one need not choose between the two. Nonetheless, it is also crucial that proponents of *Shari'ah* be confident enough to admit to the need for enhancing human rights protections in the Muslim world, the existence of certain strains or currents within the Islamic tradition that may conflict with international human rights norms, as well as coerced applications of conservative and patriarchal interpretations of Islamic law among some segments of the Muslim community.

To ease the resistance towards transitioning to this orientation, Muslims should be aware that such a transition is not unique to Muslim states, but rather, all other societies, cultures, and religions have confronted and continue to confront obstacles in seeking to establish commitment to human rights in a relatively new international geo-political context that requires them.¹⁷ They should also remember that this orientation is one that existed among early Islamic jurists, who tried to inculcate this approach in their students. One of the most authoritative figures in Islamic law, the eponym of the Shafi'i school of jurisprudence, Muhammad al-Shafi'i is popularly quoted to have said: "[As we see it] our opinion is right though it may turn out to be wrong, while we consider the opinion of our opponents to be wrong though it may turn out to be right" (as cited in Ramadan, 2005, p. 51).

¹⁷ An-Na'im notes that: "Muslims are more likely to resist commitment to these rights when they are presented as being alone in struggling with the principle, while the commitment of other cultural or religious traditions is taken for granted" (An-Naim, 2004a, p. 4).

In contrast, for proponents of human rights, an approach of incompleteness requires a 'de-centering' of the Western doctrinal positivism on human rights, which "no longer remains the property of Europeans, and can no longer mirror the particularities of one culture", and a genuine commitment to engaging in a more universal and inclusive discourse on human rights (Flynn, 2010, p.14). Like other universalistic discourses, "the discourse of human rights has to be self-reflexively open to the possibility that in any concrete case a particular is masking as a universal" (Flynn, 2010, p.14). This may be particularly important in discussions of whether secularism and liberalism are necessarily conjoined to the human rights project, or whether their interdependence has been unique to the European Enlightenment experience.

2. From essentialisms to deep and nuanced understanding.

Once both parties to the debate have accepted the incomplete nature of the tradition they are representing, the second step in approaching this dialogue is to pursue a deep, nuanced and contextualized understanding of the competing concept. Michael Rabinder James (1999) describes a similar principle in his framework for critical intercultural dialogue, which he expresses as 'giving priority to understanding the other's value to criticism of them' (p. 587).

For scholars of the Western academe, this requires a deep and nuanced understanding of Islamic law, legal theory, and its wider cosmology, as well as current social, political, legal and cultural dynamics in the Muslim world. For Muslim scholars, this requires an understanding of the history of the development of human rights, its

contested and debated elements, and important aspects of its theory and practice. Unfortunately, current engagement is often based on a shallow, overly-simplistic, de-contextualized, and selective approaches on both sides, which frequently rely on Orientalism or Occidentalism as de facto proof for claims that are made (this will be further discussed in chapter 2).

3. From rigidity and positivism to discursive traditions.

A third change in orientation is required in the way in which proponents of human rights and Islamic law conceive of the tradition they are representing. Just as a sense of completeness is problematic, a sense of doctrinal rigidity, fixity and positivism also closes one off to genuine intercultural dialogue. For this reason I will be discussing and advancing both human rights and Islam as discursive traditions, that are not static, rigid, and fixed concepts, but rather traditions that are continuously negotiated, contested and renewed.

It is important to note that a movement away from rigidity and positivism automatically undermines conflictual and adversarial approaches to Islam and human rights, which necessarily assume that the two are settled entities that exist in a stable relationship (Mayer, 2007, p. 26). Once we get beyond this false dualism, we are capable of seeing where similarities, blending, and overlap have long existed and where they can potentially be developed. While priorities and solutions may not be identical, the search should be for “isomorphic concerns, on common perplexities and the uneasiness from which the sense of incompleteness emerges” (Santos, 2002, p. 57).

4. From assimilation and conceptual manipulation to maintaining distinctive identity, conceptual integrity, and cultural pluralism.

While a meaningful encounter between the Islamic and human rights traditions certainly entails negotiation and renewal of both traditions, it is nonetheless imperative that the “integrity” of both concepts be maintained. In other words, proposing an approach to human rights which is convenient to *Shari’ah*’s proponents but which human rights advocates maintain undermines the very foundations and integrity of the rights project would not be deemed acceptable. Likewise, approaches towards *Shari’ah* that rely on heterodox epistemological commitments, fringe or marginal Islamic opinions, or that challenge fundamental beliefs of the majority of Islam’s adherents should also be critiqued for undermining the integrity of the *Shari’ah*. Like other scholars, I start from the assumption that “a substantial number of Muslims derive, and for the foreseeable future will continue to derive, their normative understandings of Islam from historical conceptions of Islamic orthodoxy” and thus it is imperative to “take into account orthodox objections to any theory of Islamic reform before assessing its plausibility” (Fadel, 2009, p. 104). Therefore, I will evaluate platforms advanced for Islamic reform according to the discursive constraints of the tradition, concretized in the essential norms and principles of the Islamic ‘Universe of Reference’.

Approaches that disregard this principle are problematic because the concepts they seek to engage in dialogue are not the concepts as commonly understood but adapted versions of what advocates of human rights understand rights to mean, or what proponents of the Islamic faith believe and practice. Ignoring these centres of gravity or critical masses and espousing an approach that lacks acceptance and legitimacy seriously

undermines the usefulness of the outcome of an intercultural dialogue. As will be further discussed in chapter 3, unfortunately, many of the current methodologies proposed for reconciling human rights and *Shari'ah* rely on reform of the latter through mechanisms that are not convincing in Islamic terms because they challenge fundamental Islamic beliefs and internal standards of coherence. From a practical perspective, espousing an approach that cannot garner the support of substantial numbers of believing Muslims is simply politically imprudent, unlikely to succeed, and may actually cause more harm than benefit. Yet this principle is not only about adopting political prudent approaches that are most likely to succeed, but also about countenancing the essential nature of human rights and *Shari'ah* as discursive traditions that contain internal standards by which they maintain their conceptual integrity. In other words, platforms advanced for reform within a tradition are “evaluated in terms of the manner in which they engage with and speak from a historically extended, socially embodied set of arguments that have their own internal standard of rational coherence” (Haj, 2002, p. 306). In the next section, I will elaborate on some of these “discursive constraints”.

These four conditions will serve as the criteria against which the existing approaches advocating reform and reconciliation between human rights and Islam will be evaluated in chapters 2 and 3. These criteria will also provide the foundation on which recommendations will be made for a new approach towards synthesis between Islam and human rights, which will enable us to take the first steps towards forging a universal human rights project which can draw on the experiences and contributions of all cultures, without privileging any one culture (chapter 4). Before proceeding to these chapters, in the remaining sections of this chapter, I will elaborate on the theoretical grounding I rely

on to conceptualize and define the Islamic and human rights traditions for the purpose of this project, with particular focus on what it means to conceptualize both of them as discursive traditions.

What are Discursive Traditions?

One common mistake made in discussions about *Shari'ah* is describing it simply as a pre-modern tradition frozen in time or as a set of unchanging doctrines and repetitive and non-rational mandates that are unamenable to change and evolution. This belief pervades much of Orientalist study of *Shari'ah* and continues to drive many modern reform efforts. For this reason, I would like to address the importance of generally conceptualizing the *Shari'ah* as a discursive tradition that does have essential fixed elements of orthodoxy and orthopraxy, but also changing aspects evident in the re-direction of Islamic discourses to meet new challenges and conflicts as they materialize in different historical contexts (Haj, 2009, p. 4). This will be followed by a discussion of why I believe that human rights should likewise be approached as a tradition with a past that conditions its present and directs its future.

Islam as a *tradition* - a set of beliefs and practices handed down from generation to generation, all the way back to the beginning of Muhammad's mission – is frequently placed in ontological opposition to modernity, rationality and negotiation. By way of example, Habermas suggests that human rights are part of a “post-traditional” normative reasoning that he contends has replaced traditional forms of ethics rooted in religion or

metaphysics (as cited in Bielefeldt, 2000, p. 97).¹⁸ Fortunately, some anthropologists and philosophers, notably Alasdair MacIntyre and Talal Asad, have been calling into question this modern prejudice against the concept of tradition. In *After Virtue*, MacIntyre criticizes the way in which the concept of a tradition has been described as “a set of unchanging doctrinal or cultural givens” by conservative political theorists who, following Edmund Burke, contrasted tradition with reason and the stability of tradition with conflict and evolution (MacIntyre, 2007, p. 222). These binary counterpositions obscure the fact that all reasoning and enquiry – from medieval logic to modern physics – occur “within the context of some traditional mode of thought transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition” (MacIntyre, 2007, p. 222). According to MacIntyre, only a Burkean tradition is always disintegrating and dying, but a ‘living tradition’ is a continuously changing set of historically-extended, socially embodied arguments that incorporate continuous conflicts (MacIntyre, 2007, p. 222). Elsewhere, MacIntyre posits tradition as

An argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and

¹⁸ In her article “Human Rights Law and the Demonization of Culture (and Anthropology along the way)” (2003), Sally Engle Merry argues that within human rights circles, culture in general is frequently constructed as a series of harmful practices, old customs, and ancient ways that act as an obstacle to the realization of shared norms and values within a cosmopolitan transnational human rights project. She maintains that this depiction draws strength from an imperial legacy that described culture as primitive and backward in contrast to the civility and progress of civilization (Merry, 2003, p. 72).

enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretative debates through which the meaning and rationale of fundamental agreements come to be expressed and by whose progress a tradition is constituted. (MacIntyre, 2007, p. 12)

In other words, living traditions are unfolding narratives which continue to motivate social actors with references from their past to shape their future: “Living traditions, just because they continue a not-yet completed narrative, confront the future whose determinate and determinable character, so far as it possesses any, derives from the past” (MacIntyre, 2007, p. 223). The inextricable link and dynamic interplay between past, present, and future figures strongly in every discursive tradition, because the very function of tradition is to establish continuity within and across historical and material contexts. Thus discourses surrounding a tradition’s beliefs and practices are not merely nostalgic, but they relate conceptually to a *past* (when the practice was instituted and from which the knowledge of its point and proper performance has been transmitted) and a *future* (how the point of that practice can best be secured in the short or long term, or why it should be modified or abandoned), through a *present* (how it is linked to other practices, institutions, and social conditions) (Asad, 1986, p. 14). Integral to this search for ongoing internal coherence across time and space are discursive constraints that determine which claims will be accepted and absorbed into the traditio and which will be rejected as the process of deliberative dialectic continues.

Conceptualizing Shari'ah as a Discursive Tradition

Building on and reworking MacIntyre's idea of tradition, Talal Asad, a leading cultural anthropologist and post-colonial thinker, has argued within his larger discussion of the anthropology of Islam that we should conceive of Islam as a discursive tradition.¹⁹ It is not only an alternative to an Orientalist perspective on Islamic law and to the imposition of Western, post-enlightenment values on it, but it is also closer to the way Muslims themselves conceptualize their tradition – as a 'discursive tradition' consisting of historically evolving discourses embodied in the practices and institutions of

¹⁹ In advancing the idea of Islam as a discursive tradition, Asad seeks to address a critical gap in the literature that raised difficulties for scholars, particularly anthropologists, studying contemporary movements and trends in Islam, namely, how to conceptualize Islam itself. Robert Launay states this problem in the following terms: "The problem for anthropologists is to find a framework in which to analyze the relationship between this single, global entity, Islam, and the multiple entities that are the religious beliefs and practices of Muslims in specific communities at specific moments in history" (Launay, 1992, p. 6). The textual approach of Orientalist scholars had long been accused of drawing essentialist characterizations and failing to countenance the many changes, negotiations, developments and diversity that characterize Islam as it is lived in the contemporary world. Consequently, some scholars gave up on the idea of conceptualizing one "Islam" and focused instead on what they call various "local Islams". Others privileged social, political and economic approaches (often utilizing ethnographic studies) to explain modern forms of political and social activism among Muslims, while excluding "scriptural" Islam from their analysis and renouncing the search for unifying structures among 'local Islams'. This last approach resulted in one scholar, Abdul Hamid El-Zein, denying the possibility of an anthropology of Islam because, he argued, Islam cannot be located as an analytical object. See O. Anjum "Islam as a Discursive Tradition: Talal Asad and his Interlocutors" (2007) for a more detailed analysis of Asad's contribution.

communities (Haj, 2009, p. 4).²⁰ As a discursive tradition then, the Islamic tradition is not fixed, but constantly changing, as it is adjudicated and re-adjudicated over time, “albeit within a long-standing framework that impinges on the direction and form of that change” (Haj, 2009, p. 7).

In other words, in discussing the potential place of a human rights discourse within the Islamic tradition, it is imperative that we first understand the tradition’s past, in which we may locate an authoritative corpus of knowledge that delineates the epistemological, cultural, and institutional limitations and possibilities within which claims about the tradition’s present and future – in relation to concepts like rights – can

²⁰ Contemporary scholars are increasingly borrowing Asad’s characterization of Islam as a discursive tradition. Samira Haj (2009) utilizes the concept of an Islamic discursive tradition as an analytical framework to challenge the idea that “fundamentalist” Islamic movements that violently reject Western modernity embody the essence of Islam, whereas Islamic thinkers who seek to redefine a modern Islam are inevitably borrowing from liberal political thought. She evaluates the work of two Muslim reformers – the Islamic fundamentalist Muhammad ibn ‘Abdul Wahhab and liberal humanist Muhammad ‘Abduh – to argue that their ideas should not be evaluated only in terms of their political goals or ‘fundamentalist’ v. liberal’ inclinations. Rather, “their work should be evaluated in terms of the manner in which they engage with and speak from a historically extended, socially embodied set of arguments that have their own internal standard of rational coherence” (Haj, p. 6). Similarly, in their article “Gender, Generation, and the Reform of Tradition: From Muslim Majority Societies to Western Europe”, Schirin Amir-Moazami and Armando Salvatore (2003) describe Islam as a discursive tradition constantly subject to internal transformation in their analysis of the interplay between social action and the challenging of dominant norms in Muslim communities in Europe. In *The Ulama in Contemporary Islam*, Muhammad Zaman (2002) analyzes Islam as a discursive tradition in his discussion of the evolving roles of traditional Islamic scholars (*‘ulama*) in the Muslim world today.

be adjudicated (Haj, 2009, p. 7). In developing a theory addressing how to reconcile the Islamic tradition with human rights, the debate will certainly encompass a wide variety of positions and voices both within and without the Muslim community; there is “not *one* binding Islamic position but rather a *great* variety of “Muslim voices” offering different views about whether and how the idea of human rights and Islamic normative requirements fit together” (Bielefeldt, 1995, p. 587). While a discursive tradition allows for considerable latitude for change and evolution, it also includes certain discursive “constraints”. The Islamic tradition is founded on a set of foundational texts (*Qur’an* and Prophetic narrations), and an established history of its own styles of reasoning based on these texts, and thus scholars must pay attention to Muslims’ discursive relationship to the foundational texts, and must start with these foundational discourses, even if intending to argue against them (Anjum, 1997, pp. 662; 666).

It is important to understand how the *Shari’ah* has historically managed the need for social change in order to appreciate avenues for internal renewal that already exist within it. While it is often believed that Islamic law is immutable and closed to adaptability and change, this is only partially accurate, “the divine law itself integrates adaptability and change in its objectives and it is therefore an inalienable part of its philosophy and outlook” (Kamali, 2008b, p. 49). Muslim jurists categorized *Shari’ah* law into two broad spheres: (1) spiritual laws (*‘ibadaat*) that do not change according to the changing vicissitudes of time and place, which generally relate to religious observances (eg: five canonical prayers, dress requirements, prohibition of usury), and (2) temporal laws (*mu’amalaat*) that are susceptible to change and evolution in accordance with the requirements of public interest (*maslaha*) and prevailing circumstances (e.g.: the role of

women in society, economic and international affairs).²¹ Some of the tools that have been used for centuries to adapt Islamic law to meet the exigent needs of societies in changing times and diverse cultures and civilizations include: recognizing independent reasoning (*ijtihad*), considerations of the public interest (*masalah*), juristic preference (*istihsan*), analogical reasoning (*qiyas*), customary practice (*'urf*), and textual interpretation (*tafsir, ta'wil*).²² For instance, since the greater part of the *Qur'an*, including its legal verses, consists of general and unqualified expressions, it is on a whole open to interpretation in ways consistent with basic tenets of Islamic orthodoxy (Kamali, 2008b, p. 49). Through these and other tools, *Shari'ah* aims to strike a balance between continuity and change.

The discursive constraints of the Islamic tradition generally relate to spiritual aspects of the faith that do not change with changing contexts, and that are encapsulated in what are considered true universals, captured in the unanimous (not majority) consensus (*ijma'*) of the recognized community of interpretive specialists (Jackson, 2003, p. 129). For example, there is a consensus among Muslims that it is obligatory to perform five daily prayers, to pay the poor-due, to eschew murder, pork, and illicit sexual relations. There is also a unanimous consensus since classical times that targeting innocent civilians is completely forbidden, which excludes Osama bin Laden's

²¹ For a more detailed discussion of the differences between *'ibadaat* and *mu'amalaat*, see M. A. Baderin, *International Human Rights and Islamic Law* (2003), pp. 39-40; M. H. Kamali, *Shari'ah Law: An Introduction* (2008), pp. 49-54; T. Ramadan, *Western Muslims and the Future of Islam* (2004).

²² A detailed discussion of these hermeneutical tools is very involved and lies outside the scope of this project. For more detailed discussions of these tools, see: M. H. Kamali, *Shari'ah Law: An Introduction* (2008); B. G. Weiss, *The Spirit of Islamic Law* (1998); W. Hallaq, *An Introduction to Islamic Law* (2009); T. Ramadan, *Western Muslims and the Future of Islam* (2004).

murderous interpretations and deeds from the confines of the discursive tradition and leads proponents of the Islamic tradition to argue that only tradition can provide the “antidote to the kind of stultifying interpretive madness that abounds in modern Islam” (Jackson, 2003, pp. 115; 130). Aside from this tool of *ijma*’, competing parties simply agreed to disagree on all other aspects of religious doctrine; in the absence of the equivalence of a single ecclesiastical authority or “church”, no individual jurist or ruler could claim the right to impose doctrine on others. The promise of tradition can be found “in its ability to accommodate and, indeed, authenticate multiple, even mutually contradictory interpretations and expressions of Islam” (Jackson, 2003, p. 115).

The Islamic tradition’s past: defining *Shari’ah*’s concept and epistemology.

For most of its history, Islamic law offered the most liberal and humane legal principles available anywhere in the world... Shari’ah, properly understood, is not just a set of legal rules. To believing Muslims, it is something deeper and higher, infused with moral and metaphysical purpose. At its core, Shari’ah represents the idea that all human beings – and all governments – are subject to justice under the law.

- Noah Feldman (2008b, para. 4)

Perhaps the central concept in the Islamic Universe of Reference, which is closest to the mega-concept of the ‘Islamic tradition’, is *Shari’ah*. In the West, simple mention of the word ‘*Shari’ah*’ is sufficient to conjure dark images of violence and repression, obscurantism, savage corporeal punishments and the oppression of women – in short, the opposite of all that stands at the centre of Western consciousness. For Muslims however, *Shari’ah* represents the essence and core of their duty before God. While much can be

said about *Shari'ah*, I will begin by a concise description of the essential aspects of the *Shari'ah*, followed by a brief discussion of one of the principal errors made in understanding *Shari'ah*, which often leads to careless reform efforts; that of narrowly conceptualizing *Shari'ah* as a system of law.

Shari'ah: Sources, structure, spirit and objectives

Shari'ah derives from two primary sources: the *Qur'an* and *Sunna*. Muslims regard the *Qur'an* as the 'Word of God' or His Divine revelation to His last Prophet Muhammad (570 - 632 CE). The *Qur'an* contained some laws, but it was not primarily a legal book and thus did not include a lengthy legal code as is found in parts of the Hebrew Bible (Feldman, 2008a, p. 23). The *Sunnah* comprises the 'path' or 'way' of the Prophet, including the whole of what he said, did, or approved of during his lifetime, and it supplements the *Qur'an* by elaborating and clarifying the jurisprudence contained within the *Qur'an*. His actions and statements were captured by those who witnessed them firsthand and were then transmitted in an oral and written tradition of reports (*hadith*) passed down from narrator to narrator in chains of transmission. The inventory of these traditions has been subject to refined verification and evaluation processes to determine their degrees of authenticity according to the science of the traditions (Ramadan, 2009, p. 25). Where legal problems arose that were not addressed by specific reports, reasoning by analogy from one situation to another (*qiyas*) was utilized. Finally, communal consensus (*ijma'*) about the proper course to take in particular circumstances was also given substantial weight. The legal system of Islam was thus based on this fourfold combination of the *Qur'an*, the *Sunna*, analogical reasoning and consensus.

Islamic law was largely developed during the first two centuries of Islam from the systematic application of the principles of the *Qur'an* and the *Sunnah* by Islamic scholars, who developed a living legal system “covering all areas of social regulation, in Western categories, from criminal law to family law, from constitutional law to public international law” (Strawson, 1993, para. 13).²³ Nonetheless, its development continues to the present day as scholars incorporate the demands of the new circumstances and conditions of the twenty-first century into the *Shari'ah*. It is also important to note the considerable diversity of approaches and interpretations within Islamic law, concretized in a variety of schools of thought (each with several divergent currents and discursive styles within them), all of which are considered equally valid and orthodox (Abou El Fadl, 1993; Kamali, 2008b).²⁴

In *The Spirit of Islamic Law*, Bernard G. Weiss summarizes the salient features of the spirit of Muslim juristic thought in the following way:

[E]spousal of divine sovereignty (the basis of everything); a fixation upon sacred texts that are the repositories of divine revelation and uncompromisingly

²³ There is an important debate within Islamic jurisprudence that addresses the conditions under which *Shari'ah* sanctions can be introduced. The scholarly consensus is that criminal law and punishments cannot be introduced in the absence of a stable and legitimate government. On the other hand, it is usually acceptable to introduce other aspects of the *Shari'ah*, such as those governing family law or personal disputes, in less ideal circumstances, such as the twenty-first century, where there are no Muslim states fully implementing the *Shari'ah* (Strawson, 2003).

²⁴ There are four dominant schools of thought in the Sunni tradition and two more among Shi'ites. This plurality within the Islamic legal tradition is said to have irritated the colonial administrators who wanted to 'apply' a cut and dried Islamic law in the courts and makes the in-depth study Islam a daunting task (Strawson, 2003, p. 35).

intentionalist approach to the interpretation of these texts; a frank acknowledgment of the uncertainty and fallibility of all individual human endeavors to capture the divine intent and a consequent acceptance of probabilism as the foundation of a valid interpretation; a tolerance of legal diversity and a willingness to disseminate juristic authority among multiple schools; a moralistic bent grounded in a particular social vision; and, last, a preoccupation with the affairs of private individuals, and especially with family relations and contracts, coupled with a concern to define the limits of the power of government. (Weiss, 1998, p. xiii)

As a system of law, the fundamental objectives or indispensable interests (*maqasid*) constituting the heart and essence of Islamic law are the safeguarding and promotion of: faith, life, reason, progeny and honour and property in society (Kamali, 2008b, p. 127).²⁵

Defining Shari'ah: beyond 'law'.

One significant mistake made in discussions about *Shari'ah* is to reduce its scope to a mere legal code, and in so doing to 'over-legalize' Islam. Unfortunately, this trend, which finds its roots in early Orientalist literature, places total emphasis on conformity to legal rules and designates Islam as a primarily law-based religion,²⁶ which has the effect

²⁵ The *maqasid* will be further touched upon in chapter 4, as some scholars have described these five objectives as the basic philosophy of Islamic law, and have suggested approaching a discussion of human rights within Islam from a 'maqasid-based approach'.

²⁶ Joseph Schacht, considered the father of Islamic legal studies in the West, describes Islamic law in the following way: "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself... [T]he whole life of the Muslims, Arabic literature,

of diminishing its purpose, spirit, moral teachings, and values which the believer seeks to integrate into his daily conduct.²⁷ From its linguistic origins, the word *Shari'ah* means “the path that leads to the spring” or “a path to seek felicity and salvation” and therefore, as a metaphor, it connotes the path, or way of life which the believer treads to obtain guidance in this world and deliverance in the next (Kamali, 2008a, pp. 2; 14; Ramadan, 2005, p. 31; Weiss, 1998, p. 17). At the most basic level, *Shari'ah* is the Muslim universe of ideals. It is the result of their collective effort to understand and apply the *Qur'an* and *Sunnah* in order to earn God's pleasure and secure human welfare in this life and attain human salvation in the life to come.

While translating *Shari'ah* as ‘Islamic law’ has become the norm, it would be a mistake to equate the *Shari'ah*, or even the legal aspects of *Shari'ah*, with ‘law’ as we conceive and practice it in the contemporary world for several important reasons. As Wael Hallaq, a prominent contemporary Islamicist, explains: “In order for the term “law” to reflect what the *Shari'ah* stood for and meant, we would be required to effect so many omissions, additions, and qualifications that we would render the term itself largely, if not entirely, useless” (Hallaq, 2005, p. 152). For instance, *Shari'ah* covers a lot of ground that in modern terms belongs outside a legal system,²⁸ and it lacks the role of control and

and the Arabic and Islamic disciplines of learning are deeply imbued with the ideas of Islamic law; it is impossible to understand Islam without understanding Islamic law” (cited in Hallaq, 2003, p. 1707).

²⁷ For more on the trend of “over-legalizing” Islam, see M. H. Kamali, *Shari'ah Law: An Introduction* (2008); B. G. Weiss, *The Spirit of Islamic Law* (1998); W. Hallaq, “What is Shari'a?” (2005).

²⁸ By way of an instructive example, we generally limit law to commands and prohibitions (pay taxes and don't commit murder) and everything beyond these are placed outside the scope of law. The *Shari'ah* covers these three categories of actions and adds to them what should be done (recommended)

management of society as an étatist instrument of social engineering and coercion, which is a “back-projection” of our notions of law (Chittick & Murata, 1994, p. 23; Hallaq, 2009, p. 165). *Shari’ah* does not distinguish between law and morality in the same way as do European-styled legal systems, which has landed it criticism for being inefficient and rigid. Yet, this is one of the aspects of *Shari’ah* that Muslim celebrate and whose loss they lament:

It turns out that Islamic law’s presumed “failure” to distinguish between law and morality did no less than equip it with efficient, communally based, socially embedded, bottom-top methods of control that earned it remarkably willing obedience and – as another consequence – made it less coercive than any church or imperial law Europe introduced since the fall of the Roman Empire. Thus the very use of the word law is *a priori* problematic, for 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 and surveillance-oriented law that by comparison to Islam’s jural forms, *lacks* (note the reversal) the determinant moral imperative. (Hallaq, 2005, p. 152)

Furthermore, in the Islamic Universe of Reference, “*Shari’ah*” is not the word traditionally used to refer to the methodological processes of Islamic legal reasoning or the positive rulings they produce – the ‘laws’ or ‘jurisprudence’ of Islam is known as

and what should not be done (reprehensible), as well as explicitly marking many things as indifferent. It also encompasses ethical and moral principles, such as honoring one’s parents and being good to one’s neighbours (Chittick & Murata, 1994, p. 23).

fiqh'. In Islamic discourse, *Shari'ah* and *fiqh* were always distinguished – *Shari'ah* being the “the divine ideal, standing as if suspended in mid-air, unaffected and uncorrupted by the vagaries of life” (Abou El Fadl, 2003, p. 136). *Fiqh* or the *corpus juris*, developed by Muslims jurists, was considered the human attempt to understand and implement the Divine ideal of the *Shari'ah*, and thus the closest articulation and expression of God’s will possibly attainable by the toil of human reason (Strawson, 1993, para. 13). As a construction of fallible jurists, *fiqh* “enjoyed validity only by virtue of the presumption that it represented the closest approximation of which humans are capable to the law of God” (Weiss, 1998, p. 120). In other words, “*Shari'ah* is immutable, immaculate, and flawless; *fiqh* is not” (Abou El Fadl, 2003, p. 136). This distinction is significant, and it in fact opens up the conceptual space for historic criticism of specific strains or opinions within the corpus of legal *fiqh* opinions.²⁹

If *Shari'ah* is more than a legal system, how can we best conceptualize and define it? Structurally, *Shari'ah* is comprised of the *Qur'an*, *Sunnah*, and *fiqh*. Substantively, the *Shari'ah* refers equally to the spirit, content and method of extracting the specific laws (Johnston, 2007, p. 158). Thus it comprises three areas: (1) normative principles of law and morality; (2) methodologies for extracting and formulating the law;³⁰ and (3) the

²⁹ This will be further elaborated on in chapter 4.

