A STRUGGLE FOR SUPREMACY

A CONFRONTATION BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND SHARI'A-BASED CONSTITUTIONAL LAW

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A Struggle For Supremacy: A Confrontation Between International Human Rights Law and Shari'a-Based Constitutional Law

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به نام خدا
برای وطن
به یاد پدر
به مهر مادر

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INTRODUCTION

1. Problem and Prospect

For two reasons, at least, it is important to study the confrontation between international human rights law and national constitutional law based on Islamic Law/Shari'a. One reason is the inevitable interaction and confrontation between different legal regimes in the global legal pluralism. Another reason is the increasing religious tensions and the decreasing religious tolerance in the international community in the recent time[1]. This often leads to a common perception that Islamic law is completely incompatible with international human rights law[2]. I disagree with this view. My point is this perception, right or wrong, without considering the role of the state is very abstract[3].

Human rights law and Islamic law represent two systems of law. Each system includes many dimensions and each dimension can be unique enough to require an in-depth study. Norms, values and laws of each system can take on different meanings across time and space. This dynamic character of Islamic law and human rights law reflects their diversity and interdisciplinary nature. Religion, culture, philosophy, politics and anthropology shape the contemporary formation of the two systems. The wide spectrum of opinions makes the study of each system very attractive, but at the same time very complex.

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[1] See e.g. Janis, M.W, Introduction, in Religion and International Law, Janis, M.W and Evans, C (eds.), 1999.

[2] For more details on critique of Islamic law, see e.g., Huntington, S.P, The Clash of Civilizations and the Remaking of World Order, 1996, Mayer, A.E, Islam and Human Rights, Traditions and Politics, 2013, Mayer, A.E, The Islam and Human Rights Nexus: Shifting Dimensions in Muslim World, Journal of Human Rights, vol.4, 2007, Chase, A, The Tail and the Dog: Constructing Islam and Human Rights in Political Context, in Human Rights in the Arab World: Independent Voices, Anthony Chase and Amr Hamzawy (eds.), 2008, Watt, W.M, Islamic Fundamentalism and Modernity, 2013.

[3] Emon, A.M, Ellis, M.S and Glahn, B, From "Common Ground" to "Clearing Ground": A Model for Engagement in the 21st Century, in Islamic Law and International Human Rights, Emon, A. M, Ellis, M.S and Glahn, B (eds.), 2012, p.6.

Yet, the question of the confrontation between international human rights law and Shari'a-based constitutional law is not just about the relationship between human rights law and Islamic law. Rather, it is also about the application and implementation of human rights law and Shari'a-based constitutional law by a particular political institution. Constitutions, in fact, reflect the nation's best understanding of rights and freedoms. In democratic and non-democratic states, constitutions are designed to establish the basic legal structure of their regime, and every legal system has some rules that determine who makes the law and how[4]. To understand a constitution, then, we need to understand its context in the light of its history. Who made the constitution, and who decided how the law should be and should not be interpreted, and who had the authority to implement the law are parts of the constitutional structure of each state. Shari'a-based constitution, at least in this sense, is not an exception to the rule. As it is impossible to understand the American constitution without taking Madison and Jefferson's perspectives into account[5], the study of Shari'a-based constitutions today requires the analysis of each state's constitutional history.

This raises another issue, which is relevant to the topic at hand. Neither human rights law nor Shari'a-based constitutional law is homogenous in practice. The governmental practices of both systems have been varied over time. There might be common grounds[6] between Shari'a-incorporated constitutional rights and human rights, just as there might be essential conflicts between sources and scope of them. Then, the confrontation between the two systems cannot simply be assumed. Unless we put broad generalization aside, place ourselves in direct contact with diverse perspectives and openly analyze through detailed examinations of: What is human rights law and what is Shari'a-based

[4] See Marmor, A, Are Constitutions Legitimate? 20 Canadian Journal of Law and Jurisprudence, 2007, pp. 69-94.

[5] See Feldman, N, The Fall and Rise of the Islamic State, 2008, pp. 1-15.

[6] For more details on "common ground", see Baderin, M, Establishing Area of Common Ground Between Islamic Law and International Human Rights Law, The International Journal of Human Rights, vol.5, No.2, 2001, pp. 72-113.

constitutional law? What does each one mean on a certain issue in a particular state? And what are the reasons for confrontation between the two laws? Only then an effective comparative study and a real legal discussion are possible.

International human rights law and Shari'a-based constitutional law are two systems, which are greatly influenced by different variables in different times[7]. Whereas the modern concept of human rights law is the legacy of the Enlightenment, the constitutionalization of Shari'a in contemporary Muslim societies is the result of the Islamic revival movements in response to foreign intervention during the post-colonial era[8]. Both systems specify the basic rights and freedoms of individuals, while they differ in their view of which rights are supreme and who has supreme authority to interpret the rights. The problem starts when each system sits in judgment over the other and claims supremacy to expound fundamental rights of individuals[9]. The supremacy here is not only the presumption of primacy. It also reflects a distinct way of understanding law, in which law's foundational unit is taken to be the comprehensive and supreme[10]. The struggle for supremacy, in this sense, is each system's claim to legitimate authority over the other. Can claims of supremacy all be justified? What is the ground for claim of supremacy? Is it to impose obligations[11] on other systems of law? Is it the claim to have

[7] See e.g. An-Na'im, A.A, Toward an Islamic Reformation: Civil Liberties, Human Rights and International Human Rights, 1996.

[8] For more details see, Lapidus, I.M, Islamic Revival and Modernity: The Contemporary Movements and the Historical Paradigms, in Journal of the Economic and Social History of the Orient, vol.40, 1997, pp.444-60.

[9] For a detailed discussion about the relationship between human rights law and constitutional law, see Neuman, G. L, Human Rights and Constitutional Rights: Harmony and Dissonance, Stanford Law Review, vol.55, 2003, pp. 1880-1990.

[10] See e.g. Culver, K and Giudice, M, Not a System But an Order: An Inter-Institutional View of European Union Law, in Philosophical Foundations of European Union Law, Dickson, J and Eleftheriadis,P (eds.) 2012, pp. 54-5.

[11] See Himma, K.E, Law's Claim of Legitimate Authority, 2001, p.20.

the right to be obeyed? If yes, what does the right to be obeyed mean? Does it mean to comply with the law or to be guided by it?[12]

The dominant analytical approach in international law presumes human rights law as the legitimate authority to protect fundamental rights for the rest of legal systems[13]. The justification lies in the universality of human rights and obligation of states to comply with universal standards. The UN Charter imposes the obligation on member states to promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction, and the Universal Declaration of Human Rights (UDHR) also recognizes the human rights and freedoms "as a common standard of achievement for all peoples and all nations." International human rights law, thus, is a leading system for protecting fundamental rights in the relation between citizens and the state, and the state is responsible to facilitate compliance with international human rights law[14].

Instead, the constitutional adoption of Shari'a as "a primary source" or "the only source" of legislation in some Muslim states[15] gives the priority to Islamic law over other laws. The supremacy claim of Shari'a-based constitution is justified on the fact that Shari'a is the path to salvation and a Muslim community should be guided and governed by it[16]. Shari'a as a rule of law system broadly covers all aspects of human life and includes rights, obligations and punishments. Based on the same idea, the Cairo Declaration on Human Rights in Islam (CDHRI) proclaims that: "fundamental rights and universal

[12] Green, Leslie, Legal Obligation and Authority, The Stanford Encyclopedia of Philosophy (Winter 2012 Edition), Edward N. Zalta (ed.)

[13] Follesdal, A, Schaffer, J.K and Ulfstein, G, The Legitimacy of International Human Rights Regime, Legal, Political and Philosophical Perspectives, 2014, pp. 21-25.

[14] For more details, see Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC, supplement no.10 (A/56/10), 2001. See also, Seibert-Fohr, A, Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 para.2, in Max Planck Year Book of United Nation Law, Frowein J. A and Wolfrum, R (eds.), vol.5, 2001, pp.399-472.

[15] The emphasis on "some Muslim states" is because not all Muslim countries acknowledge Islamic law as a source of legislation.

[16] Burns, J.G, Introduction to Islamic Law: Principles of Civil, Criminal, and International Law under the Shari'a, 2013-14, p.24.

freedoms in Islam are an integral part of the Islamic religion", and states that, "Islamic Shari'a is the only source of reference for the explanation or clarification of any of the article of this Declaration."[17]

Yet contrary to common assumption, Shari'a-based constitutional law does not exactly reflect the Islamic legal and ethical traditions expressed in the Qur'an rooted in the 7th century CE[18]. Contemporary constitutions based on Shari'a emerged as a result of political transitions over the last century[19]. They were often approved by constitutional referendum, as in Iran and Iraq, or adopted by a Constitute Assembly, as in Pakistan and Afghanistan. Shari'a as a basis for legislation in these constitutions is a set of rules, which has its basis in the divine revelation, but it is defined and applied by authority of the state[20]. While there are similarities on certain sources of Shari'a, the methods of interpretation are markedly different depending upon the Muslim understanding of Islamic law over time[21]. Constitutions of Muslim states, therefore, vary from one state to another,[22] and they may not necessarily represent the origin of Islamic law.

The different interpretation of Islamic law in the three major periods of the early Islamic era, the pre-modern Muslim era, and the modern era are leading instances. Different interpretations of Shari'a occurred following the death of Prophet Muhammad (PBUH)[23] in the early Islamic period. Further, the transformation of religio-political community

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[17] For the text of CDHRI, see: http://www.bahaistudies.net/neurelitism/library/Cairo_Declaration_on_Human_Rights_in_Islam.pdf [Accessed 25 March 2016]

[18] There is disagreement about role of the Qur'an. Some like Maududi believe that every word of the Qur'an is direct revelation for guidance of mankind and cannot be withdrawn, amended or changed by anyone. For different perspective see, Coulson, N.J, A History of Islamic Law, 1997, p.12, " The primary purpose of the Qur'an is to regulate not the relationship of man with his fellows but his relationship with his Creator",

[19] See e.g. Hefner, R.W, Shari'a Law and the Quest for a Modern Muslim Ethics, in Shari'a: Law and Modern Muslim Ethics, Hefner, R.W (ed.), 2016, pp. 1-36.

[20] Feldman, N, supra note 5.

[21] See e.g. Cook, M, Ancient Religion, Modern Politics: The Islamic Case in Modern Perspective, 2014.

[22] Stahnke, T and Blitt, R.C, The Religion-State Relationship and the Right to freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries, Georgetown Journal of International Law, vol.36, 2005.

[23] PBUH is the abbreviation of Peace Be Upon Him.

during and in the aftermath of the colonial powers had a far-reaching effect on the legal system of the Muslim states and practice of Shari'a[24]. Ultimately the position of Shari'a in modern Muslim states is a product of movements towards Islamization of the state[25]. For that reasons, there is a clear distinction between legal reasoning in Shari'a from pre-modern world of Islam to the modern context of the state, and there is a clear difference between the modern Muslim jurisprudence[26] and the classical jurisprudence[27]. Todays, Shari'a-incorporated constitutional law is a confusion between the past jurisprudence and the present legal meanings[28]. Each Muslim state has its own codification and interpretation of Islamic law, which reflects its own legal tradition and its own political wills. The use and misuse of Islamic law by regimes cause that Islamic law is often seen politically more important than legally. This is why, the accurate answer to whether Islamic law is compatible with international human rights law depends, not only, but very much on who, where, in which legal system, in what context and under what circumstances has applied and interpreted Shari'a[29].

Yet, the divergent interpretations in different times and places is clearly not only limited to Islamic law. The same, to some extent, is true for human rights law. In practice, international human rights law is not a unified legal concept.[30] It is not always integrated or even interpreted similarly into domestic systems. The most common form of

[24] For more details, see Kugle, S.A, Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia, 2001.

[25] For instance, many modern Muslim scholars have criticized the Qur'anic inheritance provision that the male should receive twice as much as the female counterpart. They argue that the Qur'an's inheritance law was due to the condition of time and it is not compatible with the principle of equality and justice mentioned in the Qur'an itself.

[26] The term Muslim jurisprudence, however uncommon, seems more precise than the Islamic jurisprudence.

[27] For more details, see Coulson, N.J, A History of Islamic Law, 1997.

[28] See e.g. Otto, J.M (ed.) Sharia Incorporated, A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, 2010, pp. 23-27.

[29] Bennet, C, New Direction: The Who, Why, What, How, and Where of Studying Islam, in The Bloomsbury Companion to Islamic Studies, Bennet, C (ed.) 2013, pp.252-282.

[30] Legg, A, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality, 2012, p.2.

implementation of human rights standards by states involves cultural diversity[31]. For that reason, all constitutional systems, at least to a certain extent, can potentially come into conflict with international human rights system. In fact in a practical conception, as Mathias Risse says, it is the practice that defines the idea of human rights[32].

Most of states, democratic and non-democratic, develop some system of limitations on the fundamental rights and freedoms. Whether in a secular legal system or in a religious legal system, the protection of certain values may give the state more leeway for the restriction of fundamental rights. Constitutional doctrine in the United States does not regulate hate speech, while the regulation of hate speech may be compatible with constitutional guarantees of freedom of speech in other states[33]. As Mark Tushnet argues variations in rights-protection are best attributed to national histories and experiences. Lacking such experiences or having different cultures, other states might find such restrictions incompatible with their understanding of rights and liberties[34]. This idea can also be found in Montesquiean legacy, that each nation's law reflects something especial about that nation's spirit[35]. In his best-known book, The Spirit of Laws, Montesquieu examines the influence of "the general spirit of the nation" on the collective life, what is called nowadays the "nation's domestic culture and domestic politics"[36].

Restrictions on fundamental rights are often justified according to the national jurisdiction. For instance, the jurisprudence of the European Court of Human Rights

[31] See Toope, S.J, Cultural Diversity and Human Rights, McGill Law Journal, vol.41, No, 1, 1997, pp.169-185. See also Falk, R, Cultural Foundation for the International Protection of Human rights, in Human Rights in Cross-cultural Perspective: A Quest for Consensus, An-Na'im, A.A (ed.), 1992, pp. 44-60.

[32] Risse, M, Human rights as Membership Rights in the World Society, Forthcoming in Human Rights, Democracy, and Legitimacy in World of Disorder, Vöneky, S and Neuman, G.L (eds.), CUP, 2018.

[33] See Tushnet, M, Advanced Introduction to Comparative Constitutional Law, 2014, p.70.

[34] Ibid.

[35] Ibid. pp. 1-9.

[36] See Schoenmakers, H, The Power of Culture, A Short History of Anthropological Theory about Culture and Power, 2012. See also Montesquieu, Ch, The Spirit of Laws, Book XIX, translated by Thomas Nugent, 1989, p.310 and Robbins, D, Cultural Relativism and International Politics, 2015.

(ECtHR) supports the intervention of the state for the protection of the national values[37]. By adopting the doctrine of margin of appreciation the ECtHR gives each member state the discretion to maintain its legal traditions and supports the principle of subsidiary. Whether the concept of laïcité in France[38] or Catholic traditions in Italy[39] to certain latitude has enjoyed the margins doctrine on matters of religious liberty before the ECtHR.[40] In seemingly similar way, the constitutional jurisprudence in the Muslim states gives priority to Islamic traditions when it comes into conflict with religious liberties. That is, in each jurisdiction certain restrictions on the fundamental rights may be applied to preserve the interests of the state. The wearing of religious symbols is restricted[41] to preserve the principle of secularism in France. The denial of the Holocaust is strictly prohibited[42] to protect the dignity of individuals as the core constitutional values in Germany[43]. Like making blasphemy illegal to protect religious values in Iran.

In order to avoid any misinterpretation, the aim is not to compare the blasphemy with the denial of Holocaust at all. Neither from nature, nor from legal point of view blasphemy is of similar importance to the denial of Holocaust. The Holocaust denial is, in fact, the

[37] See Brems, E, The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights, 56 ZaöRV, 1996. See also, Vöneky, S, Das Recht der Biomedizin auf dem Prüfstand des EGMR Grundrechtseingriffe und die Lehre vom weiten Beurteilungsspielraum des nationalen Gesetzgebers, in MedR 32, 2014, pp.704-11, Mahoney, P, Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Siders of the Same Coin, 11 HRLJ 57, 1990, and case of Stankov and the United Macedonian Organization ilinden v. Bulgaria, App. No. 29221/95 and 299225/95, 2001, para.87.

[38] See e.g. Cha'are Shalom Ve Tsedek v. France, App. No. 27417/95, 2000.

[39] For example, see case of Lautsi and Others v. Italy Judgment, App. No. 30814/06, 2011.

[40] Benvenisti, E, Margin of Appreciation, Consensus, and Universal Standards, 31 N.Y.U. J. Int'l L. & Pol. 843,1998-1999. See also Sweeny, J, Margin of Appreciation: Cultural relatively and the European Court of Human rights in the Post-Cold War Era, 2005 and Feingold, C, The Doctrine of Margin of Appreciation and the European Convention on Human Rights, Notre Dame L. Rev, vol.53, 1977-78, O'Donnell, T.A, The Margin of Appreciation Doctrine: Standards in the Jurisprudence of European Court of Human Rights, 4HRQ, 1982.

[41] For instance, Şahin v. Turkey Judgment, App. No. 44774/98, 10.Nov.2005, Köse and Others v. Turkey Judgment, App. No. 26625/02, 24.Jan.2006, Dogru v. France Judgment, App.no. 27058/05, 4. Dec.2009, Kervanci v. France, App. No. 31645/04, 4.Dec.2009.

[42] See the Auschwitzlüge law, BverfGE 90, 241, p.242, 1994. For further details on the criminalization of Holocaust denial see, Hennebel.L and Hochmann.T, Genocide Denials and the Law, 2011.

[43] See Poscher, R, Menschenwürde als Tabu, in Frankfurter Allgemeine Zeitung, 2.6.2004.

denial of truth. It is the affirmation of crimes against humanity and negation of human dignity. Laws against genocide, crimes against humanity and war crimes are matters of the international community as a whole.

Nonetheless, blasphemy and the denial of Holocaust have at least two things in common. Each provokes the religious and political sensitivities within the given society and the international community. And each is a manifestation of disrespect to the core cultural values, the observance of which is of utmost importance for the society and the state. To borrow a concept from Roy Preiswerk the term culture here refers to "totality of values, institutions and forms of behavior transmitted within a society. This wide concept of culture covers Weltanschauung, ideologies and cognitive behavior[44]" and shapes the state's religious, legal and political cultures. The values, in this sense, are often incorporated into the state's legal orders and each state is injured if a violation of these orders occurs.

Then, depending upon the country we are in, and the time we put the question the fundamental rights may be understood and limited differently. This is why, the Holocaust denial is criminalized among the perpetrators of the Holocaust more than any other country, just as the criminalization of blasphemy among Muslim societies. In this sense, the criminalization of blasphemy and the Holocaust denial is not only a restriction on "hate speech" based on race or religion or other traits, but it is necessary to protect public order and morality in given societies.

Two states, again democratic or non-democratic, can have the same general idea of the core human rights even though they disagree about the scope and limits of these rights, and even about whether certain rights belong to the list of human rights, or certain values

[44] Preiswerk, R, The Place of Intercultural Relations in the Study of International Relations, The Year Book of World Affairs 32, 1978, p. 251. See also, An-Na'im, A.A, Problems of Universal Cultural Legitimacy for Human Rights, in Muslims and Global Justice, An-Na'im, A.A (ed.), 2011, pp. 65-96.

have universal characteristics[45]. As Gerald Neuman argues, even the number of ratified core human rights treaties is not a safe indicator of respect for human rights[46]. Rights-protection, to some extent has different meanings in different states and each country may restrict the fundamental rights to a different degree for different reasons. Then, the question is not only whether the state respects the particular rights and liberties. Rather it is also, what the particular rights and liberties mean to the state[47]. This is exactly the point at which the universality of human rights faces the cultural particularities. When the state's religious, legal and political roots influence the practice of universal norms. In practice, thus, the implementation of universal norms might become subjective and not necessarily uniform.

It seems though that the idea of "the universality and respect for diversity"[48] can be assumed from the international law of human rights itself. The international human rights jurisprudence accepts state's diverse protections of human rights under specific conditions[49] and often makes reservations to treaties possible. The main international human rights treaties provide possibility for states to restrict certain fundamental rights and freedoms of individuals under certain conditions. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) allow certain restrictions on fundamental rights. Under the ICCPR the right to freedom of expression may be subject only to such limitations as are prescribed by law, and are necessary for the interest of national security or public safety,

[45] See Nickel, J, Human Rights, The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), 2017.

[46] Neuman, G.L, Human Rights, Treaties, and International Legitimacy, Forthcoming in Human Rights, Democracy, and Legitimacy in World of Disorder, Vöneky, S and Neuman, G.L (eds.), CUP, 2018.

[47] For more details, see Van Der Vyver, J.D, Universality and Relativity of Human Rights: American Relativism, Buffalo Human Rights Law Review, vol.4, 1998, pp.43-78.

[48] For more details on the issue, see Brems, E, Human Rights: Universality and Diversity, 2001.

[49] Legg, A, supra note 24, p. 37.

public order, the protection of public health or morals or the protection of the rights and reputations of others[50].

Yet, restrictions on fundamental rights should be "necessary in a democratic society"[51] and reservation to human rights treaties should be "compatible with the object and purpose of the treaty". This is why, that restrictions and reservations applied by majority of Muslim states based on their constitutional principles are often seen as invalid[52]. Of course, there is a potential for conflict between a Shari'a-based constitution and the human rights system. One reason is conflicts are more likely to arise between religious and liberal rules. This is particularly true in the relationship between the contemporary list of human rights and the Islamic legal tradition. The other reason, as mentioned above, is the legal and political culture of Muslim states and the role of the state in interpretation and practice of law.

Yet in practice some democratic states approach to international human rights law has been as much as manifestation of cultural relativism as any Muslim state[53]. There is also no notable difference between reserving Muslim states and those of democratic states that ratify without reservations but fail to implement the treaty obligations[54]. To less or greater extent both restrict the domestic implementation of human rights treaties. Moreover and more importantly, values of democratic societies may be tentative and subject to change due to internal and external factors.

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[50] ICCPR Article 19 (3): 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals. See Combating Defamation of Religion, A/HRC/ RES/7/19, 2008.

[51] UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34.

[52] See Mayer, A. E, Islamic Reservation to Human Rights Conventions: A Critical Assessment, Recht van de Islam 15, 1998, pp.25-45.

[53] Van Der Vyver, J.D, supra note 40.

[54] Lijnzaad, L, Reservation to UN-Human Rights Treaties, Ratify or Ruin? 1995, pp.1-12.

In Hertzberg et al. v. Finland 1982[55] the Human Rights Committee (HRC) accepted the Finnish government's justification that freedom of expression on issues related to homosexuality can be limited on the ground of public morals. In this case, Finnish government censured a radio program about job discrimination on the ground of sexual orientation, particularly homosexuals. The Government brought criminal charges against the editor of the program arguing that a Finnish Penal Code prohibits "publicly encouraging indecent behavior between persons of the same sex". Based on the argument that "public morals differ widely and there is no universally applicable common standard" the HRC for the first time prescribed "a certain margin of discretion[56]" for the state and found no violation of the ICCPR. The HRC, therefore, accepted the restriction on freedom of expression on issues associated with homosexuality as "necessary in democratic society" for protection of public morality[57].

What was considered as public morals in Finland in 1982, however, is no longer the case today, and the view of HRC seems discriminatory today[58]. But at that certain time, based on certain values the protection of public morality was a reasonable, objective justification for the restriction of a fundamental right. In the light of modern developments and the spread of secularism as a dominant legal standard the contemporary understanding of rights and rights-protection have been changed in many

[55] Hertzberg et al. v. Finland, Communication No. 61/1979; U.N. Doc. A/37/40, at 161, HRC 2nd April 1982.

[56] Hertzberg et al. v. Finland, Para. 10.3.

[57] Finland has been a liberal democracy since 1919.

[58] The International Commission of Jurists later in Fedotova v. Russia argued that Hertzberg v. Finland was not dispositive because: 1. Equality law, in the jurisprudence of the Committee and other human rights bodies, has developed significantly since April 1982 when the Views in Hertzberg et al. v. Finland were adopted. At that time, sexual orientation was not recognized as a status protected from discrimination and now it is. 2. Also since 1982, the Committee and other institutions have recognized that limitations on rights must not violate the prohibition of discrimination. Even a limitation with a permissible aim, such as the protection of public morality, may not be discriminatory 3. Conceptions of public morality are subject to change and what was considered justifiable with reference to public morality in 1982 is no longer the case today. Laws similar to paragraph 9 of chapter 20 of the Finnish Penal Code have since been repealed in States such as Austria and the United Kingdom of Great Britain and Northern Ireland. Furthermore, the Committee's jurisprudence reflects the evolution of the "public morals" conceptions, as does the case law of the European Court of Human Rights. See UN Human Rights Committee (HRC), Communication No. 1932/2010, 30 Nov 2012, CCPR/C/106/D/1932/2010.

secular systems. This is, however, not surprising. In the area of human rights the rights-protection system engage cultural diversity,[59] and the mechanism for implementation of human rights remains mostly, if not always, political rather than legal. In other words, the hegemonic language of international human rights law claims supremacy over the particularity of culture, while the cultural particularity often persists. The result may be disagreement between norms and hierarchical dissonance in values.

2. Subject and Object

The role of the state in practice of human rights law and Islamic law is the main focus of the present study. The study captures the shift to the more specific comparative study of human rights law and constitutional law based on Shari'a. It compares the structure and substance of the two systems and examines each system's claim of supremacy over the other. The basic argument of the study is, that the confrontation between Shari'a-based constitutional law and human rights law is contingent, not necessary. Rather, cultural values and political practices unique to each state have shaped and continue to shape the rights-protection system.

The object of this study is neither to condemn Shari'a-incorporated constitutional law nor international human rights law. The challenge is rather how to achieve the balance between universal and cultural norms and values. For this object the present study is divided into five chapters. Each chapter is designed to build an argument, which is relevant not only to the contribution to the subject at hand but hopes to develop new insights into the relationship between human rights law and Islamic law as a whole. With this aim, the first and second chapters are called, respectively, the spectrum of international human rights law and the spectrum Islamic law. To show a broad range of

[59] An-Na'im, A.A, Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment of Punishment, in Cross-cultural Perspective: A Quest for Consensus, An-Na'im, A.A (ed.) 1992, pp. 19-29.

varied but related ideas or objects in each system is the main reason for using the term "spectrum" here.

The first chapter, then, is devoted to the nature of international human rights law. Sources, purposes and functions of human rights law, the question of universality and relativism, the question of supremacy of international human rights and more importantly the role of the state in implementation of human rights are subjects of this chapter. The second chapter contributes a more nuanced understanding of the Islamic law as the source of legislation and the constitutional incorporation of Shari'a in Muslim states. The chapter provides an overview of the history of Islam, the rise of the Shi'a and Sunni schools of law, the formation and development of Islamic law as a system of rule of law, the influence of the European colonialism in the codification and implementation of Islamic legal tradition and the emergence of Shari'a-based constitutional law.

The third chapter pays special attention to question of supremacy and the confrontation between human rights law and Shari'ah-based constitutional law. By borrowing an idea from Gerald Neuman over the consensual and suprapositive aspects of fundamental rights, this chapter reveals reasons of conflicts, but also reasons of common grounds between Shari'a-based constitutional rights and international human rights.

With special reference to the constitutions of Iran and Afghanistan the focus of the fourth chapter is on the constitution building in the aftermath of socio-political transformations in the two modern Muslim states. The comparative perspective aims to show the scope and limits that each state applies to the fundamental rights upon its own legal culture. This comparison is also important to examine the influence of the Shi'a (Iran) and Sunni (Afghanistan) Islamic jurisprudence in interpretation of rights. The fifth chapter focuses particularly on the accommodation of human rights law and Shari'a-incorporated constitutional law. It provides legal methods of balancing rights, norms and values. The margin of appreciation doctrine and the German constitutional principle of "Völkerrechtsfreundlichkeit" (Friendliness towards international law) are suggested as

methods for developing judicial techniques, constructive interpretation and reducing dissonances between the two systems.

3. Terminology and Methodology

The diverse and distinctive features and functions of "human rights" and "Shari'a" may lead to ambiguity and different understanding of the subject. In order to elucidate the subject there is a need to clarify the terminology.

The term international human rights law refers to the fundamental rights and freedoms set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The rationale for selecting the ICCPR is the legally binding nature of the Covenant. It is also because Iran and Afghanistan as case studies have ratified the ICCPR without any reservation.

The English term Islamic law is used to denote the same meaning as Shari'a. Islamic law or Shari'a in its broad definition consists two principles: Islamic legal and ethical traditions. In this study the classical Islamic theory and the modern Islamic theory are clearly distinguished. The reason for distinguishing between them is the obvious difference between interpretation and practice of Islamic law in the early history of Islam and in the modern Muslim states. The term Shari'a-based constitutional law is used to describe the legal characteristic of a national constitutional law that emanate from Shari'a and changed and challenged by Muslim states.

Comparative legal study raises a number of questions about different kind of methodologies, explanatory, normative, hermeneutic, logical or evaluative[60]. Yet, sometimes there is no bright line between various types of legal research. The process of legal analysis in the present work involves description (interpretation) and

[60] For more on this issue see, Hoecke, M.V (ed.), Methodologies of Legal Research, Which kind of Method for What kind of Discipline? 2011. See also, Taylor, T.R, Methodology in Legal Research, Utrecht Law Review. 13 (3), 2017, pp. 130-141.

systematization (theory building)[61]. Both theoretical and methodological approaches applied are closely interrelated to the subject and object of the study. Comparative study of the constitutional law of Iran and Afghanistan are designed to support the central argument. The research design is accordingly informed by literatures from the principles of international human rights law, Islamic legal and ethical tradition and the modern Islamic jurisprudence.

It is improbable, if not impossible, to deal with each system of law as a whole. With this knowledge, this work is an attempt to bring a moderate perspective to the question of incompatibility of Islamic law and international human rights law. This is first and foremost a legal comparative study, not an attempt to defend certain religious beliefs against current and common misunderstandings. It permits readers to explore the possibility that the confrontation between Islamic law and international human rights law is not always fixed. Rather it is subject to change, review and development. The following chapters reflect a large number of questions that scholars of this field have raised earlier. I do not claim to make a completely innovative contribution to the ongoing debate about the relationship of international human rights law and Shari'a-based constitutional law. However, a few ideas, the most of the emphases and all mistakes are my

[61] Hoecke, M.V, Ibid.

CHAPTER I

THE SEPCTERUM OF INTERNATIONAL HUMAN RIGHTS LAW

The representation of human rights in international treaties is the beginning of the legalization of human rights. The growing influence of human rights law on national legal systems on the one hand, and the role of states in implementation of human rights on the other hand makes the interaction and confrontation between the two systems inevitable.

The interaction between national law and international normativity[62] causes the evolution in legal structure and practice of human rights law. The state influences the way in which the law interpreted and implemented. Each state has different legal tradition and political interest that impact the national practice of international law. For understanding the international law of human rights and its relationship with national law there is a need to identify the source and the legal nature of rights[63]. This identification reveals harmonies and dissonances between the two systems. It helps to recognize the particularity of each system and facilitates the dialogue between them. Despite the attention given to human rights law in academic and public discourse it remains difficult to provide a comprehensive overview of the legal scope and object of human rights. This chapter tries to shed light on the distinctive legal features of contemporary human rights law.

1. Human Rights as Law

In order to have binding effects, human rights are treated as legal rights[64]. Human rights raise the correlation between being human and having rights[65]. All members of the

[62] Addo, M, K, The Legal Nature of International Human Rights, 2010, Pp.153-212

[63] See Shelton, D. and Gould, A, Positive and Negative Obligations, in The Oxford Handbook of International Human Rights Law, Shelton, D, (ed.) 2013, pp.562-583.

[64] See Besson, S, Justification, in International Human Rights Law, Moeckli, D et al (eds.), 2014, pp. 34-52.

human family are entitled to human rights because they are human beings, and humans are inherently entitled to human rights[66]. Rights in this sense root in the dignity of the human being and refer to the equal and inalienable rights. These conceptions are based on natural law that has been reflected in the key human rights treaties[67]. This, however, provides necessary but not sufficient basis for the conceptual understanding of human rights as law.

In the strict legal sense, human rights are not abstract concepts[68]. The law of human rights emanates from the international legal norms. It includes a variety of normative concepts and legal concerns, which have been changed and challenged over time and space. The legal feature and function of human rights has increasingly been developed and reformulated since the end of the Second World War. This leads to the evolution of international human rights, which is largely affected by the role of states and national practices of these rights.

Human rights, however, date back to the earlier history. They have roots in moral norms, which are above the legalized human rights[69] and remain valid independently from legal recognition and codification. The Code of Hammurabi[70], the Cyrus Cylinder[71], the Hungarian Golden Bull of 1222[72] and the Magna Carta[73] are instances in this respect.

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[65] Donnelly, J, Universal Human Rights in Theory and Practice, 2013, pp.10-11.

[66] Ibid.

[67] Fore more details on the relation between natural law and human rights, see Lisska, A.J, Aquinas's Theory of Natural Law: An Analytic Reconstruction, 1979. See also, Finnis, J, Natural law and Natural Rights, 1980.

[68] See Tomuschat, Ch, Democracy and the Rule of Law, in The Oxford Handbook of International Human Rights Law, Shelton, D (ed.), 2013, pp. 469-96.

[69] Donnelly, J, supra note 65, pp.11-13.

[70] See e.g. Horne, Ch. F, The Code of Hammurabi (Forgotten Books), 2007.

[71] See e.g. Finkel, I, The Cyrus Cylinder: The King of Persia's Proclamation from Ancient Babylon, 2013.

[72] For more on the history of the Hungarian Golden Bull, see Cowley, M, The Golden Bull, 2012.

[73] Jones. D, Magna Carta: The Birth of Liberty, 2015, pp.123-145.

Moral rights constitute the basis of the contemporary human rights law, while the latter takes priority over the former in the legal practice[74].

Human rights are best known for being both moral and legal rights. The preambles of core international human rights instruments have explicitly justified legal human rights by reference to moral justification[75]. Moral justification is used for interpretation and justification of human rights law[76]. By recognizing moral rights in the key international treaties human rights have been given legal effects. This brings the moral values to the practical process, which is probably one of the most important outcomes of the legalization of human rights[77]. The justification of human right as law, then, requires the understanding of both moral and legal dimensions of rights. However, not all moral values protected by human rights law, and not all laws of human rights are in harmony with moral rights. The international law of human rights uses the moral justifications to strengthen its legal entitlement[78]. There is, however, a fine but significant distinction between the two dimensions. The basic difference between two categories of rights lies in the legal enforcement. This derives from the relationship between law and moral standards in general and does not devote to human rights law. The legal enforcement affects the efficiency of rights, although it is not important to their existence[79]. That is for reasons of efficiency that human rights as law and human rights as moral norms are separated.

