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HUMAN RIGHTS: SOUTHERN VOICES

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HUMAN RIGHTS: SOUTHERN VOICES

Francis Deng, Abdullahi An-Na'im, Yash Ghai, and Upendra Baxi

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In Ahdaf Soueif's novel, *The Map of Love*, an Egyptian woman, Amal, is expecting an American visitor: "Wary and weary in advance: an American woman __ a journalist, she had said on the phone. But she said Amal's brother had told her to call and so Amal agreed to see her. And braced herself: the fundamentalists, the veil, the cold peace, polygamy, women's status in Islam, female genital mutilation __ which would it be?"¹

Amal is a cosmopolitan scholar, who moves easily between the worlds of Cairo, New York and Europe. She is weary of the simplistic repetitious stereotyping of Egypt, Arab Culture and Islam by Westerners. Western normative jurisprudence faces similar charges of a repetitious parochialism about its agenda and about the bearing of other traditions on normative questions.

Western Jurisprudence has a long tradition of universalism in ethics. Natural law, classical utilitarianism, Kantianism and modern theories of human rights have all been universalist in tendency. But nearly all such theories have been developed and debated with at most only tangential reference to and in almost complete ignorance of the religious and moral beliefs and traditions of the rest of humankind. When differing cultural values are discussed, even the agenda of issues has a stereotypically Western bias. How can one seriously claim to be a universalist if one is ethnocentrically unaware of the ideas and values of other belief systems and traditions?

As the discipline of law becomes more cosmopolitan it needs to be backed by a genuinely cosmopolitan general jurisprudence.² My objective in this lecture to take a small contribution to this cause by exploring the work of four non-Western jurists who are from "the South" and who have made substantial contributions to the theory and practice of human rights. Francis Deng (Sudan); Abdullahi An-Na'im (Sudan); Yash Ghai (Kenya); and Upendra Baxi (India). I shall finish with some remarks on why I have selected these four individuals, who else might have been included, the similarities and contrasts in their perspectives, in what sense they can be claimed to be "voices" from or of the South, and their relationship to some familiar strands in Western liberal democratic theory.

Since my immediate objective is to make the views of these four jurists better known I shall try to provide a clear and fair exposition of their ideas about human rights, based on a finite number of accessible texts. This is part of the larger enterprise of de-parochializing our own traditions of

¹ Ahdaf Soueif, *The Map of Love* (London: Bloomsbury, 1999) p.6.

² William Twining, *Globalisation and Legal Theory* (London: Butterworth, 2000) and "General Jurisprudence" in M. Escamilla and M. Saavedra (eds.) in *Law and Justice in Global Society* (Granada: University of Granada, 2005)(World Congress of Philosophy of Law and Social Philosophy).

jurisprudence at a time when we need to take seriously the implications of the complex processes of globalisation for our understanding of law.

Let me begin by a brief overview of the four individuals, each of whom emphasise seemingly different aspects of “voice”. Francis Deng, justifiably, claims to speak for traditions and culture of his own people, the Ngok Dinka of Kordofan in the Sudan. He argues that traditional Dinka values are basically compatible, in most respects, with the values underlying the Universal Declaration of Human Rights and like documents. Abdullahi An Na’im argues that a “modernist” interpretation of Islam involves ideas which are, for the most part, similarly reconcilable with international human rights ideas, but that acceptance of such ideas (their internalization within Islamic belief systems) depends far more on conversations and debates *within* Islam than on cross-cultural dialogue, let alone external attempts at persuasion or imposition. Yash Ghai is skeptical of most claims to universality that are made for human rights; however, adopting a pragmatic materialist stance, he reports that he has found through practical experience of post-colonial constitution-making that human rights discourse provides a workable framework for negotiating political and constitutional settlements among politicians and leaders claiming to represent different majority, minority, and ethnic interests in multi-ethnic societies. It also facilitates popular participation in constitutive processes. Upendra Baxi argues that as human rights discourse becomes commodified, professionalized by technocrats, and sometimes hijacked by powerful groups, it is in grave danger of losing touch with the experience of suffering and the needs of those who should be the main beneficiaries — the poor and the oppressed. They are the main authors of human rights. To take human rights seriously, is to take suffering seriously.

All four have been activists as well as theorists, but in different ways. Francis Deng has had a very distinguished career in international diplomacy. Abdullahi An-Na’im has been a human rights activist within the Sudan and several other countries, and a publicist for human rights internationally. Yash Ghai has played a major role in post-independence constitution-making and reform, especially in the South Pacific and Kenya. Upendra Baxi has been an influential publicist and campaigner in India and on the international stage, as well as serving as Vice-Chancellor of two Indian universities. For the last twenty years he has campaigned and litigated on behalf of the victims of the Bhopal disaster.

FRANCIS MADING DENG³

“God asked man, “Which one shall I give you, Black Man; there is the Cow and the thing called “What’, which of the two would you like?” The man said: “I do not want What.” God said: “But What is better than the Cow”. Then God said: “If you like the Cow, you had better taste its milk before you taste it finally.’ The man squeezed some milk into his hand, tasted it, and said: “Let us have the milk and never see “What””.⁴ ()

“What you have said, you Mading, we are very pleased. Things we have told you, you will give them a purpose; you will write them down and that is a big thing....If this machine of yours writes and records what a man really says, and really records well, then if what we have said is bad, it will search for our necks; if it is good, then we will say these words have saved our country. Now we have trusted you... we trust in you fully. Whatever you think we have missed, whatever you think we should have said that we missed, let it be said that we are the people who said it.”⁵

Francis Mading Deng was born in 1938 near Abyei in Kordofan in the West of the Sudan. His father, Deng Majok, was paramount chief of the Ngok Dinka, the only Nilotic inhabitants in the Northern Sudan. It is commonly said that “Abyei is to the Sudan as the Sudan is to Africa”, a bridge between the African and Arab worlds. Deng Majok was an outstanding tribal leader, a national figure, especially prominent for his bridging role between the Arab North and the Nilotic South. He was also known as the creator of a huge family through marrying more wives than any other man in Dinka history. Francis, one of his senior sons, became both the leading interpreter of Dinka tradition and a committed proponent of human rights, maintaining that they are basically compatible. How could this be?

³ A note on sources. Francis Deng is a prolific writer, who has dealt with many topics The main sources for this section are the following works: Francis M. Deng, *Tradition and Modernization: A Challenge for Law among the Dinka of the Sudan* (New Haven: Yale University Press, 1971) (hereafter TM); *The Dinka of the Sudan* (New York: Holt, Reinhart and Winston, 1972) (hereafter DS); *The Dinka and their Songs* (Oxford: Clarendon Press, 1973) (Songs); *Africans of Two Worlds* (New Haven: Yale University Press, 1978) (hereafter ATW); *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* (Yale University Press, 1986) (hereafter MDM); (ed. With Abdullahi An Na'im) *Human Rights in Africa: Cross-Cultural Perspectives* (Washington,DC: Brookings Institution, 1990) (hereafter HRA); “The Cow and the Thing Called ‘What’: Dinka Cultural Perspectives on Wealth and Poverty”, 52 *Jo. of International Affairs* 101 (1998)(hereafter Cow), which condenses a series of articles in the Sudan Democratic Gazette in 1998-99 (referred to by date, e.g. SDG 9/98); “The Cause of Justice Behind Civil wars” in Ifi Amadiume and Abdullahi An-Na'im (eds.) *The Politics of Memory* (London: Zed Books,2000) Ch.11 (hereafter PM); and interviews and conversations conducted over the years. On the Dinka see also Godfrey Lienhardt, *Divinity and Experience: The Religion of the Dinka* (Oxford: Clarendon Press, 1961) and John Ryle et al., *Warriors of the White Nile: The Dinka* (Amsterdam: Time-Life Books, 1982).

⁴ SDG 3/99 71 cf. Cow: 101. Dinka folktale, discussed below at ooo.

⁵ Chief Ayeny Aleu, jinterview with Francis Mading Deng, reported in ATW (1978) op. cit. at 34-35.

Francis was the eldest son of Deng Majok's fourth wife. Although he did not groom any of his sons to succeed him, Deng Majok believed in education. The education of Francis Deng is a story of a remarkable journey through different cultures. It began in Deng Majok's compound in Abyei and continued in a boarding school for sons of chiefs run on similar lines to a British preparatory school. Francis Deng then proceeded to Khor Taaqqat, a secondary boarding school in the North, where the great majority of the boys were Muslims. He read law at the University of Khartoum, where he was taught in English mainly by expatriate teachers, including myself. The course was largely based on English law, but included an introduction to Shari'a law. Some attempt was made to discuss the role of customary law in the national legal system of the Sudan, but there was not sufficient literature to carry this very far. With encouragement Deng spent some of his vacations studying customary law through sitting in his father's court, reading the court records, interviewing chiefs and elders, and starting a collection of recordings of several hundred Dinka songs.⁶ This was the start of his very extensive explorations of Dinka traditions, culture and law over many years.

Francis Deng graduated with a good LLB in 1962 and obtained a scholarship to pursue postgraduate studies in London, where he stayed for a year, before proceeding to Yale Law School from which he obtained a doctorate in 1967. Before the age of thirty he had been exposed to Dinka, Christian, British colonial, Northern Sudanese, Muslim, and both English and American common law ideas. So it is hardly surprising that one of the central concerns of all his writing has been the problem of identity.

On leaving Yale, Francis Deng worked as an officer in the Human Rights Division of the United Nations Secretariat in New York from 1967 to 1972. During this period he met and married Dorothy Ludwig, and became part of an American family. They have four sons, who have grown up mainly in Washington, DC, but who have kept in touch with their Dinka heritage.

