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Human Rights Enforcement Towards a People-Centered Alternative? A Reaction to Professor Abdullahi An-Na'im

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Abstract

The lecture 'The Spirit of Laws is not Universal: Alternatives to the Enforcement Paradigm for Human Rights' by Professor Abdullahi An-Na'im goes to the heart of the human rights predicament. An-Na'im offers a profound critique of the inadequacy of the current treaty-based state-centric enforcement paradigm and suggest a people-centered alternative, to human rights protection. The alternative proposed remains rather indistinct and raises several questions addressed in this commentary. Human rights enforcement is a much more complex interplay of transnational legal processes than portrayed. It is argued that international human rights law is gradually evolving towards a more complex, multifarious landscape than that of the established, one-dimensional state-centered paradigm. Moreover, agreeing with the need for a paradigm shift away from the state as the conventional duty-bearer it is suggested that this should go beyond political power to include economic power.

Keywords

Legacy of Montesquieu – universality of human rights – international law enforcement of human rights – Montesquieu Lecture

* This commentary is a response to the lecture by Professor Abdullahi An-Na'im entitled '*The Spirit of Laws is not Universal: Alternatives to the Enforcement Paradigm for Human Rights*' at the occasion of the 2016 Montesquieu Lecture, 9th March 2016, Tilburg Law School, The Netherlands.

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1 Introduction

At the occasion of the 2016 Montesquieu Lecture organized by Tilburg Law School, the organizers requested a response to the lecture by Professor Abul-lahi An-Na'Im entitled: '*The Spirit of Laws is not Universal: Alternatives to the Enforcement Paradigm for Human Rights*'. An-Na'Im was one of the first scholars to address issues of intercultural dialogue and the need to negotiate between the global and the local on behalf of human rights. He has remained at the forefront of the discussion ever since. These issues have only become more pertinent over the years, also in my home country, the Netherlands. Thus the opportunity to reflect upon his lecture is an honor but by no means an easy task as it is hard to disagree with An-Na'Im's lucid analysis of the current weaknesses of human rights protection. Against the background of gross human rights violations occurring across the world – such as the ones we are now witnessing during the ongoing brutal war in Syria and the ensuing refugee catastrophe –, it would be naïve (to say the least) to portray the human rights regime as a success story. In his analysis of the system of human rights protection, An-Na'Im does not mince words when he states that 'the current legalistic, state-centric approach has utterly and totally failed in providing any protection of human rights whatsoever'.¹ Furthermore, An-Na'Im refers to the 'totally inappropriate means of so-called international protection'.² But An-Na'Im promises to not only criticize the 'structural inadequacy of the current treaty-based state-centric enforcement paradigm' but to also 'highlight the accessibility and viability of a universally realistic alternative of cultural transformation and political mobilization for the implementation of consensus-based human rights norms'.³ He promises to go beyond mere criticism and explore an alternative, a people-centered alternative, to human rights protection.

I dare to say that this is characteristic of An-Na'Im and his work. On a previous occasion,⁴ An-Na'Im has labeled himself a pragmatic optimist, which is refreshing in a time when it seems very popular to declare that human rights

1 A. An-Na'Im, '*The Spirit of Laws is not Universal: Alternatives to the Enforcement Paradigm for Human Rights*' (2016) 21 *Tilburg Law Review* (4).

2 *ibid.*

3 *ibid.* 3–4.

4 A. An-Na'Im, 'Transcending Imperialism: Human Values and Global Citizenship', *The Tanner Lectures on Human Values*, available at <http://tannerlectures.utah.edu/_documents/a-to-z/a/An-Naim_10.pdf> accessed 20 June 2016.

have reached a dead end.⁵ It is easy to be a pessimist, but it is a lot less easy to see the glass half-full and come up with constructive and innovative ideas.