³⁰ Islamic legal methodology is known as *usul al-fiqh*. In the contemporary Muslim world, there is a tendency to focus on the positive legal rulings at the expense of the general principles and methodology. It is entirely possible to be *Shari'ah*-compliant, in the sense of respecting the legal rulings, but to ignore or violate the principles and methodologies of *Shari'ah*. (Abou El Fadl, 2003, p.165). For more on Islamic legal methodology, see M. H. Kamali, *Principles of Islamic Jurisprudence* (2003); T. Ramadan, *Radical Reform* (2009).

specific positive rules of law (body of *fiqh*)³¹ (Abou El Fadl, 2003, pp. 135; 139). As for a more precise definition or description, despite its centrality to the Islamic faith, the term *Shari'ah* was seldom defined by Muslim jurists in the classical period, who otherwise were careful to define key terms (Weiss, 1998, p. 18). It is helpful to consider some of the somewhat abstract descriptions advanced by contemporary Islamicists. As one of the most comprehensive concepts in Islam at the very core of the religion, *Shari'ah* “constitutes an entire way of life. It embraces right ways of worshipping God, of interacting with fellow human beings, of conducting one’s personal life, even of thinking and believing...even mysticism in Islam... comes ultimately under the rubric of the *Shari'ah* in that it represents its experiential dimensions, its inner essence (*haqiqa*), its secrets (*asrar*)” (Weiss, 1998, p. 18). *Shari'ah* comprises the “totality of guidance that God has revealed to the Prophet Muhammad pertaining to the dogma of Islam, its moral values and its practical legal rule... it comprises in its scope not only law, but also theology and moral teaching” (Kamali, 2008b, p. 41) The term “Islam” means submission, and the *Shari'ah* is the divine delineation of the life of submission... it shows “how to be and remain Muslim” (Ramadan, 2005, p. 32; Weiss, 1998, p. 18). Hallaq provides a descriptive account of the role that *Shari'ah* played in society:

Sharia was not only a judicial system and a legal doctrine whose function was to regulate social relations and resolve and mediate disputes, but also a pervasive and systemic practice that structurally and organically tied itself to the world

³¹ As one of three aspects of the *Shari'ah*, the positive laws of Islam cannot simply be used synonymously with ‘*Shari'ah*’. One way to circumvent this problem is to describe the legal aspects of the Islamic tradition as *Shari'ah* law or Islamic law, using the term *Shari'ah* as a qualifier.

around it in ways that were vertical and horizontal, structural and linear, economic and social, moral and ethical, intellectual and spiritual, epistemic and cultural, and textual and poetic, among much else. The Sharia was as much a way of living and of seeing the world as it was a body of belief and intellectual play... Sharia defined, in good part (and together with Sufism), cultural knowledge. Enmeshed with local customs, ethics, and economic and cultural practices, it was an encompassing system of social values.³² (Hallaq, 2009, p.164)

From these descriptions, it becomes clear that as soon as one is “Muslim” and tries to maintain their practice of Islam, no matter where she finds herself, whether in 14th-century Arabia or 21st-century America, she is in the process of applying the *Shari’ah*, not in any peripheral way, but in its most essential aspects of moral awareness, faithful commitment, and dutiful practice (Ramadan, 2005, p. 33). It is also evident by now that as a concept to be discussed and compared, it becomes difficult to limit *Shari’ah* to a moral code or legal system. For this reason I will use the word ‘Islamic tradition’ and ‘*Shari’ah*’ interchangeably as terms that encompass all that has been described above, and I will try to avoid simplistically positing ‘Islamic law’ as a concept to be compared to ‘human rights law’.

³² Elsewhere, he contrasts this with the manner in which the *Shari’ah* has emerged in the modern world; “as a textual entity capable of offering little more than fixed punishments, stringent legal and ritual requirements, and oppressive rules under which women are required to live” (Hallaq, 2009, p. 3).

From past to present to future: *Shari'ah* as a discursive tradition.

Much can be and has been said about how *Shari'ah* as a discursive tradition should be re-negotiated and re-adjudicated in the modern era, in which it has emerged from a pre-modern era to face modern ideologies, like secularism and liberalism, and modern institutions of the state, such as democracy and human rights. It is important to note that for a Muslim, one of the essential characteristics of Islam is its universal dimension (*alamiyyat al-islam*); that it is valid in every time and place (Ramadan, 2005, p. 69). For the realization of this universal dimension, Muslim identity throughout the ages is necessarily not closed and confined within rigid, inflexible principles, but is built by “a constant dialectical and dynamic movement between the sources and the environment, whose aim is to find a way to living harmoniously” (Ramadan, 2005, p. 80). Like any tradition, some aspects of the *Shari'ah* are timeless principles, while others are contingent models that were developed for a particular social and cultural reality and are no longer suitable to the contingencies of the modern era – issues of governance such as human rights fit squarely within the latter.

Historically, the Islamic discursive tradition has been successful at evolving through incorporating the indigenous cultures that were absorbed by the Islamic civilization as it expanded beyond Arabia to Africa, Russia, China, and even to the shores of Europe; “Islam showed itself to be culturally friendly and, in that regard, has been likened to a crystal clear river. Its waters (Islam) are pure, sweet, and life-giving but—having no color of their own—reflect the bedrock (indigenous culture) over which they flow. In China, Islam looked Chinese; in Mali, it looked African” (Abd-Allah, 2004, p.

1).³³ In spite of this rich heritage, the modern era has posed certain difficulties to traditional Islamic frameworks. According to Hallaq, the demise of the *Shari'ah* was largely owing to the creation of the nation-state, which emerged out of and largely defined modernity. Conceptually and institutionally, the state came into sustained conflict with the *Shari'ah* and eventually replaced it, principally because of the many functions they shared, which rendered them incompatible (e.g.: both were designed to organize society and adjudicate disputes; both provide law and social order; both claim ultimate sovereignty, *et cetera*) (Hallaq, 2004, pp. 169-171).³⁴ Furthermore, the effects of colonialism, and its cultural effects in particular, have undermined the traditional institutions of learning and jurisprudence in the Muslim world, which have posed a serious challenge to traditional Muslim epistemologies of knowledge and the sense of moral values (Abou El Fadl, 2003, p. 117).

Yet all is not doom and gloom. Having outlined the difference between Burkean traditions that are decaying, disintegrating, and disappearing, and living traditions that are

³³ See U. F. Abd-Allah's article "Seek Knowledge in China" (2006), where he discusses at length how Islam flourished in China for over a millenia, which he maintains provides an invaluable precedent for how Islam can be indigenized in the context of an advanced non-Muslim society. He maintains that "Islam in China has left a unique legacy of cultural accomplishment that is as valuable today as ever. It demonstrates the potential resourcefulness of Islam to live in harmony with widely divergent civilizations. It sets a standard of excellence in a globalistic world in the quest for true pluralism based on mutual understanding and interests" (p. 13).

³⁴ See W. Hallaq, "What is shari'a?" (2005), in which he discusses the difficulties of conceptualizing *Shari'ah*'s historical role in Muslim societies due to the transformation, of "staggering proportions", effectuated by the introduction of the nation-state in the Muslim world.

dynamic, vital, and enduring, MacIntyre asks: “What then sustains and strengthens traditions? What weakens and destroys them?” (2007, p. 222). He finds the answer in the exercise (or lack thereof) of the ‘relevant virtues’, including: justice, courage, truthfulness, relevant intellectual virtues, and perhaps most importantly, having an adequate sense of the traditions to which one belongs or which confront one (MacIntyre, 2007, p. 223). Islamic scholars, intellectuals, and Muslims in general are working hard to sustain and strengthen their tradition in the modern world.³⁵ As a part of their ‘search for coherence’ in the modern world, it is obvious that the nation-state is here to stay, for the foreseeable future at least, and that human rights are the best tools available at our disposal to uphold human dignity and stem injustice in our shared world as it is currently ordered. By seeking to make a frank account of the challenges currently confronting the Islamic tradition – vis-à-vis concepts like rights and the nation-state – and then meeting them with courage, justice and truthfulness, determining where the tradition is falling short, and what direction its evolution should take, contemporary Muslims are seeking a renewal and revival of their tradition. This contemporary Islamic revivalism is not a novelty – it is itself deeply embedded in the Islamic tradition, which describes human history as a continuum of renewal, revival, and reform (*tajdid, ihya’* and *islah*) (Haj,

³⁵ Asad notes that describing Islam as a discursive tradition invites and does not exclude ‘outsiders’ who embrace a different tradition of rationality from studying and commenting on the Islamic tradition and its contemporary Islamic discourses. The only caveat to their doing so is that to be conscious that engaging a discursive tradition “is to be in a certain narrative relation to it, a relation that will vary according to whether one supports or opposes the tradition, or regards it as morally neutral. The coherence that each party finds, or fails to find, in that tradition will depend on their particular historical position” (Asad, 1986, p.17).

2009, p. 7).³⁶ These concepts, which can be traced back to the authoritative corpus of the Islamic tradition, are a corrective form of criticism that ensure the continuity of the tradition and circumvent the tendency towards progressive degeneration and social backsliding (Haj, 2009, p. 8).³⁷

I hope that conceptualizing Islam as a discursive tradition will help situate an ‘Islamic human rights theory’ or ‘tradition’ within (rather than outside of) the broader Islamic tradition. This concept will also be used to critique reconciliatory and reform projects (chapter 3) which call into question both the “theoretical considerations and premises emanating from the content and form” of Islam’s foundational discourses as well as the ‘discursive process’ itself. In other words, scholars who would like to take part in the dialogue between Islam and human rights would need to: (1) start within the tradition, with an understanding and critical engagement with its foundational texts and its styles of reasoning based on these texts; (2) conceptualize Islam as a discursive tradition, transcending thereby a simplistic essentialization of the Islamic traditions as static, pre-modern, and unchanging, and; (3) approach Islam on its own terms to gain an

³⁶ I use the term ‘renewal’ and ‘revival’ rather than ‘reform’ to refer to the internal discursive evolution and change required by both the Islamic and human rights traditions. The term ‘reform’ connotes and denotes many things, including insinuating “not only a transition from the pre-modern to the modern, but also passes an un-appealable verdict on an entire history and a legal culture that is perennially wanting and thus deserving of displacement, and – no less – eradication, from memory and the material world, respectively” (Hallaq, 2005, p. 153).

³⁷ This notion of renewal finds its roots in various *hadith*, the most well-known of which is: “God will send to this community at the head of each century those who will renew its religion for it.” (as cited in Haj, 2007, p. 8).

appreciation of the standards by which *Shari'ah* would evaluate human rights. In contrast, reform projects usually start and end by measuring Islamic law by the standards of human rights to determine where the former falls short – whereas the evaluation and contribution of both parties is required for a genuine intercultural dialogue.

Conceptualizing Human Rights as a Discursive Tradition

Concepts like human rights, liberalism, and secularism are often thought of and treated as self-evident truths and rational absolutes – as ‘givens’ of the modern age.³⁸ MacIntyre’s concept of a discursive tradition seeks to unsettle this belief where he describes one of these ‘givens’ – liberalism – as one such tradition, which is somewhat ironic when we consider its claim of being a break from tradition. Yet, as MacIntyre explains: “liberal theory is best understood, not at all as an attempt to find rationality independent of tradition, but as itself the articulation of a historically developed and developing set of institutions and forms of activity. Like other traditions, liberalism has internal to it its own standards of rational justification... [it] has its set of authoritative texts, and its disputes over its interpretation” (MacIntyre, 1988, p. 345). From this point of departure, it may be possible to describe human rights as a tradition like any other, one which has had a particular *past* which conditions its present, a *present* in which it is subject to an ongoing discursive process of contestation and negotiation while seeking to

³⁸ I will defer a detailed discussion of secularism, its internal diversity, contested elements and its relation to the human rights corpus to chapter 3. Similarly, a more comprehensive discussion of liberalism can be found in chapter 4.

remain faithful to its essential principles, and a *future* which it seeks to secure for itself amidst changing contexts.

The past: exploring the genealogy of human rights.

A standard history of rights.

While detailing the history of human rights is outside the scope of my project,³⁹ it is important to consider a concise overview of the historical trajectory of the human rights project to situate it within the larger tradition of liberal humanism and to recognize the ways in which its past has impacted its current form. A basic historical overview of the evolution of the concept of human rights begins with the development of natural law in classical Greece, which has since occupied a prominent role in Western ethics, politics and law. The invention of the concept of nature challenged ancestral claims to knowledge of the ‘good’ and appealed instead to what reason identifies to be intrinsically good by its very nature. In this way the earliest civilizations turned the concept of nature into a critical, normative standard which constituted an act of rebellion and resistance against unjust law and had the potential to hold the powerful to account (Douzinas, 2000, p. 16). This ‘natural cosmology’ gave rise to the belief, held by the Greeks, Romans, and Stoics, that some moral principles rooted in and legitimized by nature, were commonly held by all of humanity owing to their shared ability to reason (Douzinas, 2000, p. 17). As Cicero

³⁹ **For a detailed history of the human rights project, see M. Ishay, *The History of***

***Human Rights: From Ancient Times to the Globalization Era* (2004); C.**

Douzinas, *The End of Human Rights* (2000).

expressed – “the true law, is the law of reason, in accordance with nature known to all, unchangeable and imperishable” (as cited in Douzinas, 2000, p. 17). The main shift towards a theory of natural rights, which would later underpin human rights, was its gradual ‘Christianisation’, which transformed the flexible classical ideas of ‘natural’ and ‘virtuous’ into a set of values and commandments formulated by God, as found in the scriptures, and supplanted the source of natural law from rational morality to Divine commandment (Douzinas, 2000, p. 18). These Divine commandments were considered to be above state law, which caused inevitable conflict between higher Divine law and secular state law; a conflict which ended with a cooptation of the former by the latter. Natural law thus became a “doctrine of justification of state power and the faithful were told to respect and obey the secular princes” (Douzinas, 2000, p. 18).

The concept of nature attained its revolutionary potential with the transformation of natural law into natural rights by the liberal political philosophers of the seventeenth and eighteenth centuries, most notably Hobbes, Locke, and Rousseau, who altered both the source and method of law. The political content of natural law, which delineated the relationship of the individual to the state, was engendered by the Enlightenment, placing the individual at the centre and divorcing knowledge from revelation (Dalacoura, 2007, p. 7). Human rights still drew heavily on Christian, natural-law sources for its legitimacy, but its practical concerns were increasingly secular (Freeman, 2004, p. 390). God was separated from nature and replaced by the “omnipotent and unquestionable will” of the collective, each of whom, by their very nature, had a set of individual rights that law was to accord them (Douzinas, 2000, p. 19). While they relinquished some of their natural freedoms in the state of nature upon entering into a social contract with the state, they

still retained a number of important entitlements, which were to be protected by the state, including rights to life, liberty, and property (Douzinas, 2000, p. 19). Natural rights theory, which was subjective and rational, heavily influenced the French Declaration of the Rights of Man and the American Bill of Rights and Declaration of Independence, but was soon abandoned by Western states and theorists in favour of a doctrine of legal positivism. Further development of philosophical, sociological, economic, and psychological theories exploded the claim of a set of eternal, inalienable, and absolute rights so that by the first half of the twentieth century the theory of natural rights had been discredited even among academic circles. Its rehabilitation “under the guise of human rights” did not occur until the Nuremberg trials created a new post-war normative and legal order and set the stage for the human rights revolution of the second half of the twentieth century (Douzinas, 2000, p.22).

What is significant about this standard historical account is that it clearly reveals that the intellectual and philosophical pedigree of human rights is born out of particularly European intellectual and political developments.⁴⁰ Costas Douzinas sums up the main

⁴⁰ Micheline Ishay poses the following question in her book *The History of Human Rights* (2004): “[O]ne may still wonder why Islam, which incorporated a strong legalistic tradition and prevailed as the most tolerant of medieval civilizations, did not become the leading force in the advancement of human rights against the exclusionary moral crusade of the Christian church during the Dark Ages” (p. 60). She finds the answer in the advent of capitalism and colonialism which contributed to the secularization of Judeo-Christian morality and its privileging over other notions of ethics. Nonetheless, there is much to be gained from such an investigation; not least of which is building interest in the concept of human rights in the Muslim world by exploring the ways in which the Islamic civilization’s tolerant and pluralistic legacy laid the groundwork for the development of concepts like human rights.

factors that came together to produce what is today ‘the human rights movement’:
 “Classical natural law, Jewish and Christian theology, the ideas of the Enlightenment, modern rationalism and postmodern multiculturalism... major events such as the French Revolution and the American War of Independence, the Russian Revolution and its aftermath, the Nazi and Stalinist crimes, the Holocaust and the universal revulsion it causes... and priorities of Western (predominantly American) politicians” (Douzinas, 2000, p. 15). It is important to note that many of these decisive historical and epistemic transformations are particular to Western-European historical experience. These historical junctures, such as the Enlightenment and the formal separation of Church and State, have come to define and delineate the West and have no equivalent occurrences in Islam’s history.

From history to genealogy.

In considering the history of rights, several scholars have cautioned against reading this history as a flawless, triumphal and progressive story. In *The End of Human Rights*, Douzinas argues that the history of the formation of human rights in the West “suffers from the philosophical and historical defects of historicism” in that it is presented as “the forward march of all-conquering reason, which erases mistakes and combats prejudices” (Douzinas, 2007, p. 26). To counteract this tendency, he presents a less comforting ‘genealogy’ of human rights which he defines as “a ‘dirty’; and uneven view of the historical process” that highlights the way in which human rights, ‘the ideology at the end of history’ have been instrumentalized as an invaluable American weapon in the ideological battles of the day (Douzinas, 2007, pp. 27; 33). The concept of

a genealogy of human rights has been employed by many scholars as an exercise in reflexivity and as a means to explore the present state and future direction of the human rights corpus. In her article “Human Rights Genealogy”, Ruti Teitel explains that the idea of the genealogy of rights begins with the ‘puzzle’ that notwithstanding its normative force, contemporary human rights theory is generally considered fundamentally flawed, lacking a center, organizing structure, or unifying value (Teitel, 1997, p. 301). Teitel proposes espousing a genealogical approach to human rights theory, one that explores “international human rights theory’s historical and political legacies, its founding structures and rhetoric, with an eye toward a better understanding of the contemporary international human rights movement, its place in history, and its future potential” (Teitel, 1997, p. 301). The term genealogy has come to mean three related things: (1) an exploration of the organizing structure, logic and language of contemporary human rights theory; (2) the historical and political circumstances of the international rights movement; and, (3) the relationships between international human rights theory and other philosophical, political and legal rights theorizing (Teitel, 1997, p. 301). This genealogical approach enables us to consider the historical and political circumstances in which human rights theory was developed, and also, to clarify problems and dichotomies in both the theory and practice of rights today. For example, there is a perceived gap between the theoretical and judicialized forms of human rights, which consequently weakens the normative force of rights (Teitel, 1997, p. 305).

Following Teitel and Douzinas, I contend that the philosophical assumptions and theoretical underpinnings that ground Western concepts of human rights must be recognized, and the implications of these non-neutral, value-laden positions must be

explored. Human rights theorists generally agree that every theory of rights is derived from a set of anthropological presuppositions, philosophical hypotheses, and moral assertions about who the human being is, the nature of his well-being and his relationship to wider society, as well as other relevant concepts such as liberty and equality (Douzinas, 2000, p. 10). They are also built on particular notions of ‘philosophical anthropology’ (conceptions of human nature, and ideas about what constitutes the purpose of existence, human dignity, happiness, freedom, the relationship between man and God, etc).⁴¹ The evolution of human rights was linked to the historical trends of Christian Europe and the Enlightenment and post-Enlightenment philosophies that produced a philosophical anthropology, epitomized by individualism and humanism, which shaped the conceptualization of the inherent attributes of the human person (Pannikar, 1982, p. 84; Sachedina, 2007). The fundamental documents of International human rights law relied heavily on domestic jurisprudence developed over centuries in Western Europe and the United States, including the American Bill of Rights and the French Declaration, while no evidence exists that they drew inspiration from Asian, Islamic, Buddhist, Hindu, African, or other non-European traditions (Mutua, 2002, p. 154).

From its inception, the human rights project has had a complicated relationship with race, gender and human interdependence that has required continuous redefinition of “humanity” to widen the circle of entitlement to rights. The history of human rights is

⁴¹ For a more detailed analysis of some of these anthropological and philosophical assumptions, see R. Pannikar & R. Pannikar, “Is the Notion of Human Rights a Western Concept?” (1982).

also the history of slavery,⁴² colonialism and the exclusion of women and non-Whites: “Human rights were known long ago but only for the nobleman, or the free citizen, or for whites or christians or males, etc., and when they were hastily applied to “human beings” it was often defined just which groups belonging to the race could properly be styled “human”... this particular notion of the “human” has not always been very humane” (Pannikar & Pannikar, 1982, p. 86). Mutua argues that the basic flaw of the human rights project is that it falls within the historical continuum of the European colonial project and presents “salvation” in the modern world “as only possible through the holy trinity of human rights, political democracy, and free markets” (Mutua, 2002, p. 155). Understood as part of a larger project of liberal humanitarianism, human rights as a modern construct are rooted in and influenced by certain mega-ideals (Christianity, post-Enlightenment values, secularism, rationalism, capitalism, *et cetera*); values that are not necessarily shared or interpreted the same way by non-Westerners. As the moral guardian of global capitalism and liberal internationalism, human rights is tainted by false universalism, “a mask worn to obscure Western civilizational hegemony” (Falk, 2000, p. 147).

While these aspects of the history of the human rights tradition may be problematic inasmuch as it aspires to be a cosmopolitan project, the rights corpus must also be commended for shedding many layers of hierarchical, racist and gendered discrimination and exclusions which marked the tradition for centuries. Through its discursive processes, human rights has overcome many aspects of its earlier exclusions

⁴² T. Asad discusses how the medieval theory of natural liberty sanctioned practices such as slavery. See his *Formations of the Secular* (2003), pp. 130-131.

directed towards anyone who was not a white, propertied male in order to arrive at the present system of inclusive moral and political beliefs underpinning human rights today.

From past to present to future: transcending 'tainted origins'

One of the primary purposes of the adoption of the UDHR was to protect and safeguard individual freedoms against abuse by the expansive powers of the nation-state that was 'universalized' through colonialism (An-Na'im, 2002, p. 58). It was drafted mostly by European powers, along with the United States, who were intent on warding off similar disasters as the Second World War, at a time when the vast majority of African and Asian peoples lived in repressive European colonies.⁴³ The UDHR was followed in 1966 by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESR), which are collectively known as the "International Bill of Rights" and serve as the bedrock of international human rights standards and international human rights law (Waltz, 2004, p. 802).⁴⁴ The drafters of the Declaration approached the urgent need to protect human

⁴³ Some scholars challenge the widespread belief that the idea of developing an international human rights declaration was a post-war idea and argue that the beginning of the initiative can be traced back to the 1920s. See J. H. Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century* (1992), p. 447; P. G. Lauren, *The Evolution of International human rights: Visions Seen* (1998), pp. 105-138.

⁴⁴ These three documents that comprise the International Bill of Human Rights, were reaffirmed in the Helsinki Accords of 1975, and reinforced by the threat of international sanctions against offending nations (Shakir, 2004, para. 4).

persons in the post-WWII era from their particular experience and cultural context. Muslim participation in the process was minimal and the deliberations were not inclusive of the diverse trends in various religious traditions, including even those within Western Christian theology.⁴⁵ According to An-Na'im, the UDHR became 'globally inclusive' through its affirmation by African and Asian states upon achieving political independence and through their participation in the drafting and adoption of subsequent treaties on human rights (An-Na'im, 2002, p. 59). In contrast, Mutua maintains that the fundamentally Eurocentric character of the UDHR is not vindicated by the central role it has come to play as a norm of global civilization, but rather, this 'universality' is a "testament to the conceptual, cultural, economic, military and philosophical domination

⁴⁵ Susan Waltz (2004) contests the claim that Muslim States did not contribute to the drafting of the UDHR and subsequent rights treaties. In her article "Universal Human Rights: The Contribution of Muslim States", Waltz examines UN records, papers of the US State Department and private memories and writings dating between 1946-1966, the period during which the UDHR and Covenants were being negotiated. She argues that Arab and Muslim diplomats made important contributions to the articulation of a right to self-determination, culturally sensitive language about religious beliefs, and a separate article promoting gender equality. A. Sachedina (2007), M. Mutua (2002), and others contend that these representatives were secularly educated individuals, firmly rooted in the European intellectual tradition and "had little or no human rights training in the foundational sources of Islamic tradition and could not adequately articulate the universal impulse of Islamic comprehensive doctrines that would have enriched the debates" (Mutua, 2002, p. 155; Sachedina, 2007, p. 54). Waltz's thesis is also criticized on the grounds that the diplomats were not populist representations of the countries they represented. For example, the representative from Saudi Arabia, Jamil Baroody, was a Lebanese Christian who did not have any training in Islamic theology or law to enable him to speak authoritatively on behalf of Islam (Sachedina, 2007, p. 54).

of the European West over non-European peoples and traditions” (Mutua, 2002, p. 154).

The present consensus obscures many of the serious and consequential cultural and ideological differences that endure, and the early development of the Declaration “has continued to cast a long shadow of doubt over the cultural and political contours of the Declaration that reveal an indubitable secular-Western bias” (Sachedina, 2007, p. 54).

As the contemporary language of progressive politics and a shared international moral currency, human rights are not a problem per se, and there is no doubt that the human rights movement is well meaning. Nonetheless, the current human rights corpus represents just one tradition; that of Europe (Mutua, 2002, p. 156). As an aspiring cosmopolitan legal-moral project the human rights corpus needs to begin by making explicit the link between human rights norms and the broader liberal-political norms particular to the West, from the context of the culture and history in which it was conceived. Furthermore, it must recognize the dominance of certain tendencies that have come to characterize the human rights movement, including a hostility to diversity, a tendency to demonize, repudiate and recreate difference, and an impulse towards political and cultural homogenization (Mutua, 2002, pp. 2-3). While culturally-specific or ‘tainted origins’ are not necessarily a problem where human rights have been accepted as internationalized tools to solve shared problems, the difficulty arises where we (1) assume that there is necessarily a fit between the legal culture of human rights and the broader culture of Western norms, causing us to export other elements of liberalism, rationalism and secularism to the non-Western world under the guise of human rights neutrality; (2) where we are closed off to the possibility of change and evolution of the human rights corpus, and expect that human rights must necessarily appeal to and be

adopted by all societies in the exact same form that they have been espoused in Europe and North America; and, (3) where we ignore parallel development in other cultural traditions because they are expressed in a different way.

Assuming a fit between human rights and wider Western cultural norms.

Approaching the first tendency from an anthropological perspective, Asad examines the way in which human rights discourse is accompanied by a particular political and social culture. He maintains that there is an assumed fit between the legal culture of human rights and the broader culture of Western norms (Asad, 2003, p. 148). Without “overt coercion” the rest of the world adapts to the discourse of human rights and to what he describes as formulating the problems America invents in the words it offers (Asad, 2000, pp. 47; 151). Thus, it can be said “human rights discourse is also about undermining styles of life by means of the law and a wider culture that sustains and motivates law” (Asad, 2000, p. 49). This trend is increasingly visible among human rights proponents who privilege and promote liberal-secular values around the world by which they intend to shape the moral foundation of an international system (Monshipouri, 2010, p. 1).

Within the academic sphere, the writings of Bassam Tibi (1994) provide one such example. Tibi argues that Islam must be evaluated by the universally-accepted ‘international standard of cultural modernity’, in which secular morality is an international agreed-upon norm, rational knowledge must be given primacy over revelation in the political and legal realms, and conflict is inevitable between man(reason)-centered and theocentric views of the world, or “the global civilization of

cultural modernity and local pre-modern cultures grouped in regional civilizations” (1994, p. 297). In this context, he argues that “[m]odern law, including human rights law, is a product of the ‘cultural project of modernity’ being the substance of the ‘civilizing process’ (Tibi, 1994, p. 297). Tibi makes the mistake of conflating human rights, described as perfected, absolute ideals, with larger projects of secular morality and liberalism. He also dismisses anything religious as an impediment to the modern development of human rights and fails to imagine other ways besides secular morality to experience and engage modernity.⁴⁶ This approach is encapsulated by the now-cliché phrase “the story of western civilisation is now the story of mankind” with which John Roberts closes his famous book *The Triumph of the West* (cited in Alastair Bonnett, 2005, p. 505). In contrast to this approach, post-colonial scholars are attempting to forge ‘alternative modernities’ by which we can experience Western civilization as *one* of the stories of mankind.⁴⁷ For instance, in the field of international law, this movement has come to be known as TWAIL, short for ‘Third World Approaches to International Law’. This trend of scholarship, which speaks to the diversity within the Western Academe,

⁴⁶ See A. Sachedina, “The Clash of Universalisms” (2007), where he argues, contra-Tibi, that secular morality has been rejected by Muslims, many of who are attracted to human rights, but on the basis of their own religious and moral convictions. He contends that much of the ongoing Muslim criticisms of the UDHR as a prejudicially anti-religious and politically hegemonic project are founded upon a rejection of the universal claim of secular morality (p. 51).