[74] See Nickel, J, Human Rights, The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.) 2017.

[75] See Besson, S, supra note 63, p. 35. See also ICCPR and ICESCR preambles: "Recognition of inherent dignity and of the equal and inalienable rights of all members of the human families is the foundation of freedom, justice and peace in the world".

[76] Wellman, Carl, The Moral Dimensions of Human Rights, 2011, pp. 71-83.

[77] Ibid.

[78] Ibid.

[79] Ibid. p.35.

The foundations of internationally recognized human rights law are to be found in the UN Charter[80] and the UDHR. The contemporary law of human rights has been developed through the UN human rights treaties and international instruments. It reflects a number of subject-specific treaties to which states may become party. The 1966 International Covenants are the cornerstone of legally binding treaties. The International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols and the International Covenant on the Economic, Social and Cultural Rights (ICESCR) both identify the fundamental rights of individuals. They deal with the rights involved in the UDHR and translated them into the superlative most legally binding form. In addition to the UDHR, ICCPR and its two Optional Protocols and the ICESCR the core human rights treaties are listed as follow: the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Forms of Discrimination against Women 1979 and its Optional Protocol, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and its Optional Protocol, the Convention on the Rights of the Child 1989 and its two Optional Protocols, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, and the Convention on the Rights of Person with Disabilities 2007[81].

The UDHR, two International Covenants and subsequent international human rights instruments agree that human rights drive from the inherent dignity of the human person.[82] However, possessing a right based on the inherent dignity does not guarantee

[80] UN Charter Art 1(3): "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

[81] The Core Human Rights Treaties, Office of the United Nation High Commissioner for Human Rights, United Nations Publication, 2006, pp. 1-175.

[82] See ICCPR and ICESCR preambles: "Recognizing that these rights derive from the inherent dignity of the human person."

the capacity to enjoy the international law of human rights[83]. According to the General Comments of the Committee on CESC the principle of human dignity is linked to fulfillment of other Covenant rights[84]. The Covenants rights impose obligations on a sovereign state "to respect and to ensure individuals rights within its territory"[85]. International human rights law is however beyond treaties[86].

By virtue of art 38(1)(b)(c) and (d) of the ICJ Statute three other major sources of international law and therefore human rights law are customary international law, general principles of law, judicial decisions and writing of jurists. Customary international law is defined as a general practice of law. A jus cogens norm or a peremptory norm of general international law has root in customary international law. However, it considered as an independent source of human rights law, which raises the question of the hierarchy of norm in international law[87]. It refers to fundamental values of the international community from which no derogation is permitted[88]. States are bound by customary international law and jus cogens norms whether or not they are party to a particular treaty. All sources of human rights strengthen the normative aspect of human rights. They are key factors in the distinction between the legal and moral dimensions of human rights specifically in case of conflict.

A right contains a variety of elements according to Hohfeld's theory[89]. The four basic elements of rights are the liberty, the claim-right, the power and the immunity right.

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[83] McCorquodale, R, The Individual and the International Legal System, in International Law, Evans, M, D (ed.) 3rd Ed, 2010, pp. 280-301.

[84] Shelton, D, L, Advanced Introduction to International Human Rights Law, 2014, pp.7-13

[85] The ICCPR Art.2: (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[86] The ILC in Article 33(2) references to

[87] See Chinkin, Ch, Sources, in International Human Rights Law, Moeckli, D et al (eds.), 2014, p. 84.

[88] VCLT, Art. 53.

[89] The four elements of rights are known as "the Hohfeldian incidents" discovered by American theorist Wesley Hohfeld. For more details on the basic components of rights see, Hohfeld, W, Fundamental legal conceptions as applied in judicial reasoning, Campell, D (ed.) 2001.

Right may refer to one's liberty to do something. It may include a claim that others have a duty not to interfere[90]. Sometimes it indicates one's power to create a legal relationship[91], while sometimes it reflects one's immunity against others[92]. To have a right to x is to be entitled to x[93]. Entitlement means the right holder has a claim to enjoy his rights. The term entitlement refers to the status in which individuals possesses the right. The enjoyment of a right is understood as the ultimate aim of right-holders for having a right. Claim of a right raises the obligation of duty-bearer in the enforcement of right. Claim of having a right also holds true for having a human right, where it is claimed that rights are universal and right-holders are inherently entitled rights.

According to the natural law theory it is plausible to claim human rights as the inherent rights of all human beings[94]. All individuals are assumed to be equal and to have inalienable rights. The earlier discussion on human rights law suggested that both moral and legal dimensions are used to justify human rights. Then, the enjoyment of human rights law raises a moral and a legal obligation of duty-bearer. It is a moral obligation because it derives from universal morality. It is legal because the enforcement of rights remains the obligation of the duty-bearer. To "have a human right to x" therefore has the same legal meaning as "having a right to x".

This argument lies in the legal reasoning. Human rights legal reasoning is the right-based reasoning. The law of human rights imposes obligations on states. Individuals are rights-holders and the state is the duty-bearer. The practice of international human rights law is the duty of the state. That is, the sovereign state that has the responsibility to protect and

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[90] See Raz, J, Ethics in the Public Domain, 1994.

[91] Shestack, J. J, The Philosophic Foundations of Human Rights, in Human Rights Quarterly, vol. 20, no.2, 1998, p.203.

[92] Some scholars have restricted the category of rights only to liberty rights and claim rights, for example, see Jones. P, Rights, 1994.

[93] Donnelly, J, supra note 65, p.8.

[94] See Nickel, J, Making Sense of Human Rights, 1987, p.44.

of course the potential to violate human rights law[95]. In this sense, everyone has the inherent right to a human right means that the state has the obligation to protect human rights within its territory and jurisdiction[96].

This includes the positive and negative obligations of state. The state as the duty holder has the negative obligation not to interfere with the fundamental rights of individuals and not to violate their human rights. It has also a positive obligation to fulfill and protect human rights[97]. Seen from this perspective, rights and obligations allow the human rights law system to function. However, neither the claims of the right holders nor the obligations of the duty-bearer guarantee the enjoyment and the effective enforcement of rights.

3. Human Rights Law Between Universality and Relativism

It is assumed that the legitimacy of human rights lies in the question of universality[98]. All member states of the international community recognized the rights and freedoms listed in the UDHR. Every individual, as a rights holder, has legitimate claims for rights and freedoms set forth in the Declaration[99]. Nonetheless, states have wide discretion in implementation of human rights obligations, and no state fully complies with its obligations in practice.[100]

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[95] See Donnelly, J, State Sovereignty and Human Rights, http://mysite.du.edu/~jdonnell/papers/hrsov%20v4a.htm [Accessed 24 Feb 2016]

[96] Donnelly. J, supra note 65, p.34. See also the ICCPR Art.2.

[97] For more on positive and negative obligations in international human rights law see, Shelton, D. and Gould, A, supra note. 63.

[98] See Heyns, Ch and Killander, M, Universality and the Growth of Regional Systems, in The Oxford Handbook of International Human Rights Law, Shelton (ed.), 2013, pp. 670-675.

[99] Henkin, L, The Universality of the Concept of Human Rights, The Annals 23ft he American Academy of Political and Social Science, Vol. 506, Human Rights around the World, 1989, pp. 10-16.

[100] Neuman, G.L, Human Rights, Treaties, and International Legitimacy, Forthcoming in Human Rights, Democracy, and Legitimacy in World of Disorder, Vöneky, S and Neuman, G.L (eds.), CUP, 2018.

What states understand by universality of rights and freedoms is not the same. Cultures, religions, politics and legal cultures lead to different understandings of the universality and different practices of human rights law. The varied arguments relating to the universality of human rights such as: human rights are universal. Human rights are relative universal. Human rights are neither relative nor universal. Human rights are beyond universality and relativism indicates lack of consensus on this issue[101]. Then the questions are: what does universality of human rights mean? Does universality indicate the scope of applicability or the scope of enforceability? Is universality against cultural diversity? What does cultural diversity mean in this context? Does it mean that culture is the only source of moral and legal rules? Does the acceptance of the cultural diversity make the implementation of human rights impossible? Is it legally justifiable to claim that human rights are in some sense universal and in other sense relative?

2.1. The Concept of Universality

It is incorrect to claim that human rights are a Western creation[102]. It, however, is correct to claim that the contemporary system of international human rights law is a Western invention. As discussed in the beginning of this chapter, human rights have roots in every religion, in every tradition and every civilization[103]. But the idea of human rights as law historically emerged during 20th century as the achievement of the age of enlightenment in Europe[104] and in the aftermath of the World Wars. Viewed from this perspective, the universality of human rights might be arguable. If human rights are protected in every

[101] For instance, see Renteln, A.D, International Human Rights: Universalism Versus Relativism, 1990. Henkin, L, The Universality of the Concept of Human Rights, in The Annals of the American of Political and Social Science, 1989, pp. 10-16. Peerenboom, R, Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia," 2003. Hinkmann, J, Argumente für und wieder die Üniversalität der Menschenrechte, in Menschenrechte interkulturell, Wolf, J.C, 2000, pp.185-206.

[102] Brems, E, Human Rights: Universality and Diversity, 2001, pp.7-8.

[103] See, Alston, PH, Does the Past Matter? On the Origins of Human Rights, 126 Harvard Law Rev, 2043, 2013, and also Martinez, J, Human Rights and History, Responding to Philip Alston, Does the Past Matter? On the Origins of Human Rights, 126 Harvard Law Rev. F. 221, 2013.

[104] For more details on the history of human rights, see Ishay, M.R, The History of Human Rights, From Ancient Times to the Globalization Era, 2008.

civilization then each civilization regards its own culture superior. If the West placed human rights at the center of the international legal system, as a matter of historical fact, then the Western view of human rights dominates[105]. Human rights, then, are either ethnocentric or hegemonic, and neither the origin nor the substance of human rights law is universal.

Though, proponents of the idea of universality find this argument misleading. On the contrary they argue that where historically human rights come from does not alter the fact that human rights are universal. According to them, it is true that the conception of human dignity has existed in the history of many cultures. But the legal recognition of human rights as equal and inalienable rights for all has not existed prior to the 20th century[106]. This is why the international human rights system came into existence, in order to legally protect human rights. The fact that the idea of international human rights law first emerged in the West does not mean that the Western culture, or any particular culture, dominates all people and all cultures around the world[107]. Moreover, the UDHR as the foundation of international human rights law has not exclusively been drafted by the Western states. Many negotiators representing many countries have contributed in the drafting process of the Declaration[108]. Latin American and Muslim states, for instance, provided more than half of the votes for its adoption[109].

The universality of human rights derives from the idea that "all human beings are born free and equal in dignity and rights"[110]. Every individual is entitled to human rights by virtue of being human. Thus, human rights are universal in the sense that they are

[105] Donnelly, J, supra note 65, p. 64.

[106] See De Sousa Santos, B, Toward a Multicultural Conception of Human Rights, in Moral Imperialism: A Critical Anthology, Berta Esperanza Hernandez-Truyol (ed.), 2002, pp.39-58.

[107] See e.g. Pollis, A, and Schwab, P, Human Rights: A Western Construct with Limited Applicability, in Human Rights: Cultural and Ideological Perspective, Pollis, A and Schwab, P (eds.) 1979.

[108] For more on the history of the UDHR, see Morsink, J, The Universal Declaration of Human Rights: Origins, Drafting and Intent, 1999.

[109] See, Waltz, S, Universal Human Rights: The Contribution of Muslim States, Human rights Quarterly, vol.26, 2004.

[110] UDHR Art.1.

applicable to all people and all nations, in other words, "all human rights for all"[111]. That is, if human rights are inherent to the dignity of every human person, then neither cultural diversity nor the Western values can justify the rejection of universality[112]. The idea of universality includes a claim[113]: all people are equal in dignity and are entitled to human rights "without distinction of any kind such as race, color, sex, language, religion, political, or other opinion"[114].

This idea aims to promote human dignity and to protect human life and the common good all around the world. For the same reasons Art 2 of UDHR declares "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty". This also raises the normative concept of universality. The universality of human rights is not only a conceptual term indicating that human rights are equal and inalienable[115]. It has a particular legal meaning to protect internationally recognized human rights set forth in the UDHR. The UDHR provides the legal basis for all subsequent international treaties, particularly for the two international Covenants.

Two different universality theories have emerged from the Declaration. One has derived from the universal moral standards and the other from positive law[116]. In this respect Morsink raises the doctrine of inherent human rights[117]. He argues that the concept of inherent human rights is made up by two different theses of universality. One theory is,

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[111] Nowak, M, Introduction to the International Human Rights Regime, 2003, p. 26.

[112] See, Magnarella, P.J, Questioning the Universality of Human Rights, in Human Rights and Human Welfare, vol. 3:1, 2003. Pp. 15-25. For an online copy of document, see http://www.du.edu/korbel/hrhw/volumes/2003/magnarella3-1.pdf

[113] Brems, Eva, supra note 101, p. 5.

[114] UDHR Art. 2.

[115] Donnelly, J, supra note 65.

[116] See Magnarella, P.J, supra note 112.

[117] Morsink, J, supra note 108, p. 5.

that humans are entitled to human rights by virtue of their humanity[118]. In other words, human rights did exist before the foundation of any legal systems, and humans have them from the birth. The second thesis is that, every individual obtains his rights through a system of law. Individuals as the right holders cannot exercise their inherent human rights based on moral rights; unless the international community recognizes these rights and national legal systems enforce them[119]. Morsink defends the idea that human rights are inherent in human being and not the result of legal systems. He supports the metaphysical nature of the universal human rights.[120]. He finds the metaphysical thinking as "an essential component of fight against suppression in the globe". By taking the philosophical roots of the Declaration he emphasizes the need to think beyond political and judicial boundaries. This view gives universal moral rights absolute priority over other norms. It holds cultural diversity irrelevant to the moral rights[121]. If there are human rights by virtue of humanity, then human rights cannot be relative upon cultures.

Nevertheless, what philosophically is justifiable is not necessarily practically feasible. Suppose that individuals can exercise their fundamental rights through the international enforcement mechanisms[122], and the universality justifies the wide scope of application of human rights. Despite, the state's diplomatic activity in support of human rights engages cultural diversity[123].

2.2. The Concept of Relativism

Do cultures influence the practice of the universal human rights? The answer is yes and no. One answer is yes, because norms are affected by culture and cultural values hardly

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[118] Ibid.

[119] Magnarella, P.J, supra note 112, p.16.

[120] Morsink, J, supra note 108, pp. 17-54.

[121] Donnelly, J, supra note 65, p.90.

[122] See Magnarella, P.J, supra note 112, p.16.

[123] See Toope, S.J, Cultural Diversity and Human Rights, McGill Law Journal, vol.41, no, 1, 1997, pp.169-185.

change. Therefore, values of a society make essential differences in the practice of universality. No, because cultures evolve over time. Sometimes cultures do not play a major role in implementation of universal norms.

Nevertheless, despite states' common convictions of the core of human rights, there are disagreements over the scope of implementation of these rights. Relativism is the view acknowledging the existence of diverse reflections on universal human rights and disagreements over their practices. It raises the relativity of standards of reasoning and process of justifications about the common concept of universality[124]. Relativism refers to the priority that the state gives to its norms and values to determine the scope of rights in a given society[125]. Norms and values represent what is good and desirable in the society[126], which may include cultural, religious or even political values in a specific context[127]. In principle, relativists try to show a degree of diversity in beliefs and values. They claim that there are "genuine disagreements about the common subject matter and shared content"[128]. In other words, different understandings and the lack of consensus on the common subject reflect differences in theoretical positions and practical approaches. This is what is called "relativism about truth[129]". The universality, then, is relatively true in the sense that it might be relative to different perspectives. Many perspectives accept universality of human rights, while their scope of applicability might vary. Some give priority to human rights law over national law, while some do not.

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[124] Baghramian, Maria and Carter, J. Adam, "Relativism", The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), 2005.

[125] Teson, F.R, International Human Rights and Cultural Relativism, Virginia Journal of International Law, 25, 1984-5, pp. 869-71.

[126] See Williams, R.M. Jr, American society: A sociological interpretation, 3rd Ed. 1970, and Williams, R.M. Jr, The Concept of Values, in Sills D.L (ed.) International Encyclopedia of the Social Science, vol.16, 1968, and also see Rokeach. M, Understanding of Human Values, Individuals and Societal, 1979.

[127] See Adami. R, Reconciling Universality and Particularity through a Cosmopolitan Outlook on Human Rights, in Cosmopolitan Civil Societies Journal, vol.4, No.2, 2012, pp. 22-37.

[128] See Lynch, A.P, Truth Relativism and Truth Pluralism, in A Companion to Relativism, S. D Hales (ed.), 2011. See also Williams, B, The Truth in Relativism, Proceedings of the Aristotelian Society, vol. 75, 1974-1975, pp. 215-228.

[129] Ibid.

The Universal Declaration presents a list of human rights without any cultural hegemony. However, the question of relativity of human rights is raised during the drafting of the UDHR. The UN Commission on Human Rights (CHR) faced a theoretical impasse concerning universal principles and their interpretations while drafting the Declaration. For solving this problem, scholars from various parts of the world were asked to send their opinions to the UNESCO Committee on the Philosophic Principles of the Rights of Man. The UNESCO Committee provided the report based on different contributions including contributions on "the rights of man and Islamic tradition", "human rights in Chinese tradition" and "human freedoms and the Hindu thinking"[130]. The Committee was convinced that the members of UN share common thoughts, which are "stated in terms of different philosophic principles and on the background of divergent political and economic systems"[131]. Subsequently, in the early 1990s, international discussions on the protection and promotion of indigenous people raised the fact that a careful examination of universality requires the understanding of cultural relativity[132]. Afterward the Vienna Declaration 1993[133] also specifies "the significance of national and regional particularities and various historical, cultural and religious background."

Societies respond to the universality of human rights in different ways. Non-Western societies, for example, often identify the concept of universality within the framework of cultural diversity, that, many Western scholars take as a violation of human rights[134].

[130] Adami. R, supra note 127.

[131] See Report of UNESCO Committee on the Philosophic Principles of Rights of Man to Commission on Human Rights of United Nations, July 1947.

[132] See Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1, 1994.

[133] See Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Art.5: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".

[134] See e.g. Mayer, A.E, Islam and Human Rights, Traditions and Politics, 2013.

However, the effect of diversity, cultural or legal, on the implementation of universal norms is not limited to the non-Western countries. The existence of regional human rights instruments and their own mechanisms for the implementation of human rights strengthen this claim. The adoption of the European Convention on Human Rights and Fundamental Freedoms (ECHR) 1950, the Inter-American Convention on Human Rights (ACHR) 1969, the African Charter on Human and People's Rights (AfChHPR) 1981 and the Cairo Declaration on Human Rights in Islam (CDHRI) 1990 in parallel with the international human rights instruments shows the tendency of Western and non-Western states to give priority to their legal traditions when it comes to the practice of human rights. They often observe the core human rights treaties through the lenses of their national values. The French Republic emphasizes on the principle of laïcité. The Islamic Republic of Iran gives priority to the principles of Islamic law. Then, regardless of the universal recognition of the core human rights treaties, the implementation of rights is affected by the state's values.

Yet, the acceptance of cultural relativism does not necessarily cause the rejection of universality. Human rights law is a point of convergence between universality and relativism. This leads to the concept of the universality and respect for diversity[135].

How can human rights be both universal and particular? And to what factors might the universality be relative?

Particularity and universality are although distinct but related. In some sense human rights are universal in other sense they are relative[136]. They have universal nature but relative interpretations. They are universal in the sense that all individuals possess these rights. They are relative in the sense that the enforcement of these rights lies in authority of the sovereign state[137]. Each state has its own cultural values and legal tradition, which

[135] Brems, Eva, supra note 102, pp. 180-1.

[136] See Donnelly, J, Universality, in Encyclopedia of Human Rights, David P. Forsythe (ed.) vol.1, 2009, pp. 261-70.

[137] Ibid.

has influence on the understanding and practice of norms. Human rights are then relative to the diversity of values. Jack Donnelly explores the sense that human rights can be and cannot be universal. In his work "The Relative Universality of Human Rights"[138] he adopts several different senses of universal human rights. In his view human rights are tied to the claim of universality, but some versions of universality are not theoretically or even politically defensible. He claims that universality is "contingent and relative" depending on whether states decide to respect the Universal Declaration and the Covenants as authoritative[139]. He distinguishes between conceptual and substantive universality, universal possession and universal enforcement, historical or anthropological, functional, legal international, overlapping consensus and ontological universality.

The relative universality of human rights as Donnelly argues is a form of universalism that leaves considerable space for different forms of diversity and important claims of relativism[140]. Despite, he claims that the particularity of human rights is compatible with the universality of human rights. To support his argument Donnelly states "no particular culture or comprehensive doctrine is by nature either compatible or incompatible with human rights. It is a matter of what particular people and societies make of and do with their cultural resources. Cultures are immensely malleable…[141]." Donnelly, however, argues at the same time that no society or civilization had even vision of equal and inalienable human rights before the 17th century[142]. Donnelly claims that neither of Islamic, Confucian and African societies developed important ideas of human rights prior

[138] See Donnelly, J, The Relative Universality of Human Rights, Human Rights Quarterly, 2007, pp. 281-306. For a critique of Donnelly's theory, see Goodhart, M, Neither Relative nor Universal: A Response to Donnelly, Human Rights Quarterly, vol. 30, no.1, 2008, pp. 183-193.

[139] Ibid, p. 289.

[140] Ibid, pp. 281-2.

[141] See Donnelly, J, Universal Human Rights in Theory and Practice, 3rd Ed, 2013, p. 107.

[142] Donnelly, J, supra note 138, p.284-5.

to the 20th century and gives emphasis that the modern West has developed ideas of natural and human rights.

This claim is partly true but might be misleading. It is partly true because human rights as equal and inalienable rights for all human beings developed during the early modern era in the West. Enlightenment philosophers such as Montesquieu and Rousseau influenced traditional legal thoughts of Western. The Virginia Declaration of Rights 1776 and Thomas Jefferson's Declaration of Independence 1776 inspired the French revolutionaries to adopt the Declaration of the Rights of Man and Citizen of 1789. Based on reason rather tradition the Declaration of the Rights 1789 proclaimed inalienable and sacred rights of men[143].

The claim might be also misleading because human rights are a dynamic concept. The UN concept of human rights acknowledges that in all times and places people demand minimum standards of behavior by governments towards their own citizens[144]. The nations' understandings of what equal rights are has developed based on their culture. Then how do we come to know that civilizations did not understand the concept of equal and inalienable rights prior to the 17th century while human rights are a dynamic concept and vary with time?

Dynamic like universality is a characteristic of human rights. The vision of civilization of equal and inalienable human rights cannot be assessed with the contemporary understanding of human rights. It requires a comprehensive analysis of many dimensions of each society, civilization and culture. Societies' understanding of the concept of human rights is constantly changing. What has been understood and been practiced as equal and inalienable rights were different than those that currently exist. Up to now states struggle to understand the concept of human rights and to get equal and inalienable

[143] See e.g. Jellinek, G, The Declaration of the Rights of Man and of Citizens, translated by Farrand, M, 2008.

[144] See Messer, E, Anthropology and Human Rights, Annual Review of Anthropology, 1993, pp. 221-49.

rights into practice. And up to now states have different understanding of the concept of human rights.

It is often overlooked that religion, moral philosophy, and anthropology constitute the foundations of human rights law. If human rights are based on moral and religious thoughts then it is fair to say that they have been practiced across time and space. For instance, the doctrine of universal brotherhood in African[145] and Indian[146] ethical thoughts and among the Islamic principles[147] reflects the concept of equality and inherent rights. The doctrine can be interpreted as meaning that "all human beings are one species". However not exactly identical to Enlightenment ideas, the universal brotherhood refers to a union of men and women with common rights and duties towards one another. So quite contrary to Donnelly, civilizations and cultures had attitudes towards human rights. But of course they understood human rights to the best of their knowledge and to the extent of their experience. Relativism is neither the denial of the universality nor compatible with it. Rather it is the view that the universality is relative to a given framework of assessment[148].

The concept of relativism suggests that at least to some extent and in some sense each country has its own particular norms and values. It argues that no two countries are exactly the same in cultural values, social structure, legal system and political institutions[149]. It concludes that particular values that are unique to each community lead to different perceptions of international morality and different practices of universal legal norms. Relativism in this sense includes a wide range of factors. The focus in this section is on three factors of religious culture, political culture and legal culture. The proposed

[145] Gyekye, Kwame, African Ethics, The Stanford Encyclopedia of Philosophy (Fall 2011 Edition), Edward N. Zalta (Ed.)

[146] See Tiwari, K, of sical Indian Ethical Thoughts, A Philosophical Study of Hindu, Jaina and Bauddha Morals, 2007.

[147] See e.g. Naik, Z, Universal Brotherhood, 2009.

[148] Baghramian, Maria and Carter, J. Adam, supra note 124.

[149] See Friedman, L.M, The Legal System: A Social Science Perspective, 1975, p.199.

elements are distinct but usually interact. Each element provides supportive reasons to the claim of relativism. That is, universal standards and moral values are sometimes products of their own time and place.

2.2.1. Religious Culture and the Universality of Human Rights

One of the important factors in the study of relativism is religious culture. In general, two common views exist with respect to the relationship between religion and human rights. One view sees religion as a foundation of human rights law and essential to the possibility of these rights[150]. All major religions and the early moral philosophies consider religions as the foundations of human rights. John Locke is among many political philosophers that his philosophical thoughts are a reflection of his theological position[151]. In Lock's theory of "State of Nature" man exists in a world created by God for God's purposes, but governments are created by men in order to further those purposes[152]. As Lauren observed in his book The Evolution of International Human Rights: "Despite their vast differences, complex contradictions, internal paradoxes, cultural variations and susceptibility to conflicting interpretation and argumentation, all of the great religious traditions share a universal interest in addressing the integrity, worth, and dignity of all persons and consequently the duty towards other people who suffer without distinction[153]."

The second view sees religion as a threat to the realization of human rights law. By emphasizing on Islam, this view alleges incompatibility between international human

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[150] Amesbury, R, Universal Human Rights and Religious Particularity, in The God of Love and Human Dignity: Essays in Honor of George M. Newlands, Middleton, P (ed.), 2007, pp. 65-79.

[151] Leidhold, W, Vernunft, Erfahrung, Religion, Anmerkungen zu John Lockes "Reasonableness of Christianity", in John Locke: Aspekte seiner theoretischen und praktischen Philosophie, Aufklärung, 2006, pp. 159-178.

[152] See Tuckness, Alex, Locke's Political Philosophy, The Stanford Encyclopedia of Philosophy, 2016 Ed, Edward N. Zalta (ed.), See also Dunn, J, The Political Thought of John Lock, 1969 and Forde, S, Natural Law, Theology and Morality in Locke, in American Journal of Political Science, 45, 2001, pp. 396-409.

[153] Lauren, P.G, The Evolution of International Human Rights: Visions Seen, 2nd Ed, 2003, p.5.

rights law and religion. This leads to attempts to a more secular interpretation of human rights law. For instance, Elie Wiesel the Nobel Peace Prize laureate called UDHR as the "sacred text of a world-wide secular religion". The primary of a secular interpretation of human rights over a religious one strengthens the idea of religious neutrality. It has resulted in creating a distance between the international legal system and religions. Nonetheless, the Human Rights Committee declares, "an official or state religion in itself is not opposed to human rights"[154]. The UDHR Art 18, the ICCPR Art 27, the ECHR Art 10, the ACHR Art 12 and the AfChHPR Art 8 also guarantee the right to freedom of religion while the separation of religion and state is not their requirement[155].

Religion and human rights are interconnected but distinct. They are connected through a common source, while they are distinct in some other sources, in scope and in function. They both have roots in morality. They both determine rights and duties of individuals. They share core principles of respect for human dignity. Religion takes many forms and has variable roles in human rights thought. Like religion, human rights vary in concept, meaning and status and influence religious practices. The dynamic nature of religions and human rights provides potency for both common values and profound differences. However, recently the international community emphasizes on conflict over consensus. This view is probably the result of the rise of tensions between religion and human rights in the current century. Despite the secular interpretations of human rights, religions provide a widely accepted foundation of human rights law[156]. Religion may shape, legitimate and come in conflict with human rights. There is neither a complete

[154] HRC, General Comment No.22, The Right to Freedom of Thought, Conscience and Religion, Art.18, 1993, Para. 9 and 10.

[155] See Van Kempen, P.H, Freedom of Religion and Criminal Law: A Legal Appraisal, From the Principle of Separation of Church and State to the Principle of Pluralist Democracy? in Tensions within and between Religions and Human Rights, Johannes A, van der Ven and Hans Georg Ziebertz (eds.), 2008, pp. 27-66.

[156] Green, M.Ch and Witte, J, Religion, in The Oxford Handbook of International Human Rights Law, Shelton (ed.), 2013, pp. 9-31.

compatibility nor an absolute contradiction between any religion and human rights[157]. Religion and human rights may be congruent in a sense that both address the question of justice, rights and responsibilities. Both base their arguments on similar moral reasons and this sometimes makes a clear distinction between religion and human rights difficult. But sometimes they are incongruent[158]. That is, the relationship between religion and human rights is based on mutual influence[159]. Interaction, confrontation and tension are outcomes of this mutual influence.

Religion provides the foundation for human rights law, while it sets certain limits on the practice of human rights. Human rights law protects religion against the power of the state, while it affects its practice. Religion here refers to religious culture. The set of long-time beliefs emanates from religious beliefs that have become social norms. The influence of religious culture specifically emerges in traditional societies where the law is based on religious thoughts and practices. In traditional legal systems human rights would be understood, interpreted and implemented within the context of traditional values and religious doctrines. Religion-based reservations made by the state upon the ratification of the international treaties. At this point religious culture comes into conflict with the practice of the universality.

The expansion of the list of fundamental rights adds more complexity to the nexus between religion and international human rights law. The contemporary list of basic rights includes rights and liberties that are inconsistence with many religious values. A good example in this respect can be human rights recognition of LGBT rights. Human rights law legally supports same-sex unions, while homosexuality is often understood as indecent in many religious cultures. However, the challenges facing the LGBT

[157] See An-Na'im, A.A, Islam and Human Rights: Beyond the Universality Debate, in American Society of International Law, vol. 94, 2000, pp. 95-103.

[158] See Nafziger, J, The Function of Religion in the International Legal System, in Religion and International Law, Mark W. Janis and Carolyn Evans (eds.), 1999, pp. 155-176.

[159] An-Na'im, A.A, supra note, 157.

movements are not limited to the traditional societies. In societies with secular legal systems the LGBT rights to marry, found a family and anti-discrimination also still vary between states and do not receive the full social acceptance.

Religious disagreements about the universality question the legitimacy of human rights by claiming that the highest good for human being is the submission to the divine law. The best example for the influence of religious culture is the practice of the rights to freedom of expression. Satirical cartoons of the Prophet are criminalized as blasphemy in the legal systems of many Muslim states, while under the human rights jurisprudence they are usually considered as artistic work and thus are protected. In fact, national legal systems react differently to the claim embodied by human rights. Each state may set limits on the practice of rights regarding its own religious culture, and constitutional provisions often justify limits placed on the freedom of expression in different ways.

2.2.2. Legal Culture and the Universality of Human Rights

The other important factor of cultural relativism is the concept of legal culture. Culture is a dynamic concept. It has a fluid nature. Depending on how a culture is identified and interpreted it carries different meanings over time. This makes it hard to give an exact meaning of the word culture. Like culture, a legal system is not an isolated system. A legal system is influenced by the social world and it should be understood in context, including the cultural context[160]. The combination of two the words “legal” and “culture” makes it even harder to describe the term "legal culture[161].

Despite the uncertain meaning of legal culture, the concept has been the focus of many socio-legal studies over the years[162], particularly due to the role that legal culture plays in

[160] Friedman, L.M, supra note 149, pp. 11-16.

[161] Ibid.

[162] See Michaels, R, Legal Culture, in The Max Planck Encyclopedia of European Private Law (Basedow, Hopt, Zimmermann (eds.) 2012.

identifying the rule of law and legal actions[163]. Like culture, the concept of legal culture may be used in different ways. Most often it is used to understand the features of law within the nation state[164]. However, the role of legal culture is no longer limited to the national level[165]. As a result of globalization the influence of legal culture goes beyond the understanding of the theory and practice of national law. It affects the interpretation and implementation of universal norms as well. Lawrence Friedman, a founding father of sociology of law in the US and the innovator of the term legal culture, defines legal culture as "elements of social attitude and value"[166]. According to Friedman legal culture refers to "customs, opinions, ways of doing and thinking that bend social forces towards or away from law". Friedman points out two important elements of the law: first the influence of legal forces in making the law, secondly the impact of law on the social behavior in the outside world[167]. Namely, law shapes culture and at the same time it is shaped by culture. Friedman takes the social study of law into consideration and puts emphasis on "where the law comes from and what it accomplishes." Yet, legal culture does not mean that law necessarily derives from social orders. Rather it is related to the interaction of the legal system with its environment. In other words, it is the relationship between law and society.

Legal culture, thus, is a collection of social attitudes and values that distinguish a country from the culture and the legal systems of other countries. These values derive from the long-term social structure of the respective community[168]. Of course, many legal systems derive from the same origin, sharing similar sources and concepts. Though, each society

[163] See Silbey, S, Legal culture and Cultures of Legality, in Handbook of Cultural Sociology, Hall. J, Grindstaff, L and Lo, M, 2010, pp. 470-9.

[164] Nelken, D, Using the Concept of Legal Culture, in Australian Journal of Legal Philosophy, v.29, 2004.

[165] Ibid.

[166] Friedman, L.M, supra note 149, pp. 16.

[167] Silbey, S, supra note 163.

[168] Friedman, L.M, supra note 149, pp.193-4.

has its own particular legal culture and none of them are similar[169]. Historical, cultural and socio-political features unique to each country shape its legal culture and influence its legal system. For these reasons, legal culture has an essential role in the realization and also the non-realization of universal norms at the national level. This is why understanding the concept of legal culture helps us to understand the function of law in a specific society.

The role of legal culture becomes especially important in the relationship between Islamic law and human rights law. The legal traditions and national values of Muslim states influence the interaction between the two systems to a great extent. Enquiries into legal culture provide response to questions of why and how the enforcement of law varies in different societies[170]. Why do states set different limits for the practice of fundamental rights of individuals? Why do the majority of Muslim countries have a high rate of incompatibility with human rights law? Why did caricatures of the Prophet Muhammad become controversial in Muslim countries, while they are protected under the right to freedom of expression in the European countries? How are international standards interpreted and implemented differently within given societies?

Legal culture gives reasons for similarities and differences between legal systems in different societies. Countries with common historical events, political systems, economic situations and cultural traits are more likely to have similar legal systems. But no two countries are exactly alike[171]. The European Union law is a unique legal system operating within the member states of the European Union. The European legislation aims to provide a legal cooperation in the region, at the same time each member state has its own legal system influenced by their legal culture. Whether international norms are incorporated into national law directly through a constitutional incorporation or indirectly

[169] Ibid.

