Engaging with Abdullahi An-Na'im's Philosophy on Islam and Human Rights

Mashood A. Baderin

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ABSTRACT

Abdullahi Ahmed An-Na'im is one of the leading scholars and contributors on the subject of Islam and human rights. In fact, he remains one of the most cited authorities in the subject area. His contributions on the subject span more than three decades during which he has engaged with almost every topical issue on the subject. He has been described as one of the non-Western jurists from "the South" "who ha[s] made substantial contributions to the theory and practice of human rights" generally.[1]

There can be little doubt that Abdullahi An-Na'im has been one of the most influential voices on the issue of Islam and Human Rights.[2]

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[1] Mashood A. Baderin, *Introduction* to ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA'IM xiii (Mashood A. Baderin ed., 2010) [hereinafter ISLAM AND HUMAN RIGHTS].

[2] Malcolm Evans, *Collected Essays in Law: Abdullahi An-Na'im: Islam and Human Rights*, 13 ECCLESIASTICAL L.J. 111, 111 (2011).

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INTRODUCTION

As a contribution to this Festschrift in honor of Professor Abdullahi Ahmed An-Na'im's scholarship, I intend in this Article to revisit and expand on the analysis in my previous essay entitled *Abdullahi An-Na'im's Philosophy on Islam and Human Rights*,[3] from which the first quotation above is taken. That essay was the introduction to a selection of An-Na'im's articles published within the book *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im*.[4] I indicated then that, as an introductory essay, the essay was not intended to be a critical analysis nor a critique of An-Na'im's articles, but rather "to present[] the work 'as it is'[] [by] providing a brief summary of each of the essays contained in the volume and identifying in the process, what I consider to be the main elements of his general philosophy on the subject."[5] Since the book's publication over eleven years ago, this essay has been widely read and well-received. Malcolm Evans, for example, noted in his review of the publication that "the introduction by Mashood Baderin is a masterful overview of the work of An-Na'im as presented in these Essays and it deserves to be recognised as a significant contribution to scholarship in its own right."[6]

I have used that essay, in the past eleven years, as one of the readings for two postgraduate modules, "Human Rights and Islamic Law" and "Islamic Law," which I teach separately at the SOAS School of Law at the University of London, and the essay has attracted interesting, scholarly classroom discussions from students on each of the modules every year. That in itself re-affirms the point I made in the essay that An-Na'im remains one of the leading authorities

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[3] Baderin, *supra* note 1.
[4] *See id.*
[5] *Id.* at xiv.
[6] Evans, *supra* note 2, at 111–12.

on Islam and human rights as he has written on almost every topical issue on the subject, and his scholarship cannot be ignored. Today, it is rare to read any scholarly publication on Islam and human rights without it citing one or another of his publications. The classroom discussions stimulated by that essay have often gone beyond the sixteen articles covered in the essay, which referenced relevant publications such as his earlier book *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*,[7] his later book *Islam and the Secular State: Negotiating the Future of Shari'a*,[8] and his article *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*,[9] amongst others. Based on those classroom discussions, I will, in this Article, engage reflectively with An-Na'im's philosophy on Islam and human rights as identified in the previous essay. But in doing so, I am both conscious of his colossal authority on the subject and of the fact, as rightly noted by Daniel Philpott, that one would engage with An-Na'im's work "only in the sense that one probes the work of [an] intellectual giant."[10] Thus, in this Article I will be referring to and quoting from his other relevant publications to provide a lucid perspective of the issues.

In my analysis of the selected sixteen journal articles in that introductory essay, I identified An-Na'im's general philosophy on Islam and human rights:

> I have endeavoured to identify Abdullahi Ahmed An-Na'im's general philosophy on Islam and human rights as a three-angled philosophy, namely: (i) the philosophy for cross-cultural universality of human rights, (ii) the philosophy for internal reformation of Islamic law based on the methodology of his mentor *Ustadh* Mahmoud Mohamed Taha, and (iii) the philosophy for re-affirming secularism for Muslim states. Based on this three-angled philosophy, An-Na'im advocates a theory of interdependence between Islam, human rights and secularism through which he believes that Muslims should be able to practice their religion faithfully and at the same time enjoy the guarantees of human rights without hindrance.[11]

It is important to keep this general underlying objective of An-Na'im in mind while reflecting over his three-angled philosophy on the subject.

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[7] ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990).

[8] ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A (2008).

[9] Abdullahi Ahmed An-Na'im, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1 (2010).

[10] Daniel Philpott, *Arguing with An-Na'im*, IMMANENT FRAME (July 14, 2008), https://tif.ssrc.org/2008/07/14/arguing-with-an-Na'im.

[11] Baderin, *supra* note 1, at xxxviii.

In expanding on my previous essay, this Article will highlight and respond to four main critiques that have constantly arisen in classroom discussions over the years on each aspect of his three-angled philosophy. These include the following: (i) whether An-Na'im's concept of "cross-cultural universality" of human rights is distinguishable from the contested traditional concept of "cultural relativism" in human rights discourse; (ii) the effect of An-Na'im's non-distinction between "*shari'ah*" and "*fiqh*" in his analysis of classical Islamic law; (iii) the viability of the concept of "reverse *naskh*" for the internal reformation of Islamic law; and (iv) the effect of using "civic reason" to validate the role of Islamic principles as part of public law. In engaging with these issues, I will make reference to relevant literature in which similar questions have been raised by other scholars on the subject.

I.   DISCUSSING AN-NA'IM'S PHILOSOPHY OF CROSS-CULTURAL UNIVERSALITY OF HUMAN RIGHTS

In my previous essay, I contextualized An-Na'im's philosophy of cross-cultural universality of human rights by referring mainly to his 1994 essay titled *What Do We Mean by Universal?*[12] in which he articulated his views on the universality of human rights in relation to Islam. I identified, inter alia, that:

> An-Na'im is certainly a universalist and a staunch believer in the universal nature of human rights as is reflected in the first paragraph of this essay where he states that "[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" (p. 120). He also notes, however, that "[y]et there can be no prospect of the universal application of such rights unless there is, at least, substantial agreement on their concept, scope and content" (p. 121). Thus, his philosophy on the universality of human rights, as he manifests in this essay and consistently restates at appropriate points in all his other writings, is what may be described as a philosophy of cross-cultural universality. I identify this as the first element of his general philosophy on Islam and human rights. In relation to Islam, he reflects this philosophy of cross-cultural universality in the last paragraph of the essay wherein he concludes that "There are potentially powerful and vigorous constituencies for universal human rights worldwide – including the Islamic world. But those constituencies can never be mobilised in a

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global project on purely Western liberal notions of individual civil and political rights. Along with other rights and new formulations of familiar rights, all human rights will only command genuine universal respect and validity through discourse and dialogue" (p. 128). Between the first paragraph earlier quoted and this last paragraph of the essay, An-Na'im clearly articulates his views on the different paradoxes raised by the question of universality in theory and practice. He emphasises throughout the essay that the dialogue for cross-cultural universality must be "undertaken in good faith, with mutual respect for, and sensitivity to, the integrity and fundamental concerns of respective cultures, with an open mind and with the recognition that existing formulations may be changed – or even abolished – in the process" (p. 122).[13]

The cross-cultural universality of human rights is a core philosophy in An-Na'im's general human rights scholarship and advocacy for social change. Apart from its manifestation in his earlier works,[14] he continues to advance the need for a cross-cultural universality of human rights variously in all his recent works. He indicated his motivation for this philosophy in the introduction to the 1992 book *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. He stated: "Without underestimating the value of other possible approaches . . . a cross-cultural approach may be helpful in deepening our understanding of the underlying causes of the continuing discrepancy between theory and practice of human rights, and in addressing those causes more effectively."[15] He noted further that "the credibility and practical efficacy of national and international human rights standards would be enhanced by increasing their legitimacy in the widest possible range of cultural traditions."[16] He reflected his continued adherence to this philosophy in several sections of his 2008 book *Islam and the Secular State*, noting emphatically that human rights "can work only when they enjoy sufficient cultural and religious legitimacy"[17] and that a failure to adapt the universal principles of human rights to local conditions "can also lead to varying degrees of difficulty or ease of correction."[18] This point is reiterated in his most recent 2021 book *Decolonizing Human Rights*, in which he "proposes

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[13]   Baderin, *supra* note 1, at xvi (citing and quoting An-Naʿim, *supra* note 12, at 120, 121, 122, 128).