In 1972 Deng joined the Sudan diplomatic service. He served as Ambassador to the United States and Scandinavia, becoming Minister of State for Foreign Affairs between 1976-80. From 1980 to 1983 he was Sudan's Ambassador to Canada. Subsequently he has held a number of academic positions, mainly in the United States. He has continued to be involved in public affairs, most notably in efforts to end the civil war in the Sudan and, since 1992, as a Special Representative of the Secretary-General of the United Nations on internally displaced persons, rising to the status of Under Secretary-General. In this capacity he has had enormous influence in bringing the plight of 25 million people in 40 countries to

⁶ Deng: 1972: DS 8.

public attention and in persuading governments that this neglected problem is a matter both of sovereign responsibility and legitimate international humanitarian concern.⁷

Even when holding responsible full-time public positions, Francis Deng has been a prolific writer. His first book, *Tradition and Modernization: A Challenge for Law Among the Dinka of the Sudan* (1971) was based on his doctoral thesis at Yale. Of it, Harold Lasswell his main supervisor wrote: “Dr Deng has brought to the task of examining his own culture an impressive objectivity of outlook that testifies to his success in acquiring the essential characteristic of a scientific frame of reference.” This frame of reference, based on Lasswell and McDougal’s “law, science, and policy” approach, represented a significant departure for Deng:

“There was a time when I would have been reticent to speak of values because my earlier legal training made me suspicious of such terms as falling within the realm of metaphysics and therefore irrelevant to hard legal analysis. But then I was fortunate, I would say, to go to Yale Law School, where Myres McDougal and Harold Lasswell attached considerable importance to values. In their jurisprudence of law, science and policy, values were defined in concrete terms, embracing deference values such as power, rectitude, affection and respect, and welfare values like wealth, well-being, skills and enlightenment. Another major principle introduced by the Yale School of Jurisprudence was the concept of human dignity as an overriding goal of community and social processes. Again, human dignity was one of those concepts that I had been conditioned by my earlier legal training to dismiss as metaphysical. The Yale school gave it an empirical meaning by defining it in terms of the broadest shaping and sharing of values.”⁸

For Francis Deng these concepts resonated with Dinka values as he perceived them and at the same time provide a direct link with universal principles applicable to all societies.

Tradition and Modernization is unusual in another respect. It is one of the few books about law ever to be based quite substantially on songs. Rarer still the author was qualified by birth to be a poet. This extraordinary feat arose out of necessity: because of the security situation Deng was unable to return home to do more fieldwork, so he partly made up for this gap in his data by making an extensive collection of songs from fellow Dinkas in the United States and from his earlier recordings and his memory. In time he produced two volumes of translations of Dinka songs and

⁷ Roberta Cohen and Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, DC: The Brookings Institution, 1998). Further examples of his work as an intellectual leader in international relations include Wolfgang H. Reinicke and Francis Deng, *Critical Choices: The United Nations, Networks, and the Future of Global Governance* (Global Public Policy Project. Ottawa: International Development Research Center, 2000) and Francis Deng and Larry Minear (eds.) *The Challenges of Famine Relief: Emergency Operations in the Sudan* (Washington, DC: The Brookings Institution, 1992)

⁸ *PM* 186-87.

folktales. His early writings bring out the special role played by song in Dinka social relations in relation to courtship, bridewealth, cattle, disputes, war, religious ceremonies, and celebrations.⁹

“Among the Dinka, songs and dance have a functional role in everyday life. They do not deal with constructed situations; they concern known facts, known people, and defined objectives. But, above all they are skills of splendor in which a Dinka finds total gratification and elevation. The vigor and rhythm with which they stamp the ground, the grace with which they run in war ballets, the height to which they jump, the manner of pride and self-approval with which they bear themselves, and the way in which the high-pitched solo receives the loud unified response of the chorus combine to give the Dinka a euphoria that is hard to describe. As the singing stops, the drums beat even louder, the dance reaches its climax, and every individual, gorged with a feeling of self-fulfillment, begins to chant words of self-exaltation.

‘I am a gentleman adorned with beads
I dance to the drums and level my feet
The girls of the tribe gather before me
The wealth of the tribe comes to me.’”¹⁰

Francis Deng has produced over twenty books, including two novels. Many of them deal with the Dinka or with the problems of North-South conflict in the Sudan. Even when writing about broader issues such as human rights, displaced persons, and dispute resolution, he regularly draws on Dinka examples and reaffirms that at the core of his multi-layered identity remains a commitment to central Dinka values. A central concern of his work is to reconcile tensions between tradition and modernity, between Dinka culture and universal standards, and between national unity and diversity in a conflicted Sudan.

The historical context

⁹ “To give some examples of the general significance of songs, the social structure, particularly territorial grouping, is reinforced by age-set group-spirit dramatized in initiation, warfare, and other age-set activities, which without songs would be barren. The concept of immortality through posterity receives a great deal of its support and implementation through songs. Singers not only give genealogical accounts of their families, but also stress and dramatize those aspects which express their relevance to contemporary society. Young members of competitive families have been known to compose songs or have songs composed for them in reply to each other’s allegations about incidents affecting the relative position of their families. In this process a young man may do a special investigation into the history of his family and of the tribe, to find additional evidence to sing about and bolster his family.” (*The Dinka and their Songs* at p. 78) 1973. In this book Deng anthologises Ox songs, Cathartic songs, Initiation songs, Age-set Insult songs, War songs, Women’s songs, Hymns, Fairy-tale songs, Children’s Game songs, and School songs.

¹⁰ DS 17.

Francis Deng's writings need to be viewed in the context of the history of the Sudan. At Independence in 1956 the Dinka were one of the largest peoples in Africa. In the 1956 census they were estimated to number nearly two million, divided into twenty-five independent groups living a semi-nomadic, semi-pastoral life in settlements dispersed over nearly a million square miles within the Sudan. During the Condominium period they were perceived by outsiders to be strongly religious, immensely proud, exclusive, and resistant to change.¹¹ For many years they fiercely resisted foreign rule, but under the British they also found that the policy of indirect rule was a convenient way of maintaining their heritage and distinct identity. Whether the motives of the British in maintaining the isolation of the Southern Sudan are attributed to a respect for Nilotic culture amounting almost to romance or to a policy of divide and rule, or to a mixture of both, until Independence the Dinka enjoyed the security and exclusiveness resulting from the policy, while resenting being ruled by outsiders, whether British or Northerners.

The Sudan became independent in 1956. During the past half-century, except for a ten year break, the Dinka have suffered terribly, experiencing repression, massacres, starvation (sometimes deliberately induced), decimation, enslavement and displacement. The civil war in the Sudan began in 1955. From 1972 to 1983 there was a break following the Addis Ababa Agreement, which gave the Southern Sudan regional autonomy. War re-started in 1983, after the military regime of Gafaar Nimeiry instituted a strategy of Islamicization. The latest Peace Agreement (2004) still holds precariously at the time of writing. Over the years Francis Deng has been involved in attempts to broker a peace as a statesman, diplomat, but above all as a writer.

Here I shall concentrate on Deng's treatment of universalism and relativism with respect to human rights by focusing on a few of his very extensive writings, especially his biography of his father, a volume on Human Rights in Africa edited jointly with Abdullahi An Na'im, and a series of articles published in *The Sudan Democratic Gazette* (1998-99) and *the Journal of International Affairs* (1998) which set out his general position in summary form.¹²

Despite this terrible history of death, suffering, and displacement, Francis Deng emphasises the resilience and vitality of Dinka culture that has formed the basis of their identity. He has documented this culture in rich detail through interviews, folk tales, legends, biographies, cases, and historic events. In his early work he had to rely quite heavily on his own experience, a sparse but

¹¹ Between 1898 and 1956 Sudan was in theory jointly governed by the United Kingdom and Egypt; in fact the British were the sole rulers. The human side of the story is recounted in Robert O. Collins and Francis Deng (eds.) *The British in the Sudan, 1898-1956* (Stanford: Hoover Institute, 1984).

¹² See above n.<000>.

generally excellent scholarly literature,¹³ and his own recordings of Dinka songs. After he returned to the Sudan he was able to update his knowledge and supplement these sources with extensive recordings of interviews with Dinka chiefs and other informants.

In his scholarly writings about the Dinka, Deng adopted an approach that now might be considered unfashionable in its use of “the ethnographic present” and the rather rigid framework of analysis of Lasswell and McDougal. However, Dinka history and culture are also powerfully evoked through Dinka folktales, songs, oral history, and two novels. He identifies the unity of Dinka culture in a changing and tragic situation through a few core concepts and values that form a distinctive Dinka identity.¹⁴ His interpretation is in a sense “idealized” in that he focuses on core values of a tradition that were never fully lived up to and which, as he makes very clear, have been threatened not only by modernity but by nearly half a century of suffering.¹⁵ What follows is a brief outline of his interpretation of these ideas and how they relate to international norms of human rights, democracy, and good governance.

Dinka Culture

The Dinka were said to be among the most religious of African peoples. They believe in a single God who has similar characteristics to the God of other monotheistic religions, including Christianity and Islam, but they have no concept of heaven or hell.

¹³ Several works on the ethnography of the Dinka and neighbouring Nilotic peoples by Lienhardt, Howell, and Evans-Pritchard became anthropological classics. (See TM at xlii-iii)

¹⁴ Godfrey Lienhardt emphasises the point that “....cultural homogeneity is by no means accompanied by political unity. The million or so Dinka of the Southern Sudan and their neighbours the Nuer, are culturally very similar indeed; but politically they are divided into many mutually exclusive and often hostile tribes.” *Social Anthropology* (Oxford: Oxford University Press, 1964) at 155.

¹⁵ It is important to emphasise that most of Deng’s research and writing on the Dinka took place in the 1970s, before some of the worst traumas in Dinka history and before academic anthropology took a self-critical, and sometimes post-modern, turn. In the present context the significance of Deng’s work in that period is that it provides a rich and detailed reconstruction and interpretation of Dinka culture as an “ideal type”, which emphasises its distinctive aspects, is quite frank, and not uncritical. It has the strengths and limitations of “insider research” (e.g P.A. Adler and P. Adler, *Membership Roles in Field Research* (London: Sage, 1987)). The debate over Deng Majok’s marriages (below) illustrates, in extreme form, the divide between Dinka values and international human rights norms that Francis Deng has sought to transcend. His account is remarkably detached and open, yet he manages to maintain the posture of a loyal and respectful son.