[170] See Nelken, D, supra note 164.

[171] Friedman, L.M, supra note 149, pp.199.

through an especial act of parliament, their implementation rest on the states' national law.

The enforcement of national and international law rests on the pillars of the state legal culture, and states legal culture influences the practice of universal human rights norms. Depending on its culture and its rule of law each legal system produces and protects norms and values. As Montesquieu argues this domestic culture shapes the nation's understanding of universal norms. The argument of majority of Muslim states in incompatibility of human rights with some Islamic values is based on the same reason.

Norms and values, however, may change as a result of social and political transformations. The evolution of knowledge, revolutions, wars, elections and their aftermaths together with many other factors constantly influence attitudes and beliefs within societies. The interpretation of law as a result may be challenged and changed over time. Specifically, the aftermath of the Second World War was the beginning of many changes in the values of many, but not all, European societies. The example of this is the unique development of the idea of dignity in the German constitutional tradition[172]. As opposed to the outcomes of the Nazism, the modern German legal system has based its value on the dignity of human beings[173]. Not least inspired by Kant's moral theory the Grundgesetz (GG), the German Basic Law, guarantees the fundamental rights and liberties of each individual based on the core principle of "die Würde des Menschen" or "human dignity."[174] It declares in its first article that: "human dignity is inviolable[175]."

[172] For more, see Krieger, L, The German Idea of Freedom: History of a Political Tradition, 1972. See also, Kommers, D.P, The Constitutional Jurisprudence of the Federal Republic of Germany, 1989, and Eberle, E.J, Dignity and Liberty: Constitutional vision of Germany and the United States, 2007.

[173] See Cohen-Eliya, M and Porat, I, Proportionality and Constitutional Culture, 2013, p.49.

[174] See Eberle, E.J, The German Idea of Freedom, in Oregon Review of INT'L Law, vol.10, 2008, pp.10-23. "Man…is not a thing, and thus not something to be used merely as a means; he must always be regarded in all his actions as an end in himself."

[175] GG Art.1 (1): Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. See also Poscher, R, Menschenwürde als Tabu, in Frankfurter Allgemeine Zeitung, 2.6.2004.

That is, each person is valuable per se as a human being. By emphasizing on the role of the state, the first article states that human dignity should be respected and secured for all. This reflects two important points. The first point is the role of the state in protecting human dignity. The state here refers to the "Rechtsstaat," namely a state committed to the rule of law and to respect basic human rights[176]. The second point is the obligation of the state in preventing any threat to the right of individuals to dignity. The Bundesverfassungsgericht (BVerfG), the Federal Constitutional Court of Germany, further clarifies the concept of human dignity in the Life Imprisonment Case:

"The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself."[177]

The readjustment of the German law to the conception of human dignity shows a clear change in the legal culture of Germany. With this vision, not only the state is bound to perform duties in guaranteeing dignity of individuals, but also fellow citizens must give due respect[178]. This influences the norms and values in the society and improves the respect for fundamental rights of individual in particular.

Another example is the changing attitude of the modern German legal system towards international law. Germany traditionally adopted the dualist approach regarding the relationship with international law. Besides, the idea of Völkerrechtsfreundlichkeit, (friendliness towards international law) in the German Grundgesetz provides potential for

[176] For more detailed information on the idea of Rechtsstaat, see Brocker, M, Kant über Rechtsstaat und Demokratie, 2006.

[177] See Life Imprisonment Case, BVerfG, 45 Entscheidungen des Bundesverfassungsgericht 187, 227-28, 1977. See also Eberle, E.J, Dignity and Liberty: Constitutional vision of Germany and the United States, 2007, pp. 12-13.

[178] Ibid. Eberle, E.J, p.59.

more cooperation with international law. Article 25 Grundgesetz proclaims general rules of public international law to be an integral part of German Federal Law. The social transformations have brought modern legal thoughts into the German legal system. The transition of German constitutional values from the Nazi period to the current modern era is unique to Germany and German culture and history. Legal culture contributes to a better understanding of the dynamics of the legal systems. There is, therefore, a practical as well as epistemological rational for taking legal culture as a proof of relativism. The link between law and culture and the role of legal culture provide insights into the forms and meanings of human rights law.

2.2.3. Political Culture and the Universality of Human Rights

Besides religious culture and legal culture, political culture is one of the important factors in favor of the relativism. Despite attempts to separate culture from the modern political thoughts, the relationship between culture and politics has a great impact on the practice of international human rights[179]. The international political arena recognizes international human rights law. At the same time, it causes many human rights crises. Moral and legal dimensions of international human rights law have been often politically interpreted and practiced. Like religion, politics challenges the concept of universality. But unlike religion, politics hardly inspires concepts of human dignity, morality or justice.

Politics in this sense has a broader meaning than is generally recognized. They represent both politics and political culture of states. Political culture was first used by Gabriel Almond and Sidney Verba in The Civic Culture[180]. Almond has described political culture as the "distribution of patterns of orientations to political action." The proposed

[179] See Bove, A, The Limits of Political Culture: An Introduction to G.W.F. Hegel's Notion of Bildung, in Questionable Returns, A. Bove (ed.), Vienna: IWM Junior Visiting Fellows Conferences, vol. 12. 2002.

[180] See e.g. Almond, G and Verba, S, The Civic Culture: Political Attitudes and Democracy in Five Nations, 1963. See also, Baker, L, K, et al., Germany Transformed: Political Culture and New Politics, 1981.

definition of political culture however is unclear and has theoretical problems[181]. But the term was proposed to solve the question of how shared attitudes and values affect political systems[182]. Political culture is a reflection of the culture and history of a country. It is a collective system of beliefs, attitudes, values and historical events that affect a political system.

Each state has its own political culture. States' political culture affects the level of democracy and the protection of fundamental rights. Political culture significantly influences states policy towards the implementation of the international human rights law. On the other hand, politics and political culture are related, but they are not the same. Each state's politics have been attracted by the ideas of interest and expediency influenced by political culture[183]. Politics and interests are inseparable and significant elements of any political system. By placing interests ahead of state's concerns the implementation of international norms would depend upon the decision of power holders.

Political interests, thus, vary with time and place and clearly differ from state to state. This may affect the fulfillment of the state's obligation to respect and to protect human rights. Plenty of real-world examples illustrate how national, regional and international political interests can violate human right law. At the time of writing Syrian civil war, Yemen conflict, the so-called Islamic State group (IS) crises in Iraq, Myanmar ethnic tensions, the struggle between Israel and Palestine is going on. And each state justifies its willful ignorant policy towards human rights.

This is not surprising, however. International human rights law accepts national security and public safety as legitimate aims of the state's interference under international instruments. The state's margin for appreciation for the reason of national security is

[181] For more discussion and nuance see, Chilton, S, Defining Political Culture, 1988, pp. 419-45.

[182] See e.g. Price, D.E, Islamic Political Culture, Democracy, and Human Rights, A Comparative Study, 1999.

[183] See Benn, S.I, Interests in Politics, in Proceedings of the Aristotelian Society, New Series, vol. 60, 1960, pp. 123-140.

usually very broad. This often makes the interference by state officials legally permissible.

Of course, the international human right regime is not flexible for any kind of interference. When national security is at stake, human rights law verifies its proportionality. The necessity to observe the principle of proportionality is justified under the ICCPR. Article 2(1)(2) of the ICCPR imposes an obligation on state parties to respect the Covenant rights to individuals within their territories. In order to ensure the protection of the Covenant state parties have to adopt such measures that are necessary to give effect to the Covenant rights. States therefore must demonstrate the necessity of their interference and apply restrictions compatible with the nature of the Covenant[184]. In theory, the necessity of interference requires the application of proportionality. In practice however states' tendency to place politics ahead of the practice of human rights law influences the universality.

Besides, the international community in conflict resolution implicitly gives privilege to political interest over the universality of human rights. By giving priority to the national interests the international human rights regime embraces diversity and difference. Protecting individuals' rights and ensuring minorities' rights against the majority may be affected by political culture and national politics. Even after the great progress in the international protection of universal norms, states' political culture and interests influence the universality of human rights.

3. The Supremacy of International Human Rights Law

Questions over supremacy of international human rights law are complex and can have controversial consequences. Important questions arise concerning the supremacy of international human rights over domestic constitutional law. Does international human

[184] UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, Para.6, available at: http://www.refworld.org/docid/478b26ae2.html [Accessed 16 August 2017]

rights law by its nature achieve supremacy over domestic constitutional law[185]? Or is the supremacy of international human rights law only justifiable upon the ratification of international treaties? Does the supremacy of human rights rise or fall based upon a right in question? What kind of supremacy international law should enjoy over constitutional law?[186] Is the supremacy of human rights the legitimate authority of international human rights regime to impose obligations on states? Viewed from the perspective of international law or national law the answers to these questions may be different[187].

International human rights come in two major types: conventional and customary. Under international law, the application of conventional or treaty-based international law is based on the consent of states. A state that indicates its consent to be bound by a treaty is obliged to comply with it. Article 27 of the VCLT reflects this principle that "a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Contrary to the treaty-based obligations, customary norms bind states out of the treaty obligations[188]. Article 38 of the ICJ defines custom as " a general practice accepted as law"[189]. The word "general" indicates the universal application of customary law[190]. It implies that the majority of states participate in the formation of international custom[191]. The case of Filartiga v. Pena-Irala also reflects the domestic enforceability of international customary law[192]. From the perspective of national law it is, however, the constitution that defines the status of international treaties or the reception of customary

[185] Buchanan, A, The Heart of Human Rights, 2013, pp. 224-29.

[186] Ibid.

[187] Bethlehem KCMG QC, D, The Supremacy of International Law? Part One and Two, in EJIL: Talk! 2016, available at: https://www.ejiltalk.org/the-supremacy-of-international-law-part-one [Accessed 13 July 2017]

[188] Lowe, A, Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute, in IND.INT'L& COMP.L.REV. Vol. 23: 3, 2013, pp. 523-53.

[189] The Statute of ICJ, Art 38(1)(b) 1945.

[190] See Helfer, L and Wuerth, I, Customary International Law: An Instrument Choice Perspective, in 37 Mich. J.INT'L.563, 2016.

[191] Ibid.

[192] See Filártiga v. Peña-Irala, 630 F.2d 876, 2d Cir. 1980.

international law in domestic legal systems[193]. Article 27 of the VCLT reflects the principle of "pacta sunt servanda" (agreement must be kept)[194]. This is about how states should behave in their treaty relations and would not necessarily be evidence of the supremacy of international human rights obligations.

International human rights law does not enjoy supremacy over national constitutional law automatically. Whether priority should be given to human rights in case of conflict depends on the subject of the right and the nature of conflict. The legal superiority of international human rights law only embraces certain rights[195] and it is only limited to a human rights law of special kind by reason of their importance. More specifically, the survey of constitutional provisions and case law indicates that more domestic constitutions and domestic courts are rejecting international human rights law's claim to supremacy over domestic constitutional law[196]. It is mainly because constitutional provisions reflect historical background and fundamental values of the society. For that reason, states often places constitutional law on top of international human rights norms. In this approach constitutions "provide a basis for resistance"[197] to international human rights. A special case to consider is a superior status of the peremptory norms of general international law.

Yet, the International Law Commission (ILC) in its report on "Fragmentation of International Law" identifies three types of relationships between rules of international

[193] Bethlehem KCMG QC, D, supra note 187.

[194] See e.g. Siebeck, M, Die Vertragstreue: Vertragsbindung, Naturalerfüllungsgrundsatz, Leistungstreue, 2009, and also Kelsen, H, Principle of International Law, 1952.

[195] See ILC report on Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, 2006, Para.410, p.681.

[196] Peters, A, Supremacy Lost: International Law Meets Domestic Constitutional Law, www.icl-journal.com, vol.3, 2009, pp. 171-198. See also, Cassese, A, Modern Constitutions and International Law, 1985, pp. 331-475, and Franck, T.M and Thiruvengadam, A.K, Norm of International Law Relating to the Constitution-Making-Process, in Framing the State in Times of Transition, Miller, L.E and Aucoin, L (eds.), 2010.

[197] Jackson, V.C, Constitutional Comparisons: Convergence, Resistance, Engagement, Harvard Law Rev, 2005, p.113.

law; relation between special and general norms (lex specialis), the relation between prior and subsequent norms (lex posterior) and the relation between rules with different normative power (lex superior)[198]. In particular in respect to the supremacy of international human rights or lex superior the ILC expresses that there has never been any doubt that some considerations in the international world are more important than others and must be legally recognized as such[199]. The superior status of a certain number of rights is recognized in theory and practice of international law. The idea of hierarchy supremacy of certain rights in international law is reflected in the UN Charter, obligations erga omnes and the concept of jus cogens[200]. Article 103 of the UN Charter states, that in the event of conflict the obligations of UN Member states under the Charter prevail over their obligations under any other international agreements. However the scope of the supremacy clause under Article 103 is not clear, it gives the Charter priority over all conflicting obligations of states[201]. The question has generally been raised whether article 103 also covers the Security Council decisions. Though, Article 103 is silent on this point, the primacy of the binding decisions of the Security Council within the meaning of Article 25 of the UN Charter is often accepted in practice[202].

The ILC also recognizes "a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international

[198] ILC report on Fragmentation of International Law, supra note 187, Para.410, p.681.

[199] Ibid, Para.326, p. 167.

[200] See Vidmar, J, Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System? In Hierarchy in International Law: The Place of Human Rights, 2012.

[201] See Liivoja, R, The Scope of the Supremacy Clause of the United Nation Charter, in ICLQ, vol.57, 2008, pp. 583-612.

[202] Bernhardt, R, Article 103, in The Charter of the United Nations: A Commentary, ed. Bruno Simma, 2002, p.1295: " As far as members of the UN are bound by Art.25 'to accept and carry out the decision of the Security Council in accordance with the present Charter' they are also bound according Art.103 to give these obligations priority over any other commitment." See also, Kolb, R, Does article 103 of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council? ZaöRV, VL.64, 2004, p 21.

community as a whole, are-unlike the others-obligations in whose fulfillment all States have a legal interest.[203]"

The International Court of Justice (ICJ) in the Barcelona Traction Case ruled that "basic rights of the human person" create obligations erga omnes. The Court declared that:

"An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes" [204]

The ICCPR, ECHR and ACHR also contain some non-derogable rights. For instance Article 4 of the ICCPR provides the list of rights from which states cannot derogate. The right to life[205], the right to be free from torture and other inhuman and degrading treatment or punishment[206], the right to be free from slavery and servitude[207], prohibition of imprisonment[208], the right to be free from retroactive application of penal laws[209], the right to recognition everywhere as a person before the law,[210]and the right to be free from discriminatory treatment[211]. At the same time, Article 4 allows for a state party to derogate from its obligations to the extent strictly required by the exigencies of the

[203] The Yearbook of ILC, vol.2, part 2 at 99, UN Doc. A/CN.4/SER.A/1976/Add.

[204] See Barcelona Traction Light and Power Co., Ltd (Belgium v. Spain) 1964 ICJ Judgment of Jul 24, and also 1970 Rep 3, at 32, para.34. Judgment of Feb. 5. See also UN Human Rights Committee (HRC), General comment no. 31 [80], supra note 185. Para.2, "This follows from the fact that the "rules concerning the basic rights of the human person" are erga omnes obligations and that, as indicated in the fourth preamble paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms".

[205] ICCPR art.6.

[206] ICCPR art.7.

[207] ICCPR art.8.

[208] ICCPR art.11.

[209] ICCPR art.15.

[210] ICCPR art.16.

[211] ICCPR art.18.

situation. In this respect the Human Rights Committee in its General Comment on Article 4[212] states that any measures of derogation from the Covenant must be of an exceptional and temporary nature[213].

The hierarchy supremacy of human rights mostly emerged in the concept of jus cogens or peremptory norms. Peremptory norms of general international law as the ILC remarked are recognized in international practice, in the jurisprudence of international and national courts and in legal doctrine[214]. Jus cogens are sometimes considered as an independent source of international law, which takes precedence over other sources[215]. They refer to the fundamental values of the international community from which no derogation is permitted[216]. They are binding on all states and mostly deemed self-executing. At this point the relationship between erga omnes obligations and the concept of jus cogens becomes very close. Regarding the relationship between erga omnes obligations and jus cogens the ILC declares that: "While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States. The VCLT confirms the existence of the jus cogens and defines them as absolute rules that cannot be abrogated by domestic law or any other treaty[217]. Whether conflict occurs within norms of a single treaty, or among

[212] UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, "Derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances."Para.3, available at: http://www.refworld.org/docid/453883fd1f.html [Accessed 17 August 2017]

[213] Ibid. Para. 2.

[214] ILC, Commentaries to the Draft Articles on Responsibilities of States for Internationally Wrongful Acts, 2001.

[215] See Chinkin, Ch, supra note 87, p. 84.

[216]VCLT, Art 53.

[217]VCLT art. 53. The ILC in its commentary to art.44 (5) stated: "rules of jus cogens are so fundamental character that, when parties conclude a treaty which conflicts in any of its clause with an already existing rule of jus cogens the treaty must be considered totally invalid", ILC 1966 II, p 239, Para 8. See also,

norms of different treaties or between two legal regimes, norms of jus cogens have priority over other norms. Even conflicts between the UN Charter and the peremptory norms result to invalidity of the Charter obligations[218]. Thus, conflict of a treaty with peremptory norms makes a treaty invalid and the UN Charter is not an exception in this respect. Article 67 of the VCLT makes it clear that the hierarchy higher status of jus cogens does not have a retroactive character. The Human Rights Committee also emphasizes the great importance of peremptory norms and considers them as norms that cannot be reserved in any event[219].

According to the ILC peremptory norms include: the prohibition of aggressive use of force, the right to self-defense, the prohibition of genocide, the prohibition of torture, crimes against humanity, the prohibition of slavery and slave trade, the prohibition of piracy, the prohibition of racial discrimination and apartheid, and the prohibition of hostilities directed at a civilian population (basic rules of international humanitarian law).[220] Yet, some judicial decisions have extended the list of human rights, which have peremptory status[221]. The Inter-American Court of Human Rights in its advisory opinion on the undocumented migrants has identified the fundamental importance and peremptory status for the obligation of non-discrimination[222].

Kadelba, S, Jus Cogens, Obligation Erga Omnes and other Rules- the Identification of Fundemantal Norms, in The Fundamental Rules of the International Legal Order, Jus Cogens and Obligation Erga Omnes, Tomuschat, Ch, et al. (ed) 2006, p. 23.

[218] For more detailed information, see e.g. Fassbender, B, The United Nations Charter as the Constitution of International Community, 2009.

[219] UN Human Rights Committee (HRC), CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6, available at: http://www.refworld.org/docid/453883fc11.html [Accessed 16 August 2017]

[220] See ILC report on Fragmentation of International Law, supra note 187.

[221] See De Wet, E, Jus Cogens and Obligations Erga Omnes, in the Oxford Handbook of International Law, Dinah Shelton (ed.), 2013, pp.541-560.

[222] See Advisory Opinion on Judicial Condition and Rights of the Undocumented Migrants, IACtrHR, 2003, para. 99, available at: http://www.refworld.org/cases,IACRTHR,425cd8eb4.html [Accessed 2 August 2017]

The key focus here is on the content rather than the source of these rights. The state is obliged to respect certain rules such as the prohibition of torture, whether they drive from national law or international law[223]. The idea of normative supremacy follows two essential aims. The first aim is the resolution of conflicting norms. Secondly it aims to provide a harmonized standard among members of the international community. These are however theoretical debates. In practice conflict resolution depends on the way that rules and principles are interpreted by the state.

4. Domestic Implementation of International Human Rights Law: Who Decides?

4.1. The State's Obligations to Respect, Protect and Fulfill Human Rights

The entitlement of human rights relies on being human, but the enforcement of human rights relies on national implementation of sovereign state[224]. All human beings are equally entitled to human rights, but not all states equally recognize human rights[225].

This, however, does not put into question that states have an obligation to respect human rights and protect their civilians from atrocities[226]. With this respect, the ICCPR mandates the adoption of legislative or other measures to give effect to the civil and political rights under the Covenant. On the other hand, article 2 para.2 of the Covenant obliges each state party "to take the necessary steps, in accordance with its constitutional processes." Considering this fact that each constitution represents the basic legal structure of its

[223] Bethlehem KCMG QC, D, supra note 187.

[224] Donnelly, J, The Relative Universality of Human Rights, in HR Quarterly, vol.29. No.2, 2007, p. 283.

[225] Menke, Ch, and Pollmann, A, Philosophie der Menschenrechte Zur Einführung, 2007, p.72.

[226] See the Resolution adopted by the General Assembly, 2005 World Summit Outcome, para. 138: " Each individual State has the responsibility to protect its populations fromgenocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate,encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.."

regime the language of article 2 para.2 seems to leave the state leeway in the implementation of the Covenant[227].

The Human Rights Committee does not accept this interpretation, however. According to the Committee the implementation of the Covenant requires that the rights are ensured and not violated[228]. Each state, therefore, undertakes to take the necessary steps in accordance with its constitution as long as the Covenant rights are ensured. The logic of this argument is also apparent from article 2 para.3 ICCPR in which access to effective domestic remedies in case of Covenant violations is deemed necessary.

With respect to the primacy and centrality of human rights obligations the responsibility to protect has been broadened to a collective one[229]. This principle provides the view that the international community should collectively take actions[230], when states are unable or unwilling to protect human rights of their own populations[231]. The ICJ has also supported this view in the Certain Expenses Advisory Opinion under which the maintenance for international peace and security is not an exclusive responsibility of the Security Council[232]. The Secretary General also declares:

"If national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.

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[227] See Seibert-Fohr, A, Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 para.2, in Max Planck Year Book of United Nation Law, Frowein J. A and Wolfrum, R (eds.), vol.5, 2001, pp.399-472.

[228] See e.g. UN Human Rights Committee (HRC), General comment no. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, supra note 171.

[229] Cohen, R, The Responsibility to Protect: Human Rights and Humanitarian Dimensions, Panel on the Responsibility to Protect and Human Rights, Harvard Human Rights Journal Annual Symposium, Speech, Feb 2009.

[230] Ibid.

[231] See Huisingh, F, A Responsibility to Prevent? A Norm's Political and Legal Effects, ALF, vol. 5.1, 2013.

[232] Gray, Ch, The Use Of force and the International legal Order, in International Law, Evans M.D (ed.), 2014, pp.282-86 and pp. 610-611.

When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required."[233] The statement of the Secretary General underlines the point that primary responsibility for protecting human rights of civilians lies on the member states.

The protection of human rights is therefore an inevitable responsibility of states[234]. As a general rule, legal agreements should be carried out in good faith[235] and treaties should be interpreted regarding the relevant rules of international law applicable in the relationship between parties[236]. Despite this fact, there is no consensus on how fundamental rights should be applied or enforced at the national level[237]. States' agreements to respect and protect human rights do not guarantee states' compliance with human rights.

4.2. The State's Authorities to Interpret, Restrict and Implement Human Rights

Although the VCLT provisions are clear on treaty obligations, there is a huge gap between the theory and practice of international human rights law. Who has the power, and how the power will be exercised are the most important factors in the realization of international human rights law.

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[233] Report of the Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All, 21 March 2005 (UN Doc A/59/2005) Para. 135.

[234] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC, supplement no.10 (A/56/10), 2001 and Seibert-Fohr, A, Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 Par.2, in Max Planck Yearbook of United Nations law, Jochen A. Frowein and Rüdiger, W (eds), vol.5, 2001, Pp.399-472.

[235] VCLT art. 26. For more details, see Lukashuk, I.I, The Principle of Pacta Sunt Servanda and the Nature of Obligation under International Law, AJIL 513, 1989.

[236] VCLT art. 31(3)(c)

[237] UN Human Rights Committee (HRC), CCPR General Comment No. 3: Article 2 (Implementation at the National Level), 29 July 1981, available at: http://www.refworld.org/docid/453883fe0.html [Accessed 27 August 2017] "The Committee notes that article 2 of the Covenant (ICCPR) generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction."

The role of states should be considered as the major factor in the realization of international human rights law. Guaranteed by legal norms, international human rights are best protected by states. Then, who speaks for human rights influences the understanding, meaning and even the scope of human rights law. Whether international human rights law is universal or culturally relative, whether it has precisely been incorporated into domestic law, whether it takes supremacy over domestic law in case of conflict, its interpretation, legal scope and domestic implementation all remain within the state jurisdiction. This is why rights can have different functions depending on the normative system in which they are rooted. Within a particular legal system one might enjoy certain protections of individual rights while other might face state interference or state neglect of the same rights in other system[238]. Then, the practice of human rights could be challenged by the state's diverse interpretations of human rights[239]. And the enforcement of human rights law may be subject to certain limitations. Limitations are however the exception. The ICCPR provides room for limitations on fundamental rights only under certain restrictions. By virtue of Article 19 (3) freedom of expression "carries with it special duties and responsibilities" and therefore is subject to restrictions such as, provided by law, necessary for the respect of the rights and reputation of others, necessary for national security, public order, public health and morals[240]. Moreover, one can argue that the general principle of proportionality regulates the state intervention in the fundamental rights. According to the principle of proportionality "state action should be a rational means to a permissible end which does protect human rights unless strictly compelled by necessity"[241].

[238] See Nickel, J, supra note 94, 1987, p.27.

[239] In this respect see, Petersmann, EU, Time for Integrating Human Rights into the Law of Worldwide Organizations, Lessons from European Integration Law for Global Integration Law, 2001. For an online copy of the document see, http://jeanmonnetprogram.org/archive/papers/01/012301.html

[240] ICCPR Article 19 (3). See supra note 34.

[241] See Engle, E, The General Principle of Proportionality and Aristotle, in Aristotle and The Philosophy of Law: Theory, Practice and Justice, Huppes-Cluyesenär and Coelho (eds.), 2013, pp. 265-276.

As a result of disproportionality many rules of Islamic law, particularly Islamic criminal law, are matter of controversy. Many Shari'ah-based reservations on international human rights treaties neither seem rational, nor necessary, nor proportional when they are adjudicated according to the proportionality test[242]. This raises the question of incompatibility of Islamic law with human rights law and questions the legitimacy of Islamic law[243]. Despite this argument, certain restrictions are themselves subject to broad and narrow interpretations. This leaves ample discretion to states to interpret. According to international rules, the sovereign state is obliged to respect, fulfill and protect international human rights law. At the same time, it is the state that is empowered to interpret, restrict and implement of these rights. That is to say, international human right regime asserts an authority to evaluate whether the state practices compatible with the fundamental rights, while the fundamental rights are interpreted, limited and implemented by the state it self.

The overview of the function of international human rights law accurately reflects how the state's practice defines the concept and scope of the fundamental rights of individuals. The discussion on the universality and relativity raises the issue that the core human rights treaties are universally recognized, but are relatively practiced. With the exception of jus cogens norms, state consent still matter for the ratification of human rights treaties. And even the treaty ratification does not guarantee the effective exercise of the rights. Religious, political and legal culture unique to each country shapes its rights-protection system and influences the interpretation and implementation of human rights law.

[242] See e.g. Huscroft, G, Proportionality and the Rule of Law, 2015, Bomhoff, J, Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse, 2015 and see also Baade, B, et al., Verhältnismäßigkeit im Völkerrecht, 2016.

[243] See Hursh, J, The Role of Culture in the Creation of Islamic Law, Indian Law Journal, 84, 2009, pp. 1401-23.

CHAPTER II

THE SPECTERUM OF ISLAMIC LAW

1. Shari'a as Rule of Law

It is indeed difficult to identify Islam in such a way that demonstrates its values rather than the views of authors. It is even more difficult to give a clear-cut and unified definition of Islamic law and present it as the only authentic one. This is not because that Islam and the law of Islam lack definitions. Rather the definitions are many and multiple. Islam and Islamic law as rule of law[244] can be viewed from different angles. They can be examined through different disciplines such as "theology", "history of religions", "cultural anthropology", "Islamic mythology", "socio-political philosophy" or "philosophy of law."[245] What is Islam[246] and what is Islamic law[247] thus are subject to different meanings and diverse interpretations. In the same way as other religions, Islam means different things to different individuals. It is Muslims who interpret Islam and its law in the scope of their knowledge, which is largely affected by the socio-political circumstances of their time[248]. From the liberal Muslim intellectuals to the conservative Muslim thinkers to the fundamentalist all share the same holy book, the Qur'an. Their perceptions of Islam and interpretations of Islamic law however are different or even opposed. Clearly, then, the recognition of what is Islam and Islamic law and what is not requires special scrutiny, in-depth knowledge and strong grasp of the history of Islam, Islamic civilization, Islamic culture, Islamic philosophy, Islamic norms and laws. In order to reach the better understanding of Shari'a-based constitutional law an overview of Islam and Islamic law, however incomplete, deserve a brief notice.

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[244] Emon, A, Techniques and Limits of Legal Reasoning in Shari'a Today, 2 Berkeley J. Middle E. & Islamic L. 1 (2009), pp.1-4.

[245] See Knysh, A, Islam in Historical Perspective, 2011, pp.1-5.

[246] For different views on Islam, see e.g. Schacht, J (ed.), The Legacy of Islam, 1979, Haddad, Y.Y, Contemporary Islam and the Challenge of History, 1982, Mawdudi, A, Towards Understanding Islam,

1.1 The Emergence of Islam as a Religion

The word Islam is derived from the Arabic root "sa-la-ma" which in context to religion means "submission to God's will". Opposite of its common usage in English here "submission" does not have a negative connotation and does not imply a sense of coercion. It refers to "submission with free will". This could also be understood from the Qur'anic verses "there is no compulsion in religion" (2:256) and "to you your religion and to me mine" (109:6). Islam as a monotheistic religion emerged in Arabia, the peninsula in Southwest Asia, which today is known as the Middle East. Arabia was bound to the northwest by the Byzantine Empire with Christian religion and Greek culture, and to the east by the Persian Empire with Zoroastrian religion and the Persian culture. Despite being aware of monotheistic beliefs most of the people of the Arabian Peninsula were pagan[249] living together with Arab Jews and Christians, both spreading Aramaic and Hellenic culture[250].

For the believers and according to the standard Islamic account, Islam was revealed to the Prophet, and not created by him, in early 7th century. The Prophet was a monotheist and illiterate, who after the first revelations became able to read and recite verses, which were profoundly eloquent, insightful and prodigious:

1985, Hofmann, M, Islam the Alternative, 1993, Murata, S, and Chittick, W.C, The Vision of Islam, 1994, Rahman, F, Islam, 2002, Nasr, S. H, The Heart of Islam, 2002, Waines, D, An Introduction to Islam, 2003, Denny, F.M, An Introduction to Islam, 2011, Aslan, R, No God but God: the Origins, Evolution, and Future of Islam, 2011, Esposito, J.L, Islam: The Straight Path, 5th Ed, 2016.

[247] For radical, conservative and liberal views on Islamic law, see e.g. Maududi, A, Islamic Law and Constitution, 1955, Coulson, N.J, A History of Islamic Law, 1964, Schacht, J, An Introduction to Islamic Law, 1993, An-Na'im, A, Towards An Islamic Reformation: Civil Liberties, Human Rights, and International Law, 1996, Cotran, E and Yamani, M (eds.) The Rule of Law in the Middle East and the Islamic World, 2000, Weiss, B, The Spirit of Islamic Law, 2006, Kamali, M.H, Shari'ah Law: An Introduction, 2008, Nielson, J.S and Christofferson, L (eds), Shari'a As Discourse: Legal Traditions and the Encounter with Europe, 2010, Emon, A, Religious Pluralism and Islamic Law, 2012, Rohe, M, Islamic Law in Past and Present, 2014.

[248] See Knysh, A, supra note 245.

[249] McCloud, A.B, Hibbard S.W, Saud, L, The Historical Context, in An Introduction to Islam in the 21st Century, 2013, pp. 15-29.

[250] Lewis, B, The Arabs in History, 1954, pp. 21-35.

"Recite: in the name of your Lord who created. Who created man from a clot of blood. Read: your Lord is the most Generous. Who taught by the pen. Taught man that which he knew not." (96: 1-5).

Such a rapid alteration could not have been possible without reference to divine will.[251] The Prophet's divine revelations afterwards came to be known as the Qur'an, the first and major source of Islam and Islamic law. His deeds, sayings and teachings became the Sunnah, the second most important source alongside the Qur'an. The new religion introduced a distinctive civilization. It expressed a fundamental moral ethos and represented a system of rules[252]. The new holy book stated the doctrine of "God the One". It demanded faith in one God that is "greater than anything that can be conceived," the same idea that existed in Judaism and in the Christian Creed "Credimus/Credo in unum Deum"[253]. And the new Prophet repeatedly recited the stories of the Torah and the Bible and spread the message of dignity and merit.

The belief in oneness and uniqueness of God and the Islamic teachings of egalitarianism were against the Bedouin's system based on polytheism, power, prestige and primary kin[254]. The tribal practice of inequality and hierarchy was gradually faced with the Islamic ideas of equality and justice:

"O mankind, we have created you from male and female, and set you up as peoples (šoʿūb) and tribes (qabāʾel) so you may recognize one another; the noblest (akram) among you with God is the most pious of you" (49:13) and " be persistently standing firm in justice" (4:135).

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[251] See Knysh, A, supra note 245, pp.18-34.

[252] See Rahman, F, Islam, 2002, pp. 1-9.

[253] The origin of the Latin Creed means "We/I believe in God." However the translation used in Mass often is "I believe in God, the Father Almighty". See also Nasr, S. H, The Heart of Islam, 2002.

[254] For more insights, see Aslan, R, No God but God: the Origins, Evolution, and Future of Islam, 2011, pp. 5-22.

The intellectual expansion of Islam very soon was seen as threatening to the social order of Pre-Islamic Arabia in Mecca. The more the oral preaching of the Prophet intensified, the more tension in the society increased. This resulted in the "Hijrah" (Latin Hegira/emigration) the journey of the Prophet and his followers from Mecca to Yathrib in 622 A.D, the city that later was renamed Medina.

The importance of the Hijrah is, that it marks the emergence of the "Muslim Community" or the "Umma" and also the beginning of the Islamic calendar. The Hijrah to Medina was an opportunity to the Prophet to establish a society based on the Islamic values. The Prophet became a man of the highest spirituality and authority, in a way just as he was commanded by God to "complete the noble moral traits[255]. His orders, recommendations and prohibitions covered a Muslim's life in all its aspects.[256]. His teaching was a new initiation into the history of ideas. And his legacy, despite all disagreements among his followers, lives on. At the end of his life the respect for the dignity and rights of individuals became as the mandatory virtues[257]. Seeking knowledge was incumbent upon every Muslim[258]. The practice of female infanticide was replaced by the recognition of women's rights to dignity, to life, to family life and to property[259].

