ISLAMIC LEGAL THEORIES
ON
HUMAN RIGHTS

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A. INTERNATIONAL HUMAN RIGHTS
1. The development of International Human standards
2. The Concept of Human rights

B.THE ISLAMIC PHILOSOPHY OF HUMAN RIGHTS
1. Belief in One God
2. Human Dignity
3. The Relationship between God's Will and Human Freedom

C.THE CLASSICAL ISLAMIC LAW ON HUMAN RELATIONSIDP
1. Basic Principles of Human Rights
2. The Status of non-Muslims in relation to Muslims

D. LEGAL THEORIES ON HUMAN RIGHTS
1. Equality among citizens regardless religion
2. Women and Men Have Equal Rights
3. Freedom of Religion, Expression and Thought
4. Forgiveness is prioritized than punishment
5. Territorial recognition in International Relationship

CHAPTER I
INTERNATIONAL HUMAN RIGHTS

A. The development of International Human Standards

The idea of human rights is often linked to the philosophical traditions of Greek, Roman, and Medieval times.[1] Human rights theorists often refer to Antigone, the classic example from Greek literature. According to Sophocles (1974), King Creon reproaches Antigone for having given her brother a burial, contrary to the law of the city (because her brother had fought against the polis). She responds that she was obligated to follow a higher, convention, which supersedes positive (man-made) law.[2]

In the history of Western civilization prior to World War II, there were efforts of various kinds to promote individual rights at the national level. Western nations publicized such documents as the English Magna Carta (1215), the United States Declaration of Independence and Constitution (1776, 1787), and the French Declaration of the Rights of Man and the Citizens (1789).[3]

During the nineteenth century, as Europeans came to realize the contradiction between their political values and the practice of slavery, they instigated (bring about) an abolition movement. The sixteen Nation Agreement at Brussels in 1890 established a comprehensive system for the suppression of the slave trade. England initiated a number of bilateral treaties to secure the eradication of the slave trade, e.g. the 1926 Slave Convention. The abolition of slavery remarked at the development of the Universal Declaration of human rights (UDHR). Other examples of abuses, which led to reform movements, include mistreatment of

[1] Szabo, I, Historical Foundations of Human Rights and subsequent developments. In K.Vasak & P.Alston (Eds), *The International Dimensions of human rights*, 1982 vol.1., 11-12 (11-42)).

[2] Sophocoles.(1974). Antigone. The Theban plays. Hannondsworth: penguin. (Originally written 442-441 B.C)

[3] Alison Dundes Rentein, International Human rights: Universalism Versus Relativism (London: Sage Publications, 1990), 18.

Christians in Turkey, pogroms against the Jews in Russia, and violation of religious liberties in Spain. [4]

The Geneva Conventions of 1864, 1907, and 1929 protected the rights of the wounded, civilian populations and prisoners of war during armed conflict.[5] The treaty of Vienna guaranteed religious liberties and civil rights for citizens in the proposed union of Belgium and Holland.[6]

The League of Nations and ILO played significant role as the progenitor of the modem UN. The treaty of Versailles and the league Council reemerged in the UN system in a slightly different form. The so-called mandates system allows individuals with grievances to bring claims before the league Council. Tolley says," for the first time some nations sates became regularly accountable to an international body for mistreatment of individuals subject to their rule", The principle behind the mandates system has survived in the trusteeship system of the UN, although not many "non-self-governing territories" remain.[8] The only apparent human rights guarantees existing under the League of Nations pertained to the protection of minorities and indigenous populations in mandates territories. But in any event, the league was mostly ineffectual, even the most monstrous crimes against humanity, such as those (carry out) perpetrated by Hitler, Mussolini, and Stalin, failed to elicit (bring out) serious response from it. The most successful human rights institutions is the ILO whose goal to ensure safe, humane, and fair labor standards. It was exemplary in its standard setting as well as in its enforcement techniques.[9]

A private body, the Institute of International law, consisted of leading international law scholars from across the globe, met at Briarcliff, New York, in

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[4] Tolley, H. Jr. *The UN Commission on Human Rights* (Boulder and London: Westview Press: 1987,) P.1

[5] Pictet, J. *Development and Principles of International humanitarian law.* Dordrecht: Martinus Nijhoff; Geneve: Henry Dunant Institute, 1985).

[6] Ibid.

