# SOCIAL INSTITUTIONS AND INTERNATIONAL HUMAN RIGHTS LAW IMPLEMENTATION

Having articulated numerous human rights norms and standards in international treaties, the pressing challenge today is their realisation in States' parties around the world. Domestic implementation has proven a difficult task for national authorities as well as international supervisory bodies. This book examines the traditional State-Centric and legalistic approach to implementation, critiquing its limited efficacy in practice and failure to connect with local cultures. The book therefore explores the permissibility of other measures of implementation, and advocates more culturally sensitive approaches involving social institutions. Through an interdisciplinary case study of Islam in Indonesia, the book demonstrates the power of social institutions like religion to promote rights compliant positions and behaviours. Like the preamble of the 1948 Universal Declaration of Human Rights, the book reiterates the role not just of the State but indeed 'every organ of society' in realising rights.

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## Every Organ of Society

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CAMBRIDGE
UNIVERSITY PRESS

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University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108489577
DOI: 10.1017/9781108777711


First published 2020

*A catalogue record for this publication is available from the British Library.*

*Library of Congress Cataloging-in-Publication Data*
Names: Fraser, Julie, 1981– author.
Title: Social institutions and international human rights law implementation : every organ of society / Julie Fraser, Utrecht University.
Description: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2020. | Based on author's thesis (doctoral - Universiteit Utrecht, 2018) issued under title: "Every organ of society" : exploring the role of social institutions in the effective implementation of international human rights law. | Includes bibliographical references and index.
Identifiers: LCCN 2020009259 (print) | LCCN 2020009260 (ebook) | ISBN 9781108489577 (hardback) | ISBN 9781108777711 (epub)
Subjects: LCSH: Human rights–Social aspects. | International and municipal law. | Human rights and international law. | Human rights advocacy. | Civil rights (Islamic law)–Indonesia.
Classification: LCC K3240 .F727 2020 (print) | LCC K3240 (ebook) | DDC 341.4/8–dc23
LC record available at https://lccn.loc.gov/2020009259
LC ebook record available at https://lccn.loc.gov/2020009260

ISBN 978-1-108-48957-7 Hardback

To Elizabeth Reed, a.k.a. Gramses

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# FOREWORD

## *Reflections on the Mediation of the Universality of Human Rights*

ABDULLAHI AHMED AN-NA`IM

I am delighted to offer this foreword to the outstanding book by Dr Julie Anne Fraser on the prospects of a sustainable practice of human rights around the world and specifically in the Muslim world. I am gratified to read her analysis and reflection on the dynamic evolution of cross-cultural perspectives on the multiple foundations of the universality of human rights. At a moral and intuitive level, the claim that human rights are due to every person by virtue of their humanity indicates that these rights should be protected for every person everywhere. While this proposition sounds reasonable and straightforward, questions of who is to protect the human rights of whom and how, and who is to evaluate the practice and how, remain intractable and problematic from an international law and international relations perspective. This book and this foreword address these issues.

The overarching legal and political difficulties for the international protection of human rights relate to the 'sovereignty and territorial integrity' of States, and were clear from the beginning of the Charter of the United Nations (UN) in 1945. Article 2.4 of the Charter provides: 'All Members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' Article 2.7 emphasises that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.' These provisions indicate a broad outline of the protection of sovereignty and territorial integrity of States parties to the UN

Charter, in addition to the categorical principles of customary international law.[1]

In view of this very specific and limited authorisation of the use of force (i.e. either self-defence or as authorised by the Security Council under Chapter VII), there is no legal justification for unilateral extra-institutional (i.e. by one or a few states) action outside the UN's framework – such as the so-called humanitarian intervention into another State under the guise of protecting human rights. Whatever the justification claimed for the use of force, it must be established under international law and not some vague geopolitical reasoning or historical pretentions. It is reckless and irresponsible for the Permanent Members of the UN Security Council – especially the USA and Russia – to frequently violate the sovereignty and territorial integrity of many smaller and weaker States, often without bothering to offer any legal justification. This does not make the action lawful by the criteria of legality under international law. The legality of intervention must be the subject of a positive rule and doctrine, rather than simply assumed to be lawful by default.

Claims of the universality of the concept of human rights in general, or of specific human rights claims, are all inherently relative to the location and context of supporters and opponents alike. It is therefore what I call the 'overlapping consensus' of different cultural traditions and the practice of their respective communities that bestow the quality of being a human right. For example, as quoted by Hossein Houshmand in an article: 'An-Na`im says, "If international human rights standards are to be implemented in a manner consistent with their own rationale, the people (who are to implement these standards) must perceive the concept of human rights and its content as their own. To be committed to carrying out human rights standards, people must hold these standards as emanating from their worldview and values."'[2] The fact that Houshmand, an apparently Shi'i Muslim scholar from Iran, is quoting me, a Sunni Muslim scholar from Sudan, may indicate the possibilities for a global Muslim consensus on the process of identifying broad-based Muslim perspectives on the universality of human rights among Muslims.

