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## Muslim Modernism, Islamic Law, and the Universality of Human Rights

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# MUSLIM MODERNISM, ISLAMIC LAW, AND THE UNIVERSALITY OF HUMAN RIGHTS

*Mohammad Fadel\**

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## INTRODUCTION

I first encountered Professor An-Na'im's work quite serendipitously as a graduate student at the University of Chicago. At that time, I had not yet begun my legal studies and was early in my graduate student days at the Department of Near Eastern Languages and Civilizations. While browsing the stacks of the Regenstein Library, my eyes fell upon Professor An-Na'im's book, *Toward an Islamic Reformation*.<sup>1</sup> Although the book was not particularly relevant to my coursework at the time, its title intrigued me and I checked it out and read it quickly alongside my other assignments. At that time, I thought the work was interesting but I did not give it too much heed. Little did I know that, upon becoming a legal academic with more than a passing interest in Islamic and

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<sup>1</sup> ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (1990).

human rights law, I would have occasion to engage with Professor An-Na'im's rich body of scholarship repeatedly.

It is in the spirit of someone who has benefitted greatly from Professor An-Na'im's dedication to the field of Islamic and human rights law that I eagerly accepted the invitation to contribute an article to this Festschrift. While he could not have known it at the time he published *Toward an Islamic Reformation*, Professor An-Na'im was a trailblazer in the study of international human rights law in the African and Muslim contexts and in how to understand the place of indigenous legal traditions (such as is customary African law and Islamic law) within the broader context of human rights law.

While it is, of course, reckless to attempt to summarize the scholarly career of someone whose output is as rich and prolific as that of Professor An-Na'im, I hope he will indulge me in characterizing his work as an attempt to reconcile one's specific commitments—in his case, the specific commitments arising out of being a Sudanese, African-Arab Sunni male—with the universal commitments arising out of being a member of humanity. At different times, An-Na'im offered various strategies to accomplish this reconciliation. One strategy was to propose a radical inversion of those elements of Quranic and Islamic teachings that Muslims should deem universally authoritative (e.g., the universal, non-specific, and aspirational teachings characterizing the so-called Meccan phase of Prophet Muḥammad's mission in contrast to the specific, legislative verses characterizing the so-called Medinan phase of the Prophet's mission).<sup>2</sup> Another strategy he proposed imagined this reconciliation from an institutional perspective: a secular state, committed to religious neutrality, could create the political space within which individual Muslims could work out freely for themselves different ways to reconcile their particular commitments with universal ones.<sup>3</sup> The themes and problems Professor An-Na'im courageously raised and tackled in his long, productive scholarly career are precisely the issues that continue to engage thoughtful Muslims the world over. My contribution to this Festschrift seeks to explore one important theme from Professor An-Na'im's early work: the problem of grounding human rights norms in local indigenous cultures. Accordingly, this Article will take as its starting point Professor An-Na'im's article, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*.<sup>4</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> See generally ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A (2008) (arguing that only in a secular state does an individual Muslim have the religious freedom to determine for himself or herself the precise contours of what God requires in particular situations).

<sup>4</sup> Abdullahi Ahmed An-Na'im, *Toward a Cross Cultural Approach to Defining International Standards*

In his book, An-Na'im makes the critical argument that for international human rights law to be effective, or for it to become more effective, the subjects of the law—the citizens of the various states in the world—must make the norms of international human rights law their *own* norms, such that they see the requirements of human rights law as a legitimate part of their own legal system rather than a foreign imposition.<sup>5</sup> In order for human rights norms to become more effective, An-Na'im argues that they need to be perceived as legitimate from both the internal perspective of a given regime as well as a “cross-cultural perspective[.]”<sup>6</sup> The principle of indigenizing human rights norms is based on the intuitive notion that if a legal norm is perceived as legitimate from the internal perspective of those governed by that legal system, individuals are more likely to adhere freely to it themselves and demand that others honor it as well.<sup>7</sup> Accordingly, human rights lawyers ought to be concerned with *how* international norms are interpreted from the perspective of different cultures—in order to specify abstract human rights principles in a manner most consonant with the local norms of different societies—as much as they are with determining the specific *content* of human rights norms.<sup>8</sup>

The desirability of strengthening the cross-cultural legitimacy of human rights, in turn, is based on the notion that the legitimacy of human rights law requires taking into account the scores of diverse cultures present in human civilization.<sup>9</sup> An-Na'im, however, is careful to reject one obvious interpretation of cultural pluralism, namely, that the content of international human rights law should be limited to those rights for which there is *actual*, positive agreement among all human cultures.<sup>10</sup> While affirming the universality of international human rights laws in the abstract, An-Na'im argues that it may be necessary to affirm a deeper and broader conception of human rights by retrospectively interpreting local values in an enlightened manner so that they become more consistent with the norms of international human rights law.<sup>11</sup> This is to be accomplished through what he calls “internal dialogue and struggle to establish enlightened perceptions and interpretations of cultural values and norms.”<sup>12</sup> As local human rights advocates work within a particular cultural tradition to

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*of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* (1995).

<sup>5</sup> *Id.* at 20–21, 25, 27–28, 37.

<sup>6</sup> *Id.* at 29.

<sup>7</sup> *Id.* at 21, 27–28.

<sup>8</sup> *Id.* at 21, 27–28, 37.

<sup>9</sup> *Id.* at 21.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

indigenize universal human rights norms in the local idiom, they also engage in dialogue with their peers from other societies and cultures in an attempt to work out a common understanding of what human rights norms mean in a specific context.<sup>13</sup> This process of intercultural exchange affirms both the universal values of human rights law along with their specific articulations in different jurisdictions.<sup>14</sup> An-Na'im then goes on to apply the framework he has developed to the question of the fixed, scriptural penalty in Islamic law for theft—amputation of the right hand—showing both the potential of this approach and its limitations.<sup>15</sup>

Although An-Na'im took up the theme of how to indigenize human rights norms largely in the earliest part of his career, this question has only become more salient with the passage of time, given the fall-out from the terrorist attacks of 9/11, the United States' invasion of Iraq in 2003, and the failure of the Arab Spring. On the one hand, extremist Muslim political movements like Daesh (also known as ISIS) not only openly rejected particular elements of the modern human rights movement, but they also appeared to pursue policies deliberately intended to signal their unequivocal and categorical rejection of all post-World War II norms, including the very idea of universal human rights, by restoring *de jure* slavery and massacring their opponents.<sup>16</sup> Even before the rise of Daesh, however, the United States and its allies had engaged in a process of othering Muslims and Arabs to justify horrific abuses of the human rights of persons detained in the so-called “war on terror,” with U.S. lawyers even distorting the meaning of “torture” to provide cover for these abuses.<sup>17</sup>

Just as insidiously, if not as well known, numerous western jurisdictions adopted, or attempted to adopt, measures targeting quotidian practices of Islam, such as the head scarf (*hijāb*) worn by many Muslim women and the face veil (*niqāb* or *burqu'*) worn by comparatively fewer Muslim women,<sup>18</sup> the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 29–37.

<sup>16</sup> See generally Ali Rod Khadem, *Why Should Law and Policy Makers Understand Extremist Beliefs? The Islamic State (ISIS) as a Case Study: Past, Present, and Future*, 23 LEWIS & CLARK L. REV. 103, 121–23 (2019); Mohammad Fadel, *Ideas, Ideology, and the Roots of the Islamic State*, 31 J. POL. & SOC'Y 83 (2019) (explaining ISIS's principled objections to the foundations of the modern regime of international law and international human rights law).

<sup>17</sup> See *Human Rights and Civil Liberties*, COSTS OF WAR (June 2021), <https://watson.brown.edu/costsofwar/costs/social/rights>. The scholarly literature on the damage wrought to the international human rights regime by the United States' “global war on terror” (instituted in response to the terrorist attacks of September 11, 2001 [9/11]) is too vast to cite, but this web page gives a good overview of many salient issues. *Id.*

<sup>18</sup> See, e.g., Ronan McCrea, *The Ban on the Veil and European Law*, 13 HUM. RTS. L. REV. 57, 57–97 (2013).

construction of mosques,<sup>19</sup> and even the authorization of Muslim cemeteries.<sup>20</sup> Some ostensibly liberal jurisdictions, otherwise committed to human rights, adopted measures targeting Muslim immigration<sup>21</sup> and prohibiting the recognition of judicial decisions based on Islamic law, even when ordinary principles of private international law would have recognized those decisions.<sup>22</sup> Ironically, advocates of these anti-Muslim measures often weaponized human rights norms, especially gender equality and same-sex rights, as a pretext for discriminating against Muslims.<sup>23</sup> In light of these developments, it would not be an exaggeration to say that there has never been a greater need for re-establishing the cross-cultural legitimacy of international human rights law than the present moment.

My Article will proceed as follows. First, it will explore the political context in which Muslim “human rights exceptionalism” is sustained. This particular section will begin with Muslim responses to the international human rights regime through the articulation of “Islamic” human rights norms that apologetically defended some traditional norms of Islamic law while remaining committed in principle to a universal idea of human rights. It will then describe post-9/11 “rejectionist” developments in the Muslim world that culminated in the rise of Daesh and its principled rejection of human rights law in its entirety. This section will conclude with a description of measures taken in western democracies that single out Muslims and Islam and attempt to justify curtailing Muslims’ rights on the ground that Islam represents a unique danger to the public order.

