

A Review of Mashood A. Baderin's International Human Rights and Islamic Law

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Abstract:

This paper provides a critical analytical review of the seminal work, International Human Rights and Islamic Law, by Professor Mashood A. Baderin. The book examines the question of compatibility between the two legal systems through an innovative dialogical approach, challenging the common assertion of their inherent irreconcilability. The review follows the book's structure chapter-by-chapter, highlighting its key contributions framed within the proposals of the 'margin of appreciation' and 'maqasid/maslahah' doctrines, while offering an assessment of the strengths and potential limitations of its arguments. The paper concludes by affirming the book's value as a serious scholarly contribution that enriches the global dialogue on universality and cultural particularity in human rights.

Keywords: International Human Rights, Islamic Law, Shari'ah, Mashood Baderin, Compatibility, Margin of Appreciation, Maqasid al-Shari'ah, Maslahah, International Covenants.

I. Introduction

Professor Mashood A. Baderin's book, International Human Rights and Islamic Law, constitutes a serious scholarly endeavor to answer the fundamental question regarding the compatibility of the two legal systems and the ability of Muslim states to fulfill their international human rights obligations while adhering to Islamic law. Through this work, the author challenges the monological approach prevalent in much of the existing literature, proposing instead a 'dialogical approach' that opens a theoretical dialogue between the practical applications of international human rights and the foundational principles of Islamic jurisprudence.

The scope of this review will be limited to analyzing the book's content using a chapter-by-chapter review methodology, focusing on the pivotal points in each section to avoid unnecessary length. Originally a PhD thesis defended at the University of Nottingham, UK, in 2001, this book is a significant addition to legal scholarship, having won the Best Book Award at the First International Book Festival on Human Rights and Islam in 2004 and published by Oxford University Press.

II. Chapter 1: Introduction

The introductory chapter begins by examining the different conceptual interpretations of international human rights. Baderin emphasizes the distinction of his 'dialogical' approach from the 'monological' approaches that characterized earlier works by scholars such as Ann Elizabeth Mayer and Abdullahi An-Na'im, which often sought to reform Islamic jurisprudence 'from within' to conform to international

human rights standards, sometimes disregarding Islamic jurisprudential justifications. The dialogical approach aims to create an equitable theoretical dialogue, drawing on evidence from both Islamic jurisprudence and international human rights practice.

The chapter presents the book's main objective: to achieve a "common universal understanding" that guarantees the full protection of human rights for every individual everywhere. The author suggests several mechanisms to achieve this goal, most notably exploring both the Islamic legal principle of *maslahah* (welfare) and the European human rights doctrine of the 'margin of appreciation' as tools for bridging perspectives.

III. Chapter 2: Human Rights and Islamic Law

This chapter is divided into four main sections. It first discusses the traditional barriers that must be overcome to facilitate dialogue. It then reviews "Islamic Responses in International Human Rights Discourse," categorized by Halliday into four classes: full compatibility, the superiority of Shari'ah in realizing rights, the rejection of human rights as an imperialist agenda, and complete incompatibility. The author briefly evaluates these responses within an Islamic framework.

The third section addresses the core question: what are human rights? It adopts Dowrick's definition, which focuses on "humanity" as the basis for claiming rights. It then outlines the emergence of international human rights, their categorizations, the debates between universalism and cultural relativism, and the place of Islamic law within these discussions.

The final section focuses on the nature of Islamic law, its sources (Shari'ah), its methodologies (Fiqh), its spiritual and temporal aspects, and its objectives in promoting benefit and preventing harm. It concludes by stressing that morality and substantive justice remain cornerstones of human rights philosophy.

IV. Chapter 3: The ICCPR in the Light of Islamic Law

This chapter, along with the next, forms the analytical core of the book. It provides a detailed comparative analysis of the provisions of the International Covenant on Civil and Political Rights (ICCPR) in light of Islamic law, article by article, to avoid simplistic generalizations.