[255] This refers to the Hadith known as "Makārim Al- Akhlāq", means the noble character traits. According that the Prophet states "I have been sent to bring the noble moral traits to perfection." With this respect see Saleh, W.A, The Formation of the Classical Tafsīr Tradition: The Qur'an Commentary of Al-Tha'labī, 2003, pp.115-19. See also Schäder, H.H, Die islamische Lehre vom Vollkommenen Menschen, ZDMG 79, 1925, pp.192-268. For the comparison of the "Makārim Al- Akhlāq" with the concept of "Highest Good" in Kant's moral philosophy, see Engstrom, S, The Concept of Highest Good in Kant's Moral Philosophy, in Philosophy and Phenomenological Research, 51(4), 1992, pp.747-80.

[256] Burton, J, An Introduction to the Hadith, 1994, p.19.

[257] See, e.g. Ramadan, Tariq, In the Footstep of Prophet: Lessons from the Life of Muhammad, 2007.

[258] Josef, S (ed.), Science and Modern Islamic Discourses, Encyclopedia of Women and Islamic Cultures: Family, Body, Sexuality and Health, E.J, Brill, vol.3, 2006, p 361-3.

[259] For different debates over the status of women in Islam, see e.g. Stowasser, B, Women in the Qur'an, Traditions, and Interpretation, 1994, pp. 119-134, Walter, W, Women in Islam, 1993, Nasir, J.J, The Status of Women Under Islamic Law and Under Modern Islamic Legislation, 3RD Ed, 2009.

1.2 The First Constitution of the First Muslim Community: An Example of Pluralism

At the time of the Hijrah the city of Medina was mostly composed of Jewish tribes and Arab-pagans. The conflict between the Jews of Banū Nadīr and Banū Quraiza and the rival Arab clans of Aus and Khazraj led to a division among the tribes[260]. The people of Medina had welcomed Prophet Muhammad not so much as the Prophet of God, but as a spiritual leader who might resolve tribal disputes and disunity among the Medinan[261]. Moreover, the Prophet's religious purpose needed the political supports. First, after receiving a reception from the majority of people in Medina the Prophet formed a new religious community. But, a set of principles was necessary to replace the incorrect tribal traditions, to achieve a uniformity of practice, and to bind members of the Umma together. To this end, the Prophet declared the denunciation of war in Medina as a sacred city and drafted the Constitution of Medina[262] between the non-Muslim believers and Muslims. The Prophet acknowledged the concept of "Dhimma" or "protected person"[263]that arose from the Qur'an and was originally based on the tolerance for the cultural diversity in the early stage of Islam.

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[260] See Lewis, B, supra note 250, 1954, p.40.

[261] Ibid. p. 41.

[262] The Constitution of Medina is also known as the Charter of Medina or what is known in Arabic as Dastūr al-Madīnah or Mithaq al-Madīna. For more details on the Constitution of Medina, see, e.g. Watt, W.M, Muhammad at Medina, 1956, Serjeant, R.B, The Constitution of Medina, Islamic Quarterly.8, 1964, pp.3-16, Berkey, J, The Formation of Islam: Religion and Society in the Near East, 600-1800, 2003, p. 64, Lecker, M, The Constitution of Medina: Muḥammad's First Legal Document, 2004, Holland, T, In the Shadow of the Sword: The Battle for Global Empire and the End of the Ancient World, 2012, p.383, Walker, A, Constitution of Medina, in Muhammad in History, Thought, and Culture: An Encyclopedia of the Prophet of God, Fitzpatrick, C et al. (eds.), vol.1, 2014, pp.113-15. See also, Suermann, H, Die Konstitution von Medina Erinnerung an Ein Anderes Modell des Zusammenlebens, 2012, Wellhausen, J, Muhammads Gemeindeordnung von Medina, in *Skizzen und Vorarbeiten*, Wellhausen, J (ed.), vol. 4, 1889, pp.65-83, and Schaller, G, Die Gemeindeordnung von Medina: Darstellung eines politischen Instruments, Ein Beitrag zur gegenwärtigen Fundamentalismus Diskussion im Islam, 1985, https://archive.org/stream/DieGemeindeordnungVonMedina/Die_Gemeindeordnung_von_Medina#page/n0/mode/2up [Accessed 25 September 2017]

[263] Peters, F, People of the Book: Oxford Bibliographies online Research Guide, 2010, pp. 3-9.

The idea grants the "People of the Book", Zoroastrians, Jews, Christian, Sabians, and in some cases Hindus, the autonomy of their religious institution in the Muslim community while they pay tax[264]. The Constitution instituted a number of rights and duties. It protected security for all and founded a system of arbitration for resolving disputes and a tax system. It abolished the presumption of guilt by association, which was widely practiced at that time, and established the presumption of innocence[265]. It regulated the civil and political relations between the Meccan immigrants, the Muslim minority of Medina and the Jewish tribes and brought them together under one community[266]. At the same time it confirmed their identity and allowed the exercise of their religion[267].

Bernard Lewis, the dean of American orientalists, in his book "The Arabs in History" calls the Medina Constitution "the first constitution of the Arabian Prophet". Lewis points out that "the document is not a treaty in the European sense, but rather a unilateral proclamation. Its purpose was purely practical and administrative and reveals the cautious, careful character of the Prophet"[268].

The Constitution of Medina is certainly neither a treaty nor a utopian document for all times. But it is definitely a unique initiative to make a constitution to build harmony among social groups and to form unity-in-diversity. The unity-in diversity in the Constitution reflects a sense that humans have a right to hold different ideas, but within the unity of God.

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[264] See Bosworth, C.E, The Concept of Dhimma in Early Islam, in Christians and Jews in the Ottoman Empire, vol.1, Braude, B and Lewis, B (eds.), 1982, pp.37-54. See also Cahen, C.L, Dhimmi, The Encyclopedia of Islam, vol.2, Lewis, B, Pellat, Ch and Schacht, J (eds.), 1965, pp. 227-230.

[265] For further details, see Hamidullah, M The First Written Constitution in the World, 1986. Available at: https://archive.org/details/THEFIRSTWRITTENCONSTITUTIONOFTHEWORLD [Accessed 3 October 2017]

[266] Guillaume, A, The Life of Muhammad: A Translation of Ibn Ishraq's Sirat Rasul Allah 1955, pp. 231-233.

[267] Hamidullah, M, supra note 265.

[268] Lewis, B, supra note 250, pp. 42-3.

This includes, at least, three important points. First, the source of political authority was not only the divine power, but also the consensus of public opinion. Secondly, the constitution dealt with the civil and political rights of individuals compatible with that certain time and place. And finally, the establishment of a multi-religious pluralistic society shows that toleration for other monotheists is rooted in Islamic tradition[269]. It was the form of government in which the rules of the People of the Book in the area of the personal status law were upheld[270] and the minority rights were protected. The conceptual source of pluralism has it basis in the Qur'anic reminders that if your God had pleased, He could have made all human beings into one nation and he could have created them as pious believers, but God wished to leave them free to chose their own path and face the consequences.[271] The Qur'anic recognition of pluralism has of course less in common with the Western secular philosophy[272]. It is rather the diversity under the unity of God[273].

1.3. The Emergence of Shari'a as a Legal System

Islam presents a law unique in itself and distinct from Jewish law and canon law, whilst it shares common ground with other monotheistic religions in many respects[274].

The Qur'an, not only a holy book on theology, includes moral and legal codes. And the Sunnah of the Prophet, his teachings and sayings, alongside of the Qur'an remains the second primary source of Islamic legal theory and practice up to the present[275].

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[269] For more details see, Voll, J.O, Pluralism and Islamic Perspectives on Cultural Diversity, in Cultural Diversity in Islam, Said and Sharify-Funk (eds.) 2003, pp.

[270] Esack, F, Religio-Cultural Diversity: For What and with Whom? Muslim Reflections from a Postapartheid South Africa in the Throes of Globalization, in Cultural Diversity in Islam, Said and Sharify-Funk (eds.) 2003, pp. 176-78.

[271] See Voll, J.O, supra note 269, pp. 123-28.

[272] See Said, A.A and Sharify-Funk, Dynamic of Cultural Diversity and Tolerance in Islam, in Cultural Diversity in Islam, Said and Sharify-Funk (eds.) 2003, pp. 23-26.

[273] For more details see e.g. Nasr, S. H, The Heart of Islam, 2002.

[274] See Weiss, B, The Spirit of Islamic Law, 2006, 1-24.

Law, therefore, from the very beginning has been integral to Islam. This is the divine law cited in the Qur'an, which the obedience to it leads to salvation according to the Islamic beliefs. This is, however, not to say that Islam has had a structured legal system from the beginning. Besides the general principles such as the equality in dignity[276], justice[277], the presumption of innocence[278], the obligation of contracts[279], the inheritance law[280] and some mentioning of different crimes and their punishments[281], there are a few strictly legal codes in the Qur'an[282]. The Qur'anic legal commands and prohibitions were clear during the lifetime of the Prophet. As the receiver of the revelation, the Prophet was sufficient for understanding, interpretation and application of the Qur'anic messages. His conduct was, additionally, the living source of moral and legal goodness. And his religious authority was binding in case of any question that might be raised[283]. But, the living source and the legitimate authority were no longer available after the death of the Prophet in 632 A.D[284].

The passage of time and various social and political factors resulted in a lack of correct understanding of the origin of Islam. Who had the authority to interpret the Qur'an after the Prophet? What did Muslims do when they faced issues that had never been dealt with in the Prophet's life? Or when they met antithetical Hadīth (the sayings of the Prophet)[285]?

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[275] See the Qur'an, Al-Nisa (4: 63): "O Believers, obey God, obey the Messenger and those in authority among you."

[276] See the Nobel Qur'an, Al-Isra (17: 70).

[277] See the Nobel Qur'an, for instance Al-Nisa (4:135) and Al-Nahl (16:90).

[278] See the Nobel Qur'an, Al-Hujurat (49:12)

[279] See the Nobel Qur'an, Al-Maeda (5:1)

[280] See the Nobel Qur'an, Al-Nisa (4:7 and 11)

[281] See the Nobel Qur'an, for instance Al-Nour (24: 2, 3, 4)

[282] Some scholars state that about 500 to 600 verses out of over 6000 verses in the Qur'an have a legal character. Abdullahi Ahmad An-Na'im, Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law, p.20 notes that about 80 verses deal with the legal matters in a strict sense.

[283] See Rahman, F, supra note 252, pp.68-70.

[284] Ibid.

[285] Murata, S and Chittick, W.C, The Vision of Islam, 1994, pp. 28-34.

Shari'a as a rule of law system was articulated and formulated by the early jurist scholars in response to questions posed by individuals between the Prophet's death and the beginning of the 9th century[286].

Shari'a, literally means "the path", connotes the rule of law system in Islam. While Islam represents a religion as a whole, Shari'a reflects an important legal body of it[287]. Different writers though do not use the term Shari'a uniformly. From time to time it is used broadly to refer the divine law of Islam and the duty of mankind. The English term Islamic law, even it has not precisely the same connotation as Shari'a, is used to denote the same meaning. Shari'a has its basis in the divine revelation, while it has been reinterpreted through juristic efforts and jurisprudence across time[288].

1.4. The Rise of Shi'a and Sunni Schools of Law

The division among Muslims communities and diversity in the practice of law started after the death of the Prophet with the rise of Sunni and Shi'a visions. The divergence of Sunni and Shi'a began from the question of the legitimate succession to the Prophet. The Shi'a or Party of Ali believe that the Prophet chose Alī ibn Abī Ṭālib, his cousin and son-in-law, as his only legitimate successor. After the Prophet's wife, Ali was the first person to acknowledge Islam[289]. According to Shi'a and also some Sunni sources[290] the Prophet appointed Ali as his brother, trustee and the sole interpreter of his legacy during his life[291].

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[286] See Knysh, A, supra note 245, pp. 95-6.

[287] See Kamali, M.H, Shari'ah Law: An Introduction, 2008, pp.1-13.

[288] For detailed information, see e.g. Masud, M.Kh, Messick, B and Powers, D.S (eds.) Islamic legal Interpretation: Muftis and their Fatwas, 1996.

[289] For more on the history of Shi'a, see e.g. Momen, M, An Introduction to Shi'i Islam: The History and Doctrines of Twelver Shi'ism, 1995, and Richard, Y, Shi'ite Islam: Polity Ideology, and Creed, 1995, and Dakake, M. M, The Charismatic Community, Shi'ite Identity in Early Islam, 2007.

[290] For Sunni view, see e.g. Al-Tabari, Tafsir al-Tabari, de Goeje, series 1, pp.3350. For Shi'a view, see e.g. Amini, H, Al-Ghadir. See also, Jordac, G (a Christian author), The Voice of Human Justice (Sautu'l 'Adalati'l Insaniyah), 4th Ed, 2000.

[291] See Rogerson, B, The Hires of the Prophet Muhammad and the Roots of the Sunni-Shia Schism, 2006, 31-61.

Back from the Farewell Pilgrimage (the last pilgrimage of the Prophet) in the place called Ghadīr Khumm the Prophet made a strong public statement and announced Ali as his only successor[292]. Appointing Ali as the legitimate successor, indeed, was compatible with the Qur'anic verses that clearly recognize a special place for the closet relatives of the earlier Prophets for their succession[293]. Also it was more consistent with the Prophet's conduct that put great emphasis on the eminent position of Ali as his close family[294].

Contrary to the Shi'a, the Sunni trust that the Prophet had left no known successor. What happened was, right after the Prophet's death some of his companions chose Abu Bakr as a Caliph or successor during the assembly. In historical order, therefore, Abu Bakr (632-4), Umar (634-46), Uthman (646-56) and then Ali (656-61) became leaders of the Muslim community. Up to now, Shi'a find this decision against the clear command of the Prophet in Ghadīr Khumm, and they believe in the guidance of Ali as the first leader of the community, while the Sunni Muslims accept the precedents of the four Caliphs[295].

In the early period after the Prophet, despite the lack of agreement in the leadership of the Muslim community, there were no key disagreements over the practice of ritual and legal orders. The memory of the tradition of the Prophet was alive and it was followed during the periods of Caliphs (634-61)[296].

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[292] For a detailed history of Ghadīr Khumm, see the magnum opus of Amini, H, Al-Ghadir fi'l-Ketāb wa'l-Sunnah wa'l-Adab, in 11 vols. 1967.

[293] For an excellent study on this issue, see Madelung, W, The succession to Muhammad: A Study of the Early Caliphate, 1997, pp. 1-27. Sunni view is quite opposite to this.

[294] In this respect Wilfred Madelung the German scholar of Islamic studies, The Succession to Muhammad, p.9 states that: The chain of the prophets and their family is described with more detail in the following verses: "And We gave him [Abraham] Isaac and Jacob, all of whom We guided. And before him We guided Noah, and of his off-spring, David, Solomon, Job, Joseph, Moses, and Aaron. Thus We recompense those who do good. And Zachariah, and John, and Jesus, and Elias, all of them among the righteous, and Ismael, and Elias, Jonah, and Lot; each of them We preferred above the worlds, and [some] of their fathers, their descendants, and their brothers. We chose them and guided them to the straight path".

[295] Aslan, R, supra note 254, pp.107-139

[296] See Schacht, J, Law and the State, in The Legacy of Islam, Schacht, J and Bosworth, C.E (eds.) 1997, pp. 392-405.

After the leadership of Alī ibn Abī Ṭālib the dynasties ruled the Muslim world. During the Umayyad, the first Muslim dynasty, a new form of administration and legislation were established. Shari'a as a legal system began to appear[297] and Islam extended from southern Spain and North Africa into India. The remarkable role of Muslim jurists (Faqīh or Muftī), the first collections of sayings of the Prophet and the developed of Islamic jurisprudence (Fīqh) occurred during the late Umayyad and the early Abbasid periods (710-750)[298]. Under the Abbasids dynasty Islamic law became increasingly a rigid legal system that reflects the socio-cultural circumstances of the early Abbasids time and grew by the different juristic methods and doctrines[299].

At the time that Islamic law came into existence the multiple understanding of the Qur'anic text and different versions of the Prophet's Sunna led to the differences of juristic opinions. The Shi'a and Sunni were divided into different schools of law, known as Madhahīb. Each jurist generally is a specialist in one Madhhab. Each Madhhab embodies certain methods of interpretation and derivation of religious practice and each Muslim is free to pursue the path he has found as the correct way of practicing Islam.

Within Shi'a "Ja'fari or Imāmi" named after Ja'far-al Sadiq (d.748) the sixth descendant of Ali, is the major School[300]. Imāmi or Twelver Shi'ism believes in the twelve rightful Imāms, Ali and eleven descendants after him. Since the year 1501 Ja'fari legal thought has been considered as the official jurisprudence in Iran. It is also applied in Iraq, Azerbaijan, Lebanon and Bahrain. Zaydī and Ismā'īlī are two other Shi'a schools that share the Ja'fari origin[301].

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[297] See Rahman, F, supra note 252, pp. 68-70.

[298] Black, A, The History of Islamic Political Thought: From the Prophet to the Present, 2010, pp.32-8.

[299] Joseph Schacht notes that Islamic law is a jurists' law that provides the unique legal science. Supra note 296.

[300] Amir-Moezzi, M.A, The Spirituality of Shi'i Islam: Beliefs and practices, 2011, pp. 103-131.

[301] Jafari: Shii Legal Thought and Jurisprudence, in The Oxford Dictionary of Islam, ed. Esposito, J.L, Oxford Islamic Studies Online [Accessed 20 October 2017]

The four main Schools of Sunni are also named after their founders; the Hanafi School after Abu Hanífa (d.767), the Maleki School after Málik ibn Anas (d.795), the Shafi'i School after Muhammad al-Shafi'i (d.820) and Hanbali School after Ibn Hanbal (d.855)[302]. The Hanafi School due to its relative flexibility and emphasis on the "personal reasoning" was recognized by the Ottoman Empire and later became a basis for legal interpretation in many Muslim states. Quite the opposite of the Hanafi School, the Hanbali is the strictest school regarding the interpretation of the Qur'an and the Hadīth. The Hanbali School became dominant in Saudi Arabia. The original Qur'anic manuscript has been left unchanged up to modern times and remains the major source of Shari'a among different schools of law. However the authenticity of the prophetic Hadīth, which were carried-over, classified and collected from one generation to another became an important concern of legal scholars. Shi'a scholars accept only those Hadīth that were conveyed by Ali and his descendants, the Imāms[303]. To the contrary, The Sunni scholars and their collections of Hadīth focus on those Hadīth transmitted by the first three Caliphs. The Muslim community, then, faced a number of controversies from the early history of Islam on. Not only over the legitimacy of government, but also challenges existed over the interpretation of the Qur'an and the authenticity of the prophetic Hadīth[304].

There are of course some consensuses among all scholars of different schools. There are however broad disagreements on the legal doctrines and differences in the observances of them. The reason for mentioning this is not to focus only on conflict rather than consensus among Muslims. Beyond the diversity, differences and distinctions at the heart of Islam stands the One God[305].

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[302] See Voll, J.O, Islam: Continuity and Change in the Modern World, 2nd Ed, 1994, pp.15-21.

[303] The term Imāms in Shi'ism refers to the members of the family of the Prophet. In Shi'ism Imām is inerrant, like the Prophet. The term is different from the general meaning in Sunni Islam or in the Western terminology.

[304] Leaman, O, An Introduction to Classical Islamic Philosophy, 2002, P.5.

[305] Nasr, S. H, supra note 273, pp. 1-55.

1.5. Jurisprudence, Juristic Disagreement and Diversity in Shari'a

Legal interpretation is not only a reflection of the law. Rather it is a product of different methodologies, legal reasoning, rhetorical approaches and understanding or possibly misunderstanding of the letter and the spirit of the law. Applied by Muslim jurist scholars the legal interpretation and jurisprudence in Islam share the same common ground.

From the perspective of Islam, the divine law aims to regulate the God-to-person and person-to-person relations. There exists, therefore, a clear distinction between the rights of God and the rights of humans in Islamic principles[306]. Some rights and duties are clear, while others might be ambiguous[307]. To achieve the divine law revealed in the Qur'an and the Sunna[308], the classical jurists of the Shi'i and Sunni schools, 8th-10th centuries, made the most extraordinary efforts. The "classical jurisprudence or Fīqh" represents the study, knowledge and science of the divine law and the Prophet's tradition. Derived from the divine will, Fīqh is the positive law of some Muslim societies, which reflects the perspective of the jurists upon the methodology that they employ[309].

For this reason, Islamic law as a system of rule of law is seen as God's law and jurist's law at the same time[310]. The Muslim jurisprudence could perhaps be compared with the philosophical and legal hermeneutic in the Western tradition in the early 19th century[311]. Different ways of looking at law have developed to different methodologies for the derivation of religious rules.

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[306] See Schacht, J, supra note 296.

[307] See the Qur'an Al-Imran (2:7): "…Some of its verses are absolutely clear and lucid, and these are the cores of the Book. Others are ambiguous. Those in whose hearts there is perversity, always go about the part which is ambiguous, seeking mischief and seeking to arrive at its meaning arbitrarily, although none knows their true meaning except Allah. On the contrary, those firmly rooted in knowledge say: We believe in it; it is all from our Lord alone. No one derives true admonition from anything except the men of understanding".

[308] For more discussion, see Coulson, N.J, A History of Islamic Law, 1997.

[309] Weiss, G.B, supra note 274, 1998, pp. 113-144.

[310] See Schacht, J, supra note 296, pp. 392-405.

[311] See e.g. Rippin, A (ed.), Approaches to the History of the Interpretation of the Qur'an, 1988. See also Hawting, G.R (ed.) Approaches to the Qur'an, 1993.

The methods of the jurisprudence are known as the roots of jurisprudence or Usul al-Fīqh[312]. They are different between Shi'a and Sunni schools or even may vary from one jurist to another within a school law[313]. The four core methods and sources applied in the Sunni jurisprudence are: the "Qur'an", the "Sunna" of the Prophet, the "consensus or Ijma" of the entire body of jurist scholars in the Muslim community about an issue, and finally the "reasoning by analogy or Qiyas". Much like the Sunni jurisprudence, the Shi'a legal thought recognizes the "Qur'an", the "Sunna" and the "consensus" that includes the Prophet's or Shi'a Imāms opinions. But unlike the Sunni schools, the Shi'a rejects analogy and accepts the "reason or intellect or Àql" as the forth method[314]. The correlation between reason and the revelation has emerged in the Ja'fari jurisprudence. The legal doctrine "whatever is judged necessary by reason is also judged necessary by revelation"[315] is therefore the basis for juristic opinions in Shi'ism. The "reason" is different from the "every personal opinion". Rather it refers to the reason of legal experts in Islamic law.

What is especially remarkable here is the existence of "independent reasoning or Ijtihād".[316] Ijtihād is the process of making legal decision based on the independent interpretation by "Mujtahīd or legal expert" to explicate the law.

This of course provides jurist scholars considerable leeway in interpretation and issuing legal judgment. In addition, jurist scholars may be asked to issue their "juristic opinion or Fatwā" in particular legal cases in connection with ongoing issues in society.

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[312] For more details, see Kamali, M.H, Principles of Islamic Jurisprudence, available at: http://www.targheeb.com/phocadownload/Fiqh/ISLAMIC%20LAW%20HISHAM%20KAMALI.pdf.

[313] Weiss, G.B, supra note 274.

[314] See e.g. Hallag, W, The Origins and Evolution of Islamic Law, 2005.

[315] See Jafari: Shii Legal Thought and Jurisprudence, in The Oxford Dictionary of Islam, ed. Esposito, J.L, Oxford Islamic Studies Online.

[316] Weiss, G.B, The Theory of Ijtihad, American Journal of Comparative Law, 1976.

The confrontation between reason and tradition resulted in two ways of thinking about the methods of interpretation. Traditionalists take the divine law complete and comprehensive for precise answers to the moral, legal and ritual questions. They emphasize on the imperfection of human reason to interpret God's will and claim that the Qur'an is to be understood in its apparent meaning[317]. Some radical traditionalists go even further, arguing that the reason-based interpretation disproves the divinity of the Qur'an[318]. Rationalists, on the contrary, give a special importance to the reason as a source of religious insight. Shari'a in their view is the divine law as humanely understood and Fīqh is the juristic efforts to interpret this law. This view is especially true once the Prophet, the Shi'i Imāms and the Sunni companions are no longer present. Nevertheless, the majority of jurist scholars take a position in the middle. Nearly all the major schools apply the reason in their approaches, though in practice Shi'a are more rationalist[319].

The attempts towards the understanding of Shari'a first carried out by the early Muslim scholars born and schooled in the Middle East, whose native tongue was Arabic, Persian or Turkish[320]. Their different legal doctrines resulted in a considerable diversity, which makes disagreement among them inevitable. This was a juristic disagreement based on first-hand knowledge of the subject in many respects. The principle of "Ikhtilāf or disagreements of jurists"[321], mentioned in the Qur'an and the Sunna, affirms the existence of diversity of opinions over juristic issues.

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[317] Saud, L, Islamic Political Theory, in An Introduction to Islam in The 21st Century, McCloud, A.B, Hibbard S.W, Saud, L (eds.) 2013, pp.81-5.

[318] Ibid. P.83. This view is supported by Hanbali School.

[319] See supra note 311. Since 1959 the Jafari School of jurisprudence has been afforded the status of "fifth school" along with the four Sunni schools by Azhar University in Cairo.

[320] With this respect, see Butterworth, Ch.E, On What is Between, Even Beyond, the Paradigms of the State and Islam, in Between the State and Islam, Butterworth, Ch. E and Zartman, W (eds), 2001, pp. 14-

[321] See Ikhtilaf al-Fiqh, in The Oxford Dictionary of Islam. Ed. Esposito, J.L, Oxford Islamic Studies Online. [25 October 2017].

The basis for Ikhtilāf is to recognize the contrary views, while there is a belief in the oneness of God, the holy Qur'an and Prophet Muhammad[322]. The disagreement remains over the formulation, reinterpretation and implementation of the divine law. The plurality of juristic opinions in fact does not contradict the singularity of the law of God, rather guarantees the unity in diversity.

The most famous instances of disagreement are the different positions of Muslim scholars on the controversial issues of polygamy and inequality of inheritance in Islam. With regard to the polygamy, the common assumption is that family law in Islam permits Muslim men to take more than one wife (up to four wives) at the same time. However, the Qur'anic verse on polygamy (4:3) specifies the clear requirement that the husband should be able to treat wives equally and justly. To avoid any confusion, the Qur'an (4:129) further explicitly states: "and you will never be equal between wives."[323] Moreover, a general rule in the interpretation of the Qur'anic verses is to carefully consider the context and cause of the revelation. The same is true here. The reason for the revelation on polygamy was to prohibit the practice of pre-Islamic Arabia from having polyandrous and polygamous marriages[324]. The Qur'an not only has prohibited the tribal customary law of the nomadic Arabs, but also reformed the institution of marriage based on the principle of justice. Despite the clear aim of the verse, the legality of polygamy is found in the jurisprudence and domestic law of many modern Muslim states[325]. Such practices without considering the object, purpose and normative logic of Shari'a obviously reflect the considerable bias of male scholars.

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[322] See Kamali, M.H, supra note 287, pp.99-121.

[323] For Shi'a interpretation of the Qur'an, see Tabatabaeī, M.H, Al-Mizan fī Tafsir al-Qur'an, 1974, and for Sunni interpretaion of the Qur'an see, Al-Tabarī, Jāmī al-Bayan fī Tafsīr al-Qur'an or Tafsir Al-Tabari, 1980.

[324] For more on the history and culture of the pre-Islamic Arabs, see Smith, R.W, Kinship and Marriage in Early Arabia, 1885, and see also, Hillman, E, Polygamy Reconsidered, 1975.

[325] For the list of countries which recognize polygamy, see: https://infogalactic.com/info/Legal_status_of_polygamy [Accessed 25 October 2017]

The disagreement on the Islamic law of inheritance is more controversial though. The interpretation of the Qur'anic inheritance rules varies between the Shi'a and Sunni schools and its practice is dramatically different from one Muslim state to another. The Islamic law of inheritance manifests in Sura al-Nisa, the chapter on women in the Qur'an[326]. This chapter represents the Qur'an's role as an authoritative source of law[327] and mostly deals with the marriage and inheritance law.

The main dispute is over the practice of the verse, which explicitly specifies that the male heir should receive twice as much as the female counterpart: "God commands you, with respect to your children, to give the male the share of two females… This is an obligation from God. Indeed, God is all- knowing, all-wise (4:11)."

Many contemporary Muslim scholars have tried to clarify various questions concerning the interpretation of this verse. In particular, the main question has been whether or not the divine law can be changed and interpreted in the light of the evolution of society and the requirements of the present time.

Viewed from the perspective of some liberal Muslim feminists the Islamic law of inheritance is a clear discrimination against women[328]. Some other modern thinkers argue that the Qur'anic inheritance rules are generally conditioned by socio-historical background of their enactment.[329] They are incompatible with the moral teachings and the essential messages of the Qur'an itself on dignity, equality and justice. In their view, the Islamic law of inheritance was a remarkable progress towards the status of women in pre-Islamic Arabia. It changed the tribal customary law when only the male agnates were entitled to inheritance.

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[326] Al-Nisa or Women is the 4th chapter of the Qur'an.

[327] For more details, see Ernst, C.W, How to Read the Qur'an: A New Guide, with Select Translations, 2011.

[328] See e.g. Ahmed, L, Women and Gender in Islam: Historical Roots of a Modern Debate, 1992.

[329] With this respect, see Rahman, F, Islam and Modernity: Transformation of an Intellectual Tradition, 1984.

It is therefore best understood against the customary inheritance practices of nomadic Arabs upon the condition of the time[330]. This would, thus, be a guideline for the modern interpretation of the Islamic inheritance law in the light of modernity and transformation of the Muslim communities over time.

Yet, according to the classical view, the Islamic inheritance law cannot be reformed or modified. First, because of the source of law is the divine revelation. It is a compulsory rule and is not subject to any change. Second, in the Islamic inheritance system one can transfer an equal share of his estate to his heirs during his lifetime. Or he can distribute up to one-third of his estate assets by means of a valid will or testament[331]. Thus, the Qur'anic rule takes effect only when a deceased person has not officially transferred his property or in the absence of a valid testament. Third, the reason for the difference between men and women' inheritance right is to balance economic justice and to support the institution of family. In Shari'a a woman is granted a right to maintenance and Mahr (dowry) upon marriage.

Financial support is the obligation of the husband towards his wife according to the Qur'an[332], while the wife has no financial responsibility towards her family. For establishing justice in the family the Qur'an awards a son twice the share of a daughter.

The disagreement on the interpretation of Qur'anic verses has led to different practices of the divine will. Shari'a has influenced and been influenced by local customs, regional culture and national socio-political factors. The practice of Shari'a does in fact vary within one state and between other Muslim states and is sometimes radically different from what is represented in the sources of Islamic law. The modern practice of polygamy in Muslim states is a good example of this.

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[330] For the historical evolution of Islamic Inheritance Law, see Coulson, N.J, supra note 307.

[331] See Powers, D.S, The Islamic Inheritance System: A Socio-Historical Approach, in Arab Law Quarterly, vol.8, 1993, pp.13-29.

[332] See the Nobel Qur'an Al-Nisa (4:4) "And give the women (upon marriage) their bridal gift graciously. But if they be pleased to remit you a portion of it, then take with grace and pleasure".

In Iran, for instance, before the Islamic Revolution 1979 article 16 of the Family Protection Act 1975 restricted the polygamy to the court's permission under certain conditions such as the consent of the first wife. According to Article 17 of the Act "any man, who already has a wife and marries another woman without obtaining the due permission from the court, shall be sentenced to six months' to one year of imprisonment." After the Islamic Revolution and following the transformation of the legal system article 16 of the Family Protection Act 1975 remained applicable and was further affirmed by the new Family Protection Act 2011. Even though the punishment prescribed under article 17 of the Act 1975 is considered invalid due to incompatibility with Shari'a. In addition, the Civil Code of Iran legalized "Mut'a or temporary marriage". The Mut'a allows men to marry for a specified period of time. The practice of Mut'a is however only accepted by Ja'farī jurisprudence under very limited conditions and it is highly controversial among classical and contemporary Ja'farī jurists[333]. It is considered as Haram or Forbidden in other Shi'i schools as well as in all Sunni schools.

As a result, regardless of the Qur'anic verse on polygamy, according to laws of the Islamic Republic of Iran a man could marry (up to four permanent wives) only by permission of the court under certain conditions[334] and at the same time has a right to temporary marriage. In almost a similar way, the Civil Law of the Republic of Afghanistan 1977 in article 86 allows polygamy under specific conditions. Though at present polygamy is deemed as socially indecent in both Iranian and Afghan societies but it is still practiced especially in rural communities. Quite to the contrary, in Turkey polygamy is criminalized with the adoption of the Civil Code 1926, part of Atatürk's reforms. And in Tunisia polygamy was prohibited and criminalized by virtue of article 18 of the Personal Status Code 1956[335].

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[333] See Mutah, in The Oxford Dictionary of Islam, Esposito, J.L (ed.) Oxford Islamic Studies Online [Accessed 2 November 2017]

[334] Iran's Family Protection Act 1975 Article 16: "A man, already having a wife, may not marry a second wife unless in the following situations:

Perhaps, the examples of Iran, Afghanistan, Turkey and Tunisia show how major socio-political transformations influence the practice of Shari'a and lead to disagreements among Muslims jurists. The Islamic Revolution in Iran, more than two decades of civil war and the reign of the Taliban in Afghanistan, the Atatürk's reforms in Turkey and the French colonialism in Tunisia are reflected in the changes of their legal institutions. Of course this is not to say that the formation of Shari'a is attributed solely to the social changes and cultural developments of Muslims communities. "Who decides what, under the control of whom" is of equal importance.

This is also a reminder for the influence of relativism in the interpretation and implementation of the fundamental rights. As mentioned in the previous chapters, the three elements of cultural relativism, namely religious culture, legal culture and political culture, make some fundamental rights particularity relative.

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1) First wife's consent.
2) Inability of first wife in performing marital duties.
3) Non-submission of the first wife to the husband.
4) Affliction of the wife to insanity or other difficulty to cure diseases.
5) Conviction of the wife.
6) Addiction of the wife.
7) Wife's abandonment of family life.
8) Wife infertility.
9) Disappearance of the wife."

[335] See Mashhour, A, Islamic Law and Gender Equality: Could there be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt, in Human Rights Quarterly, 27, 2005, pp.562-96.

2. The Modern Codification of Islamic Law

If the emergence of Shari'a as a system of law was the result of the Umayyads and Abbasids' attempts in the pre-modern era, the modern codification of Shari'a is the outcome of two historical eras: the Ottoman Empire era[336] and the era of European Colonialism over the Muslim communities[337]. Challenged by these two eras, many Muslim states came to the idea of the codification of legal norms similar to that of the European.