[1] *The Republic of Nicaragua v. The United States of America* (1986) International Court of Justice Report 14.

[2] Abdullahi Ahmed An-Na`im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992) p. 431, quoted by Hossein Houshmand, *Human Rights*, Volume 9, Numbers 1, 2, (Summer 2014, Winter 2015) 1-18, at p. 18. For a broader application of similar strategies see Andrew March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford University Press 2009).

For global humanity to be and to remain entitled to these rights, all human beings must be entitled to assert what they believe to be their entitlements as human rights from their own perspectives. For one community to presume to impose its view of human rights on other communities – or to deny the claim of others to assert their view in the same way – is an inherent contradiction to equal human dignity as the foundation of all human rights. This view is rooted in the claim of universality itself, which must be globally inclusive to support the concept and its normative contents. On the other hand, however, there is the inescapable paradox of normative relativity and local contextualisation of the practice of any doctrine of the universality of human rights. The apparent deadlock is that the universality of any human right can neither be imposed nor left to arbitrary unilateral choice. The hypocrisy and double standards of the present fiasco continue even when the text of human rights treaties is categorical and without exceptions, while the practice is driven by the expediency of propaganda and public relations.

Once such stark choices are laid out in such clear terms, human rights advocates will have to either abandon the pretense of rights' conformity with uniformity or as mediated through cultural transformation and political mobilisation. I propose mediation, across cultural perspectives, instead of unilateral imposition by one community upon another. Unilateral imposition of purported uniform human rights norms will not only fail in every instance but also undermine the broader principles and practice of respect for individual human dignity and collective social justice. A more realistic and sustainable approach is to follow and mediate human practice, instead of preempting uniformity by seeking to force different cultural norms and experiences into preconceived normative imperatives.

For instance, most international human rights treaties allow for exceptions and States tend to make their ratification of human rights treaties subject to 'reservations, declarations and understandings' to limit and adapt their obligations under the treaties to the values and socio-economic context of their populations. The lack of coercive enforcement of human rights treaties also enables consensus to evolve among States which are parties to treaties and international organisations charged with supervising the implementation of the obligations created by the treaties over time and so forth. There are also possibilities for training and deliberations regarding some major human rights fields, such as the World Health Organization, Convention on the Rights of the Child and UNESCO, where State officials interact with relevant agencies and

experts to inform and develop their national compliance with the human rights in questions. Still, there is a constant tension between national policies and political context on the one hand, and international human rights obligations on the other. That tension may also reflect lingering resentment of European colonialism and continued under-development.

There are many plausible theories for the colonial/imperial thrust of Europe into different regions of the world, but a dynamic mix of cultural and geopolitical relations probably constitute some of the most likely factors, especially in the relations of Europe with North Africa and Asia.[3] This dimension may be the most relevant here in view of Fraser's focus on Islam in Indonesia in Southeast Asia. Various parts of the region have been in close contact since ancient times, but the recent colonial and current neocolonial entanglements have been more transformative of traditional Muslim communities. As a result of these combinations of events and changing dynamics of relations, Muslim societies emerged as separate nations, with their respective States subject to the general principles governing the behaviour of States which are members of comprehensive international organisations. In reacting to their new environment, Muslim communities are reacting to what they know about the history, geopolitics, ethical assumptions, etc. of the present international order and how it works.

For instance, the League of Nations' Mandate for France and the United Kingdom in the East Mediterranean territories of the defeated Ottoman Empire enabled those European colonial powers to define and establish the nation-states of Iraq, Lebanon, Syria, Jordan and Israel. From the perspective of the Muslims of the region, those former Western colonial powers are implicated in the violent instability throughout that region by the end of the twentieth and beginning of the twenty-first centuries, denying the Palestinian right to self-determination, and the deadlock between Turkey, Syria and the Kurdish communities in the region. The UN human rights system emerged under the authority of the UN Charter, and international trade is now regulated by the World Trade Organization (from the GATT in 1947 to WTO since 1995). Again, these institutions are likely to be perceived by some Muslims as tools of Western imperialism and economic exploitation.