⁴⁷ See A. Bonnett “Occidentalism and Plural Modernities: Or How Fukuzawa and Tagore Invented the West” (2005), for a discussion of the theme of ‘plural modernities’ and a trenchant critique of the conflation of the West with modernity. He compares the work of two important figures from the Japanese and Indian traditions who develop narratives of the West and of Asia which they employ to form novel and distinctive visions of the nature of modernity.

espouses a critical approach towards international law, including the role it has played in advancing colonialism and legitimizing the ongoing subjugation of the Third World.⁴⁸

When it comes to promoting human rights, the value-laden notions that may underpin them in the West – like liberalism, rationalism, and secularism – should be recognized and care should be taken not to impose these on other societies under the guise of human rights neutrality. The West is too often represented as “a realm beyond culture and the place of universal values” – values which represent progress and underpin the human rights project (Razack, 2008, pp. 104-105). Yet, Sherene Razak asserts that these values and this culture are not neutral nor are they the end product of a normative rational endeavour. She describes modernity as a ‘project’ that certain powerful people seek to achieve, and secularism as a means by which states secure their power as ‘neutral arbiter’ (Razack, 2008, pp. 161; 177). The UN has for example determined that a secular approach to human rights is adequate, even necessary, in view of the diversity of the world’s religious and philosophical beliefs. While many theorists, like Jack Donnelly, concur with this approach, Michael Freeman is careful to point out that this assumes that secularism is *neutral* between these beliefs (Freeman, 2004, p. 385). Razack would concur – she contends that ideas like secularism, freedom of the market, freedom of choice, individualism, and gender equality are “harnessed to the project of empire” and

⁴⁸ For more on the TWAIL movement, see R. Johnson, “The Model Law on HIV in Southern Africa: Third World Approaches to International Law Insights Into a Human Rights-Based Approach” (2009); M. Al Attar & R. Miller, “Towards an Emancipatory International Law: The Bolivarian Reconstruction” (2010).

serve to divide those who are modern and those who are not (Razack, 2008, p. 177). The problem with this framing is that it

[L]eaves no room for interrogating the more insidious ways in which modern states secure their power, the economic, social and political arrangements on which human rights, individualism and gender equality rest, arrangements that have required the domination of the North over the South and the eviction of large numbers of people from political community. (Razack, 2008, p. 177)

Being open to the possibility of change and evolution and, ignoring parallel developments in other cultures.

The dominant belief among human rights proponents seems to be that human rights standards and norms have been fixed and all what remains is simply elaborating and implementing those standards. This orientation of moral, political, and legal certainty is manifested in the push to put off discussion of the political and philosophical roots of the human rights corpus and its cultural relevance to non-Western societies (Mutua, 2002, p. 4). However, as a discursive tradition, human rights should be recognized and advanced as a contested concept that is continually constructed and reconstructed through an ongoing discursive process. Marie-Benedicte Dembour (2010) summarizes the wide spectrum of views about and approaches towards human rights into four schools of thought: (1) *natural*, in which rights are entitlements possessed by simply being human; (2) *deliberative*, in which rights are agreed upon political values that liberal societies choose to adopt; (3) *protest*, in which rights are claims and aspirations that are fought for

to contest the status quo in favor of the oppressed; and, (4) *discourse*, in which rights only exist because people talk about them; they are neither a given nor do they necessarily constitute the right answer to the ills of the world. Dembour provides a systematic comparison of the schools of thought in terms of several key aspects: how they conceive of rights; what they think rights are for and what they are based on; how rights relate to law; whether they consider human rights law since 1948 as definite progress; whether they believe rights are realizable; and, finally, whether they consider rights to be universal (Dembour, 2010, p. 11). Interestingly, her analysis also cuts across academic disciplines to demonstrate that academics from diverse disciplines – from law, political theory and international relations to philosophy, anthropology, sociology, history and cultural studies – can be located in every section of the human rights conceptual field (Dembour, 2010, p. 19). The detailed exposition she provides is helpful in clarifying the diversity that exists within the human rights movement, and the negotiated and re-negotiated status of many aspects of the corpus. For the purpose of the present work, her study enables me to place arguments made about human rights and their compatibility with Islam into a general approach and to understand thereby how a particular scholar is making and defending their claims.

In spite of the diversity within the human rights corpus, the natural school remains the most influential and has traditionally represented ‘human rights orthodoxy’ (Dembour, 2010, p. 19). Consequently, human rights scholars have tended to rely on the natural school of human rights to launch their critique of non-Western conceptions of human rights. The natural school conceptualizes rights in a very narrow way that tends to exclude approaches to rights that are not expressed and formulated in a way that relies on

the ontological presuppositions of natural law.⁴⁹ For instance, Jack Donnelly is a prominent rights theorist who closely identifies with the natural school. He argues that human rights are foreign to non-Western political cultures for three main reasons: (1) some basic protections provided and justified in non-Western societies only protect some people; (2) some protections are not ‘owed to persons just because they are persons’, but rather are conceived as grants that the community gives people conditionally, on account of their acceptance of responsibilities within the community; and, (3) basic protections are sometimes not justified as entitlements inherently belonging to individuals, but as other people’s duties (Drydyk, 1997, p. 162). Jay Drydyk criticizes Donnelly’s approach as a Eurocentric conception of human rights that privileges form over substance, and argues that human rights are justifiable within all cultures. To bolster his critique, he gives the scenario of a Western and an Asian state that provide identical human rights

⁴⁹ Critiques of narrow, exclusivist approaches to rights have emerged from various cultural and theoretical perspectives. For feminist critiques of human rights, see W. Brown, “Suffering Rights as Paradoxes” (2000); K. Engle, “International Human Rights and Feminism: Where Discourses Meet” (1992). For examinations of rights from African perspectives, see D. Penna & P. Cambell, “Human Rights and Culture: Beyond Universality and Relativism” (1998); M. Mutua, *Human Rights: A Political and Cultural Critique* (2002). For critiques from Asian perspectives, see E. Welch & V. A. Leary, *Asian Perspectives on Human Rights* (1990); B. Kausikan, “Asia’s Different Standard” (1993) and “An East Asian Approach to Human Rights” (1995); F. R. Dallmayr, ““Asian Values” and Global Human Rights” (2002); J. R. Bauer & D. A. Bell, *The East Asian Challenge for Human Rights* (1999). From Latin American perspectives, see H. Fruling, “Political Culture and Gross Human Rights Violations in Latin America (1992); W. C. Paolo, “From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights” (2003).

protections, however, they are conceived of in the Western country as entitlements, and in the Asian countries as duties. He asserts that according to Donnelly, the Asian country would be described as having no conception of human rights, which “betrays a greater concern for how people think about human rights than for how well they protect them” (Drydyk, 1997, p. 163).

In contrast to the rigid naturalist position, the deliberative, protest, and discourse schools can easily accommodate other approaches and ways of thinking and talking about rights. Dembour maintains that the traditional human rights orthodoxy rooted in the natural school is being replaced by a new orthodoxy represented by the deliberative school (Dembour, 2010, p. 19). The emergence of a truly universal, multicultural human rights corpus may require an eclectic combination of elements from each of these schools. From the natural school we may borrow the transcendental confidence in universal rights as entitlements owed to every human being; from the protest school the critical view towards human rights law believed to favour the elite and the relentless advocacy on behalf of the oppressed; from the deliberative school the pragmatic approach to rights as political tools and the focus on building consensus and societal agreement on rights; and, from the discourse school the acknowledgment that rights are not necessarily and forever the only or best emancipatory language and political approach to bringing about greater justice and peace in the world.

Conclusion

It is dishonest to strictly compare and evaluate non-Western approaches to rights by the standards set by a particular approach to rights, such as that espoused by scholars

of the natural school. Likewise, it is unjustifiable to demand that conceptions and approaches to rights around the world exactly mirror the liberal-humanist version we have developed in the West. The discursive processes within the human rights movement should proceed in the spirit that while we may agree that rights may be the best tool currently at our disposal to protect against the massacres of modernity, we also recognize that the human rights movement is young, and “its youth gives it an experimental status, not a final truth” (Mutua, 2002, p. 4).

Inclusion is the key to legitimacy. What is needed is a cross-cultural dialogue that is undertaken in the spirit of seeking to benefit from other cultures and possibly incorporate elements of their rights traditions in a truly universal consensus around rights and.⁵⁰ Ultimately, the shared aim of all the schools of rights vis-à-vis encounters with non-Western cultures should be the cross-fertilization of cultures that would allow a truly universal human rights corpus to emerge. As Richard Schwartz explains: “Every culture will have its distinctive ways of formulating and supporting human rights. Every society can learn from other societies more effective ways to implement human rights. While honouring the diversity of cultures, we can also build toward common principles that all can support” (as cited in Mutua, 2002, p. 159).

⁵⁰ In relation to learning from other cultures, D. A. Bell gives the example of the East Asian tradition of filial piety, which strongly emphasizes the idea that children have a duty to care for elderly parents. He maintains that during the course of intercultural dialogue, non-East Asian states may also come to regard the right to be cared for by adult children as a fundamental human right (Bell, 1999, p. 853).

Chapter 2: Orientalism & Occidentalism in the Islam-Human Rights Debate

Among those who take an ‘adversarial’ approach and presume that the relationship between Islam and human rights is fundamentally hostile, two main approaches can be discerned: Orientalism and Occidentalism. A dominant trend within the Western Academe has been an approach of ‘Legal Orientalism’, which relies on essentialist constructions of Islamic law to characterize its legal tradition as backward and defective and to claim an exclusively Western lineage for all ideas relating to or analogous to human rights. The second approach, termed by some as ‘Occidentalism’, emerges from some Muslim scholars who reject Western human rights and deny its positive contributions while asserting the superiority of classical Islamic law to modern human rights formulations.

First Approach: Legal Orientalism vis-à-vis Islamic Law

Where it is anything but a fiction, the opposition traditionally established between Orient and Occident is met nowhere more clearly than in the domain of law.

— Jean Escarra (Escarra, 1961, p.2)

Orientalism and Said.

Few works have had as much impact on cultural and area studies in the past few decades as Edward Said’s (1979) *Orientalism*. In this landmark work, Said describes how the study of the Orient by Western scholars has represented, analyzed, imagined, and constructed the Orient (and specifically the Muslim Orient) as unchanging and inferior. Said loosely defines Orientalism as: “the corporate institution for dealing with the Orient

– dealing with it by making statements about it, authorizing views of it, describing it, teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient” (Said, 1979, p. 3). In discussing Orientalism, Said does not write about Islam or the Near East, but rather, he refers to a series of ‘discourses’ (used explicitly in the Foucaultian sense) that structure Westerners’ understanding of the Orient which have the cumulative effect of reducing “the Orient” to a passive object, to be known and represented “by a cognitively privileged subject — ‘the West’” (Ruskola, 2002, p. 185). As Said exhorts:

Without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage — even produce — the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period. (Said, 1979, p. 3)

Said identified several hallmarks of Orientalist discourses, which can be summarized into three essential features – essentialism, otherness and absence – through which “the colonial world can be mastered and the colonial mastery will in turn reinscribe and reinforce these defining features” (Mitchell, 1992, p. 289).

The first feature, *essentialism*, constructs the Oriental Other as a monolithic and static entity, “the product of unchanging racial or cultural essences” (Mitchell, 1992, p. 289). Through this lens, modern political realities in the Arab world can be traced to unchanging theological principles or cultural characteristics of the Islamic ethos rather than the histories of colonialism and imperialism and international or regional politics and economics. And thus as Said elaborates, for Orientalists, “there are still such things

as an Islamic society, an Arab mind, an Oriental psyche” (Said, 1979, p. 8). The second and third features, *otherness* and *absence* dovetail with this essentialism by dividing humanity into “solid containers of difference”, namely East and West, in which the Orientalist Other is marked by a series of fundamental absences (of movement, reason, order, meaning and so on), always determined by reference to Western standards of evaluation (Youmans, 2003, p. 110). The feature of otherness presumes a radical separation and opposition between the West and the Orient; between the familiar (Europe, West, ‘us’), and the strange (the Orient, the East, ‘them’). By positing ineradicable distinctions between the West and the Orient, the common humanity of Western and Oriental peoples is obscured and Orientals are dehumanized in ways that serve the goals of Western imperialism. Said pinpoints the emergence of Orientalist attitudes towards Muslim societies to a period in the Middle Ages when Europe began to see itself as one great Christian community, which was a sense of self formed on the basis of opposition to the Oriental ‘Other’. Thus, the Othering of non-Western peoples also benefited European culture by enabling it to utilize the “Other” as a mirror by which it could come to know itself as complete, civilized, peaceful, active, rational, and ordered by recognizing its Other as defective, savage, violent, passive, static, emotional, and chaotic. As Said explains: “European culture gained strength and identity by setting itself off against the orient as a sort of surrogate and even underground self” (Said, 1979, p. 3).

As an area of academic interest, Orientalism grew alongside colonialism, serving it by providing ideological explanations and a store of seemingly positive knowledge about the inferiority of the cultures and societies of the occupied lands. European scholars, colonial administrators and policymakers, travelers, social scientists, biblical scholars,

archaeologists, novelists, poets, philosophers, and historians all cooperated in and benefited from the development of Orientalist discourses which were forged from an interplay between the academic and imaginative meanings of the exotic Orient in which myth and reality gradually became one (Said, 1979). Each generation of Orientalist writers was influenced by previous generations, which facilitated the absorption and reprocessing of century old biases and prejudices (Karim, 2003, p. 57). Consequently, greater credibility was given to written material about the Orient than to actual experience, and “strongly-held and oft-repeated beliefs about the Orient functioned as self-fulfilling prophecies” and gained the status of self-evident truth (Karim, 2003, p. 58). Scholars continue to document the ways in which the mass media and the academic community continue to re-produce these ‘truths’ to the present day, regularly “raiding the Orientalism cupboard for alimentation, picking up old prejudices and scatological bits of information” (Said, 1997, p. 50). Said’s aim in *Orientalism* is to undo the construed “oppositions between the Orient and the Occident, Western knowledge and Western power, scholarly objectivity and worldly motives, discursive regimes and authorial intentions, discipline and desire, representation and reality, and so on” by deconstructing the faulty assumptions on which they are founded (Youmans, 2003, p. 111).⁵¹

⁵¹ While Said’s work has been widely received, it has nonetheless been criticized as well. Critics of Said’s work allege that he is guilty of the same crime as some of the Orientalists he disparages: painting all scholars with the same stroke, neglecting diversity among them, and downplaying their neutral contributions, such as chronicling the histories of certain countries. Said is also criticized for his encompassing attack on the categorization of cultures, societies, and nations and the ambiguous and tentative solutions he proposes which leave few options for social and comparative studies of the region (Youmans, 2003, pp. 110-112). Some supporters of Said’s work have criticized Orientalist discourse for

From Orientalism to legal Orientalism.

To live under Islamic Sharia law is to live in the world's largest maximum-security prison... how could they [Muslim nations] have strangled themselves with the most barbaric, oppressive, and demeaning laws on earth for fourteen hundred years.

- Nonie Darwish (2008, pg. 28)

The application of Orientalism to law is a recent development and the term 'legal Orientalism' has only recently been employed by scholars studying non-Western law through the lens of Orientalism.⁵² Legal Orientalism can be loosely defined as applying Orientalist methodologies to the study of law and characterizing non-Western societies through the Orientalist features of essentialism, otherness and absence. In a series of articles, John Strawson explains how strong and enduring Orientalist images persist in essentializing Islamic law,⁵³ including its 'human rights' tradition as a backward and

being too hegemonic and not allowing "the Orient" any agency for resistance or even a role in its own construction (Ruskola, 2002, p. 193). Notwithstanding these criticisms, some of which may be valid, it is important to note that Said's objective was not to evaluate the accuracy of Orientalist representation, but to question the shared assumptions, methods, and praxis of scholars writing about the Orient and to inject a measure of skepticism in the minds of the readers and recipients of Orientalist writings.

⁵² For examples of scholars who have used the concept of legal Orientalism, see: J. Strawson, "Islamic Law and English Texts" (1995); W. Hallaq, "The Quest of Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse" (2002); J. Kroncke, "Substantive Irrationalities and Irrational Substantivities: The Flexible Orientalism of Islamic Law" (2004); H. McGeachy, "The Invention of Burmese Buddhist Law: A Case Study in Legal Orientalism" (2002); V. Taylor, "Beyond Legal Orientalism" (1997).

⁵³ Although I take issue with equating *Shari'ah* with Islamic law for reasons explained in the previous chapter, a discussion of Legal Orientalism is warranted by the mere fact that it is Orientalist

defective legal system, which is coupled with the claiming of an exclusively Western heritage for human rights (Strawson, 1997, pp. 32-33).

Since Said's thesis was largely developed in relation to literature and he does not deal with law explicitly in any of his works, there has been some resistance to the idea that the study of law can also be subject to an Orientalist critique. Anne Mayer, writes in the introduction to the Second Edition of her authoritative book *Islam and Human Rights* that "Said's Orientalism is not a concept developed for application to the field of law", but one that is only applicable to literature, philosophy and anthropology and that it is "people influenced by his arguments [who] have often tended to expand them carelessly to encompass the domain of legal scholarship" (Mayer, 1995, p. 7). This restrictive approach ignores the usefulness of Said's methodology and places too much emphasis on his particular scholarly focus, which is literature. For these reasons, many scholars have argued contra-Mayer that "law is a kind of literature with its own narratives", and, while Said himself does not deal with law explicitly, he does so implicitly in his review of the canons of Orientalism,⁵⁴ most of which contained substantial discussions of Islamic law (Youmans, 2003, p.107).⁵⁵ Furthermore, any area of analysis, legal or otherwise, that

scholars who have tended to over-legalize the tradition; this faulty characterization of *Shari'ah* is itself a feature of Orientalist literature.

⁵⁴ For example, in passing Said says of Sir William Jones, a forerunner of the British Orientalist tradition, "his official work was the law, an occupation with symbolic significance for the history of Orientalism" (1979, p. 78).

⁵⁵ See the following classic works of Orientalists that deal extensively with law, including Islamic law by E. Lane, *Manners and Customs of Modern Egyptians* (1836); A. Milner, *England in Egypt* (1892); E. Cromer, *Modern Egypt* (1911).

involves images of “the Other” relates to Orientalism “if one accepts the notion that law neither occurs in an isolated bubble, nor is it immune from greater society” (Youmans, 2003, p. 108).

Furthermore, there is considerable evidence that the study of Islamic law has been integral to the Western imperial and Orientalist projects since their inception, though historically, it had largely been studied within the branches of history, administration or general Islamic studies (Strawson, 1993, para. 16). Hallaq argues that more than any other Islamic discipline, the success of the colonialist enterprise depended on an intimate familiarity with the law of Islam, even more so than Islamic theology, mysticism, or philosophy (Hallaq, 2002, p. 1). He goes so far as to say that “Islamic law has long been recognized by Orientalism as a central and strategic field of enquiry - one so vital that it lay at the heart of the European colonialist enterprise” (Hallaq, 2002, p.1). In an article in which he explores the significance of the study of Islamic law to the European colonialist enterprise and to Orientalist discourses, Hallaq argues that Orientalist analysis of Islam and Islamic legal history in particular has remained essentially unchanged despite dissenting voices and the significant doubts that have been cast on their validity (2002).

Legal Orientalism in the Islam-human rights debate.

Unfortunately, literature about Islam and human rights is full of characterizations of Islamic law through the lens of legal Orientalism’s main features: essentialism, otherness and absence. In what follows I will survey some of the literature about Islamic human rights to provide a brief discussion of the enduring themes, features and claims emerging from some academics who rely – implicitly or explicitly – on an Orientalist methodology.

Rights in non-Western legal systems.

One of the essentialist assumption that underlies much of the literature about Islam and human rights, is the claiming of an exclusively Western heritage for human rights, located in European civilization and culture, while dismissing the possibility that such concepts could lie in ‘intellectual lineages’ beyond the West (Strawson, 1997, p. 33). This perspective is underpinned by an ahistorical narrative that traces the development of human rights in the Western world, one that celebrates the various human rights declarations and the formation of the UN, but is silent about sexism, racism, colonialism, slavery, fascism, and the Holocaust. This rigid and exclusionary approach is further exacerbated by scholars from the naturalist school of rights who define human rights in a rigid and circumscribed way that expressly excludes locating rights outside a Western context. For instance, Jack Donnelly has repeatedly asserted in many of his works that human rights are only possible in a post-feudal state, and therefore that the concept of right was alien to pre-capitalist traditions and “quite foreign to, for example, Islamic, African, Chinese and Indian approaches to human dignity” (Donnelly, 1982, p. 303; Mutua, 2002, p. 79). Elsewhere, Donnelly asserts that the ‘incorporation’ of non-Western understanding and practices with respect to human right would not only amount to challenging the very idea of human rights, but would come “dangerously close” to destroying or denying human rights “as they have been understood” (Donnelly, 1989, p. 58). In other words, Donnelly suggests that non-Western traditions are incapable of making a normative contribution to the human rights corpus, and that non-Western societies necessarily Westernize through industrialization and urbanization, so as to render them “fertile ground for the germination of human rights” (Mutua, 2002, p. 79).

An essentialist feature that is found in much of the literature is the contrasting construction of Islamic societies as backward, traditional and rural, and Islam as unchanging and unchangeable. *Shari'ah* law tends to be described as a static and unchanging legal system that is inherently discriminatory against certain categories of people, particularly women and non-Muslims.⁵⁶ For instance, in an article addressing the problem of secularism in human rights, Michael Freeman argues: “Traditional Islam, which is incompatible with human rights...” and “Shari’a, however, discriminates against women and non-Muslims, and, in this, is clearly not in conformity with international human rights law” (Freeman, 2004, p. 379). Whether or not these sorts of assertions made about Islamic law are accurate requires a deeper understanding and broader investigation of a complicated tradition than what Freeman provides, and than what is presently found in existing literature. Instead, this void tends to be filled with easy assertions and essentialisms, which Hallaq, describes as follows:

Discourse on things Islamic does not take the form of a hypothesis whose truth or falsehood is to be tested, but rather of a postulate, only to be posited, affirmed, and reaffirmed, whatever its true epistemic value. More curious, if not astonishing, is the daring generality and universality of the judgment, for it offers neither distinctions nor exceptions. It is categorical, yet it is confident. (Hallaq, 1992, p. 173)

⁵⁶ For a fascinating discussion of the essentialization of *Shari'ah* in the religious arbitration debate in Ontario, see N. Bakht’s “Were Muslim Barbarians Really Knocking on the Gates of Ontario?” (2005); S. Razack, *Casting Out* (2008).

Problematic methodologies.

Many essentialisms about *Shari'ah* are supported and constructed by several methodological tendencies of human rights scholars in their study of Islamic law. The first is the tendency towards conservative readings and interpretations within Islamic law, which has always been characterized by a wide variety of opinions and internal dissent. Interestingly however, there is also a tendency within the Western academe towards liberal readings and interpretations of Islamic law, even where they are quite marginal, or where they have been decisively rejected by the vast majority of Muslims, simply because they conform to Western sensibilities and orientations. A second methodological tendency is to return to 7th century Arabia as the context for 'real' Islam and to ignore the fourteen centuries of historical and legal developments since the time of the Prophet Muhammad. Strawson describes this as a 'narrow historical determinism', and notes that fundamentalist Islamists take a similar approach in categorically rejecting the historical engagement and development of classical Greek philosophy by Muslim scholars, and considering this period of Islamic history as an aberration that corrupted the 'pure' and 'original' Islam (Strawson, 2007, p. 38). In a similar vein, one of the characteristics of the Orientalist analysis of Islamic legal history is a persistence in focusing attention on specific issues and ignoring others, such as the periods in history that have been the subject of intense study and those that have been nearly or entirely ignored. Hallaq argues that such features of Islamicist inquiry are no mere coincidence, but strategic decisions that further an Orientalist critique of Islamic law (Hallaq, 2002, p. 2).

Another significant methodological flaw is that the hybridity of cultures, including legal cultures, is seriously underestimated by Western scholars working in the

human rights field, who privilege an approach of ‘rigidly positivist frameworks’ and ‘fixidity of legal lineages’ (Strawson, 1997, p. 41). In *Islam and Human Rights*, Mayer sets out to compare Islamic law with international law to determine where the former has disparities with the latter. This positivist methodology clearly indicates that Mayer believes that there is a clear and absolute identity of Islamic law separate from international law, and also implies that Islamic law has not made important contributions to the international legal system (Strawson, 1997, p. 40). In the Second Edition of her book, published in 1995, Mayer indicates that

Concepts of human rights are just one part of a cluster of institutions transplanted [to the Islamic Middle East] since the nineteenth century from the West, the foremost of which was the model of the nation state...it was inevitable that the legal institutions associated with it should also be transplanted. These legal institutions included constitutionalism and the scheme for the protection of human rights. (Mayer, 1995, p. 10)

With this paradigm in mind, Mayer purports to examine “reactions to imported legal concepts” in her work, which clearly indicates her underlying assumption that human rights are entirely foreign to Islamic law and society (Strawson, 1997, p. 41).⁵⁷

Strawson further critiques Mayer’s choice of sources: “Although entitled *Islam and Human Rights*, by chapter two we have been told that the text will actually compare

⁵⁷ See B. Aral, “The Idea of Human Rights in the Ottoman Empire” (2004), in which he argues that the Ottoman legal system in place in the 18th century accorded extensive rights to the individual, Muslim and non-Muslim alike. Only with the *Tanzimat* reforms of the 19th century, influenced by European legal systems and institutions did the state come to dominate the public sphere and narrow the scope of civil liberties.

three United Nations instruments with a selection of Islamic writings”, which include a handful of seemingly random pamphlets, writings of informal organizations, academic exercises and diplomatic efforts (Strawson, 1997, p. 40-41).⁵⁸ Mayer’s methodology is not only problematic because she chooses a handful of conservative interpretations of Islamic law, but also for her claim that these writings have been dominant within Islamic jurisprudence (Strawson, 1997, p. 41). In short, her methodology can be described as “a combination of silence and selectivity of Islamic sources” which “serves to build an argument that there is a culture-based resistance to human rights in Islam” (Strawson, 2007, p. 34).

Excluded from international law

In relying on an essentialist view of Islamic societies and the West, Western scholarship tends to involve the comparison of ‘one-dimensional binary opposites’ – two systems of law that are closed off to each other and are assumed to have had no dynamic interchange. The juxtaposition between an undisputed positivist version of international law and a static, unaccommodating construction of Islamic law sets the two in opposition, where “Islamic law confronts the international legal order. It is not part of it, it is the ‘other’” (Strawson, 1993, para. 32).

⁵⁸ The main sources Mayer relies upon in her work are: a document by Sufi leader Sultanhussain Tabandeh; a paper by Indian Islamic scholar Abul A’la Mawdudi; a publication by a private organization, the London based Muslim Council; the Iranian Constitution; the Basic Law of Saudi Arabia; al-Azhar’s *Draft Islamic Constitution* and the *Cairo Declaration of Human Rights*, issued by the Organization on the Islamic Conference (Strawson, 1997, pp. 40-41).