“The overriding goal of Dinka society is *koc e nohm*, a concept of procreational immortality which aims at perpetuating the identity of every individual male. Respect for the dignity of any person is central to this principle.”¹⁶

Both men and women are immortalized by procreation. It determines their social status, wealth, and place in history. Immortality maintains the identity of the dead and enables them to continue to participate in social processes in this world and to influence them.¹⁷

Two central concepts are *cieng* and *dheng*. The concept of *cieng* sets the standard of good social relations. It has no counterpart in English. As a verb it can mean to treat a person well, to live in harmony, to be generous, hospitable, kind. A person’s character or behaviour can be evaluated in terms of having good or bad *cieng*:

“*Cieng* places emphasis on such human values as dignity, integrity, honor, and respect for self and others, loyalty and piety, compassion and generosity, and unity and harmony...Good *cieng* is opposed to coercion and violence, for solidarity, harmony, and mutual cooperation are more fittingly achieved voluntarily and by persuasion.”¹⁸

Cieng sums up central values of human relations. Dinka society provides various avenues for individual and collective pride in attaining values that demand respect. A person attains [the status of] *dheng* (or *dheeng*) by his or her conduct. “Among the many positive meanings of *dheng* are nobility, beauty, handsomeness, elegance, charm, grace, gentleness, hospitality, generosity, good manners, discretion, and kindness.”¹⁹

As with virtue, there are many paths to *dheng*, through ancestry, cattle, sexual prowess, graciousness, generosity, bravery, or wealth in the form of cattle.²⁰

Dinka values are believed to be sanctioned by God and the ancestors. Harold Lasswell commented on the powerful processes of early socialization that created an “inner policeman” that

¹⁶ SDG 9/98; cf. Deng (1998) <Cow>

¹⁷ HRA 264. For example: “When a man dies before marrying, even as an infant, he leaves his kinsmen with a religious obligation to marry on his behalf and beget children to his name”. HRA 265. This is sometimes (misleadingly) referred to as levirate marriage (TM 137-39).

¹⁸ Id 266.

¹⁹ Id. 267.

²⁰ Ibid. Deng illuminatingly explores the complexities and nuance of the concepts of *cieng* and *dheng* in their social context in TM 24-30 and DS 9-24. *Cieng* sets social standards for ideal human relations that promote harmony and unity; *dheng* categorises individuals according to how they have earned respect through their conduct. It is easy to see why Francis Deng finds that these concepts resonate with more abstract (and usually vaguer) Western concepts such as dignity and respect for persons.

can continue to operate after an individual had moved from his original setting and came into contact with other norms, values and temptations.²¹ In traditional society living up to these values was largely left to individual conscience, social approval and disapproval, and persuasion rather than force. Dinka tradition makes no sharp distinction between law, custom, and morals. All are backed by religious and social pressures and especially by individual conscience:

“These moral and spiritual principles are also applied to guide and control the exercise of political and legal authority. Dinka law is not the dictate of the ruler with coercive sanctions. Rather it was an expression of the collective will of the community, inherited from the ancestors, generally respected and observed, sanctioned largely through persuasion, or if need be, spiritual sanctions.”²²

“Despite the martial culture of the Dinka as herders and warriors, killing, even in fair fight, is believed to be spiritually contaminating and dangerous according to ritual practices. Killing by stealth or ambush is considered particularly depraved and requires even more elaborate procedures of redress and rites of atonement. Theft was hardly heard of in traditional society and, when it occurred, was met with degrading sanctions that were severely damaging to one’s social standing. Virtually every wrong threatens the wrongdoer with misfortune and death.”²³

Dinka norms on killing, marriage, the family, harms, insult, and defamation (including defamation of the dead), social hierarchy, and economic relations are all directly related to the overriding importance of immortality through procreation and the values embodied in the concepts of *cieng* and *dheng*. These values integrate the individual and the community. They are illustrated in concrete form by the role of cattle in Dinka society.

“It is for cattle that we are liked, we, the Dinka. The government likes us because we keep cattle. All over the world people look to us because of cattle. And when they say, “Sudan”, it is not just because of our color, it is also because of our wealth; and our wealth is cattle...”²⁴

Cattle are wealth, but they signify much more than that. Cattle constitute bridewealth that ensures continuity through procreation; cattle are prepared for special sacrifices to God, the spirits and ancestors. A great many songs are about oxen or the need for oxen __ for marriage, for sacrifice,

²¹ Lasswell: “the basic norms of society are rather fully incorporated into the emerging personality system at an early age ... The inner policeman continues to operate after the individual has moved from his original social setting and is exposed to novel norms and sanctions” Preface to *TM* (1971).

²² SDG 9/98

²³ SDG 9/98 at 10.

²⁴ ATW 71.

or just for *dheng*. Young men exalt themselves and their lineage through identification with their personality ox, a castrated bull of little practical value.

“When I rise I sing over my ox,
gossipers disperse
I am like my forefathers
I rise to be seen by my ancient fathers
I rise to be seen walking with pride
As it was in the distant past
When our clan was born.”²⁵

According to Dinka legend:

“God asked man, “Which one shall I give you, Black Man; there is the Cow and the thing called “What’, which of the two would you like?” The man said: “I do not want What. God said: “But What is better than the Cow”. Then God said: “If you like the Cow, you had better taste its milk before you taste it finally.’ The man squeezed some milk into his hand, tasted it, and said: “Let us have the milk and never see “What””.²⁶

Francis Deng interprets “What” in this creation myth to refer to curiosity and the search for scientific knowledge and, hence a rationalization of Dinka conservatism and backwardness in relation to modern science and technology.²⁷

Leadership

The Dinka lacked any centralized institutions for making or enforcing law, and some anthropologists have maintained that they were an example of an “acephalous” or chiefless society and that “chiefs” were a colonial creation. However, this is misleading. The Dinka did have leaders whom anthropologists have variously referred to as “master of the fishing spear” (Lienhardt) or “the Leopard Skin Chief” (Howell and Evans-Pritchard)²⁸ These titles emphasise the religious nature of traditional leadership which contrasted with British secular

²⁵ SDG 6/99

²⁶ SDG 3/99 71 cf. Cow 1998: 101.

²⁷ ATW 71n.; cf, Cow

²⁸ ATW 118

conceptions of the role of chiefs. According to Deng, the traditional leader was the embodiment of Dinka values, mediating between God, the ancestors, and the living:

“Viewed in local terms, these qualities are often associated with ‘the tongue’ and ‘the belly’. By the tongue is meant the ability to speak soothing and conciliatory words that bring harmony and mutual co-operation to human relations. The belly connotes showing hospitality to visitors, but also generosity to the needy.”²⁹

During the condominium period chieftainship among the Dinka became more secular and political. Persuasion remained a prime requirement of leadership, but over time authority came to rely more on secular punishments than on religious sanctions. Such punishments as prison and flogging offended Dinka conceptions of dignity and were resented, although over time they came to be accepted to some extent.³⁰ Pressures on traditional chiefs to meet their material obligations sometimes led to accusations of corruption or abuse.³¹ The move from religious to secular opened the way to criticism of chiefs and even to political opposition.

Francis Deng’s father, Deng Majok, lived through all of these strains between tradition and modernity and was regarded by many as the embodiment of a great Dinka leader. He was widely admired for many qualities, including wisdom, generosity, strong leadership, progressiveness<> and for building good relations with neighbouring Arabs while safeguarding the security and independence of his own people.³² However, he was often criticised for “excessive marriage”. At first sight this provides a rather striking example of a conflict between Dinka tradition and modern “universal” values. But the story is more complex than that.

In his biography of his father Francis Deng deals frankly and in detail with his father’s prodigious uxuriousness.³³ Chapter 12 is significantly entitled “The economics of polygyny”. By Dinka tradition there is no limit to the number of wives that a man can enter into provided that he can afford them. In Deng Majok’s case estimates of the total number of wives he acquired during his life vary between 200 and 400. This appears to have been a record in Dinka history and it occasioned continuing controversy. On the one hand, he was clearly fulfilling the imperatives of procreation and immortality. According to his son, he generally treated his wives and offspring generously and fairly, but he maintained control and surface order within the family through the strict discipline of an

²⁹ MDCM 278.

³⁰ “The alienation of the people from modern-day secular authority may be illustrated by the fact that the Dinka refer to the government, even that represented by the Chief, as ‘*jur*’ (foreigner). (Holt 142)

³¹ MCDM at 278 suggesting this is a cause of corruption in Africa generally

³² MCDM 273-74 cf. Francis Deng, *Seed of Redemption: A Political Novel* (New York: Lilian Barber Press, 1986) 165-6.

³³ See above n.000.

authoritarian patriarch. He “granted equal opportunities for procreation”³⁴ but there was often “turmoil beneath the calm.”³⁵ Within Ngok Dinka society the situation was problematic.

The size of his family was a matter of prestige rather than shame. But marriage was costly and the family was worried about the draining of their wealth; others hinted at corruption, though no formal accusations were ever made. Deng Majok’s defenders maintained that he always acted in accordance with Dinka mores, if not European ones. Nearly all the arguments seem to have centred on issues of power, wealth, and procreation, rather than on sexual morality. His son reports:

“In defending his marriages, Deng Majok gave different reasons to different people. To some, especially his family, he might talk of marriage as an investment and a source of economic and social security. To others he might mention the need to broaden the circle of relatives and the relationships by affinity as a strategy of extending political influence. But the reason he stressed most often and which cut across all others was procreation. And, in a curious way, all those who discussed the matter with him now report his arguments with considerable sympathy and nearly always end up agreeing with his point of view, if only in retrospect.

‘When his marriages began to be excessive’, said Nyanbol Amor [his second wife], we went and said to him: ‘Deng, what is this? Cattle should be allowed to remain for some time to increase in number. You now seize a cow a woman uses for making butter and you send it off to marriage; why is that? Aren’t we enough? We do not want you to continue with your marriages!’

He replied: ‘Are you people fools? Have you no sense of judgment? I am marrying these wives for your own good. These women will have children. And it is these children who will remain with you.’”³⁶

It was not only his wives who tried to dissuade him. Sons, elders, fellow chiefs, and ordinary people raised the issue with him. The discussions appear to have been quite frank and open, but Deng Majok never relented. In respect of marriage Deng Majok was treated as a spendthrift investor in wives, but in other respects he was considered to be a great modernizer. He invested in the education of his sons, but was more reluctant to educate the daughters. He built good relations with his Arab neighbours, he emphasised ideas of due process, he resorted to modern medicine. During the period of the condominium Deng Majok also exactly fitted the British policy of indirect rule:

“Deng Majok’s leadership represented a peak in the evolution of tribal authority from the role of spiritual and moral functionary to an autocratic government institution backed by the

³⁴ MCDM 174

³⁵ Id. (Chapter heading).

³⁶ id. 203.

coercive power of the state. The erosion of the egalitarianism and democracy of traditional society has been counterbalanced by the effectiveness of the new institutions in establishing and consolidating broad-based adherence to the rule of law in the broader framework of the nation-state. Deng Majok and other tribal chiefs in both the North and the South were indispensable in the maintaining of order and security among the masses of the rural population and in the context in which the central government machinery was otherwise remote and costly.”³⁷

When Deng writes about reconciling Dinka values with “modernity” he is concerned more with the relationship to human rights norms than to values of the colonial (or Condominium) state.