[14]   *See, e.g.*, HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES (Abdullahi Ahmed An-Naʿim & Francis M. Deng eds., 1990); HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Naʿim ed., 1992); Abdullahi Ahmed An-Naʿim, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment, in* HUMAN RIGHTS: AN ANTHROPOLOGICAL READER 68–85 (Mark Goodale ed., 2009).

[15]   HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS, *supra* note 14, at 2.

[16]   *Id.*

[17]   AN-NAʿIM, *supra* note 8, at 44.

[18]   *Id.* at 138.

advancing the universality of human rights through internal discourse within the Islamic and African societies and cross-cultural dialogue among human cultures."[19] Despite the astuteness of this philosophy, however, it has not escaped critique from human rights scholars and ardent advocates of unconditional universality of human rights. Rhoda Howard, for example, has argued against what she has described as "the enterprise of surveying world cultures and religions in order to establish a consensus on human rights[.]"[20]

The main critique against the cross-cultural universality of human rights is that this philosophy is perceived as evoking the traditional cultural relativist argument that has been contested vigorously by ardent universalist human rights scholars and advocates over the years, due to its perceived tendency to undermine the universality of human rights. Such contestation is based on the fact that universality is considered to be at the heart of international human rights scholarship and advocacy. As I noted in my previous essay, "[t]he usual starting point of human rights discourse is the question of its universality[,]" and the title of the 1948 Universal Declaration of Human Rights "clearly indicates that the international human rights agenda was meant to be a universal one from the beginning."[21] Thus, in my Human Rights and Islamic Law class discussions on this philosophy of cross-cultural universality, many "ardent universalists" among the students often query whether there is any practical difference between this concept of cross-cultural universality and the traditional concept of cultural relativism in international human rights discourse. In my view, while both concepts reflect the need to acknowledge the cultural difference in the universal application of human rights, there is some degree of difference between them that needs to be directly addressed due, particularly, to the acknowledged, age-long academic controversies surrounding the scope of cultural relativism in human rights scholarship.[22]

As I have noted before:

> The theory of cultural relativism is . . . advocated mostly by non-Western States and scholars who contend that human rights are not exclusively rooted in Western culture, but are inherent in human nature and based on morality. Thus, human rights, they claim, cannot be interpreted without regard to the cultural differences of peoples.

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[19]   ABDULLAHI AHMED AN-NAʿIM, DECOLONIZING HUMAN RIGHTS i (2021).

[20]   Rhoda E. Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS, *supra* note 14, at 81, 99.

[21]   Baderin, *supra* note 1, at xv.

[22]   *See, e.g.*, Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984).

Advocates of cultural relativism assert that "rights and rules about morality are encoded in and thus depend on cultural contexts."[23]

The concern of most ardent universalists is that "the theory of cultural relativism is prone to abuse and may be used to rationalize human rights violations by different regimes[]" as "[i]t admits of pluralistic inputs, which, if not properly managed, can debase the efficacy of human rights."[24] An-Na'im obviously appreciates and has responded variously to this legitimate concern against cultural relativism by noting that "[t]he critics of cultural relativism perceive it as undermining the ability to condemn repressive practices in other countries that are sanctioned by the particular culture. For example, some scholars have charged that relativism provides a notion that can [even] be used to justify slavery and genocide."[25] While he concedes that "[t]here is certainly substance to this criticism if one believes cultural relativism implies the complete tolerance of all norms and practices sanctioned by the respective cultures."[26] He however mitigates that concern by reference, inter alia, to Jack Donnelly's typology of cultural relativisms[27] to the effect that "[c]laims of cultural relativism show a great diversity in meaning, substance, and importance."[28] Thus, he reaches the conclusion that "[c]ultural relativism does not necessarily require allowing cultures total autonomy in accepting a given human right as culturally legitimate or rejecting it as culturally illegitimate[;]"[29] rather, "the basic premise of international efforts to protect and promote human rights is the belief that there are limits on cultural relativism."[30]

Also, in the introductory chapter to the 1990 edited volume *Human Rights in Africa: Cross-Cultural Perspectives*, An-Na'im and Francis Deng acknowledged academic critiques of the cross-cultural perspective, which apparently stem from the pessimism for cultural relativism. They noted that "[s]ome people . . . think that this approach actually retards the evolution of international standards[]" based on the argument that "the cultural approach fosters a relativism that is opposed to universalism, whether it is because of a

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[23]   MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 27 (2003).

[24]   *Id.*

[25]   Abdullahi Ahmed An-Na'im, *Problems of Universal Cultural Legitimacy for Human Rights*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 14, at 340.

[26]   *Id.*

[27]   *See* Donnelly, *supra* note 22, at 401 (classifying cultural relativism into two main types—namely, (i) strong cultural relativism and (ii) weak cultural relativism—but noting that "[a]cross the continuum of strong and weak relativisms there are several levels and types of relativity[]").

[28]   HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 14, at 342 (quoting Donnelly, *supra* note 22, at 410).

[29]   *Id.* at 343.

[30]   *Id.*

sincere commitment to local cultures and traditions or a purposeful manipulative effort to justify violations of human rights at the local or national level."[31] They then noted that although the contributors to that volume

> all say they would like to see the countries of the world adopt international standards for the protection of human rights[,] [t]he problem is that most of them have mixed feelings about the proper role of the various cultural traditions in this regard, largely because they feel that the assertiveness of these traditions acts as a force that casts doubt on the universal validity of international standards.[32]

Reflectively, it can be established that there is some degree of theoretical difference between the concept of cross-cultural universality of human rights and the concept of cultural relativism in human rights. To avoid mere conjecture about An-Na'im's current perspectives on this critique, I raised this point in my discussion with him while writing this Article. He noted that this question is actually the subject of his most recent book, *Decolonizing Human Rights*, the core point of which is that every human being is a cultural relativist, including all liberal universalists, because there is no culturally-neutral human rights.[33] The question is therefore how to include all cultural perspectives instead of assuming that "liberal relativism" is the exclusive standard by which all perspectives are judged. In *Decolonizing Human Rights*, An-Na'im challenges what he describes as "liberal relativism pretending to be global universalism[]"[34] and engages with what he describes as "the inevitable paradox of the universality of human rights project, on the one hand, and relativity of every cultural, ideological, or geographical premise or rationale of the international protection of these rights, on the other."[35] He suggests cross-cultural dialogue as the paradigm for resolving this paradox, stating the following:

> The choice I am suggesting is between no protection under the liberal relativism of the current international legal system, or some degree of possible protection under the proposed indigenous formation of human rights. Though it remains possible for such formations of human rights to achieve universality, this will be a gradual and incremental process, occurring through what I call internal discourse and cross-cultural dialogue.[36]

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[31]   *Id.* at 1.
[32]   *Id.*
[33]   *See generally* AN-NA'IM, *supra* note 19.
[34]   *Id.* at 37.
[35]   *Id.* at 103.
[36]   *Id.* at 102–03.

Thus, An-Na'im's philosophy of cross-cultural universality of human rights apparently seeks to mediate the paradox of the universality of human rights project on the basis that "[a]ny concept of human rights that is to be universally accepted and globally enforced demands equal respect and mutual comprehension between rival cultures[.]"[37]

I have adduced a similar argument, describing the situation as the "paradox of universalism and cultural relativism[.]"[38] I have also noted:

> The present theory of universalism is itself . . . criticized as being culturally relative to Western values. That is the paradox, whereby the controversy between universalism and cultural relativism actually portrays a situation of cultural relativisms.
>   . . . .
>   . . . This calls for a multicultural or cross-cultural approach to the interpretation of and application of the international human rights principles in a manner that will not reduce its efficacy but lead to the realization of an inclusive theory of universalism.[39]

Bassam Tibi also conveyed similar thinking by distinguishing "cultural pluralism" from "cultural relativism." Tibi stated: "Being committed to cultural pluralism and opposed to cultural relativism, [he] share[s] this view [of cross-cultural university], provided we can reach a universal consensus on the basic human rights shared by different cultures."[40] Thus, the philosophy of cross-cultural universality advocates for "cultural pluralism," which is both inward and outward looking, in the universality of human rights. This stands in contrast to the concept of "cultural relativism," which is only inward looking. This philosophy would involve a cultural dialogue of human rights values, in which all cultures would have a right to participate, contribute, and convince *rationally* on any cultural value brought into the dialogue. Unlike cultural relativism, cross-cultural universality calls for "an objective evaluation of what every civilization can contribute to universalism in international human rights law. Presumptions of cultural inferiority must be avoided and justifications on cultural differences must be examined . . . within . . . human dignity with a view to evolving an inclusive universalism in international human rights law."[41] With regard to

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[37] An-Na'im, *supra* note 12, at 120; *see also* Abdullahi Ahmed An-Na'im, *Universality of Human Rights: An Islamic Perspective*, *in* JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE 311, 314–319 (Nisuke Ando ed., 1999).