The belief that public international law is of an entirely western derivation remains widespread to this day, regularly advanced in most texts on the subject, such as *International Law*, in which author Rebecca Wallace (1992) claims that the "international system is of recent origin," and that it "stems from the rise of the secular sovereign state in Western Europe" (Wallace, 1995, p. 4). Such beliefs are so commonly held that former Secretary General of the United Nations and Professor of Public International Law at Cairo University, Butros Butros Ghali, confidently writes about the "great project of international law that began with Grotius over three centuries ago" (as cited in Strawson, 1993, para. 27). Yet as early as the eighth century (CE), Islamic jurists had produced *al-siyar*, juristic texts that dealt with issues which Europeans would later term international law. Al-Shaybani's *Siyar*, for example, was complete by the end of the eighth century (CE), "some eight hundred years before Grotius set pen to paper". His text codifies in detail the law of war, the law of occupation, the law of treaties and diplomacy, the rights of foreigners, and, far ahead of its time, provides substantial principles about the legal protection of the environment; "many of Al-Shaybani's propositions on the Law of War, would not seem unfamiliar to the modern student of international law" (Strawson, 1993, para. 27). Sven Lindqvist points out that even before al-Shaybani, the earliest humane rules related to warfare are to be found in Abu Hanifa's formulations in the 7th century:

It was Abu Hanifa, a leading legal expert of Persian origin, the founder of a school of law in Baghdad, who first forbade the killing of women, children, the elderly, the sick, monks and other non-combatants. He also condemned rape and the killing of captives... A legal expert in Baghdad, [he] attempted to make war more humane by setting forth rules that were not accepted in Europe until several

centuries later—rules that were still not accepted, in any case not practiced, when colored people were involved. (Lindqvist, 2000, p. 9)

Nathaniel Berman and Christopher Weeramantry (1999) maintain that international law has failed to function at a 'cross-cultural level', which is evident in the hesitation to incorporate ideas from beyond the field, including the neglect of non-Western scholars such as Shaybani (Berman & Weeramantry, 1999, p. 1568). Ultimately, at the root of this exclusion was the relegation of Islamic international law to the status of "fiction", which rested on two hundred years of its exclusion by European powers.

Richard Falk maintains that the Islamic civilization has long suffered from geopolitical exclusion, which continues to the present day, both with respect to substantive and symbolic issues of concern in the Islamic world (Falk, 2000, p. 148). However, were it represented otherwise, Islamic Law would have as much claim as any other legal system to be included in the International legal tradition on the basis of Article 38 of the Statute of the International Court of Justice, which states that the "law of civilized nations" is a source of international law (Strawson, 1993, para. 28). Discarding the 'colonial phraseology' of this article, which Strawson reads as "major legal systems of the world", the right of Islamic law to play a decisive role in the development of International law should be asserted. Even if we accept that the entirety of International law originated in the West, it does not mean that it must necessarily exclude non-Western sources – “there is no necessary opposition between Islamic law and international law. Indeed on the contrary, Islamic law is part of, a source of, public international law” (Strawson, 1993, para. 32).

Scholars and international institutions are increasingly acknowledging this limitation of international law and are taking the steps to recognize its unacknowledged inheritance from non-Christian traditions and to launch a cross-cultural synthesis. For instance, in 1992, the International Law Association established a committee to discuss the role of Islamic law within international law on the grounds of the "need for understanding and dialogue between different intellectual and religious traditions which bear on international law and relations" (International Law Association, 1993). Furthermore, scholars within the Western academe, are increasingly demanding that international law be more receptive to questioning the imperial elements implicated in its formation and to recognize the traces that colonialism as a political phenomenon has had on the substance of the law, its inclusions and exclusions (Youmans, 2003, p. 115). Historically, this has not been the case; "International law's blinders were poised to keep colonial struggles out of its jurisdiction... [it] took for granted the colonial system, thus ignoring the voices of the hundreds of millions living in protectorates, colonies and mandates" (Youmans, 2003, p. 115).

Lost in translation – on rights v. duties and individual v. collective rights.

A third form of exclusion is that which is so to speak 'lost in translation'. It is often asserted that the *Qur'an* does not contain any discussion of rights at all, and some scholars have gone as far as to say that the idea of right is 'unknown' to Islam. For example, Tibi argues: "In Islam, Muslims, as believers, have duties/fara'id vis-à-vis the community/umma, but no individual rights in the sense of entitlements" (Tibi, 1994, p. 289). This is in spite of the fact that the word *haqq* appears frequently in the *Qur'an*, which literally means 'right', but is frequently translated as a 'claim'. According to

Strawson, “there is no linguistic justification for transforming the meaning of this term... certainly in Arabic there has been a stable meaning attached to *huquq* [rights]” (Strawson, 1997, pp. 46-47).⁵⁹ Even more scholars claim that the focus in the Islamic tradition is entirely or primarily on duties.⁶⁰ For instance, Abdulaziz Sachedina asserts that “in Muslim culture the emphasis is on responsibilities, without any mention of rights.” (Sachedina, 2007, p. 55). Yet scholars who specialize in Islamic law assert that the Islamic juristic tradition does not show a preference for rights over duties, and some pre-modern jurist even argued that every duty had a reciprocal right, and vice versa (Abou El Fadl, 2003, p. 155).

Another claim that is often made about the Islamic tradition is that it is anti-individualistic or collectivist in nature.⁶¹ For instance, R.J. Vincent claims that “the

⁵⁹ This mis-translation is of the same provenances as the translation of ‘jihad’ – words that have been given a ‘special cultural translation’. Jihad, almost always translated as ‘holy war’, literally means ‘effort’ and is used in primary and secondary Islamic sources to refer to a wide array of struggles, such as that against the self’s passions, for social justice, with the written word *et cetera* (Streusand, 1997). Thus, while the combative aspect is only one possible translation of jihad, the translation ‘holy war’ is used to “reinforce the Orientalist construction of Islamic societies as based on irrational violence, which the prefix ‘holy’, plucked from the air, conveys” (Strawson, 1997, p. 37).

⁶⁰ For this claim that Islamic law is concerned primarily with duties and not rights, see R. E. Howard, *Human Rights and the Search for Community* (1995), pp. 92-104; Rosen, *The Justice of Islam* (2000), pp. 7, 79-80, 156-7; B. G. Weiss, *The Spirit of Islamic Law* (1998), pp. 145-85; D. Price, “Islam and Human Rights: A Case of Deceptive First Appearances” (2002).

⁶¹ For this oft-repeated claim about the collectivist nature of rights in Islam, see B. Tibi, “Islamic law/Shari’a, Human Rights, Universal Morality and International Relations” (1994); R. J. Vincent, *Human Rights and International Relations* (1986); D. E. Arzt, “The Application of International Human Rights

religious community of Muslims, comes before the individual” and Donna Arzt writes that “the individual’s lack of rights is not seen by Islam in a negative light. This condition reflects the rejection of individualism in favor of communalism. The individual is placed in the context of the community of believers, which it itself has rights as a unit as a whole” (Arzt, 1990, p. 206; Vincent, 1986, p. 42). Tibi goes so far as to argue that this aspect of Muslim culture requires radical religious-cultural reform: “How could cultures in which the individual is conceived of as a limb of an organically defined religious-cultural collectivity admit individual rights without undergoing radical changes in their prevailing world view?” (Tibi, 1994, p. 296). According to Muslim scholars, these generalizations have no basis in the writings of Muslim jurists, and from a theological perspective, the notion of individual rights is easier to justify in the Islamic tradition than a collectivist orientation (Abou El Fadl, 2003, p. 155).⁶² It seems perhaps that such assertions are based on cultural assumptions about the non-Western ‘other’: “It is as if the various interpreters, having decided on what they believe is the Judeo-Christian or

Law in Islamic States” (1990); J. Donnelly, “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982).

⁶² Abou El Fadl provides one possible explanation of this phenomenon: “The widespread rhetoric regarding the primacy of collectivist and duty-based perspectives in Islam points to the reactive nature of much of the discourse on Islamic law in the contemporary age. In the 1950s and 1960s, most Muslim countries, as underdeveloped nations, were heavily influenced by socialist and national development ideologies which tended to emphasize collectivist and duty-oriented conceptions of rights. Therefore, many Muslim commentators claimed that the Islamic tradition necessarily supports the aspirations and hopes of what is called the Third World. But such claims are as negotiative, reconstructive, and inventive of the Islamic tradition as is any particular contemporaneous vision of rights.” (Abou El Fadl, 2003, p. 155).

perhaps Western conception of rights, assume that Islam must necessarily be different (Abou El Fadl, 2003, p. 154).

Second Approach: Occidentalism vis-à-vis International Human Rights

What you, the West, and your local stooges call our backwardness is our authenticity, what you term our primitiveness is our identity, what you denounce as our brutality is our sacred tradition, what you describe as our superstitions is our holy religion, and what you despise as our illiteracy is our ancient custom, and we are going to insist on their superiority to all that you can offer, no matter what you say and no matter what you do.

- As cited in Sadik al-Azm (2009, p. 8).

From Orientalism to Occidentalism.

In reaction to the widespread influence of Said's *Orientalism*, several scholars have begun to theorize about the essentialization of the 'West' by 'non-Westerners' (these terms remain highly ambiguous in their works). This essentialization of the West has been described variously as a 'revolt against the West' by Hedley Bull, 'Orientalism-in-reverse' by Sadik al-Azm, and Occidentalism or *al-istighrab* by several scholars, including James Carrier, Ian Buruma and Avishai Margalit, Hasan Hanafi and Alastair Bonnett. One of the first scholars to use the term 'Occidentalism' was James Carrier in "Occidentalism: the world turned upside down" (1992), and in his anthology *Occidentalism: Images of the West* (2003). In his writings, Carrier differentiates between two types of Occidentalism; 'Occidentalism' proper – essentialistic renderings of the West by Western anthropologists and 'Ethno-Occidentalism' – essentialist renderings of the West by members of alien societies (Carrier, 1992). Carrier's work, which focused on the production of essentialist images of the West by Western anthropologists and scholars

and the resulting impact these images have had on the development of Western identity, constitutes important early theorization of the concept of Occidentalism. For example, he notes that the perceptions and beliefs that non-Westerners have about themselves are sometimes products of the very process of developing essentialist understandings of the colonizing and encroaching Western world (Carrier, 1992, p. 198).

In its most basic formulation, Occidentalism or “Orientalism-in-reverse” has been described as the process by which Easterners succumb to “the dangers and temptations of applying the readily available [Western] structures, styles and ontological biases of Orientalism upon themselves and upon others” (al-Azm, 1981, p. 19). The term has come to loosely describe ‘non-Westerners’ – which could be Asians or Africans but in this case refers to Muslims – who essentialize the West in negative ways and assume that anything non-Western/Islamic is bound to be better. It refers to a very specific kind of discourse (sometimes associated with violent actions) emanating from the Arab and Muslim world which seek to denigrate, denounce and condemn the West in every conceivable way, intending to retaliate “by paying back the West and its orientalism in kind” (al-Azm, 2010, p. 7-8). In many ways, Occidentalism is founded on the nationalism that grew in the Muslim world in reaction to Western imperialism and colonialism (Lary, 2006, p. 9).

In their book *Occidentalism: A Short History of Anti-Westernism*, Buruma and Margalit (2004) define Occidentalism as “the dehumanizing picture of the west painted by its enemies” and define its four main elements as: hostility to the city; revulsion for the material life; abhorrence of the western mind; and hatred of the infidel. Buruma and Margalit also defend the claim that Occidentalism “like capitalism, Marxism, and many other modern isms” was born in the Western world, and was later transferred to other

parts of the world through the impact that western ideas had on radical modernizers and elites in those countries (Buruma and Margalit, 2004). This claim has been contested for grossly underestimating the histories, traditions and cultures of non-Western societies and neglecting the role of the power-relationship between the West and non-West and the impact of American policies (Jacques, 2004). Occidentalism has also been criticized for attempting to produce a conceptual equivalent to Orientalism, since Orientalism is a discourse of power, which has a deep embodiment in Western knowledge and disciplinary structures (Sardar, 2004). Buruma and Margalit's work has been especially critiqued for lacking a definition of what constitutes 'the West' that needs defending; for arguing that the roots of Occidentalism lie in the Western, not the non-Western world; for ignoring the power-relationship between the West and non-West and the impact of Western policies; and, even for getting "dangerously close to the orientalism they abhor" (Jacques, 2004; Sardar, 2004).

In contrast to Buruma and Margalit, Alastair Bonnett points to other meanings or versions of Occidentalism which are less reductionist and more constructive. He draws on Asian and Indian accounts of the development of modern identities of both the West and Asia/India, to establish the centrality of stereotypes of the West in the development of non-Western identities and competing modernities (2005). Bonnett also rejects Buruma and Margalit's assumption that Orientalism necessarily produced or predated Occidentalism in each and every part of the world or that it is merely a supplementation or 'footnote' to Orientalist constructions spawned by the West (Bonnett, 2005, p. 507). He asserts that as a concept, the 'West' emerged in the non-Western world before it emerged in Western Europe towards the end of the 19th century (Bonnett, 2005, p. 506).

In places like Russia, East Asia, and the Middle East, the idea of the ‘West’ was debated for centuries before it entered the lexicon of Western Europe. As one scholar explained: “It appears from history that we have always been watching the West... We used the term ‘western’ before foreigners called us ‘eastern’” (as cited in Bonnett, 2005, p. 506).

However, Bonnett concedes that in certain parts of the world – particularly where Said’s work has had the greatest impact, such as in the Middle East – such a lineage may in fact exist. Said’s *Orientalism* literally instigated a debate on Occidentalism in the Arab world. The most substantial and clear formulation of Occidentalism or ‘*istighrab*’ in the Arab world can be found in the work of Egyptian philosopher Hassan Hanafi’s *Muqaddima fi ‘ilm al-istighrab* [Introduction to the science of Occidentalism] (1991). Hanafi calls on the Arab intelligentsia to establish a science of Occidentalism which would systematically study and understand the West, in the same way in which the West has studied them through Orientalism, and contribute thereby to the Arab world’s liberation: “Occidentalism is a discipline constituted in Third World countries in order to complete the process of decolonization” (Hanafi, 1995, p. 354). Hanafi uses the word *istighrab* to describe Occidentalism, which connotes “to find stranger, odd, queer or far-fetched” and clearly indicates the main thrust of his project: to objectify the West in reductive ways in order to establish and affirm thereby a clear and independent sense of Muslim-Arab identity (al-Azm, 2009, p. 6; Bonnett, 2005, p. 507).

While Hanafi’s call did not lead to any tangible results, al-Azm notes that his project emanated from a vantage point of resentment and inferiority, and it entailed a wholesale, uncritical adoption and emulation of the West’s much-denounced science of Orientalism, with all of its scholarly flaws, which has resulted in its being described as

“more of a type of ideologically-based preaching than a ‘science’” (al-Azm, 2009, p. 7). Al-Azm also notes that a serious adoption of this project would have led to relinquishing the possibility of ever “transcending this whole orientalism/occidentalism *problématique* in the direction of a higher synthesis based on our common human concerns and shared scientific and scholarly interests (i.e., a scholarly horizon beyond both orientalism and occidentalism)” (al-Azm, 2009, p. 7). Bonnett points to the diverse heritage of Occidentalism in the literature that provides a less reductive approach than Hanafi’s; writings from scholars across Afro-Asia whose intent is not the construction of negative images of the West, but rather specialized literature that discusses how the West has been viewed around the world and “insists on the importance of studying non-Western representations of the West in their own right, as both intrinsically important and possessing a degree of autonomy from Western global hegemony” (Bonnett, 2005, p. 507). Bonnett challenges al-Azm’s assumption of “primacy and determining power for Western conceptions of the West and its others” with an alternative conception of the development of ‘the West’ as a concept – one which has multiple sites of creation: “there is no urtext of Occidentalism” (Bonnett, 2005, p. 508).

Occidentalism in the Islam-human rights debate .

Khaled Abou El Fadl argues that the Muslim response to international human rights law was conditioned by the circumstances in which it was introduced to them:

Muslims did not first encounter Western conceptions of human rights in the form of the Universal Declaration of Human Rights (UDHR) of 1948, or in the form of negotiated international conventions. Rather, they encountered such conceptions as part of the ‘White Man’s Burden’ or the ‘civilizing mission’ of the colonial era,

and as a part of the European natural law tradition, which was frequently exploited to justify imperialistic policies in the Muslim world. This experience has had a significant impact on the understanding of human rights in the Muslim social imagination, and on the construction of Islamic discourses on the subject. (Abou El Fadl, 2003, p. 117)

In other words, among Muslim intellectuals and scholars, human rights were initially perceived as a thoroughly politicized weapon plagued by widespread Western hypocrisy (Abou El Fadl, 2003, p.118). Following Abou El Fadl, I will discuss the Muslim intellectual response to human rights into two predominant orientations – (1) Apologetic, and, (2) Exceptionalist. Both of these orientations are reactive and defensive, and rely on Occidental intimations to lay their claims.

1. Apologetics.

The apologetic orientation was intended to defend the Islamic belief and tradition from the perceived onslaught of Westernisation and modernity by emphasizing both the compatibility and supremacy of Islam with the paradigms of modernity, including such concepts as democracy and human rights (Abou El Fadl, 2003, p. 118). Apologists produced a large body of works which listed rights purportedly guaranteed by Islam, sometimes compared with the rights articulated in the UDHR, and often supported the existence of these rights by selective citations from the *Qur'an* or Prophetic reports. These texts were intended to prove Islam's inherent compatibility with international human rights and/or that Islam constituted a fuller and more coherent expression of

human rights; which simply rendered international rights redundant (Abou El Fadl, 2003, p. 119). According to Abou El Fadl,

[A] common heuristic device of apologetics was to argue that any meritorious or worthwhile modern institutions were first invented and realized by Muslims. Therefore, according to the apologists, Islam liberated women,⁶³ created a democracy, endorsed pluralism, and protected human rights, long before these institutions ever existed in the West. (Abou El Fadl, 2003, p. 118)

In the abstract for an article comparing the UDHR to an 8th century book about Islamic governance, Muslim scholar Mohamad Nuh Qudah writes: “What humanity has achieved in the last few years, Islamic law had presented centuries ago...the Islamic understanding for human rights [is] superior to the human understanding because Islam is Allah[’s] law while human understand[ing] is a product of humanity[’s] weakness” (Qudah, 2006, p. 93).

Another slightly different approach is taken by scholars who claim that human rights and Islamic law are incompatible because they are too different, while also dismissing the international human rights system as a hegemonic tool of the West. These scholars try to depict an Islamic human rights scheme which is “strongly different and

⁶³ Literature discussing feminism and Islam is varied and at times even contradictory. For literature which accepts some of the theses, demands and/or methods of Western feminism, see L. Ahmed, *Women and Gender in Islam*, see M. Qudsia, *Islamic Feminism and the Exemplary Past* (2000); A. Al-Hibri, *Islam, Law and Custom: Redefining Muslim Women’s Rights* (1997); A. Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (1999). For works that tend to remain within the classical Islamic frame of reference, see T. Ramadan, *Radical Reform* (2009), pp.207-232; N. Yassine, *Full Sails Ahead* (2006).

defend the system against Western intellectual arrogance and cultural imperialism” (Shah, 2006, p. 871).⁶⁴ For example, they may argue that in contrast to the notion of human rights advanced by Western scholars and institutions, in Islam the origin of rights and duties is Divine and not mere human artifact; rights are theocentric not anthropocentric; and rights granted by God are permanent and eternal, in contrast to man-made rights which are dynamic and changing (Shah, 2006, pp. 871-873).

The depiction of human rights as a part of Western cultural invasion of Muslim societies and a tool for instilling Muslims with a sense of cultural inferiority is a frequent theme of the writings of prominent Muslim scholars like Sayyid Qutb, Abu A’la al-Mawdudi, Muhammad al-Ghazali, and Jalal Kishk. In a popular pamphlet entitled *Human Rights in Islam*, first published in 1976, Mawdudi chastises the “people of the West” for having the habit of “attributing every beneficial development in the world to themselves” (Mawdudi, 1976, p. 15). Yet, he has no qualms about making the exact same claim about Islam. After presenting his ideas on human rights in Islam, Mawdudi asserts:

This is a brief sketch of those rights which 1400 years ago Islam gave to man... we realize that even in the modern age, which makes such loud claims of progress and enlightenment, the world has not been able to produce more just and equitable laws than those given 1400 years ago. On the other hand, it is saddening to realize that Muslims nonetheless often look for guidance to the West. (Mawdudi, 1976, p. 39)

⁶⁴ For scholars who make these claims, see for example Brohi, (1978). “Islam and human rights”; M. Khadduri, “Human Rights in Islam” (1946); A. A. Mawdudi, *Human Rights in Islam* (1976).

In a book entitled *Human Rights in Islam and Common Misconceptions*, Abdul-Rahman al-Sheha summarizes many of the tendencies of the apologetic orientation in the introduction to his book, in which he details an Islamic scheme of human rights:

Some nations and international organizations, call loudly to principles that seek to guarantee human rights. Islam established, within its enlightened Shari'ah (law and jurisprudence) many of these human rights some fourteen centuries ago. The rights enumerated by modern international organizations are characterized by deficiencies in conceptualization, flaws in formulation, and injustices in application. They are subject to political agendas, economic pressure and culturally biased viewpoints. They carry the residues of colonialism and imperialism. Such rights are often enumerated and established not for the interests of all humans, rather, for the benefit of certain organizations and powerful special interest groups. This becomes more evident when, as we see all over the world, many of our fellow humans suffering from the worst atrocities, and yet, there is no organization to truly defend the poor and the weak (al-Sheha, 2007, p. 7).

This body of works produced by Muslim apologetics has been criticized for its lack of critical engagement with Islamic texts and for lacking a genuine ideological commitment and rigorous understanding of the implications of the concept of human rights (Abou El Fadl, 2003, p. 120). There is also tendency to frame the issue of human rights in ways that undermine its universal appeal (e.g.: taking an exclusively Theocentric approach to rights), which, like an exclusively secular approach, denies human rights the common ground necessary to proceed on a global scale (Shakir, 2004, para. 16). The

discourse of apologetics is also prone to gaping generalities, to glossing over nagging problems in predominantly-Muslim societies, such as the fact that in the contemporary era, Muslims live under the authority of nation-states which continue to violate the basic rights of their citizens (Shakir, 2004, para. 16). It seems that the production of these schemes was primarily an exercise in resistance to the deconstructive effects of Westernization and affirmation of self-worth and emotional empowerment, precluding a serious analytical discourse on human rights (Abou El Fadl, 2003, p. 120).

2. Exceptionalists.

The second orientation, is one of Exceptionalism/Anti-Westernism, which responded to modernism by escaping to a strict literalism in which primary Islamic texts became the sole sources of legitimacy, historical and contextual interpretations of the divine law were rejected, and the vast majority of Islamic history and the classical legal tradition was treated as a corruption and aberration of ‘authentic’ and ‘pure’ Islam (Abou El Fadl, 2003, p. 120-121). It also constituted a rejection of most humanistic fields of knowledge, especially philosophy, along with all moral approaches that defer to reason, intuition, contractual obligations, or social and political consensus in favour of one sole source of law: the intent or will of the Divine (Abou El Fadl, 2003, p. 121). For example, Sheikh Omar Abd al-Rahman, the one-time spiritual leader of a violent Islamist Egyptian movement who was convicted of offenses relating to the 1993 World Trade Centre bombing clearly describes what he believes are the distinct values of ‘Islam’ as he denies the worth of Western values and systems:

[T]here are two parties; the party of God and the party of devil...We do not believe in democratic ideas, nor do we believe in natural Law or the ideas of the

French revolution. We do not believe in the principles of the Bolshevik revolution, nor do we believe in materialist capitalism. But we do believe in the way of the followers of the prophetic traditions. To us the *Qur'an* and the prophetic traditions are the authentic premise for our ideas and our way of life and death. This confirms what was said by our Prophet Muhammad “Two things I have bequeathed to you: The *Qur'an* and my traditions. If you adhere to them you will not stray.” (As cited in Strawson, 1993, para. 59)

Like apologetics, the puritan movement also shunned any analytical or historical approaches to the understanding of the Islamic message. However, in contrast to apologetic literature, puritan literature is much more anti-Western and it did not attempt to engage with the idea of human rights or to justify international rights on Islamic terms, but simply set out the divine law, “on the assumption that such a law, by definition, provides human beings with a just and moral order” (Abou El Fadl, 2003, p. 122). The exceptionalists:

[R]eacted to the eagerness of the apologists to articulate Islam in a way that caters to the latest ideological fashion by opting out of the process. In the puritan paradigm, Islam is perfect, but such perfection meant that ultimately Islam does not need to reconcile itself or prove itself compatible with any other system of thought. According to this paradigm, Islam is a self-contained and self-sufficient system of beliefs and laws that ought to shape the world in its image, rather than accommodate human experience in any way. (Abou El Fadl, 2003, p. 121)

As a defensive ideology, Exceptionalism “understood and constructed Islam only through the prism of seeking to be culturally independent from the West”, and so it reacted to Western supremacy in the modern world by constructing Islam as the antithesis of an essentialized view of the West (Abou El Fadl, 2003, p. 123). From this standpoint, Exceptionalists considered Islamic scholars who attempted any type of doctrinal reconciliation to be suffering from “Westoxification” and treated them as betrayers of the Islamic tradition (Abou El Fadl, 2003, p. 123).

Wither Orientalism and Occidentalism?

This world-wide cultural diffusion [of Western culture] has protected us as man had never been protected before from having to take seriously the civilizations of other peoples; it has given to our culture a massive universality that we have long ceased to account for historically, and which we read off rather as necessary and inevitable.

— Ruth Benedict (2005, p. 6).

Indeed, understanding as a continuous intellectual endeavor is nothing but the rigorous critique of misunderstanding, misrepresentation, and all sorts of cultural myths and misconceptions.

— Zhang Longxi (1998, p. 2)

The problems with Orientalist and Occidentalist approaches to the encounter between the human rights and Islamic traditions can be summarized in their disregard for the four principles for a constructive encounter outlined in chapter 1. Both approaches: (1) assume a sense of completion and perfection of their convictional system, be it human rights or Islam; (2) rely on easy essentialisms about the other tradition instead of seeking a deep and nuanced understanding; and finally, (3) and (4) seek to maintain the integrity

of their tradition by clinging to a rigid and positivist framework that rejects internal contestation or external contribution.

It is evident from the above discussion and survey of the literature that there is an assumption among human rights proponents that human rights as understood and practiced in the West have reached a status of universal consensus and acceptance. Therefore, they treat any discussion or debate about human rights emanating from non-Western peoples as an illegitimate rejection of an agreed upon and complete project, and replicate thereby the power relationship between the West and the Islamic world by representing the Western legal system as superior and complete as they de-legitimize Islamic law; “during the high point of colonialism, Europeans saw Islamic law as flawed due to its connection with a false religion, today, it remains flawed due to its alleged rejection of human rights. What remains consistent is the right of Europeans (and the West in general) to take the authoritative view” (Strawson, 2007, p. 34). Legal Orientalism has been the primary vehicle through which the human rights and Islam debate has been approached since the colonial era, and it is sustained to this day through a complex mix of Western power, the purported superiority of European intellectual judgment, as well as racism; “it uses the superior location that power provides to motivate an intellectual system which necessarily subjects Islam to European evaluation” and to build a superior sense of Western self-identity (Strawson, 1995, p. 21). By constructing fixed images of Islam and the West, Orientalism obscures the actual discussion of human rights in Muslim societies, and deflects attention from the specific impact of colonial occupation on the region (Strawson, 1997, p. 49).

In contrast, Muslim societies encountered human rights during the colonial era, and have since continued to witness its uneven reach and instrumentalization as part of ongoing imperialistic policies in the Muslim world. An Orientalist approach towards Islamic law elicits a reactive response from Islamist movements which simply reverses this process by denying the legitimacy of Western political and legal values and representing Islamic law as the complete and superior system and the Western legal system as decadent (Strawson, 1993). In this way, “the Islamists have more in common with the approach of some of their Western detractors than they might think. Islamists similarly see the only solution for the future of humanity as a turn to Islam. Both approaches are universalist” (Strawson, 1993, para. 60).

A second step away from Orientalism and Occidentalism, after developing a sense of the experimental and incomplete nature of one’s own project, would be a conscious commitment to developing a deeper and more nuanced understanding of the other tradition, be it human rights or Islamic law. Interestingly, scholars who boldly assert and critique the human rights tradition in Islam also readily admit their ignorance of Islamic law. For instance, in his article identifying major conflict areas between *Shari’ah* and human rights and Muslim positions on human rights today, Heiner Bielefeldt (1995) carefully includes a footnote at the very beginning of his essay:

In order to avoid misunderstandings, I should make it clear that I am not a Muslim and thus not part of the internal Islamic discourse on human rights. Furthermore, I am lacking the language skills needed to explore the sources written in Arabic, Persian, Turkish or Urdu. Consequently, I will only make reference to articles or books which are available in English, French or German. I have tried to remedy

this problem by talking, over some years, with many scholars of Islamic studies and, in particular, with Muslims of different backgrounds and various political convictions. (Bielefeldt, 1995, p. 617)

Human rights theorists who write about Islam and human rights have been criticized for their underdeveloped study of Islamic theoretical discourse and the contested variations of Islamic law and for clinging to a simplistic and conservative reading of Islamic legal history (Quraishi, 2000). Overcoming these tendencies will open up an engagement with existing scholarship that has been up to this point excluded from modernist and post-modernist concerns. Similarly, Muslim apologetics that have authored Islamic human rights schemes have been criticized for lacking understanding of what the concerns of human rights are and their approaches are described as “by-products of methodological confusion and weaknesses” (Mayer, 1999, p. 71; Tibi, 1994, p. 225). These are some suggested areas where scholars from the Western and Muslim worlds can seek to strengthen their understanding of the ‘Other’.