Universal values

In his early writings Francis Deng did not make much reference to human rights, but he has always emphasised human dignity as a basic value. After completing his doctorate at Yale he worked for five years as a Human Rights Officer in the UN Secretariat and acquired considerable professional expertise in the area, especially in relation to women’s rights. Since then he has been a firm, quite orthodox, upholder of the international human rights regime and of basic principles of democracy, both of which he considers to be universal. On human rights he emphasises the United Nations Charter and the Universal Declaration of Human Rights, especially such general phrases as “the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family”. On democracy he states:

“Among the principles of democracy that have gained universal validity are that governments rule in accordance with the will of the people and adhere to the rule of law, separation of powers, and independence of the judiciary, and respect for fundamental rights and civil liberties. These principles should be safeguarded by transparency, freedom of expression (and of the press), access to information and accountability to the public. Given the tendency of Africans to vote according to their ethnic or tribal identities, democracy will have to mean more than electoral votes. In the context of ethnic diversity, devolution of power through decentralisation down to the local level, combined with some methods of ensuring the representation of those who would otherwise be excluded by the weight of electoral votes, would be necessary. In any case, democracy, however defined or practiced, implies accommodation of differences and a special responsibility for the protection of minorities.”³⁸

³⁷ Id. 140.

³⁸ SDG 5/98 at 11.

At first sight these familiar ideas of modern liberal democracy seem a long way from Dinka tradition with its emphasis on immortality, especially through the male line, polygyny, a non-monetary economy, divine chieftainship, and cattle. Nor does this fit with his father's autocratic style. How could a UN Human Rights Officer working on international women's rights continue to respect and honor his father, a patriarch who had over 200 wives? Are Dinka concepts of *cieng* and *dheng* quite the same as the meaning of "dignity" in the UN Declaration on Human Rights? How can one reconcile the immortality of ancestors with so earthbound and secular an ideology as modern human rights? Is Dinka tradition really democratic?

Francis Deng adopts an elaborate strategy to confront these issues. The following is just a brief summary.

First, Deng is not a cultural relativist.³⁹ Following Abdullahi An Na'im, he emphasises that for institutions and particular norms to be accepted as legitimate and to be effective they must be debated, interpreted, and applied within the concepts and internal logic of local cultures. However, this does not preclude using universal standards as a basis for judging particular features of a culture or tradition. Relativism that rejects all external standards is unacceptable; but relativism in the sense of taking very seriously the beliefs and values of a given culture complements universalism. In respect of the details of institutional design and specific prescriptions, culture is an essential part of legitimating any social change.⁴⁰ In short, a cultural approach to human rights and democracy involves seeing tradition as supplementing abstract values and principles. *Cieng* and *dheng* are conceptions that concretise, localise, and enrich abstract notions of human dignity.

Second, human rights and the principles of democracy are universal, but only at a very abstract level. At that level, Dinka ideals which emphasise respect for persons, dignity and harmony are fundamentally compatible; indeed, Deng goes so far as to say that the Dinka "clearly had notions of human rights that formed an integral part of their value system."⁴¹ Furthermore, although the principles of democracy are universal, "democracy needs to be home grown to be sustainable". Independence constitutions in Africa tended to fail, not because of their ideals, but because they

³⁹ See especially HRA, SDG 8/98.

⁴⁰ Contrast with Ghai who plays down the importance of "culture" as contrasted with material interests.

⁴¹ SDG 8/98.

were essentially imposed from above and in a form that was not the result of a genuine local constitutive process. The ideals, he claims, were already part of African tradition:

“In traditional Africa, rulers governed with the consent of the people who participated broadly in their own self-administration; were free to express their will; and held their leaders to high standards of transparency and accountability. In that sense, indigenous societies were more democratic than most modern-states in Africa.”⁴²

Thirdly, the Dinka are changing. They have become more open to learning from the outside world and some are less confident about the superiority of their own culture. There is even talk of giving up the Cow for the pursuit of “What”. After over forty years of conflict and suffering they yearn for peace. How far these terrible years and the dislocation of so many have weakened the grip of Dinka culture and its “internal policeman” is uncertain. But for many the core values embodied in *cieng* and *dheng* have sustained their identity. After conducting a series of interviews with chiefs and elders in 1999, Francis Deng concluded that the civil war had been both a radicalising and destabilising factor, ironically increasing motivation for development, but in ways that are compatible with basic elements of their cultural integrity.⁴³ For example, in an integrated rural development project the Dinka strongly resisted any suggestion that cattle could be used as draft animals, but they were prepared to sell them for cash, or use them in ways “that are compatible with the dignity of the animals as they see it.”⁴⁴

Fourthly, Deng acknowledges that judged by the standards of human rights norms some aspects of Dinka culture are open to criticism. In 1990 he summarised the main points as follows:

“There are, however, severe constraints on the Dinka cultural system in terms of objective universal human rights standards. One set of negative effects derives from the inequities inherent in the logic of the lineage system and its stratification on the basis of descent, age, and sex. Another set of negative characteristics lies in the conservative nature of the system and its resistance to change or cross-cultural assimilation. And yet another shortcoming of the system lies in the fact that its human rights values weaken as one goes away from the structural center of the Dinka community.”⁴⁵

⁴² SDG 5/98. kk Not everyone will agree with this generalised account of African political traditions, but there is a recognizable affinity with Deng’s accounts of Dinka political tradition. His argument is that the institutions and processes might be different, but the values are closely compatible.

⁴³ “Whether it is a manifestation of characteristics hitherto hidden by their isolationism, the result of the impact of the civil war, or simply adaptability to their present circumstances, the Dinka are demonstrating a degree of commitment to development that would surprise the observers of the 1950s.” (SDG 10/99 p. 13)

⁴⁴ SDG 10/99 p.11

⁴⁵ HRA 273; Cf. the following summary: “Although Dinka cultural values, in particular the emphasis on procreational continuity, idealised human relations, and the dignity of the individual in the communal context, engendered<sic> the

Women in Dinka society

Perhaps the biggest test of Deng's argument about the compatibility of Dinka tradition with human rights is the subject of the status and treatment of women, as it is for many of the world's cultures, traditions and religions. Deng's own accounts of Dinka cosmology and of his father's uxoriousness, although clearly an extreme case, suggests a large gulf between central aspects of Dinka tradition and the norms and standards embodied in the Convention on Elimination of Discrimination Against Women (CEDAW) and like instruments. Deng acknowledges this. He accepts that polygamy is inconsistent with equal respect and that Dinka women have a subordinate role in Dinka cosmology and tradition. He himself is committed to UN values on the status of women. He is monogamous and the Dinka heroes in his two novels are monogamous — indeed, one resists pressures to take additional wives.⁴⁶ He can point out, in mitigation, that the central concept of *thek* applies to women, as well as to men and clan divinities. *Thek* includes, but is broader than the English concepts of respect and deference. As Lienhardt points out:

"*Thek* ...is a compound of behaviour which shows unaggressiveness and deference to its object, and of behaviour which shows esteem for it."⁴⁷

Francis Deng is quite explicit about the position of women. After acknowledging the inequities of the social structure in the passage quoted above, he continues:

"The problem lies not only in the injustices of the system but also in the fact that those who are less favored by it tend to react to the inequities, thereby creating paradoxes in the social system. For instance, although women are the least favored by the ancestral values, society depends on them not only as sources of income through the custom of marriage with cattle wealth but also as mothers who perform the educational role of inculcating ancestral values in their children at an early age. Yet women have no legitimate voice in the open channels of decisionmaking and can participate only through indirect influence on their sons and husbands. But because of the close association between mothers and children and the considerable influence wives have over their husbands, women are regarded as most influential in the affairs of men. Nevertheless, because of the inequities of polygyny, women

elements of human rights principles, the system had built-in shortcomings, embodied in structural inequities, resistance to change, and a condescending view of the outside world." (SDG 9/98). See also SDG 9/98 p. 9, explicitly linking Dinka values to human rights, but with similar reservations.

Cf alternate formulation 8/98 p9 explicit link to h.r.

⁴⁶ *Seeds of Redemption*, op. cit.

⁴⁷ Godfrey Lienhardt, *Divinity and Experience: The Religion of the Dinka* (Oxford: Clarendon Press, 1961) at 126.

are known for jealousies, divisiveness, and even disloyalty to clan ideals. Their influence, especially on the children, must therefore be curtailed.

The Dinka reconcile these conflicting realities by recognizing the love and affection for the mother as functions of the heart, while those feelings for the father are functions of the mind.....

As a result of these contradictions, the position of women among the Dinka is a complex one, in which deprivations and inequities are compensated by devices that ensure a degree of conformity and stability, despite ambivalences⁴⁸

This is to state a problem rather than to resolve it. The status and treatment of women in Dinka tradition are closely bound up with Dinka cosmology, with its emphasis on procreation and veneration of male ancestors, a pastoral economy, its practices and attitudes to cattle, and many other matters. This raises a host of complex questions about how far Dinkas living in rural communities could retain their strong sense of cultural identity over time if they were to adjust to the standards of the outside world in respect of monogamy, the education of women, participation in decision-making, non-discrimination and other requirements of even minimalist versions of feminism. How far can the specifics of traditional Dinka values and beliefs justify a margin of appreciation that modifies abstract principles of women's equality? And what of the situation of Dinka women who live outside traditional society? Francis Deng does not attempt to address these issues in a sustained way. In the light of the tragic history of the Dinkas over the last thirty years they may not even be the most pressing questions.