[38] BADERIN, *supra* note 23, at 26.

[39] *Id.* at 28.

[40] Bassam Tibi, *The European Tradition of Human Rights and the Culture of Islam*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 14, at 109.

[41] BADERIN, *supra* note 23, at 28.

Islamic law, the necessary question to then ask is as follows (as I indicated in the previous essay):

> But what kind of contribution can Islam bring to this dialogue towards the realisation of a cross-cultural universality of human rights? An-Na'im identifies that in "[r]eading the Qur'an and Sunna, one will find authority for liberalism as well as conservatism, and Muslim history gives clear examples of both tendencies". This matter, he argues "is determined by the choices Muslims make, and the struggle they wage in favour of their choices, in their own historical context" . . . . Thus, for Islam to be able to make a meaningful contribution to the dialogue for cross-cultural universality of human rights, Muslims must, in the view of An-Na'im, choose liberal interpretations of Islamic sources to make Islamic law amenable to modern international relations and human rights.[42]

Thus, for Islam's constructive contribution to the cross-cultural universality of human rights, An-Na'im advances the need for internal reform, making the pragmatic argument that it is imperative for Muslims to choose liberal and human rights-friendly interpretations of Islamic sources. Through the adoption of such liberal and tolerant perceptions of Islamic teachings, Muslims would be able to practice their religion faithfully and at the same time enjoy the guarantee of human rights without hindrance or rivalry between the two values, which is the general underlying objective of An-Na'im's philosophy on Islam and human rights. This perception is similar to Habermas's presentation of law and morals as being aligned and not rival concepts in his discourse theory on human rights.[43]

Other contemporary Muslim scholars have espoused comparable views on the need for contextual and evolutionary interpretations of Islamic sources to respond constructively to contemporary global challenges, such as the promotion and protection of human rights. For example, I have argued that in choosing between the different possible interpretations of Islamic law, the political and legal authorities in Muslim-majority states should "exercise their authority on the basis of the 'liberal' Islamic theological/juristic opinions that would enhance good governance and human rights of the populace."[44]

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[42]   Baderin, *supra* note 1, at xvi–xvii.

[43]   *See* Jeffrey Flynn, *Habermas on Human Rights: Law, Morality, and Intercultural Dialogue*, 29 SOC. THEORY & PRAC. 431 (2003); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

[44]   Mashood A. Baderin, *An Analysis of the Relationship Between* Shari'a *and Secular Democracy and the Compatibility of Islamic Law with the European Convention on Human Rights*, *in* ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES, AND THE PLACE OF SHARI'A 89 (Robin Griffith-Jones ed., 2013).

A similar view has been advanced by Khaled Abou El Fadl in his 2007 book *The Great Theft: Wrestling Islam from the Extremists*, wherein he observed notably that:

> [m]odernity embodies pervasive and insistent universalisms such as human rights, self-determination, prohibitions on the use of force, basic rights for women, and ethnic, national, and religious rights; complex global economic systems; and many other international institutions that compose the structure of our modern world. Unless religions can contribute to and enrich human life in decisive and clear ways within this existing universal structure, religion will either be forced to the sidelines of history, or be forced into a confrontation with the powers of modernity—powers that will often be violent and destructive.[45]

He then also proposed the need for internal reform of Islamic law, but noted that "[m]any Muslims are offended by . . . reform because they wrongly believe that this implies that Islam is somehow faulty or incomplete. But reform is not about correcting God; reform is about improving our relationship with God, and about better serving the trust that has been given to us."[46] He continued, "In other words, the critical reflection that I am calling for is about, first, reassessing . . . our understanding of the nature of the trust placed in us by God; and second, once we develop a conception of that trust, assessing whether we are doing our duties toward that trust."[47] He then identified two main approaches in that regard, namely, "the puritan" and "the moderate," noting that "[t]he issue that confronts most Muslims right now is: As to the two opposite poles that currently exist, to which pole do they wish to direct their faith?"[48]

To answer that question from An-Na'im's perspective, the right way is for Muslims to adopt a modern, moderate, civil, rational, kinder, and gentler interpretation of the Islamic sources, to enable them to confront modern global challenges such as the universality of human rights. While a general agreement about the need to promote a more compassionate and benevolent understanding of Islamic law can be deciphered amongst most contemporary Muslim jurists, especially in this "emerging post-modern period of Islamic law[,]"[49] the more difficult task is in reconciling the differences in the approaches and methodologies for achieving that. This task serves as the basis for exploring An-

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[45] KHALED ABOU EL FADL, THE GREAT THEFT: WRESTLING ISLAM FROM THE EXTREMISTS 282 (2007).
[46] *Id.* at 283.
[47] *Id.* at 283–84.
[48] *Id.* at 284.
[49] MASHOOD A. BADERIN, ISLAMIC LAW: A VERY SHORT INTRODUCTION 17–18 (2021).

Na'im's philosophy of internal reformation of Islamic law, as will be discussed below.

II.   DISCUSSING AN-NA'IM'S PHILOSOPHY OF INTERNAL REFORMATION OF ISLAMIC LAW

Although An-Na'im had advanced the need for an internal reformation of Islamic law in earlier works, his 1990 book *Toward an Islamic Reformation* is his major work which sets out in detail his philosophy of internal reformation of Islamic law. There, he noted the decline in the application of Islamic public law in most parts of the Muslim world since the late-nineteenth century due to Western influence.[50] However, from the late-twentieth century almost all Muslim states started "experiencing rising demands for a stronger Islamic identity and greater application of Shari'a."[51] He then identified the need for such demands "to be reconciled with the realities of the nation-state and the international order of the late twentieth century and with the expectations of the Muslims themselves to enjoy the benefits of modern notions of constitutionalism and human rights."[52] An-Na'im is a pioneer in this regard, arguing that due to the failure of earlier attempts at reforming Islamic law based on "the historical conception and formulation of Shari'a[,]" there was a need to develop a "new version of public law of Shari'a" for modern Muslim-majority states.[53] Consequently, he boldly asserted in that work that "[i]t is my thesis that as long as Muslims continue to adhere to the framework of historical Shari'a, they will never achieve the *necessary* degree of reform which would make Islamic public law workable today."[54] Apparently, his emphasis on Islamic public law (*mu'āmalāt*) is due to the fact that traditionally, the impact of modern constitutionalism and human rights law is mostly in the area of public law within domestic systems as applied by the state.[55]

He made it clear that his call for a "new version of public law of Shari'a" was to be based on an internal reform through modern re-interpretation of the Islamic sources and not by secularization. In my previous essay, I contextualized

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[50]   AN-NA'IM, *supra* note 7, at 33.

[51]   *Id.*

[52]   *Id.*

[53]   *Id.*

[54]   *Id.* at 34.

[55]   However, human rights law has continued to seep slowly and incrementally into areas of private law. *See, e.g.*, Daniel Friedmann & Daphne Barak-Erez, *Introduction* to HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann & Daphne Barak-Erez eds., 2001).

this philosophy by reference mainly to his 1987 essay *Islamic Law, International Relations, and Human Rights: Challenge and Response*,[56] noting that:

> An-Na'im proposes "solutions to the drawbacks of historical *Shari'a* from a religious rather than secular perspective, because Muslims do not separate the religion of Islam from the law of Islam" (p. 318). He argues here that a reformation of Islamic law through a modern interpretation of the *Shari'a* would work better for the advancement of human rights in Muslim states than a secular approach. He observes, *inter alia*, in that regard that "because *Shari'a* signifies the positive law of historical Islam, its general principles continue to bind and motivate Muslims" (p. 319) and that the appeal of the *Shari'a* amongst the majority of Muslims makes it imperative for it to be "authoritatively reformed from within the Islamic traditions and in ways acceptable to Muslims themselves, [o]therwise, such reform would lack legitimacy and practical viability" (p. 319). He also notes, however, that "although Muslims will not accept secular reforms to their religious law and practice, they have made some concessions to the demands of constitutionalism and the rule of law in national and international relations" (p. 319). He summarizes his arguments in this essay to the effect 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" (p. 320). However, in his view, "[f]ulfilling that obligation by re-introducing historical *Shari'a* would be disastrous for international relations and human rights" (p. 320). He therefore proposes that "the Muslims' religious duty may be satisfied by applying modern version of Islamic law that is consistent with peaceful international relations and respect for human rights" and that "[t]his modern version will [still] be Islamic *Shari'a* because it will be derived from the fundamental sources of Islam, without being identical in every respect to historical *Shari'a*" (p. 320).
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>   . . . But he also argues conversely that "[w]hile this Article criticizes historical public *Shari'a* as being inconsistent with prevailing human rights standards, it does not unqualifiedly endorse those standards that originated with the western liberal tradition" (p. 332). Rather he proposes solutions from within Islam, stating that a "legitimate and lasting constitutional and legal order that can address modern international relations and domestic human rights must develop from within Islam" (p. 333), for which he argues that the best solution must be based on the methodology of his late mentor *Ustadh* Mahmoud Mohamed Taha, who was executed in Sudan in 1985 for the alleged offence of apostasy under Sudanese law then. An-Na'im

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[56]   Abdullahi Ahmed An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 317 (1987), *reprinted in* ISLAM AND HUMAN RIGHTS, *supra* note 1.

consistently proposes *Ustadh* Mahmoud Taha's methodology as the best means of transforming Islamic law to meet the standards of modern human rights and international relations in all his essays contained herein as well as in his other major works on the subject. This may be described as the philosophy of internal reformation of Islamic law based on the methodology of his mentor *Ustadh* Mahmoud Mohamed Taha, which I identify as the second element of his general philosophy on Islam and human rights.

     An-Na'im's proposition for the internal reformation of Islamic law is taken further in [his] essay, "A Kinder, Gentler Islam?" first published in 1991. In this essay, he argues essentially for a kinder, gentler interpretation of the Islamic sources.

     In An-Na'im's view it is possible, indeed imperative, "to develop a new version of *Shari'a* based on a modern interpretation of the sources of Islam" (p. 11) in ways that would promote a kinder, gentler Islam. He states: "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" (p. 11). He then goes on to elaborate on his proposed methodology of transforming this tradition, which is again the methodology of his late mentor *Ustadh* Mahmoud Mohamed Taha.[57]

This advocated approach of *Ustadh* Mahmoud is what may be described as the concept of reverse *naskh* (abrogation), which An-Na'im discussed in detail in *Toward an Islamic Reformation*.[58] The approach is based on the teachings of *Ustadh* Mahmoud as mainly explained in the book *The Second Message of Islam,* which was translated into the English language by An-Na'im in 1987.[59] He summarized the approach as follows:

> The basic premise of *Ustadh* Mahmoud is that a close examination of the content of the Qur'an and Sunna reveals two levels or stages of the message of Islam, one of the earlier Mecca period and the other of the subsequent Medina stage. Furthermore, he maintained that the earlier message of Mecca is in fact the eternal and fundamental message of Islam, emphasizing the inherent dignity of all human beings, regardless of gender, religious belief, race, and so forth. That message

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     57   Baderin, *supra* note 1, at xvii–xix (citing An-Na'im, *supra* note 54, at 318, 319, 320, 332, 333; Abdullahi Ahmed An-Na'im, *The Islamic Law of Apostasy and Its Modern Applicability: A Case from the Sudan*, 16 RELIGION 197 (1996), *reprinted in* ISLAM AND HUMAN RIGHTS, *supra* note 1; Abdullahi Ahmed An-Na'im, *A Kinder, Gentler Islam?*, 52 TRANSITION 4 (1991), *reprinted in* ISLAM AND HUMAN RIGHTS, *supra* note 1, at 11).

     58   *See* AN-NA'IM, *supra* note 7.

     59   MAHMOUD MOHAMED TAHA, THE SECOND MESSAGE OF ISLAM (Abdullahi Ahmed An-Na'im trans., 1987).

was characterized by equality between men and women and complete freedom of choice in matters of religion and faith.

When that superior level of the message was violently and irrationally rejected and it was practically demonstrated that society at large was not yet ready for its implementation, the more realistic message of the Medina stage was provided and implemented. In this way, aspects of the message of the Mecca period which were inappropriate for practical implementation within the historical context of the seventh century were suspended and replaced [by the founding Islamic law jurists through the process of *naskh* with] the more practical principles revealed and implemented during the Medina stage. *Ustdah* Mahmoud, however, maintained that the suspended aspects of the Mecca message were not lost forever as a source of law. Rather, they were postponed for implementation under appropriate circumstances in the future.

. . . .

. . . *Ustadh* Mahmoud proposed the evolution of the basis of Islamic law from the texts of the Medina stage to that of the earlier Mecca period. In other words, the evolutionary principle of interpretation is nothing more than reversing the process of *naskh* or abrogation so that those texts which were abrogated in the past can be enacted into law now, with the consequent abrogation of texts that used to be enacted as Shari'a. Verses that used to be enacted as Shari'a shall be repealed, and verses that used to be repealed shall be enacted as modern Islamic law. Since this proposal would found modern principles of public law on one class of Qur'an and Sunna texts as opposed to another class of those texts, the resultant body of law would be as Islamic as Shari'a has been. . . . I submit that a system of public law based on the Qur'an and Sunna, albeit "not necessarily the classical medieval Shari'a," would be the modern "Shari'a."[60]

While the concept of reverse *naskh* is certainly novel and bold, it has received a mixed academic reaction, with some commentators commending the concept as a unique and welcome attempt toward the internal reform of Islamic law, and some commentators, notably Muslims, critiquing the concept as non-sustainable for different reasons. In his foreword to An-Na'im's book, John Voll expressed the view that the concept provides "an alternative to both the secularists and the fundamentalist[]" approach to Islamic reformation, but he also acknowledged that "[m]any Muslims will disagree with An-Na'im's views, but the book is a contribution to the continuing debate in the Islamic world."[61]

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[60]   AN-NA'IM, *supra* note 7, at 52–56.
[61]   John O. Voll, *Foreword* to AN-NA'IM, *supra* note 7, at xii.

Conversely, Louay Safi has expressed the view that the concept of reverse *naskh* is non-sustainable for three main reasons as follows:

> An-Na'im's proposal seems on its face value to provide a quick fix to the contradictions between historical shari'a and international human rights. However, the "evolutionary principle"[] alluded to . . . is not sustainable, I contend, as it can be easily faulted on both theoretical and practical grounds. First, since the Qur'an is considered by Muslims, as An-Na'im himself agrees, as a divine revelation, one has to accept the totality of the Qur'anic statements to be a single disclosure. Therefore, one is not justified in abrogating the Madinan verses altogether on the ground that they address a particular historical society. Rather one has to eliminate the possibility of generalizing particular rules by demonstrating their particularity. Such a procedure would permit one to arrive at the same result without reverting to a wholesale rejection of on-third of the Qur'an. Secondly, negating the Madinan Qur'an would not be acceptable by the bulk of Muslims, including those who agree with An-Na'im that there should be a fresh reading of the Islamic sources so as to effect a sweeping legal reform. . . . Thirdly, negating one-third of a book which the majority of Muslims consider to be incontrovertible is counterproductive, particularly when it can be shown . . . that the contradictions between the Makkan and Madinan statements on women and non-Muslims are more apparent than real, resulting from faulty interpretations by classical scholars, as well as the application of atomistic methodologies of derivation.[62]

Abdulaziz Sachedina has also expressed a similar opinion and has referred to the fact that some of the Medinan verses are actually compatible with human rights, noting: "Is not, for example, one of the essential bases for religious tolerance, 'there is no compulsion in religion' (2.256), part of the Medinan section of the Qur'an?"[63] An-Na'im also acknowledged that this verse was revealed in Medina but stated that it was revealed in the early Medina period in contradistinction to verses revealed in the later Medina period, which, he argued, had sanctioned "the use of varying degrees of coercion on non-Muslims to induce them to convert to Islam."[64]

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[62]   Louay M. Safi, *Towards an Islamic Tradition of Human Rights*, 18 AM. J. ISLAMIC SOC. SCIS. 16, 19–20 (2001).

[63]   Abdulaziz Sachedina, *Abdullahi Ahmed An-Na'im,* Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law, 25 INT'L J. MIDDLE E. STUD. 155, 156 (1993) (reviewing AN-NA'IM, *supra* note 7).