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<sup>19</sup> See, e.g., Jocelyne Cesari, *Mosque Conflicts in European Cities: Introduction*, 31 J. ETHNIC & MIGRATION STUD. 1015, 1015–22 (2005); *Controversies over Mosques and Islamic Centers Across the U.S.*, PEW RSCH. CTR. (Sept. 27, 2012), <https://www.pewforum.org/2012/09/27/controversies-over-mosques-and-islamic-centers-across-the-u-s-2>.

<sup>20</sup> See, e.g., *Why Many French Muslims Choose Burial Abroad*, BBC NEWS (July 22, 2013), <https://www.bbc.com/news/magazine-23325581>; *Plans for Muslim Cemeteries Face Backlash Across the U.S.*, CBS NEWS, <https://www.cbsnews.com/news/plans-for-muslim-cemeteries-face-backlash-across-the-us> (last visited July 9, 2021); *Rejected Muslim Cemetery: Even in Death, We Find No Peace*, <https://www.theglobeandmail.com/opinion/rejected-muslim-cemetery-even-in-death-we-find-no-peace/article35719131> (last visited July 9, 2021); Christopher Cataldo, *Discriminating Against the Dead: How to Protect Muslim Cemeteries from Exclusionary Land Use Mechanisms*, 58 B.C. L. REV. 1391, 1391–1423 (2017).

<sup>21</sup> Ronan McCrea, *Limitations on Religion in a Liberal Democratic Public Order: Christianity, Islam, and the Partial Secularity of the European Union*, 27 Y.B. EUR. L. 195, 195–236 (2008).

<sup>22</sup> Council Regulation 1259/2010 of Dec. 20, 2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343) 10, 10–16; Will Smiley, *The Other Muslim Bans*, 1 J. ISLAMIC L. 1, 2–38 (2020).

<sup>23</sup> See Smiley, *supra* note 22; McCrea, *supra* note 21, at 195–236 (discussing how the idea of “European” values is being used to discriminate against immigrants from Muslim-majority states); Rim-Sarah Alouane, *The Weaponization of Laïcité*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS.: BERKLEY F. (Oct. 7, 2020), <https://berkeleycenter.georgetown.edu/posts/the-weaponization-of-laicite>.

The second Part of this Article will explore in greater depth the problem of lawlessness, with violations of human rights law understood as a specific case of a more general problem. While the previous section will discuss *principled* objections to the *contents* of human rights norms, this section will aim to show that not all failures to comply with human rights norms are a matter of principled rejection, but rather represent a failure of political will on the part of a particular state. In fact, many abuses of human rights in the Muslim world are better understood from this perspective rather than from the assumption that the norm itself is questioned. This section will raise the question of the relationship between the political and the legal and of what kind of political arrangements are necessary to promote a law-abiding state and a law-abiding citizenry. In exploring the normative dimension of this question, I will also discuss how nineteenth- and twentieth-century Arab Muslim thinkers of the Nahḍa (i.e., the nineteenth-century Arab literary and political renaissance) addressed the political dimension of legal reform and why they believed domestic political reforms must either precede the desired legal reforms or occur concurrently with them. I will use their arguments to make the case that democratization—although it might lead to short-term results that are in tension with human rights norms—remains the most plausible pre-condition for entrenching human rights norms in *all* societies, including Muslim ones.

Part Three of this Article will take up with greater specificity these two themes—the internal legitimacy of human rights norms and the cross-cultural legitimacy of international human rights norms—and will build on the arguments of the two previous sections; namely, it will argue that doctrinal change, without the institutional capacity to make law effective, is insufficient to secure human rights. This argument implies a positive duty on the part of the developed world to assist in creating the political and institutional means to secure human rights in the Muslim developing worlds, more generally through recognizing broader duties of international solidarity.

Part Three will begin with an inquiry into how Islamic law can contribute to strengthening international duties of solidarity as a prerequisite for strengthening international human rights law. Without recognizing robust positive duties of international solidarity, international human rights law risks becoming a tool of imperialism rather than a tool to protect the most vulnerable.<sup>24</sup> This section will then discuss certain Islamic jurisprudential doctrines to argue that recognizing the contingency of human rights within the economic and political circumstances of particular states, and the resulting pluralism in the practice of

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<sup>24</sup> See Rafia Zakaria, *Against White Feminism: Notes on Disruption* (2021).

human rights, need not undermine the universalism of human rights. Finally, I will explore what I consider to be plausible yet “enlightened” interpretations of historical Islamic law, using the Islamic law of marriage formation as an example to point to reform strategies that promote greater substantive convergence between the historical norms of Islamic law and contemporary international human rights norms.

## I. MUSLIM “HUMAN RIGHTS EXCEPTIONALISM”

The literature on Islam and human rights is vast, too vast for an exhaustive survey in this context.<sup>25</sup> Specialists on the relationship between Islamic law and international human rights law generally concur that the main source of conflict does not stem from an absence of the *idea* of human rights in Islamic law, and neither does Islamic law lack sufficient internal resources to develop a theory of international human rights law, but rather the tension is born out of a perceived conflict between the epistemological origins of the different regimes. Islamic law, with the rights and duties that it recognizes, is rooted in divine revelation that claims for itself perfection; meanwhile, international human rights law is a secular project that takes no notice of revelation, except to the extent that it guarantees some religious freedom to individuals.<sup>26</sup> The philosophical tension in the foundational premises of international human rights law and Islamic law has been further exacerbated by the realities of power asymmetries between the western world and the Muslim world that from the perspective of the latter, render the international human rights project an extension of colonialism,<sup>27</sup> even a repackaged version of the colonial era’s “White Man’s Burden” with the same attendant hypocrisies.<sup>28</sup>

At the same time, however, the prestige of human rights in the post-World War II era means that even those generally predisposed to rejecting them find themselves drawn to affirming some kind of universal conception of human

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<sup>25</sup> In addition to Professor Na’im’s work, see ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* xii (5th ed. 2013); Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J.L. & RELIGION 185 (2000); MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (2005); Khaled Abou el Fadl, *The Human Rights Commitment in Modern Islam*, in *HUMAN RIGHTS AND RESPONSIBILITIES IN THE WORLD RELIGIONS* 301–64 (Nancy M. Martin & Joseph Runzo eds., 2002); Mohammad Fadel, *Public Reasons as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 CHI. J. INT’L L. 1, 1–20 (2007); Ann Elizabeth Mayer, *Internationalizing the Conversation on Women’s Rights: Arab Countries Face the CEDAW Committee*, in *ISLAMIC LAW AND THE CHALLENGES OF MODERNITY* (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004).

<sup>26</sup> el Fadl, *supra* note 25, at 312, 314; Moosa, *supra* note 25, at 197–98; MAYER, *supra* note 25, at 51, 58.

<sup>27</sup> MAYER, *supra* note 25, at 58.

<sup>28</sup> el Fadl, *supra* note 25, at 305–06.



rights as part of the Islamic tradition.<sup>29</sup> This view, however, has generally produced either an apologetic approach that claims to ground modern human rights norms in classical principles of Islamic law,<sup>30</sup> or a modified version of classical Islamic law using the language of human rights that suppresses substantive conflicts between “Islamic” conceptions of human rights and the objective articulation of human rights set out in international conventions.<sup>31</sup>

Although the motives of the intellectuals who articulated Islamic human rights schemes had a sincere desire to bridge normative gaps between secular conceptions of human rights and substantive rules of Islamic law, their apologetic approach suffered from some important limitations. Their approach’s failure to engage seriously with the historical tradition of Islamic law rendered them vulnerable to attacks from Muslim rejectionists because they failed to address sufficiently the problem of the authenticity of their Islamic human rights schemes, after first raising authenticity as an objection to the wholesale acceptance of secular conceptions of human rights.<sup>32</sup> Their approach also had the unfortunate effect of secularizing the discourse around human rights in the Muslim world, something that only reinforced claims that human rights schemes were alien to the Muslim tradition and part and parcel of a colonial project.<sup>33</sup>

Echoing the very same concerns that animated Professor An-Na‘im’s apprehensions about conflicts between local cultural norms and the standards of international human rights law, Abou el Fadl argues that the failure to produce a well-grounded reconciliation between the legacy of Islamic law and the norms of international human rights law inevitably produced what he calls a weak subjective commitment to contemporary human rights norms in the Muslim world.<sup>34</sup> The failure of the apologetic approach to Islam and human rights inadvertently helped strengthen the hand of Muslim rejectionists: if, as the apologists argued, Islam already provided the appropriate, substantive menu of

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<sup>29</sup> MAYER, *supra* note 25, at 59–60; el Fadl, *supra* note 25, at 304.

<sup>30</sup> MAYER, *supra* note 25, at 60; el Fadl, *supra* note 25, at 307.

<sup>31</sup> Moosa, *supra* note 25, at 200. The most important objective expressions of Islamic human rights schemes are the Universal Islamic Declaration of Human Rights and the Cairo Declaration on Human Rights in Islam. *Universal Islamic Declaration of Human Rights*, UNIV. OF MINN. HUM. RTS. LIBR., [http://hrlibrary.umn.edu/instree/islamic\\_declaration\\_HR.html](http://hrlibrary.umn.edu/instree/islamic_declaration_HR.html) (last visited July 11, 2021); *Cairo Declaration on Human Rights in Islam*, UNIV. OF MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/instree/cairodeclaration.html> (last visited July 11, 2021).