Conclusion

Francis Deng has been a prolific writer on a wide range of topics and he has addressed a variety of audiences. For present purposes, his most relevant writings can be treated as falling into three groups. First, an extensive collection of books and essays that describe, evoke and explain Dinka culture, with tradition and modernisation as a central theme. Most of these writings are scholarly works addressed to mainly Western audiences and published in the 1970s. A second, more varied group, deals with political and social relations between the North and South Sudan. In some instances the explicit aim is to encourage a more sympathetic understanding of Southern culture and aspirations by Northern Muslims. In these, identity is a central theme. For over 30 years Deng

⁴⁸ HRA 273-274

has supported a unified but pluralistic Sudan in which a strong national identity is forged through an open recognition of cultural diversity.⁴⁹

Thirdly, since about 1990, partly influenced by Abdullahi An Na'im, he has addressed issues concerning the compatibility of human rights with African traditions. In this context he has adopted an explicitly cross-cultural perspective. These writings are less extensive than the other groups and are addressed to rather varied audiences.⁵⁰

In the present context, the first group of writings is probably the most significant. Francis Deng's main achievement is to describe, evoke, and interpret a highly distinctive and proud traditional culture in a vivid and sustained way and to relate it to a wider, rapidly changing world. His account of Dinka traditions may now seem somewhat idealized, even outdated, but he has provided a rich body of authentic material which is open to interpretation from other perspectives. Above all, he has enabled the voice of Dinka tradition and values to be heard. He has given the Dinka a voice in the outside world. He has also illustrated in a vivid and specific way the more general theme of the complex relationship between long-established traditional values and modern conceptions of human rights.

⁴⁹ Francis Deng has sometimes been criticized for being too conciliatory and too optimistic. He reports how at a dinner party Nelson Mandela was criticised for being too indulgent and Francis defended him, arguing that everyone has a good side and a bad side and in relations with others one should build on their good side. He is well known for the diplomatic way in which he has dealt with Heads of Government and other political leaders when confronting them about their responsibilities for displaced persons. And he has over the years sought rapprochement with the Northern Sudanese leaders. He claims that this represents the Dinka way. PM 185-6.

⁵⁰ The main ones are HRA (1990), (academic, mainly addressed to the human rights community in the United States), Cow (1998), and a series of articles in the Sudan Democratic Gazette addressed to fellow Southerners.

Abdullahi Ahmed An-Na'im⁵¹

"I am arguing for secularism, pluralism, constitutionalism and human rights from an Islamic perspective because I believe this approach to these principles and institutions is indispensable for protecting the freedom for each and every person to affirm, challenge or transform his or her cultural or religious identity."⁵²

"To seek secular answers is simply to abandon the field to fundamentalists, who will succeed in carrying the vast majority of the population with them by citing religious authority for their policies and theories. Intelligent and enlightened Muslims are therefore best advised to remain within the religious framework and endeavour to achieve the reforms that would make Islam a viable modern ideology."⁵³

On January 18th, 1985 Mahmud Mohamed Taha was publicly executed in Khartoum on the grounds that he was an apostate and a heretic. Taha was the leader of a small radical modernizing movement in the Sudan, known as the Republican Brothers (or Republicans), founded in the late

⁵¹ This section is based mainly on the following works by Abdullahi An Na'im: *Toward an Islamic Reformation: Civil Liberties, Human rights and International Law* (Syracuse, NY: Syracuse University Press 1990 Preface by John Voll); *Human Rights in Africa: Cross-Cultural Perspectives* (ed. with Francis Deng, Washington, DC: Brookings Institution, 1990); *Human Rights in Cross-cultural Perspectives: Quest for Consensus* (Philadelphia: Pennsylvania University Press, 1992); "Promises We Should All Keep in Common Cause" in J. Cohen, M. Howard and M. Nussbaum (eds.) *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999); "Human Rights in the Arab World: A Regional Perspective" 23 *Human Rights Qtrly* 701 (2001); *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002); *Human Rights Under African Constitutions: Realizing the Promise for Ourselves* (ed., Philadelphia: University of Pennsylvania Press, 2003); "The Future of Shari'ah Project" (Memo. 2004); *The Future of Shari'a* (Unpublished manuscript, 2005) Ch.1 (cited with permission of the author); cited (An Na'im (2005) etc.)

See also: Tori Lindblom and Kari Vogt (eds.) *Islamic Law Reform and Human Rights; Challenges and Rejoinders* (Nordic Human Rights Publications, Copenhagen, Oslo, 1993) (a useful symposium centred on An Na'im (1990); Ann Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" 15 *Michigan Jo. Int. Law* 307 (1994); and *Islam and Human Rights: Tradition and Politics* (3rd edn. Boulder: Westview Press, 1990); Ustadh Mohamed Taha, *The Second Message of Islam* (trs. By Abdullahi An a'im. Syracuse: Syracuse University Press, 1987) Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) contains a mildly critical account of An Na'im's treatment of International Law.

⁵² An Na'im (2005) Ch.1. para 15.

⁵³ Cited by Voll, Foreword to An Na'im (1990).

1940s during the struggle for independence. For the previous two years the Republicans had been peacefully protesting against human rights violations that resulted from President Ja'far Nimeiry's programme of Islamicization that had begun in 1983. Their protest had included bringing several unsuccessful suits in the courts alleging that the introduction of a traditionalist version of Islamic law (Shari'a) was unconstitutional because it involved discrimination against women and non-Muslims.⁵⁴ Taha and some of his followers had been interned in 1983. They were released about eighteen months later, but Taha and some others were re-arrested in January 1985.

Apostasy was not then an offence under Sudanese law. Taha was originally charged and tried for offences under the Penal Code and the State Security Act. However, the appellate court, without any serious trial of the issue, or even a pretence of due process, convicted Taha of heresy and apostasy and sentenced him to death. The President swiftly confirmed the sentence, which was immediately carried out. This blatantly political and unlawful killing shocked many ordinary Sudanese, Northerners as well as Southerners who were opposed to Islamicization. It was without precedent and quite contrary to Sudanese ways of handling political disagreements. Instead of representing a great victory for Islam, as Nimeiry proclaimed, Taha's execution strengthened the opposition to his regime, which was overthrown in a peaceful revolution in April, 1985, only three months after Taha's death. Human rights activists proclaimed Taha to be a martyr and established Arab Human Rights Day to commemorate the anniversary of his death.⁵⁵

Among Taha's followers was Dr Abdullahi An-Na'im, who at the time was an Associate Professor of Law at the University of Khartoum. An-Na'im had joined the Republicans in the late 1960s when he was still a law student. After graduating from Khartoum in 1970, he went to England for postgraduate work, first in Cambridge and then in Edinburgh, where he obtained a doctorate in criminology in 1976. He returned to Sudan to teach and practice law and to resume his association with the Republicans. Mahmud Mohamed Taha had been banned from public activity since the early 1970s.⁵⁶ An Na'im was one of his most loyal followers and soon became a leading spokesman for his ideas. In 1983, with Taha and others, he was interned without charge for about eighteen months. They were released in late 1984, but Taha was arrested again, tried, and executed. Having unsuccessfully campaigned for Taha's reprieve An-Na'im left the Sudan in 1985, resolved to promote and develop the ideas of his master. He has remained in exile ever since (except recently for occasional visits), first holding some short-term appointments, including being Executive

⁵⁴ Mayer (1999) 379.

⁵⁵ Mayer (1994) 387.

⁵⁶ Voll, Preface to An Na'im (1990)

Director of Africa Watch from 1993-95. Since 1995 he has been a Professor of Law at Emory University at Atlanta. An Na'im is now well-known, not only as Taha's most prominent follower, but also as a prominent Islamic jurist in his own right.

By 2004 An-Na'im had published several books and nearly 50 articles. He has written about public law, family law, international law and many particular topics. Here I shall concentrate on his writings about human rights in relation to Islamic law. In order to understand these, it is first necessary to outline Taha's main ideas, as expounded in his most important book, which was first published in Arabic in 1967 and was translated into English by An-Na'im as *The Second Message of Islam* (1987).

Mahmud Mohamed Taha was considered a revolutionary in many quarters in the Islamic world. He had been declared an apostate by Al-Azhar as early as 1973 and he was regularly attacked by Muslim Brothers and other "fundamentalists". His main concern was to adapt Islamic law to modern conditions and to interpret it in a way that would be compatible with human rights as expressed in basic international documents, such as the Universal Declaration of Human Rights. Taha's key idea was methodological — what he called "the evolution of Islamic legislation". He advanced a method of interpretation that would allow the abrogation of some texts of both the Qu'ran and the Traditions of the Prophet (the Sunna) in favour of other texts in the same sources. The texts should be read in their historical context in order to distinguish between fundamental principles and transitional provisions, which were relative to time and place, and which were never meant to be binding for all time. This method opens the door to the idea of continuous reform of the Shari'a to suit changing conditions, even in respect of doctrines based directly on the holy Qu'ran, which many Muslims consider to be immutable.

The historical argument pointed out that Islamic law was only systematized during the periods of the Medina and Ummayed states, some 150-250 years after the death of the Prophet (seventh century). In this view, the early generations of Muslims, who are considered to have been among the most holy, were not the subject of the Shari'a in the form that it came to be accepted by most subsequent believers. Moreover, much of the early medieval Shari'a itself was legislation responsive to its immediate social, economic, and political context and could now be discarded as out-dated. Thus Taha (and his followers) treat Shari'a as a medieval construct and advance an Islamic alternative to Shari'a. Only by using this radical method of interpretation would it be possible to bring Islamic law into line with modern needs, conditions and standards. Furthermore, significant aspects of the received Shari'a could be shown to be incompatible both with human rights and relevant passages in the Qu'ran. By far the most important clashes concern the Shari'a's differential

treatment of “the other” — slaves, women and non-Muslims. Taha argued for a strong egalitarian principle of equal treatment of all human beings irrespective of race, gender, nationality, or status.⁵⁷

An-Na'im's intellectual development is marked by several stages, but he has remained faithful to the basic methodology and conclusions of his teacher. He first promulgated Taha's own ideas in both Arabic and English. His first major book, *Toward an Islamic Reformation* (1990) built explicitly on Taha's ideas, but developed them in more detail in respect of political structure, criminal justice, civil liberties, human rights and international law. Written in a clear and concise style it provides “the intellectual foundations for a total reinterpretation of the nature and meaning of Islamic public law.”⁵⁸ His method is to contrast the Medina version of the Shari'a with international human rights standards and a liberal human rights philosophy.

An-Na'im is a strong supporter of the international regime of human rights. His approach “is based on the belief that, despite, their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated as the framework for a common ‘culture’ of universal human rights”.⁵⁹ Human rights are not universal merely because they are posited in international law. “Rather, the rights are recognized by these documents because they *are* universal human rights.”⁶⁰ He sums up his basic theory as follows:

“The criteria I would adopt for identifying universal human rights is that they are rights to which human beings are entitled by virtue of being human. In other words, universal standards of human rights are, by definition, appreciated by a wide variety of cultural traditions because they pertain to inherent dignity and well-being of every human being, regardless of race, gender, language, or religion. It follows that the practical test by which these rights should be identified is whether the right in question is claimed by the particular cultural traditions for its own members. Applying the test of reciprocity among all human beings rather than just members of a particular group, I would argue that universal human rights are those which a cultural tradition would claim for its own members and must therefore concede to members of other traditions if it is to expect reciprocal treatment from those others.