[64]   AN-NA'IM, *supra* note 7, at 55.

In my Islamic Law class discussions of An-Na'im's philosophy of internal reformation of Islamic law, the critique, especially from the Muslim students, has mostly been with respect to two issues, both relating to the nature of Islamic law. The first one is an issue of terminology, relating to An-Na'im's non-distinction between the two terms "*shari'ah*" and "*fiqh*" in his analysis of the nature of Islamic law, while the second one stems from the first issue and relates to the viability of the concept of reverse *naskh* as proposed. An-Na'im's non-distinction between *shari'ah* and *fiqh* stems from his argument that "[t]he sources and development of Shari'a will show that Shari'a, as known to Muslims today, is not divine in the sense of being direct revelation[,] [but] the product of a process of interpretation of, and logical derivation from, the text of the Qur'an and Sunna and other traditions."[65]

Many Islamic scholars support the view that in explaining the nature of Islamic law, it is necessary to distinguish between *shari'ah* and *fiqh* to differentiate the divine sources of Islamic law from its human jurisprudential interpretations. Even though the term *shari'ah* is often used loosely, mostly by laypersons, for both the divine sources (*shari'ah*) and its human understanding (*fiqh*), the classical Islamic law jurists used the term *shari'ah* in Islamic legal theory (*usul al-fish*) with particular reference to the main sources of Islamic law, i.e., the Qur'an and the *Sunnah*, which are divine and textually immutable. Classical Islamic law jurists' use of the term is based on the Qur'anic use of the term as such: "Then We [God] put you [Muhammad] on a pathway [*shari'ah*] of the matter, so follow it, and do not follow the whims and desires of those who do not know."[66]

Conversely, the classical jurists used the term *fiqh* with reference to the human juristic understanding and interpretation of *shari'ah*; the *fiqh* is mutable and may change according to time and circumstances. The fact that *shari'ah* would need to be understood and interpreted through *fiqh* is reflected in the Qur'an: "[Those] who listen to [the word (revelation)] and follow [the] best [interpretation of it; t]hose are the ones God has guided, and those are the people endowed with insight."[67] In addition, the Qur'an also states, "Follow . . . the best [interpretation] of what has been revealed to you from your Lord[.]"[68] It is through the medium of *fiqh* that the jurists transform *shari'ah* into applied Islamic law.

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[65]   *Id.* at 11.
[66]   QUR'AN 45:18.
[67]   *Id.* at 39:18.
[68]   *Id.* at 39:55.

To that end, Baudouin Dupret has noted the following:

> References to the Sharia are not frequent in the Quran. In reality, most classical scholars did not evoke the Sharia and did not claim to know it, because this would have meant declaring oneself equal to God, thus committing the capital sin of associationism. Writings on Islamic normativity, from the ninth century onward, assumed the features of a particular form known as *fiqh*.[69]

Based on their human understandings of the provisions of *shari'ah*, the classical jurists compiled *fiqh* manuals under the different jurisprudential schools. The *fiqh* rulings are accepted as law, but unlike *shari'ah* itself, they are not immutable. Notably, Islamic law has always been specified in the context of *fiqh* by the jurists as reflected in the titles of their different *fiqh* manuals. Some well-known examples are al-Jaziri's *al-fiqh ala al-madhahib al-arbaʿah* (i.e., *fiqh* according to the four jurisprudential schools), Sayyid Sābiq's *fiqh al-sunnah* (i.e., *fiqh* according to the *Sunnah*), and Wahbah al-Zuhaylī's contemporary *al-fiqh al-Islāmiyy wa adillatuh* (i.e., Islamic jurisprudence and its evidences), amongst many others. Thus, conflating *shari'ah* and *fiqh* often creates confusion with regard to the question of Islamic law reform. Hammudah 'Abd al 'Ati has noted in that regard that "confusion arises when the term *sharī'ah* is used uncritically to designate not only the divine law in its pure principal form, but also its human subsidiary sciences including *fiqh*."[70]

An-Na'im himself addressed this contentious point in his 1998 essay titled Shari'a *and Positive Legislation: Is an Islamic State Possible or Viable?*, noting the following:

> A distinction is commonly drawn in Islamic discourse between *shari'a* and *fiqh*. As recently explained by Bernard Weiss, "*shari'a* law is the product of legislation (*shari'a*), of which God is the ultimate subject (*shari'*). *Fiqh* law consists of legal understanding, of which the human being is the subject (*faqih*)." This distinction can be useful in a technical sense of indicating that some principles or rules, as compared to others, are more based on speculative thinking than textual support from the Qur'an and/or Sunnah. But this does not mean that those which are taken to be *shari'a*, rather than *fiqh*, are the direct product of revelation because the Qur'an and Sunnah cannot be understood or have any influence on human behaviour except through the effort of fallible human beings.[71]

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[69] BAUDOUIN DUPRET, WHAT IS THE SHARIA? 9 (2018).

[70] HAMMŪDAH 'ABD AL 'ATI, THE FAMILY STRUCTURE IN ISLAM 14 (1977).

[71] Abdullahi Ahmed An-Na'im, Shari'a *and Positive Legislation: Is an Islamic State Possible or Viable?*,

In appreciating the relevance of the debate on this point, he revisited it again in *Islam and the Secular State*, making his view clearer on the point as follows:

> In fact, both Shari'a and *fiqh* [Islamic jurisprudence] are products of human interpretation of the Qur'an and Sunna of the Prophet in a particular historical context. Whether a given proposition is said to be based on Shari'a or *fiqh*, it is subject to the same risks of human error, ideological or political bias, or influence[d] by its proponent's economic interests and social concerns. . . . Since human interpretation of relevant texts of the Qur'an and Sunna is unavoidable in both aspects of this issue, it is difficult to distinguish between the two.[72]

To avoid speculation about his current view on this point, I raised this critique with An-Na'im in my discussion with him, and he reiterated that distinguishing between *shari'ah* and *fiqh* represents a semantic attempt to explain away the problematic aspects of the relationship between Islam and human rights and does not really answer the hard questions posed by international human rights standards to classical Islamic law provisions on issues such as criminal punishments and discrimination against women and religious minorities.

Evidently, however, the substantive value of the need for a distinction between *shari'ah* and *fiqh* is that the distinction is at the heart of the general debate on the internal reform of Islamic law in relation to whether Islamic law is completely divine and thus can or cannot be reformed. When the term *shari'ah* is mentioned, divine revelation is what immediately comes to the mind of most Muslims; this is why it is imperative to distinguish *shari'ah* from *fiqh*, especially in relation to Islamic law reform. It is apparent from Abou El Fadl's observation above[73] that many Muslims are opposed to the idea of reforming Islamic law because they wrongly believe this implies correcting God's revelation. In response, Abou El Fadl rightly noted that reform is not about correcting God's revelation; rather, it is about improving our understanding of God's revelation. In my view, distinguishing between *shari'ah* and *fiqh* can be instructive in separating between God's actual revelation and our human understanding of God's revelation, and help in assuaging the misplaced opposition that many Muslims have to propositions on the internal reform of Islamic law due to their misunderstanding of the real object of reform.

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5 Y.B. ISLAMIC & MIDDLE E.L. 29, 34 (1998).

[72]   AN-NA'IM, *supra* note 7, at 35.

[73]   *See supra* text accompanying note 45.

The second critique about the viability of the concept of reverse *naskh* relates to the complexity and controversy surrounding the scope and concept of *naskh* itself in Islamic legal theory. An-Na'im acknowledged this complexity in his analysis of the concept of *naskh* by observing the following:

> *Naskh* is a vast and highly complex subject in Islamic theology and jurisprudence. At least two types of *naskh* were accepted by the majority of Muslim jurists, *naskh al-hukm wa al-tilawa* (abrogation of both the ruling and wording of the text) and *naskh al-hukm duna tilawa* (abrogation of the ruling but not the wording of the text). . . . [W]e are concerned with the second type of *naskh*, in which the text remains part of the Qur'an but is deemed inoperative for legal purposes.
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> . . . .
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> It must be emphasized, however, that whereas the principle of *naskh*, in the sense relevant to the present discussion, had already appeared toward the end of the first century of Isla, its status and role during the earliest period are not clear.[74]

Part of the complexities concerning the concept is also that there is no jurisprudential agreement on the particular list of abrogated verses amongst Islamic jurists. Also, regarding its nature, some jurists perceive the concept of *naskh* as part of the process of divine revelation (*shari'ah*) by reference to a specific Qur'anic verse, which states, "Any verse . . . We [God] cause to be abrogated or forgotten; We will replace it with one like it or better. Do you not know that God has power over all things?"[75] The complexity of the concept of *naskh* is reflected in the level of attention and commentary given by Qur'anic exegetes and jurists to this verse and the concept's scope of application, including whether *naskh* extends to the *Sunnah* as well. Conversely, other jurists perceive the concept of *naskh* as part of the classical jurisprudential process (*fiqh*) formulated by the classical jurists as a crucial tool for reconciling apparently contradictory Qur'anic injunctions.