<sup>32</sup> MAYER, *supra* note 25, at 60; el Fadl, *supra* note 25, at 307, 311. An interesting counterexample is in Mashood Baderin’s work, in which he attempts to reconcile systematically between the International Covenant for Civil and Political Rights (ICCPR); International Covenant on Economic, Social, and Cultural Rights (ICESCR); and Islamic law. See BADERIN, *supra* note 25.

<sup>33</sup> el Fadl, *supra* note 25, at 307–08.

<sup>34</sup> *Id.* at 312–13.

rights for human beings, why engage in any reconciliatory project at all?<sup>35</sup> On this view, Islam already provides a universal scheme of human rights, and if the Islamic scheme conflicts with the secular scheme, so much worse for the latter; in no event should Muslims bother with revising their own conceptions based on what non-Muslims think the appropriate content of rights should be.<sup>36</sup> Ironically, this led rejectionists to adopt a posture that equated anti-westernism with Islam, with the result that even in areas where genuine Islamic arguments consistent with contemporary human rights norms were available, rejectionists refused such positions out of hand.<sup>37</sup>

The hesitancy of Muslims to endorse international human rights law unqualifiedly is not merely an interesting theoretical question of jurisprudence. It has had important practical consequences for the universality of human rights law. Muslim states have sometimes, while ratifying an international instrument, included a broadly worded reservation that nullifies their obligation under the treaty to the extent that their commitment would contradict Islamic law. The treaties with the most common “Islamic law” reservations are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC), but they are by no means the only treaties with an Islamic law reservation.<sup>38</sup> The ubiquity of these reservations, combined with their ambiguity, in turn have caused many states to question the validity of these reservations from the perspective of international law and have undermined confidence in the commitment of Muslim states to fulfill their obligations under these treaties.<sup>39</sup>

But Muslims and Muslim-majority states are not the only parties responsible for exceptionalizing Islam and Muslims with respect to international human rights law. In the decades following 9/11, the European Union (EU) has taken numerous steps to formalize an exceptional status for Islam and Muslims in its

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<sup>35</sup> *Id.* at 307.

<sup>36</sup> *Id.* at 309.

<sup>37</sup> *Id.* at 313. An excellent example of this rejectionist tendency to equate anti-westernism with Islam can be found in ISIS’s determination to restore slavery despite classical Islamic law’s numerous provisions encouraging freedom and the juristic maxim that “the Lawgiver looks forward to freedom.” See Fadel, *supra* note 25, at 10.

<sup>38</sup> Ann Elizabeth Mayer, *Islamic Reservations to Human Rights Conventions: A Critical Assessment*, 15 *RECHT VAN DE ISLAM* 25, 25–45 (1998); see also Mohammad Fadel, *The Challenge of Human Rights*, *SEASONS* 59, 60–61 (2008); BADERIN, *supra* note 25, at 220 (mentioning other human rights conventions that have prompted Islamic law reservations).

<sup>39</sup> Fadel, *supra* note 38, at 61 n.9. It should be noted that Muslim-majority states are not the only states that have invoked Islamic law-based reservations to CEDAW. India and Singapore, for example, have both entered reservations to CEDAW in light of their domestic commitments to allow Muslim minorities to regulate their community affairs (including family law) according to the norms of Islamic law. *Id.* at 61 n.8.

legal system.<sup>40</sup> Ronan McCrea, for example, has shown that EU law has demanded higher standards of secularity from Muslim-majority states seeking admission to the EU (i.e., Turkey) and immigrants from Muslim-majority countries, than it has from Christian-majority states and immigrants from Christian-majority countries.<sup>41</sup> More generally, Europeans see in Muslims' outward manifestations of their quotidian religious practices, such as the wearing of the head scarf, a deep contradiction to European cultural notions about the proper place of religion in European society.<sup>42</sup> Thus, these measures carry with them the not-too-subtle message that the successful integration of Muslims—especially when viewed in the context of immigration—requires Muslims to abandon practices, such as the wearing of the headscarf, that manifest signs of Islamic difference.<sup>43</sup> Moreover, decisions of the European Court of Human Rights have accorded European states a wide “margin of appreciation” in the measures they adopt to regulate Islam and Muslims on the grounds of protecting gender equality and Europe’s democratic order from the allegedly anti-democratic character of Islam.<sup>44</sup> Furthermore, a recent case from the European Court of Justice opens the door for private employers to prohibit their employees from publicly manifesting Islamic symbols, such as head scarves, if the prohibitions are made pursuant to a neutral policy adopted in response to a genuine need either to prevent conflict within the business or to project an image of religious neutrality to customers—even if, statistically, the burden of complying with the rule seems to fall exclusively on Muslim women.<sup>45</sup>

Under the guise of protecting Europe’s public order from religious totalitarianism, some European states have even adopted measures intended to probe the subjective beliefs of prospective immigrants from Muslim-majority countries in determining their potential for successfully “integrating” into

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<sup>40</sup> McCrea, *supra* note 21.

<sup>41</sup> *Id.* at 195–96.

<sup>42</sup> McCrea, *supra* note 18, at 58. As sociologist of religion José Casanova argues, European secularism is based on a particularly European notion he describes as “stadialism,” which is rooted in the conviction that being modern entails overcoming religion. José Casanova, *Secularisation, Religion and Multicultural Citizenship, in RELIGIONS AND DIALOGUE: INTERNATIONAL APPROACHES 23–24* (Wolfram Weisse et al. eds., 2014). Muslims’ continued outward adherence to religious practices therefore contradicts this particularly European sense of the secular and disrupts their cultural sense of what it means to be a modern person. *Id.* Ironically, this particularly European understanding of secularism, insofar as it is used broadly to limit Muslims’ human rights in Europe, functions similarly to Islamic law reservations to human rights treaties.

<sup>43</sup> McCrea, *supra* note 21, at 231; McCrea, *supra* note 18.

<sup>44</sup> Mohammad Fadel, *Muslim Reformists, Female Citizenship, and the Public Accommodation of Islam in Liberal Democracy*, 5 POL. & RELIGION 2, 2–4 (2012); McCrea, *supra* note 21, at 210–12.

<sup>45</sup> ECLI:EU:C:2021:594, ¶¶ 59, 63, 76–78 (July 15, 2021), <https://curia.europa.eu/juris/document/document.jsf?jsessionid=094FE3477503430E362C11B572AD1ACB?text=&docid=244180&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2112380>.

European secular society. The Netherlands, for example, now requires immigrants from Muslim-majority countries not only to answer invasive questions about their subjective beliefs regarding potentially controversial conduct such as homosexuality, but also compels them to watch videos that include scenes of topless bathing and same-sex couples kissing before they can sit for citizenship exams.<sup>46</sup> Other European states have followed the Netherlands' lead in introducing measures intended to single out Muslims' subjective religious beliefs as appropriate criteria by which to accept or reject immigrants to their countries, even though it is by no means apparent that the religious views of prospective immigrants from Muslim-majority states are substantially different from views held by substantial groups of non-Muslim citizens in these respective states.<sup>47</sup>

European hostility to Islamic law has even manifested in the EU's decision to change its substantive choice-of-law provisions with respect to recognition of foreign divorces<sup>48</sup> by focusing on the allegedly discriminatory nature of a legal rule in the abstract, even if in practice the law effects no discrimination.<sup>49</sup> As Susanne Gössl argues, the best reading of the Rome III Regulation is that the Regulation requires judges to focus on the nature of the foreign rule, not the concrete outcome of the foreign judgment, because the Regulation's goal is to communicate the EU's moral rejection of any "rule which abstractly violates essential values of the EU" and the EU's determination that such a rule, no matter its actual effects, "should not have any legal effect in any Member State forum."<sup>50</sup> The irony, of course, is that such a broad exclusion of foreign divorce judgments can substantially burden the human rights of an immigrant to marry in the host jurisdiction by refusing to accord recognition to a prior divorce in the immigrant's home country.

As these facts make clear, the need for cross-cultural understanding of human rights laws has only increased over the last twenty years.

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<sup>46</sup> McCrea, *supra* note 21, at 226.

<sup>47</sup> *Id.* at 228–33. Indeed, commentators noted that some prominent German politicians would likely fail the very same tests they were demanding immigrants pass in proving that they could successfully integrate into German society. *Id.* at 229.

<sup>48</sup> Council Regulation 1259/2010 of Dec. 20, 2010, *supra* note 22, art. 10.

<sup>49</sup> Susanne Lilian Gössl, *Open Issues in European International Family Law: Sahyouni, "Private Divorces" and Islamic Law Under the Rome III Regulation*, EUR. LEGAL F. 68, 73 (2017).