From 15th to 17 centuries the Islamic legal history entered into a new religio-political phase. The Muslim world was divided into three great empires; the Ottomans from east of black sea to the North Africa coast and from Hungary to the Persian Gulf coast, the Safavids in Iran and the Moghuls in India. In the struggle for power each empire practiced Islam differently from others and each had its own religious polity[338]. Like the rise of Catholic and Protestant states in Europe, the Ottoman Sultān Selīm I[339], adopted Sunni Hanafī School to unify rule of practice, while Imāmi Shi'ism became the official school of law in Iran under the rule of Shah Ismā'il Safavid[340]. The official selection of a certain school and its doctrines within the Empires' territory resulted in more uniformity in the law applied. It was the first step towards the codification of Islamic law. Specifically under the Ottomans Empire, due to the Sultāns' power and the Empire's extent, Islamic law enjoyed the highest degree of efficiency since the early Abbasid[341].

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[336] See e.g. Anscombe, F.F, Islam and the Age of Ottoman Reform, Past and Present, vol. 208, 2010, pp.159-189.

[337] See for instance, Powers, D.S, Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India, Comparative Studies in Society and History, vol.31.1989, pp. 535-71.

[338] Black, A, supra note 298, pp.195-7.

[339] For more details, see ÇIPA, H.E, The Making of Selim: Succession, Legitimacy, and Memory in the Early Modern Ottoman World, 2017.

[340] For more on the history of Shi'a in Iran, see Dabashi, H, Nasr, S.H, Nasr, S.V (eds.) Expectation of the Millennium: Shi'ism in History, 1989.

[341] Schacht, J, supra note 296.

The Hanafization gave rise to a new kind of the Shari'a Court system and Qanun (laws and regulations enacted by government) became an integral part of the legal system[342]. Moreover, during this time the Ottoman Empire interacted with the European legal system. Later on, in the late 19th century the Ottomans became familiar with the European Capitulations according to which the European citizens residing in the Middle East would be governed by their own law[343].

The European Capitulation law turned out to be a starting point for the codification of law. As a result, the Ottoman Empire adopted "Tanzimāt or reorganization", a series of legal reforms that emanated from the European legal codes[344]. Tanzimāt reforms led to a new type of legal pluralism within the legal system of Muslim states and have continued up to now, that is, the plurality of the Islamic and European legal traditions, the two fundamentally different law[345]. The European colonialism from the 17th through the 20th century had even more significant impact on the modern codification of Islamic law.

The British colonized Muslim areas of Africa, Asia and parts of Southeast Asia. The French controlled North Africa and part of West and Central Africa. The Spanish and Portuguese held Muslim territories in Philippines, todays Malaysia and parts of North Africa and the Dutch ruled over territories of todays Indonesia[346].

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[342] Qanun, in The Oxford Dictionary of Islam, Esposito, J.L (ed.) Oxford Islamic Studies Online [Accesses 5 November 2017]

[343] See Emon, A.M, Shari'a and the Modern State, in Islamic Law and International Human Rights, Emon, A. M, Ellis, M.S and Glahn, B (eds.), 2012, pp.65-8.

[344] See Kareem Zanki, N.K, Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars, International Journal of Humanities and Social Science, vol. 4, No.9 (1), 2014. See also, Emon, A.M, supra note 343.

[345] See Emon, A.M, Ibid.

[346] Nasr, S.V.R, European Colonialism and the Emergence of Modern Muslim States, In The Oxford History of Islam, Esposito, J.L (ed.) Oxford Islamic Studies Online [10-Nov-2017]

The European colonizers replaced religious, cultural, legal, and socio-political institutions of Muslim countries with Western ones. The transformation of law, among other interests, was central to the "civilizing mission" of colonialism[347]. The colonists endeavored to rule laws and legal institutions of the colonized Muslim territories. The reason for this is clear. By controlling law the colonial process is far more possible. At this time Muslim societies faced the imposition of new legal and cultural orders, while each had its own distinct legal culture. The result was a dual legal system[348], which reflected the Western norms but has its basis in Islamic traditions. The interaction between Islamic legal traditions and Western rules and the struggle to understand what it meant to be a Muslim contributed to the emergence of three different perspectives of modernism, salafism and messianism, which later led to the numerous changes in the Muslim World and the image of Islam[349]. Much influenced by the Western modernity, some reformist Muslim thinkers speak of the "dynamic Shari'a". They argue that the interpretation of the Qur'an could adapt to the needs of times[350]. In contrast to the modernist, Salafis reject the diversity of opinions in Shari'a and accept their own radical interpretation of the Qur'an[351]. And the phenomenon of messianism refers to a number of charismatic leaders who claimed to be the "Awaited Messiah or The Mahdi"[352], namely the last survival of the Prophet's family[353]. Subsequently, in response to the conditions created by the colonial domination two important movements occurred in the late 19th and early 20th centuries: Islamic revival and independence movements. The Islamic

[347] Merry, S.E, Law and Colonialism, 25 Law and Soc'y, Rev. 1991, pp.889-922.

[348] Ibid.

[349] For more details, see The Rise of European Colonialism, Harvard Divinity School, available at: https://rlp.hds.harvard.edu/rise-european-colonialism [Accessed 10 November 2017]

[350] For instance, Muhammad Abduh (d.1905) and Muhammad Iqbal (d.1938)

[351] For instance, Muhammad ibn Abd al-Wahhab the founder of Wahhabism in Saudi Arabia.

[352] "Imam Mahdī" or the "Hidden Twelfth Imam" is the survival of the Imami Shi'ism and the descendent of the Ali. According to the Ja'fari School "Imam Mahdī" has gone to the "Great Absence" and will return together with Jesus at the end of time to establish justice and peace in the world. See also Sachedina, A.A, Islamic Messianism: The Idea of Mahdi in Twelver Shi'ism 1981.

[353] For instance, the Ahmadiyya Muslim Community is the sect founded in British India by Mirza Gulam Ahmad who claimed to be the Messiah.

revival movements called for a return to the origin of Islam. The idea of "renewal or Tajdid" had a precedent in the early centuries of Islamic history. The term refers to the vital efforts of Muslims in maintaining a truly Muslim society in accord to the Islamic teachings. In the 20th century, however, the revival movement had a different nature. It was more an objective movement influenced by ideological and political views in response to the Western control of Muslims lands.

These movements represented an Islamization of all aspects of the community life and reflected the idea that it is God and not people who are sovereign[354]. This idea was very important in shaping the vision of Muslim thinkers who later established the legal systems derived from European code and Islamic legal tradition. For instance Pakistan established the first Islamic Republic and constituted the legal system based on English common law and Shari'a. Inspired by the revival movements and the Western nation-states model, the independence movements developed in many colonized Muslim countries.nFollowing the independence, post-colonial states have adopted different legal systems, in which Shari'a is no longer fully practiced or is only applied on the level of the personal status law and the criminal law. Tunisia (1956) adopted a legal system modeled on the French system with a limited room for Islam, while Morocco (1956) formed a dualistic legal system based on the French and Islamic legal traditions.

The colonial control in the past has had a great impact on the role of law and the rule of law in the Muslim countries up to the present. The history of colonialism provides the answer of how and why understandings of Islamic law and ethics vary in the contemporary Muslim world.

[354] See e.g. Haddad, Y.Y et.al, The Contemporary Islamic Revival: A Critical Survey and Bibliography, 1991.

The contemporary approach towards Islamic law in many Muslim states is in fact the product of this particular historical event. The postcolonial practice of Shari'a varies widely between Muslim communities and has become distanced from the origin of the Qur'an and the teachings of the Prophet more than any time in the history of Islam. Albeit this does not mean that the modern position of all Muslim states on Islam and Islamic law is entirely inspired by the rise and fall of European colonialism. But, and perhaps more to the point the religious, legal and political culture of many Muslims states are still indebted to this period.

3. Islamic Law Between Revelation and Reason

Islamic law as a rule of law system in the modern Muslim states is neither merely the Qur'anic verses nor the prophetic Tradition. It is a result of the interaction between the divine revelation and human reason. The present practice of Islamic law, then, represents the political history of Muslim states rather than the historical origin of Islamic values[355]. Islam and its law are influencing and being influenced by highly sophisticated legal and political culture of states across time and places. This comes however as no surprise. As in pre-modern Europe, politics and religion have always been an integral part in the Muslim states. The struggle for power and the clash of cultures, the rise of diverse ideologies in general, the state's control over the exercise of religion as a vehicle for anti-colonial movements against the European colonialism[356], and the tensions between the revival of Islamic law and Modernity since the beginning of 1970s[357] in particular, have reshaped Islamic law in the Muslim world.

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[355] For more details on this issue, see Carl, B.L, Religion and State: The Muslim Approach to Politics, 2001. See also Donohue, J, Esposito, J, Islam in Transition: Muslim Perspectives, 2006.

[356] Zartman, W, Islam, the State, and Democracy: The Contradictions, in Between the State and Islam, Butterworth, Ch. E and Zartman, W (eds.), 2001, pp. 231-6.

[357] Lapidus, I.M, Islamic Revival and Modernity: The Contemporary Movements and the Historical Paradigms, in Journal of the Economic and Social History of the Orient, vol. 40, 1997, pp.444-60. See also, Brown, N.J, Arguing Islam after the Revival of Arab Politics, 2017.

All these transitions have influenced the contemporary religious, legal and political culture of each Muslim state varied from one state to another. The different interpretations and distinct implementations of Islamic law show the diversity of Muslim understanding of Islamic law.

The contemporary interpretation of Shari'a, then, must be understood in terms of these developments and controversies. They may be totally true but only part of the whole truth. They might be partly true, or they may be not true at all. The one holy book can be interpreted in a way that leads to peace or causes to war. Some scholars invoke the origin of Islamic law to justify calls for human rights[358], while at the same time some other scholars see Islamic law incompatible with human rights[359]. Some interpretations reveal the truth, while some reverse the truth. This reminds the phrase by John William's in Augustus: News will come from Rome, but it will be rumor confounded with fact, fact confounded with self-interest, until self-interest and faction become the source of all we shall know.[360] This however is not limited to Islam. Whether the phenomenon of the Crusades[361] and the idea of holy war in the Medieval times or The Thirty Years' War between Protestants and Catholics at the beginning of the 17th century[362], or the emergence of the Islamic State (ISIS) in the 21st century all are consequences of the incorrect interpretations of the religions, which consider to be the religions of peace[363].

[358] For instance see, Baderin, M.A, International Human Rights and Islamic Law, 2003, and Emon, A.M, Shari'a and the Modern State, in Islamic Law and International Human Rights, Emon, A. M, Ellis, M.S and Glahn, B (eds.), 2012, and Sentürk, R, Human Rights in Islamic Jurisprudence: Why Should all Human Beings Be Inviolable? in The Future of Religious Freedom: Global Challenges, Hertzke, A.D (ed.) 2012.

[359] For instance see, Mayer, A.E, Islam and Human Rights, Traditions and Politics, 2013.

[360] William, J, Augustus, 1971, p.24.

[361] For more details on the history of Crusades, see Riley-Smith, J, The Oxford History of Crusades, 2002.

[362] See, e.g. Wilson, P.H, The Thirty Years War: Europe Tragedy, 2012.

[363] Knysh, A, supra note 245, pp.3-4.

To borrow a notion from Seyyed Hossein Nasr's "The Heart of Islam", then Islam is not any more or less the "religion of the sword" or the "religion of peace" than any other religion[364]. Rather it is a religion, like other monotheistic religions, which is understood differently by human reason.

It therefore seems incorrect to consider all diverse interpretations of a religion as equally correct. The divine revelation is the major sources of law, which can be selectively chosen, interpreted and employed. The enormous gaps between the origin and the practice of Islamic law and the immense difference between how Islam and its law are observed by communities at different periods of history embody the fact that states' understanding of Islamic law may be subject to change. This point at the very least sheds light on the substantial difference between Islam and its followers, and even among the followers of Islam themselves. Islamic law as a source of legislation and the basis of the positive law reflects God's will and represents human will. It is the Islamic law and the state's legal reasoning. The latter is changeable, while the former is uniform across time and space. That is why, what is considered as Islamic legal and ethical tradition by Muslims can vary, sometimes in contradictory ways. Today, Shari'a as rule of law system has been integrated with other legal traditions or has been removed and replaced by them. To understand the contemporary meaning and role of Islamic law, therefore, only examining the sources of Shari'a is not sufficient.

[364] Nasr, S.H, supra note 273, pp.217-22.

4. Domestic Implementation of Islamic Law: Who Decides?

The brief overview of origin and development of Islamic law from the death of the Prophet to the revival movements has provided answers to the question of why the form and meaning of Islamic law have been challenged and changed over centuries. Precisely, the influence of power, politics and authority in the formation of modern legal systems showed the important role of the state in practice of religion. From the historical perspectives there is in fact no certain distinction between religion and the state either in pre-modern or modern era. Rather the political ideology to the great extent has been conducted in terms of "Religionspolitik"[365].

Yet, the role of state and the scope of religious authority in Muslim community is a matter of disagreement. How and to what extent Islam regulate the legal and political rules of the community? Does Islam aim to guide, or does it aim to govern all public and private aspects of community life? Who adopts Islamic law as a source of legislation? Who decides how Islamic law should be implemented and who speaks for Islamic law in Muslim communities?

Some Muslim thinkers believe that the foundation of the "Umma" and the role of the Prophet as the leader of community indicate that Islam has been a "Political Religion" by its very nature[366]. The other opinion held also by many contemporary Muslim scholars is that the Muslim community is a "Religion, Life and the State" or "Din, Dunya wa Dawlah." They emphasize that Islam is not solely a religion[367]. Rather it addresses religious, political and legal concerns of the Muslim community.

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[365] Black, A, supra note 298, p.5.

[366] For the opposite view, see Ayubi, N, Political Islam: Religion and Politics in the Arab World, 1993, pp. 1-34. Also see e.g. Tmīm, B, The Umma and the Dawla: The Nation-State and the Arab Middle East, 2008, and Mandaville, P, Transnational Muslim Politics: Reimagining the Umma, 2001.

[367] See "Din wa-Dawlah" in The Oxford Dictionary of Islam. Ed. John L. Esposito. Oxford Islamic Studies Online, available at: http://www.oxfordislamicstudies.com/article/opr/t125/e542 [Accessed 14 September 2017]

Based on the principle of "God's absolute ruler" this group believe in the application of Shari'a in the entire public and private realms. To the contrary some believe that Islam has not specified a certain system of government for Muslims. The major Islamic sources contain very little on politics and there is no religious and political authority in Islam except the call to do well and prevent evil[368].

Each of these ideas is partly true. Neither the Qur'an nor the Sunna does define a particular political structure, but presents fundamental moral and legal principles for a rule and the ruler. Even the Constitution of the Medina during the rule of the Prophet has not outlined any certain form of government. On the other hand, politics cannot operate against the spirit of religion according to the Islamic teachings[369]. This relationship between religion and politics makes it difficult to determine precisely whether the model of government in Islam falls under the definition of theocracy or not[370]. But, precisely it can be determined that Islam's ideal political system does not fall under the definition of autocracy.

4.1.State Authority to Interpret, Implement and Restrict Islamic Law

Modern Muslim states' implementation of Shari'a is unlike any previously seen in the history of Islam. Over the past generations, the legal systems of most Muslim societies have become a centralized and state-authorized system of rule of law. Like other states the majority of Muslim states base their legal developments on codified law. Islamic law is no longer necessarily the source of legislation and legal systems are generally divided into Shari'a-incorporated and secular systems.

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[368] See Belkeziz, A, The State is Contemporary Islamic Thought: A Historical Survey of the Major Muslim Political Thinkers of the Modern Era, 2009, pp. 27-42.

[369] See Nasr, S.H, supra note 273, pp.147-55.

[370] For opposite view, see Nasr, supra note 273, pp.147-8. According to Nasr the term theocracy has been understood in the context of Western history. A theocracy means the rule of the priesthood or the priestly class, of whom the ruler is the head or leader. While in Islam there is no priesthood comparable to that found in Christianity. He states the Islamic ideal is that of a nomocracy, that is, the rule of Divine Law.

In Shari'a-based legal systems, Shari'a is considered as the source of legislation, while the level of incorporation into the national codified law is varying among Muslim states. In this case, the state decides to whom Shari'a is applied and which school of law or what Islamic jurisprudence shall be used. Modern judges apply the rules as written in the law books and do not even need to have knowledge of the origin source of Shari'a[371]. In secular legal system, secular law is dominant, but in some cases Islamic legal and ethical traditions are applied in family and personal status law.

While the principles of Shari'a are the source of legislation in the Egyptian Constitutions of 1971 and 2014, the Egyptian Civil Code relies heavily on the French Civil Code[372].

The codified legal system in Pakistan is similar to the 19th century English common law, but at the same time the Constitution of Pakistan 1973 provides that all existing law shall be brought into conformity with the norms of Islamic law[373]. To the contrary Islam and Islamic law have not been constitutionally privileged in the Lebanese constitutions, while each religion has its own family law and religious court.

Constitutionalizing of modern Muslim states with or without Shari'a may first raise this question: what is the definition of a Muslim state? Is a Muslim state identified by the official religion of the state acknowledged in the constitution? For instance Tunisia. Or is a Muslim state recognized by the religion of majority of population regardless of its secular system? Like Albania, Azerbaijan, Tajikistan and Turkey. Or is a Muslim state defined upon the incorporation of Shari'a in its legal system? For example Afghanistan, Egypt, Iran and Iraq.

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[371] See, Lombordi, C.B, State Law as Islamic Law in Modern Egypt: The Incorporation of Shari'a into Egyptian Constitutional Law, 2006.

[372] Emon, A, Techniques and Limits of Legal Reasoning in Shari'a Today, 2 Berkeley J.Middle E.& Islamic L, 1. 2009.

[373] See, Lau, M, introduction to the Pakistan Legal System, With Special Reference to the Law of Contract, 1 Y.B. Islamic & Middle E.L. 1994, pp. 5-7.

For instance, Albania and Turkey are two Muslim-majority states, both countries have adopted a secular system of government and both countries have been influenced by the Ottoman Empire's rule for many centuries. Nevertheless, Albania is rarely considered as a Muslim country, while Turkey has proved that the state can very well be a Muslim state even without the constitutionalization of Shari'a. The example of Tunisia is of particular interest. The 2014 Tunisian constitution acknowledges Islam as official religion of the state, while it does not mention Shari'a as source of legislation. Some Muslim thinkers raised the argument that a modern state cannot be a Muslim state[374], while Tunisians actively debated how their newly democratic state would remain a Muslim state[375]. On the other hand, today many Muslim states often invoke Islamic law to claim their political legitimacy[376]. Particularly, the religious provision in their constitutions shows how this provision is used to express the state's authority and legitimacy, rather than to manifest the religious legal content.

Making Shari'a the law of the state does not make the state and its people more devoted to Islam. Such a judgment would be extremely difficult to make. However, it seems that the embodiment of religion in culture, policy and law of the state represents a religious foundation of the state and its authority. Again, the religious, legal and political culture of the state demonstrates the distinctive character of the state. The new democratic Tunisian constitution shows how Tunisia as one of the secular Middle Eastern country has tried to protect Islamic legal tradition in the society through acknowledgment of Islam as official religion of the state.

[374] Zeghal, M, Constitutionalizing a Democratic Muslim State without Shari'a: The Religious Establishment of in the Tunisian 2014 Constitution, in Shari'a: Law and Modern Muslim Ethics, Hefner, R.W (ed.), 2016, pp. 107-130.

[375] Ibid.p108.

[376] See Emon, A, supra note 372, p.3.

Nonetheless, the Organization of Islamic Cooperation (OIC) consists of fifty-seven Muslim member states[377]. Regardless of whether Islam is constitutionally acknowledged as official religion of the state, or whether it is considered as source of legislation, a state with a remarkable Muslim population has been characterized as a Muslim state. In other words, a Muslim country often refers to a country where the majority of population is Muslim.

Muslim states, in fact, like any other states have the authority to make and enforce laws within their territory. This is the state that has the authority to enforce Islamic law that governs its people. This is the state that speaks for Islamic law, reinterpret Islamic law for its political ends and limits or extents the scope of Islamic law. For this reason, it would be wiser to speak of a "Muslim state" rather than "Islamic state". Or better said the term "Islamic state" to speak of modern Muslim-majority states is a common mistake. Even if a state claims allegiance to Islam and Islamic law and establishes the "Islamic Republic" as a form of government, the entanglements of religion and politics over time makes it difficult to attribute modern Muslim societies to Islam.

The best way to understand this is simply to look at the examples of Islamic Republic of Iran. In Iran the Shah attempted to modernize the legal system before the overthrow of his regime, whilst Khomeini incorporated the new political and religious ideology in the same state system. There is no doubt that the incorporation of Shari'a into legal systems of modern states creates a number of problems. But the problems more stems from the political role Shari'a plays in the Muslim communities than from its religious character. Then, if many non-democrat Muslims states have secular systems, then attribution of human rights violation to Islamic law is simply incorrect[378].

[377] For more on the OIC, see e.g. Kayaoglu, T, The Organization of Islamic Cooperation: Politics, Problems, and Potential, 2015. See also, Mayer, A.E, supra note 126, pp.2-4.

[378] With this respect, see e.g. Roy, O, Secularism Confronts Islam, 2007.

5. Shari'a-Based Constitutional Law

5.1. Constitutionalization of Shari'a in Modern Muslim States

Constitutional law by definition is a body of law evolved from the constitution setting out the fundamental rights and principles according to which a state is governed[379]. Yet, the terms fundamental rights and principles are not always applied and implemented uniformly and consistently. Derived from, written or unwritten, national constitutions fundamental rights may be characterized differently. What is, then, the characteristic of these rights? First and foremost it lies in the state's consent[380]. Each state has its own set of experience, its own developmental history and its own religious, legal and political culture different from other states. These factors affect state's understanding of the task of writing new constitutions and setting the fundamental rights and principles[381]. The same is true for the process of constitutionalization in Muslim countries. But of course the entanglement of religion and politic to a great extent shapes the norms and values of the Muslim societies. The result of constitutionalization in Muslim states is therefore radically different from modern secular societies.

The debate over the constitutionalization of states based on the Islamic legal principles has been given a more attention in recent decades as a result of the rise of what is often called the "Islamization" of states. As has been observed, in the 19th and 20th centuries the legal system of most Muslim societies experienced complex political transitions. Later on in the 1970s and 1980s Muslim countries witnessed the emergence of Islamic revival

[379] For general views on the constitution and constitutional law see e.g. Gardbaum, S, The Place of Constitutional Law in the Legal System, in The Oxford Handbook of Comparative Constitutional Law, Rosenfeld, M and Sajó, A (eds.) 2012, pp. 169-187. See also Tushnet, M, Constitution, in in the Legal System, in The Oxford Handbook of Comparative Constitutional Law, Rosenfeld, M and Sajó, A (eds.) 2012, pp. 217-232.

[380] See Kramer. L.D, The People Themselves: Popular Constitutionalism and Judicial Review, 2004, pp. 9-18.

[381] Ibid. p.9.

movements inspired by anti-colonial thoughts[382]. The new political elites tried to give priority to their own religious-based national laws, legal systems and legal culture[383]. While the former movements resulted in a narrow influence of Islamic traditions, the Islamic revival movements led to the formation of Shari'a-based legal systems.

Today in Muslim states two major tendencies are on the rise. The first is the tendency of liberal Muslim leaders to make a democratic Muslim society in accordance with the international standards. Like, the new reform movements in Tunisia following the Arab spring. The second is a move towards greater incorporation of religious thoughts and traditions into the national legal and political institutions. This political tendency, though is often incompatible with the Islamic values, is considered as the modern Islamization of state. The recent transitions in Turkey are good examples of this new political tendency.

The incorporation of Islamic law into legal systems as a consequence of sociopolitical transformations raises concerns about the legal status and role of Shari'a. Does Shari'a-based legal system exist as an integral part of rule-of-law-based legal system[384]? How and to what extent can affect the scope of constitutional protection of fundamental rights[385]?

Two particular factors justify the incorporation of Islamic law into the constitution: religious and political. Each is associated with a particular institution and powers and each poses challenges to the practice of the other. The constitutionalization of Shari'a is, thus, the beginning of the new normative and political transformations in Muslim-majority societies. The modern Shari'a-incorporated constitutions are a product of each state's experience of socio-political struggles and cultural understanding of Islamic law

[382] See Hefner, R.W, Shari'a Law and the Quest for a Modern Muslim Ethics, in Shari'a: Law and Modern Muslim Ethics, Hefner, R.W (ed.), 2016, pp. 24-5.

[383] Otto, J.M (ed.) Shari'a Incorporated: A Comparative Overview of the Legal systems of Twelve Muslim Countries in Past and Present, 2010, pp. 23-33.

[384] Ibid. p.15.

[385] See e.g. Emon, A.M, The Limits of Constitutionalism in the Muslim World History and Identity in Islamic Law, available at: http://ssrn.com/abstract=[1086767]

over time. They often blended Islamic legal and ethical traditions with their own religious, legal and political culture.

A very important insight that is often overlooked is the reciprocal influence of religion, law and politics in portraying the constitutional incorporation of Shari'a. This is important because each of them may make a claim of authority and challenge the interpretation and implementation of the fundamental rights. It shows also the process, provisions, purpose and practice of Shari'a-based constitutions vary among Muslim states and are not homogenous. This is especially notable when it comes to the question of the fundamental rights and freedoms of individuals.

This idea should, however, not be seen as the interpretation of Islamic law has been always relative to the socio-political factors. Prior to the massive political transformations in Muslim societies Shari'a and Fīqh (the juristic knowledge of Shari'a) were the scholarly specialty[386]. The interpretations of Islamic legal and ethical norms have their own standards of rational justification[387]. Depending upon who implements law and how it is implemented even the contemporary Shari'a-based legal systems can guarantee justice in Muslim societies. Islamic law can be used to justify the government intervention in fundamental rights or can be used to justify the government protection of these rights. Different approaches to legal interpretation of Islamic law also provide various ways of thinking about Islamic legal and ethical traditions. A narrow or broad interpretation may result in a dynamic as well as disproportionate interpretation of Shari'a. So it is not uncommon to see that the incorporation of Shari'a into the national constitutions has resulted in completely different set of law in two Muslim countries that share similar historical background. In this sense, not only different forms and meanings of Islamic law, but even the diversity in culture and legal culture shape different constitutional laws.

[386] See Hefner, R.W, supra note 382, p.6.
[387] Ibid.

The rights, freedoms and principles set out in a Shari'a-based constitution represent particular norms and values of a particular Muslim country. To understand Shari'a-based constitutional law, thus, requires attention to the sources of Islamic law, the applied Islamic jurisprudence (Shi'a/Sunni), the normative framework of the state's legal system, and the culture of the state according to which rules of law are understood and implemented. That is, the role of cultural relativism in shaping national constitutional law and the protection of fundamental rights.

Yet, leaving aside the question of particularity, the government in the most, if not all, Muslim countries enjoys a broad discretion in determining the scope and limits of fundamental rights. Then, legitimate or illegitimate intervention in fundamental rights and freedoms rely on state authority. The authority of state itself derives its legitimacy from the constitution in order to make and enforce rules that governed the people.

The Shari'a-based constitutions provide sources of law and a basis for jurisdiction. Islamic law, as a religious system of rule of law, was incorporated into the national constitution and became an integral part of the modern legal systems. In other words, Islamic law provides the main sources of the legislation. It influences the scope and limits of rights and freedoms. It impacts the legal and cultural understanding and practice of law. But the rights and freedoms enshrined in the constitution do not only represent the rule of law in Islamic legal thought and practice. They also reflect the state's policy and understanding of law at the time of drafting the constitution. Not only the constitutional incorporation of Shari'a, but also the degree of incorporation and the direction of interpretation have been determined under the rules of the Muslim state at the time of the constitutional-making process. This point is crucial, because invoking Islamic law as part of constitutional framework can affect the scope and limits of fundamental rights. At the same time it is the state that push the constitutionalization of Shari'a in a direction it wanted. This raises considerable questions about the normative status of Shari'a in

Shari'a-based constitution, its function and its relation with positive law at both national and international level.

5.2. Islamic Supremacy Clause

The wording of Shari'a-incorporated constitutions varies among Muslim states. And each constitution characterizes the role of Shari'a differently[388]. Crucial to a Shari'a-based constitution is however a clause that declares Shari'a as a basis for legislation.

Constitutional provisions may refer to Shari'a as "a primary source of legislation" or "the only source of legislation". Some Arab countries like Bahrain, Kuwait, Qatar, Sudan, the United Arab Emirates, and Yemen have adopted Shari'a as "a source" or "a main source" of legislation[389]. While some other Muslim countries like Iran and Pakistan refer to Shari'a "as the only source of legislation". Constitutional references to Shari'a "as the only source of legislation" are known as "Islamic supremacy clauses."

For the first time, the Islamic supremacy clause was drafted in Iran's constitution of 1907 following socio-political transition. The idea, however, most likely dates back to the British colonial rule and the application of the doctrine of repugnancy[390]. According to this doctrine the colonial customs and laws "should not be contrary or repugnant" to the law of the Realm or the superior law. Until the passage of the Colonial Laws Validity Act 1865, all colonial legislatures were subordinate to the imperial parliament. Colonial legislations, as a result, had to conform to English standards and not to be repugnant to

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[388] Lombardi, C.B, Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did they Come From? What Do they Mean? Do they Matter? AM.U.INT'LL.REV. 28: 3, 2013, pp.733-73.

[389] With this respect see for example, the Constitution of Qatar Art.1: "Qatar is an independent sovereign Arab State. Its religion is Islam and Shari'a law shall be a main source of its legislations. Its political system is democratic." See also Sudan's Constitution Art 5 (1): "Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people."

[390] For more on the doctrine of repugnancy in the British Colonies, see Ibhawoh, B, Imperial Justice: Africans in Empire's Court, 2013, pp.55-64.

the law of England[391]. Similar to the idea of repugnancy, Islamic supremacy clauses not only require the state legislation to be consistent with Islamic norms, but they also require that laws repugnant to Islamic law will be void[392]. The clear difference, of course, is the sources of standards.

To different degrees, however, all Shari'a-incorporated constitutions try to articulate Islamic law as an important normative source or as a fundamental source of legislation. Yet constitutions with Islamic supremacy clauses form a privileged status for Islamic law within the normative constitutional legal order[393]. This distinction is important, because Islamic law as "the only source of legislation" has a broader application. That is, Shari'a as supra-constitutional order would impact all legal enactments including laws, regulations, decrees, and administrative acts[394].

For instance, the Constitution of Pakistan has since 1973 set forth the repugnancy clause. According to article 227 (1): "All existing laws shall be brought in conformity with the injunction of Islam as laid down in the Holy Qur'an and Sunna, in this Part referred to as the injunction of Islam, and no law shall be enacted which is repugnant to such injunction.[395]" Similar language has also been adopted in Saudi Arabia's basic law of 1992. Article 48 explicitly states that: "The court will apply the rules of the Islamic Shari'a in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunna, and statutes decreed by the Ruler which do not contradict the Book or the Sunna".

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[391] Todd, A, Parliamentary Government in the British Colonies, 1880, p.14.

[392] See Ahmed, D and Ginsburg, T, Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions, Virginia Journal of International Law, vol. 54:3, 2013, pp.15-17.

[393] Brown, J.N and Sherif, A.O, Inscribing the Islamic Shari'a in Arab Constitutional Law, in Islamic Law and the Challenge of Modernity, Haddad.Y.Y and Freyer Stowasser, B (eds.) 2004, p. 63.

[394] Ibid.

[395] See Lau, M, supra note, 373.

Such constitutional provisions challenge the adoption of domestic laws and the incorporation of international law, which are not compatible with Islamic norms. It is therefore no surprising that Muslim countries often refuse to unconditionally ratify international human rights treaties on constitutional grounds.

Two questions should be addressed here: what does Islamic law here refer to? Is the Islamic supremacy clause antithetical to the adoption of fundamental rights?

Contrary to the common assumption of some scholars, Islamic law here is not precisely the Islamic legal principles revealed in the Qur'an. Instead, Islamic law here refers to Fīqh or the juristic interpretation of the Islamic rules of law defined and applied by authority of the state. The states' implementation of Islamic law is the contemporary interpretation of the classical interpretation. The rich tradition of Islamic legal thought and practice is in fact determined by modern political thought and practice. In other words, the idea that the supreme source of law lies in Islamic law allows political authorities to put both law and politics into practice. The way in which the Islamic supremacy clauses have recently been applied shows how the past and present political thought does provide a basis for constitutionalism in modern Muslim states[396]. Shari'a, though in its strict legal sense, does not form the basis of the political order; rather it is used to justify political order. This, however, does not necessarily mean that the constitutional interpretation and enforcement of Islamic norms are always the same. What is especially remarkable about Islamic supremacy clauses is that they may vary in form and function. Depending on constitutional texts, judicial interpretations and legal culture of the particular states. An Islamic supremacy clause may have different meanings, interpretations and effects on the legislation. The variation in the Islamic jurisprudence and the fact that Muslim understandings of Islamic law and ethics have always been varied could justify the different practice of these norms.

[396] Brown, N.J, Constitutions in Non-constitutional World: Arab Basic Laws and the Prospects for Accountable Government, 2002, pp.163-193.

The supremacy of Islamic law also raises the question of respect for the fundamental rights and freedoms. The common assumption is a constitution that requires legislation to respect Islamic norms is incompatible with liberal values[397] and the international law of human rights. Specifically, the international community often considers the compatibility of constitutional law with human rights law as one of the essential safeguards of fundamental rights. This concern is important, first because Shari'a as source of legislation imposes set of limitations on interpretation and implementation of rights. Secondly, it is important because an Islamic supremacy clause constitutionally forbids the adoption and incorporation of laws and regulations that are antithetical to Islamic norms. The formulation of reservations to international human rights conventions based upon religious motivations[398] particularly shows the constitutional role that Islamic supremacy clause may play. This is an example of so-called "Islamic particularity" that challenges the universality of human rights law.

Nonetheless, not all Muslim states with Shari'a-incorporated constitutions make reservation when they ratify human rights conventions. And not all reservations made by Muslim states to human rights conventions are because of religious reasons. For example Afghanistan, Egypt, Iraq, Yemen ratified the ICCPR without any reservation, while Bahrain and Kuwait made Islamic-based reservations and interpretive declarations respectively to the ICCPR[399]. From the different positions of Muslims states with Shari'a-based constitutions on the core international human rights treaties two points stand out. First, the Islamic supremacy clauses are not interpreted and applied similarly. Second, the normative superiority of Islamic norms is not necessarily in conflict with the recognition and respect for fundamental rights and freedoms. This is not to say that the Muslim

[397] Lombardi, C.B, supra note 388.

[398] Brems, E, Human Rights: Universality and Diversity, 2001, pp. 267-272. See also, Mayer, A. E, Islamic Reservation to Human Rights Conventions: A Critical Assessment, Recht van de Islam 15, 1998, pp.25-45.