Where the concept of *naskh* is perceived or analyzed as part of the process of divine revelation based on Chapter 2, Verse 106 of the Qur'an, then most Muslims would oppose the concept of reverse *naskh* because Qur'anic revelation stopped with the death of the Prophet and thus the process cannot now be reversed. However, where the concept is perceived as part of the classical jurisprudential process (*fiqh*) formulated by the classical jurists as a crucial tool for reconciling different Qur'anic verses, then the concept of reverse *naskh* would be more tenable to most Muslims as a novel approach for the internal

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[74] AN-NA'IM, *supra* note 7, at 57–58.
[75] QUR'AN 2:106.

reformation of Islamic law as proposed. Citing Ahmad Hasan, An-Na'im apparently supports the view that the theory of *naskh al-hukm duna tilawa* (abrogation of the ruling but not the wording of the text) was developed and applied by the classical Islamic jurists as part of their jurisprudential process (*fiqh*) and does not reach back to the Prophet's time.[76] Therefore, *naskh al-hukm duna tilawa* is distinguishable from *shari'ah* per se, if the principle of distinction between *shari'ah* and *fiqh* is applied. This discussion again underscores the importance of distinguishing between *shari'ah* and *fiqh* even in arguing for the concept of reverse *naskh* as proposed by An-Na'im.

III.   DISCUSSING AN-NA'IM'S PHILOSOPHY OF RE-AFFIRMING SECULARISM FOR MUSLIM STATES

The basis of An-Na'im's philosophy of re-affirming secularism for Muslim states is reflected in his confidence that the principles of constitutionalism and human rights can only be guaranteed by the "secular" state due to its perceived religious neutrality. This is well reflected in his statement in *Islam and the Secular State*:

> I am proposing the principles of constitutionalism, human rights, and citizenship, which can work only when they enjoy sufficient cultural and religious legitimacy to inspire and motivate people to participate in organized and sustained political and legal action. An Islamic discourse is essential for legitimizing the necessary strategies for regulating the public role of Islam. At the same time, that discourse cannot emerge or be effective without the security and stability provided by the secular state.[77]

This was the opening quotation in my previous essay, and it triggered discussions in my Human Rights and Islamic Law class about whether the secular state is really religiously neutral or rather non-religious or even anti-religious. Notably, while some scholars opine that neutrality is consistent with religious liberty, others argue that "properly defined, [neutrality] is often at odds with religious liberty[,]" and thus is non-religious or even anti-religious.[78] Also, David Cinotti has observed that "neutrality is an indeterminate and vacant idea because one may always counter neutrality-based arguments by reframing the definition of neutrality or by making counterarguments also from neutrality."[79]

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[76] *See* AN-NA'IM, *supra* note 7, at 58.

[77] AN-NA'IM, *supra* note 8, at 44.

[78] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 994–95 (1990).

[79] David N. Cinotti, *The Incoherence of Neutrality: A Case for Eliminating Neutrality from Religion*

He continued, "Despite assertions to the contrary, government decisions toward religion, either by legislatures or the judiciary, are inevitably directed by the value judgments of the decisionmakers. Such bias belies the possibility of government neutrality."[80] Thus, the problem with the traditional concept of the secular state is that its religious neutrality is contested both in theory and practice.

It must be acknowledged and emphasized, however, that An-Na'im's notion of the "secular state" in relation to Muslim-majority states is a qualified one different from the traditional secular state. His conception of the secular state is contextualized as a truly "neutral," "pragmatic" secular state that facilitates "an *enabling* discourse for *promoting* the role of Islam in public life[]"[81] as opposed to what he calls "authoritarian secularism"[82] that does not allow a role for religion at all in public life. In my previous essay, I had contextualized this philosophy by reference mainly to his 2003 essay titled *Re-affirming Secularism for Islamic Societies*,[83] noting that:

> In addressing the issue of Islam versus secularism, An-Na'im first argues that "[t]he commonly presumed incompatibility between Islam and secularism needs to be re-evaluated" (p. 36). He observes that there is both a definitional and terminological as well as substantive confusion about the presumed incompatibility between Islam and secularism, which needs to be deconstructed. In trying to deconstruct the traditional understanding of secularism he argues that traditional equation of secularism with complete disregard for religion, or a diminishing role for religion in public life is problematic. He criticises "the tendency to limit secularism to the experiences of west European and North American countries with Christianity since the 18th century", pointing out that in its west European and North American sense the term secularism "has come to Africa and Asia in the suspect company of colonialism". In his view "secularism should be understood in terms of the type of relationship between religion and the state, rather than a specific way in which that relationship has evolved in one society or another". After that terminological deconstruction of the concept of secularism, he then proceeds to argue for the re-affirmation of secularism in Muslim states and proposes that "the most compelling argument for an Islamic rationale for secularism is its necessity for pluralistic nation states that are able to safeguard the freedom of religion and belief of believers and non-believers alike"

Clause Jurisprudence, 45 J. CHURCH & STATE 499, 500 (2003).

    [80]   *Id.*

    [81]   AN-NA'IM, *supra* note 8, at 292–93.

    [82]   *Id.* at 182.

    [83]   Abdullahi Ahmed An-Na'im, *Re-affirming Secularism for Islamic Societies*, 3 NEW PERSPS. 36 (2003).

(p. 37), meaning that "the freedom of religion and belief of Muslims as well as non-Muslims is more likely to be violated by a state that seeks to promote a particular religious doctrine than one that is neutral on the matter". He illustrates his points by citing examples of Muslim intellectuals and political dissidents who have sought refuge in Western countries "because they enjoy more freedom of belief and political action in "secular" states that are more or less neutral on issues of religion" (p. 38). He further argues that the notion of an Islamic State is a contradiction in terms and that the diversity of opinion among Islamic schools of thought and scholars makes it impossible for the state to enact the *Shari'a* into positive law as that would lead to the selection of some opinions over others by the state and consequently deny Muslims the freedom to follow other equally legitimate Islamic opinions of their choice. In his view, Muslims actually "need the protection of human rights, and political and social space secured by secularism to live up to the ideals of their own religion" and asserts that such "protection and space cannot be sustained among Muslims without an internal transformation of their own understandings and practice of Islam" (p. 39). This may be described as his philosophy of re-affirming secularism for Muslim states, which I identify as the third element of his general philosophy on Islam and human rights. It is important to bear in mind An-Na'im's redefinition of secularism in this context.

   To drive his arguments home, he gives some examples with the issue of women's rights in Egypt and of Islamic identify in the Sudan and Iran to illustrate that a "secular space" is necessary for the realisation and enjoyment of human rights in Muslim states.[84]

Considering that (1) he is proffering solutions from within Islam, and (2) he had earlier asserted, inter alia, that "[a]lthough Muslims presently live with superficial patterns of western-style government, *Muslim belief precludes a purely secular approach to law and state*[,]"[85] and that "[a]n Islamic discourse is essential for legitimizing the necessary strategies for regulating the public role of Islam[,]"[86] one may feel puzzled about An-Na'im's specific standpoint on re-affirming secularism for Muslim states. For example, in his review of An-Na'im's *Islam and the Secular State*, Andrew March expressed the view that:

   in this book, An-Na'im performs what is not so much an about-face as a ninety-degree turn. Rather than arguing that Muslims must reform Islamic law from within so that the laws of Muslim states will enjoy both compatibility with human rights law and popular legitimacy, An-

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 84 Baderin, *supra* note 1, at xx–xxi.