<sup>50</sup> *Id.* Gössl's reading of Article 10 is not universal; she supports her reading based on the structure of the Rome III Regulation as well as what she calls the specific intent of its drafters to "focus on certain Islamic law provisions." *Id.*

## II. INTERNATIONAL HUMAN RIGHTS LAW AND THE PROBLEM OF LAWLESSNESS

The great German interwar legal theorist Herman Heller declared that all law requires “an intersubjective, normative binding of wills[.]”<sup>51</sup> In making this claim, Heller was seeking to strike a middle ground between those legal positivists who identified sovereignty with the command of the state, and those who equated sovereignty with the abstract norms of the legal system. He rejected the former because he believed it is the nature of law to be reciprocal, existing as a relationship between those giving commands and those expected to obey them or conduct their affairs in compliance with those commands.<sup>52</sup> The crude Austinian conception of law as a command backed by force, or of the sovereign as the person who commands but is not commanded, conceals this reality by failing to recognize that the idea of legitimacy is an inseparable feature of law, and without it neither the law nor the state can exist.<sup>53</sup> But formalists were also subject to criticism from Heller because they failed to take into account that individual will is *also* an indelible feature of law. The law does not exist simply as formal, abstract norms, but as rules that are only manifested when individual wills adhere to them in recognition of the rules’ demands as vindicating just claims or adhere to them as rules rightly compelling dissenters to comply—both insofar as dissenters regard themselves as bound by the rules and consider the pain of punishment or detrimental consequence that arises from failing to comply.<sup>54</sup> Because law as a formal system is always dependent on individual wills to carry it out, and individuals demand that the law be just, it is futile to believe that the law can ever fully escape the contingencies of human subjectivity.<sup>55</sup> Legal order and the rule of law, in the end, always depend on the conscience of the individual legal subject and his or her willingness to abide by the norms of the legal system.<sup>56</sup>

The difficulty that An-Na’im identified in his essay, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*, with respect to honoring human rights law is not limited to human rights law,<sup>57</sup> but is pervasive to *all* kinds of law and from a certain perspective is an inseparable

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<sup>51</sup> HERMANN HELLER, SOVEREIGNTY: A CONTRIBUTION TO THE THEORY OF PUBLIC AND INTERNATIONAL LAW 143 (David Dyzenhaus ed., Belinda Cooper trans., 2019).

<sup>52</sup> See DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen, AND HERMANN HELLER IN WEIMER 184–85 (1999).

<sup>53</sup> *Id.* at 181, 184.

<sup>54</sup> *Id.* at 183–84, 199.

<sup>55</sup> *Id.* at 210.

<sup>56</sup> *Id.*

<sup>57</sup> An-Na’im, *supra* note 4, at 19.

feature of law: legality must always exist side by side with illegality, or the material risk of illegality, because legitimacy and legality are separate categories and cannot be collapsed into one another.<sup>58</sup> When we look to Muslim-majority states in the Global South we realize that while there may be widespread defiance of human rights laws, there is also widespread defiance of legal norms that, at least theoretically, are already immanent in Muslim-majority societies that claim a basic adherence to the norms of Islamic law. It is difficult to argue, in those cases at least, that cultural illegitimacy is a plausible explanation for rights violations.

Without attempting to provide an exhaustive survey of widespread practices in Muslim-majority societies that violate both principles of human rights law and Islamic law, I will give two examples illustrating the problem of lawlessness by both civil society and the state: so-called “swap” or “exchange” (*shighār*) marriages and torture. In a swap marriage, each family marries off an eligible female from the family to an eligible male from the other family, with the dowry obligations owed to each bride being canceled by the offset. In other words, the obligation of the husband from the first family to pay dowry to the bride from the second family is offset by the obligation of the husband from the second family to pay dowry to the bride from the first family. This form of marriage had been practiced in pre-Islamic Arabia and was deemed to violate Islamic law because it deprived the bride of ownership over her dowry.<sup>59</sup> As practiced today, it also entails a mutual threat structure: if one husband divorces or mistreats his wife, the other husband is obliged by custom to mete out the same treatment to his wife.

Despite its illegality under Islamic law, this form of marriage continues to be widely practiced in rural parts of the Muslim world, such as Yemen and Pakistan, where it accounts for up to one-third of all rural marriages in the latter.<sup>60</sup> The stubborn persistence of this unlawful form of marriage, despite general awareness that such marriages are not Islamically permissible, seems to stem from a combination of factors: poverty (which makes payment of dowries difficult), tribal traditions, and weak judicial institutions (which undermine

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<sup>58</sup> DYZENHAUS, *supra* note 52, at 199.

<sup>59</sup> MĀLIK IBN ANAS, AL-MUWAṬṬĀʾ: THE RECENSION OF YAḤYĀ B. YAḤYĀ AL-LAYṬHĪ 482, hadith no. 1673 (Mohammad Fadel & Connell Monette trans., 2019).

<sup>60</sup> Priya Elan, *Yemen Swap Marriages – A Tradition that Makes and Breaks Families*, GUARDIAN (July 31, 2014), <http://www.theguardian.com/tv-and-radio/2014/jul/31/yemen-swap-marriages-radio-review>; Hanan G. Jacoby & Ghazala Mansuri, *Watta Satta: Bride Exchange and Women’s Welfare in Rural Pakistan*, 100 AM. ECON. REV. 1804, 1804–25 (2010). Exchange marriages are also practiced in other traditional societies where the practice of dowry is observed. Jacoby & Mansuri, *supra*, at 1805 n.3.

reliance on formal legal rules).<sup>61</sup> For example, Hanan Jacoby and Ghazala Mansuri argue that swap marriages, at least in the context of rural Pakistan, represent an efficient solution to the ex post risk that the husband, after marriage, may abuse his wife, and they present evidence demonstrating that women in swap marriages experience fewer cases of such abuse than similarly situated women in conventional marriages.<sup>62</sup> This evidence should not be taken as an endorsement of swap marriages, but merely as proof that legal rules—even when accepted as culturally legitimate—also require a suitable institutional and economic environment to become effective.

Torture is another example of a widespread case of unlawful behavior that is condemned both by Islamic law and international human rights law.<sup>63</sup> Reflecting the common Muslim understanding that Islam prohibits torture, numerous Muslim-majority countries have acceded to international conventions prohibiting torture without taking an Islamic law-based reservation to those commitments.<sup>64</sup> Nevertheless, numerous Muslim-majority countries, despite being signatories to the United Nations (U.N.) Convention Against Torture and the fact that Islamic law is declared in their constitutions to be the basis of their legal orders, are regularly implicated in the systematic use of torture in their legal systems.<sup>65</sup> Indeed, the empirical evidence suggests that the prevalence of torture in Muslim-majority countries is not strongly correlated with a Muslim state's constitutional commitments, be the state a self-declared Islamic or secular state.<sup>66</sup>

As these two examples indicate, even in circumstances where there is ample evidence to suggest that a norm enjoys strong local legitimacy, other factors may undermine compliance with the norm and may even overwhelm a legal system's

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<sup>61</sup> Elan, *supra* note 60; *The Documentary: Yemen's Swap Marriages* (BBC television broadcast July 29, 2014); Jacoby & Mansuri, *supra* note 60, at 1804–25.

<sup>62</sup> Jacoby & Mansuri, *supra* note 60, at 1806.

<sup>63</sup> It is important not to apply contemporary notions of torture or cruel and unusual punishment anachronistically to pre-modern legal cultures. For an overview of Muslim juridical views on torture, see el Fadl, *supra* note 25, at 334; Baber Johansen, *Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof*, 9 ISLAMIC L. & SOC'Y 168, 168–93 (2002); Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT'L L. 21, 21–42 (2007); Ira Allen et al., *Torture*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N. Katz ed., 2009); 'ABD ALLĀH IBN 'ABD AL-RAḤMĀN IBN ABĪ ZAYD AL-QAYRAWĀNĪ, AL-NAWĀDIR WA-AL-ZIYĀDĀT 'ALĀ MĀ FĪ AL-MUDAWWANAH MIN GHAYRIHĀ MIN AL-UMMAHĀT 3:73 (Muḥammad Bū Khabzah et al. eds., 1999). Even if one does not agree that Islamic law categorically prohibits torture—understood as a technique to extract information from a suspect—it is clear that its prohibition would be consistent with historical Islamic ethical norms.

<sup>64</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>65</sup> Reza, *supra* note 63, at 22.

<sup>66</sup> *Id.* at 31–34.

capacity to fulfill its own good-faith commitments. Anyone genuinely concerned with human rights law as a tool for improving the lives of ordinary citizens around the world must therefore be concerned with a lot more than the abstract norms of a legal system and must also focus on the material conditions in a particular jurisdiction that make it vulnerable to what can be called a failure of commitment rather than a normative rejection of a human rights ideal. In other words, it is imperative that substantial consideration be accorded to the sociological dimension of legal systems in Muslim-majority states when assessing both their human rights performance, what can be reasonably expected in terms of improving that performance, and what kinds of reforms are most likely to produce greater human rights compliance.