A third step involves breaking the false dualism between Islam and the West and developing a new engagement with Islamic law which is more inclusive of Muslim voices in international and human rights law. Where an Orientalist methodology exists which relies on essentialism, otherness, and absence, it is not possible to simply ‘lose essentialism, reverse otherness and fill in absence’; this would merely sustain Orientalism by constructing images of Islam from wider sources (Strawson, 1997, p. 50).

The paradox of globalization is that it at once causes the old traditional points of reference to disappear while also “reawakening passionate affirmations of identity that

often verge on withdrawal and self-exclusion, self-protection, self-preservation, and self-definition over and against the “Western mega-machine” (Ramadan, 2005, pp. 4-5). Espousing this binary vision of the world may provide Muslims with an immediate sense of power, might, and legitimacy in their otherness, but in reality it strengthens the logic of the dominant system, “whose power, by contrast, lies in always appearing open, pluralistic and rational” (Ramadan, 2005, p. 5). Yet, if properly managed as a cosmopolitan project, the human rights movement provides a unique historical juncture that offers the possibility of a new, universalist, engagement between human cultures. What is needed at this juncture is building a new human rights current which can draw on the experiences and contributions of all cultures without privileging any one culture. Dissolving the fixed character of the false dualism of East and West will lead us to realize how intertwined the modern era really is:

It is conceived on the basis of superficial criteria – the criteria of the mechanical and the technical – whereas there no longer exists a ‘West and an ‘East’ each forming a self-contained conceptual unity. The West contains many ‘Wests’ more decadent than any Arab decadence and the Arab East has many ‘Easts’ more advanced than the most advanced of these ‘Wests’. (As cited in Strawson, 1997, p. 50)

Chapter 3: Existing Methodologies for Reconciliation and Reform: The work of Abdullahi An-Na'im, Abdulaziz Sachedina and Khaled Abou El Fadl

Beyond the approaches of Orientalism and Occidentalism that assume a competing and conflicting relationship between Islam and human rights, some contemporary scholars have proposed alternative approaches that advocate for reconciliation between the two traditions. Proponents of compatibility generally advocate a partial reform of classical Islamic law, a complete overhaul of Islamic law, or a re-conceptualization and re-thinking of certain elements of Islamic theology and ethics to mediate the tensions between human rights standards and the Islamic tradition. This trend of scholarship represents a welcome evolution in Muslim scholarship on human rights, which seeks its grounding in the foundational sources of Islam, acknowledges the existence of differences (in form or substance) between Islamic law and international human rights, and advocates for liberal interpretations of Islam to overcome these tensions. While quite a few scholars have written on ways to reconcile Islam and human rights,⁶⁵ in this chapter I will discuss and evaluate the works of three leading scholars whose contributions to the debate have made them authorities in the field – Abdullahi An-Na'im, Abdulaziz Sachedina, and Khaled Abou El Fadl.

The philosophies and formulae developed by these three scholars are generally consistent with and representative of the norms, principles, and substance of the human rights corpus, and for this reason, they have generally been well received in the West. It is important to note that by their own assertions, these scholars are intending to reach and

⁶⁵ For a comprehensive list of some of important books and articles addressing how to reconcile Islam and human rights, see footnote 2 above.

influence not only Western academics through their writings, but also, and primarily a Muslim audience. While I may agree with some of the objectives set and conclusions reached by An-Na'im, Sachedina, and Abou El Fadl, I will also argue that the goal of synthesis between human rights and Islam requires acceptance of the norms and foundational principles of *both* human rights and Islam as discursive traditions, and not simply the assimilation of Islam to the human rights tradition. Moreover, a necessary step towards implementing a reconciliatory effort is to garner the support of substantial numbers of believing Muslims and human rights advocates, which is unlikely unless we carefully adhere to the principles for intercultural dialogue that I have previously outlined.

In this chapter, I will begin (Part I) by discussing Abdullahi An-Na'im's scheme of reconciliation through the discarding of the 'historical *Shari'ah*', along with the whole of its legitimating framework, and the development of a modern version of *Shari'ah* based on new methods of interpretation (notably that of 'reverse abrogation') to render Islamic law consistent with human rights standards. In Part II, I will evaluate Abdulaziz Sachedina's proposal to ground human rights in an 'overlapping consensus' of universal morality through a re-formulation of Islamic theology that would enable it to share secular morality's universal concern for human dignity and human agency. In Part III, I will provide an analysis of Khaled Abou El Fadl's rethinking of aspects of Islamic theology and *Shari'ah* epistemology and his engagement with the existing human rights resources in the classical *Shari'ah*. Finally, I will conclude with some general remarks on the problematic aspects of these three reform proposals, and I will discuss how these deficiencies can be addressed in light of the framework I have developed.

Shari'ah Reform through 'Reverse Abrogation': Abdullahi An-Na'im

An-Na'im has been described as one of the jurists from "the South" who has "made substantial contributions to the theory and practice of human rights" (Baderin, 2010, p. xiii). He is a leading authority on the topic of Islam and human rights, and his writings are among the most cited. His contributions on the subject span more than three decades during which he has engaged with almost every topical issue related to the compatibility of Islam and human rights; issues which he has grappled with since his days as a student at the University of Khartoum, Sudan, in the late 1960s (Baderin, 2010, p. xiv).

In an introductory essay to *Islam and Human Rights: Selected Essays* (2010), a compilation of a selection of An-Na'im's essays on the topic of Islam and human rights, Mashood Baderin identifies three central elements of An-Na'im's philosophy: (1) cross-cultural universality of human rights; (2) the re-affirmation of secularism for Muslim states, and; (3) internal reformation of Islamic law based on the philosophy of his mentor *Ustadh* Mahmoud Mohamed Taha. In what follows, I will critically examine these three elements of An-Na'im's philosophy, with special attention to his reform methodology, which is especially pertinent to this discussion.

Cross-cultural universality of human rights.

An-Na'im is a staunch advocate of the universality of human rights. He clearly states: "[h]uman rights ought, by definition, to be universal in concept, scope and content as well as in application: a globally accepted set of rights or claims to which all human beings are entitled by virtue of their humanity and without distinction on grounds such as

race, gender or religion” (An-Na’im, 1994, p. 120). Nonetheless, An-Na’im is careful to point out that this universality cannot simply be assumed to exist, or ‘proclaimed’ in international documents, but rather, a genuine agreement on the universality of the content and substance of rights is a goal to be realized through deliberate strategies that aim to attract popular support (An-Na’im, 2000, pp. 100–101).

To this end, An-Na’im advocates for cross-cultural dialogue that would build a substantial agreement on the content, scope, and concept of rights. He maintains that a universal consensus cannot be mobilized in a global project on purely Western liberal notions of individual civil and political rights, but rather, it must be forged on the basis of genuine universal respect and discourse “undertaken in good faith, with mutual respect for, and sensitivity to, the integrity and fundamental concerns of respective cultures” (An-Na’im, 1994, pp. 122; 128). To enable Islam to make a meaningful contribution to this dialogue, An-Na’im contends that Muslims must choose liberal interpretations of Islamic sources to make Islamic law amenable to modern international relations and human rights (Baderin, 2010, xvii).

Affirmation of secularism for Muslim states.

An-Na’im’s thinking about the appropriateness of secularism for Muslim states evolved in his writings through the years. Initially, in a 1987 article entitled “Islamic Law, International Relations, and Human Right: Challenges and Response”, An-Na’im argued that “for Islamic states, smooth and successful transition to complete secularism is neither likely nor desirable because Muslims are obligated to live in accordance with Islamic law” and “Muslim belief precludes a purely secular approach to law and the

state” (An-Na’im, 1987, pp. 320; 333). Instead, he proposed that Muslims’ religious duty would be satisfied by applying a modern and reformed version of Islamic law consistent with peaceful international relations and respect for human rights (An-Na’im, 1987, p. 320). An-Na’im later modified this earlier position and argued that the presumed incompatibility of Islam with secularism must be re-evaluated. An-Na’im felt that this modification was necessary to safeguard the pluralistic character of nation states and the freedom of religion of all citizens, including Muslims, whose freedom of religion would be more likely violated by a state that promoted a particular religious doctrine than one that was neutral on religious matters (An-Na’im, 2003, p. 38).

To establish secularism for Muslim societies, An-Na’im begins by professing that there is widespread suspicion associated with the term ‘secularism’ in Islamic societies, where it is generally perceived as a Euro-Christian concept imposed upon non-Western societies by colonial and neo-colonial forces (An-Na’im, 2005, p. 61). Rather than simply equating secularism with exclusion of and indifference towards religion, or a diminishing role for religion in public life, An-Na’im proposes re-defining secularism in a way that is “deeply contextual and dynamic”. He defines it for the purpose of his argument as a state that is neutral with respect to both religion and non-religion and adheres to a constitution that protects human rights (Fadel, 2009, p. 102). Following Stephen Monsm and Christopher Soper, An-Na’im maintains that the minimum requirement for a positive relationship between religion and the state is that “people are neither advantaged nor disadvantaged by their adherence to their secular or faith-based tradition” (An-Na’im, 2005, p. 63).

An-Na'im proposes to overcome the tensions between religion, secularism, and human rights through his theory of "conceptual synergy and interdependence". In a 2005 article, he analyses how human rights depend on both secularism and religion; how religion depends on both secularism and human rights; and finally, how secularism also depends on both religion and human rights.⁶⁶ In this way, An-Na'im asserts that individuals and communities do not need to make a choice among religion, secularism and human rights, but rather, the synergy between the three of them should be strengthened and promoted (An-Na'im, 2005, pp. 57; 80).

Reforming Islamic law – Ustadh Mahmoud Mohamed Taha's Formula.

As early as 1987, An-Na'im was advancing an agenda for the reformation of Islamic law through a modern interpretation of the *Shari'ah*. He characterizes *Shari'ah* as a historical formulation of Islamic law that is inconsistent with prevailing human rights

⁶⁶ An-Na'im argues that human rights need religion to "validate their moral foundation and to mobilize religious adherents" and it needs secularism to "provide the political stability and peace among communities of believers and nonbelievers". Secularism needs human rights for "normative guidance in the daily protection of people against the abuse of state power" and it needs religion "to provide a widely accepted source of moral guidance for the political community and to help satisfy and discipline the nonpolitical needs of believers within that community". And religion needs secularism "to mediate relations between different communities (religious, antireligious, nonreligious) that share the same political space" and it needs human rights "to protect the dignity and rights of religious adherents within any political system... and ensure freedom of belief and practice within each religion itself and thus ensure the evolution and continuing relevance of each religion to its own membership". See An-Na'im, 2005, pp. 64-65.

standards, especially the rights of women, non-Muslims, and freedom of belief among Muslims (An-Na'im, 1987, p. 331). While acknowledging that the norms of "historical *Shari'ah*" were considered enlightened and humane by the standards of the pre-modern era, he contends that historical *Shari'ah* must be displaced as a legitimizing force in modern Muslim states: "criticisms are not ... addressed to *Shari'a* in its own proper historical context but rather against those who wish to resurrect dated concepts and principles and implement them under radically transformed domestic and international conditions" (An-Na'im, 1991, p. 11). In contrast to this 'historical *Shari'ah*', An-Naim has proposed the development of a new, modern version of *Shari'ah* based on a modern interpretation of the sources of Islam, which would promote a "kinder, gentler Islam" entirely consistent with human rights standards (An-Na'im, 1991). He calls upon Muslims to achieve their own 'reformation' through a very specific reform methodology developed by his mentor, *Ustadh* Mahmoud Mohamed Taha, who was executed in 1985 by the Sudanese government on charges of heresy and apostasy according to Sudanese law at the time.

In order to make sense of Taha's proposed methodology, some background information about the Islamic founding texts, the *Qur'an* and *Sunnah*, are necessary. The *Qur'an* is believed by Muslims to have been revealed from God to the Prophet Muhammad over a period of 23 years. The first revelations and the beginning of the Prophet's mission occurred in Mecca (610 CE) and continued for 13 years until the migration to Medinah (622 CE), precipitated by the unbearable persecution of the Prophet Muhammad by his tribe. The revelation continued to descend during the Medinan period for about 10 years. The two periods represent two levels or stages of the

message of Islam, with the Meccan period characterized by establishing the basic tenets of belief, such as belief in one God and an afterlife, essential values like justice and mercy, and the continuity of Islam from the previous Abrahamic faiths. In contrast, the Medinan revelations were characterized by commands concerning social and political goals and concrete instructions on how to live in a community of both believers and non-believers, at times surrounded by hostile enemies, in keeping with God's wisdom (Chittick & Murata, 1994, p. xxiii).

Taha maintained that the earlier message of the Meccan period represents the “eternal and fundamental message of Islam” that emphasizes the inherent dignity of all human beings and the fundamental values of equality and justice (An-Na'im, 1990, p. 52). His main contention is that the positive public law of Islam was based on the revelations of the subsequent Medinan stage rather than the earlier Meccan stage. This was largely due to the fact that the first public order established in Medina served as a model from which precedents were set. In some cases, this was carried out by medieval Muslim jurists through the process of '*naskh*' (literally abrogation or repeal), which allowed for the abrogation or repeal of certain texts of the *Qur'an* and Prophetic tradition (*Sunnah*) in favor of other texts of the *Qur'an* and *Sunnah*. Where inconsistencies were deemed to exist between the Meccan and Medinan verses and related *Sunnah*, the early jurists held that the Medinan verses abrogated the earlier Meccan guidance, and so, An-Na'im argues, the positive law of the *Shari'ah* was based on the revelation of the Medinan stage (An-Na'im 1990, p. 56).

The basic tenet of Taha and An-Na'im's new epistemology of the “evolution of Islamic legislation” is the establishment of a new principle of interpretation, that of

‘reverse abrogation’, through which Medinan verses would be abrogated and replaced with the earlier more universal verses of the Meccan period. In other words, verses that used to be enacted as *Shari’ah* will be repealed (Medinan), and verses that used to be repealed (Meccan) would be enacted into modern Islamic law for greater compatibility with the international standards of human rights and law (An-Na’im, 1990, p. 56).

Critiques of An-Na’im.

An-Na’im’s extensive writings are a welcome addition to our growing awareness of the challenges facing *Shari’ah* in modern Muslim states. An-Na’im effectively highlights the need for recognizing these challenges and raises valid and complex questions about engaging pre-modern *Shari’ah* norms in contemporary times. However, his approach is not without significant epistemological problems, which ultimately render his proposed methodology and conclusions unconvincing in Islamic terms and make it unlikely that his thesis will carry implications beyond the interest of Western academics. While a detailed critique of An-Na’im’s scheme is beyond the scope of this project, I would like to highlight a few salient reasons that explain why his proposed alternative lacks the legitimacy and grounding necessary for it to have transformative potential.

First, like many other scholars advocating the compatibility of Islam and human rights, An-Na’im contends that secularism is integral to advancing human rights in

predominantly Muslim societies.⁶⁷ While An-Na'im admits that the term 'secularism' carries negative connotations in the Muslim world, his proposed re-configuration of the term to connote complete neutrality of the state and not the relegation of religion to the private domain is neither clear, nor is it compelling. The problem with attempting to redefine a ubiquitous term like secularism is that it has come to be widely perceived to revolve around two central meanings: the separation of religious from secular institutions in government and the exclusion of religion from the public sphere.⁶⁸

According to Abou El Fadl, secularism has "become an unworkable and unhelpful symbolic construct" in the Muslim world, where it is associated with Western intellectual invasion, both during the Colonial and post-Colonial periods, as well as a symbol of "a misguided belief in the probity of rationalism and a sense of hostility to religion as a source of guidance in the public sphere" (Abou El Fadl, 2002, p. 93). Even if it has been given a more expansive theoretical definition by some scholars, like Charles Taylor,

⁶⁷ Other scholars who make this argument include B. Tibi, *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations* (1994); A. E. Mayer, *Islam and Human Rights: Tradition and Politics* (2006).

⁶⁸ Among established constitutional democracies, secularism is associated with a broad spectrum of political views that permit a wide variety of interpretation of the role of religion within the state and in issues of governance, which makes it difficult to objectively define what a 'secular state' is. France, Turkey and even Québec can be placed on one extreme of the spectrum, where *laïcité*, not just secularism, seeks to maintain a democratic public space completely free of religion. In contrast, Canada and the UK permit a more open, multicultural secular state in which religion and religious expression are permitted in the public sphere and remnant traces of Christian norms, values, and religious doctrine continue to permeate public institutions. The United States is in a category of its own in that its constitution strictly separates Church and State, and yet religion plays an influential role in the public and private spheres.

its symbolic value remains unchanged.⁶⁹ Furthermore, the model of a secular state that is completely neutral with respect to religion and non-religion and does not advantage or disadvantage adherence or non-adherence to religion remains an ideal that has not yet been realized. Western states have assimilated Christian norms in a way that renders them invisible, such that a Christian citizen whose religion has already been ‘accommodated’ can be ‘secular’ while practicing their religion without hindrance, while Muslims, Jews, and other minorities are depicted as constantly demanding ‘unreasonable’ accommodation.

Sachedina argues that the complete secularization of the public sphere is alien to Islamic juridical and theological anthropology: “Human beings are not conceived in terms of compartmentalized individuals who can separate the spiritual from the temporal in their persons and keep the former from interfering with their everyday lives” (Sachedina, 2007, p. 50). As a result, given the choice between allegiance to *Shari’ah* and allegiance to a secular Constitutionalism, most Muslims would understandably choose the former. This aversion to secularism is amplified by the consistent failure of the liberal-secular paradigm to deliver justice in Muslim countries that adopted its presuppositions in restructuring their societies in the post-colonial period (e.g.: Turkey, Algeria) (Sachedina, 2007, p. 50).

⁶⁹ In *A Secular Age*, Charles Taylor (2007) advances a re-definition of secularism, in which it can carry one of three meanings: (1) withdrawal of religion from the public sphere; (2) decline in personal religious commitment; and most novel, (3) a shift from understanding religious commitment as the norm to one of many options available in a society that does not revolve around any particular philosophy as a point of reference.

Denouncing secularism for Muslim states begs the question: what alternatives have Muslim scholars proposed to secularism by which to avoid the hegemony of religious law and the possible abuse of power facilitated by the sovereignty of the nation state? While the post-Enlightenment experience of separating religion and politics is alien to Muslim political experience, this is not to say that there is no separation between religion and the state in the Islamic Universe of Reference. In fact, there has always been a functional recognition of the separate jurisdictions of the spiritual and temporal which allowed a predominantly Muslim order to meet the demands of what were often multi-faith and multi-cultural societies (Sachedina, 2007, p. 61). Sachedina contends that the separation of the spiritual from temporal is a necessary means to achieving freedom from repression, coercion, and injustice, and when Muslim public orders have not conceptually distinguished the strictly religious from the political, they have often proven unable to establish adequate freedom of religion and conscience (Sachedina, 2010, p. 192).

Ramadan advances the use of a principle of ‘distinction’ instead of ‘separation’ that may allow Muslim societies to evolve towards open political systems based on pluralist principles. Ramadan argues that “the principle of “separation” was born in the West in the course of a history that was essentially about Christianity and that made possible the birth of secularism and democracy... we propose that the principle of “distinction” should allow Muslim societies to evolve toward an open political system based on very demanding pluralist principles” (Ramadan, 2005, p. 246). Ramadan locates four vital principles in scriptural sources: the rule of law, equality of citizenship, universal suffrage, and the establishment of rules that allow change or removal of people in power (Ramadan, 2005, p. 246). With these principles in mind, it is left to Muslim

states to determine a model that would be faithful to these principles while countenancing their specific history, culture, demographics, and even their collective psychologies; “the principles are universal, but not the models” (Ramadan, 2005, p. 246; Mutua, 2002, p. 156). Mutua argues that political arrangements in non-Western states may come to resemble ideas and institutions of Western political democracy, or borrow from them, but if permitted to evolve organically, they will belong to the people (Mutua, 2002, p. 5).

What this means is that the choice is not one between a secular and theocratic state. It is possible to conceive of a state that is stable, based on constitutionalism, respects the rule of law, grants individual rights, while allowing religion to influence governance and play an active role in the public sphere. Sachedina argues that “Abrahamic traditions in general and Islam in particular have much to contribute to a discourse about the desirability of including universal religious argument calling for human cooperation in establishing a just public order” (Sachedina, 2006, p. 177). To make this contribution to modern civil society, Muslims must develop “a fresh reading of their heritage... to explore the possibilities of retrieving the core values of Islamic system to offer this fresh paradigm (Sachedina, 2009, p. 77). The accommodation of a dynamic presence for religion in the public sphere is not particular to the Muslim world alone. In his landmark study *Public Religions in the Modern World*, Jose Casanova argues that religion has been “deprivatized” on a global scale since the 1970s, which has led scholars to question previously hegemonic theories of secularization that envisioned the “increasing marginalization of religious within the public sphere in favor of positivist, secular-humanist societies”. They have been left them to ponder the reality of “public

religions”, the repoliticization of religions that have rejected the marginalized, privatized status forced upon them by modernity (Halverson, 2010, p. 127).

For the purpose of the present work, my central contention is that the human rights corpus should not be inextricably tied to secularism. Promoting secularism – both as it is widely conceived and also as An-Na’im intends to re-configure it – should not be done under the guise of human rights neutrality. To do so would be to the detriment of the human rights project, while will continue to be perceived as a threat to non-Western societies that are suspicious of secular ideologies that they believe are “determined to destroy the spiritual and moral foundations of a global community to make room for liberal secular ideas of inalienable human rights” (Sachedina, 2007, p. 61).

Second, An-Na’im’s project aims to “transform the understanding of the very foundations of traditional Islamic law”, not simply to reform them (Voll, 1990, p. ix). To this end, he wholly rejects the traditional formulations of Islamic law, along with the entire learned theological, ethical, and legal tradition that has existed for well-over a millennium, as well as any modernist efforts to reform the medieval legal structure that accept any of the assumptions of traditional Islamic law (Voll, 1990, p. x). He makes no attempt to integrate Western and traditional Islamic thought, but calls for a total reinterpretation of the nature and meaning of Islamic public law (Voll, 1990, p. ix). In contrast to other advocates of reform like Fazlur Rahman and Sachedina, who have strongly asserted the need for corroboration between Muslim intellectuals and traditional Islamic scholars, An-Na’im contends that “there is no basis for the authority which Muslim intellectuals concede to the ‘*ulama* and the proponents of *Shari’ah*” (An-Na’im,

1990, p. 61).⁷⁰ He also notes that although his own mentor, Ustadh Taha, graduated as a civil engineer, he did not suffer from an “inferiority complex” in relation to the “specialists” of *Shari’ah*, but on the contrary, he believed that they were in fact “the biggest obstacle to genuine Islamic reform” (An-Na’im, 1987, p. 205).

This radical approach seems to be conditioned by a very specific conceptualization of *Shari’ah* as a body of positive law from medieval times that is inflexible and unamenable to any internal renewal and ultimately incompatible with modernity. An-Na’im does not countenance any of the internal reform mechanisms built into the *Shari’ah* itself and he rejects any attempts to engage in exegetical or hermeneutical analysis of Islamic sources (Fadel, 2009, p. 104). These oversights may be at least partially owing to An-Na’im’s lack of expertise in traditional Islamic law. This shortcoming is evident in several aspects of An-Na’im’s writing. In numerous places An-Na’im misconstrues the meaning of technical terms in the *Qur’an* and traditional juridical sources and engages in what critics have considered to be a ‘lack of contextualization’ and ‘forced interpretation’ of verses of the *Qur’an* to make them fit the general thesis of his book. He also relies heavily on secondary sources in English, many of which are

⁷⁰ Fazlur Rahman points out that the ‘*ulama*, traditional scholars trained in *Shari’ah*, are incapable of contributing to the process of modernization alone because their education and orientations restrict them to traditional confines and may often even prevent them from perceiving existing problems. He concludes that this is why modernism has been the work of “lay” Muslims with a liberal education, yet their credentials have been suspect, which makes it difficult for them to lay the foundations of a new Islamic theology (see An-Na’im, 1990, p. 61). Ramadan on the other hand advocates for collaboration between Islamic scholars and intellectuals and professionals in which the latter furnish the former with the political and social context needed to renew the tradition (Ramadan, 2005, p. 163).

written by mid-twentieth century Orientalists (e.g.: Schacht, Coulson, Gibb, Goldziher) whose preconceived interpretations of the Islamic tradition have been categorically rejected (Sachedina, 1993, p. 157).

Furthermore, the language of ‘reformation’ implicit and explicit in An-Na’im’s work may also be alienating to the Muslim audience he seeks to convince. An-Na’im writes: “Far from advocating the abandonment of the Islamic tradition, I am calling on Muslims to achieve their own ‘reformation’ in order to transform their tradition into a viable and just ideology for their modern exercise of their right to self-determination” (An-Na’im, 1991, p. 11). While most Muslims may believe the need for some level of internal renewal, using the language of and deliberately driving a ‘reformation’ within Islam may strike some as “copying another experience, from another era, in another religious tradition... [as] social engineering and intellectual tinkering” (El-Effendi, 2010, p. 34).

Third, An-Na’im asserts the need for cross-cultural dialogue about the content and scope of human rights, which he argues cannot be based on purely Western liberal notions of rights but must be entered with an “open mind and with the recognition that existing formulations may be changed – or even abolished – in the process” (An-Na’im, 1994, pp. 122; 128). Yet, An-Na’im hardly suggests any reformulations of human rights (or related notions of liberalism and secularism), but accepts them as perfected ideas and self-evident universals that are above challenge. He simply places the Islamic tradition between the ‘universality of human rights’ and the ‘secularity of the modern nation-state’ and so the onus is always on Islam to be radically reformed to comply with universal human rights and secularism and never the other way around. This uncritical acceptance

by An-Na'im has also be criticized by other scholars like Santos De Sousa who critiques An-Na'im for "uneven inconsistency" in that his diatopical hermeneutics is directed towards Islamic reform while he "accepts the idea of universal human rights too readily and acritically, becoming surprisingly ahistorical and naively universalist as far at the Universal Declaration goes" (Santos, 2002, p. 53).

Finally, An-Na'im's reform methodology is entirely based on the work of his mentor, Ustadh Taha, whom he met early on as a student in Sudan. While Ustadh Taha's reform strategy may be an interesting reform mechanism, An-Na'im should have gone beyond the work of Ustadh Taha to consider other reform strategies, particularly those that are more grounded in traditional sources. Many scholars and scriptualists have also strongly criticized An-Na'im's suggested reform methodology of 'reverse abrogation',⁷¹ describing it as a case of "insisting on retaining and elevating a relatively minor concept in the traditional methodology (*naskh*) to a place of fundamental importance in his modern strategy for reform" (Erwin, 2001, p. 114). His presumption that the *Qur'an* exhibits a clear epistemological break between the eternal and tolerant message of Meccan verses and the more restricted or 'realistic' message of the Medinan verses has been described as inaccurate by scholars who argue that the *Qur'an* addressed the shifting concerns and evolving challenges of the early Islamic public order. Furthermore, Muslim scholars are increasingly deconstructing the pre-modern theory of abrogation,

⁷¹ See for example: C.P. Erwin, *Islamic Law and Modernity: Abdullahi an-Na'im's Proposal for Reform* (2001); M. Arkoun, "The Concept of "Islamic Reformation"" (1993), pp. 11-24; I. Ahmed, "Abdullahi An-Na' im on Constitutional and Human Rights Issues" (1993), pp. 61-74; L. Safi, "Towards an Islamic Tradition of Human Rights" (2001), pp. 18-20.

which was largely a medieval development, arguing instead that the Medinan verses are to be interpreted through the prism of the ethical norms and standards established in the early Meccan period, providing the *Qur'an* with a coherent moral code that overcomes any perceived inconsistencies or contradictions (Edaibat, 2011, p. 47). Courtney Erwin describes his scheme as “provocative and aggressive” in that it alleges that

The texts of the *Qur'an*, which have bestowed stability through continuity and a level of objective truth through their unwavering status of certainty upon the legal history and personal conviction of Muslims for over one thousand years, are not to be subject to human interpretation... Does modernity have the power to influence a hermeneutical paradigmatic shift that deconstructs certainty and reconstructs the meaning of law and morality in the *Qur'an*? (Erwin, 2001, p. 89)

More generally, the doctrine of *naskh* as a strategy of reform has been refuted by several contemporary Muslim scholars, which leads me to conclude that An-Na'im exerted an unworthy amount of energy on developing and defending a scheme of doubtful relevance to the successful reform of *Shari'ah* law.⁷²

In spite of these significant problems, An-Na'im's philosophy has received widespread acceptance among Western academics working primarily in the areas of comparative law and human rights. This is somewhat problematic because these scholars are simply not aware of the limitations of his approach from the perspective of the

⁷² For examples of modern works by Islamic scholars refuting the doctrine of *naskh*, see M. H. Kamali, *Freedom of Religion in Islam* (2007), p. 88; A. H. Saqqa, *La Naskh fi al-Qur'an* (n.d.); I. A. Khan, *The Theory of Abrogation: A Critical Evaluation* (2006); J. M. Afanah, *Al-Ra'y al-Sawab fi Mansukh al-Kitab* (1992).