[399] For list of states members to the ICCPR and their reservation, see United Nations Treaty Collection available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en [Accessed November 2017]

member states to ICCPR and ICESCR ensure and respect the fundamental rights of individuals within their territories. Rather the majority of Muslim countries do not have a satisfactory human rights record.

Yet, while the idea of the normative superiority of Shari'a raises the possibility of conflict between the universal norms and particular values, there are many concepts shared by Shari'a-based constitutional law and international human rights law. In term of purpose the two systems have been designed to protect basic rights of individuals. The most important fundamental rights and principles such as human dignity[400], the right to life, self-determination, the presumption of innocence and the right to fair trial and equality before the law, the rights to freedom of expression, assembly and association, the right to privacy and to protection of property, the right to social security and have a family have indeed roots in the Islamic legal tradition[401] and have been entrenched in the majority of Shari'a-based constitutions. The purpose of Islamic supremacy clause is to set forth the commitment of the state legislation to comply with Islamic norms. At the same time Islamic norms share common ground with fundamental rights, at least in some respects.

The development of the so-called idea of "Islamic human rights" and adoption of a number of declaration based on Islamic principles were an attempt to show the existence of the fundamental rights and liberties in Islamic law. The Universal Islamic Declaration

[400] Regarding the constitutional protection of human dignity for instance, see the Constitution of Islamic Republic of Iran Art. 22: "The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law". The Constitution of Iraq Art. 31(1): "The liberty and dignity of man shall be protected." The Constitution of Bahrain Art. 18: People are equal in human dignity and citizens are equal before the law in public rights and duties." The Constitution of Islamic Republic of Afghanistan Art.24: "…Liberty and human dignity are inviolable. The state shall respect and protect liberty as well as human dignity." The Constitution of the Arab Republic of Egypt Art.51: " Dignity is the right of every human being and may not be violated. The State shall respect and protect human dignity." The Constitution of the Republic of Yemen Art.48: "The state shall guarantee to its citizens their personal freedom, preserve their dignity and their security…" The Constitution of Islamic Republic of Pakistan Art.14 (1): " The dignity of man and, subject to law the privacy of home, shall be inviolable."

[401] For more details on the civil and political rights in the light of Islamic law, see Baderin, M.A, International Human Rights and Islamic Law, 2003, pp. 47-168.

of Human Rights 1981, the Cairo Declaration on Human Rights in Islam 1990, the Arab Charter on Human Rights 1994 though have never been approved by the UN, but have became an important point in the debate on the relationship between Islamic law and human rights law. By using the text and language of the Universal Declaration of Human rights, all three documents include some elements of universality and the Islamic legal tradition[402].

In the majority of Muslim states Shari'a-based constitutions in fact combine the principles of Shari'a, elements of the Western model of government and of course legal tradition particular to each state's legal culture. Nathan Brown and Adel Omar Sherif argue that in most of Arab states' constitutions a juristic paradox is obvious. On the one hand, the constitution is the fundamental law of the state and the expression of the will of a sovereign people. On the other hand, the reference to Islamic norms indicates the existence of a superior law[403]. According to Brown and Sherif "constitutional texts often sharpen the paradox when imply not merely that the Shari'a must guide interpretation, but also that it supersedes all other legal rules."

This argument is very important, partly because although the purpose of Islamic supremacy clauses is to ensure the compatibility of legislation with Islamic norms, they were also incorporated to guarantee the political legitimacy of leaders. The contemporary practice of Islamic law reflects the role of politics in Islam rather than the role of Islam in politics. This is why Shari'a-based constitutions include basic rights and freedoms, but few Muslim governments have been restricted in their authority by them[404]. The normative supremacy of Islamic law, however, should not be perceived as a rejection of international human rights law. Islamic law as a system of rules of includes basis rights and freedoms and has its own justification. But of course, Islamic law is made dependent

[402] Brems, E, supra note 383, pp. 240-46. See also, See e.g. Halliday, F, Relativism and Universalism in Human Rights: the Case of the Islamic Middle East, Political Studies, vol.43, 1995, pp. 152-167.

[403] Brown, J.N and Sherif, A.O, supra note 396, pp. 55-6.

[404] Brown, J.N, supra note 396, see Introduction at xiv.

on religion. And the religious structure of Islamic law is what makes it different from positive rules of law.

A brief overview of the legal practice in the first century of Islam, the rise of different schools of law, the unity and diversity in Shari'a, the doctrine of juristic disagreement, the role of the great empires in development of Shari'a, the influence of colonialism and the reception of the European legal tradition, the Islamic revival movements, the formation of sectarian legal systems, and the emergence of Shari'a-based constitutions are good reasons to justify that Islamic law does not exist in the abstract. Nor the contemporary Shari'a-based legal systems could be understood without referring to the state's practice of law. This helps develop a clearer sense of diversity.

One serious criticism of Islamic law made by some Western thinkers is that Islamic legal tradition fails to fulfill the requirements of a modern society[405]. They usually argue that Islamic particularities are incompatible with the object and purpose of universal standards. In their view, Islamic legal and ethical ideals neither are fundamental values nor universally accepted. This point is raised often especially when it comes to the judicial enforcement of human rights treaties. Based on this assumption, many voices have been raised in defense of the incompatibility of Islamic law with human rights, rules of law and democracy. For many scholars of law the only example of formal rational law is the Western legal system[406]. As Noah Feldman in "The Fall and Rise of the Islamic State" mentions even when Max Weber, the well-known German sociologist, wanted to describe judgments issued without legal rules of decision, "he used the image of the Muslim judge (Qadī) sitting under the palm tree, dispending justice as he saw fit[407]".

Inspired by the Western legal systems and model of government some Muslim intellectuals support a secular, pluralistic and democratic form of government in Muslim

[405] See e.g. Mayer, A.E, Islam and Human Rights, Traditions and Politics, 2013.
[406] See e.g. Gerber, H, State Society, and Law in Islam: Ottoman Law in Comparative Perspective, 1994.
[407] See Feldman, N, The Fall and Rise of the Islamic State, 2008, p.22.

states[408]. Some argue that secularism, in the sense that it limits religion to the private domain is compatible with the Qur'an and the Sunna[409].

Many Muslim scholars typically reject the view that Islamic law is truly distinct realm from fundamental norms. In struggle to develop an alternative, these scholars claim that the fundamental principles could be found in the sources of Islamic law and the teachings of the Prophet. Many have also been attempting to represent Islamic law and ethic compatible with the modern Western counterparts[410]. By reviewing the sources of law through different methods of interpretation they support the arguments that Islamic law should be interpreted to the needs of time and place[411].

Some conservative Muslim thinkers, to the contrary, reestablish a religious view that Muslims salvation rest upon the adoption and application of Islamic norms and values in Muslim societies[412]. Derived from the divine revelation Islamic law is unitary and unchanging and the state therefore must respect Islamic law and the Islamic jurisprudence.

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[408] Ali Abd al-Raziq, the Egyptian intellectual in his highly controversial book Al-Islam wa-usul Al-hukm (Islam and the Source of Political Authority) argue against the idea of a specifically Islamic notion of government. See Abd al Raziq, Ali, in The Oxford Dictionary of Islam, Esposito, J.L (ed.), at Oxford Islamic Studies Online.

[409] See e.g. Ganji, A, why Secularism is Compatible with the Qur'an and Sunnah- And an 'Islamic State' is Not, available at: https://www.huffingtonpost.com/akbar-ganji/secularism-islam-islamic-state_b_6426300.html[1 December 2017]. See also, Norris, P, and Inglehart, R, Sacred and Secular: Politics and Religion World Wide, 2011, and Fish, M.S, Are Muslim Distinctive? A Look at the Evidence, 2011.

[410] Baderin, M.A, supra note 389.

[411] See e.g. Rashid Rida and Abd al Razzaq al-Sanhuri views on Islam. Rashid Rida the Syrian-born Muslim reformer and writer formulated a response to the pressures of the modern Western world on traditional Islam. Rida argued that modern principles could be found in the teachings of the Prophet and in the practice of the first generation of Muslim, before corruptions began to spread among the religious practices of the faithful. See Rashīd Rīda in the Encyclopedia Britannica and the Oxford dictionary of Islam. See also, Hill, E, Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of Abd al-Razzaq al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971, 3 Arab L.Q. 182, 1988.

[412] See e.g. Maududi, A.A, Islamic Law and the Constitution, 1955 and Human Rights in Islam, 1976 from the same author.

Yet, all these views exhibit a common defect. All rest on an absolutistic view. The point is, that the understanding of Islamic law could be achieved through the in-depth understanding of sources of law, and not through personal assessment. To understand Islamic legal and ethical traditions addressing questions relating to the sources of the law, the nature of law, the values enshrined in the law, the law's authority and the religious structure of the law are necessary[413]. Once one takes these needs seriously, he would discover how the Islamic legal tradition has been interrupted and its message lost over time.

The question, then, is no longer whether Islamic law is compatible with international human rights law. Though it might be relevant in theoretical debates, but in practice it completely failed to resolve conflict. It failed to consider the role of the state and the fact that understandings of Islamic norms have always been varied.

Again turning back to the example of blasphemy in order to clarify the issue. Comparable to the concept of blasphemy in the Christian faith[414], offering insult, wounding and mockery are admonished in the Qur'an and the teachings of the Prophet[415]. The reasons are simple. Disrespect incites disrespect, invites hatred and inflames violence. Despite the fact that the Qur'an clearly deprecates the act of insulting, it does not specify any certain punishment for blasphemy, or at least no worldly punishment. Viewed from the Qur'an perspective, even those who "insult Allah in enmity without knowledge" face forgiveness[416]. The concept of blasphemy has faced a number of changes since its origin.

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[413] Weiss, B, supra note 263.

[414] For more details, see Nash, D, Blasphemy in the Christian World: A History, 2007.

[415] See the Noble Qur'an (49:11): " O you who have believed, let not a people ridicule [another] people; perhaps they may be better than them; nor let women ridicule [other] women; perhaps they may be better than them. And do not insult one another and do not call each other by [offensive] nicknames. Wretched is the name of disobedience after [one's] faith. And whoever does not repent - then it is those who are the wrongdoers". See also (45:9): "And when he knows anything of our verses, he takes them in ridicule. Those will have a humiliating punishment".

[416] See the Noble Qur'an (6:108): "And do not insult those they invoke other than Allah, lest they insult Allah in enmity without knowledge. Thus we have made pleasing to every community their deeds. Then to their Lord is their return, and He will inform them about what they used to do."

From the end of medieval period punishing public acts of blasphemy is eradicated in the West. By the end of 17th century the legislations against blasphemy was emerged in England and other part of Europe indicating that blasphemy threaten the power of the state[417]. Todays, as a result of the separation of state and religion and respect for freedom of expression and religious beliefs blasphemy law has less, or no, place in the Western modern states[418]. With this respect, UNESCO in World Trends in Freedom of Expression and Media Development 2014 concerning the West European and North American regions declared: "in law reform, there has been a trend towards repeal of blasphemy and religious offence laws".[419]

In a similar way to the history of blasphemy in the West, the concept of blasphemy in Muslim communities has undergone many changes over time. Blasphemy's status as an offence in modern Muslims states illustrates two facts. As David Nash argues, blasphemy law is a manifestation of what people think about their God and the sacred. That is, it protects religious values and cultural sensibilities within the society. Besides, blasphemy law is a display of power. It protects state authority and interest in a religious-based legal system. It is because Muslim political leaders often invoke Islam to secure their political legitimacy. By developing the concept of blasphemy and criminalizing it, a Muslim state recognize the important role it has to play in protecting the Islamic values and in managing its policy.

Many Muslim states have criminalized blasphemy and defamation of religion in their penal codes after the colonialism[420]. They have prescribed different penalties ranging

[417] See Nash, D, supra note 376, pp. 1-12.

[418] For example France in 1787, Sweden in 1970, The United Kingdom in 2008, The Netherlands in 2014, Norway 2015, Iceland in 2015 and Denmark in 2017 are the countries that have reversed or abolished the blasphemy law.

[419] World Trends in Freedom of Expression and Media Development: Regional Overview of Western Europe and North America, UNESCO 2014.

[420] For colonial origins of the blasphemy laws see, Abbas, Sh.B, Pakistan's Blasphemy Laws From Islamic Empires to the Taliban, 2013, pp. 73-86.

from a fine to death, while there is no specified punishment for blasphemy in Islamic law and ethic. Blasphemy law, therefore, has its basis in religion, but its interpretation and application lie in the authority of the state. Viewed in historical detail, the blasphemy law shows how the origin of Islamic law is understood and interpreted differently by modern Muslim states.

The detailed analysis of Islamic law shows that Islamic law is subject to different interpretations. Derived from the divine revelation, the Islamic jurisprudence reflects the perspective of the jurists over time. Contrary to the modern Muslim jurisprudence, the classical jurisprudence closely tied with the two major sources of Shari'a, the Qur'an and the tradition of the Prophet. Logically the original meaning of Islamic legal and ethical tradition is changed over history. Today, Shari'a as a basis for legislation is a set of rules, which is defined and applied by authority of the state. Shari'a-based constitutional law is the product of each state's national and historical experiences, which affects the scope and limits of the fundamental rights of individuals. As a result, in discussing Islamic law today two important points should be kept in mind[421]: first, the emphasize on the main sources of Islamic law to understand what Shari'a is[422], and secondly, the influence of religious, political and legal culture of the state on the understanding and practice of Shari'a.

[421] Corell, H, Commentary to "Shari'a and the Modern State" and "Narrating Law", in Islamic Law and International Human Rights, Emon, A. M, Ellis, M.S and Glahn, B (eds.), 2012, p. 84.
[422] Ibid.

CHAPTER III

CONFRONTATION OF HUMAN RIGHTS AND SHARI'A-BASED CONSTITUTIONAL RIGHTS

The overview of the sources and scope of international human rights law and Shari'a-based constitutional law in the first and second chapters presupposed that each of which is a unique socio-political phenomenon and possesses certain legal features, which must be considered in understanding the identity, limits and character of each system. With different degree of protection the two systems develop a set of fundamental rights and determine their limits, while each system claims for supremacy over the other in the protection of these rights. The supremacy claims are best explained by a conflict between the constitutional rights and international human rights, which remain to be explained.

This chapter examines the supremacy claims made by each system and the causes of conflicts and confrontation between the two systems. Drawing on the work of Gerald Neuman "Human Rights and Constitutional Law: Harmony and Dissonance", the chapter describes three aspects of fundamental rights, the consensual, the supra-positive and the institutional aspects, and their possible conflicting influences on determining interpretations of fundamental rights at the Shari'a-based constitutional level and international human rights level[423].

1. Confrontation and Claim of Supremacy

The lack of attention, or interest, to the interaction and confrontation between human rights and Shrari'a-based constitutional rights has left little literature to the question of the relations between the two systems.

[423] Neuman, G. L, Human Rights and Constitutional Rights: Harmony and Dissonance, Stanford Law Review, vol.55, 2003, pp. 1863-1900.

Traditionally, monism and dualism are two common theories used to describe the relationship between international law and domestic constitutional law[424]. In a monist theory, international treaties are deemed superior to all laws, including constitutional law[425]. In this system, international human rights law is incorporated into constitutional law, and they prevail over constitutional provisions in the event of conflicts. By contrast, in a dualist system the rights enshrined in international treaties would have no effect until they have been translated into domestic law. Monism and dualism, however, are no longer regarded as effective theories[426]. Nor are they useful to describe the constitutional approach towards international human rights law. Regarding the reception of international human rights law into domestic legal order many states are neither monist nor dualist. While the implementation of fundamental rights to a large extent depends on the states' interest,[427] states could potentially give rise to each of theory[428].

Accordingly, sometimes the relationship between international human rights law and Shari'a-based constitutional law is relatively close. This is particularly true about the constitutional recognition of fundamental principles such as human dignity, justice and rule of law. Sometimes the relation between the two systems results in conflict between norms that deny each other's validity. Each system claims to supremacy over the other and asserts authority to expound the fundamental rights of individuals[429].

[424] Kelsen, H, Pure Theory of Law, in Knight translation, 2d Ed., 1967, pp. 328-47. See also Starke, J.G, Monism and Dualism in the Theory of International Law, in Paulson, S.L and Paulson, B.L, Normativity and Norms: Critical Perspectives on Kelsenian Themes, 1998.

[425] See e.g. Carter, M, An Analysis of the No Hierarchy of Constitutional Rights Doctrine, Review of Constitutional Studies, 2006.

[426] Denza, E, The Relationship Between International and National Law, in International Law, Evan, M.D, 2014, p.418.

[427] Jacobsen, A.F, Human Rights Monitoring: A Field Mission Manual, 2008, pp.54-5.

[428] See Telman, D.A.J, A Monist Supremacy Clause and A Dualistic Supreme Court: The Status of Treaty Law as U.S. Law, 2013.

[429] Ibid.

The claim of supremacy, then, is claim of each system to have legitimate authority[430] over the other system in protection of fundamental rights. Where does claim of supremacy derive from? And how does each system of law possess the legitimate authority? Each system's claim to legitimate authority derives from particular sources, which justify obedience[431]. These are sources of obligations, which provide legitimation for the enforcement of fundamental rights[432]. Supremacy claims are best understood in case of disagreement between the two systems. They, however, are not only a presumption of primacy. It also represents different and distinct way of understanding of law, in which law's foundational unit is taken to be the comprehensive and supreme[433]. The struggle for supremacy, then, specially increases when the understanding of rights and the scope of rights-protection between the two systems are divergent. This makes the relationship between the two systems increasing complex. The reason for the complexity can be found in Neuman's discussion about a normative disagreement between international human rights law and national constitutional law. According to him:

"A national constitutional right and a similarly phrased international human right may rest on entirely different kinds of normative foundations, or they may simply diverge in their conceptions of the rights. For example, particular national constitutional provisions may reflect a specific religious tradition or a specific secular philosophy of freedom, or they may bracket internal disagreement on foundational issues and express value commitments grounded on national experience". In Neuman's view the potential for dissonance between the two systems lies in their separate bases of legitimacy and the

[430]See Lacewing, M, Authority and Legitimacy, available as a pdf from: http://cw.routledge.com/textbooks/alevelphilosophy/data/AS/WhyShouldIBeGoverned/Authorityandlegitimacy.pdf

[431] See. Roughan, N, Mind the Gaps: Authority and Legality in International Law, EJIL, vol.27, 2016, pp. 329-51.

[432] Neuman, G.L, supra note 423, p.1866.

[433] See e.g. Culver, K and Giudice, M, Not a System But an Order: An Inter-Institutional View of European Union Law, in Philosophical Foundations of European Union Law, Dickson, J and Eleftheriadis,P (eds.) 2012, pp. 54-5.

contrary interpretive influences of the three aspects of fundamental rights, which include "the consensual", "supra-positive" and "institutional aspects"[434].

Neuman, however, identifies the potential dissonances between international human rights and national constitutions in the liberal tradition, namely two parallel regimes of positive law or "dual positivization". The argument is that the same is true of the confrontation between international human rights law and Shari'a-based constitutional law.

It might be argued that Shari'a-based constitution neither is a positive law, nor can meet the requirements of constitutionalism[435]. For the most part because Shari'a-based constitutions have been written to institutionalize and justify the state's political authority, rather than to guarantee the rights and freedoms of individuals[436]. The diverse interpretations of Islamic law could also possibly support autocracy as seen in many Muslim states[437]. Shari'a-based constitutions, therefore, fail to impose limits on the powers of the government and their religious structure fail to respect the principle of state neutrality. These result in a lack of democratization, even when the Muslim state exercises some elements of democracy[438]. Yet Neuman's idea seems to be applicable to any conflicting of fundamental rights that might take place at two positive legal regimes. It is also applicable to the potential conflict between international human rights and Shari'a-based constitutional rights. One reason is, Shari'a as the basis for legislation is

[434] Neuman, G. L, supra note 423.

[435] See Rosenfeld, M, Modern Constitutionalism as Interplay Between Identity and Diversity, in Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives, Rosenfeld, M (ed.), 1994, pp.13-14.

[436] Brown, N.J, Constitutions in Non-constitutional World: Arab Basic Laws and the Prospects for Accountable Government, 2002, pp. 161-2.

[437] See also Abou El Fadel, Kh, The Centrality of Shari'a to Government and Constitutionalism in Islam, in Constitutionalism in Islamic Countries: Between Upheaval and Continuity, Grote, R and Röder, T (eds.) 2012, pp. 35-8.

[438] See e.g. Holmes, S, Precommitment and the Paradox of Democracy, in Constitutionalism and Democracy, Elster, J and Slagstad, R (eds.) 1988.

codified as positive statutes and enforced by the authority of the modern state[439]. The other reason is that Shari'a-based constitutions are often viable documents, even if they do not serve constitutionalist ends[440].

While the constitutionalism has been weak in Muslim societies to date the constitutional provisions on fundamental rights have not been absent[441]. The fact that the supreme source of law lies in religious texts, or the state does not bind itself by fundamental rights does not exclude Shari'a-incorporated constitutions from a constitutional system. Islamic political thought itself provides a basis for constitutionalism[442]. There is almost no Shari'a-based constitution that does not recognize the basic human rights. Substantive separation of powers and a set of general principles on justice, rule of law and governance[443] are enshrined in majority of constitutions of Muslim societies.

Like most constitutional laws, Shari'a-based constitutional law may exist in parallel or conflict with international human rights law. The degree of interaction and confrontation between the two systems depend on the relationship between the three common characteristics of fundamental rights protected in each system[444]. The conflict among the aspects produces different kinds of divergence and result in a normative disagreement between international human rights and Shari'a-based constitutional rights. This is identified as potential causes of conflict between the two regimes based on Neuman's idea, which may be only one approach among many others. In what follows first the three common aspects of fundamental rights, the consensual, supra-positive and institutional

[439] For more details, see Hefner, R.W, Shari'a Law and the Quest for a Modern Muslim Ethics, in Shari'a: Law and Modern Muslim Ethics, Hefner, R.W (ed.), 2016, pp.10-14.

[440] For more details see, Brown, N.J, supra note 436.

[441] Ibid.

[442] Ibid.

[443] For more details, see Kamali, M.H, Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law, in Constitutionalism in Islamic Countries: Between Upheaval and Continuity, Grote, R and Röder, T (eds.) 2012, pp. 19-33.

[444] See e.g. Neman, G.L, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, The European Journal of International Law vol.19 no.1, 2008, pp.111-16.

and their influence on the interpretation of these rights will be explained. In the second section conflicts among the three aspects and the way that they cause confrontation at the constitutional and international human rights level will be discussed.

2. Three Common Aspects of Human Rights and Constitutional Rights

2.1. Consensual Aspect

Shari'a-based constitutional rights and international human rights derive their positive force from the consent of political institution, or of people[445]. Political institution in this sense refers to the sovereign state, which provides one source of legitimation for the enforcement of fundamental rights and freedoms of individuals[446]. In Shari'a-based constitutional regime the consent of state results in positive embodiment of the Islamic jurisprudence in a constitutional system. In international human rights regime the consensual aspect results in entry into force of international treaties rights as positive legal norms. The consensual source of fundamental rights may also influence the interpretation of rights under different interpretive methodologies. It may shed light on how rights were understood at the time of initial consent and how rights are currently understood in terms of ongoing socio-political consent[447]. Some scholars, however, question whether state consent could provide source of legitimacy for the enforcement of international human rights. They argue that the source of consent is generally deemed unsatisfactory when applied to the international context[448]. This may particularly true when fundamental rights derive their positive force from non-democratic political institutions. Yet, state consent though may not be sufficient for providing the source of

[445] Neuman, G.L, supra note 423, p.1866.

[446] See Bodansky, D, and Watson, J.S, State Consent and the Sources of International Obligation in Proceedings of the Annual Meeting, American Society of International Law, vol. 86, 1992, pp.108-13.

[447] Neuman, G.L, supra note 423, p.1866.

[448] For more discussion on the issue, see Meyer, L.H, and Sanklecha, P, Introduction: Legitimacy, Justice and Public International Law: Three Perspective on the Debate, in Legitimacy, Justice and Public International Law, Meyer. L.H (ed.) 2009, pp. 1-28.

legitimation, but it is still a necessary condition[449]. Enforcement of human rights, thus, derives part of its legitimacy from the consent of each state. With the exception of international customary law and jus cogens norms, the ratification of international human rights treaties rests on the consent of the state parties. Even in case of general principles of customary law and peremptory norms the consent of majority of states provides the positive force of these norms. Furthermore, democracy is not a necessary condition for providing a source of consent[450]. Fundamental rights may derive their legitimacy from the consent of a democratic or undemocratic state.

2.2. Supra-Positive Aspect

The other aspect of fundamental rights is the supra-positive aspect, which is more relevant than other aspects to the conflict of Shari'a-based constitution and human rights law.

Fundamental rights may have a normative force independent of their embodiment in law, or superior to the positive legal system, which explains the reference to a "supra-positive" aspect.[451] This independent normative force may derive from natural law, universal morality, religious beliefs or core cultural values of a particular society. These are transcendent and supra-positive sources, which have a higher claim than positive legal rules. But at the same time they form the basis of positive legal rights. For that reason, the legal rights are sometimes described as "positivizations of preexisting supra-positive norms."[452]

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[449] See e.g. Buchanan, A, and Keohane, R.O, The Legitimacy of Global Governance Institutions, in Legitimacy, Justice and Public International Law, Mayer, L.H, 2009.

[450] For more details, see Rawls, J, The Law of People, 1999, pp.62-78.

[451] In referring to this independent normative force as supra-positive Neuman "does not mean to assert that they apply of their own force within the legal system to trump positive law, but rather that they supply an external standard of normative evaluation, which the legal system fully or partly internalize as a positive fundamental right." Neuman, G.L, supra note 408, p. 1868.

[452] See Neuman, G.L, Constrained Derogation in Positive Human Rights Regimes, in Human Rights in Emergencies, Criddle E.J (ed.) 2016, pp.17-21. For more on positive legal orders, see also Kedar, N, The

The supra-positive character may provide a different source of legitimacy for the enforcement of fundamental rights. It may also contribute to the interpretation of fundamental rights by providing persuasive reasoning based on sources of legitimacy[453]. Two fundamental rights may share the same source of legitimacy. For example both derive their legitimacy from natural law, or both receive their legitimacy from religious traditions. Or they may have different sources of legitimacy. With respect to international human rights, it is generally assumed that the inherent dignity of the human person and the egalitarian dimensions of human rights provide a source of legitimation for the enforcement of these rights. As the divine law and religious dimensions of Islamic legal tradition provide a source of legitimacy for the enforcement of rights enshrined in Shari'a-based constitution. Different basis of legitimacy[454] may pose conflict of rights and duties and raise the potential of a normative disagreement between the two regimes[455]. Issues involving a choice among core values are often emanated from a different basis of legitimacy.

2.3. Institutional Aspect

In Neuman's view fundamental rights are legal rules that are designed in a manner that facilitate compliance by the duty-holders[456]. The institutional aspect of fundamental rights influences the interpretation of constitutional rights and international human

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Political Origins of the Modern Legal Paradoxes, in Paradoxes and Inconsistencies in the Law, Perez, O and Teubner G (eds.), 2006, pp.104-112.

[453] Neuman, G, L, supra note 423.

[454] For more details on different types of legitimacy, see Weber, M, Three Types of Legitimate Rule (Die drei reinen Typen der legitimen Herrschaft) translated by Gerth, H, 1958 and Politics as a Vocation, 1965. See also, Hinsch, W, Justice, Legitimacy and Constitutional Rights, in Justice, Equality and Democracy, Matravers, M and Meyer, L.H (eds.), 2011, pp.39-54.

[455] See Wellman, C, The Moral Dimensions of Human Rights, 2011, pp.138-40

[456]Neuman, G.L, supra note 423, p. 1869.

rights[457]. This aspect justifies limits on drafting and interpreting rights that already derive their legitimacy from the consent of state or supra-positive aspects or both of them[458].

Some human right rights and constitutional provisions are best understood through the institutional aspect of fundamental rights. The institutional aspect also makes the contribution to protect rights effectively and indicates that mechanisms for implementing fundamental rights may vary from one society to another. For instance, the general principle of good faith in the Vienna Convention (VCLT) requires every state to behave in a manner that would promote justice and fairness[459]. This principle provides an interpretative method, which enhances effects of treaties. Based on the principle of good faith, the rule of pacta sunt servanda influences the interpretation of treaties in a way that guarantee the legal security and the stability of treaty relations[460]. Likewise, in the regional human rights system, the European doctrine of margin of appreciation rests partly on the institutional concerns. The margin doctrine as an interpretative guide provides a room for variation among national jurisdictions[461].

Similarly, institutional concerns may influence the interpretation of constitutional rights. For example, Islamic supremacy clauses in Shari'a-based constitutional systems require the compatibility of all rules and regulations with the Islamic jurisprudence. These constitutional clauses are designed to guarantee the compliance with the Islamic principles. Yet efforts to institutionalize the protection of constitutional rights not only affect the interpretation of constitutional provisions, but also the interpretation and implementation of international human rights treaties.

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[457]Neuman, G.L, Standing Alone or Together: HRC's Decision in AP v Russian Federation, in Integrated Human Rights in Practices: Rewriting Human Rights Decisions, Brems, A and Desmet, E (eds.), 2017, pp.88-92.

[458] Ibid.

[459] Article 31(3)(c) of the VCLT. For more details, see also Ziegler, A.R, Good Faith as a General Principle of (International) Law, 2015.

[460] See Panizzon, M, Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expection, Good Faith Interpretation and Fair Dispute Settlement, 2006, pp. 71-2.

[461] Neuman, G.L, supra note 423, p. 1871-2.

3. Causes of Confrontation and Potential for Conflicts

The relationship between the consensual, supra-positive and institutional aspects results in conflicting rights and interpretations. The conflicting rights arises a normative disagreement between the constitutional and international human rights systems. The normative disagreement often occurs between the consensual or supra-positive aspects of fundamental rights. Conflicting of fundamental rights, however, is potential not inevitable[462].

The conflicting rights can occur within the same aspect or source of legitimacy, or across different aspects and sources of legitimacy.

3.1. Conflicts within Aspects

The potential for conflict within each aspect results from conflicting claims of similar source of legitimacy. The consensual and supra-positive aspects provide an independent source of legitimacy for Shari'a-based constitutional rights and international human rights, while at the same time each creates potential for conflicting claims of legitimacy. The institutional aspect though does not involve an independent source of legitimacy, but it may also influence the interpretation fundamental rights, which derived their legitimacy from the consensual or supra-positive aspects[463].

The potential for conflicts between the consensual aspects: first lies in the method used by the state towards the incorporation international law. The closer the connection between constitutional rights and international human rights, the less likely the potential for conflicts. Where international law is not directly applicable, therefore, the conflicting claims of legitimacy arise. Second, national constitution and international customary law rest on the different sources of consensual legitimacy, which may cause conflicts of

[462] See e.g. Zucca, L, Conflicts of Fundamental Rights as Constitutional Dilemma, in Conflicts Between Fundamental Rights, Brems, E (ed.), 2008.

[463] Neuman, G.L, supra note 423, p.1874.

fundamental rights. The consent of states provides the source of consensual legitimacy for constitutional law, while states are obliged to the customary international law without their express consent[464]. Divergence within supra-positive aspects also causes conflicting interpretations of fundamental rights. Shari'a-based constitutional rights and human rights rest on different kinds of normative foundation, which results in different understandings of fundamental rights. The constitutional incorporation of Shari'a reflects specific religious legal culture of the state inspired by its national experiences. Supra-positive aspect of international human rights, to the contrary, tends to reflect the universality of human rights. The claim of each system to supremacy is often made based on a source of supra-positive legitimacy, which challenge the rights-protection systems. Sometimes religious aspect of constitutional provisions clearly violate international human rights law, while sometimes it is not possible to establish a priority between conflicting claims of legitimacy in abstract[465].

Conflicts within institutional aspects may arise from the desire of the constitutional and human rights systems to meet its own institutional needs[466]. The divergence of institutional aspects thus also results in the potential for conflicting fundamental rights and interpretations. For instance, Muslim states reservations to human rights treaties based on their constitutions may come into conflict with the "object and purpose" of a treaty[467].

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[464] Ibid.

[465] See Neuman, G.L, supra note 423, p. 1877.

[466] Ibid.

[467] Lijnzaad, L, Reservation to UN-Human Rights Treaties, Ratify or Ruin? 1995, pp.1-12. See also, Mayer, A. E, Islamic Reservation to Human Rights Conventions: A Critical Assessment, Recht van de Islam 15, 1998, pp.25-45, and Gardiner, R.K, Treaty Interpretation, 2015, pp. 189-200, and see the Committee's general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, Official Records of the General Assembly, Fiftieth Session, Supplement No. 40, vol. I .

3.2. Conflicts Across Aspects

Conflicts across different aspects of fundamental rights make the connection between the international human rights system and Shari'a-based constitutional system even more complex[468]. Conflicts across aspects often occur between the consensual and supra-positive aspects and arise the potential for the contrary interpretations of fundamental rights. Conflicts may also result from the divergence between institutional aspect of rights and consensual or supra-positive features. Conflicts across consensual and supra-positive aspects are major causes of confrontation and conflicting interpretations between international human rights and Shari'a-based constitutional rights. Consider constitutional protection for freedom of expression. Certain supra-positive aspects, such as religious traditions or core cultural values, limit the normative understanding of freedom of expression under the ICCPR[469]. The conflict may occur in the other direction. The consensual aspects of constitutional rights may come into conflict with the supra-positive feature of fundamental rights protected by international human rights[470]. In this case international human rights criticize constitutional provisions invoking universal values. As Neuman argues in either case, the constitutional understanding of the fundamental rights is challenged. This often leads to resistance and results in the struggle for supremacy between constitutional values and international standards.

Addressing Neuman's idea on the three aspects of fundamental rights, this chapter points to the claim of supremacy and causes of conflict between international human law and Shari'a-based constitutional law. The degree of confrontation between the two systems depends especially on the relationship between the consensual and supra-positive aspects

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[468] See e.g. Sniderman, P.M, The Clash of Rights. Liberty, Equality and Legitimacy in Pluralist Democracy, 1996. See also, Cerna, C.M, Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts, HRQ 16, 1994.

[469] For the normative perspective of human rights, see Haule, R, Some Reflections on the Foundation of Human Rights: Are Human Rights an Alternative to Moral Values? In Max Plank Yearbook of United Nations Law, Von Bogdandy, A, and Wolfrum, R (eds.) vol.10, 2006, p.367-95.

[470] Neuman, G.L, supra note 423, p. 1879.

of fundamental rights. Shari'a-based constitutional rights reflect Islamic legal tradition, while international human rights is based on secular philosophy of freedom (supra-positive aspect of rights), while both rights are applied and interpreted by the state (consensual aspect of rights). The conflict among the aspects result in a normative disagreement between international human rights and Shari'a-based constitutional rights and influences the interpretation of fundamental rights at the national and international levels.