Ottoman-era Muslim reformers were acutely aware of the sociological dimension of the rule of law and afforded meaningful attention to the problem of the individual citizen's role in upholding the rule of law.<sup>67</sup> The nineteenth-century Egyptian scholar Rifāʿa Rāfiʿ al-Ṭaḥṭāwī, for example, understood that the extent of civic freedom (*al-ḥurriyya al-madaniyya*) a people enjoys is socially grounded and dependent on the willingness of individuals within that society to defend the formal rights, accorded to them by law, against unlawful actions of the government or members of society.<sup>68</sup> The actual freedom that a people enjoys, according to al-Ṭaḥṭāwī, is ultimately dependent on the progress of civilization (*tamaddun*) in that country, with civilization being understood as a combination of both moral and material progress.<sup>69</sup> The nineteenth-century Tunisian Ottoman statesman and reformer Khayr al-Dīn al-Tūnisī emphasized the role of the sharīʿa and rational positive law (*siyāsa maʿqūla*) in acting as a restraint (*wāziʿ*) against arbitrary and despotic rule.<sup>70</sup> However, he noted that the law—whether revealed or positive—can only succeed in restraining the state if a critical mass of individuals were sufficiently motivated to defend the law when

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<sup>67</sup> For an overview of modernist Islamic political thought and its relationship to legal reform, see Mohammad Fadel, *Modernist Islamic Political Thought and the Egyptian and Tunisian Revolutions of 2011*, 3 MIDDLE E. L. & GOV. 94, 98–104 (2011).

<sup>68</sup> RIFĀʿA RĀFIʿ AL-ṬAḤṬĀWĪ, AL-MURSHID AL-AMĪN LIL-BANĀT WA-AL-BANĪN [THE TRUSTWORTHY GUIDE FOR GIRLS AND BOYS] 128 (2002) (“[I]t being as though the social institution which is composed of the people of the country have mutually guaranteed and agreed to respect the rights of one another and that each one of them guarantees to the other that he will assist them in their performance of everything that does not violate the country’s basic law and not to oppose him, and that they will reject, together, all those who oppose him in exercising his freedom on condition that he does not go outside the bounds of the law (*fa-ka’anna al-hay’ a al-ijtimā’iyya al-mu’allaḥa min ahālī al-mamlaka taḍāmanat wa tawāṭa’at ‘alā adā’ ḥuqūq ba’ḍihim li-ba’ḍ wa anna kulla fard min afrāḍihim ḍammana li-l-bāqīn an yusā’idūhum ‘alā fi’lihim kulla shay’ lā yukhālīf sharī’at al-bilād wa an lā yu’arīḍūhu wa an yunkirū jamī’an ‘alā man yu’arīḍuhu fī ijrā’ ḥurriyyatihi bi-sharṭ an lā yata’addā ḥudūd al-aḥkām.”).*

<sup>69</sup> Fadel, *supra* note 67, at 99.

<sup>70</sup> KHAYR AL-DĪN TŪNISĪ, AQWAM AL-MASĀLIK FĪ MA’RIFAT AHWĀL AL-MAMĀLIK 101–02 (1972).



it was violated.<sup>71</sup> Therefore the people were to act as a practical restraint upon public officials tempted to break the law.<sup>72</sup> For the Syrian-Egyptian reformer of the early twentieth century Muḥammad Rashīd Riḍā, legal reform, without the necessary social, political, and moral reform, would simply reproduce conditions of autocracy and would be bound to fail. Accordingly, to prevent modernization programs from becoming despotic, it is necessary that any program seeking to reform the people's customs—many of which Riḍā did not dispute needed reform—proceed in accordance with the people's consent obtained through universal education.<sup>73</sup>

Lawlessness has many causes, only one of which is subjective rejection of the norm. Modern Muslim reformers, like modern human rights advocates, understand that norms must be internalized by the law's subjects for the norms to become effective. For that reason, education is viewed as a crucial prerequisite for creating and sustaining a rights-respecting culture.<sup>74</sup> But greater awareness of rights and duties under the law is insufficient: promotion of a rule-of-law culture also requires institutions capable of vindicating legal rights so that citizens have confidence in relying on the formal legal system to secure their rights. Otherwise, the formal legal system remains a dead letter and fails in its potential to promote the rights of the people effectively.

The writings of nineteenth-century Muslim legal and political reformers reflect their common understanding that the creation of a rights-respecting legal order also requires a constitutional system of government that is not only formally committed to the rule of law, but is also subject to the effective supervision of citizens determined to ensure that the government is law abiding. From this perspective, only a representative government is capable of promoting and vindicating an effective rule-of-law regime, and ultimately is the condition precedent to a regime that respects human rights.<sup>75</sup> The successful implementation of a rule of law-/human rights-respecting legal order, however, also requires sufficiently-resourced institutions capable of sustaining the legal order. This implies development as another prerequisite for achieving a human rights-respecting regime. Accordingly, development, broadly understood as

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> MUḤAMMAD RASHĪD RIḌĀ, AL-KHILĀFAH AW AL-IMĀMAH AL-'UṢMĀ 97 (1922) (arguing that it is impossible to uproot the traditions and values of a generation using peaceful means of persuasion and that compelling radical change in such a short time requires despotic government).

<sup>74</sup> *Id.* at 97; BADERIN, *supra* note 25, at 222.

<sup>75</sup> AL-TAHTĀWĪ, *supra* note 68, at 94 (arguing that a person is only truly a citizen when he or she has an effective voice in the governance of his or her state).

including moral, economic, and political progress, is a precondition for the successful implementation of a human rights agenda.

If this analysis is correct, it implies that the effective institutionalization of norms is contingent on certain conditions being satisfied—namely, requisite moral, economic, and political progress. Whether there is a human right to development, however, remains contentious.<sup>76</sup> Nevertheless, without recognition of a right to development, human rights law—with its tendency to focus solely on what Samuel Moyn calls “status equality” at the expense of striving toward more egalitarian material conditions<sup>77</sup>—risks becoming transformed from a tool for protecting the most vulnerable to a tool justifying domination over the less developed world in the name of respecting human rights.

### III. ISLAMIC LAW AND THE CROSS-CULTURAL LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS NORMS

This section will argue that Islamic law principles, when combined with certain modernist conceptions of Islamic international law, can meaningfully contribute to strengthening the transnational duties of solidarity that are necessary to make any conception of international human rights successful. This section will also argue that Islamic jurisprudence offers certain tools for reconciling pluralism in the practice of human rights law with the universality of human rights law. I will conclude by using these tools of Islamic jurisprudence to give a brief discussion of the structure of Islamic marriage law, responding to stereotyped beliefs that Islamic law is indifferent to the autonomy of women in marriage, a view that manifests itself in the belief that compelled marriages are ubiquitous in Muslim communities.<sup>78</sup>

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<sup>76</sup> RUMU SARKAR, *Is There a Human Right to Development?*, in INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS, & GLOBAL FINANCE 123–78 (2020).

<sup>77</sup> SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 176 (2018).

<sup>78</sup> Noemie Bisserbe & Matthew Dalton, *France Passes New Bill to Tighten Control of Mosques*, WALL ST. J. (July 23, 2021), <https://www.wsj.com/articles/france-passes-new-bill-to-tighten-control-of-mosques-11627066189> (citing the problem of coerced marriages as one justification for the law). For a nuanced approach to the problem of protecting the right of consent to marriage in the context of immigrant communities in the United Kingdom, see ABDULLAHI AHMED AN-NA'IM, FORCED MARRIAGE, <https://www.soas.ac.uk/honourcrimes/resources/file55689.pdf> (emphasizing the need to empower women and encourage the community to focus on measures protecting consent rather than criminalization).

A. *Distributive Justice, Development, and Islamic Law*

Whether global distributive justice and development are proper concerns of international law and international human rights law is controversial. The demands for the right to development and an egalitarian distribution of global income and resources reached their apex in the 1970s with a call from the states of the Global South to create what was ambitiously called the New International Economic Order (NIEO).<sup>79</sup> The states of the Global South, through the NIEO, sought to reorder global capital flows in a way that would secure a more egalitarian distribution of the world's output, which they saw as a necessary step to make the ideals of sovereign equality and the self-determination of peoples meaningful.<sup>80</sup>

However, at the same time the Global South was arguing for the necessity of including distributive justice as part of international law, elites in the developed world pushed back, arguing that claims to self-determination were ultimately only defensible insofar as they furthered the human rights of individuals.<sup>81</sup> This second argument gained further strength based on the widely shared view that elites in the Global South were advancing claims against the developed world only in the name of distributional justice but in fact with the aim of entrenching their own rule and enriching themselves at the expense of their populations.<sup>82</sup> The latter argument won the day, and instead of international law developing a system of cross-border redistribution, international human rights law focused on vindicating harms to individuals rather than on remedying structural inequalities in the global economic system. The only tangible effect the call for a new economic order had on the developed states of the Global North has been a modest modification of Part IV of the General Agreement on Tariffs and Trade that gave certain concessions to developing states.<sup>83</sup> Instead of seeking substantive economic equality, the new goal of international human rights law instead became securing individuals a right to subsistence and physical security only from the worst abuses.<sup>84</sup>

In response to the individualistic focus of conventional human rights law, many international human rights scholars have argued for recognizing some positive duties of solidarity. Scholars refer to these “solidarity” rights as “third-

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<sup>79</sup> MOYN, *supra* note 77, at 113.

<sup>80</sup> *Id.* at 156.

<sup>81</sup> *Id.* at 159.

<sup>82</sup> *Id.* at 159–60.

<sup>83</sup> PAUL B. STEPHAN & JULIE A. ROIN, INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY 36 (4th ed. 2010).