 85 An-Na'im, *supra* note 55, at 333 (emphasis added).

 86 AN-NA'IM, *supra* note 8, at 44.

Na'im now argues that Muslim societies ought to endorse something like American-style secularism, according to which religion may breath easily in the public sphere and inform public morality but make no claim to authority over coercive state legislation.[87]

This conflict may be resolved by the fact that An-Na'im states clearly that he is calling for a secular state and not a secular society. He notes that while he references the secular state and law in his argument, "it is not to advance Secularism as a life philosophy[.]"[88] Rather, he argues, "I am calling for the state to be secular, not for secularizing society. I argue for keeping the influence of the state from corrupting the genuine and independent piety of persons in their communities."[89] He cites earlier Muslim reformist scholars such as Ali Abd Raziq and Rashid Rida to substantiate his view of the institutional separation of Islam and the state, which does not necessarily mean that Islam and politics should be separated. He argues that "[s]eparating Islam and the state while maintaining the connection between Islam and politics allows for the implementation of Islamic principles in official policy and legislation[.]"[90] Such contribution would, however, have to be based on "civic reason" and not "solely on the grounds that they are believed to be part of Shari'a."[91] He explained in that regard the following:

> By a secular state I mean one that is neutral regarding religious doctrine, one that does not claim or pretend to enforce Shari'a—the religious law of Islam—simply because compliance with Shari'a cannot be coerced by fear of state institutions or faked to appease their officials. This is what I mean by secularism . . . namely, a secular state that facilitates the possibility of religious piety out of honest conviction.[92]

This perspective would not, however, make the proposition less controversial, especially amongst Muslim scholars. Helen Haste has rightly noted in that regard that "not all Muslim scholars will fully agree with An-Naʿim's proposals regarding the institutional separation of Islam and the state, [but] his thoughts are a step forward towards a healthy negotiation for the future of Sharia."[93]

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[87] Andrew F. March, Islam and the Secular State. *By Abdullahi Ahmed An-Na'im. Harvard University Press, 2008. 324 pages. $35.00.*, 79 J. AM. ACAD. RELIGION 258 (2011) (reviewing AN-NA'IM, *supra* note 8).

[88] An-Na'im, *supra* note 9, at 1–2.

[89] AN-NA'IM, *supra* note 8, at p. 8.

[90] *Id.* at 4.

[91] *Id.* at 1.

[92] *Id*.

[93] *Islam and the Secular State: Negotiating the Future of Shari'a*, HARV. UNIV. PRESS, https://www.hup.harvard.edu/catalog.php?isbn=9780674034563&content=reviews (last visited Jan. 15, 2022) (quoting Helen Haste).

Reflectively, I consider his concept of "civic reason" to be central to his general philosophy on Islam and human rights, as it apparently links his philosophy of the internal reformation of Islamic law to his philosophy of re-affirming secularism for Muslim states in relation to the contribution that Islam can make to the cross-cultural universality of human rights. He elaborates the concept of "civic reason" as follows:

> By civic reason, I mean that the rationale and the purpose of public policy or legislation must be based on the sort of reasoning that most citizens can accept or reject. Citizens must be able to make counterproposals through public debate without being open to charges about their religious piety. Civic reason and reasoning, and not personal beliefs and motivations, are necessary whether Muslims constitute the majority or the minority of the population of the state.
>   . . . The requirement to present publicly and openly justifications that are based on reasons which the generality of the population can freely accept or reject will over time encourage and develop a broader consensus among the population at large, beyond the narrow religious or other beliefs of various individuals and groups.[94]

He illustrates this by stating that a "Muslim who is arguing that . . . interest (*riba*) should be illegal because it is prohibited in Shari'a (*haram*) may be able to present some general policy rationale to support the argument that other citizens can debate, accept, or reject without passing judgment on the religious belief of that Muslim."[95] The U.N. Human Rights Committee has expressed a similar perspective in its General Comment 22 on the Freedom of Thought, Conscience or Religion and General Comment 34 on Freedoms of Opinion and Expression. Specifically, in restricting any of these rights on grounds of public morals, it must be noted that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."[96] Moreover, "[a]ny such limitations must be understood in the light of universality of human rights and the principle of non-discrimination[.]"[97]

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[94]   AN-NA'IM, *supra* note 8, at 7–8.

[95]   *Id.* at 279.

[96]   Hum. Rts. Comm., CCPR Gen. Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993).

[97]   Hum. Rts. Comm., Gen. Comment No. 34: Article 19: Freedoms of Opinion and Expression, ¶ 32, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

With specific reference to his concept of "civic reason" in relation to Islamic law, the recurring discussion in my Islamic Law class has been that the concept has the tendency to impose the need for a rational justification of the validity of Islamic law including the provisions from its divine sources, which, although appreciated, is not a necessary requirement under classical Islamic legal theory. To capture his current perspective, I raised this question in my discussion with An-Naʿim. He reiterated the need not to be held down by traditional Western understandings of terminologies like "secular," noting that his notion of the secular state is not a non-religious or anti-religious state but a state that is neutral and accommodative of religious norms as earlier analyzed.

The debate about the role of reason and rationalism in Islamic legal theory has been a contentious one as early as the ninth century in the debates between the Traditionalists (*ahl al-hadith*) and Rationalists (*ahl al-raʾy*), as well as a principal doctrine of the rationalist Muʾtazilah group. In contemporary legal theory, Muhammad Abduh is identified as one of the modern advocates of Islamic law reform who consistently "argued for harmony between sound reason and revelation, which he thought could never stand in conflict. If there appears to be a contradiction or conflict between the two, it is because one or the other has been misunderstood."[98] Oussama Arabi has noted in that regard that Abduh's approach was aimed at making "rational thought . . . to have an equal say in determining the rules governing human relations and social order."[99] But to sustain that position and make it acceptable within Islamic legal theory, Abduh made a clear distinction between acts of worship (*ibadat*) and civil transactions (*muʾamalat*). Arabi noted that "this principle applies to the domain of practical rulings (*al ahkam al-amliyya*), to the exclusion of the rules of worship (*ibadat*) in which Muslims have no licence to deviate from the textual rules of the Qurʾan and Prophetic certified *sunna*."[100] Similar to the earlier discussion on the need to distinguish between *shariʾah* and *fiqh* as relating to the divine and human aspects of Islamic law, respectively, Abduh's distinction between *ibadat* and *muʾamalat* in relation to reason and revelation again underscores the need for distinction between issues relating to divine aspects and those relating to human aspects in the theoretical analysis of Islamic law reformation.

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[98]   WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ UṢŪL AL-FIQH 217 (1997).

[99]   OUSSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 25 (2001).

[100]   *Id.* at 35 (alteration in original).

CONCLUSION: A CONSISTENT VOICE ON POSSIBLE SYNERGY BETWEEN ISLAM AND HUMAN RIGHTS

As noted in the quotation at the beginning of this article, there is no doubt that An-Na'im is an intellectual giant by all standards, whose "contributions on the subject span more than three decades [(now more four decades)] during which he has engaged with almost every topical issue on the subject."[101] A notable characteristic of his scholarship is the originality, genuineness, conviction, and tenacity with which he has advanced his thoughts on Islam and human rights over the past four decades, maintaining a consistent voice on the possible synergy between the two systems. As noted by Mohammad Fadel, "[t]hroughout this period he has expressed allegiance to two moral and intellectual traditions that are typically viewed as in competition if not outright conflict."[102] I agree with Fadel that An-Na'im could not have advanced this position "for so long, however, without genuine dedication to the advancement of both a universal system of human rights, and the promotion of a religious conception of Islam that would enable Muslims to endorse the emerging international human rights regime on terms that would not compromise their moral integrity."[103]

In my previous essay, I contextualized his attempt at finding a synergy between Islam and human rights by reference again to his article on *Re-affirming Secularism for Islamic Societies*:

> Based on those three identified elements of his general philosophy of Islam and human rights, An-Na'im then introduces in this essay, a theory of "synergy and interdependence" of religion, human rights and secularism by arguing that: "The synergy and interdependence of religion and human rights enable Muslims to observe their own understanding and practice of Islam through an assertion of human rights, while using their Islamic identity to promote their human rights within their own Muslim communities. By ensuring that minority and dissident voices within a religious tradition are able to challenge dated and regressive understandings and practices of Islam, human rights and secularism help Muslims avoid the difficult choice of either rejecting their religion entirely or abandoning their own human rights" (p. 41). His conclusion in this essay is to the effect that "[m]aintaining a dynamic synergy and interdependence among human rights, religion and secularism will enable all citizens to live by their religious

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[101]   Baderin, *supra* note 1.

[102]   Mohammad Fadel, *Islamic Politics and Secular Politics: Can They Co-Exist?*, 25 J.L. & RELIGION 187, 187 (2010) (reviewing AN-NA'IM, *supra* note 8).