The point of the preceding reflections is that the international human rights paradigm should not be taken in isolation of the recent colonial

[3] See, for example, Edward W. Said, *Orientalism* (Vintage Books 1979); *Culture and Imperialism* (Vintage Publishing 1994).

and post-colonial histories of different regions of the world and their populations. Such histories are unlikely to be taken by local populations as separate or independent of other aspects of international factors and policy issues, like the universality of human rights. Indeed, how can human rights advocates expect or even assume that their activities are taken by post-colonial communities as innocent and independent of the colonial history and post-colonial relations with Western powers and their foreign policy agenda? Human rights attitudes and policies accepted by Western communities are likely to be seen elsewhere as the outcome of a brutal colonisation continuing into post-colonial hegemony, rather than mandated by their own traditional, cultural or religious factors. This does not mean that the cultural legitimacy of human rights is never contested or deemed irrelevant anywhere, but only says that such legitimacy and relevance must be founded on the experiences and values of the relevant communities of believers. Fraser well elaborates this view in her case study from Indonesia.

To reflect on the mediation of human rights in relation to Islam and Muslims, I would first note that I prefer the term 'Muslims' to include all persons and communities who self-identify as Muslims, over the term 'Islamic', which is an ambiguous and contested notion that is claimed by all sort of actors in relation to divergent and contradictory objectives. The question of whether Islam as a world religion is innocent or guilty is incoherent in this context because Islam in the abstract is not an entity that can be or act one way or the other. For instance, Boko Haram members in Northeast Nigeria claim their movement to be Islamic, while to the majority of Muslims in Nigeria and around the world, the views and actions of the members of Boko Haram are antithetical to Islam. We should also recall the chauvinistic and counter-chauvinistic historical and current agenda for attributing moral agency – or the lack of it – to Islam.

It is more productive to emphasise that it is always Muslims who believe, think, decide and act one way or the other in their own specific historical context, and not Islam as the religion of a quarter of humanity today, from West China, to Southeast Asia and West Africa. Locating the issues within the human agency of Muslims makes it possible for them to act or to refrain from acting in one way or another, while describing the issues as Islamic as such makes it beyond the ability of Muslims to change. As a Muslim, I can respond to the conflicting claims of Iran, Saudi Arabia and others, for instance, to be 'Islamic' by explaining why I disagree with such competing human interpretations of Islam and presenting my own alternative interpretation for a humane Islamic

alternative to all of those perspectives. Yet, there is no coherent way to evaluate which position is more truly Islamic than the other. There is no specific form of political doctrine of Islam, except for general principles like respect for human dignity, justice and seeking consultative accountable government, which have always been believed to be practiced by a variety of monarchial, republican or despotic regimes.

Once the sources, methodologies and main Schools of Islamic Jurisprudence (*Madhahib*) that formulated the structure and content of what is now known as Sharia were established by the tenth century CE, those methodologies and principles enjoyed a great deal of stability for extended periods of time until recently. In the belief that those founding Schools have elaborated all that can and should be known about Sharia, the masses of Muslims found it safer to blindly follow (*taqlid*) one scholar or follow one *Madhahib*, instead of accepting responsibility for their own independent choice among competing views. To justify the practice of *taqlid* since the tenth century, Muslim scholars invented the fiction of 'closing of the gate of *Ijtihad*' although there was no gate to be closed and no one had the religious authority to close it even if it existed.

It may be understandable that Muslim scholars did that to enforce what they believed to be politically and socially necessary for stability and conformity, but the consequence has been a highly unacceptable degree of stagnation. While there may have been minor adjustments or variations among and within the *Madhahib*, that could only be done within the sources and methodologies of the established *fiqh*. Although it is widely acknowledged among Muslims that there is now a need for fresh *Ijtihad* to address the problematic aspects of traditional formulations of Sharia, Muslims at large have generally failed to produce a coherent and legitimate methodology for Islamic reform to deal with those aspects based on Quran and Sunna. The only exception in my view is *Ustadh* Mahmoud Mohamed Taha of Sudan, who was executed on 18 January 1985, following a sham trial for apostasy.[4]

Here lay the deep-rooted causes of the religious dimension of the ambivalence of Muslims regarding some major human rights issues, such as the rights of women and non-Muslims, and the freedom of religion and belief.[5] While failing to address the obvious problems, Muslim

[4] Abdullahi Ahmed An-Na`im, The Islamic Law of Apostasy and its Modern Applicability: A Case from The Sudan, *Religion* (1986) Vol. 16 pp. 197-223.