Islamic tradition's own discursive standards of coherence. Santos for example describes his scheme as the more inclusive of "two different interpretations of the *Qur'an*" which provides a "wider circle of reciprocity" (Santos, 2002, pp. 55-56). Paradoxically, in his writings An-Na'im recognizes that it is imperative to utilize a reform methodology that would be accepted by Muslims themselves - yet his own methodology is gravely lacking this legitimacy.⁷³ He also mentions that his proposed reform will likely be rejected, but for the wrong reasons: "because it challenges the vested interests of powerful forces in the Muslim world and may upset male-dominated traditional political and social institutions" (as cited in Baderin, 2010, p. xxiii). I contend that while any reform strategy is likely to be resisted by elites and traditional institutions, An-Na'im's methodology would be rejected for a less insidious reason; he assigns completion to the human rights tradition while relying on essentialisms about the Islamic tradition; he fails to conceptualize Islam as an evolving, discursive tradition; and he relies on a spurious reform methodology to bridge the gap between the two traditions.

Universal Morality through Re-conceptualizing Islamic Theology: Abdulaziz Sachedina

Abdulaziz Sachedina is part of an emerging trend of Muslim intellectuals who combine study of traditional Islamic studies and modern academic training. A bio-ethicist, he is trained under prominent Shi'ite clerics in the traditional seminaries in Iran

⁷³ For example, An-Na'im asserts that it is imperative that "Shari'a be authoritatively reformed from within the Islamic tradition and in ways acceptable to Muslims themselves, [o]therwise, such reform would lack legitimacy and practical viability (An-Na'im, 1987, p. 319).

and Iraq as well as holding a PhD in Islamic Studies from Canada, placing him in a unique position to share his insights on the topic of Islam and human rights, which he has been researching and writing about for over two decades. His most recent book *Islam and the Challenge of Human Rights* (2009) mounts a unique challenge to existing reform methodologies that focus on the Islamic juridical tradition.

I have discussed aspects of Sachedina's philosophy in the critique of An-Na'im's position on secularism for Muslim states, as well as in chapter 1 in the discussion of the culturally specific nature of the UDHR. In what follows I will highlight two other important elements of Sachedina's philosophy, which as will be evident, are differently oriented than An-Na'im's. First, Sachedina's explicit goal is to show that Islamic doctrine shares with secular morality a universal language of human dignity and agency, which can serve as a shared basis upon which both traditions may ground human rights protections. Second, I will discuss his investigation of Muslim philosophical and theological resources, rather than specific aspects of positive Islamic law, to draw out a shared universal foundation for human rights. Finally, I will provide a critical analysis of his philosophy and methodology.

Universal morality: a foundation for human rights.

Sachedina's starting point is the contested question of whether there exists a single moral foundation for human rights that spans many cultures, various culturally specific moral foundations, or no moral foundation at all. In several articles, and in his recent book *Islam and the Challenge of Human Rights*, he argues contra Michael Ignatieff and others that treat human rights as "pragmatic political instruments" supported

by “the rationality that remains when the particularities of one’s religious convictions are bracketed or suppressed” (Sachedina, 2007, p.54). His contention is that there exists a shared universal moral basis of human dignity that should serve as the legitimating foundation for human rights.

Sachedina believes in the need for a cross-cultural discussion about the universal moral foundation of human rights, between secularists and traditionalists, which would “provide a corrective to Muslim perceptions about the intended secularist bias of the Declaration” and will produce a shared universal morality that will enable the UDHR to have moral enforcement in the world community (Sachedina, 2007, pp. 51-52). To this end, he critically analyzes Muslim theological sources and advances an understanding of Muslim theology that is “human-centered”; that supports universal human rights based on the ‘principle of inherency and inalienability of the rights that accrue to all humans as humans’, consistent with and as universal as secularly derived human rights (Sachedina, 2009, p. 16).

Re-conceptualizing Islamic Theology.

For Sachedina, it is Islamic theology and ethics, and not Islamic law that should be the logical point of departure for establishing human rights foundations in Islam. He maintains that “if traditional Muslim scholars can be convinced of the authenticity of natural law in Islamic theological ethics, then human rights discourse in the Muslim world can be based on this foundational doctrine, which treats human equality as its first and essential tenet” (Sachedina, 2009, pp. 113-114). Sachedina relies on the Shi’ite tradition and the Mu’tazilite school of rationalist theology to ground his

theory, the latter being the closest that the Islamic tradition has come to developing a theory of natural law, where it recognizes human beings as the locus of reason and moral agency. To appreciate the significance of this paradigm shift, it is important to note the critical debates that took place in the Muslim world from the ninth to eleventh centuries (CE) between the Ash'ari and Mu'tazili schools of theology.⁷⁴

The Mu'tazilite theological doctrine, which first appeared toward the beginning of the eighth century, was characterized by the extreme stress placed on reason as the fundamental determinant of how the *Qur'an* should be interpreted and defended (Chittick & Murata, 1994, p. 245). The Mu'tazilites claimed “an objective existence to ethical values which God takes into account in his dealings with people and in his created order (objectivism)” and believed that these values could be known to people through the use of reason (partial rationalism) (Johnston, 2004, p. 236). Majid Fakhry explains that for the Mu'tazilites, ethical knowledge produces intuitive certainty, and is therefore “autonomous and self-validating”, which means that human reason does not need the assistance of revelation to determine the basic contours of righteous living (as cited in Johnston, 2004, p. 236). In contrast, the Ash'ari school, which represents the principal theological position of Sunnism, swung the pendulum the other way; towards the authority of revelation and placing limits on the use of reason (Chittick, 1994, p. 245). The Ash'arites taught that ethical values were only defined in terms of what God decrees (theistic subjectivism, or ethical voluntarism) (Johnston, 2004, p. 236). They maintained

⁷⁴ For more on the historic Ash'ari-Mu'tazili debate, see J. Halverson, *Theology and Creed in Sunni Islam: The Muslim Brotherhood, Ash'arism and Political Sunnism*; D. Johnston, “A Turn in the Epistemology and Hermeneutics of Twentieth of Twentieth Century Usul al-Fiqh” (2004).

that while reason is capable of ascertaining the existence of God, it cannot stipulate actions as morally right or wrong, or religiously obligatory; only scripture can produce ethical certainty in human actions (Johnston, 2004, p. 237). The Mu'tazila school was instated as "official state doctrine" during the eight century of the Abbasid caliphate, and an inquisition against opponents of the doctrine was even instituted. After this brief period of ascendancy through political endorsement, the Mu'tazilites never regained their status, and by the twelfth century, the Ash'ari view had emerged as theological orthodoxy in Sunni circles, up to the present day (Brower, 2004, p. 58).

Sachedina investigates Muslim theological resources, and relies on the Mu'tazili doctrine to uncover a notion of "political theology" (*al-kalam al-siyasi*) on the basis of which he establishes inherent and inalienable rights that accrue to all humans *qua* humans (Sachedina, 2009, p. 16). Sachedina describes the central thrust of his project in the following way:

Islamic political theology based on the central doctrine of a just and merciful God bound by His own moral essence to guide humanity to create a just public order can serve as the major theological-ethical foundation for human rights and its prerequisite, namely, democratic governance in Muslim societies (Sachedina, 2009, p. 25).

To this end, he proposes what amounts to a major shift in the understanding of human personhood – from a juridical to a theological-ontological status of human personhood – to bring together secular humanist conceptions of human rights and that of Muslim traditionalists which he believes differ in perspective and not in substance (Shah, 2011, p.

202). In other words, Sachedina argues that Islamic ethics and theology rather than Islamic jurisprudence must assume a central role in defining human rights that accrue to all, establishing the foundation of a pluralist society of equal citizenship regardless of religious affiliation (Sachedina, 2009, p. 114). To bolster this claim, Sachedina is successful in finding support in Qur'anic verses for the bestowal of dignity on all humans because of their 'human-ness' or personhood rather than their religious affiliation (Shah, 2011, p. 201). This is an essential step for building an understanding of human rights within the Islamic tradition which would protect everyone, corresponding to the universality of secularly derived human rights, including an in particular non-Muslims in a pluralistic Muslim state.

Critiques of Sachedina

Sachedina's work is a welcome contribution to the debate from a traditionally trained scholar who also maintains a commitment to pluralism and human rights. Notwithstanding Sachedina's unique thesis, his presentation is not without its conceptual problems.

First, Sachedina's primary focus is on establishing a foundational discourse in which to ground an overlapping consensus between secular and religious norms that support human rights. While certainly a noble task, many scholars from both the Western and Muslim worlds maintain that any attempt to resolve the meta-ethical foundations of human rights is a distraction. While Sachedina, a proponent of the natural school of rights, goes to great lengths to establish the primacy of engaging in this discussion rather than treating human rights simply as a political imperative, it is questionable whether this

approach is really necessary, or whether it will raise more questions than it will solve. He does not consider the possibility of approaching the Islam-human rights encounter from the perspective of any other school, such as the deliberative-school, in which rights are simply agreed upon political values that societies choose to adopt, and thus a universal overlapping consensus on rights may be built without excavating the philosophical roots of both traditions. Sachedina points out that

it would be a mistake to think that Muslim thinkers, even the most traditionalist among them, are against the need for universal human rights to protect human dignity and human agency in the context of a nation-state today. Even the staunchest opponents of the Universal Declaration of Human Rights, who regard the document as being morally imperialistic and culturally ethnocentric, concede the fact that human beings have rights that accrue to them as humans (Sachedina, 2007, p. 50).

If such awareness already exists, it seems redundant to seek philosophical congruence between the Islamic and human rights traditions at the level of first principles to validate the idea of rights.

Second, Sachedina focuses the bulk of his book on re-imagining Islamic theology, which is repetitive at times, but only briefly touches on contentious rulings of Islamic substantive law, which lie at the heart of the debate on the compatibility of Islam and human rights. To his credit, he argues for the re-examination of the position of traditional scholars (*'ulama*) on gender equality, the treatment of non-Muslims in Muslim states and in developing the Islamic concept of citizenship. However, he does not discuss

some key contentious areas, such as the hudud (criminal sanctions). Nonetheless, it is doubtful that an exclusive focus on theology alone can serve to overcome the practical and perceived obstacles presented by contentious rulings.

Finally, while every scholar is entitled to choose a methodology which she finds persuasive, in light of the aims Sachedina sets out to achieve, his project is undermined by his exclusive reliance on the Shi'ite and Mu'tazilite philosophies, which have been historically opposed by mainstream Sunni orthodoxy, and in some cases may be considered a greater 'internal' threat than the 'external' threat of secularism. Sachedina's project stresses the importance of engaging traditional Sunni scholars, and gaining their endorsement of constitutional democracy and rights protections in Muslim states as a critical element of entrenching cultural legitimacy for the UDHR in the Muslim world (Sachedina, 2009, p. 22). Yet he relies on a methodology that they would consider highly apocryphal. As one critic notes: "With Mu'tazilite being a minority in the Muslim world, however, it is not clear to what extent and with what effect modern Muslim thinkers, theologians, and scholars can exert pressure on Muslim jurists to rethink their juridical decisions" (Monshipouri, 2010, p. 4). However, Sachedina is right to point out that "[a]lthough the Mu'tazilite rationalist thesis was defeated... their attribution of legitimacy to human reason as a critical source of moral epistemology has resurfaced among Sunni Muslim modernists and continues to influence their advocacy of human rights based on inherent human dignity today" (Sachedina, 2009, p. 61).⁷⁵ Nonetheless,

⁷⁵ For more on neo-mu'tazili trends among modernist Muslim reformers, see D. Johnston, "A Turn in the Epistemology and Hermeneutics of Twentieth of Twentieth Century Usul al-Fiqh" (2004); R. C. Martin & M. R. Woodward, *Defenders of Reason in Islam: Mu'tazilism from Medieval School to Modern*

there remains a disconnect between Sachedina's stated goals, and the methodology he espouses to reach those ends.

Moreover, Sachedina seems to imply that the anti-rationalism of Sunni Ash'ari theology has historically served to justify and perpetuate intolerance and authoritarianism among Muslim rulers and jurists (Edaibat, 2010, para. 7). However, this depiction of Ash'arite theology has been deemed inaccurate by scholars who argue that it "displays an oversimplification of its tenets" and ignores "the fact that Ash'arite theology continued to maintain an ancillary role for reason in the evaluation of its sacred texts and that the Sunni jurisprudence developed largely as a discursive tradition with a healthy tolerance for pluralism and a lack of a centralized authority" (Edaibat, 2010, para. 8). The eponym and founder of the Ash'ari school was himself formerly trained as a Mu'tazilite and he endorsed the use of reason in a limited capacity – "his school's creed can be regarded as mounting a nuanced critique on the limits of reason, preferring the primacy and epistemological certainty of revelation over the employment of unrestrained inquiry in the understanding of theological matters" (Edaibat, 2010, para. 8). In fact the very idea that the Mu'tazilah were the champions of vibrant rationalism in the Islamic intellectual tradition has been challenged: "there is no justification for thinking that the [Mu'tazilites] hold reason in greater respect than the [Ash'arites]. Indeed... it might be claimed that precisely the reverse is the case, in that the Ash'arites, as opposed to the Mu'tazilites, more readily admit reason's relevance to the very basis of faith" (Leaman, 1985, p. 161).

Symbol (1997); A. R. Byrd, *A Euro-American 'Ulama? Mu'tazilism, (Post)Modernity, and Minority Islam* (2007).

Sachedina's work presents a novel approach towards mediating tensions between classical Islam and international human rights through theology, which recognizes the dynamic nature of both traditions and the possibility of evolution from within them. Nevertheless, his approach lacks internal legitimacy and is unlikely to garner wide support from traditional Muslims who will question the heterodox epistemological commitments central to his project.

Re-imagining Theological Values and Developing Rights 'Potentialities' in the Islamic tradition: Khaled Abou El Fadl

Khaled Abou El Fadl is a prominent and prolific liberal scholar and influential thinker trained in the traditional Islamic sciences as well and an expert in modern jurisprudence and international law. He seeks to promote a 'modernity-friendly' interpretation of Islamic doctrine in contrast to the more strict interpretation of radicals or traditionalists. According to one scholar, "His main tool is to query the faithfulness of traditional interpretations to the true spirit of Islam, mainly through questioning the authenticity of the bulk of the body of hadith, and through attacks on what he sees as rigid Wahhabi scripturalism" (El-Affendi, 2010, p. 24).

Abou El Fadl discusses the tensions between Islam and human rights within his larger philosophy, which favours pluralism and democracy as necessary evolutions for Muslim societies. He argues that the Islamic tradition contains "institutions that could be utilized in a systematic effort to develop social and moral commitments to human rights" (Abou El Fadl, 2003, p. 113). His focus on these 'doctrinal possibilities' or 'concepts constructed by the interpretive activities of Muslim scholars' is commendable and could

be further developed into a systematic human rights philosophy. Supported by consistent social practice, Abou El Fadl foresees that these ‘possibilities’ and ‘concepts’ could be transformed into an entrenched culture that honours and promotes human rights (Abou El Fadl, 2003, p. 114).

In contrast to An-Na’im and Sachedina’s approaches (with which he says he does not necessarily disagree), Abou El Fadl seeks to move beyond ‘original-intent’ arguments which claim that “God’s original intent was consistent with a scheme of greater rights for human beings but that the socio-historical experience was unable to achieve a fulfillment of such an intent” (Abou El Fadl, 2003, p. 128). Abou El Fadl contends that Islamic discourses need to go further “than either identifying core values or constructing arguments about a historically frustrated divine will” or “a human-centered theology” (Abou El Fadl, 2003, p. 128). He does not investigate the issue of the foundation of human rights but espouses a generalized approach towards human rights as a commitment to the worth and well-being of every human being, which permits for rights to be founded in a wide array of sources (Abou El Fadl, 2003, pp. 123-124). In contrast to An-Na’im, Abou El Fadl contends that the historical Islamic *Shari’ah*, when critically analyzed and properly understood in its historical context, can act as a considerable force for principled reform and development. He argues that “ignoring or dismissing this impressive interpretive tradition as irrelevant or disposable will serve not to liberate and empower Muslim reformers but to deny them legitimacy and to impoverish them intellectually” (Abou El Fadl, 2004, p. 43).

There are two main elements to Abou El Fadl’s human rights philosophy which merit attention in the context of the present work: (1) re-imagining the implications of

Islamic theology, and, (2) extracting existing ‘potentialities’ within the Islamic tradition that are similar to the concept of human rights, which can be further developed into a concrete system of rights. In what follows I will discuss these two elements in further detail.

Re-imagining the implications of Islamic theology: justice and mercy as the Divine charge.

In a similar vein as Sachedina, Abou El Fadl’s project is fundamentally premised on a reimagining and rethinking of the “meaning and implications of divinity”, the relationship between God and the human being, and therefore a re-conceptualization of what *Shari’ah* law is and is not (Abou El Fadl, 2003, p. 128). In contrast to normative Islamic views that God is the sole Legislator, Abou El Fadl argues that God does not seek to regulate all human affairs, but that He delegates to human beings the task of regulating their own affairs as long as they observe certain minimal standards of moral conduct (Abou El Fadl, 2003, p. 134). These minimal standards are epitomized by two objective and universal values of Islamic law: justice and mercy. Thus Abou El Fadl argues that God’s sovereignty is honoured by the human quest to construct a just society that pursues mercy, and consequently respects human diversity by protecting the basic rights that are due to all human beings (Abou El Fadl, 2003, p. 154).

Abou El Fadl also raises an important tension central to the Ash’ari-Mu’tazili debate: does the Divine law define justice, or does justice define the Divine law? In other words; does justice exist independently of the norms of revelation, or is justice known only as a consequence of revelation? Abou El Fadl privileges the minority Mu’tazilite view that knowledge of what is just and good can be reached independently of revelation.

On this basis, he proposes a significant paradigm shift in Islamic thinking when he argues that justice is what ought to control and guide all human interpretive efforts at understanding the law, and he goes so far as to propose that “justice and whatever is necessary to achieve justice is the divine law and is what represents the supremacy and sovereignty of the Divine” (Abou El Fadl, 2003, p. 146).

He further argues that justice may be the key value by which the moral systems of democracy and Islam may interface. He contends that democracy offers the greatest possibility for fulfilling the divine charge of justice and protection of human dignity, “without making God responsible for human injustice or the degradation of human beings by one another” (Abou El Fadl, 2004, p. 5). In other words, Abou El Fadl contends that by recognizing the human responsibility for articulating, executing and adjudicating governance, divine sovereignty remains intact (Sonn & Williamsburg, 2010, p. 182).

Developing ‘potential’ concepts of right articulated in the pre-modern Shari’ah.

A second important theme in Abou El Fadl’s approach to human rights in the Islamic tradition is discussing the already existing notions similar to rights, which are both explicit and implicit in the historical *Shari’ah*. In other words, his work focuses on ‘potentialities’ – “doctrinal aspects in Sunni political thought that could legitimate, promote, or subvert” the emergence of human rights practices in Muslim cultures (Abou El Fadl, 2002, p. 68). Abou El Fadl’s grounding and expertise in Islamic jurisprudence uniquely places him to locate and draw out the implications of these doctrinal potentialities related to rights protections that existed in the pre-modern Islamic juristic

tradition, which remain dormant until and unless they are “co-opted and directed by systematic thought supported by cumulative social practices” (Abou El Fadl, 2002, p. 68). While he recognizes that the tradition did not articulate a notion of fundamental or basic individual rights, he nonetheless maintains that the tradition was not oblivious to the notion, and it did articulate a conception of “protected interests” that are accorded individuals (Abou El Fadl, 2003, pp. 149-151). Along with outlining some of the potential resources within the *Shari’ah* relating to rights, Abou El Fadl also discusses the limits of some of these elements and how they can be extended and re-formulated to meet the needs the contemporary era.⁷⁶

Critiques of Abou El Fadl.

Of the three approaches reviewed in this chapter, I believe that Abou El Fadl’s approach comes closest to meeting the conditions for a principled reconciliation between Islam and human rights. Abou El Fadl’s philosophy is based on a nuanced understanding of both traditions – he countenances the discursive and changing nature of the Islamic tradition while conceding the shortcomings of some of its pre-modern formulations relating to rights protections. Nonetheless, his approach is not without problems.

Like Sachedina, Abou El Fadl espouses an approach that is rooted in novel theology, a sort of neo-mu’tazilite argument. Unlike Sachedina, Abou El Fadl is not quite as explicit in his writings about his reliance on Mu’tazilite theology, though this is evident in his methodology, arguments, and assumptions, and on rare occasion, he has

⁷⁶ These aspects of Abou El Fadl’s philosophy will be discussed in chapter 4.

made reference to his association with the school.⁷⁷ He perhaps acknowledges this problematic aspect of his work when he writes in his concluding remarks to his essay: “I have justified this position on Islamic grounds, and, while acknowledging that this approach is informed by the interpretive traditions of the past, it is not the dominant approach to the subject or even a well-established approach among Muslims in the modern era (Abou El Fadl, 2003, p. 154). Nonetheless, critics have argued that this approach weakens Abou El Fadl’s appeal and potential success among mainstream Muslims, and that the controversial theological questions he raises “may be more intractable than the legal rules that are the object of the desired reform” (Fadel, 2011, p. 131).

Mohammed Fadel argues that by grounding his support for democracy and human rights in a historically unconventional Islamic conception of justice that relies on reason and is independent of revelation, Abou El Fadl provides an argument for liberalism that is at odds with mainstream Islamic orthodoxy. He also notes that the mainstream Ash’ari position was not an indictment of reason – which Ash’ari scholars relied upon to demonstrate the existence of God and to distinguish truth from falsehood – but rather a recognition that because the ultimate good is salvation and not justice, revelation has priority in issues of moral knowledge (Fadel, 2004, p. 82). Fadel notes: “it is somewhat

⁷⁷ Abou El Fadl defends the Mu’tazilah where he asserts that among fundamentalist Muslim scholars “there is great pride taken in the idea that Islam is the religion of reason and rationality but rationalistic schools, such as the Mu’tazilah, are condemned as a corruption of the real Islam. On the one hand, it is often asserted that Islam is the religion of human intuition (*fitrah*), but on the other, there is a pronounced suspicion and hostility towards intuitive notions of natural rights (2001, p. 175). He explicitly associates himself with the Mu’tazilah school in an interview with PBS – see Faith and Doubt at Ground Zero, 2002.

surprising then, that Abou El Fadl would partly ground the basis for democratic life among Muslims on a heretofore discredited theological argument, according to which justice is independent of revelation. His case would have been stronger if he had demonstrated that democracy is consistent with either theory of the good traditionally espoused by Muslim theologians” (Fadel, 2004, p. 82). Fadel also questions Abou El Fadl’s reliance on a top-down approach which begins from abstract values and upon which he establishes rules and argues that a bottom-up approach would go further in demonstrating that the fundamental principles of the Islamic tradition support the need for a democratic rights-protecting society (Fadel, 2004, p. 84). In contrast, Fadel endorses a bottom-up approach that begins with well-established legal rules, moral principles, and theological truths, which are collectively more consistent with a democratic society than other readings that contradict democratic notions (Fadel, 2004, p. 84).

Furthermore, from a methodological perspective, Abou El Fadl’s work has been criticized for presenting an asymmetrical comparative ethics that “takes for granted the perfected state of liberal Western politics” and does not critically examine liberal notions of justice, tolerance and individual rights from the standpoint of the Islamic tradition (Mahmood, 2004, p. 77; Reinhart, 2004, p. 71). Saba Mahmood questions why in Abou El Fadl’s work the Islamic tradition bears the burden of proving its compatibility with liberal ideals, while the line of questioning is almost never reversed: “It is striking that the normative claims of liberal conceptions such as tolerance are taken at face value, and no attention is paid to the contradictions, struggles, and problems that these ideals actually embody” (Mahmood, 2004, p. 75). She suggests that the answer may be found in the ‘hegemony’ that liberalism commands for many contemporary Muslim intellectuals

who seek to find in their tradition “nuggets to be refined and molded into a faithful image of Western notions and practices” (Mahmood, 2004, p. 75; Reinhart, 2004, p. 71).

Conclusion

The philosophies of An-Na'im, Sachedina and Abou El Fadl reviewed in this chapter provide interesting and unique approaches towards reconciling Islam and human rights which are certainly more promising and constructive than reductive, essentialist Orientalist and Occidentalist methodologies. Nonetheless, the reform methodologies advanced by these three scholars are somewhat uneven. They accept the state of liberalism, secularism and the human rights corpus as complete and near-perfect, while placing the onus for reform almost exclusively on the Islamic tradition that must be refashioned to fit the requirements of Western-style human rights. They do not treat human rights as a discursive tradition, but as the standard to which all other traditions must be assimilated.

An approach that is faithful to the criteria required for a meaningful inter-cultural encounter must countenance the shortcomings and incompleteness of both traditions. Only when this occurs will there be an awareness of the ways in which the two traditions may complement and mutually benefit each other, producing thereby an impetus for internal renewal consistent with the internal standards of coherence that exist in each tradition. In the next chapter, I will discuss some provisional steps towards the internal renewal required of both traditions that would be considered legitimate by the standards of both traditions.

Chapter 4: Towards a More Constructive Encounter Between Islam and Human Rights

In chapters 2 and 3, I described and critiqued existing literature that addresses the compatibility of the human rights and Islamic traditions by making reference to the criteria for a meaningful encounter described in chapter 1. In this chapter, I will outline an approach that I argue would be faithful to the principles of a constructive encounter between the human rights and Islamic traditions and which endeavours to avoid the pitfalls of the approaches described in the preceding chapters. While no single rhetorical or reform strategy offers a “magic bullet” for solving all the perceived and actual tensions between the two traditions, in what follows, I will outline some necessary (if not always sufficient) provisional steps that both traditions should take as part of their respective internal transformations or ‘renewals’ to enable constructive dialogue and collaboration between the two traditions.

For the human rights tradition, an internal renewal requires an openness and willingness to evolve and accommodate diversity, built on the realization of the experimental nature of its corpus. In approaching other traditions, the goal of the human rights corpus should not be to achieve philosophical congruence at the level of roots and first principles, nor should it be the projection and imposition of particular historically-conditioned philosophical commitments, like liberalism, onto other traditions with which it seeks to co-exist. Rather, the aim should be developing an ‘overlapping consensus’ in which rights are a thin, minimalist theory that acts as a shared language of social justice and contemporary political instruments for stemming injustice. Conceived as such, human rights are not only compatible with any and all religious traditions that share its

commitment to realizing global peace and justice, but they are in fact complemented by religions that address ontological and epistemological questions beyond the purview of rights.

For the Islamic tradition, the promise of human rights may address some of the most pressing concerns of citizens of Muslim states in the contemporary era. The challenge however is to localize rights in majority-Muslim societies using the available cultural tools familiar to the people. To this end, a “bottom-up” approach should be espoused towards the tradition’s resources, which shows that fundamental principles of the Islamic tradition in fact reinforce and support the protection of rights. As a discursive tradition, which is capable of countenancing the need for social change, where these potentialities already exist, support for human rights in the contemporary era should be a natural evolution for the tradition. Furthermore, the Islamic traditions must continue its internal discursive processes to flush out discriminatory and objectionable opinions and currents within the tradition, which is an important avenue towards mediating perceived and actual tensions between the two traditions.