The author examines each right under the Covenant, interpreting it according to the jurisprudence of the Human Rights Committee (HRC) and relevant scholarship, before presenting the Islamic perspective, citing practices of Muslim states and the Cairo Declaration on Human Rights in Islam.

For instance, in analyzing the right to privacy (Article 17), he demonstrates the alignment between the international text and Islamic texts emphasizing the inviolability of private life and home. Concerning freedom of religion and the issue of apostasy, Baderin reviews historical differences among jurists regarding the punishment for apostasy, citing opinions from early scholars like Ibrahim al-Nakha'i and Sufyan al-Thawri. He concludes that this issue falls within the discretionary legislative authority of an Islamic state, within the limits permitted by Article 18(3) of the ICCPR, which allows for restrictions on specified grounds.

Regarding freedom of expression and limitations related to blasphemy, the author argues that the Shari'ah's protection of communal sensibilities can be interpreted within the restrictions permitted for the protection of public order or morals under Article 19(3)(b) of the Covenant. The chapter also addresses women's political rights in detail, clarifying that negative practices in some states (such as Kuwait's reservation to Article 7 of CEDAW) stem from positive law or custom, not from fundamental Shari'ah rulings.

V. Chapter 4: The ICESCR in the Light of Islamic Law

This chapter follows the same analytical approach, focusing on the International Covenant on Economic, Social and Cultural Rights (ICESCR). It investigates whether Shari'ah can serve as a vehicle for realizing these rights in Muslim states.

The author discusses key contentious issues, such as women's rights to work and to hold judicial office. He presents the spectrum of classical juristic opinions, from the majority traditional view prohibiting women from serving as judges, to Abu Hanifah's opinion permitting it in civil matters, and the opinions of Ibn Jarir al-Tabari and Ibn Hazm permitting it unconditionally. He concludes that many restrictions on women's employment in Muslim societies stem from custom rather than definitive scriptural evidence. The chapter also addresses in depth the concepts of family and children born out of wedlock, acknowledging that this issue is governed by more definitive religious rulings in Shari'ah. The author utilizes the General Comments and reporting guidelines of the Committee on Economic, Social and Cultural Rights, references relevant ILO conventions, and cites the Cairo Declaration.

VI. Chapter 5: Conclusion and Practical Means

The concluding chapter proposes practical measures to complement the theoretical discussion. The author calls for adopting moderate, dynamic interpretations of Shari'ah to enhance human rights, particularly concerning women's rights, minority rights, and the application of criminal punishments. He suggests national means such as education and establishing national human rights commissions, and regional means like activating the role of the Organization of Islamic Cooperation and establishing a regional Islamic Court of Mazal'im (grievances), while emphasizing the necessity of cooperation with UN mechanisms.

The primary universal tool he advocates is the adoption of the 'margin of appreciation' doctrine by UN human rights treaty bodies, similar to its use by the European Court of Human Rights. He argues this doctrine would be useful in addressing sensitive issues such as the definition of family, homosexuality, blasphemy, and abortion in Muslim states, allowing for consideration of cultural and religious contexts during assessment.

VII. Concluding Assessment

Mashood Baderin's book is a distinguished scholarly contribution to a complex field in need of further intellectual engagement. The book has received wide acclaim, described by prestigious journals like the European Journal of International Law as a masterful and thoroughly documented analysis. It successfully combines a deep understanding of Islamic texts and jurisprudence with a precise grasp of the international human rights system.

However, the approach is not without criticism. Commentators such as Moataz Al-Feghery have pointed out that a broad application of the 'margin of appreciation' doctrine, as Baderin suggests, could conflict with the principle of universality and provide states with a pretext to evade their obligations, particularly on issues like polygamy which may conflict with equality principles under the ICCPR.

Nevertheless, the book remains a reasoned and serious attempt at reconciling the international obligations of Muslim states with their Islamic frame of reference. In an era where a genuine dialogue of civilizations is urgently needed, this work represents a step in the right direction, for every long journey begins with a single step.

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