⁵⁷ An Na'im (1990) Ch. 7 (“Shar'ia and Basic Human Rights Concerns”) is an excellent statement of a general position that is fleshed out in more detail in many subsequent writings.

⁵⁸ Voll Preface to An Na'im (1990) at ix.

⁵⁹ An Na'im (1992) 21.

⁶⁰ An Na'im (1990) 165-66.

In content and substance, I submit that universal human rights are based on two primary forces that motivate all human behavior, the will to live and the will to be free.⁶¹ Through the will to live, human beings have always striven to secure their food, shelter, health, and all other means for the preservation of life.... At one level, the will to be free overlaps with the will to live, in that it is the will to be free from physical constraints and to be secure in food, shelter, health, and other necessities of a good life. At another level, the will to be free exceeds the will to live in that it is the driving force behind the pursuit of spiritual, moral, and artistic well-being and excellence.”⁶²

An-Na'im's method is to contrast the Medina version of the Shari'a (and the Mecca texts that were intended to be universal) with "enlightened" international standards and his liberal theory of human rights. He is critical of the tendency for some to play down or be evasive about conflicts between the historical Shari'a and international human rights norms. For example, some governments in Muslim countries sign up to international human rights conventions, but do not abide by them; others enter vague reservations. Islamic Declarations of Human Rights are silent on key issues relating to the position of women, non-Muslims, and religious freedom.⁶³ An-Naim criticizes the selective nature of many reforms of family law in Muslim countries.⁶⁴ He also criticizes Dr Hassan el Turabi, the leader of the Islamic National Front in Sudan, for being vague and evasive on the status and role of women, while claiming that Islam treats all believers equally.⁶⁵ In contrast to the majority of Muslim commentators on human rights, some are more candid. For example, Sultanhussein Tabandeh indicates clear inconsistencies between the Shari'a and the Universal

⁶¹ The footnote reads: "Here I am adopting the analysis of Ustadh Mahmoud Mohamed Taha, *Second Message of Islam* pp. 80ff." It is significant that An Na'im makes hardly any reference to Western political theorists.

⁶² An Na'im (1990)164. An-Na'im's interpretation of human rights is recognizable as being within the mainstream of democratic or humanistic liberalism. He appeals to the principle of reciprocity (Kant's Golden Rule), he emphasizes dignity and well-being as values (an echo of Lasswell via Francis Deng?), and he talks of achieving an "overlapping consensus" (Rawls' term) between cultures. He is aware of affinities with Kant, Rawls, and Habermas, but claims that he reached his conclusions by a different route or at least that he was not consciously influenced by them (Interview with the author 2003). John Rawls, in a solitary discussion of An Na'im in a footnote, says of his discussion of constitutionalism ("This is a perfect example of overlapping consensus"). (Rawls, *Collected Papers* at 590-91n. (1999) (originally *The Idea of Public Reason Revisited* (1997)). Recently An Na'im has emphasised the role of the idea of "public reason" in Islamic debates about public policy and reform (see below).

⁶³ For forceful critiques of some Islamic Declarations see Ann E. Mayer *Islam and Human Rights: Tradition and Politics* (Boulder, Col.: Westview Press, 1991) and Bassam Tibi (in Lindblom and Vogt, 1993) at 80-81: Referring to a series of Declarations of the late 1980s and early 1990s (by Al-Azhar, the London based Islamic Council and others) Tibi states: "The Islamization programs supported by these self-professed and alleged exponents of specifically Islamic human rights schemes repudiate rather than embrace the standards of international human rights law" (88-89 (mentioning specifically the treatment of women and religious minorities). For a detailed analysis of the 1990 Cairo Declaration on Human Rights see Mayer (1994) op. cit. n.1.

⁶⁴ See especially An Na'im (2002).

⁶⁵ (1990) 39-41.

Declaration of Human Rights in arguing that Muslims are not bound by the latter.⁶⁶ Conversely, An-Na'im argues that the Sharia's needs to be radically reformed because it is inconsistent with human rights standards, especially in respect of discrimination against women and non-Muslims⁶⁷, freedom of religion, and slavery.⁶⁸

His general conclusion is summarized as follows:

“Unless the basis of modern Islamic law is shifted away from those texts of the Qu’ran and Sunna of the Medina stage, which constituted the foundation of the construction of the Shari’a, there is no way of avoiding drastic and serious violation of universal standards of human rights. There is no way to abolish slavery as an institution and no way to eliminate all forms and shades of discrimination against women and non-Muslims as long as we remain bound by the framework of Shari’a.{t]he traditional techniques of reform within the framework of Shari’a are inadequate for achieving the necessary degree of reform. To achieve that degree of reform, we must be able to set aside clear and definite texts of the Medina stage as having served their transitional purpose and implement those texts of the Meccan stage which were previously inappropriate for practical application but are now the only way to proceed.... In view of the vital need for peaceful co-existence in today’s global human society, Muslims should emphasize the eternal message of human solidarity of the Qu’ran and the Mecca period rather than the exclusive Muslim solidarity of the transitional Medina message.”⁶⁹

⁶⁶ 171-2. Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (London: Goulding, 1970). Cf. Mayer (in Lindblom and Vogt (1993)): “An Na'im is committed to the proposition that public law in Muslim countries should be based on Islam — unlike many other Muslims who believe that Islamic law should be relegated to the sphere of personal status and private law matters such as contracts, a belief that has dictated the role Islamic law has played in actual legal systems in the twentieth century.”

⁶⁷ An Na'im is unequivocal about his own position on the treatment of women and non-Muslims. In a response to Susan Okin he stated: “I am not suggesting, of course, that either minority or majority should be allowed to practice gender discrimination, or violate some other human right, because they believe their culture mandates it. In particular, I emphasize that all women’s rights advocates must continue to scrutinize and criticize gender discrimination anywhere in the world, and not only in Western societies. But this objective must be pursued in ways that foster the protection of all human rights, and with sensitivity and respect for the identity and dignity of all human beings everywhere.” (An Na'im in Cohen, Howard and Nussbaum, 1999, op. cit. n.1). On religious toleration see (1990) 175-77.

⁶⁸ An-Na'im's treatment of slavery is a good example of his approach. During the formative stages of Shari'a a person's status was normally determined by their religion. At that time women were not regarded as full persons and slavery was an established institution in many places. The medieval Shari'a reflected these practices: “The most that Shari'a could do, and did in fact do, in that historical context was to modify and lighten the harsh consequences of slavery and discrimination on grounds of religion or gender... Shari'a as a practical legal system could not have disregarded the conception of human rights prevailing at the time it purported to apply in the seventh century, modern Islamic law cannot disregard the present conception of human rights if it is to be applied today.” (1990:170) Recently, An Na'im has emphasised a continuing role for a re-interpreted Shari'a: “Thus Shari'a does indeed have a most important future in Islamic societies and communities for its foundational role in the socialization of children, sanctification of social institutions and relationships, and the shaping and development of those fundamental values that can be translated into general legislation and public policy through democratic political process. But it does not have a future as a normative system to be enacted and enforced as such as public law and public policy”. (2005) Ch. 1.

⁶⁹ An Na'im (1990) 179-80.

For much of the twentieth century debates and struggles about interpretation of Islamic theology and jurisprudence have tended to be framed either as debates between schools or as disagreements between fundamentalist and secularists. An Na'im's aim is to establish an Islamic foundation for "the benefits of secularism", among which he includes religious toleration, equality between Muslims and non-Muslims and men and women, constitutional democracy, and equal status for Muslim and non-Muslim states.⁷⁰ Some Islamic reformers believe that such "benefits" can only be achieved through a secular democratic system, which takes priority over religious doctrine.⁷¹ An Na'im on the contrary believes that liberal democratic ideas will never be accepted by Muslims unless they are persuaded that they are backed by Islamic premises. He therefore sets out to show that Islam, as interpreted by Mohamed Taha, does support the same values.⁷²

For An-Na'im the different schools of Islam are themselves a product of the middle ages (although they are probably here to stay) and few devout Muslims will be persuaded by secular arguments:

"To seek secular answers is simply to abandon the field to fundamentalists, who will succeed in carrying the vast majority of the population with them by citing religious authority for their policies and theories. Intelligent and enlightened Muslims are therefore best advised to remain within the religious framework and endeavour to achieve the reforms that would make Islam a viable modern ideology."⁷³

This passage provides a link to the next stage of An Na'im's intellectual development. In considering the debate about universalism and cultural relativism in respect of human rights, he began to focus on the problems of persuasion and effectiveness in the context of cultural diversity and pluralism of beliefs. While maintaining a universalist stance in respect of basic values, he concluded that cultural legitimacy of human rights ideals could only be achieved by internal dialogue within a culture rather than external pressure. Dialogue between cultures is also important in order to achieve an overlapping consensus on human rights and the necessary conditions for peaceful co-

⁷⁰ (1990) at 8, Lindholm and Vogt (1993) at 107 ("I am proposing an understanding of Islam which will achieve the benefits of secularism with an Islamic rationale").

⁷¹ E.g. at 73

⁷² "Taha's methodology, however, would not abolish *hudud* as a matter of Islamic law." (1993) at 108.

⁷³ Quoted by Voll, Foreword to An Na'im (1990).

existence; but acceptance of the legitimacy of human rights standards requires internal cultural support.

In the next stage of his work, An Na'im placed more emphasis on what he called "cultural legitimization".⁷⁴ He argues that the legitimacy of human rights standards will only be plausible to a given constituency if members believe that they are sanctioned by their own cultural traditions. Since people understand things through their own cultural lenses, such legitimacy can mainly be attained by dialogue and struggle *internal* to that culture. As he put it recently:

"While this approach raises the possibility of local culture being invoked as the basis for violating or rejecting the existence of a human right, I am unable to see an alternative to a basic methodology of cultural legitimacy which can be constantly improved through practice and over time. For example, culture may be used to justify discrimination against women or the use of corporal punishment against children as being in their own 'best interest'. Rejecting the cultural argument presented in support of such views is unlikely to work in practice. Indeed, women themselves are likely to support their own repression if they believe it to be 'the will of God' or the immutable tradition of their communities. In contrast, an approach that acknowledges the underlying value of respecting the will of God or local tradition, and then continues to question what that means under present circumstances is more likely to be persuasive."⁷⁵

Outsiders purporting to advance an interpretation of a culture (as happened in the Rushdie affair) will nearly always be viewed with suspicion.⁷⁶ An Na'im is critical both of universalist positions based solely on Western or liberal perspectives and of militant cultural relativist positions. He himself explicitly defends a weak form of cultural relativism partly for tactical reasons, but also because belief in human rights can only be internalized when reconciled with other aspects of one's system of beliefs.⁷⁷ Cross-cultural dialogue has a role, not only in identifying shared values but also in

⁷⁴ Especially An Na'im and Deng (1990), An Na'im (1992) and (1993).