[5] See generally, Abdullahi Ahmed An-Na`im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1990).

discourse about Islam and human rights is totally apologetic: refusing to acknowledge the problems with traditional Sharia, yet claiming exaggerated credit for traditional Muslim scholars who upheld human rights even before the concept was known to other human societies. While prohibiting chattel slavery in their modern legal systems as totally abhorrent, Muslims today still fail to address the issue from the perspective of Sharia. The reason for this confusion is not only that the gate of *Ijtihad* is believed to be closed but also that even if it is wide open, *Ijtihad* is not permitted by traditional methodologies (*usul al-Fiqh*) to challenge any principles of Sharia that are founded on explicit or categorical texts of the Quran or Sunna. Scores of Muslim scholars since the nineteenth century have called for the opening of the gate of *Ijtihad*, yet none of them have so far actually practiced *Ijtihad* in order to provide Muslims with a coherent methodology that enables them to repudiate aggressive Jihad to propagate Islam or to end the institution of slavery from a Sharia perspective.

The only exception, to my knowledge, is *Ustadh* Mahmoud Mohamed Taha who proposed shifting the basis of Sharia from the Quran and Sunna of the latter Medina stage, to that of the earlier Mecca stage. As he explained in his book *The Second Message of Islam*,[6] Taha argued that Sharia principles founded on the Medina revelations, which was the first message of Islam, authorised aggressive Jihad to spread Islam and the subordination of women to men, and of non-Muslims to Muslims. Those principles, argued Taha, were transitional, while the universal principles of justice, equality and human dignity founded on the Mecca revelations, which he called 'the second message', did not include any of those principles. Fraser's study of Islam in Indonesia highlights these same principles of justice, equality and dignity. Taha argued that the postponed second message of Islam is now applicable because humanity at large is ready to live up to those standards through the tripartite principles of political and economic equality and social justice (democracy, socialism and social justice). He also emphasised the imperative requirements of self-determination and peaceful international relations under the rule of international law.

I believe that *Ustadh* Mahmoud's methodology is coherent and consistent with original Islamic principles and will be acceptable to Muslims

[6] The original edition of Taha's book was published in Arabic in 1967. The first English translation, as *The Second Message of Islam,* was published in 1987.

if presented to them in a peaceful and orderly manner. Competing methodologies should also be presented for debate. The question for this foreword is whether domestic and international conditions do, in fact, support the optimistic claim that humanity in the twenty-first century is ready for the second message of Islam.

# ACKNOWLEDGEMENTS

This book is the product of over five years' work and the input of many people. It is based on my PhD research, which was funded by the Dutch Government and supervised by Prof. Dr Tom Zwart (Utrecht University) and Prof. Dr Yvonne Donders (University of Amsterdam). To them I am indebted. I also wish to acknowledge and thank the members of my PhD Defence Committee, Prof. Dr Abdullahi Ahmed An-Na`im (Emory University), Prof. Dr Eva Brems (Ghent University), Prof. Dr Antoine Buyse (Utrecht University), Dr Lucien van Liere (Utrecht University) and Prof. Dr Barbara Oomen (Utrecht University).

I am grateful for the input and camaraderie of all of my colleagues at the Netherlands Institute of Human Rights (SIM) and the Montaigne Centre for the Rule of Law and Administration of Justice at Utrecht University, including Dr Stacey Links, Dr Qiao Cong-rui and Dr Brianne McGonigle Leyh. I have benefited from the close and supportive academic community in the Netherlands, which included the members of the Netherlands Network of Human Rights Researchers and the focus area of Culture, Citizenship and Human Rights. I was also grateful to have participated in international networks with other scholars who kindly shared their expertise, including the Association of Human Rights Institutes, the Asian Law Institute and the Cross-Cultural Human Rights Centre.

Given that this book is based on field work and empirical research, I must acknowledge and thank the many people who assisted me. In particular, I am grateful for the guidance of Ms Pramila Patten, Ms Hilary Gbedemah and Prof. Dr Kees Flinterman. To all of my colleagues and interview participants in Indonesia, this book would simply not have been the same without you. Thank you for your time, your insights and your inspiration. I am lucky to have been able to go abroad for research, and acknowledge the privileges I enjoyed (but did not earn).

In my research I was supported by a number of women who helped me directly and indirectly, personally and professionally. I would like to

acknowledge them, as well as all of the women in academia who blazed the trail before me. I am grateful also for the comments of peer reviewers, as well as the invaluable editorial and secretarial support I received. To everyone who read a chapter, debated a concept or simply listened to me thinking out loud – thank you. I shall pay the favour forwards.

Finally, to all my friends and family, I am grateful for your patience and positivity. The success is made meaningful when shared with you. For the lifetime of love and support that I have received from my biggest fans, Carol, Col and Shell, I can only say thank you. And to my love, David, thank you for holding my hand throughout.