CHAPTER IV

SHARI'A-BASED CONSTITUTION-MAKING IN COMPARATIVE PERSPECTIVE

1. The Constitutions of Iran: From Monarchy to Republic

A constitution defines a set of rights and principles upon which the state is based. A constitution however, does not merely reflect a set of rights and principles. Rather it represents a broad spectrum of ideas reflecting various socio-historical backgrounds and political demands[471]. 20th-century Iran has experienced two constitutions, which were outcomes of two revolutions: the Constitutional Revolution 1905-1911 and the Islamic Revolution 1979. The first revolution was inspired by Western nationalism and influenced by Perso-Islamic theory of "seeking justice."[472] This revolution was an attempt for reestablishing the Iranian society similar to the European. The second revolution, to the contrary, was inspired by the wave of Islamic revival movements, denounced Western liberalism and aimed to renew "the golden age of Islam."[473] While there is a clear difference between the causes of the Constitutional Revolution and the Islamic Revolution, there is at least a common ground between them. Both Revolutions resulted in the Shari'a-based constitutional law.

Why, then, the Constitutional Revolution inspired by Western liberal thought resulted in Shari'a-incorporated constitution? How can this contradiction be explained?

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[471] See Amanat, A, Constitutional Revolution: Intellectual Background, Encyclopedia Iranica, vol. VI, Fasc.2.pp.163-176.

[472] For more details, see Lambton, A, The Persian Land Reform (1962-1966), 1969, and Firooz-Abadi, D, The Islamic Republic of Iran and the Ideal International System, in Iran and International System, Ehteshami, A and Molavi, R (eds.) 2012, pp. 50-3.

[473] See Abrahamian, E, Iran Between Two Revolutions, 1982, pp. 530-8. For more on the history of Islamic golden age see, Lombard, M, The Golden Age of Islam, 2009.

These questions cannot be answered without taking into account the key factors that have framed Iran's constitutional structure[474]. Religious and political cultures are the most important factors in the formation of Iran's constitutions in both historical and contemporary setting. Drawing on the idea of Lawrence Friedman, each nation has also its own legal culture, which can describe "underlying traits of a whole legal system, its ruling ideas, its flavor and its style[475].

Iran, known as Persia in the West prior to 1935,[476] has been the stage for the confrontation between monarchies and religious authorities over the long centuries. Unlike any other Muslim countries, Iran is the only Islamic Republic, which its people have very strongly held on their pre-Islamic cultural roots, achievements and national sentiments. Iran has been ruled by monarchies from the establishment of the Achaemenid dynasty by Cyrus the Great in 550 BC to the overthrown of Pahlavi dynasty in 1979. In the late 7th century Islam was introduced into Iran, when the Umayyad Arab conquered the Zoroastrian Persian-Sassanid Empire. In the early 16th century the Safavid Empire reunited Iran as an independent state and declared Twelver or Imāmi Shi'ism as the official religion of the state. Up to the present time, Iran remains the only country where the official religion is Shi'a Islam.[477]

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[474] Ibid, Abrahamian, E.

[475] See Cotterrell, R, Law, Culture and Society: Legal Ideas in the Mirror of Social Theory, 2006.

[476] Ērān, Ērānšahr, Ariya derive from Ariyānām, have been designated and used by the Iranian people since the Sassanian period (224-651 AD). For more on history of Iran, see Amanat, A, Iran: A Modern History, 2017, The Oxford Handbook of Iranian History, Dabashi, H, Iran: The Rebirth of Nation, 2016, Daryaee, T (ed.) 2012, Streusand, D.E, Islamic Gunpowder Empires: Ottomans, Safavids, and Mughals (Essays in World History), 2011, Dabashi, H, Shi'ism: A Religion of Protest, 2011, Katouzian, H, The Persians: Ancient, Mediaeval, and Modern Iran, 2009, Katouzian, H, Iranian History and Politics: The Dialectic of State and Society, 2003, Mottahedeh R, The Mantle of the Prophet: Religion and Politics in Iran, 1985, and Montesquieu, Persian Letters, 1721.

[477] Mir-Hosseini, Z, Sharia and National Law in Iran, in Sharia-incorporated: A Comparative Overview of the Legal System of Twelve Muslim Countries in Past and Present, Otto, J.M (ed.), 2010, pp.322-66. See also, Abrahamian, E, The Causes of the Constitutional Revolution in Iran, IJMES 10, 1979, pp. 381-414.

In Imāmi Shi'a belief the leadership of the Muslim community after the Prophet passed to the twelve legitimate Imams from his descendants, starting with Imam Ali and ending to Imam Mahdi. Mahdi, who is alive but hidden from sights[478], would return at the end of time as the awaited Messiah[479] to rise up against unjust and to reestablish peace and equality in the world while Jesus Christ would be together with him[480].

The concept of Imamate and believe in the Hidden Imam has had a profound impact on the legal structure and political ideology in Iran to date. According to the Imāmis the twelve Imams are infallible and have true knowledge of the Qur'an, which has been handed down from one Imam to the next. During the absence of the twelfth Imam the religious scholars (Ulama) and the expert jurists (Fuqaha) undertake the spiritual and legal guidance of the Shi'a community.

Imāmi or Ja'fari jurisprudence was developed and interpreted by the early expert jurists. In the absence of a clear textual guidance an "independent reasoning or Ijtihād" applied by Mujtahid, a qualified jurist with an extensive knowledge of Arabic, the Qur'an and the legal theory, to find a solution to a legal question[481]. Many jurists have strongly believed that the specific Islamic legal principles like some of punishments cannot be performed during the absence of the infallible Imam. There have been unease relations between Shahs and clerics. Nonetheless, Shi'a clerics played an active societal role by issuing fatwas on crucial issues.

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[478] For more detailed discussions, see Amir Arjomand, S, The Shadow of God and the Hidden Imam, 1984.

[479] The concept of expected Messiah exists in other religions, as the expected Saoshyant of Zoroastrianism, the expected Jesus of Christianity, the expected Buddha Maitreya and the expected Kalki Avatar of Hinduism. For the opposite view that there is no savior besides God, see Adamson, J.J, Real Prophecy Unveiled: Why the Christ Will not Come Again, and Why the Religious Right is Wrong, 2003.

[480] See Sachedina, A.A, Islamic Messianism: The Idea of Mahdi in Twelver Shi'ism, 1981, p.172. For more details, see also Sadr, M.B, An Inquiry Concerning Al-Mahdi, 2014, and Bazargan, M, The Inevitable Victory, 1979.

[481] Hallaq, WB, Was the Gate of Ijtihad Closed? International Journal of Middle East Studies, vol. 16, no.1, 1984, pp.3-41.

The special role given to the Ulama developed enormously under the Safavids. The source of law was Shari'a as interpreted by the expert jurists, and the justice system composed of two types of courts: the Urfi courts and the Shari'a courts. Urfi or monarchical courts dealt with the state's matters, while the Shari'a courts dealt with civil law, family law and inherence. The Urfi and Shari'a courts were interdependent and functioned within the administration of justice in Safavid Iran[482]. The Shah appointed the religious judges and controlled the entire system.

Following the downfall of the Safavids and during the Qajars dynasty 1779-1925 Iran witnessed the combination and confrontation between Perso-Shi'i identity and modernity. This institutional duality and ideological dichotomy is still a remarkable feature of the Iranian society[483].

The birth of modern Iran is dated to the early 19th century, when modernizing reforms happened during the reign of Naser al-Din Shah Qajar[484].

Developing the relations with the European countries, introducing the European technology and educational methods to the country, establishing Dar al-Fonun (the Academy of Applied Science) modeled after the French Polytechnic School, publishing of the first newspaper Vaqaye-Eteffaqiye (Current Affairs), restricting the power of clergy, and not least sending young elite to Europe for further study, who later became Iranian intellectuals marked the beginning of the modern Iran. Yet, at the same time, foreign interference and territorial invasion increased under the Qajar monarchs. Britain extended its control over areas of the Persian Gulf and Russian continued its intervention in the Caucasus and the eastern Iran.

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[482] For more details, see Abisaab, R.J, Delivering Justice: The Monarch's Úrfi Courts and the Shari'a in Safavid Iran, in The Oxford Handbook of Islamic Law, Emon, A and Ahmed, A (eds.) Online Publication Date Oct 2017. See also, Banani, A, The Modernization of Iran, (1921-1941), 1961.

[483] Sakurai, K, Iran: Three Dimensional Conflicts, in Education in West Central Asia, Ahmed, M (ed.), 2013, pp. 57-78.

[484] Mir-Hosseini, Z, supra note 477, pp.323-4.

By the end of 19th century domestic crises arose as a result of the European influence on Iran's economy and politics. The conflict emerged with the Tobacco Concession of 1891 granting the English enterprise the full monopoly to sale and export Iran's tobacco in return for the annual pay to the Shah[485]. Bazzaris (merchants) protested against the concession and a fatwa was issued by the leading mujtahid Mirza Hasan Shirazi, declaring the use of tobacco as war against the Hidden Imam. This led to series of popular movements constituted of the modern educated intellectuals, who venerated "not the divine rights of kings but the inalienable rights of man"[486], the traditional merchants class and the Shi'i clerics.

The modern intellectuals together with the traditional middle class helped to turn local movements into the Revolution. Despite their differences, they have the common aim to limit the absolutism of the Shah and the foundation of House of Justice (Edalat Khaneh). This was the beginning of the constitutionalism in Iran before the establishment of the Islamic Republic.

1.1. The Constitutional Monarchy of Iran

1.1.1. The Constitutional Revolution of 1905-1911

The social movements with their distinctive pluralistic characters resulted in the Constitutional Revolution, known as Enqelab-e Mashrute[487], in the early 20th century. The Constitutional Revolution's grassroots base was unique in the history of the modern Middle East[488] and has remained a turning point in the history of modern Iran. By incorporating modern concept of democracy, nationalism, secularism and the rule of law

[485] For more on the history of Qajar Iran, see Lambton, A, Qājār Persia, 1987, Stebbins, H.L, British Imperialism in Qajar Iran: Consuls, Agents and Influence in the Middle East, 2016, and Amirahmadi, H, Political Economy of Iran under Qajars 1976-1936, 2012.

[486] Abrahamian, E, supra note 474, p.50-1.

[487] See an excellent work of Kasravi, A, History of the Iranian Constitutional Revolution, vol.1, translated into English by Evan Siegel, 2006.

[488] Amanat, A, Iran: A Modern History, 2017, pp.315-88.

diverse social and political groups aimed to end the despotic power of the Shah through the formation of a constitution, an independent judiciary and an elected legislature[489]. As Abbas Amanat in "Iran: A Modern History" mentions, in fact domesticating the Western notions of democratization and modernization in the Shi'i political culture enabled the growth and early success of the Revolution.[490] As a result of the Revolution Mozaffar al-Din Shah issued the decree for the constitution (Qanun-e Asasi) and the establishment of the first national parliament (Majles-e Shuray-ye Melli) in 1906. The intent was to set up a constitutional monarchy with power held by a parliament and ministers[491].

1.1.2. Shari'a-Based Constitution of 1907

In the image of modern society and with little legislative experience the first Majles ratified the Constitution based on secular ideals in December 1906. The Constitution contained fifty-one articles. It set forth the basic ideas of sovereignty, separation of powers, the parliament's rights and obligations and it did not refer to Islamic law once[492]. Yet in terms of fundamental rights the Constitution required revision, and the modern basis of Constitution was not acceptable to the religious clerics. Objections to the non-religious structure of the Constitution were raised by the leading Ulama who supported the Revolution. The outcome was the ratification of Supplement to the Constitution in October 1907, which was inspired by the French and Belgian constitutions but its context was in accordance with the dominant religious tradition in Iranian society[493]. This led to

[489] Mir-Hosseini, Z, supra note 477, p.325.

[490] Amanat, A, supra note 488, p.331.

[491] Constitutional Revolution (Iran), in The Oxford Dictionary of Islam, Esposito, J.L (ed.), Oxford Islamic Studies Online [Accessed 1 Dec 2017]

[492] For the Iranian Constitution 1906, see Peaslee, A.J, Constitutions of Nations, 1950, pp. 201-5, available at http://fis-iran.org/en/resources/legaldoc/iranconstitution [Accessed 1 Dec 2017]

[493] Amanat, A, supra note 486, p. 339. For more discussion, see also, Martin, V, State, Power and Long-term Trends in the Iranian Constitution of 1906 and its Supplement of 1907, in Journal of Middle Eastern Studies, vol. 47, 2011, pp. 461-76.

the emergence of the first Shari'a-based constitution in the history of modern Muslim states.

The 1907 Supplement to the Constitution protected some fundamental rights but ignored others. It protected the equality of all citizens before the law[494] and secured all individuals lives and honor from every kind of interferences[495]. It further protected the freedom of press, publication and assembly so long as they are not inconsistent with the Islamic principles[496]. Article 1 and 2 of the Supplement provided the Shari'a basis of the Constitution. Islam and the Shi'a Ja'fari School of jurisprudence were acknowledged as the official religion of Persia under article 1. Article 2 of the Supplement specified that: at no time must any legal enactment of the Majles be incompatible with the sacred principles of Islam or the teachings of the Prophet. In other words, article 2 contained the Islamic supremacy clause, which declared Islamic law as the basis for legislation. Subsequently after several drafts, the Majles ratified that the committee of at least five mojtahids would observe the compatibility of legislation with the sacred principles of Islamic law. From this point on the compatibility of laws and regulation with Islamic law has been an integral part of Iran's legal culture, what would reemerge later under the Constitution of Islamic Republic of Iran.

[494] Article 8 of the Supplement: The people of the Persian Empire are to enjoy equal rights before the Law.

[495] Article 9 of the Supplement: All individuals are protected and safeguarded in respect to their lives, property, homes, and honor, from every kind of interferences, and none shall molest them save in such case and in such way as the laws of the land shall determine.

[496] Article 20 of the Supplement: All publications, except heretical books and matters hurtful to the perspicuous religion [of Islam] are free, and are exempt from the censorship. If, however, anything should be discovered in them contrary to the Press law, the publisher or writer be known, and be resident in Persia, then the publisher, printer and distributor shall not be liable to persecution.

1.2. The Constitutional Republic of Iran

1.2.1. The Islamic Revolution of 1979

To borrow an idea from Bernard Lewis, in revolutions there is an element of theater. Revolutions move to different scripts and their actors play different roles[497]. Depending upon different conditions of their own countries, dramatist and director attempt to gain the interest, sympathy and the wide participation of the audience. As the French Revolution formulated its ideals as liberty, equality and fraternity, and the Russian Revolution exemplified the ideals of communism, the Iranian Revolution represented itself in the language of Islam.[498] Over the last decades religious sentiments provided an effective element for mobilizing public opinion and for arousing the people in defense of a regime or against a regime.[499]

Yet, the theater of the Islamic Revolution was unique in many respects. The script of the Revolution and the role of the Revolution's director were unlike to any other revolutions. The Iran's Revolution 1979 happened with the leadership of Ayatollah Khomeini along with wide popular support that resulted in the vast socio-political transformation. It was a radical but indeed the most popular middle-class movement in the late 20th century[500].

The Revolution was a turning point in the modern history of Iran, when the Shah was replaced by the Ayatollah and the monarchy was replaced by the Islamic Republic. Amir Arjomand provides one of the best descriptions of the Revolution 1979 in his book "The Turban for the Crown": "the Ayatollah succeeded in raising the banner of Islamic

[497] See Lewis, B, Islamic Revolution, in The New York Review of Books, available at: http://www.nybooks.com/articles/1988/01/21/islamic-revolution/ [Accessed 15 December 2017]

[498] Ibid.

[499] Ibid.

[500] For more on the history of the Islamic Revolution 1979, see Abrahamian, A, Khomeinism: Essays on the Islamic Republic, 1993.

theocracy in the land of the Shah, the last king of kings who, until the day of his departure, commanded a large army equipped with the latest weapons."[501]

Iran between two Revolutions, from the Constitutional to the Islamic Revolution, witnessed a number of significant events. The fall of the Qajars and the rise of the Pahlavi dynasty in the early 1920 was the beginning of the reforms to the Iran's judicial system. Inspired by the Atatürk's reforms in Turkey, Reza Shah Pahlavi established a modern legal system modeled after the French system. The Constitution was amended four times during the Pahlavi dynasty, but the "Islamic supremacy clause" was retained[502]. Many areas of law were derived from the European codes, the jurisdiction of Shari'a courts was decreased to matters involving marriage and divorce[503] and the influence of clerics was reduced. More controversial was Reza Shah's "unveiling decree 1936" that banned women from wearing the veil in public.[504] Following these reforms, during 1941-1953 Iran experienced a secular political system with influence of the intellectuals. The reforms continued during the reign of Mohammad Reza Shah Pahlavi. The ratification of the Family Protection Law 1967 was the major legal reform, which granted women some rights to divorce and child custody, required judicial permission for polygamy under certain circumstances and established special family court[505].

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[501] Amir Arjomand, S, The Turban for the Crown: The Islamic Revolution in Iran, 1988, p.3.

[502] The Constitution was amended in 1925, 1949, 1957 and 197 in accordance with the Pahlavis dictates.

[503] Mir-Hosseini, Z, supra note 477, p.327. See also Culture and Cultural Politics Under Reza Shah, Devos, B and Werner, Ch (eds.), 2013.

[504] Chehabi, H.E, The Banning of the Veil and Its Consequences, in The Making of Modern Iran: State and Society under Reza Shah, 1921-1941, Cronin, S (ed.), 2003. See also, Paidar, P, Women and the Political Process in Twentieth-Century Iran, 1995, pp.106-9, and Mottahedeh, N, Iran, in The Encyclopedia of Women and Islamic Cultures: Family, Law and Politics, Josep, S and Nagmābādi, A (eds.), 2005, pp. 481-2.

[505] Family Protection Law 1967/75, full text available at: http://fis-iran.org/en/women/laws/family [Accessed 20 December 2017]. For more discussions on family law in Iran, see Bøe, M, Family Law in Contemporary Iran: Women's Rights Activism and Shari'a, 2015. See also Bagley, F.R.C, The Iranian Family Protection Law of 1967: A Milestone in the Advance of Women's Rights, in Iran and Islam, Bosworth, C.E (ed.), 1971, pp.47-64.

Yet the Pahlavi's modernization had always been entangled with the despotism[506]. This led to more competition between democracy and ideology and resulted in more conflict between the secular state and the society. Ayatollah Khomeini, who was forcibly exiled from Iran in 1964, issued a Fatwa that the Family Protection Law is incompatible with Islamic law and the divorce under the law is invalid[507]: "The law that recently passed on the orders of the agents of the foreigners, the law designated the Family Law, which has as its purpose the destruction of the Muslim family unit, is contrary to the ordinances of Islam. Those who have imposed this law are criminals from the standpoints of both Shari'a and the law. The divorce of women divorced by court is invalid, they are still married and if they marry again, they become adulteresses". This Fatwa was a leading example of political Islam, which strengthened Khomeini's doctrine of the "Guardianship of the Religious Jurist" or "Velayat-e Faqih."[508] In Khomeini's view the guardianship of the religious jurist is absolute. Faqih has the authority over social, legal, economic and political matters of the society during the Occultation of Imam Mahdi. This doctrine allows Faqih to act as the custodian of Prophetic tradition, the interpreter of the Divine laws, and the advisor of the ruler.[509]

Ultimately, Khomeini's exile, his political Fatwas, and socio-economic crises transformed to the rise of popular support for a revolutionary movement. Supporters of the Revolution were opponents of the Shah. From Marxist to Islamist came under the leadership of Ayatollah Khomeini with the aim of ending the autocratic Pahlavi and in the hope of establishing a pluralistic system. What they did not expect, though, was the governance of clerics.

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[506] Ghazi Moradi, H, Despotism in Iran, 2017, pp. 283-88.

[507] Algar, H, Islam and Revolution: Writings and Declarations of Imam Khomeini (1940-1980), 1981. See also Ghamari-Tabrizi, B, The Divine, the People, and the Faqih: On Khomeini's Theory of Sovereignty, in A Critical Introduction to Khomeini, Adib-Moghaddam, A (ed.), 2014, pp. 211-38.

[508] See Khomeini, R, Islamic Government: Governance of the Jurist, 1970. See also, Dahbashi, H, Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran, 1993.

[509] Ghamari-Tabrizi, B, The Divine, the People, and the Faqih: On Khomeini's Theory of Sovereignty, in A Critical Introduction to Khomeini, Adib-Moghaddam, A (ed.), 2014, pp. 224-6.

The Shah left Iran and on February 11, 1979 the people celebrated the victory of the Revolution. Khomeini first raised the establishment of the Islamic Republic and set-aside the doctrine of "Velayat-e Faqih". In an interview with the Le Monde Khomeini elaborated his position on republican character of his ideal Islamic government.

"Le Monde: Your Excellency wishes to establish an Islamic Republic in Iran. For French people this is ambiguous, because a republic cannot have a religious foundation. Is your republic based on socialism? Constitutionalism? Would you hold election? Is it democratic? Ayatollah Khomeini: Our republic has the same meaning as anywhere else. We call it "Islamic Republic" because it has emerged with an Islamic ideology, but the choice belongs to the people. The meaning of the republic is the same as any other republic in the world."[510]

In March 1979 an overwhelming majority of Iranian voted in favor of the Islamic Republic, which ended to the 2500 years of monarchy in Iran. Yet the legacy of Khomeini and his ideology brought many surprises after the Revolution. Not the least of which was the ratification of a Shari'a-based Constitution based on the doctrine of "Guardianship of Faqih"[511]that has influenced the legal culture and political structure of Iran up to the present.

1.2.2. The Shari'a-Based Constitution of 1979

The Constitution of Islamic Republic of Iran was ratified through the national referendum in December 1979 and after several drafts it was amended in 1989[512]. Perhaps Weber's theory of Legal Change provides a good explanation for the post-revolutionary

[510] Ibid. P 212-13.

[511] See e.g. Rahnema, A, Ayatollah Khomeini's Rule of the Guardian Jurist: From theory to Practice, in A Critical Introduction to Khomeini, Adib-Moghaddam, A (ed.), 2014, pp.88-114.

[512] See Randjbar-Daemi, S, Building the Islamic State: The Draft Constitution of 1979 Reconsidered, Journal of Iranian Studies, vol.46, 2013, pp. 641-63.

Constitution in Iran[513]. In Weber's view "when we are concerned with law, legal order or rule of law we must strictly observe the distinction between a juristic and a sociological point of view". From this perspective, the constitutional structure of Iran has been influenced by power structure during the two periods of modernization and Islamization[514]. The Constitution of Islamic Republic is a manifestation of socio-political dynamics during the Revolution and composed of two major elements: democratic and religious.[515]. The juxtaposition of democratic and religious elements reflects the complexity of the constitutional system. The fundamental rights of individuals under chapter 3 of the Constitution, in particular, mirror this complexity[516].

The democratic character of the Constitution promulgated under Article 6 of the Constitution: "In the Islamic Republic of Iran, the affairs of the country must be administered on the basis of public opinion expressed by the means of election, including the election of the president, the representatives of Islamic Consultative Assembly (Parliament), and the members of councils, or by means of referenda in matters specified in other articles of this Constitution."

The chapter 3 of Constitution titled "The Rights of the People" further protects equality of individuals before the law regardless of color, race, language and other such distinctions (Arts. 19-20). It secures the rights of women in all respects (Art. 21) and guarantees security of dignity, life, property and domicile (Art. 22). It protects the freedom of publications, press and expression (Arts. 24, 175) and contains the right to due process and the presumption of innocence (Arts. 32, 36, 37). It includes the social

[513] In this respect, see Mohammadi. M, Judicial Reform and Reorganization in 20th Century Iran: State-Building, Modernization and Islamicization, 2007, pp. 23- 32. See also Sutton, J, R, Law/Society Origins, Interactions and Change, 2001, pp. 99-128.

[514] Ibid, Mohammadi, M, p.29.

[515] Schirazi, A, The Constitution of Iran: Politics and the State in the Islamic Republic, 1997, pp. 8-10.

[516]For more details, see Moschtaghi, R, The Relation Between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran: A Multilayer System of Conflict? In Max Planck Year Book of UN Law, vol.13, 2009, pp.375-420.

rights of citizens and considerable attention to economic issues (Arts. 43, 46, 48, 49). And not least the Constitution obliges the president to avoid any form of autocracy and to protect the freedom and dignity of individuals (Art. 121).

Nevertheless, the separation of powers, the sovereignty of people and respect for fundamental rights of individuals are conditional upon their conformity with Islamic principles[517]. The Government is obliged to secure the rights of women only in accordance with Islamic criteria (Art. 21). Publication and the press are free unless their content is deemed harmful to Islamic norms (Art. 24) and more importantly all citizens enjoy human rights, political rights, social and cultural rights in compatible with Islamic norms (Art. 20). However, the necessity of compatibility between the fundamental rights and Islamic norms is not necessarily equal to violation of these rights. This particularly is true where Islamic law coincides with human rights law and they share common ground. But the point here is not only the condition of compatibility with Islamic principles. More important is rather the interpretation of these principles by the state officials.

The religious element of the Constitution is specified in the Preamble and the main articles of the Constitution[518]. The preamble of the Constitution enshrines the aim of the Republic to establish an ideal society on the basis of Islamic principles and guidelines. For this aim, Islam is the official religion of the state as interpreted by the Twelver Ja'fari School of jurisprudence. This principle will remain unchangeable according to Article 12 of the Constitution. The Constitution further recognizes Zoroastrian, Jewish, and Christian as religious minorities, who are free to perform their religious ceremonies and to act according to their own canon in matters of personal affairs and religious education (Art. 13). The religious feature of the Constitution particularly emerges in Article 4:

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[517] See e.g. Grote, R and Röder, T.J, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives, in Constitutionalism in Islamic Countries: Between Upheaval and Continuity, Grote, R and Röder, T.J (eds.) 2012, pp. 321-372.

[518] Schirazi, A, supra note, 515. See also, Hirschl R, Constitutional Theocracy, 2010, pp.36-7, and Amir Arjomand, S, Constitution of the Islamic Republic, in The Encyclopedia Iranica, vol. VI, Fasc.2, 2011, pp. 150-8.

"All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the Fuqaha of the Guardian Council are judges in this matter." Two important points arise from Article 4. The first point is setting Islamic law as the only basis for legislation. The privileged status for Islamic law within the constitutional law is further secured by Article 72, according which the Parliament cannot enact the law contrary to Islamic norms.[519] In other words, the Islamic supremacy clause not only requires the state legislation to be consistent with Islamic norms, but it also requires that laws should not be in contrary or repugnant to Islamic.

The second point is the emergence of the Guardian Council a constitutional supervisory committee based on the Khomeini's ideology of the "Guardianship of Faqih." The Guardian Council is composed of six Faqih (Ayatollahs) appointed by the Supreme Leader and six jurists suggested by the head of judicial system and voted on by the Parliament. The authority of the interpretation of the Constitution is vested with the Guardian Council. All legislation passed by the Parliament must be sent to the Council to evaluate its compatibility with the Constitutional provisions and Islamic criteria. Moreover, the Council server as a watchdog over election and hold veto powers over parliamentary legislations[520]. This clearly has resulted in the monopoly of politics and power, which often leads to the confrontation between the government and the Guardian Council. The more reformist the President, the more likely is the disagreement between the Guardian Council and the government.

The decisions of Guardian Council defined power structure and may even incompatible with the Islamic legal tradition or the rule of law. This is especially apparent in the recent

[519] Article 72: The Islamic Consultative Assembly (Parliament or Majles) cannot enact laws contrary to the principles of the official religion of the country or to the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.

[520] Gheissari, A and Nasr, V, Democracy in Iran: History and the Quest for Liberty, 2006, pp. 77-104.

case of a Zoroastrian member of Yazd City Council Sepanta Niknam is the first Zoroastrian who has served as a member of the city council in Yazd. Niknam was suspended from serving as the member of the council after he was legally re-elected again in May 2017. Following his complaint, the Court of Administrative Justice ruled against Niknam in September 2017. The Court based its decision on the declaration issued by the Guardian Council banning non-Muslims from representing Muslim majority constituencies[521].

The decision issued by the Guardian Council was against the rule of law and the spirit of the Constitution. First, the Law on the Formation, Duties, and Election of National Islamic Council[522] permits religious minorities to run as a candidate in elections. Secondly, the Constitution officially recognizes Zoroastrian as a religion minority in Iran. Thirdly, more than two-thirds of the people who voted for Niknam in the May 2017 election were Muslims and he is legally a representative of the people. The President Rouhani has spoken out against the ban and the tension raised between the government and the Guardian Council. The head of Judiciary supported the Guardian Council while the Parliament found the decision illegal and against the rule of law. Ultimately, the agreement reached between the Parliament and the Judiciary to cancel the suspension until the law concerning the participation of religious in elections is amended. This case clearly indicates the role of the state in the interpretation and implementation of Islamic law.

[521] See the report of Center for Human Rights in Iran, 7 November 2017, available at: https://www.iranhumanrights.org/2017/11/irans-rouhani-writes-to-supreme-leader-on-dispute-over-suspended-zoroastrian-council-member/ [Accessed 30 December 2017]. See also the report of Radio Farda, 8 November 2017, available at: https://en.radiofarda.com/a/iran-zoroastrian-allowed-to-serve-yazd/28842931.html [Accessed 30 December 2017]

[522] The Farsi version of law is available at: http://rc.majlis.ir/fa/law/show/92681

1.3. The Place of International Human Rights in the Constitution of Islamic Republic of Iran

The Islamic supremacy clause under Article 4 of the Constitution determines the relationship between the Constitution and international law in a general manner. The state, therefore, protects international human rights law in accordance with Islamic norms. This allows Iran to apply reservations to human rights treaties based on the incompatibility of the treaty with the constitutional provisions or Islamic principles.

Yet, Iran is a state party to the key international human rights treaties: The Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG),[523] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[524], the International Covenant on Civil and Political Rights (ICCPR)[525] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[526], the Convention on the Rights of the Child (CRC)[527] and the Convention on the Rights of Person with Disabilities (CRPD).[528] Most of human rights treaties are signed and ratified without any reservation during the reign of Pahlavi. The Islamic Republic, however, has made reservation and declaration respectively to the CRC and CRPD. Based on these reservations Iran does not consider itself bound by any provisions of the Convention that may be incompatible with the domestic laws and Islamic principles. The greatest challenge to the implementation of human rights is not the reservation to human rights treaties, though. The human rights violation in Iran clearly shows that Iran is not even bound to its obligations under the ICCPR and ICESCR, which were ratified without

[523] CPPCG, 9 December 1984, signature by Iran 8 December 1949, ratification 14 August 1956.
[524] CERD, 7 March 1966, signature by Iran 8 March 1967, ratification 29 August 1968.
[525] ICCPR, 16 December 1966, signature by Iran 4 April 1968, ratification 24 June 1975.
[526] ICESCR, 16 December 1966, signature by Iran 4 April 1968, ratification 24 June 1975.
[527] CRC, 20 November 1989, signature by the Islamic Republic of Iran 5 September 1991, ratification 13 July 1994.
[528] CRPD, 13 December 2005, Accession by the Islamic Republic of Iran 23 October 2009.

reservation. This once again raises the role of the state and its authority in interpretation and implementation of Islamic law and international human rights law.

2. The Constitutions of Afghanistan: From Monarchy to Republic

Many constitutions were issued in Afghanistan's history, while Afghanistan has never experienced an ideal constitutionalism. Since the ratification of the first Afghanistan's constitution in 1923, Afghanistan has had eight constitutions, each of which reflects a part of the constitutional history of Afghanistan.[529] The Afghanistan's constitutional history is in fact an expression of the political upheaval of the past and the constitutional development of the present.

Standing on the Silk Road and surrounded by the Persian and Indian Empires the land currently known as Afghanistan[530] was the meeting place of various cultures and had a positively attraction for conquerors.[531] For millennia, Afghanistan was conquered and controlled by neighbors Empires. The Arab invasion in the 7th century introduced Islam and Islamic legal tradition to the entire region and led to a predominant de facto legal rules composed of Shari'a and the Pashtun tribal customary law[532].

In the mid 19th century Afghanistan lied within the British influence. As the new nation was ethnically and to some extent religiously diverse, Amir Abdul Rahman aimed to

[529] Thier, A.J, The Making of a Constitution in Afghanistan, New York Law School Law Rev.vol.51, 2006-7, pp. 558-79. Available at: http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/11/51-3.Thier_.pdf, [Accessed 25 December 2017].

[530] The region was known as Ariana to the Greeks c.200 BC. Some believe that Afghan is derived from Avagana or Ab-bar-Gan meaning the "Mountainous Country". The Romans also called the area Albania, which means the mountainous area. Yaghistan was also a popular name of Afghanistan meaning the "Land of Rebellious or Ungovernable" referred to those fighting the British invasion. Afghanistan itself means the "Land of Afghans" and came into use in the middle of 18th century when Ahmad Shah Durrani established the first Afghan Kingdom in 1747. See Everett-Heath, J, The Concise Dictionary of World Place Names, 2017.

[531] See e.g. Barfield, T, Afghanistan: A Cultural and Political History, 2010, pp. 23-32.

[532] Ahmed, F, Shari'a, Custom, and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan, Global Jurist, vol.7: Iss.1, Article 5, 2007. See also, Barfield, T.J, Culture and custom in Nation-Building: Law in Afghanistan, 60 ME.L.Rev.347, 2008, and Kakar, P, Tribal Law of Pashtunwali and Women's Legislative Authority, 2003.

establish a politically and legally unified country. During his reign the verdicts were issued in accordance with the principles of Islamic law based on the Hanafi School one of the main Sunni jurisprudence. The nation's laws were divided into Islamic law, administrative laws (Qanūn) and the tribal laws[533].

20th-century Afghanistan has witnessed various vicissitudes: from the struggle against the British domination to the establishment of constitutional monarchy, from the creation of the Republic of Afghanistan to the Soviet communist invasion of Afghanistan and not least from the devastating civil war to the rise of Taliban and fundamentalism.[534]

Yet, the 20th century is marked as the beginning of the constitutional history in Afghanistan. Inspired by Reza Shah's reforms in Iran the first constitution of Afghanistan was issued based on liberal ideas by Amir Amanullah Khan in 1923. The 1923 Constitution announced Islam as the official religion of the state, but it did not declare the Hanafi School as the official jurisprudence[535]. At the same time several major steps were taken towards legal equality and modernization of the state. The independence of judiciary, the rights of women to education, restriction on polygamy, abolishing child marriage and protection of religious freedoms were introduced into the society.[536] Amanullah Khan's attempts for establishing a modern legal framework, however, faced opposition from the Hanafi Ulama and the regional tribes. The new reforms were deemed un-Islamic and Amanullah forced to convene the "Loya Jirga" (the Grand Assembly)[537]

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[533] Yassari, N and Saboory, M.H, Shari'a and National Law in Afghanistan, in Sharia-incorporated: A Comparative Overview of the Legal System of Twelve Muslim Countries in Past and Present, Otto, J.M (ed.), 2010, pp.257-312.