[103]   *Id.* at 102.

convictions while respecting the right of others to do the same, instead of expecting people to choose between competing religions or religious interpretations" (p. 45).[104]

I also referenced his 2005 article *The Interdependence of Religion, Secularism, and Human Rights: Prospects for Islamic Societies*[105] in which he emphasized the interdependence of religion, secularism, and human rights, in relation to Islamic societies:

> [T]he apparent tensions between or among religion, secularism and human rights "can be overcome by their conceptual synergy" (p. 56). He notes that he is "not suggesting the collapse of all related ideas, institutions, and policies into [this] framework" but that his purpose "is to highlight the dynamics of one complex process that might contribute to individual freedom and social justice" for all (p. 56). While he believes that his proposition of synergy was applicable to various religious and political contexts, his "primary concern as a Muslim is the prospect for this approach in Islamic societies" and "would like to encourage the determined promotion – the strengthening – of this synergy in the interest of legitimizing human rights, regulating the role of religion in public life, and affirming the positive place of secularism in Islamic societies" (p. 57).[106]

In that article, he emphasized the important role of human agency in every society as well as in his proposed synergic process by arguing that each of the three paradigms, i.e., religion, secularism, and human rights, is an enabling factor of human agency and equally susceptible to be influenced by human agency.[107] The question, therefore, is "how to secure the best conditions for human agency to achieve the transformations required[.]"[108] While he noted that "[h]uman agency is always integral to the interpretation and implementation of every doctrine[,]" he also acknowledged that "the guardians of orthodoxy everywhere claim eternal validity for their own interpretation and practice[.]"[109] Thus, he argued that it is the principles of human rights that can guarantee the conditions that will facilitate the atmosphere to challenge such orthodox claims from within.[110] He then analyzed how human rights depend on both secularism and religion on the one hand, and how religion depends on both secularism and

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[104]   Baderin, *supra* note 1, at xxi.
[105]   Abdullahi Ahmed An-Naʿim, *The Interdependence of Religion, Secularism, and Human Rights: Prospects for Islamic Societies*, 11 COMMON KNOWLEDGE 56 (2005).
[106]   Baderin, *supra* note 1, at xxxvii.
[107]   *Id.* at xxxviii.
[108]   An-Naʿim, *supra* note 104, at 64.
[109]   *Id.* at 65.
[110]   *Id.*

human rights on the other, and finally how secularism also depends on both religion and human rights.[111] He proceeded to analyze this interdependence in Islamic contexts with examples again from the issue of women's rights in Egypt, and the negotiation of identity and politics in Sudan and in Iran.[112] He ended this article with a strong assertion that "peoples and individuals need make no choice among religion, secularism, and human rights[.]"[113] In his view, "[t]he three can work in synergy."[114] Therefore he urged "both scholars and policymakers to take responsibility for that mediation rather than permit further damage to be done by belief in the incompatibility of religion with secular government and human rights[,]" a human choice, he argued, that will be made by individuals.[115]

This brings in the question of who is the actual audience of An-Na'im's philosophy of Islam and Human Rights. Is it the Muslim world? Is it the West? Is it Muslims wherever they may be? Or is it the world at large? Bearing in mind that he has emphasized that his scholarship is aimed at realizing social change on the ground, his intended audience must be primarily the Muslim world and then, perhaps, Muslims wherever they may be. There was, however, some early sense of pessimism amongst some Muslim scholars regarding how An-Na'im's approach would be generally received in the Muslim world and by Muslims generally, as reflected by Sachedina's observation in 1993:

> Na'im's well-articulated arguments[,] . . . though not without epistemological problems, are ones that the Islamic religious leadership in the Arab world needs to hear, if their claim to an "Islamic solution" for every modern problem is to hold any validity, and the author will need them to hear it if his framework for reform in the Islamic world is to receive serious consideration. As it stands, I do not believe that Na'im's proposed alternative can carry any implications beyond the Western academic interest in it, particularly if it remains inaccessible to the Arabic speaking Sunni Muslim world. A fundamental prerequisite for advocating a political or social reform that has the stamp of Islamic legitimacy is to take a serious account of the realities of the social universe in which these reforms are ultimately to find actualization.
>   . . . .
>   . . . Nevertheless, Na'im's work is bound to stimulate much debate, at least, among the Muslims in the West who are searching for new intellectual strategies to interact with their inherited normative

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[111]   *Id.*
[112]   *Id.*
[113]   *Id.* at 80.
[114]   *Id.*
[115]   *Id.*

tradition in order fully to integrate into the non-Muslim social universe. It is certainly a welcome addition to our growing awareness of the challenges facing modern educated Muslim intellectuals. It also serves as a reminder to many of us who are engaged in making Islam intelligible to the West in general and to our Western academic colleagues in particular that we are engaged in two levels of religious discourse: one allows us to speak to the "insiders,"—that is, the community of the believers—and the second allows us to communicate intellectually with the "outsiders," the "others." Professor Na'im's religious discourse, as the conclusion states, is directed towards the "insiders," using a methodology that would be regarded by them as questionable. By depending on preconceived interpretations of Islamic tradition in the secondary sources in English, Na'im will, I believe, alienate many of the "insiders" who need to take seriously his advocacy for long overdue reform.[116]

Since then, however, *Toward an Islamic Reformation* has been published in three other major languages, making it more accessible to non-English language speakers in the Muslim world. It was first published in Arabic in 1994, then in Indonesian in 1995, and in Farsi in 2003. Apart from these three major languages of the Muslim world, it was also published in Russian language in 1999. Conversely, Fadel has noted the following with regard to *Islam and the Secular State*:

> One group of critics has already expressed their scepticism of Na'im's Islamic arguments, suggesting they are insufficiently grounded in Islamic revelation to be taken seriously by Muslims. I too have my own doubts regarding the Islamic plausibility of Na'im's arguments, but not because they are insufficiently grounded in Islamic revelation. Indeed, in some ways Na'im is also a scripturalist: he argues against the normativity of the Islamic tradition in favor of continuous individual interpretations of revelation.
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> . . . .
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> Despite my dissatisfaction with the Islamic justification Na'im provides for his version of secularism, . . . I believe Na'im makes very persuasive practical arguments in favor of a secular state that will appeal to many religious Muslims who are simply seeking a way to live their lives as more or less traditional Muslims within the framework of a modern nation state.[117]

As I stated in my previous essay, whether or not one agrees with every aspect of An-Na'im's three-angled philosophy on Islam and human rights and his

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[116] Sachedina, *supra* note 62, at 156–57.

[117] Fadel, *supra* note 101, at 103, 118.

theory of interdependence, "there is no doubt that he is a great scholar whose views make significant contributions to human rights discourse generally and to the topic of Islam and human rights particularly."[118] "The factual point is that the questions he raises and engages with regarding the relationship between Islam and human rights in the modern world generally and in modern Muslim states particularly are very valid and complex questions, which he himself acknowledges could be addressed from many different perspectives."[119] "He states, for example, . . . that 'I am not suggesting the collapse of all related ideas, institutions, and policies into the framework I am describing. My purpose . . . is to highlight the dynamics of one complex process that might contribute to individual freedom and social justice[.]'"[120] And there is no doubt that his scholarship has continued to influence or, at least, forms part of the ongoing debate on how to balance the relationship between Islam, human rights, and the secular state in the Muslim world today.

I venture to conclude that in trying to find possible synergy between Islam, human rights, and the secular state, An-Na'im's scholarship has turned full circle on this complex subject. While his earlier book *Toward an Islamic Reformation* established his perspective on the need for internal Islamic reformation, his *Islam and the Secular State* can be described as an academic balancing act, in the preface of which he insinuated that he would be casing his pen when stating that the book was "the culmination of [his] life's work, the final statement [he] wish[ed] to make on issues [he has] been struggling with since [he] was a student at the University of Khartoum, Sudan, in the late 1960s."[121] But as these persistent issues are continually subjected to academic debate, he could obviously not resist the temptation to uncase his pen again to write his most current book *Decolonizing Human Rights*, which establishes his perspective on the need to decolonize human rights to make it inclusively universal.[122] With his scholarship having obviously turned full circle, one may rightly and expectantly ask, what next in the law should we expect from this academic giant?

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[118]   Baderin, *supra* note 1, at xxxix.

[119]   *Id.*

[120]   *Id.*

[121]   AN-NA'IM, *supra* note 8, at vii.

[122]   *See generally* AN-NA'IM, *supra* note 19.