Section I: Towards an Overlapping Consensus on Rights: Discursive Traditions in Tension

The problem of the ‘false universal’.

Much of the literature concerning the Islam-human rights debate espouses an approach that seeks to go to the root of both traditions and ensure that they are compatible in their philosophical assumptions and first principles in order for them to co-

exist.⁷⁸ Yet, it is no secret that some of our most cherished institutions in the West in fact diverge at a theoretical level, and yet they have been negotiated and operate together in practice. For example, human rights and democracy, two of our most prized institutions in the West, are differently oriented, even incompatible at the level of their basic principles; democracy is about the rule of the majority, while human rights reflects the rights of individuals and minorities to place limits on those majorities. Ignatieff contends that “there is a problem with whether liberal values – human rights and democracy – actually entail or in fact contradict one another... it cannot be said with confidence that the advent of democracy improves the human rights of those who do not happen to belong to the electoral majority” (Ignatieff, 2001, p. 172). Were we to focus on philosophical commitments only, we would describe human rights as somewhat anti-democratic and democracy (majority rule) as a threat or impediment to the realization of certain rights. Yet, we have successfully negotiated and balanced their competing interests to the extent that despite the fact that they are not necessarily compatible as basic ideas, democracy and human rights are often considered natural or even necessary extensions of each other. Something similar can happen between human rights and Islam: the foundational principles and philosophical underpinnings of the two traditions might not be fully compatible, but that does not preclude the possibility of a harmonious co-existence and partnership between the two traditions.

In contrast to a pragmatic and cooperative approach to the Islam-human rights encounter, there exists a dominant trend that seeks to ensure that human rights exist in

⁷⁸ See for example: An-Na'im, “What Do We Mean by Universal?” (1994); B. Tibi, *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations* (1994); D. Hollinger

non-Western contexts alongside other philosophical trends that have been interlinked with rights in the West, and thus to fashion others in our own image through the project of human rights. This approach is frequently espoused by adherents of the naturalist school who not only claim that human rights been fully universalized, but also that the liberal-secular-humanist moral-philosophical vision which grounds its development in the West has also reached universal acceptance. Donnelly for example suggests that there is a “remarkable international normative consensus on the list of rights... based on a plausible and attractive theory of human nature” and that the verbal acceptance of this list of rights is “a prima facie indication of the attractiveness of the underlying moral vision” which grounds those rights (Donnelly, 1989, p. 23). This is not exclusive to the natural school – deliberative scholar David Hollinger questions the viability drawing a distinction between “a minimalist human rights program and that program’s broader matrix of enlightenment aspirations” and argues that “a human rights agenda is, willy-nilly, connected to an international politics that would promote the social, cultural, and political conditions” conducive to the diminution of cruelty”, such as “individualism, egalitarianism, and democratic political culture” (Hollinger, 2001, p. 122; 119).

I would argue that what Donnelly describes as a ‘universal consensus’ is actually a *lack of dissent* rather than any positive affirmation of universality about rights or about morality and human nature. The belief that the liberal-secular-rational moral vision is universal can be described as an ideologically driven projection of a ‘false universal’ or a particular parading as a universal. Jackson describes the false universal in the following way:

The false universal conceals itself in the habit and or privilege of speaking as if the shape that one's values and preferences assume in concrete social, political, or interpersonal contexts is not grounded in cultural, historical, or even ideological perspectives but, instead, is reflective of a transcendent, "natural" order whose validity is obvious to everyone, save the stupid, the primitive, or the morally depraved. In a word, the false universal is a manifestation of history internalized, normalized, and then forgotten as history - at least for those on the inside looking out.⁷⁹ (Jackson, 2003, p. 112)

Towards a Minimalist, Cross-cultural “Overlapping Consensus” on Rights

From the perspective of the other three schools of human rights (the protest, deliberative and discourse schools), agreement at the level of foundations and roots is neither necessary nor desirable, which is a useful step towards circumventing the problem of false universals. Although the Islamic traditions and the human rights tradition may compete in some respects as approaches to solving problems or even as theories of the good and may have divergent foundational doctrines, they certainly share enough basic

⁷⁹ Jackson provides an interesting discussion of ‘false universals’ within the Islamic tradition itself. He argues that the “East’s truths” – the way in which Islam is understood and practiced in the Middle East – are projected onto the tradition as the only proper Islamic understanding. This results in limiting the abilities of non-Middle Eastern Muslims – whether in Russia, the Congo or America - to define what is Islamic, which is believed to be the prerogative of Muslims in the Muslim world or in the Middle East. He describes this as the Islamic version of the “white man’s burden” (Jackson, 2003, pp. 115-117).

propositions and common interests that an overlapping consensus on rights as basic normative standards in our cosmopolitan world can be fostered through genuine intercultural dialogue which adheres to the criteria previously outlined in chapter 1. Such an approach is diametrically opposed to the projection of false universals, which are born of a “fundamental fear and recognition that *no* system of open intellectual exchange can guarantee the emergence or suppression of any particular view (Jackson, 2003, p. 116)

An ‘unenforced, genuine, overlapping consensus’ is an idea most thoroughly developed by John Rawls, describing circumstances in which members of a liberal polity agree on essential constitutional principles, but not for the same reasons and despite their holding incompatible comprehensive religious or philosophical beliefs.⁸⁰ Charles Taylor and others have modified and built on Rawls’s concept to suggest that such a ‘free-standing’ consensus is the most promising means of securing international support for human rights rather than attempting to ground such a consensus in a particular doctrine of truth or ideology (such as secularism humanism).⁸¹ In such an arrangement, groups,

⁸⁰ See J. Rawls, “The Idea of an Overlapping Consensus” (1987) and *Political Liberalism: Expanded Edition* (2005).

⁸¹ Several scholars propose applying the idea of an overlapping consensus to universal human rights. See for example C. Taylor, “Conditions of an Unforced Consensus on Human Rights” (1996); Bielefeldt, ““Western” versus “Islamic” human rights conceptions?: A critique of cultural essentialism in the discussion on human rights” (2000); M. Fadel, “Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law” (2007). Note that one important departure from Rawls’ work in the writings of these scholars is the inclusion of ‘comprehensive doctrines’ like religion in ‘public reason’. Rawls confines them to background culture or private life and only permits ‘purely political’ ideas that are ‘free-standing’ and unrelated to any comprehensive doctrines. In this work, I am adopting the idea of an ‘overlapping consensus’ from the work of Charles Taylor, in

communities and civilizations “while holding incompatible fundamental views on theology, metaphysics, human nature, etc., would come to an agreement on certain norms that ought to govern human behavior” (Taylor, 1996, p. 125). Contrary to Donnelly, who argues that universal human rights are to be grounded in a universal value, that of human dignity, Taylor asserts that such a consensus does not require agreement on the foundation or source of these rights;

Each [group, country, religious community, civilization] would have its own way of justifying this from out of its profound background conception. We would agree on the norms, while disagreeing on why they were the right norms. And we would be content to live in this consensus, undisturbed by the differences of profound underlying belief. (Taylor, 1996, p. 126)

By not deriving human rights from a single foundational source that everyone would agree to be authoritative, it is possible for people with different religious or philosophical commitments to support a set of human rights that is grounded in, consistent with or at least not conflicting with their own belief and value systems (Taylor, 1996, p. 127). This idea was also expressed in 1949 by Jacques Maritain, one of the prominent drafters of the UDHR:

I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality, fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different

which he permits the inclusion of comprehensive doctrines of all types and aims to develop a consensus not on premises, but on conclusions about ‘thinly conceived’ practical norms and protections.

from mine or opposed to mine... is equally the only way founded upon truth. (As cited in Taylor, 1996, p. 128)

Maritain is also quoted to have said: "Yes, we agree about the rights, but on condition no one asks us why" (as cited in Glendon, 2002, p. 77).

Obviously, an unforced consensus, which is not predicated on false universals, is unlikely to satisfy everyone, and will result in diverse manifestations of human rights practices across the globe, which will both overlap with and diverge from normative Western rights standards and approaches. Thus there is general agreement that such a consensus would not seek to designate the good or virtuous according to any one moral tradition, but would depend on agreement about what is "insufferably, inarguably wrong" (Ignatieff, 2001, p. 56).

Western liberal scholars, like Michael Ignatieff and Daniel Bell, have argued that this 'thin' consensus would include protections against such things as slavery, genocide, murder, torture, prolonged arbitrary detention, and systematic racial discrimination (Bell, 1999, p. 851). Ignatieff argues that this minimalism is in fact 'the most we can hope for':

What should our goals as believers in human rights be? Here my slogan would be the title of the justly famous essay by my old teacher, Judith Shklar, "Putting Cruelty First." We may not be able to create democracies or constitutions. Liberal freedom [in some societies] may be some way off. But we could do more than we do to stop unmerited suffering and gross physical cruelty. That I take to be the elemental priority of all human rights activism: to stop torture, beatings, killings, rape, and assault and to improve, as best we can, the security of ordinary people.

My minimalism is not strategic at all. It is the most we can hope for. (Ignatieff, 2001, p. 173)

In contrast to a minimalist approach revolving around a defensible core of rights “that are strictly necessary to the enjoyment of life whatever”, he argues that rights ‘inflation’, or the tendency to “define anything desirable as a right” in fact erodes the legitimacy of a core of rights that is painstakingly built on consensus (Ignatieff, 2001, p. 90).

While I concur that a minimalist consensus on ‘thinly conceived’ practical norms and protections should be the intended starting point of an intercultural dialogue, I contend that we cannot pre-determine the substance of that consensus. Scholars like Ignatieff and Bell rely on liberal individualism to privilege a consensus on individualist civil and political rights. An alternative hypothesis of what this core set of rights would consist of is advanced by Wendy Brown. She critiques Ignatieff for attempting to stave off inclinations towards collective rights or second generations rights that insist on the primacy of rights to food, shelter, or healthcare lest this render the human rights project “more politically ambitious and thus less immediately efficacious or realizable” (Brown, 2004, p. 457). If we are genuinely committed to an open and inclusive deliberation about rights that will result in a truly universal consensus, we cannot pre-determine the substance of a core set of rights and should be open to the inclusion of social and economic rights along with civil and political rights.

Liberalism as human rights’ false universal.

What lies beyond a consensus on a core set of rights can potentially be further developed, but this must also be built on canvassing and the result of consensus. A minimalist consensus opens up the possibilities of conflict, deliberation and contestation

using a “shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root” (Ignatieff, 2001, p. 95). Unfortunately, in the current circumstance, what lies beyond an emerging overlapping consensus on core rights is a ‘secondary’ set of liberal rights and values that are saturated with the teleological pretensions of the human rights discourse, including such things as individualism, autonomy, freedom of choice, attitudes towards the human body (pain, physical damage, integrity, *et cetera*), a particular view of gender equality, freedom of the market, democratic political culture, secularism, *et cetera*.

The tendency of the human rights discourse in this arena is to advance a hidden agenda, to “conceal while pursuing interests and outcomes that lie beyond its stated objectives” (Jackson, 2011b). Jackson elaborates on this goal:

Secondary rights often constitute the final aims of human rights and in this capacity are actually served by the primary rights. In this sense, they are secondary only accidentally and in theory. In actual practice they are primary. To state the matter in Islamic terms, secondary rights often constitute the maqasid of Western human rights. And just as in Islamic legal theory no individual law, no matter how explicitly laid out in the sources it might be, is to be applied in instances where its application stands to obliterate one of the maqasid of the shari‘ah, primary human rights may take a back seat where their pursuit threatens the unspoken maqasid of human rights. (Jackson, 2011b)

Jackson provides an instructive example in discussions surrounding polygyny to explain this paradox. Many proponents of human rights in Muslim contexts, including for

example An-Na'im, argue that Islamic law to be in violation of universal human rights because of its allowance of polygyny, and thus that *Shari'ah* stands in need of re-interpretation, which should include a ban on polygyny to further the equality of men and women.⁸² Jackson remarks however that were inequality between men and women really the source of the violation and thus the aim of this critique, then allowing polyandry would be just as effective an option as would banning polygyny, which would have the additional advantage of promoting more perfect equality and greater freedom (Jackson, 2011b).⁸³ Yet, this possibility "is never even contemplated, which suggests that the universal value of equality is not at all an end but rather a *means* to an end, which is to bring Muslim life into conformity not simply with universal values but with very specific concretions of these values by the dominant civilization (Jackson, 2003, p. 115).⁸⁴

What are these false universals and values that the West seeks to advance through the human rights project? According to Sally Merry, "Human rights are part of a distinctive modernist vision of the good and just society that emphasizes autonomy,

⁸² See A. An-Na'im "Shari'ah and Basic Human Rights Concerns" (1998), pp. 232-233.

⁸³ Discussions surrounding contentious practices like polygamy and niqab demonstrate the vast diversity within the Islamic and human rights discursive traditions, and also, the indeterminacy of rights. For example, core rights like equality are used to justify opposing and contradictory arguments for and against polygamy and niqab; positions which are advanced and defended using human rights language by members of both the Islamic tradition and liberal/feminist traditions.

⁸⁴ There are other reasons why allowing polyandry wouldn't address all the problems associated with polygyny as it is sometimes practiced, and it may even raise additional challenges. However, the fact that this possibility is never considered despite the greater freedom and choice it would allow, while all energies are directed towards banning polygyny, is nonetheless telling of the aims of the human rights movement.

choice, equality, secularism and protection of the body” (Merry, 2006, p. 221). Despite their pretensions to transcendence and universalism, these liberal values are not abstract, neutral or un-storied; they are quite storied and often pressed to teleological ends. Mutua argues that the human rights corpus, as an essential element of the “holy trinity” of “liberalism, democracy and human rights” is intended to promote and diffuse liberalism across the globe (p. 44). He maintains that as a liberal project, the implicit but overriding goal of the human rights movement is “the imposition of Western-style liberal democracy, complete with its condiments” across the globe (2002, p. 5).

While the term ‘liberalism’ connotes and denotes different meanings to different people, scholars have generally distinguished between two strands within the tradition – neutralist (or political) and perfectionist (or comprehensive). Neutralist/political liberalism has been described as “a hospitable empty box in which any culture, tradition, way of life, or world-view is welcome to pursue its dream” (Galeotti, 2002, p. 37). Political liberalism is a restrained doctrine of social and political cooperation that encourages pluralism and allows for competing visions of “the ultimate meaning of life and the epistemological foundation for discovering it” and suspends judgment on their rightness, giving up thereby any pretense to producing “better citizens” (March, 2007, p. 401). In contrast, perfectionist liberalism is a theory of value, a way of life, and an epistemology which values rational autonomy, critical scrutiny of ‘tradition’, skepticism and experimentation and entails a distinct and concrete moral outlook that is actively defended and boldly promoted (March, 2007, p. 401). This more comprehensive liberal project conceives of pluralism as a secondary or tertiary value, and “those whose way of life clashes with the fundamental values of freedom, autonomy and self-development

may be either tolerated, if it proves useless or counterproductive to repress them, or coerced, if it seems feasible to force them to comply, or if they appear to pose an imminent threat to the liberal order” (Jackson, 2011b).

Following the Cold War, Western liberalism declared a victory over communism and projected a generalization of liberal democratic models across the world, such that the belief that “the liberal political system is the best arrangement for all human societies, regardless of their diverse histories and conceptual and material resources, is rarely questioned these days” (Mahmood, 2004, p. 76; Strawson, 1997, p. 33). Liberalism, especially perfectionist liberalism, tends to be pitched alongside human rights to Muslim communities in the West and majority-Muslim societies. Yet, it is my contention that human rights, as a language and political tool can be localized and deeply entrenched in non-Western contexts without necessitating the adoption of the full set of liberal values which mark dominant human rights discourse. The human rights project should not be about universalizing a particular cultural model, but its principal aim should be imagining models and projects that can stem poverty and violence and reduce human indignity, and powerlessness. If human rights has historically been based on or tied to secular and liberal values in the West, this does not necessitate that human rights be accompanied by these values in other non-Western contexts. Given the historically unprecedented homogenizing force of globalization, it would certainly be worthwhile and insightful to consider how the world is (or can be) lived differently (Mahmood, 2004, p. 77). As Abu-Lughod asks:

[M]ight other desires be more meaningful for different groups of people? Living in close families? Living in a godly way? Living without war? Why presume that

our way, whatever it is, is best? The historical record of the secular humanist West is far from unblemished, with genocides, colonialism, world wars, slavery, and other forms of inequality deep parts of it. (As cited in Razack, 2008, p. 105)

The role of religion in complementing rights.

There exist shared concerns and interests between the Islamic and human rights traditions, in that they are both concerned with promoting and achieving justice and peace in the world, and both enjoy major international constituencies with deeply committed members. However, the human rights tradition is not a comprehensive doctrine – it sets standards to achieve justice and equality within the legal and political spheres – but does not address existential questions about the meaning of life or guidance as to how to lead one’s life as an individual or within one’s community. In this sense, rights are differently oriented than cultural or religious traditions, and does not directly compete with them in these jurisdictions (Bielefeldt, 2000, p. 116).

The UDHR, along with much of the literature on human rights, does not define “the human” in “human rights” other than, tautologically, as the subject of human rights. Talal Asad poses the question: “what kind of human does human rights recognize *in practice?*” (Asad, 2003, p. 148). The human once theorized by natural rights was described as having a specific human nature tied to Christian morality through natural law; made in the image of God, he was bare, abstract, bourgeois and Protestant and was assumed to have inherent dignity, autonomy and bodily integrity. This conception of the ‘human’ in human rights presupposes a specific philosophical anthropology that the human rights corpus can no longer defend convincingly across the globe. In other words,

now that rights have been severed from Christianity, they no longer answer existential questions about human nature and metaphysics.

A 'hollowed' version of human rights revolving around the UDHR, or even a defensible core of rights is not something to be believed in – it has a very weak relation to ethics and spirituality. For many people, human rights need religiously-based understanding of what human being is because human rights no longer fills the space about what human being is and how he relates to others. Human rights cannot and do not replace religion; they need to be complemented by everyday ethics from within the context they inhabit. As Ignatieff explains: “We need to stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation.... [R]ights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable” (Ignatieff, 2001, p. 95).

Elsewhere he argues:

The universal commitments implied by human rights can be compatible with a wide variety of ways of living only if the universalism implied is self-consciously minimalist. Human rights can command universal assent only as a decidedly “thin” theory of what is right, a definition of the minimum conditions for any kind of life at all. Human rights is only a systematic agenda of “negative liberty,” a tool kit against oppression, a tool kit that individual agents must be free to use as they see fit within the broader frame of cultural and religious beliefs that they live by. (Ignatieff, 2001, pp. 56-57)

Besides complementing rights, religion can also enhance its promise. Practically, human rights are invoked when an individual is wronged and their dignity is violated – but it would be nice not to be wronged in the first place. Many people and societies derive their morality and ethics from their religious tradition. And while human rights are largely implemented and protected through legal proscriptions and the threat of coercive sanctions, religion is capable of inculcating internal morality and a sense of personal responsibility that can be more effective in stemming rights violations than surveillance and law. The Islamic tradition has always incorporated the concept of rights and entitlements as part of a holistic vision in which rights and obligations are often inter-related and reciprocal. Where individuals are conscious of and careful about their responsibilities and duties towards other human beings, the rights of these others will be respected in proportion to how much they respect their own duties (Ramadan, 2009, pp. 100-101). Furthermore, many of the goals of the human rights discourse, particularly those that relate to the realm of ‘secondary’ rights such as racism, chauvinism and ethnocentrism, can be difficult to achieve through legal proscriptions alone. To address these social ills, we also need what MacIntyre and others refer to as virtues, and what Muslims know as *akhlaq*. According to Jackson, “The virtues or *akhlaq* are not simply important as a theoretical alternative to human rights. Their absence is actually the reason we get what so many human rights violations in the first place, why all the lofty declarations, Muslim and non-Muslim alike, remain in all too many instances idle ink on paper” (Jackson, 2011b).⁸⁵

⁸⁵ Where structural problems exist, personal virtues need to be accompanied by more comprehensive strategies such as education, policy changes, *et cetera*.

Within the Islamic tradition, the approaches taken to discussing human rights have focused almost exclusively on the theological aspects of the tradition (e.g.: Sachedina and Abou El Fadl), or the detailed legal aspects (e.g.: Orientalists and An-Na'im). However, the realms of law and theology represent two of the three aspects of the Islamic tradition – belief (*iman*) and practice (*islam*) – leaving the third aspect of spirituality (*ihsan*), which subsumes the study of *akhlaq* and ethics, almost entirely unexplored. Yet the Islamic spiritual tradition of *ihsan* (literally: doing what is beautiful), which is more commonly known as Sufism, expresses a distinct message of service to mankind, moral excellence, selflessness and magnanimity that provides an important prospect for approaching human rights (Chittick, 1994, p. xxxii; Muedini, 2010).

Sufism tends to stress the inwardness, contemplation and the cultivation of the soul that is forgotten in the outwardness of acts of worship and the focus on legalism and social interaction inherent in the other aspects of the tradition. This has led to a belief that Sufism amounts to distancing yourself from the physical world and not being concerned with current affairs and politics. Yet the spiritual tradition in Islam can contribute to a discussion of human rights in its emphasis on “humanitarianism, tolerance, harmony [and]...love of mankind” (Fatemi, 1973, p. 47). Sufis have been known historically to risk their lives in fighting against issues of poverty and inhumanity; issues now labeled under the banner of human rights; and even in recent history, Sufi orders played an important role in the struggles to liberate colonized countries (Fatemi, 1973, p. 48). According to Muedini:

[P]lacing the human rights discourse under a Sufi framework allows one to constantly devote her/his “worship” to helping others, and to protect and ensure

the rights of all, since this act will ultimately bring one closer to God, since Sufis believe that serving others is “the shortest and easiest” way to God...And it is this love of The Divine, this constant yearning for closeness to God that ultimately drives an adherent to serve others. (Muedini, 2010, p. 17)

Section II: Localizing Rights in the Islamic Tradition

The second dimension required for a meaningful encounter between the Islamic and human rights traditions is an internal renewal of the Islamic tradition that accommodates a new awareness of the need and use of human rights in the contemporary era. The goal is to engage the Islamic tradition – its existing tools of legal theory, substantive law and hermeneutical tools – to demonstrate how fundamental principles of the Islamic tradition reinforce and support the idea of rights. This is an imperative of the socio-cultural approach to human rights, which

[R]equires a search within different societies and cultures for relevant accommodating models to help realize international human rights norms. It ensures that the local communities understand human rights as part of their own human heritage and thus push the human rights idea from the bottom to the top, which, where effectively achieved, becomes a powerful politico-legal tool for the populace, the State, and for human rights advocates generally. (Baderin, 2007, p. 7)

The norms, structures and institutions through which human rights are implemented should be grown at home, and should utilize the cultural tools that people at the

grassroots level are familiar with (Mutua, 2002, p. 5).⁸⁶ This is an important step towards localizing and integrating rights into the cultural and religious ethos of Muslim societies.

In this section, I will begin by examining the complementary role that human rights discourse can play in enhancing the promise of the *Shari'ah* in the contemporary era and I will discuss the importance of drawing out the implicit rights tradition in the *Shari'ah*. This will be followed by an overview of the various strategies that have been proposed by scholars to utilize the existing resources within the *Shari'ah* with which it can interface with the human rights tradition. Finally, I will touch upon the question of how we should approach situations of conflict in which we may come across positions and currents within the historical Islamic tradition that may conflict with modern human rights standards.

⁸⁶ It is worth noting that locating resources and potentialities related to human rights within the Islamic tradition is not the same as constructing a full-fledged human rights scheme or declaration rooted exclusively in Islamic sources. Muslim scholars and organizations have sought to do this, such as Abu 'Ala Mawdudi and the Organization of Islamic Conference have been criticized for making a facile and shallow attempt at reconciling human rights with Islam and for seeking to ground rights in an exclusivist world view which has the effect of constructing alternative rights projects or declarations that compete with efforts to construct a universal human rights project and undermine the UDHR. For critiques of Muslim human rights schemes, see example: Z. Shakir, "American Muslims and a Meaningful Human Rights Discourse in the Aftermath of September 11, 2001" (2003); K. Abou El Fadl, "The Human Rights Commitment in Modern Islam" (2003); E. Moosa, "The Dilemma of Islamic Rights Schemes" (2001).

The role of human rights in complementing *Shari'ah*.

It is useful to briefly consider what the Islamic traditions could potentially benefit from an internal renewal and a meaningful dialogue with the human rights tradition. First, as was previously discussed in chapter 1, the ascent of the nation-state fundamentally re-ordered Muslim legal and social orders and displaced *Shari'ah* with modern European legal codes. While the restoration of Islamic law in Muslim societies as state law is a complicated endeavour both in theory and in practice, human rights, as expressed and formulated in the modern era will not be found in the classical Islamic tradition. In fact, the concern of human rights with the duality of interests of the state and the individual was not a major concern of classical Islamic law, because Islam's perception of human rights is not premised on a social contract framework positing the individual versus the nation-state (Kamali 2003, pp. xiii; xiv). The repository of political and executive power was the community of believers (*ummah*), while ultimate sovereignty belongs only to God (Kamali, 2003b, pp. xiii; xiv). The state is under duty to protect the five essential objectives of Islamic law (discussed in part two), and it has no authority to overrule it, and thus no legitimacy if it violates the rights that law sanctions. As Mayer explains: "the government will obey the dictates of the *Shari'ah*, so the individual will have no cause to complain of government misconduct" (Mayer, 1995, p. 53). In this sense, human rights norms fill an important void in Muslim states to address the exigencies of the modern nation-state. Therefore, by absorbing the idea of human rights, the Islamic tradition is able to protect the dignity and rights of its religious adherents within the contemporary political context and to ensure its evolution and continued relevance to its membership.

Second, on the international stage, the language of rights can be a powerful means for Muslims states – that are generally politically weak – to hold powerful states accountable for their policies and the selective application of rights. It may seem a trivial observation that human rights have only been concretized for a small number in industrialized state and are selectively applied as dictated by Western interests. Human rights is perhaps the most powerful language currently at our disposal to redress injustice and articulate rightful claims of the poor, unprivileged and oppressed in developing states. The promise of human rights to the third world is to solve and contain problems of cruel conditions of life, state instability and other social crises (Mutua, 2002, p. 6).

Finally, of all the philosophies and institutions of modernity that the Islamic tradition must confront, human rights are one of the easiest to reconcile with. This can be preparation for more complex philosophic encounters with concepts like democracy, secularism liberalism, *et cetera*. In such encounters and collaborations there lies an opening for the Islamic tradition to reconnect with its own points of reference and to explore possible models for meeting the demands of justice and equality in the modern context. It is also an unprecedented opportunity for the West and Muslim world to discover their common values and draw on the best of their shared histories:

From “borrower” in the Middle Ages, the West became “lender” in modern times, lending to Islam what the latter had long forgotten as its own home-grown product... Thus not only have the East and West “met”; they have acted, reacted, and interacted, in the past, as in the present, and, with mutual understanding and goodwill, may well continue to do so far into the future with benefit to both sides. (Makdisi, 1981, p. 291)

Tracing *Shari'ah's* potential evolution to accommodate rights.

As has already been discussed, much of the discourse on Islam and human rights is conducted through the prism of dualisms – modern/pre-modern; liberal vs. illiberal; progressive vs. backward; values vs. culture. The problem with dualisms is that they obscure the political and social interests at stake in imposing a certain version of modernity on non-Western cultures, and set up a false dichotomy between Islam and human rights. As Kennedy explains, they also contribute to the framing of political choices in the third world as oppositions between local/traditional and international/modern modes of life and forms of governance (Kennedy, 1996, p. 116). This impoverishes local political discourse and may strengthen those who advance extreme political agendas because they offer a powerful ‘traditional’ or ‘authentically Islamic’ alternative to ‘Western’ pressures for modernization/liberalization. In other words, the dominant discourse about Islam and human rights puts the pressure on Muslims the world over to choose between adherence to their religious values and espousing human rights –no third option is presented.

A potential alternative to a dualistic discourse is conceiving of the Islamic tradition as a discursive tradition, and then drawing out and giving credence to the implicit tradition of rights in Islam. This allows proponents of rights in majority-Muslim societies to be perceived as authentic articulators of change, who rely on an alternative vision than extremists that is rooted *within* rather than without the tradition (Kamali, 2008a). Much of this implicit tradition mirrors international human rights standards, though there must always be accommodation for some divergence in the discourse, interpretation and form of human rights. As Kennedy warns - “form can hamper peaceful

adjustment and necessary change, can be over or under inclusive”, particularly when they are forced on other cultures without giving due attention to socio-political conditions that will determine the meaning a right has in a particular context (Kennedy, 2002, p. 110). This is analogous to the way in which simply holding elections in developing countries is considered sufficient proof of the democracy. It becomes a substitute for genuine popular engagement in the political process, which could be better accomplished by some other mechanism.