The lecture '*The Spirit of Laws is not universal*' is an exploration of a number of concepts that lie at the heart of the human rights predicament. I distill two themes that give rise to a number of questions: the inadequacy of the state centric approach and the need for a people-centered alternative for enforcement. These are pertinent issues also in my research field – business and human rights – and I see many parallels. In this commentary, I will address three issues. I will begin with the proposed people-centered alternative for human rights protection, which raises several questions, some of a rather practical nature. Despite the promise to explore its 'accessibility and viability', the proposed alternative remains rather indistinct. The second issue concerns the issue of enforcement of human rights and what actually is meant when we talk of enforcement in the context of human rights. And, finally, the exclusive focus in An-Na'Im's lecture on the state as the sole protector and violator raises several questions. I would argue that there is a need to conceptualize power beyond political power to include economic power.

2 The People-centered Alternative to the State-centric Model for Human Rights Enforcement

The lecture of An-Na'Im brings the famous words of Eleanor Roosevelt, one of the drafters of the Universal Declaration of Human Rights, to mind. On the tenth anniversary of the Universal Declaration she said the following:

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.⁶

5 See E. Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014) 137.

6 E. Roosevelt, 'In Your Hands: A Guide for Common Action for the Tenth Anniversary of the Universal Declaration of Human Rights', available at <<http://www.un.org/en/globalissues/briefingpapers/humanrights/quotes.shtml>> accessed 20 June 2016.

An-Na'Im stresses exactly that: the content and application of human rights should be determined by the people; it should be an inclusive concept realized in local context. In his words: 'the human rights paradigm cannot exist at all except in terms of the dynamics of globally inclusive concept and content, as realized in local context'.⁷

I cannot but fully agree with the need of putting people at the center of human rights protection: the human rights idea should not be a state-centric, but rather a people-centered idea. Human rights are about empowerment of people. The challenge is in the process of translating/bridging the global and the local. This brings to mind the work of Sally Engle Merry, professor of anthropology. Her research on the interplay between local culture and transnational ideas in the field of gender violence (termed by Merry as 'vernacularization') demonstrates this process of translation and how challenging the intertwining of local and global spaces in practice can be.⁸ In his proposal for a people-centered alternative for the enforcement of human rights, An-Na'Im does not explore *how* this is to be achieved and how certain pitfalls are to be addressed. How to avoid the participation of only the elite? How to protect the weaker party against the stronger, more vocal party? How and who will punish a breach of a human rights norm? These are pertinent questions which need to be answered in order for a people-centered approach to be a viable alternative for the established state-based paradigm.

2.1 *Human Rights Enforcement*

The alternative proposed by An-Na'Im is an alternative to *enforcement*. As An-Na'Im makes crystal-clear: the state-centric approach to human rights enforcement has many shortcomings when it comes to human rights protection. It is not difficult to find examples of this. However, this does beg the question – what exactly do we mean when we refer to the *enforcement* of human rights? The focus of An-Na'Im's exposé is on humanitarian intervention, which undeniably is highly problematic and controversial. However, should we indeed equate human rights enforcement only with the use of force? Isn't it the human rights regulatory landscape that aims to ensure compliance much more refined? Human rights are clearly under-enforced but international norms of human rights are nevertheless enforced. In his work on enforcement, Koh has referred to the complex transnational legal process where human

⁷ An-Na'Im (n 1) 1.

⁸ S. Engle Merry and P. Levitt, *Vernacularization in Action: Using Global Women's Human Rights Locally* (Special Issue of Global Networks 9, Blackwell 2009) 67.

rights enforcement takes place through institutional interaction where global human rights norms are debated, interpreted and ultimately internalized into domestic legal systems.⁹ Human rights enforcement on a government to government level indeed paints the bleak picture of ineffectiveness and impotence An-Na'Im is referring to. However, this perspective of international human rights law enforcement, which Koh terms the 'horizontal story', is not the complete picture. We also need to look at the 'vertical story', which is a much richer story, a multi-dimensional picture 'that includes a different set of actors, fora and transactions'.¹⁰ Only referring to the highly controversial instrument of humanitarian intervention as the way to enforce human rights does not do justice to the intrinsically much more complex legal processes that underlie human rights enforcement. Even though clearly human rights supervisory mechanisms suffer from serious shortcomings, certain developments in the transnational legal process of human rights enforcement have started to make some – albeit small – inroads into addressing shortcomings of the state-centric approach. I will mention just a few of such developments.