⁷⁵ An Na'im (2005) Ch. 1. The passage continues: "As a Muslim, if I am presented with a choice between Islam and human rights, I will always choose Islam. But if presented with an argument that there is in fact consistency between my religious beliefs and human rights, I will gladly accept human rights as an expression of religious values and not as an alternative to them. As a Muslim advocate of human rights, I must therefore continue to seek ways of explaining and supporting the claim that these rights are consistent with Islam, indeed desirable from an Islamic perspective, though they may be inconsistent with certain human interpretations of Shari'a."

⁷⁶ Nearly all Western discussions ignored scholarly *internal* Islamic debate on the Rushdie affair, e.g. M. M. Ahsan and A. R. Kidwai (eds.) *Sacrilege versus Civility: Muslim Perspectives on The Satanic Verses Affair* (Rev. edn., 1993, Leicester, The Islamic Foundation).

⁷⁷ Discussing a comment by Mohammed Arkoun (Lindholm and Vogt (1993) 11-24), An Na'im replies: "... there is an important tactical difference between our approaches. Whereas Arkoun wishes to problematize the text of the Qu'ran itself immediately, I seek to explore the possibilities of transforming the understanding of that text." (1993) 101). His constant theme is the practicalities of achieving consensus.

a building a richer new consensus, provided that the dialogue is genuinely reciprocal.⁷⁸ Both internal and external dialogue can be constructive and dynamic; they do not merely identify existing similarities and differences, but they can also generate new ideas and enriched understandings.

“This bonding through similarities does not mean, in my view, that international peace and cooperation are not possible without total cultural unity. It does mean that they are more easily achieved if there is a certain minimum cultural consensus on goals and methods. As applied to cooperation in the protection and promotion of human rights, this view means that developing cross-cultural consensus in support of treaties and compacts is desirable. Cultural diversity, however, is unavoidable as the product of significant past and present economic, social and environmental differences. It is also desirable as the expression of the right to self-determination and as the manifestation of distinctive self-identity.”⁷⁹

An-Na'im recognizes that “culture” is neither monolithic nor static and typically provides space for internal dialogue as is well illustrated by the rich tradition of debate within Islamic jurisprudence. He recognizes that the possibilities of genuine dialogue can be curtailed or suppressed if a powerful group claims to have a monopoly of authoritative or correct interpretation.⁸⁰

An Na'im illustrates his conception of internal dialogue by reference to the controversial topic of Islamic punishments.⁸¹ Many Islamic countries, including Saudi Arabia, and Iran are signatories to the International Covenant on Civil and Political Rights (and other related documents). Article 7 of the ICCPR prohibits “torture or cruel, inhuman, or degrading treatment or punishment”. Under Islamic law serious criminal offences are classified as *hudud* and carry with them mandatory punishments that include amputation of the right hand for theft and whipping, stoning to death, and exact retribution (eye for an eye) for specific offences. These offences are defined and punished by the express terms of the Qu'ran and/or Sunna. Taking the example of theft, the question arises: can

⁷⁸ An Na'im's conception of reciprocal dialogue seems quite analogous to Habermas' “ideal speech situation”, but he disclaimed firsthand knowledge of Habermas' work at the time he developed these ideas. (interview, 2003). However, more recently he has cited Habermas in relation to his project on “The future of Shar'iah project” (unpublished manuscript).

⁷⁹ An Na'im (1992) 27. The passage continues: “Nevertheless, I believe that a sufficient degree of cultural consensus regarding the goals and methods of cooperation in the protection and promotion of human rights can be achieved through internal cultural discourse and cross-cultural dialogue. Internal discourse relates to the struggle to establish enlightened perceptions and interpretations of cultural values and norms. Cross-cultural dialogue should be aimed at broadening and deepening international (or rather intercultural) consensus.”

⁸⁰ “The claim may of course be made that a certain policy or law Shari'a, but that is always false because it is nothing more than an attempt to invoke the sanctity of Islam for the political will of the ruling elite.” (An Na'im (2005).

⁸¹ Especially (1990) 111-115, 123-24), (1992) 32-37, (1993) 108-13; cf. Baderin (2003) at 78-85.

amputation of the right hand be treated as cruel, inhuman or degrading *as a matter of Islamic law*? An Na'im gives a qualified answer to this question. First, he distinguishes sharply between the actual practices of particular regimes and the theoretical, or theological, interpretation of the principles governing punishment. Thus he argues that enforcement of *Hudud* in Saudi Arabia, Sudan, by the Taliban in Afghanistan, or recently in Northern Nigeria is all illegitimate from an Islamic point of view.⁸²

Second, he points to some of the interpretive resources available to a sincere liberal Muslim who privately is repelled or uneasy about these provisions:

"Islamic law requires the state to fulfil its obligation to secure social and economic justice to ensure decent standards of living for all its citizens *before* it can enforce these punishments. The law also provides for very narrow definitions of these offenses, makes an extensive range of defences against the charge available to the accused person, and requires strict standards of proof. Moreover, Islamic law demands total fairness and equality in law enforcement."⁸³

An-Na'im personally believes that these prerequisites are extremely difficult to satisfy in practice "and are certainly unlikely to materialize in any Muslim country in the foreseeable future."

⁸⁴ Nevertheless, he concludes: "Neither internal Islamic reinterpretation nor cross-cultural dialogue is likely to lead to the total abolition of this punishment as a matter of Islamic law."⁸⁵ Given the political will, much can be done to restrict the scope of *hudud* and its implementation. A strong case can be made for not applying religious sanctions to non-Muslims and in some predominantly Muslim countries Shari'a has been displaced by secular law. But outright abolition of *hudud* punishments is not likely. The basic idea is embodied in texts that express the will of God, backed by internally coherent theological rationales.⁸⁶ In this kind of case, "the internal struggle cannot and should not be settled by outsiders"; what counts as cruel, inhuman or degrading in a given society must be settled by the standards of that society.

In the process, as in his treatment of *hudud*, he appears to concede that there are points at which human rights and Islamic principles may conflict and that here Islamic principle "trumps"

⁸² Personal communication to the author. In his view *Hudud* should not be enforced by the state at all, unless it were adopted as part of the criminal code through the political process, without reference to religious beliefs and subject to constitutional safeguards. Even then he would take a very narrow view of its applicability. (An Na'im (2005) Ch.1.)

⁸³ An Na'im (1992) 34.

⁸⁴ (1992: 34), but see above n.000.

⁸⁵ (1992) 36.

⁸⁶ For example, a *hudud* punishment may be considered lenient because it is not carried over to next life id. at 35.

secular values. However, he emphasises that the range and extent of application would be severely constricted. Again his concern seems to be the practicability of reaching consensus through persuasion:

“I agree with Ann Mayer that many Muslims today would probably prefer to continue within the Western-style criminal justice systems introduced in these countries during the colonial period. However, as increasingly stronger Islamist movements are demanding the enforcement of *hudud*, Muslims in general may find it difficult to maintain the status quo without appearing to be anti-Islamic. In this light, I believe that there is a growing need for thinking about Islamic criminal justice.”⁸⁷

This is the considered view of a thoughtful scholar who is regarded as an extreme liberal by many Muslims.⁸⁸ It sets out uncomfortably clearly his view of the possibilities and limitations of building a worldwide consensus by dialogue. An-Na’im is not a strong cultural relativist. He believes that most of the values embodied in the current human rights regime can be reconciled with interpretations of Islam that would be widely, if not universally acceptable. Too much attention is paid to headline-catching examples, such as female circumcision, many of which are contested within Islam.

*A third stage*⁸⁹

⁸⁷ (1993) 109. An Na’im distinguishes between his own personal beliefs and arguments that are likely to persuade fellow Muslims: “If the reform of Islamic law suggested in *Toward* is not achieved through one methodology or another, then my personal choice as a Muslim would be to live in a secular state rather than one ruled in accordance with Shari’a. But I seriously doubt if this would be the choice of the majority of Muslims today.” (id. 107). For a reflective and generally sympathetic critique of An Na’im’s approach to criminal justice see Mayer in Lindholm and Vogt (1993) Ch.3.

⁸⁸ Despite his vulnerability to marginalization or dismissal as the follower of a heretic, An Na’im seems to attract large audiences and his writings have been widely circulated in [parts of] the Middle East. He is, of course, not alone as a liberal reformer, but he is unusual first as a jurist writing in English and, second, as a reformer who insists on basing his arguments on Islamic ideas.

⁸⁹ During the 1990s An Na’im developed his cross-cultural approach to legitimation of human rights (partly in association with Francis Deng). Subsequently his main activities have been concerned with detailed, often practical applications of his general approach, especially modernization of Shar’iah. He is especially concerned with human rights advocacy. He sees the relationship between state and religion as a crucial issue. At the time of writing his latest initiative is “The Future of Shar’iah Project” which is “particularly concerned with the constitutional and legal dimensions of the post-colonial experiences of Islamic societies, especially issues of the relationship among Islam, State and Society... The fundamental concern of this project is how to *ensure the institutional separation of Shari’ah and the state, despite the organic and unavoidable connection between Islam and politics.*” (Memo., op. cit., emphasis in the original)

An-Na'im has always been activist as well as a scholar. He was involved in Taha's Islamic Reform Movement from the late 1960s. After he left the Sudan he became Executive Director of Human Rights Watch (Africa) in Washington, DC (1993-95). He has always emphasised the importance of implementation and enforcement of human rights. He has been active in many committees and non-governmental organizations concerned with human rights in Africa and the Middle East. He has been involved in projects to promote human rights values at grass roots levels through linking to specific local concerns and promoting cross-cultural dialogue about relevant issues such as problems of women's access to land or reform of family law. He has been especially interested in ways of lessening "human rights dependency", professionalizing local NGOs and encouraging their breaking away from dependence on foreign funding or being perceived of agents of some "Western agenda". All of such "advocacy for social change" is based on his two central ideas: a liberal modernist interpretation of Islam and the need to strengthen the cultural legitimacy and effectiveness of international human rights standards.