<sup>84</sup> MOYN, *supra* note 77, at 160, 167.

generation” human rights, with some authors expressly noting that Islamic law has much to teach international human rights law about these third-generation rights.<sup>85</sup> In this context, I want to touch briefly on two such potential rights. The first is the right to material support combined with the correlative duty of providing support, and the second is the right of access to justice.<sup>86</sup>

Rumu Sarkar points to the Islamic legal obligation of *zakāt*—a special tax imposed on the relatively wealthy for the benefit of the poor and needy—as an example of a rule that provides doctrinal grounds supporting the right to development.<sup>87</sup> The law governing *zakāt* revenues, however, is only one doctrine of Islamic law that supports the redistribution of resources from the well-off to the worst-off. Muslim jurists recognized something akin to John Rawls’ difference principle in public spending that applied to state revenue generally: they held that the state, after meeting basic needs (such as defense and the salaries of public officials), had a duty to prefer the poor over the well-off.<sup>88</sup> From a modernist Islamic perspective, permanent legal peace has erased the distinction between Muslim territory (*dār al-islām*) and non-Muslim territory (*dār al-ḥarb*).<sup>89</sup> Taking this Islamic principle of peace seriously requires taking seriously the duties of redistribution that Islam recognizes as attendant to—and presumably constitutive of—a relationship of permanent peace. In other words, transnational duties of support, at least from an Islamic perspective, are implicit in the *idea* of permanent peace. It therefore follows that because the world is now part of a unified legal order under international law, principles of distributive justice necessarily apply across borders.

The second Islamic law doctrine that is of importance in this context is the duty to establish a fair system of adjudication. This duty is but one example of a class of duties in Islamic law known as collective duties—*farḍ kifāya*—that are *obligations* on the collective political community.<sup>90</sup> Jurists identified a broad range of activities that fell under this category of the law, some of which were religious (e.g., communal prayers [*ṣalāt al-jamā’a*]) while others were secular,

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<sup>85</sup> See, e.g., Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. DEV. L.J. 67, 67–116 (2005); SARKAR, *supra* note 76, at 156.

<sup>86</sup> ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007).

<sup>87</sup> SARKAR, *supra* note 76, at 157.

<sup>88</sup> AL-QAYRAWĀNĪ, *supra* note 63, at 3:189–90.

<sup>89</sup> Mohammad Fadel, *Modern Islamic International Law Between Accommodation and Resistance: The Case of Israel and BDS*, 19 Y.B. ISLAMIC MIDDLE E. L. ONLINE 247, 247–278 (2018).

<sup>90</sup> Adnan Zulfiqar, *Collective Duties (farḍ Kifāya) in Islamic Law: The Moral Community, State Authority and Ethical Speculation in the Premodern Period* (2018) (Ph.D. dissertation, University of Pennsylvania) (Publicly Accessible Penn Dissertations).

such as instruction in the arts and crafts and, crucially, establishment of a system of justice.<sup>91</sup> Moreover, the great Ḥanafī jurist Abū Bakr al-Kāsānī (d. 587/1191) noted that the obligation to establish a system of justice is absolute and could not be subject to abrogation because its origin lies in reason, not revelation.<sup>92</sup>

The importance of declaring the establishment of justice as an unqualified collective duty can be clearly seen in requiring political communities to act constantly in providing effective means to address injustice in society. While this might be viewed as solely the duty of individual states, the Muslim modernist view that the entire world is functionally now one legal jurisdiction by the legal reality of permanent peace implies that collective duties such as establishing effective systems of justice is an international concern. This view also implies that states should have a right to call on other states to assist them in developing their internal justice systems to allow them to meet their duty to provide an effective system of justice to their citizens. Although the traditional view is that first-generation human rights, insofar as they consist of negative liberties, can be satisfied simply by the state's agreement to refrain from certain kinds of activities, this view radically underestimates the need for resources in establishing a sufficiently robust judicial system to vindicate even the negative liberties of a state's citizens.<sup>93</sup>

### *B. Islamic Jurisprudence and Reconciling Pluralism with Universalism in International Human Rights Law*

One principal objection to Islamic human rights schemes, or Islamic law reservations to human rights treaties, is that such notions undermine the

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<sup>91</sup> MUHAMMAD IBN MUHAMMAD ḤAṬṬĀB ET AL., *MAWĀHIB AL-JALĪL LI-SHARḤ MUKHTAṢAR KHALĪL* 3:348 (Zakarīyā 'Umayrāt ed.).

<sup>92</sup> In Islamic law, certain rules can be abrogated, in whole or in part, by a subsequent command of revelation. One such example is the Qur'an's treatment of wine, which only became prohibited after initial revelations addressing it first discouraged Muslims from consuming it; then prohibited them from praying while drunk; and finally, outright prohibited it. *See, e.g., Qur'an Sūrah II: al-Baqara (The Cow)* 2:219 (declaring that wine has some beneficial aspects but the sin associated with drinking exceeds its benefits); *Qur'an Sūrah IV: al-Nisā' (Women)* 4:41 (prohibiting believers from praying while they are drunk); *Qur'an Sūrah V: al-Mā'ida (The Feast)* 5:90 (prohibiting Muslims from drinking wine categorically). The claim that there is an obligation to establish a system of justice is a claim that it would be impossible for God *not* to command because the existence of an effective system of justice is rationally necessary. ABŪ BAKR IBN MAS'ŪD KĀSĀNĪ, *KITĀB BADĀ'Ī AL-ṢANĀ'Ī FĪ TARTĪB AL-SHARĀ'Ī* 7:2 (1986).

<sup>93</sup> ACCESS TO JUSTICE AS A HUMAN RIGHT, *supra* note 86, at 30 (implying that first-generation human rights can be vindicated without need for supplying material resources, unlike duties of solidarity that can only be fulfilled through the provision of material goods). Global rankings of states based on their adherence to the rule of law clearly show the link between good governance and development. *See Countries Scored by Overall Score*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/global/2020> (last visited July 26, 2021). Ghana, the highest-ranked lower-middle-income state, is ranked fifty-first overall. *Id.*

universality of human rights law and are therefore fundamentally contradictory to the idea of a universal system of human rights. When Muslims object to the content of certain norms of human rights law, the usual response is that Muslims should reform their understanding of Islamic law, not that the content of human rights law itself should change or permit an exception for states with significant Muslim populations.<sup>94</sup> In response to these demands, Mashood Baderin instead puts forward the case for a “complementary” approach between international human rights norms and Islamic norms, in which both Islamic law and international human rights law are prepared to adapt to further the common goal of strengthening human rights universally. Baderin calls on Islamic law specialists to advance “enlightened” interpretations of Islamic law that exhibit a sincere desire to reconcile with the substantive norms of international human rights law.<sup>95</sup> He then calls on jurists of international human rights law to apply the doctrine of “margin of appreciation” with respect to Islamic ethical and moral values, which provide content to many rules of Islamic law, and to recognize that human rights are achievable within an Islamic law framework.<sup>96</sup>

Baderin points out the jurisprudential conceptions of *maqāṣid al-sharīʿa* (“the purposes of the law”) and *maṣlaḥa* (“public interest”) as doctrines internal to Islamic law that could be used to develop “enlightened interpretations” of Islamic law.<sup>97</sup> It is not clear, however, whether “enlightened interpretations” of Islamic law would ever satisfy the views of those who advocate a universal conception of international human rights law unless those “enlightened interpretations” happen to coincide precisely with the content of international human rights law. On the other hand, if “enlightened interpretations” of Islamic law that are substantively the same as international human rights law emerged, what would be “Islamic” about those norms? Indeed, if such a development is possible, why should Muslims object to the demands that Muslims must discard rules of Islamic law to the extent those rules conflict with international human rights law?

Baderin, however, no doubt believes that even the most flexible interpretations of Islamic law, using the concepts of *maqāṣid al-sharīʿa* and *maṣlaḥa*, combined with a sincere desire to adopt positions consistent with international human rights law, will nevertheless be substantively different in

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<sup>94</sup> BADERIN, *supra* note 25, at 221–22 (criticizing what he calls the “unilateral” approach to Islamic law and international human rights law that imposes on Muslims the duty to change their own doctrines without requiring any adjustments to the content of international norms).

<sup>95</sup> *Id.* at 222.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

non-trivial ways from international human rights law. In that case, we need a way to theorize a pluralism in the practice of human rights law without undermining universalism. The structure of *maqāṣid al-sharīʿa* allows us to do that.

According to this jurisprudential theory, all rules of law can be understood as functioning to protect one of five universal ends of human civilization: religion (*dīn*), life (*hayāt*), progeny (*nasl*), rational capacity (*ʿaql*), and property (*māl*).<sup>98</sup> Particular rules, moreover, further these universal ends in different ways: some rules are foundational or necessary (*ḍarūrī*) insofar as their absence would threaten the protection of the substantive end of the law itself; other rules respond to a need to further the benefit arising out of the fundamental substantive interest (*hājī*), although the interest's absence does not lead to the destruction of the fundamental end that the law seeks to secure; and, finally, there are rules that perfect or beautify (*tazyīnī*) the law's fundamental substantive value (i.e., one of the five universals of the law) by going beyond what is merely convenient, when viewed from the protection of the fundamental legal interest at stake.<sup>99</sup> There is an organic connection, however, between these different categories of rules, that results in the law being inherently teleological (i.e., striving for its own perfection). The internal logic of the law, and the interests it protects, push the law to transcend the primitive stage of development—when only the most fundamental legal interests are protected—to reach the stage of tertiary rules, at which point the legal interest is not only protected but is positively flourishing.<sup>100</sup>

For example, the fundamental interest the law of marriage protects is the reproduction of the human species. This fundamental interest, however, is best protected from the Islamic perspective when the full panoply of rights, duties, and conditions that Islamic law imposes on marriage (such as dower, consent, social equality, piety in the spouses, right to divorce, etc.) are satisfied. The desire to reproduce the species carries within it the desire to secure the terms of reproduction in the most appropriate manner, thus leading the law to secure more than just the primary interest at stake in reproduction.

