'Ijtihad' and 'Relevance of Sharia' to Contextualize Universal Human Rights Discourse

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A response to 'Human Rights, Universality and Sovereignty: the Irrelevance and Relevance of Sharia' (Abdullahi An-Na'im[*])

This article provides a useful paradigm to re-conceptualize the debate on global justice in terms of a dialogue between a universal notion of human rights and the particularity of Islamic societies. It shows that Sharia can be adapted to modern societies, but also that, because Muslims comply with a distinct source of moral justification and plural sources of legality, this process can be accepted by part of the Islamic community and refused by another – or even rejected by one and the same community.

As the author suggests, Sharia norms reflect an ongoing process of interpretation of the Quran, which started in the 8th and 9th centuries CE. Scholars developed a methodology (*usul al-fiqh*) for the classification of sources and the derivation of specific rules from general principles that did not change the basic structure of Sharia for 1000 years. Some aspects of the historical Sharia can therefore be reconsidered through the application of a similar process of interpersonal, unofficial reinterpretation, which is *human* and not sacred, of its norms in the light of modernity. This clearly applies to those social and political aspects of Sharia (*muamalat*) that can change over time, without questioning matters of faith ('*aqida*) and worship practices (*ibadat*).

A first consideration concerns the role of the state and the relationship between Sharia norms and state authority. An-Na'im argues that the application of Sharia norms in the settlement of disputes was voluntary and community-based, in a context where Sharia norms and state regulations were relatively independent of each other. However, I would recall that Sharia was interpreted and applied by independent scholars, in an age when states did not comply with the model of a modern nation state as they are today. Furthermore, in the 20th century

Muhammad 'Abdu emphasized the necessity to open the gate to '*ijtihad*', promoting a process of reform and reinterpretation of Sharia in the light of modernity. Among his several reforms, he promoted the creation of the first modern bank in the Islamic world, which allowed and regulated interest charges on loans (forbidden by the Quran) in such a way as to manage not to create a strong opposition.

In spite of this promising theoretical background, the acceptance and implementation of the human rights regime in Islamic societies is still controversial. One major issue in both the conceptualization and the practice of human rights in Islamic countries is surely related to the tension between the alleged universal validity of these standards and the limits of internal state sovereignty. For the author this paradox may be avoided by educating people to adhere to human rights values from within their tradition. He proposes to reframe the notion of universality into a more fluid and dynamic conception that incorporates the 'contextual' and 'particular' even while accepting the moral universal validity of these rights.

The author proposes a peculiar strategy to reconcile or 'mediate' between the context and the universal, which configures a possible role of Sharia in the public discourse on legal norms. Sharia can be 'irrelevant' to this process when a specific Sharia norm is implemented by the state as a legal obligation that is valid for all within the state boundaries. Sharia norms enforced by the state cease in fact to be religious in nature. On the other hand, he argues that Sharia is 'relevant' because it 'influence(s) the legitimacy and practical efficacy of the protection and implementation of human rights norms in Islamic societies and communities'. This perspective shows that the religious doctrine can indeed change, as it did under the Ottoman Empire and during the Nahda in the 20th **2** century. Similarly, I believe that some elements can be improved according to the urgency of a global and inclusive framework of justice. The problem remains how to develop a democratic debate between the supporters of this possibility and its opponents, who consider Sharia as a 'divine and eternal' doctrine.

As the authors suggests, both the doctrine and ethos of early Muslim scholars can offer grounds for an encounter between human rights and the Islamic normative system. However, human rights' overall acceptance in Islamic societies requires a further effort in terms of the cooperation of external and internal activists. Islamic societies have increasingly shown an ambivalent attitude towards the conceptualization and practice of the human rights regime as emerged in the aftermath of the Second World War. A comparison of the charter of the Organization of the Islamic Conference (OIC) and the charter of the Arab Center for International Humanitarian Law (ACIHL) can illustrate such ambivalences. While the former refuses some of the principles of the UN Universal Declaration of Human Rights (UDHR), the latter replicates most of them. In particular, although the ACIHL charter incorporates principles like gender equality and the right to form trade unions, the OIC charter prohibits these principles in the name of Sharia. According to this document, the right to form trade unions is presupposing an idea of class struggle that reflects a conflicting understanding of social interactions (*fitna*), which contrasts the Islamic principle of harmony within community. The same occurs with reference to gender equality, which is perceived as contrary to the principle of male guardianship over women (*qawama*). These ambivalences call for an approach to human rights debate that is more sensitive to the social and cultural particularities but firmly grounded in the respect of the normative content of human rights standards.

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