An Na'im's current project concerns "The Future of Shari'a", with particular reference to the relationship among Islam, state and society. The objective "is to ensure the institutional separation of Islam and the state, despite the organic and unavoidable connection between Islam and politics." It challenges "the dangerous illusion of an Islamic state that can enforce Shari'a principles through the coercive power of the state."⁹⁰ This work in progress develops a number of themes: that human agency has been central to the development of Shari'a, and is necessary for its continuing interpretation and for motivation for social and cultural change; that whatever the state or other authority tries to enforce in the name of Shari'a is necessarily secular; that the separation of Islam and the state does not involve relegation of Islam to the private domain, for it still has a role in the formation of public policy and legislation; but this role needs to be performed through public reason rather than coercion.⁹¹

A significant development in An Na'im's thinking concerns "secularism". If, as is widely assumed, "secularism" implies hostility to religion or its decline or exclusion of all considerations drawn from belief in God, this is naturally opposed to an Islamic point of view. But, more narrowly interpreted as a principle for mediating between different religious beliefs through separation of religion and state, it is necessary for ensuring a stable basis for co-existence and co-

⁹⁰ An Na'im (2005) Ch. 1. Cf. "The categorical repudiation of the dangerous illusion of an Islamic state to coercively enforce Shari'a principles is necessary for the practical ability of Muslims and other citizens to live in accordance with their religious and other beliefs." (ibid.)

⁹¹ Ibid. "[B]y public reason I mean that the rationale and purpose of public policy or legislation must be based on the sort of reasoning that the generality of citizens can accept or reject, and make counter-proposals through public debate without being open to charges of disbelief, apostasy or blasphemy." (ibid.)

operation in conditions of pluralism of beliefs (now almost universal) and for facilitating “the unity of diverse communities in one political community”.⁹² In this narrow sense “secularism” is an important part of An Na’im’s political theory

Conclusion

An Na’im’s views are, not surprisingly, controversial in the Muslim world. In internal debates within Islam he is in danger of being dismissed as an extremist, as the disciple Taha who was condemned as an apostate, and as an open subscriber to “Western values”. Clearly his overt challenges to a number of cherished beliefs may be felt to be shocking. However, his views are not quite as extreme as may appear at first sight. His account of history is close to that of many respected scholars. All Muslim countries have accepted the form of the nation state, most with “modern” constitutions. Most of these states are signatories of the bulk of human rights conventions, with surprisingly few reservations. Many of the reforms that An-Na’im advocates have been adopted in several, sometimes most, Muslim countries, but in a more piecemeal fashion than he suggests. His main contribution is to provide a coherent religious justification for reforms that have been, or might be, made in the name of “modernization” or “secularisation”.

An-Na’im is controversial, but there is a danger that he should be perceived as the darling of Western liberals, a liberal Muslim who is importing “enlightened” ideas into Islam. But his message to non-Muslims is not so comfortable. First, participants in a debate need to be prepared to learn as well as to teach. There is much in the Islamic tradition from which Westerners can learn, for instance in relation to commercial morality.⁹³ Secondly, there is the problem of ignorance. Before rushing to judgement non-Muslims need to try to understand the internal logic of views that may seem strange or abhorrent to them; they need to be aware of the ways in which such views are contested and debated within the culture of Islam; they should not exaggerate the gap between Islamic beliefs and the values embodied in international human rights norms at this stage in their history; and, above all, before labelling some practice as “barbaric” they need to consider how some of their own practices appear to members of other cultures. They also need to be aware of the extent of the

⁹² Ibid.

⁹³ See Khurshid Ahmed, “The Challenge of Global Capitalism: An Islamic Perspective” in John H. Dunning (ed.) *Making Globalization Good* (Oxford: Oxford University Press, 2003).

leeways for interpretation within traditions such as that of Islam, as is vividly illustrated by recent scholarship on law reform in Malaysia and other predominantly Muslim countries.⁹⁴

REFERENCES

The purpose of this lecture is to make the ideas about human rights of four leading “Southern” jurists better known and more accessible. To this end, I shall focus mainly on a few specific texts that are widely available in the hope that some will be stimulated to read the originals.

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⁹⁴ e.g. Donald L. Horowitz, “The Qu’ran and the Common Law: Islamic Law Reform and the Theory of Legal Change”, 42 *Am Jo. Comp. L.* 233 and 543 (1994). Cf. J. N. D. Anderson’s earlier classic work, *Law Reform in the Muslim World* (London: Athlone, 1976). On Islamic Banking, Muhammad Nejatullah Siddiqi, *Banking Without Interest* (The Islamic Foundation, Rev. ed. 1997) and, more generally, *Review of Islamic Economics* (1991- continuing) and Ian Edge (ed.) *Islamic Law and Legal Theory* (New York UP, Reference Collection) .

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Upendra Baxi

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KEYNOTE QUOTES

Francis Deng

"God asked man, "Which one shall I give you, Black Man; there is the Cow and the thing called "What', which of the two would you like?" The man said: "I do not want What. God said: "But What is better than the Cow". Then God said: "If you like the Cow, you had better taste its milk before you taste it finally.' The man squeezed some milk into his hand, tasted it, and said: "Let us have the milk and never see "What"". (3/99)

"When I rise I sing over my ox,

gossipers disperse

I am like my forefathers

I rise to be seen by my ancient fathers

I rise to be seen walking with pride

As it was in the distant past

When our clan was born.” (6/99)

“Although Dinka cultural values, in particular the emphasis on procreational continuity, idealised human relations, and the dignity of the individual in the communal context, engendered the elements of human rights principles, the system had built-in shortcomings, embodied in structural inequities, resistance to change, and a condescending view of the outside world.”

Abdullahi An-Na'im

“The criteria I would adopt for identifying universal human rights is that they are rights to which human beings are entitled by virtue of being human. In other words, universal standards of human rights are, by definition, appreciated by a wide variety of cultural traditions because they pertain to inherent dignity and well-being of every human being, regardless of race, gender, language, or religion. ... Applying the test of reciprocity among all human beings rather than just members of a particular group, I would argue that universal human rights are those which a cultural tradition would claim for its own members and must therefore concede to members of other traditions if it is to expect reciprocal treatment from those others.”

“Unless the basis of modern Islamic law is shifted away from those texts of the Qu'ran and Sunna of the Medina stage, which constituted the foundation of the construction of the Shari'a, there is no way of avoiding drastic and serious violation of universal standards of human rights. There is no way to abolish slavery as an institution and no way to eliminate all forms and shades of discrimination against women and non-Muslims as long as we remain bound by the framework of Shari'a.[t]he traditional techniques of reform within the framework of Shari'a are inadequate for achieving the necessary degree of reform. To achieve this degree of reform, we must be able to set aside clear and definite texts of the Medina stage as having served their transitional purpose and implement those texts of the Meccan stage which were previously inappropriate for practical application but are now the only way to proceed.... the vital need for peaceful co-existence in today's global human society should emphasize the eternal message of human solidarity of the Qu'ran and the Mecca period rather than the exclusive Muslim solidarity of the transitional Medina message.” (1990: 179-80)]

“To seek secular answers is simply to abandon the field to fundamentalists, who will succeed in carrying the vast majority of the population with them by citing religious authority for their policies and theories. Intelligent and enlightened Muslims are therefore best advised to remain within the religious framework and endeavour to achieve the reforms that would make Islam a viable modern ideology.”

"I am not suggesting, of course, that either minority or majority should be allowed to practice gender discrimination, or violate some other human right, because they believe their culture mandates it. In particular, I emphasize that all women's rights advocates must continue to scrutinize and criticize gender discrimination anywhere in the world, and not only in Western societies. But this objective must be pursued in ways that foster the protection of all human rights, and with sensitivity and respect for the identity and dignity of all human beings everywhere." "Promises we should all keep in common cause" (1999) p. 61

Yash Ghai

"On the more general question of universalism and relativism, it is not easy to generalize. It cannot be said that bills of rights have a universalizing or homogenizing tendency, because by recognizing languages and religions, and by affirmative policies a bill of rights may in fact solidify separate identities. Nevertheless, a measure of universalism of rights may be necessary to transcend sectional claims for national cohesion. Simple polarities, universalism/ particularism, secular/ religious, tradition/ modernity do not explain the complexity; a large measure of flexibility is necessary to accommodate competing interests. Consequently most bills of rights are Janus-faced (looking towards both liberalism and collective identities). What is involved in these arrangements is not an outright rejection of either universalism or relativism; but rather an acknowledgement of the importance of each, and a search for a suitable balance, by employing, for the most part, the language and parameters of rights."(UR 1139-40)

Upendra Baxi

"Human rights futures, dependent as they are upon imparting an authentic voice to human suffering, must engage in a discourse of suffering that moves the world" (VS 156)

" '[S]laves', 'heathens', 'barbarians', colonized peoples, indigenous populations, women, children, the impoverished, and the 'insane', have been at various times and in various ways, thought unworthy of being bearers of human rights."(FHR 29)

"The astonishing quantity of human rights production generates various expressions of scepticism and faith. Some complain of exhaustion (what I call "rights weariness"). Some suspect sinister imperialism in diplomatic maneuvers animating each and every human rights enunciation (what I call "rights-wariness"). Some celebrate human rights as a new global civic religion which, given a community of faith, will address and solve all major human problems (what I call "human rights evangelism"). Their fervor is often matched by NGOs that tirelessly pursue the removal of brackets in pre-final diplomatic negotiating texts of various United Nations' summits as triumphs in human solidarity (what I call "human rights romanticism"). Some other activists believe that viable human rights standards can best be produced by exploring contingencies of international diplomacy (what I call "bureaucratization of human rights"). And still others [like me] insist that the real birthplaces of human rights are far removed from the ornate rooms of diplomatic conferences and are found,

rather, in the actual sites (acts and feats) of resistance and struggle (what I call “critical human rights realism”).” (VH 156/ FHR 58-59)

“[T]he task of human rights, in terms of making the state ethical, governance just, and power accountable, are tasks that ought to continue to define the agendum of activism” (FHR xii).