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<sup>98</sup> Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, 12 ISLAMIC L. & SOC'Y 182, 188 (2005).

<sup>99</sup> Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CANADIAN J.L. & JURIS. 5, 54–57 (2008) (discussing the relative categories of interests in Islamic jurisprudence).

<sup>100</sup> See Mohammad Fadel, *Maṣlaḥa as 'Flourishing' and Its Place in Sunnī Political Thought* (unpublished manuscript) (on file with author).

This conception of the law has the virtue of recognizing both the contingency of the particulars of legal systems and the existence of a common framework for shared flourishing, even if at the most abstract level, that places limits on which rules are legitimate. Interestingly, even in the Middle Ages when this jurisprudential theory originated, it was viewed as a universal theory of law—or at least a theory of law that could explain the legal systems of Christianity and Judaism, as well as views of Greek philosophy.<sup>101</sup> In this view, differences in legal traditions result from different relative weights given to a *common* basket of ethical goods, not from categorical differences that render them mutually unintelligible or otherwise incommensurable.<sup>102</sup> Moreover, this conception of the law is analogous to contemporary conceptions of proportionality. Courts attempt to resolve conflicts between the claims of an individual right holder and the legitimate aims of state legislation pursuant to this contemporary conception by striving to ensure the state action achieves its aims through minimal impairment of the individual’s right.<sup>103</sup>

A similar approach can be adopted toward international human rights law, pursuant to which international human rights law is understood as creating binding, universal obligations *only* at the most abstract level, while conditionally allowing national legal orders to specify how those abstract obligations are manifested. Allowing jurisdictions to pursue different strategies for the specification of abstract human rights norms is necessary if international human rights law is to be consistent with democratic governance. Different legal systems face different constraints, some of which might be: a normative objection to a particular formulation of an abstract right; institutional weakness preventing a particular state from adhering effectively to a particular norm; or path dependency that produces a high degree of incommensurability between crucial social institutions that appear similar, but have radically different histories.<sup>104</sup> But following the approach embedded in the “purposes of the law” requires observers to be in a position to take the “internal perspective of the law,”<sup>105</sup> a task which requires jurists of different systems to explain to others why they believe their particular rules are consistent with the fundamental,

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<sup>101</sup> Fadel, *supra* note 99, at 55–56.

<sup>102</sup> *Id.* at 56.

<sup>103</sup> *See* R. v. Oakes, [1986] S.C.R.103 (Can.) (requiring the government—when accused of infringing a right—to show, among other things, that the means chosen minimally impair the right in question).

<sup>104</sup> Marriage is one such example. Because of the Catholic Church’s historical role in regulating marriage in the west, and the role of the Church of England following the Reformation in regulating marriage in the common law world, marriage has always been primarily a public act. In contrast, in Islamic law the public’s role in the regulation and dissolution of marriage has been incidental, with the focus instead being on the contractual rights of the parties.

<sup>105</sup> *See* H.L.A. HART, THE CONCEPT OF LAW 88–89 (1961).



abstract ideals of international human rights law. I will give a brief example of how such an approach can shed light on an important question in international human rights law: does Islamic law respect the autonomy of women in the formation of marriage contracts?

### *C. The Autonomy of Women and Compelled Marriages in Islamic Law*

Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR) states that “[n]o marriage shall be entered into without the free and full consent of the intending spouses.”<sup>106</sup> Baderin took this point to be so consistent with Islamic law that he did not discuss any strategies that could be deployed within Islamic law to effect a reconciliation between classical Islamic law and the ICCPR.<sup>107</sup> While as a general matter, it is true that Islamic law requires free and full consent of adult parties to a marriage contract, classical Islamic law generally permitted the father, in his capacity as the natural guardian of his minor children, to contract binding contracts of marriage on their behalf.<sup>108</sup> There is no doubt that Baderin is aware classical Islamic law permitted a father to make binding marriage contracts on behalf of his minor children (and in certain cases, a judge could as well), as evidenced by two very informative blog posts that he published on this topic, the first giving an overview of the positions taken by classical schools of Islamic law as well as the views of dissenters, and the second discussing strategies followed by contemporary Muslim states in the regulation or prohibition of the marriage of minors.<sup>109</sup>

Baderin noted that contemporary Muslim states that have moved to prohibit the marriage of minors (except in exigent circumstances) after the approval of a judge have done so in reliance on the concept of public interest (*maṣlaḥa*), in

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<sup>106</sup> International Covenant on Civil and Political Rights [ICCPR] art. 23, ¶ 3, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 179.

<sup>107</sup> BADERIN, *supra* note 25, at 133 (“paragraphs (1), (2), and (3) of Article 23 are in full consonance with Islamic law”).

<sup>108</sup> For a detailed overview of the law regulating a guardian’s power to compel the marriage of a minor child in one school of Islamic law, see Mohammad Fadel, *Reinterpreting the Guardian’s Role in the Islamic Contract of Marriage: The Case of the Maliki School*, 3 J. ISLAMIC L. 1, 1–26 (1998).

<sup>109</sup> Mashood Baderin, *Marriage of Minors Under Islamic Law: Between Classical Jurisprudence and Modern Legislative Reforms – Part 1*, UNIV. OF LONDON: UNDERGRAD. L. BLOG (Apr. 23, 2018) [hereinafter Baderin, *Marriage of Minors Part 1*], <https://lawsblog.london.ac.uk/2018/04/23/marriage-of-minors-under-islamic-law-between-classical-jurisprudence-and-modern-legislative-reforms-part-1> (discussing historical doctrines); Mashood Baderin, *Marriage of Minors Under Islamic Law: Between Classical Jurisprudence and Modern Legislative Reforms. Part 2*, UNIV. OF LONDON: UNDERGRAD. L. BLOG (Apr. 25, 2018) [hereinafter Baderin, *Marriage of Minors Part 2*], <https://lawsblog.london.ac.uk/2018/04/25/marriage-of-minors-under-islamic-law-between-classical-jurisprudence-and-modern-legislative-reforms-part-2> (discussing modern statutory regulation of the marriage of minors).

light of empirical evidence showing the harmful social and medical consequences of juvenile marriage, particularly for females.<sup>110</sup> The problem with this formulation of the rule, however, is that it suggests the marriage of minors is presumptively lawful, with the restriction being justified on grounds external to the relationship, i.e., social and medical consequences. Such a justification for proscribing minor marriages says nothing about the extent to which Islamic law values the autonomy of the parties to the marriage, even though Baderin states that classical Islamic law viewed the marriage of minors to be legally exceptional.<sup>111</sup>

Baderin is certainly correct in his assertion that the marriage of minors is legally exceptional in Islamic law, but it is important to consider the views of classical Muslim jurists on issues pertaining to autonomy and contract formation to show why. Mālik b. Anas (d. 179/795), author of the first written treatise in Islamic law, the *Muwatta'*,<sup>112</sup> made the following observation in explaining the legal principle that a man is prohibited from seeking marriage to a woman who has received a marriage proposal from another man:<sup>113</sup>

[I]n our opinion, and God knows best, the explanation for this statement of the Messenger of God (pbuh) is that it applies to the case of a suitor who proposes to a woman, and the woman responds positively; they agree on a determinate dower (*ṣadāq*), having come to a mutual agreement to marry; and she makes stipulations for her own benefit in the terms of the marriage contract. That is the category of woman to whom other suitors may not propose. The statement of the Prophet (pbuh) was not intended to apply to a suitor who proposes to a woman, but she does not find his proposal agreeable, nor does she respond positively to him.<sup>114</sup>

This report, along with Mālik's commentary at the beginning of the chapter dealing with marriage, can reasonably be understood as representing the baseline case of marriage formation: a suitor proposes to the would-be bride, and they come to agreement regarding material terms, including the bride's dower and

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<sup>110</sup> Baderin, *Marriage of Minors Part 2*, *supra* note 109 (“Based on evidence that the practice is generally harmful to children both socially and medically, there have been attempts at reforming the law in different Muslim-majority states in the larger interest of society based on relevant Islamic law principles of *maslahah* (public interest or human benefit) and *darūrah* (necessity).”).

<sup>111</sup> Baderin, *Marriage of Minors Part 1*, *supra* note 109 (“The nucleus of the classical majority view is that while marriage of minors is not the general norm under the *Shari'ah*, it may be necessary in the minor's own interest and thus its permissibility under Islamic law.”).

<sup>112</sup> ANAS, *supra* note 59.

<sup>113</sup> *Id.* at 473, hadith no. 1635 (“[T]he Messenger of God [pbuh] said, ‘No suitor should propose to a woman if another has already made her a proposal [*khitba*].’”).