To begin with, as is of course typical for law in general, human rights law is reactive. The fact that accountability for human rights violations is often illusive at the international level leads An-Na'Im to the observation that '[p]reemption of violations should therefore be the primary strategy for the protection of human rights'.¹¹ In international human rights law the importance of prevention is acknowledged and the obligation to prevent human rights violations is expressly formulated in some treaties,¹² has been addressed in General Comments issued by UN supervisory bodies¹³ and several reports.¹⁴

9 H. Hongju Koh, 'How is International Human Rights Law Enforced', *Addison C. Harris Lecture*, available at <<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2279&context=ilj>> accessed 20 June 2016.

10 *Ibid* 1408–1409.

11 An-Na'Im (n 1) 2.

12 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [1984] GA res 39/46, 1465 UNTS 85 (CAT) (entered into force 26 June 1987) art. 2. See also Convention on the Prevention and Punishment of the Crime of Genocide [1948] GA res 260 (III A) art. 1.

13 Most recently, Joint Convention on the Elimination of All Forms of Discrimination against Women General Recommendation No. 31. See also CEDAW Convention on the Rights of the Child General Comment No. 18 on harmful practices (/C/GC/31-CRC/C/GC/18).

14 Notably in relation to: the prevention of torture, genocide, mass atrocities, incitement to hatred, violent extremism, and the elimination of discrimination on particular grounds (such as race, religion or belief or sexual orientation or with regard to a particular group

Nonetheless, it is true that states habitually fall short in effectively preventing human rights violations. An-Na'Im concludes that 'there is no strategy or institutional capacity for preempting violations at the international level'.¹⁵ This does not do justice to several developments aimed at preempting human rights violations. In this respect, it is especially worth pointing out the work of the Inter-American system for the protection of human rights, where a lot has been done in the area of prevention, early-warning, and urgent-action.

An important dimension of the transnational processes that underlie human rights enforcement is the increasing emphasis on participation of NGOs and individuals in (international) human rights supervisory mechanisms.¹⁶ International human rights law is gradually evolving towards a more complex, multifarious landscape than that of the established, one-dimensional state-centered paradigm. True, such participation remains limited and a lot needs to be done to further break down the barriers that perpetuate the exclusion of different actors in international structures and processes. But the slow development towards greater inclusion should not be overlooked. Another example of the development towards a more refined system of checks and balances is the rise of National Human Rights Institutions (NHRIs) across the world as an additional layer of supervision linking the national and the international level.¹⁷ And finally, in the spirit of Montesquieu, the important role of the judiciary in the process of enforcing human rights should not be overlooked.

In sum, human rights enforcement entails a complex, multidimensional transnational legal process which encompasses much more than the instrument of humanitarian intervention.

such as women, persons with disabilities and minorities. See the study by the OHCHR, *The role of prevention in the protection and promotion of human rights* (UN Doc. A/HRC/30/20 Distr.: General 16 July 2015).

15 An-Na'Im (n 1).

16 For example, NGOs are involved in the proceedings at the United Nations. Article 71 of the UN Charter provides NGOs with consultative status with the United Nations Economic and Social Council. More in general, NGOs play an important role in improving human rights compliance by raising awareness and providing information. The increasing attention for corporations as important actors in the field of human rights presents another challenge to the one-dimensional state-centric paradigm.

17 At the time of writing there are 106 NHRIs that have been accredited by the International Coordinating Committee of the UN (72 of which have the so-called A-status meaning they are fully compliant with *the Paris Principles*. These Principles lay out requirements concerning, *inter alia*, the independence, plurality, mandate and competence.

2.2 *The Need to Address Economic Power: Shifting the Paradigm*

In An-Na'Im's analysis of the failures of human rights protection, the focus is exclusively on the relationship between the citizen and the state and on the state as both protector and potential violator of human rights norms. Power has fragmented and in many ways economic power now rivals the power of the state. An often quoted illustration of corporate power is the statement that the revenues of General Motors are more than the GDP of 148 countries and Wal-Mart's revenue is larger than the combined GDP of all Sub-Saharan Africa.¹⁸ In light of the many examples of negative impact of corporate activities on human rights,¹⁹ it may be argued that economic power now poses a greater threat to human dignity than the state does. This begs the question: should we not, when addressing the issue of human rights protection, move beyond the state? I would argue that there is a need to conceptualize human rights protection beyond political power to include economic power.