Many scholars argue that building human rights on traditional cultural resources – on the customs and values that people use to make sense of their lives – is more likely to lead to long-term commitment to human rights ideas and practices (Bell, 1999, p. 854).⁸⁷ From the point of view of the *Shari'ah*, its inherent ‘search for coherence’ as a discursive tradition, acts as a force that produces an internal impetus to self-reform and evolution (Asad, 1986). As a tradition which reached the peak of its development in the classical medieval tradition, how it will operate in the modern age, in both Western and non-Western contexts, certainly entails an important margin for evolution, transformation and adaptation to what are different social, political and cultural environments.

One way of conceptualizing how this evolution could take place within the Islamic tradition is through what Tariq Ramadan has described as the ‘principle of

⁸⁷ See for example M. A. Baderin, "Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives (2007); M. Mutua, *Human Rights: A Political and Cultural Critique* (2002). D. A. Bell, “What Rights Are Universal?” (1999); K. Abou El Fadl, “The Human Rights Commitment in Modern Islam” (2003).

integration.’⁸⁸ Ramadan describes this principles as: “everything a society or culture produces and accepts that is not in opposition to a clearly stipulated prohibition is in fact integrated and considered part of the Islamic universe of reference” (Ramadan, 2005, p. 54). In other words, through this principle, Muslims may re-appropriate the true universality of Islam by integrating and making their own anything that people have produced that is good, just and humane, whether intellectually, scientifically, socially, politically, economically or culturally (Ramadan, 2005, p. 5).⁸⁹ Historically, the nature of *Shari’ah* as it relates to non-Muslim orders is that “non-Muslim” does not necessarily equate to “un-Islamic” or “anti-Islamic”. According to Jackson, the Prophet Muhammad modeled this principle in his interaction with the pre-existing order of his adopted home at Medinah, and the Muslim public orders established in the conquered territories followed this precedent (Jackson, 2011a). In other words, the fact that there was no democracy or ‘human rights’ in the Prophet’s time, does not make them any more or less “Islamic” than domes, minarets, or schools of *fiqh*, which also did not exist in sixth century Arabia (Jackson, 2010). *Shari’ah* attempts to process ever-changing realities and

⁸⁸ Ramadan posits this principle in contrast to the bi-polar and dualistic reaction which often emanates from the Muslim world in response to the homogenizing effect of globalization – that is, a push towards withdrawal and self-exclusion, self-protection, self-preservation and self-definition over and against the “Western mega-machine”. This has been expressed in the slogans: ‘Whatever is Western is anti-Islam’ and ‘Islam has nothing in common with the West’ (Ramadan, 2005, pp. 4-5).

⁸⁹ More a more detailed discussion of T. Ramadan’s ‘Principle of integration’ and how it relates to both his greater philosophy and broader classical and contemporary Islamic thought, see *Western Muslims and the Future of Islam* (2005), pp. 51-55.

responds by adapting many of its rules, and integrating that which is beneficial and humane.

Insofar as human rights are gaining universal acceptability as shared moral and legal principles, as a matter of principle, *Shari'ah* has no problem absorbing them as its own. In view of the fact that Muslim societies are ordered as nation-states, many with Western-style legal systems, few would deny that human rights can serve as instrumental tools to uphold human dignity within this order; “all that can be said about human rights is that they are necessary to protect individuals from violence and abuse, and if it is asked why, the only possible answer is historical” (Ignatieff, 2001, p. 452). Furthermore, there is clear historical precedence within the tradition for collaborating with others through covenants and agreements that further the common good. For instance, the Prophetic precedent in *hif-al-fudool* is particularly instructive. Five tribes, including the tribe to which the Prophet Muhammad belonged agreed on a covenant that stated that all would stand up for anyone who had suffered injustice and oppression, regardless of how powerful he was, or his tribal affiliation. The Prophet was only a young man when he was present at this pact, yet he would later in Prophethood describe it as an a honourable pact: “I was present in the house of ‘Abd Allah ibn Jud‘an at so excellent a pact that I would not exchange my part in it for a herd of red camels,⁹⁰ and if now, in Islam I were summoned unto it, I would gladly respond” (Lings, 1983, p.32). This indicates that participation in declarations and covenants that aim to protect human dignity, such as the

⁹⁰ A red camel was considered to be the most valuable possession in seventh century Arabia, and was used by the proverbially by Arabs to symbolize great wealth (Chenery, 1867, p. 438).

UDHR could be called a *Sunnah* or an exemplary Prophetic action that his followers are to comply with.

The existing resources within the *Shari'ah* supportive of rights.

In moving towards a collaborative venture between the Islamic and human rights traditions, contemporary scholars have suggested varying points of contact where *Shari'ah* can interface with human rights. Insofar as some of the literature marked by Orientalist features suggests that the language of human rights is fundamentally alien to Islam, it is useful to draw out the explicit and implicit support and potentialities for rights available within the *Shari'ah*. The wide array of approaches scholars have presented is indicative of the wealth of resources available within the *Shari'ah*. In chapter 3 I detailed three of these approaches promulgated by An-Na'im (abrogation), Sachedina (theology) and Abou El Fadl (essential Islamic values), all of which make important contributions to the discursive process, in spite of their shortcomings as full-fledged reform proposals. In what follows I will provide an overview of some other approaches. No one particular approach need be chosen, rather, considered together, the various proposals evidence the concern for human dignity and rights in the pre-modern *Shari'ah*, which, though differently expressed or formulated, nonetheless share the same concern for maintaining the dignity and rights of human beings.⁹¹

⁹¹ Pannikar, R. & Pannikar, R. describe this search as not merely a translation of rights into other cultural language, but a search for a 'homeomorphic' equivalent to human rights; "we should investigate how another culture satisfies the equivalent need... homeomorphism is not the same as an analogy; it represents a peculiar functional equivalence ... a kind of existential functional analogy" (Pannikar, R. &

Maqasid-based approaches.

Perhaps the most popular proposal for demonstrating the adaptability of Islamic law in the modern period in general, and with human rights in particular, has been the *maqasid*-based approach.⁹² The overall ‘*maqasid*’ (pl: *maqasid*) or purpose of the corpus of Islamic law in jurisprudential theory has been explicated as ‘*tahqiq masalih al-‘ibad*’, or ensuring the welfare of the people or the interest of humanity (Abou El Fadl, 2004, p. 23). Traditionally, the welfare of the people is further classified into three levels of necessity: necessities (*daruriyaat*), needs (*haajiyaat*) and luxuries (*tahsiniyyaat*), which must be fulfilled by the governing body in descending order of importance (Abou El Fadl, 2004, p. 23). The first tier of necessities is further divided into what has become known the ‘*al-daruriyaat al-khams*’ –five essential objectives or indispensable matters of human life: the safeguarding and promotion of (1) faith; (2) life; (3) reason; (4) progeny and honour/lineage; and, (5) property (Kamali, 2008b, p. 127). In other words, the fundamental objective and purpose of Islamic law, and governance by extension, is the

Pannikar R., 1982, p. 78). By way of example they compare how Brahman, the universal Hindu Spirit is not analogous with God; rather, they are homeomorphic equivalents.

⁹² For a discussion of the historical development and contemporary usages of *maqasid al-Shari’ah*, see J. Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (2008) and *Maqasid al-Shariah: A Beginner’s Guide* (2008); M. H. Kamali, *Shari’ah Law: An Introduction* (2008); B. G. Weiss, *The Spirit of Islamic Law* (1998). In “A Turn in the Epistemology and Hermeneutics of Twentieth Century Usul al-fiqh” (2004), David Johnston also provides an overview of the literature on human rights that relies on the *maqasid* as a strategy for contemporary reform of the *Shari’ah* and discusses possible theological and doctrinal consequences of this trend.

safeguarding and promotion of these indispensable interests, which constitute the heart and essence of Islamic law.

Scholars suggest that the *maqasid* can be considered the basic philosophy of Islamic law, which is indicative of the social and moral vision that animated Muslim jurists. It also provides a useful theoretical framework for the student of the *Shari'ah* in that the detailed knowledge she may acquire of the detailed doctrine and laws of the *Shari'ah* can be more interesting and meaningful in light of the *maqasid* (Auda, 2008b, p.16; Kamali, 2008b, p. 139). These objectives, developed between the eleventh and fourteenth centuries, were drawn from the primary sources of Islamic law, namely the *Qur'an* and the *Sunnah* (Prophetic example), as well as the Islamic legal heritage itself (Auda, 2008b, p. 16). They have gained wide acceptance by all schools of Islamic thought and have been further elaborated on and developed up to the contemporary era. As part of a larger 'philosophy of Islamic law', the *maqasid* explain the wisdom behind the rulings and the ends that the laws aim to achieve by blocking or opening certain means (e.g.: banning alcohol is intended to protect people's intellects, property and honour). They further represent the Divine intents and moral values upon which the *Shari'ah* is based, such as justice, human dignity, facilitation, etc. (Auda, 2008b, p. 3). Thus, insofar as the letter and texts of the *Shari'ah* do not (always) expressly promote inalienable rights that are due to the individual, the spirit of the *Shari'ah*, and the purpose behind the texts – abstracted in the *maqasid* – represent a key link between the pre-modern Islamic tradition and contemporary notions of human rights and development.

In order to concretize this link, many Muslim scholars have suggested that the *maqasid* should be further developed and explicated to meet the needs of the

contemporary era. For example, some scholars have suggested that protection of religion be extended to include protecting the freedom of religious belief; the protection of life to mean that the taking of life must be for a just cause and the result of a just process; the protection of the intellect to encompass the right to free thinking, speech and association; and, the preservation of progeny developed into a family-orientated theory (Abou El Fadl, 2003; Auda, 2008a; Kamali, 2008b). There has also been suggestion of adding a sixth objective or purpose of Islamic law, such as the protection of personal privacy (Kamali) or human development (Auda), to be one of the aims that the *Shari'ah* seeks to realize. Similarly, the argument can be made to expand the current objectives of Islamic law or to add another objective to ensure the protection of human rights and personal freedom.⁹³

Inductive “bottom-up” approaches.

A second approach that has been advanced is that of abstracting from the centre of the Islamic tradition elements, implicit and explicit, that relate to rights. Such a “bottom-up” approach would consider primary texts, legal rules, fundamental moral principles and theological truths, to demonstrate that the body of these rules, principles and truths, considered as a whole, are not only more consistent with and reinforce respect for human

⁹³ For further discussion about suggests for extending the *maqasid*, see J. Auda, *Maqasid al-Shariah: A Beginner's Guide* (2008), pp. 7-9, 22-27, and *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (2008); K. Abou El Fadl, “Islam and the Challenge of Democracy”, pp. 23-25, 41 (2004); M. H. Kamali, *Shari'ah Law: An Introduction* (2008).

rights, but would outweigh any readings to the contrary (Fadel, 2004, p. 84).⁹⁴ In Abou El Fadl's words, "to argue that the juristic tradition did not develop the idea of fundamental or basic individual rights does not mean that that tradition was oblivious to the notion" (Abou El Fadl, 2003, p. 150). Fadel provides an example of how a bottom-up approach, in contrast to a top-down approach based on essential values, could operate in relation to protecting individual autonomy: "Muslims' commitment to individual autonomy could be easily demonstrated by citations to numerous well-known medieval authors as well as particular rules of substantive rules that protect autonomy. On this bottom-up approach, autonomy is deeply rooted in a wide range of rules and practices, not in a single value treated as a basic moral axiom" (Fadel, 2004, pp. 84-85). Generally scholars have only touched on aspects of the laws and principles in the Islamic tradition that are reminiscent of rights. However, considered together, it is evident that this can be developed into a more robust approach towards the Islamic tradition's heritage of rights.

In "American Muslims and a Meaningful Human Rights Discourse in the Aftermath of September 11, 2011", Zaid Shakir, a prominent Islamic Scholar argues that Islamic human rights discourse must be rooted in the UDHR, and demonstrates that most of its elements have legitimate Islamic parallels in the concepts and frameworks of the Islamic tradition (2004). He bolsters this claim with examples from *Qur'an* and Sunah that unequivocally guarantee the right to life, even in times of war; to religious freedom, and other personal liberties. Abou El Fadl expounds a wide array of jurisprudential

⁹⁴ M. Fadel proposes this as an alternative approach to Abou El Fadl's "top-down" approach which takes abstract values as the starting point from which rules consistent with democratic principles can then be derived for a Muslim order. See Fadel's response essay: "Too Far From Tradition" (2004).

principles and positions that exhibit a humanitarian or compassionate orientation, such as the presumption of innocence in all proceedings and the burden of proof always resting with the accuser; deference given to releasing a guilty person in criminal cases than running the risk of punishing an innocent person; condemning the use of torture and the use of coerced confessions, and so on (Abou El Fadl, 2003, pp. 150-151).

Many scholars have also highlighted that in the classical Islamic legal discourse, there was a notion of individual claims that were immune from governmental or social limitation.⁹⁵ These claims or rights were divided into two categories: the rights accorded to God (*huquq allah*, or *ibadat*), and the right of human beings or individuals (*haqq al-‘ibaad*). The rights of God have to do with ritual worship, like prayer, fasting, pilgrimage, and criminal sanctions.⁹⁶ The rights of human beings are detailed in the *maqasid* (goals or

⁹⁵ See for example B. G. Weiss, *The Spirit of Islamic Law* (1998), pp. 182-184.

⁹⁶ In relation to the criminal sanctions (*hudud*), many scholars note that since they fell under God’s rights, the overall spirit of mercy of the *Shari’ah* meant that the procedural rules governing the application of criminal penalties was ‘patently obstructive’ and may be more correctly conceived of as safeguards for the individual than as facilitations of penal justice. Weiss for example notes that this concern to protect the individual against the harshness of the penal code is evident in the procedural rules of cases of fornication where “the jurists requires that the accusation be brought before the judge within one month of the offense, that the accusation be supported by four trustworthy witnesses who can testify to having seen coitus take place, that the witnesses be made liable to the statutory punishment, flogging, in the event the court does not uphold the accusation, and that the witnesses cast the first stones. The jurists also recommend that witnesses refrain from witnessing and that the offender not confess but rather turn to God for forgiveness. They even allow a confession, having been made, to be retracted subsequently” (Weiss, 1998, pp.184-185). Since these conditions are not being met in the contemporary era, Ramadan has called for a controversial moratorium on *hudud* punishments (See Ramadan, 2006).

purposes of Islamic law), being the establishment and protection of religion, life, family, reason and wealth. Interestingly, he notes that rights not specifically and clearly retained by God become rights retained by people, that the rights of people may only be forgiven by people, and that in the case of conflict between the two categories, the rights of humans are given precedence (Abou El Fadl, 2003, pp. 151-152). However, in contrast to rights as unwavering entitlements, Muslim jurists thought of individual rights as arising from a legal cause brought about by the suffering of a legal wrong. A person does not possess a right until he or she has been wronged and, as a result, obtains a claim for retribution or compensation (Abou El Fadl, 2003, p. 153). Furthermore, individuals were encouraged to settle their disputes out of court, so that the realization of the individual's rights through the courts when violated is only carried out at the behest of the wronged party (Weiss, 1998, p. 183). Abou El Fadl suggests transforming this traditional conception of rights to a notion of immunities and entitlements that are the property of individual holders, regardless of a legal cause of action and in the absence of a specific grievance (Abou El Fadl, 2003, p. 153).

Tensions and currents within a discursive tradition.

In a thought provoking article about the discursive processes taking place within the Islamic tradition in post-September 11th America, Jackson describes one of the Islamic tradition's as a "commitment to procedure over substance and its resulting

willingness to countenance all manner of substantively repugnant views as long as these are derived (or authenticated) through proper and recognized procedures” (Jackson, 2003, p. 122). In other words, here we find an admission by one of *Shari’ah*’s own proponents that there exists within its ‘hyperpluralistic’ jurisprudential corpus opinions and currents that would be considered lamentable, dangerous or even ‘repugnant’ by modern (or even pre-modern) standards.⁹⁷ Even though it cannot be claimed that pre-modern Muslim jurists were universally committed to gender and racial equality, it was the Islamic tradition’s redeeming qualities of its commitment to “free speech” and its aversion to authoritarianism that impeded the speed and degree to which these views could be banished.

In spite of this, discriminatory and inequitable opinions were generally abolished through the tradition’s own discursive processes, usually by being displaced by other opinions that were also built on legitimate sources and methods but had more appeal within the interpretive community. The point to note is that not every single opinion expressed in the corpus of *fiqh* will be compatible with human rights standards – nor

⁹⁷ Jackson provides a few examples of these views: Al-Shafi’i (eponymous leader of one of the four orthodox schools) held that if a man had a daughter through an act of fornication or adultery, he could marry her because she was not legally considered his daughter. Abu Hanifa (eponym of another orthodox school) held that if a man presented false evidence affirming marriage to a woman that the judge accepted, this man could cohabit with this woman despite his knowledge that no marriage had taken place. Malik (eponym of another school) is reported to have held that while normally a male relative was required to represent a brief for a marriage to be valid, this stipulation was relaxed under certain circumstances, such as when the woman was of lowly origins, was “unattractive”, or was black! Interesting, he also notes that these views were jettisoned by later jurists within the respective schools who argued that other opinions were sounder because they had greater epistemic weight. (Jackson, 2003, pp. 123-124)

should it be expected to be. But rather than denying that such views exist within the tradition (as some Muslim apologetics and romantics tend to do), or to give excessive focus and attention to these often solitary or marginal opinions (as some Orientalist and Huntington-inspired scholars have been inclined to do), I contend that allowing the *Shari'ah* as a discursive tradition to run its relevant discursive processes would be a far more promising strategy. In addition to examples mentioned in the footnotes, entire orthodox schools of law disappeared through the discursive processes. For instance, the Zahiri School refused to accept reasoning by analogy (*qiyas*) as a method to address new circumstances. After a few centuries of participation in the discursive *fiqh* tradition, the demands of social evolution reached a point where they could no longer respond effectively to changing circumstances and were relegated to the margins of history (Jackson, 2003, p. 124).

In a similar vein, some opinions within the historical *Shari'ah* are not so much troublesome as they are outdated. Ramadan gives the example of the division of Islamic and non-Islamic territories by medieval Muslim scholars into '*dar al-harb*' (the abode of war) and '*dar al-islam*' (the abode of Islam). This division was based on a particular geopolitical reality of their time, which led then-scholars to formulate a conception of the world in terms of this binary vision to serve the needs of that era. The problem arises when such a vision is imported in today's globalized world, with diversity, blending, constant movement of populations, international politics and economic reliances, complex alliances, treaties of peace and collaboration and multiple spheres of influence (Ramadan, 2005, pp. 65-66). For these reasons, many Muslim scholars have described the current state of world affairs according to a third concept, introduced by al-Shafi'i –

'*dar al- 'ahd*' – the abode of treaty, or '*dar al-amn*' - the abode of safety.⁹⁸ Ramadan discusses and critiques even this third approach as simplistic and reductionist, before advancing his own concept of describing our global village as '*dar al-shahadah*' an open world which is an abode of witnessing onto shared essential values, of justice and mercy (Ramadan, 2005, p. 75).

It is in light of the discursive processes of the *Shari'ah* that we can understand the oft-quoted statement of the great medieval scholars Ibn al-Qayyim describing the spirit and essential values of the *Shari'ah*:

The Islamic law [*Shari'ah*] is all about wisdom and achieving people's welfare in this life and the afterlife. It is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the *Shari'ah*, even if it is claimed to be so according to some interpretation. (as cited in Auda, 2008b, p. 20)

This is not to say that every single legal opinion expressed by Muslim scholars is just, merciful, wise and good – or even 'civilized' according to our Western sensibilities. But the point is that these values are embodied in the ideal which the *Shari'ah* symbolizes, and thus human interpretive efforts within the discursive realm of *fiqh* are to remain faithful to the values as much as possible, and when they fail to do so, they will be

⁹⁸ In *Western Muslims and the Future of Islam*, T. Ramadan discusses the trend among Muslim scholars to rely on the pre-modern concept of '*dar al- 'ahd*' or '*dar al-amn*' to describe the contemporary globalized world and why this approach is lacking (2004, pp. 63-77.)

displaced, through ongoing discursive processes, by legal opinions that are more faithful to the ideal.

Conclusion

A meaningful and constructive encounter between the Islamic and human rights traditions that results in synthesis and future collaboration requires an internal renewal of both traditions. For the human rights tradition, this requires openness to diversity and abstaining from imposing Western liberal values on others under the guise of human rights neutrality. The *Shari'ah* needs to come to draw out the potentialities available in its tradition to reinforce the idea of rights, thereby to integrate it into the local cultural and religious ethos of Muslim societies. The Islamic tradition must also continue its discursive processes to mediate the presence of discriminatory and objectionable currents within its corpus.

In pursuing these internal renewals we must bear in mind that while all traditions, including the Islamic tradition, are constantly evolving, it does not necessarily follow that “those who contest the dominant values from within will want to live in quite the way that self-styled champions of modernity (from within their society and without) say they should” (Asad, 2003, p. 39). For instance, Asad argues that while it may be true that many women in male-dominated societies resent their husbands governing them, it does not follow that “all these women will spontaneously seek the particular ordering of gender relations that abstracted human rights would prescribe – a law predicated on the supreme value of the self-owning individual” (Asad, 2003, p. 39). Where the human rights tradition is no longer committed to achieving broader liberal goals through the

universalizing rights, this may bother human rights advocates who are committed to broader liberal goals, however, this would not raise a problem for reconciling the two traditions per say.

Considered from a different perspective, in his article “Public Reason as a Strategy for Principles Reconciliation: The Case of Islamic Law and International Human Rights Law”, Fadel develops a framework for a principled reconciliation between human rights and Islamic law through Rawls’s liberal theory of public reason. He argues that were both traditions to observe the limitations of public reason, the major concerns of both parties would be resolved without either side having to abandon its fundamental moral commitments. One interesting assumption which is integral to his framework is that an individual’s voluntary rational deviation from an equality norm should not raise a political concern for liberals, even if that inequality would be considered a violation of the individual’s human rights were it to be mandated by the state (p.3). Based on this assumption, he argues that public reason can accommodate such things as Islamic inheritance laws, niqab, and even *hudud* laws.

As Ignatieff argues: “You cannot impose human rights values: they will not take hold if you do. Besides, imposition violates the very principles are seeking to uphold. So the margins of appreciation open to each culture are going to be large, and outsiders to the culture will have to learn to live with a lot that may seem illiberal or inhumane to them, but which continues to receive the support of the indigenous culture” (Ignatieff, 2001, p. 171).

Conclusion: Theory, Context and Looking Beyond Rights

As of the time of this writing, the Middle East revolutions are in full swing. Egypt and Tunisia are making transitions into democratically-inspired rights-protecting states. Freedom fighters in Libya are on the verge of ridding the country of Qaddafi and revolutions continue to be violently suppressed in Syria, Bahrain and Yemen. Uprisings continue to spring intermittently elsewhere in the region, in Jordan, Algeria and Morocco. The demands of the uprisings are not only political in nature, but also insist on economic and social change in the Muslim world. If we were to consider what the biggest obstacles are to realizing those demands, stemming rights abuses, and achieving social justice, we would include such things as corruption, autocratic regimes (most often instated and supported by Western powers), economic instability, remnants of a colonial legacy, and ongoing Western imperialism. As for the potential challenge posed by the norms and values of the Islamic tradition, this seems to interest Western scholars more than the victims of human rights abuses in Muslim states.

While this thesis has focused exclusively on developing a framework to ensure a meaningful and constructive encounter between the Islamic tradition and the human rights tradition, an outcome of isolating two elements is that it ignores the host of other relevant factors at play. The actual encounter between Islam and human rights takes place within the broader context of a whole range of other economic, political, social, and cultural factors that inhibit or foster rights protections. This may seem obvious, due to preconceived notions about Islam “this truism seems worth recalling because Islamic religion and culture often are portrayed as being the chief obstacle to an improvement of

the troubling human rights situation in some of these countries” (Bielefeldt, 2000, p. 102). In fact, many scholars have argued that the human rights abuses in the Muslim world have little to do with religion. Faath and Mattes point out that most of the human rights violations that they analyzed in North Africa do not show specifically “Islamic” features, and Price notes the statistically insignificant relationship between Islamic culture and poor record of human rights (cited in Bielefeldt, 2000, p. 102).

In this thesis I have argued that human rights, though not currently universalized, have the potential of becoming a universal moral currency through which to stem human suffering and political violence. In order to realize this potential, it is imperative that the encounter between Islam and human rights is conditioned by a framework for a meaningful encounter, which adheres to four important criteria by both traditions: (1) awareness of the incompleteness of the tradition being advanced; (2) conceptualizing the tradition as a discursive one that is capable of evolution to meet the needs of changing contexts; (3) seeking a deep and nuanced understanding of the other concept; and, (4) maintaining internal coherence and integrity of both concepts. It is my contention that the current approaches taken to this debate are lacking in these regards. In chapter 1, I argued that Orientalist literature that advance human rights and broader Western norms as perfected ideals and Occidentalism literature that maintains that the Islamic tradition does not need to evolve to meet the exigencies of modern demands are both problematic. In chapter 2, I described more constructive reform methodologies advanced by contemporary Muslim scholars that are a marked amelioration from Orientalist approaches, but are still lacking due to the heterodox epistemological commitments used to advance their claims, their insistence on liberalization or secularization as an integral

part of implementing human rights in the Muslim world, and their placing on the onus for reform exclusively on the Islamic tradition.

The main contention advanced in this thesis is that it is possible to espouse an approach that is faithful to the values, principles and commitments of both traditions and which also countenances the need for the internal renewal of both traditions to meet the needs of changing circumstances. Conceptualized as discursive traditions that have evolved with the passage of time and responded effectively to changing contexts, human rights and Islam can certainly one again rise to the occasion. For the human rights tradition, the challenge is to remain a thin, minimalist theory that acts as a pragmatic, universal vocabulary that individuals and communities across the globe may use to advance their claims. As a flexible, shared language, rights should be disentangled from wider liberal and secular philosophies and be open to evolution through inter-cultural dialogue with diverse cultures and civilizations.

Human rights should not be considered a panacea for all ills, nor should they be seen as the 'only' and 'final' answer; "This belief, which is religious in the evangelical sense, invites "end of history" conclusions and leaves humanity stuck at the doors of liberalism, unable to go forward or imagine a postliberal society. It is an assertion of a final truth. It must be rejected" (Mutua, 2002, p. 3). The needs of societies and the international order may very well transform and require pragmatic political tools other than rights (Kamali, 2008b, p. 206). This may include looking 'beyond rights' for other political projects or more ambitious justice projects that may "offer a more appropriate and far-reaching remedy for injustice", especially if we define the chief contemporary global problem not as violations of individual rights by abusive state powers, but as "relatively unchecked

globalization of capital, postcolonial political deformations, and superpower imperialism combining to disenfranchise peoples in many parts of the first, second, and third worlds from the prospects of self-governance to a degree historically unparalleled in modernity” (Brown, 2004, p. 462).

The Islamic tradition must come to terms with the new context of the nation state and the contemporary international order which its pre-modern framework alone is not capable of managing. As Erwin notes: “while the traditional or classical formulation of Islamic law may be perceived as inappropriate in contemporary circumstances, Islamic law itself certainly can be implemented in the modern context, albeit after significant reformulation ...([which] has not yet presented itself)... the concept and ideal of Islamic law is not restricted whereas the temporal manifestation of that ideal is” (Erwin, 2001, p. 90). Insofar as human rights are the best available tool at our disposal to further the promise of *Shari'ah* of upholding human dignity, the challenge is to localize rights within the cultural and religious ethos of the Muslim world by developing existing human rights potentialities within the existing corpus of the Islamic tradition. Proponents of *Shari'ah* must also revive the traditions internal discursive processes through which discriminatory and oppressive Islamic opinions were historically discarded and replaced.

Finally, in addition to these internal renewals, many other structural, political and economic changes are required to realize rights in the Muslim states, in particular furthering economic development and education. Nonetheless, as a provisional starting point, bringing the two discursive traditions into a principled dialogue can go a long way towards realizing the promise of human rights in the Muslim world.

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