<sup>114</sup> *Id.* at 473, hadith no. 1636.

any stipulations<sup>115</sup> she wishes to impose on the suitor.<sup>116</sup> It is only upon their mutual agreement that the contract is formed, at which point it becomes forbidden for other suitors to make new proposals to the woman.<sup>117</sup> Mālik's comment on the Prophetic report makes clear that he centers the prospective bride's consent to marriage in determining when the contract's existence has become sufficiently definite so that its principal legal incidents, including her foreclosure from entertaining any other marriage proposals, take effect. It is also notable that Mālik describes the bride as negotiating terms for her own best interest. Mālik's rule that any gifts the guardian receives from suitors must be turned over to the bride also makes clear that the bride—and not her guardian—is the principal in the marriage contract.<sup>118</sup>

That the full and free consent of the bride to the marriage contract is the Islamic “norm”—with contracts arranged by guardians for minors being the “exception”—is not only implicit in the *Muwatta*'. The thirteenth-century Egyptian and Syrian jurist al-'Izz b. 'Abd al-Salām (d. 660/1262) also expressly affirms the importance of autonomy as a general value in Islamic law and states an exception was made in the case of the marriage of minors out of necessity:

Interdicting an independent person from acting to further his own interest is a legal injury . . . and so too, compelling the marriage of women is a legal injury . . . but it was permitted in the case of minor unmarried girls in view of the need to secure appropriate matches when they appear, given that appropriate suitors are not always available.<sup>119</sup>

Ibn 'Abd al-Salām in this passage expressly affirms that invasion of a woman's autonomous choice in marriage is a legal injury, thereby establishing the Islamic “norm” clearly. He goes on to explain why, however, necessity gave rise to an exception in the case of minor girls, affirming a reason *intrinsic* to the contract itself—namely, the difficulty of finding a suitable match. From the perspective of Ibn 'Abd al-Salām, this exception reinforces the rule of autonomous choice: the guardian's decision to arrange the minor female's marriage to an appropriate suitor is presumably the decision the minor's future self would have made had she been able to consent at the time of the contract.

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<sup>115</sup> For a brief overview on the law regulating stipulations in an Islamic marriage contract, see Mohammad Fadel, *Political Liberalism, Islamic Family Law, and Family Law Pluralism*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 164, 178–80 (Joel A. Nichols ed., 2011).

<sup>116</sup> ANAS, *supra* note 59, at 473, hadith no. 1636.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 476, hadith nos. 1647–48.

<sup>119</sup> 'IZZ AL-DIN 'ABD AL-'AZIZ IBN 'ABD AL-SALĀM, QAWĀ'ID AL-AHKĀM FĪ MAŚĀLIḤ AL-ANĀM 1:89.

This brief excursion into classical Islamic law allows us to assert confidently that Islamic law recognizes the autonomous choice of both parties to the marriage contract to be an important value that the law must protect, and that the classical recognition of an exception in the case of minors was understood to be consistent with their autonomous interest in a good marriage. The historical rule that necessity justifies interference in the minor's autonomy when done by the father or a judge (who, in each case, were understood to be faithful representatives of the minor) need not be recognized in the modern world. However, from this perspective the justification for modern reforms restricting a parent's power to contract the marriage of minor children includes much more than potentially negative social or medical consequences in the future. Far from being an exception to a well-established Islamic rule, modern reforms are simply a recognition that the exigencies of the pre-modern social world (that authorized the exceptional powers of the father or judge) no longer apply to the rule of full and free consent. Accordingly, there can be no *Islamic* objection to prohibiting guardians from contracting marriages for their minor children.

Such an argument in support of prohibiting guardians from arranging marriage contracts for their minor children—at least in social circumstances where a sufficient degree of economic and social development has occurred such that marriage is no longer a matter of necessity—is Islamically compelling. Nevertheless, this example, like the example of exchange or swap marriages discussed above, illustrates the impossibility of separating so-called first-generation rights from third-generation solidarity rights: in many cases, the effectiveness of even first-generation rights can only be realized through sufficient social, economic, and political development. Even in circumstances where there is an “overlapping consensus” regarding the content of a legal rule, a particular society may be unable to adhere to it not because it contests the content of the rule, but because it lacks the means to adhere to it.<sup>120</sup>

## CONCLUSION

There can be little doubt that Professor An-Na'im's call for a cross-cultural approach to human rights remains salient more than a quarter century after he first articulated it. Muslims, in particular, find their human rights threatened by both non-Muslim states, whether authoritarian (e.g., China) or militantly secular/democratic (e.g., France), and authoritarian Muslim-majority states

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<sup>120</sup> It is interesting to note that the two Muslim-majority countries, cited by Baderin as jurisdictions where the marriage of minors remains widely practiced, are Yemen and Niger, two of the poorest countries in the world. Baderin, *Marriage of Minors Part 2*, *supra* note 109.

(e.g., Egypt). Despite the disparate political and economic systems of these different regimes, they are united by a profound hostility to assertions made by Muslims of rights that others take for granted; such hostility rests on the claim that by exercising their rights in a manner inconsistent with the state's wishes, Muslims are acting in a manner contrary to the public order. Some of this hostility could be mitigated by a clearer articulation of Islamic legal principles and their presentation in a language that does not make them seem incommensurate with the rules of international human rights law. At the same time, Muslim-majority states, and states with historically significant Muslim minorities that continue to be governed in part by Islamic law (e.g., India), need to do a much better job at fighting customary practices (such as exchange or swap marriages, or marriages of minors) that are inconsistent with both Islamic law and international human rights law. Additionally, these states must devote more resources to the economic, social, and political development of marginalized populations. Indeed, while deep disagreement about the content of norms may explain the failure of Muslim-majority states to adhere to some norms of international human rights law, many, if not most, of their failures in this respect are better understood as failures of commitment and will, rather than a reflection of deep moral disagreement.

Accordingly, it is crucial to challenge the artificial division in international human rights law between individuals' first-generation negative-liberty rights and third-generation solidarity rights. In practice, experience has demonstrated the difficulty of securing individual rights in the absence of meaningful political, economic, and social development. As others have noted, and as I have tried to show in greater detail in this contribution, Islamic law provides substantial doctrinal support for what have come to be known as third-generation rights and duties.

Perhaps less well-known is the importance of individual rights in classical Islamic law, as demonstrated in the example of marriage contracts. Space limitations precluded a discussion of other examples in Islamic law that affirm the importance of individual rights, but it may be sufficient to cite a statement from the great eighth-century Muslim jurist, Abū Yūsuf (d. 182/798), affirming the fundamental principle of due process of law that lies at the foundation of Islamic conceptions of legality: "The ruler (*al-imām*) is not permitted to take *anything* from the possession of anyone except in accordance with a well-known (*ma'rūf*), established (*thābit*) claim."<sup>121</sup> Just as the ruler is not entitled to deprive

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<sup>121</sup> ABŪ YŪSUF YA'QŪB IBN IBRĀHĪM IBN AL-ANṢĀRĪ, KITĀB AL-KHARĀJ 1:78 ("Laysa li'l-imām an yukhrija shay'an min yad aḥad illā bi-ḥaqq thābit ma'rūf:").

individuals of their rights without due process of law, a fortiori private individuals are not allowed to do so to one another. But to make this principle effective requires a strong public order: something that, unfortunately, most states in the Muslim world and the developing world generally lack.

Modern Islamic international law, with its commitment to global legal order undergirding the promise of perpetual peace, provides an important framework for thinking about transnational duties of solidarity as necessary to such global legal order. This is both in terms of a fairer distribution of global income and in securing the institutional framework required to safeguard the rule of law and protection of rights by promoting social, economic, and political development globally.

Finally, a cross-cultural approach to international human rights law is desperately needed if it is to avoid the fate of becoming weaponized against lesser-developed states, their citizens, and immigrants from Muslim-majority states. The institutionalized discrimination we see against Muslims in Europe is only becoming more intense and foreshadows years of increased religious tension that, based on recent experience, is only likely to become more extreme.<sup>122</sup> It is up to human rights lawyers and scholars to prevent this from happening.

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<sup>122</sup> Bisserbe & Dalton, *supra* note 78 (alleging that mosques promote an ideology of “separation”); ECLI:EU:C:2021:594 (July 15, 2021), <https://curia.europa.eu/juris/document/document.jsf?jsessionid=094FE3477503430E362C11B572AD1ACB?text=&docid=244180&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2112380> (permitting employers to prohibit Muslim women from wearing Islamic headscarves in circumstances where customers might object or where the wearing might cause conflict in the workplace); see also Alaattin Doğru, *Mosque Imam Sacked in France for Reciting Verses Deemed ‘Contrary to the Values of Republic’*, ANADOLU AGENCY (July 24, 2021), [https://www.aa.com.tr/en/europe/mosque-imam-sacked-in-france-for-reciting-verses-deemed-contrary-to-values-of-republic-/2312755?fbclid=IwAR0ms\\_b6JBTYgwzTwU7vmqzY5jsDK5Az5VH2AW3W7B65xpzzvhVHesvLQgY](https://www.aa.com.tr/en/europe/mosque-imam-sacked-in-france-for-reciting-verses-deemed-contrary-to-values-of-republic-/2312755?fbclid=IwAR0ms_b6JBTYgwzTwU7vmqzY5jsDK5Az5VH2AW3W7B65xpzzvhVHesvLQgY) (noting that the French State ordered a private Muslim association to dismiss a prayer leader because he discussed certain Quranic verses in a public sermon that the Ministry of Interior deemed inconsistent with gender equality).