This does raise the fundamental question to know whether in light of the problems posed by economic globalization human rights provide a discourse that produces solidarity to address the adverse corporate impact across borders. For example, it is not that long ago that children were set to work in European countries. A lot has been improved; however the discourse has not yet proved to be persuasive enough to convince corporations to respect the rights of workers in other parts of the world. I would argue that we need a paradigm-shift in the attribution of responsibility for human rights violations. The Universal Declaration of Human Rights does not on its face limit human rights obligations to states famously stating in its preamble that 'every individual and every organ of society' has a role to play in promoting and upholding human rights. Nevertheless, the idea of that document and the treaties that followed from it was that states hold the human rights obligations. It is clear that economic globalization and the fragmentation of power forces us to further reconsider the boundaries between the public and the private. In fact, we can no longer maintain the argument by An-Na'Im that 'only states can claim rights and discharge of obligations under international human rights law'.²⁰ Multinational corporations are already participants in the international human rights

18 See J. Stiglitz, 'Balancing rights and responsibilities', *Grotius Lectures*, available at: <<http://business-humanrights.org/en/joseph-stiglitz-multinational-firms-misuse-of-power-can-harm-environment-human-rights-development-address-at-american-society-of-intl-law>> accessed 17 June 2016.

19 For examples see the website of the Business and Human Rights resource center, available at <www.business-humanrights.org> accessed 20 June 2016.

20 An Na'Im (n 2) 13.

system. Corporations use the *system* of human rights. Just think of the cases brought before the European Court of Human Rights by corporations where corporations claim that their human rights have been violated.²¹

Thus, I would advocate that what we need is a paradigm-shift regarding the duty-bearers under international law. We need to include corporations. The last few decades we have seen a remarkable evolution in soft law of the idea of corporate responsibility for human rights.²² In an attempt to address the governance gaps that exist in the field of business and human rights we can witness a move away from the confines of traditional international law solutions towards what may be called experimental governance or polycentric governance. This refers to the coexistence of several different regulatory regimes around the same issue without a clear hierarchy, where no entity holds the sole rule-making power.²³ Initiatives aimed at regulating corporate impact on human rights increasingly involve many different actors both in the design of regulation and its supervision and this includes those that are the object of such regulation, corporations.

Let me illustrate this with an example. In April 2013, the world witnessed the deadliest garment-factory accident in history. Rana Plaza, an eight-story commercial building on the outskirts of Dhaka, the capital of Bangladesh, collapsed. Some 5,000 people worked in Rana Plaza, which mostly housed small garment factories. 1,200 people died when the building collapsed, over 2,500 injured people were rescued from the building alive some after having been trapped for days. The garment workers died or were injured while making clothes for some 30 popular European and American brands. In the aftermath of the Bangladeshi disaster several regulatory initiatives were taken. The International Labour Organisation (ILO) worked with the government of Bangladesh on a National Action Plan on Fire and Building Safety. But we have also seen regulatory initiatives where the state plays only a marginal or even no role at all. The Accord on Fire and Building Safety in Bangladesh is a multi-stakeholder agreement between the signatory brands and a coalition of local

21 European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] OJ C 103, art. 34 provides that the Court may receive applications from 'any person, non-governmental organization or group of individuals claiming to be the victim of a violation'.

22 The United Nations Guiding Principles on Business and Human Rights adopted by the Human Rights Council in 2011, available at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 20 June 2016.

23 For a discussion of polycentricity see L. Catá Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricityz' (2012) 17 *Tilburg Law Review* 177–199.

and global unions and NGOs. More than 150 corporations from 20 countries have signed the Accord. Corporations agree, *inter alia*, to independent inspections of buildings and the publication of results.²⁴ This is just one example of a regulatory dynamic that moves beyond the limits of the one-dimensional state centric approach. A true people-centered approach to human rights protection requires a further expansion of the notion of duty bearers under international human rights law towards inclusion of corporations.

24 Available at <www.bangladeshaccord.org> accessed 20 June 2016.