[534] Thier, A.J, supra note 529.

[535] See Constitution of 1923 or Neẓām Nāma-ye Assāsi-ye Dawlāt-ye Ālīā-ye Afghanistan, Art. 2.

[536] Yassari, N and Saboory, M.H, supra note 531, pp. 277-280. See also, Rahmani, A, The Role of Religious Institutions in Community Governance Affairs: How Are Communities Governed Beyond the District Level? 2006.

[537] In Afghan history the term Loya Jirga refers to a "mass gathering of the Afghan people". It traditionally involves ethnic Pashtun tribal elders, who gathered together to reach consensus on critical issues, such as the choosing of a ruler or approval of the law. Later in the 20th century the term refers to the "National Assembly" or the "Assembly of Afghan Leaders" a body of legislature that brings the representatives of

to amend the Constitution. Following the amendments the Hanafi School was declared as the official Madhhab of the state, the polygamy was allowed, the prohibition on child marriages was revoked, the religious liberty was restricted and the Loya Jirga further subjected all laws to the approval of clerics. Consequently, the first Constitution and Amanullah Khan both failed against the clerical and tribal power[538].

With the support of the traditional Ulama and the regional tribes Nadir Shah became the king and promulgated the second Constitution in 1931. Contrary to the first constitution, the 1931 Constitution included the Islamic supremacy clause. Nadir Shah acknowledged Shari'a as the source of laws and established the Society of Ulama[539]. Islamic law dominated the judiciary and political Islam dominated the society.

The 1931 Constitution remained in force until the ratification of the third constitution of Afghanistan in 1964. During 1964 to 2001 no effective constitution was drafted successfully due to increasingly political turmoil[540]. The short-lived regimes failed to establish a long-term constitution. Afghanistan's experience of so many constitutions makes it difficult to observer the role of Shari'a-based constitutions in legal and political culture of this country. The two Shari'a-based constitutions of 1964 and 2004, however, marked the start of new political situations in the constitutional history of Afghanistan. The following are important roles these constitutions play in the present understanding and implementation of the fundamental rights.

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nation together for a political decision. See e.g. Wardak, A, Jirga: Power and Traditional Conflict Resolution in Afghanistan, in Law After Ground Zero, Strawson, J (ed.) 2002, pp. 183-202. See also Salim, A, Loya Jirga: The Afghan Grand Assembly, 2006.

[538] For more details on the constitutional history of Afghanistan, see Pasarlay, Sh, Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory, 2016 available at:https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/36735/Pasarlay_washington_0250E_16099.pdf?sequence=1&isAllowed=y [Accessed 20 January 2017].

[539] See e.g. Gregorian, V, The Emergence of Modern Afghanistan: Politics of Reform and Modernization 1880-1946, 1969.

[540] See e.g. Amin, S.H, Law, Reform and Revolution in Afghanistan, 1993. Rubin, B, The Fragmentation of Afghanistan, 1995. Ewans, M, Afghanistan: A Short History of Its People and Politics, 2002, and Ansary, T, Games without Rules: The Often-Interpreted History of Afghanistan, 2014.

2.1. The Constitutional Monarchy of Afghanistan

2.1.1. The Constitution of 1964

The wave of reform movements led by the first generation of Afghan intellectuals in the mid 20th century. In opposition to the royal monopoly of power the leader of movements demanded the separation of powers and a constitutional monarchy. As a result of the movements, Zahir Shah called for the drafting of a new constitution that would be acceptable to the Ulama, the tribal notables, the to the intellectuals[541]. The Constitution was drafted over an 18-month period and ratified by the Loya Jirga in 1964.

Unlike the two former constitutions, the 1964 Constitution introduced a great degree of democratic participation. It moved Afghanistan into a new political era and it serves as the basis for the 2004 constitution[542]. In response to the demands of the intellectuals the Constitution established a constitutional monarchy based on the separation of powers[543]. The equality of human being[544], freedom of thought and expression[545] and the right to education for all were protected[546]. For the first time the formation of political parties was recognized under the Constitution[547], a unified and independent judiciary was created and the Supreme Court was established the highest judiciary authority[548].

Like the two previous constitutions, Islam has an important role in the Constitution of 1946. Islam remained the state religion. Religious rituals were to be performed in accordance with the Hanafi School and the King had to be a Hanafi Muslim[549]. The role

[541] For more details, see Dupree, L, Afghanistan, 1973.
[542] Thier, A.J, supra note 529.
[543] The1964 Constitution of Afghanistan or Qanun-e Assasy-e Afghanistan, Art. 2.
[544] Ibid. Art. 25.
[545] Ibid. Art.31.
[546] Ibid. Art. 34.
[547] Ibid. Art. 32.
[548] Ibid. Art.107.
[549] Ibid Art. 8.

of Islamic principles especially emerged in the "Repugnancy Clause" of the Constitution under article 64, paragraph 2:

"There shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in this Constitution".

Another important article with respect to the role of Islam was article 69, which brought a long discussion of legal and philosophical points[550]. This article indicated:

"Excepting the conditions for which specific provisions have been made in this Constitution, a law is a resolution passed by both Houses [Parliament] and signed by the King. In the area where there is no such law exists, the provisions of the Hanafi Jurisprudence the Shai's shall be considered as law".

Article 69 implicitly mentioned the supremacy of the state law over the Hanafi jurisprudence. This may however seem contradictory with the repugnancy clause under article 64. This ambiguity raised concern within the Ulama at the time of drafting the Constitution. They rejected article 69 due to the primacy of state law over the Hanafi jurisprudence[551]. In response to the Ulama the secretary of Loya Jirga argued that no state law would be repugnant to Islamic principles according to article 64, but it should not be necessary compatible with Hanafi Islam[552]. Article 69 opened opportunity to interpret Islamic principles from perspective of different schools of jurisprudence. As Afghanistan is known as a "Nation of Minorities"[553] a large amount of Afghans were followers of other Schools. Article 69, therefore, was a great move towards religious tolerance among different ethnic groups in Afghanistan. This system, as Alexander Thier has described, required the laws of Afghanistan not to contradict the principles of Islam, but at the same

[550] Dupree, supra note 541, p. 579

[551] Pasarlay, Sh, supra note 536, pp. 92-3. See also, Farhang, M.M, Afghanistan Dar Panj Qarn-e Akhir, 1371, p.492. (Afghanistan in the Last Five Centuries/1992)

[552] Ibid.

[553] See Jawad, N, Afghanistan: A Nation of Minorities, 1992.

time allowed the representatives of the people to decide how to do that[554]. This indicated the fact that the Islamic legal and ethical tradition defined the scope of fundamental rights set forth under the Constitution. The Constitution of 1964, however, was a progress towards legal developments, but it was a failure to establish political stability. By the 1970s, the communist movements and the modern Islamist movements challenged the constitutional monarchy. The communists formed the PDPA, the People's Democratic Party of Afghanistan. The modern Islamists, which had their basis in the Shari'a Faculty at Kabul University, formed the Muslim Youth Organization, later known as Islamic Society (Jamiat-e Islami).[555] The Marxists attempted to promote the idea of socialism, while the Islamists inspired by the Muslim Brotherhood in Egypt sought to establish a state base on (their own interpretation of) Shari'a. The communist's first effective political move was the Republican coup that established the Republic of Afghanistan in 1973.[556]

2.2. The Constitutional Republic of Afghanistan

2.2.1. The Shari'a-Based Constitution of 2004

If the late 20th century is known as the Worst of Times in Afghanistan's history,[557] Afghanistan's constitution-making in the beginning of the 21st century is considering as a response to the failures of the previous century,[558] even if there is still a long way to go to achieve an ideal constitutionalism. The collapse of Taliban led to the creation of a new Afghan government that dependent on the warlord's power bases. The 2004 Constitution was mandated by the Bonn Agreement, The Agreement on Provisional Arrangements in

[554] Thier, A.J, supra note 529, p. 565.

[555] Barfield, T, supra note 531, pp. 213.

[556] Ibid,

[557] Ibid. Pp. 225-71.

[558] See Mallat, Ch, Constitution For the Twenty-First Century: Emerging Patterns_ The EU, Iraq, Afghanistan, in The Law Applied: Contextualizing the Islamic Shari'a, Bearman, P, Heinrichs, W and Weiss, B (eds.) 2008, pp.195.

Afghanistan Pending the Re-Establishment of Permanent Government Institutions, which was signed in Bonn, Germany in 2001.[559]

Following the requirements of the Bonn Agreement, President Karzai appointed the Constitutional Drafting Commission. The first draft of Constitution was revised and changed by the Constitutional Review Commission in 2003. After several drafts and ideas the final draft of the Constitution was ratified by 502 representatives of the Constitutional Loya Jirga in 2004 and officially designated Afghanistan the Islamic Republic. The new Constitution traces its roots to the 1964 Constitution, while a number of articles reflect recent developments.

The experience of failed constitutions in the past helped Afghanistan to establish a new Constitution, which stands on the rule of law rather than power[560]. By emphasizing on the creation of a society based on the "preservation of human dignity", "protection of human rights" and "realization of democracy"[561] the 2004 Constitution of Afghanistan is indeed the most democratic constitution in the region. The new Constitution, however, is a good example of a strong constitution on paper, but weak effect in reality.[562] Similar to the 1979 Constitution of Iran, the fundamental issues addressed in the 2004 Constitution of Islamic Republic of Afghanistan composed of two major elements: democratic elements and religious elements, which are specified in the short Preamble and the main articles of the Constitution.[563]

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[559] See e.g. Rubin, B, Crafting a Constitution for Afghanistan, Journal of Democracy, vol.15, 2004, pp.5-19.

[560] See e.g. Amir Arjomand, S, Constitutional Development in Afghanistan: A Comparative and Historical Perspective, 53 Drake Law Review, 2005.

[561] The Constitution of Islamic Republic of Afghanistan or Qanun-e Assasy-e Afghanistan, Art.6.

[562] Thier, A.J, supra note 529, p. 561.

[563] For more detailed information, see Ehler, R.S, et al., An Introduction to the Constitutional Law of Afghanistan, ALEP, Stanford Law School, 2015, available at: https://www-cdn.law.stanford.edu/wp-content/uploads/2015/12/Intro-to-Con-Law-of-Afg-2d-Ed.pdf [Accessed 2 January 2018].

The brief Preamble of the Constitution of Afghanistan provides essential democratic elements of the Constitution. The Preamble introduces Afghanistan as the "united, indivisible" state "belongs to all its tribes and peoples," which establishes an order on the "people's will and democracy". The democratic character of the Constitution is particularly defined under Article 4, clause 1:

"National sovereignty in Afghanistan shall belong to the nation, manifest directly and through its elected representatives".

Article 4 is an expression of the principle of a representative democracy,[564] which subsequently set out in Article 61 of the Constitution according to which "the president is elected directly by people through free, general, secret and direct voting". The Constitution also incorporated a system of separation and balance of powers to ensure that the judicial, executive and legislative branches of the new government could not become too powerful. For instance, Article 94 gives the president the authority to veto laws passed by a majority of the National Assembly (The Parliament), while the National Assembly can override the President's veto by a two-thirds majority of the legislation. In addition, the Supreme Court has the power to review the laws and regulations at the request of the Government or courts for their compliance with the Constitution's provisions (Art. 121).

Regarding the protection of fundamental rights Chapter 2 of the Constitution titled "Fundamental Rights and Duties of Citizens" affirms the equality between all peoples and tribes (Art. 6). It declares the right to life and liberty as the natural rights of human being (Arts. 23, 24). It secures the presumption of innocence, due process (Arts. 25, 27) and freedom from torture (Art. 29) and protects the right to peaceful assembly, freedom of expression, right to privacy (Arts. 36, 37, 38). Last, but certainly not least, the Constitution guarantees all the rights and freedoms set forth in the Universal Declaration

[564] See Moschtaghi, R, Max Planck Manual on Afghanistan Constitutional Law, Volume One: Structure and Principles of the State, 2009.

of Human Rights (UDHR), UN Charter and international treaties ratified by Afghanistan (Art. 7).

The Constitutional obligation of Afghanistan to respect the UDHR is perhaps the most important starting point towards the protection of international human rights law. The question arises here whether the Constitutional obligations to protect human rights is contradictory to the Islamic basis of the Constitution. This is especially notable regarding the rights to freedom of expression and freedom of religion. In the case of blasphemy, for instance, would Afghanistan give priority to its obligation under human rights law to protect freedom of expression over its religious culture to punish blasphemy? In order to understand the tension between two constitutional principles, we need to examine more carefully the role of Islam in the Constitution.

Islam has a strong religious, legal and political influence in the 2004 Constitution. The role of Islam particularly appears in the Preamble and the first three articles of the Constitution. The first article of the Constitution declares Afghanistan as the Islamic Republic, the second article adopts Islam as the official religion of the state and the third article establishes "Repugnancy Clause" reads:

"No law shall be contrary to the beliefs and provisions of the sacred religion of Islam in Afghanistan".

On a plain reading of article 3, three points are evident:

1. Islamic principles have superior status over other legislation.
2. The provisions of international treaties shall not be contrary to the beliefs and provisions of Islam.
3. Laws in conflict with the principles of Islam are by definition unconstitutional.

This is also confirmed by Article 162 of the Constitution by virtue of which:

"…Upon the enforcement of this constitution, laws and legislative decrees contrary to its provisions shall be invalid".

Furthermore, the state is obliged to unify educational curricula compatible with Islamic norms and national culture (Art. 45) and to eliminate traditions contrary to the principles of Islam (Art. 54). The President of Afghanistan must be a Muslim and political parties cannot have the program contrary to the Islamic principles (Arts. 62, 35). Ultimately, the Constitution strengthen the role of Islamic principles in Article 149:

"The provisions of adherence to the fundamentals of the sacred religion of Islam and the regimes of Islamic Republic cannot be amended".

The 2004 Constitution of Afghanistan provides the clear reference to the role of Islam[565]. What, however, remains unclear is the meaning of "Islamic beliefs and provisions" under the Constitution[566]. The language of Article 3 does not make clear the source and meaning of "Islamic provisions". Does the term generally refer to the Qur'an and the Sunnah of the Prophet? Does it particularly refer to the specific school of jurisprudence? Or does it refer to the state's understanding of Shari'a based on its own religious and political culture?

Article 130 Para. 2 refers to the Hanafi jurisprudence only in those cases where there is no legislation to cover the issue: "When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner".

Further, under Article 131, the Constitution allows the application of Shi'a jurisprudence in matters of personal status[567]. As in the 1964 Constitution, Article 130 of the 2004

[565] For a more detailed discussion of the role of Islam in the 2004 Constitution of Afghanistan, see Gerber, G, Die neue Verfassung Afghanistan: Verfassungstradition und politischer Prozess, 2007, pp.99-109.

[566] Mahmoudi, S, The Shari'a in the New Afghan Constitution: Contradiction or Compliment? ZaöRV 64, 2004, pp. 867-80. Mahmoudi states that this article (3) is a legally vague concept and prone to broad interpretations.

[567] 2004 Constitution of Afghanistan Art.131: Courts shall apply Shia school of law in cases dealing with personal matters involving the followers of Shia Sect in accordance with the provisions of law. In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of

Constitution requires the laws of Afghanistan not to be contrary with the principles of Islam, but the interpretation of Islamic principles lies in the authority of the state's officials. By virtue of Article 121, the Supreme Court has the authority to decide whether a law is not inconsistence with the Islamic beliefs and provisions. Will the Supreme Court reflect a broad and moderate interpretation of Islamic law?[568] The answer to this question depends heavily upon who hold the power: modernists, reformists or fundamentalists.

2.3. The Place of International Human Rights in the Constitution of Islamic Republic of Afghanistan

Unlike its weak human rights record Afghanistan has a strong commitment to international human rights treaties. Afghanistan is a state party to: The Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)[569], the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[570], the International Covenant on Civil and Political Rights (ICCPR)[571] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[572], the Convention on the Rights of the Child (CRC)[573], the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[574], and more importantly Afghanistan has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[575]. Most of human rights treaties are signed and ratified without any

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the Shia Sect, courts will resolve the matter according to laws of this Sect.

[568] Thier, A, supra note, 527, p. 578.

[569] CPPCG, 9 December 1984, accession by Afghanistan 22 March 1956.

[570] CERD, 7 March 1966, accession by Afghanistan 1983.

[571] ICCPR, 16 December 1966, accession by Afghanistan January 1983.

[572] ICESCR, 16 December 1966, accession by Afghanistan January 1983.

[573] CRC, 20 November 1989, signature by Afghanistan 27 September 1990, ratification 28 March 1994.

[574] CAT, 10 December 1984, signature by Afghanistan 4 February 1985, ratification 1 April 1987.

[575] CEDAW, 18 December 1979, signature by Afghanistan14 August 1980, ratified by Islamic Republic of Afghanistan 5 March 2003.

reservation, especially the two legally binding ICCPR and ICESCR, which bind Afghanistan to protect all civil and political rights of individuals.

The place of international human rights law in the Constitution of Afghanistan appears under Article 7, which requires the state to abide by all international treaties to which it is a party. With this respect Article 58 establishes the Independent Human Rights Commission of Afghanistan for the monitoring the implementation of human rights law. This article also provides individuals the right to file a complaint with the Human Rights Commission, that is, the similar mechanism as national ombudsman[576]. Yet, the Constitutional obligation to observe the Islamic principles may come into conflict with the Constitutional obligation to observe international human rights law. As argued regarding the Constitution of Iran, conflict between Islamic norms and human rights norms is not inevitable, but contingent. One example is the confrontation between the constitutional guarantees of freedom of expression in compliance with the ICCPR and Article 34 of the Constitution.

Article 19 para.2 of the ICCPR states:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

While article 34 of the Constitution specifies:

"Every Afghan shall have the right to express thoughts through speech, writing, illustrations as well as other means in accordance with provisions of this Constitution."

The necessity of compatibility "with provisions of this Constitution" requires the state to observe the "repugnancy clause" under article 3 of the Constitution. Afghanistan, therefore, is obliged to protect the right to freedom of expression in accordance with

[576] Mahmoudi, S, supra note 566, p. 873.

international standards, while it is bound to ensure the compatibility of the right to freedom of expression with Islamic values. At this point, each system claims to have legitimate authority over the other system in protection of fundamental rights. As argued in Chapter III, this is what Neuman means about a normative disagreement between international human rights law and national constitutional law. From the perspective of international law the principle of "pacta sunt servanda" would be applicable here. "A state may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Some scholars also support the view that the explicit obligation to protect the UDHR and the UN Charter under the 2004 Constitution is a strong reason that the state bound itself to promote human rights after the collapse of Taliban in Afghanistan[577]. This is why the conservative interpretation of the Constitution will be against its sprit.[578] These arguments are only partly true. They pay considerable attention to the theoretical aspects of international human rights law, while the scope of the implementation of human rights law remains uncertain. While the Constitution has made a progress towards the incorporation of international human rights, it reflects the religious and legal culture of Afghanistan. The careful examination of the drafts of Constitution also shows the strong influence of the state's religious culture on the constitution-making process.[579] Then, the question arises here is: how compatible is Afghan religious culture with the rights and liberties understood in the international human rights instruments?

In case of Parwiz Kambakhsh, a 23-year-old student of journalism, the Primary Court in Balkh sentenced Kambakhsh to death for blasphemy in 2007. Kambakhsh was accused of downloading and distributing an article from the Internet that criticized women's rights in Islam. Kambakhsh received numerous supports from international human rights

[577] Knust Rassekh Afshar, M, The Case of an Afghan Apostate: The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution, in Max Planck Year Book of United Nations Law, Wolfrum, R and von Bogdandy, A (eds.) vol.10, 2006, p. 603.

[578] See e.g. Vergau, H.J, Manifest der Hoffnung. Über die neue Verfassung Afghanistan, in Verfassung und Recht in Übersee, Nr.37. 4, Quartal, 2004.

[579] Pasarlay, Sh, supra note 551, p.223.

campaigners and politician calling for his release.[580] Following international pressure on President Karzai the Court of Appeal reduced the death sentence to 20 years imprisonment. The Supreme Court upheld the 20-year prison sentence in 2009. Consequently after the Swedish officials mediation with President Karzai, Kambakhsh was released and fled from Afghanistan[581].

A few points should be mentioned here. As discussed in Chapter II there is no certain punishment for blasphemy in the Qur'an or the Sunnah. The Penal Code of Afghanistan makes no specific reference to blasphemy as a crime. The Penal Code generally addresses "Crime Against Religions", which includes no reference to blasphemy or death sentence. In case of Kambakhsh, the Court of First Instance based the judgment on the Hanafi jurisprudence according to article 130 of the Constitution. By virtue of article 130 para.2 courts are permitted to invoke the Hanafi jurisprudence when there is no provision in the Constitution or statute available for application in a dispute. The application of Hanafi jurisprudence, however, has to be used within the limits set out in the Constitution and in a way to attain justice in the best possible manner.

The latter two requirements "within the limits of the Constitution" and "to attain justice in the best manner" oblige the courts to take all reasonable steps to achieve justice and to decide according to the latter and spirit of the Constitution. To the contrary, article 130 para.2 is often interpreted in a way that gives the courts room to apply the Hanafi jurisprudence without considering the constitutional concerns. The blasphemy case of

[580] See Human Rights Watch reports available at: https://www.hrw.org/news/2009/03/10/afghanistan-20-year-sentence-journalist-upheld , and [Accessed 25 January 2018]

[581] See also, The Local report available at: https://www.thelocal.se/20150122/afghan-student-smuggled-on-swedish-government-plane [Accessed 25 January 2018]. See also, President Karzai Intervenes in Case of Parwiz Kambakhsh, KABUL PRESS (2008), available at http://www.wluml.org/node/4390 [Accessed 25 January 2018]

Kambakhsh demonstrates the uncertain legal status of the state with respect to the implementation of individual's rights and application of human rights.

The conatituional history of Iran and Afghanistan shows that their Shari'a-based constitutional law cannot be separated from the historical background of their religious, political and legal culture. The Perso-Shi'i character of the state and political thought in Iran, the vicissitudes of war in Afghanistan, the shifts in political systems and the development of Iran and Afghanistan as non-Arab Muslim states all enormously changed the function of Islamic law over time. The relationship between religion and politics in 20th century Iran and Afghanistan led to the formation of the Islamic Republics and Shari'a-based constitutional law. Today, the Constitution of Iran and Afghanistan include the democratice elements, while requires the laws not to be contradictory to the principles of Islamic law. And this is while the principle of Islamic law is defined and applied by the state. This reminds us how the practice of Islamic law is influenced by the state's cultural discursive.

CHAPTER V

LEGAL METHODS FOR BALANCING CONFLICTING RIGHTS

In a world of culturally diverse states, the interpretation of fundamental rights at the international level and national constitutional level may be the same, different, or distinct. Different or distinct interpretations of rights may lead to conflict. When national constitutional rights and international human rights come into conflict, choice or balance among them is inevitable. Different legal methods are applied to balance conflicting rights. Balancing conflicting rights, in this sense, is to balance between fundamental rights and the purpose of the state restriction. The question here is: How far can international human rights law and national constitutional law contribute to balance conflicting rights?

The first section discusses the margin of appreciation doctrine as an international effort to accommodate diversity. Further, the German principle of Völkerrechtsfreundlichkeit will be suggested as the constructive interpretation method[582] to accommodate international human rights to Shari'a-based constitutional rights.

1. Contribution of International Human Rights Law to the Accommodation of Shari'a

1.1. The Doctrine of Margin of Appreciation

The meaning of rights and rights-protection system does vary from state to state. The scope and limits of fundamental rights are bound to differ according to the specific jurisdiction in which they are embedded. Each jurisdiction offers an approach to protect

[582] The idea derived from Ronald Dworkin's interpretive approach to the law. For more details, see Brink, D.O, Originalism and constructive Interpretation, in The Legacy of Ronald Dworkin, Waluchow, W and Sciaraffa , S (eds.), 2016.

fundamental rights based on its specific legal culture. Certain values of a given society shape its legal culture and influence the jurisdictional process. Having a different legal and jurisdictional culture makes the different application of fundamental rights often inevitable. On the same basis, since Handyside v. The United Kingdom[583] the ECtHR has adopted the margin of appreciation doctrine as an interpretive tool to balance between individuals' rights and their legitimate restrictions ground[584]. The margin of appreciation doctrine allows states to have a certain measure of discretion in implementing their human rights obligations under the European Convention of Human Rights.

The margin of appreciation doctrine, thus, has a basis in the concept of deference and to a certain degree involves relativism about rights[585]. Seen from this perspective, the margin doctrine can provide a justification for the diversity-approach[586] in the national practice of international human rights even beyond the ECtHR system. Compared to the jurisdictional diversity and legal pluralism at the world level, the diversity existing among the ECHR states parties is clearly less[587]. The Human Rights Committee, as the UN human rights treaty body, in Hertzberg and Others v. Finland has also adopted the "certain margin of discretion" to restrict the right to freedom of expression for the protection of public morals:

"It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion ought to be accorded to the responsible national authorities." [588]

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[583] Handyside v. United Kingdom, December 7, 1976.

[584] See Brems, E, Human Rights: Universality and Diversity, 2001, pp.

[585] Legg, A, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality, 2012.

[586] Ibid.

[587] Brems, E, supra note 584, pp. 361.

[588] See Hertzberg et al. v. Finland, Communication No. 61/1979; U.N. Doc. A/37/40, at 161, HRC 2nd April 1982. See also, e.g. Mcgoldrick, D, The Human Rights Committee: Its Role in the Development of the International Covenant on civil and Political Rights (Oxford Monograph in International Law), 1994.

The adoption of a wide margin of appreciation helps to accommodate diversity within the international human rights system[589]. This particularly is important for balancing conflict between Shari'a-based constitutional rights and international human rights. The margin of appreciation here aims to develop the relationship between international human rights law system and national constitutional law system. This argument is also advanced by Merrills that, "the margin of appreciation is a way of recognizing that that international protection of human rights and sovereign freedom of action are not contradictory but complementary."[590]

One, however, may reject the idea on the ground that the adoption of the margin of appreciation should be "necessity in a democratic society" and in accordance with "the principle of proportionality[591]."

Yet, some alternatives to accept the idea are: first, the concept of democracy and the requirements of proportionality are subject to change and they do not always lead to a no-violation judgment. In the case of Wingrove v. The United Kingdom concerning the state refusal to grant a distribution certificate to a short film entitled "Visions of Ecstasy" on the ground that it is blasphemous against Christian religion the ECtHR states:
"As in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and place to place to place…"[592]. What was considered as the proportionate

[589] Brems, E, supra note 584, pp. 361.

[590] See Merrills, J.G, the Development of International Law by the European Court of Human Rights, 1993.

[591] For more detailed discussion, see Arai-Takahashi, Y, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, 2002. See also, Barak, A, Proportionality: Constitutional Rights and their Limitations, 2012, and Brauch, J, The Margin of Appreciation and the Jurisprudence of the European Court of Human Right: Threat to the Rule of Law, Columbia Journal of European Law, vol.11, 2005, pp. 113-150.

[592] Wingrove v. The UK, App. No. 17419/90, 25 November 1996. Para. 58.

interference in respect to the Convention and as necessity in a democratic society in the UK 1996, is either no longer acceptable or would be rarely applied in practice.

Secondly, the strength of reasons for adoption of the margin doctrine as a tool to accommodate diversity depends on the case-by case basis. It is not an absolute rule or even a justification for human rights violation. As Eva Brems states:

"The Islamic religion is advanced as a justification of numerous restriction of individual rights. All these situations can be characterized as conflicts of rights. As these are generally matters involving sensitive societal values, a wide margin of appreciation may be appropriate. Yet many of restrictions are of a particularly serious nature, so that a wide margin is by no means a warrant against their being labeled human rights violation."[593]

Therefore, the restriction on blasphemy against Islam involves cultural values and application of a wide margin of appreciation may be appropriate, but of course death sentence for blasphemer cannot be justified under any circumstances. This indeed would be a great contribution to accommodate diversity and to balance conflict between universality and religious particularity.

2. Contribution of Shari'a to the Accommodation of International Human Rights Law

In Shari'a-based legal systems, where religion, politics and law are interconnected the role of jurisdiction in the adjudication of fundamental rights becomes more important. Legislators, courts and litigants are all agents in the jurisdictional process[594] and each can have an effective impact on any fundamental rights dispute. The increasingly important role of national courts in the interpretation of fundamental rights raises some important

[593] Brems, E, supra note 581, pp. 387. See also, Baderin, M.A, International Human Rights and Islamic Law, 2003, pp. 231-235. Baderin discusses the margin of appreciation doctrine as universal means of enhancing human rights.

[594] Kaufman, J.A, The Origins of Canadian and American Political Differences, 2009, pp.22-24

points about the possibility of reducing the dissonance between international human rights law and Shari'a-based constitutional law through judicial interpretation.

2.1. The Principle of Völkerrechtsfreundlichkeit

The German constitutional principle of "Völkerrechtsfreundlichkeit" or "the friendliness towards international law" allows the Court to apply a substantial degree of discretion when it comes to interpretation of international law[595]. That is, the international law friendly principle requires that the laws be interpreted as consistently as possible with international law in accordance with the provisions of the Grundgesetz (the German Constitution).[596]

The Principle is derived from different provisions of the Grundgesetz and reflects the important role of the Basic Law towards international law. Article 59 (2) of the Basic Law represents dualist system with respect to international treaties. This article states:

" Treaties that regulate the political relations of the Federation or relate to subject of federal legislation shall require the consent or participation, in the form of federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning federal administration shall apply mutatis mutandis." The German Constitutional jurisprudence, however, does not apply pure dualism or monism with respect to international law. This idea is also supported by virtue of article 25 of the Basic Law according to which the general rules of international law are considered to be part of the German legal system[597].

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[595] See Kokott, J and Sobotta, Ch, The Kadi Case: Constitutional Core Values and International Law_ Finding the Balance? In The European Court of Justice and External Relation Law: Constitutional Challenges, Cremona, M and Thies, A (eds.), 2014.

[596] Lovric, D, A Constitutional Friendly to International Law: Germany and its Völkerrechtsfreundlichkeit, 24 Australian Year Book of International Law 75, 2006.

[597] See Wolfrum, R, Hestermeyer, H and Vöneky, S, The reception of International Law in the German Legal Order: An Introduction, in The Implementation of International Law in Germany and South Africa, 2015, p.5.

Yet, the general rules of international law under article 25 refer to customary international law and general principles of law, but not to international treaties[598]. This demonstrates this fact that the principle of Völkerrechtsfreundlichkeit does not create a constitutional obligation

The German constitutional principle of Völkerrechtsfreundlichkeit provides an interpretive method to incorporate international human rights into national legal system. This Principle can be used to reduce dissonances between constitutional rights and international human rights in Iran and Afghanistan. Especially with respect to the Constitution of Afghanistan and the adoption of the friendliness towards international law can lead to balance conflicting rights.

The margin of appreciation doctrine and the German principle of Völkerrechtsfreundlichkeit offer the constructive interpretation method to balance conflict between international human rights and Shari'a-based constitutional law. Despite the criticism that the application of both methods requires "a democratic society," this Chapter raises the potential of both methods in balancing conflict rights in the confrontation between international human rights and Shari'a-based constitutional rights by addressing on the core idea behind the margin of appreciation doctrine and the principle of Völkerrechtsfreundlichkeit. That is, to understand one another's interpretations.

[598] Ibid.p.17.

CONCLUSION

The debates over the relationship between international human rights law and domestic laws based on Islamic law have often concluded that Islamic law is incompatible with international human rights. This study is designed to challenge this common perception. It offers a view of how international human rights and Islamic law are understood, interpreted and applied differently by states over time, and it emphasizes how religious, political and legal cultures guide the state's understanding of rights in many ways.

The overview of the history and development of international human rights law notes some important logical and practical issues about the implementation of human rights law. This study questions the ability of international human rights law to cope with the multicultural world. It indicates that human rights are "common standards of achievement for all peoples and all nations", which their implementation does fall within the scope of the state's authority. The universality of human rights justifies the existence of human rights for all without distinction, while the state's cultural values influence the concept of universality in practice. This view supports the concept of cultural relativism. Cultural relativism in this sense, however, does not reject the concept of universality. Rather it strengthens the argument that international human right law is a middle point between the absolute universality and absolute relativism. The concept of relativism here suggests that at least to some extent and in some sense each country has its own particular norms and values, which influence the state understanding and implementation of rights. This reminds us "the concept of the universality and respect for diversity".

The overview of the history and development of Islamic law shows that Shari'a in Islam is a normative system of law. Derived from two major sources of the Qur'an and the tradition of the Prophet it is subject to different meanings and diverse interpretations. Fundamental differences between pre-modern Shari'a and Shari'a in modern Muslim states indicate the development of Islamic law over history. It is said that the colonialism

and the rise of Muslim sovereign states have very much influenced the modern codification of Shari'a. Today, Shari'a as the basis for legislation is codified as positive statutes and enforced by the authority of the Muslim state. Vary from one state to another the modern Islamic jurisprudence represents the political history and legal culture of each Muslim state rather than the historical origin of Islamic values. Two Muslim countries that share similar historical background may have different understanding of Shari'a and apply different Islamic jurisprudence.

The incorporation of Shari'a into the constitutions of modern Muslim states more reflects particular norms and values of the respective country than the religious character of Islamic law. Different punishments for blasphemy in Muslim states clearly indicate the role that the state plays in understanding and practicing of Islamic legal tradition. Then, the state's commitment to the Qur'an and the Prophet's tradition may vary or may even be "symbolic, hortatory, or advisory."[599] The Shari'a-based constitution-building in the aftermath of socio-political transformations in Iran and Afghanistan, the two non-Arab Islamic Republics, shows that the scope and limits that each state applies to the constitutional rights of individuals rely on its own interpretation of Shari'a and its own legal and political culture. Therefore, in discussing Islamic law today, first the major sources of Islamic law and secondly the state's own religious legal tradition should be taken into account.

Then, that state's implementation of human rights and Islamic law involves cultural diversity. As Mark Tushnet reminds us the rights-protection is best attributed to national histories and experiences. Differences in national histories and political experiences unique to each state, at least to some extent, shape the state's rights-protection or rights-violation system. Based on its own national experiences each state describes a set of limitations on the rights and freedoms of individuals, while other states might find such

[599] Lovin, R.W, Epilogue, Common Ground or Clearing Ground? in Islamic Law and International Human Rights, Emon, A. M, Ellis, M.S and Glahn, B (eds.), 2012, p. 382.

restrictions incompatible with their understanding of rights and liberties. As a result, depending upon the country we are in and the specific rights in question the fundamental rights may be understood and limited differently. To identify the nature and causes of conflict between international human rights and Islamic law, therefore, an in-depth understanding of the values enshrined in the laws and legal culture of each Muslim state are necessary. Having in mind all these considerations, the conflict and confrontation between Islamic law and international human rights law is contingent, not necessary.

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