[7] Tolley H. Jr., Decision-Making at the UN Commission on Human Rights, 1979-1982, *Human Rights Quaterly,5, 27-57,* 1983, p.2

[8] Humphrey, J.P. The International law of Human rights in the middle twentieth century. In M.Bos *(Ed.)The present state of international law and other essays* (Deventer: Kluwer, 1973) p.80

[9] Swepson, L. Human Rights complaint procedures of International labor Organization. In H. Hannum, (ED.) *Guide to international human rights practice* (Philadelphia: University of Pennsylvania Press 1984), 74-93

1929 to develop an "international Bill of Rights" In their first draft they set out what they regarded as state duties to respect individual rights.[10] They include six specific articles: the rights to life, liberty, property, religious and linguistic freedom and to a nationality. Although their effort did not produce any tangible results, some claim they greatly influenced the movement, which culminated in the human rights provisions in the charter of the UN.[11]

Another memorable articulation of human rights ideals was president Franklin D. Roosevelt's annual message to Congress on January 26, 1941, in which he advocated the 'four freedoms": freedom of speech, freedom of worship, freedom from want, and freedom from fear. Roosevelt and Winston Churchill included these notions in the Atlantic Charter, which was drawn up August 14, 1941, adding the need for self-determination, economic progress, and social security.[12] The pre history of the UN ended January 1942, with the signing by 26 nations of the Declaration of the UN. The Moscow Declaration paved the way to the development of the UN organization by formally recognizing the need for such a world body.[13]

The basis of work undertaken at the conference on International Organization was the proposal developed at Dumbanton Oaks. Many nations and nongovernmental organization attended the conference, in which a draft of the charter finally adopted. The UN charter was the first international agreement in which the countries of the world made a commitment to promote human rights at the international level. In contrast to the League of Nations Covenant, the charter made explicit reference to human rights in its preamble and in several different article (1, 13,55,62:2,68). Other articles have proved to be instrumental to those seeking to advance the cause of human rights (11,14,73).[14]

The language pertaining to human rights that incorporated in the charter is vague. It only refers to fundamental human rights in the most general terms. Consequently, there has been substantial disagreement over the extent to which it

[10] Fareed, N.J. *The United nations Commission on Human rights and its work for human rights and fundamental freedoms.* Ph.d dissertation (Washington State University: 1977),p.26

[11] (Drost, P, Human Rights as legal rights. Leiden: A.W.S. Uitgeversmi, 1951, p.19).

[12] (Szabo, Ibid, 1982, p.22)

[13] Fareed, Ibid, 1977 p.28)

[14] Ibid, 31-33

imposes legal obligation upon its signatories. The content of human rights duties held by state is vague, making it impossible to determine the nature of their obligations. The vagaries of UN Charter may not permit to assume that states have incurred legal obligations by virtue of having ratified the instrument. It seems the language used is not strong enough to support obligations.[15]

The most controversial provision in the charter was article 2 (7);

> Nothing contained in the present Charter shall authorize the UN to intervene in matters, which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present charter, but this principle shall not prejudice the application of enforcement under Chapter VII.

Intervention is justified only under Chapter VII when the Security Council finds a "threat to the peace, breach of the peace, or act of aggression" (article 39). The Security Council must interpret gross human rights violation as being serious enough to constitute a threat of war. [16]

In the UN, the main responsibility for advancing the cause of human rights belongs to the General Assembly. Under its auspices, the economic and Social Council (ECOSOC-article 60) is authorized to pursue human rights activities. According to Article 60, the General Assembly may decide questions directly itself in sessions or rely on a report from one of the Assembly's seven main committees.[17]

Ordinarily, human rights issues are referred to the Third Committee, which is concerned with social, humanitarian, and cultural matters.

Article 34 specifies that the Security Council investigate disputes which might give rise to international conflict. On occasion, the Trusteeship Council (article 76© and 87) and the ICJ have decided human rights questions. The Secretariat is designated as a key human-rights actor in the charter as well (97-99). Under article 13 (Ia) of the charter, the General Assembly is responsible for the codification of

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[15] Driscoll, D.J. The Development of Human Rights in international law. In W.laqueur & B.Rubin (Eds.) *The human rights reader*. New York: New American Library, 1979, p.43 (41-56)

[16] Tolley, Ibid, 1987,p.6-7

[17] Schwelb, E. & Alston, P. The principal institutions and other bodies founded under the Charter In K.Vasak &P.Alston (Eds), *The International Dimensions of Human Rights* (Vol.1 pp. 231-300 l). Westport, CT: Greenwood Press, 1982 p.232,(231-301)

international law. It therefore established the international Law commission (ILC) in 1947.[18]

One of the most lasting contributions of the UN Charter was the establishment of a Commission on Human Rights, which was provided for in Article 62. In fact, it is the only Commission specifically referred to in the chapter. Pursuant to article 68, ECOSOC first set up a subsidiary organ, the so- called Nuclear Commission on Human Rights, which initially included nine members serving in their personal capacity. AS its second session, in June 1946, ECOSOC established the eighteen-member full Commission. The principal concerns of the Commission were an international bill of rights; international conventions of specific topics; the protection of minorities; and the prevention of discriminations on the grounds of race, sex, language, or religion.

In 1946 and 1947, ECOSOC authorized the Commission on Human rights to create subcommissions. Three such subcommissions were established, but only one has survived. At the same time that ECOSOC set up the Nuclear Commission of Human Rights, it appointed a nuclear subcommission on the status of women. This subscommission met in the spring of 1946 and concluded that it did not wish to be "dependent on the pace of another commission".[19] The Council acceded to the request to tansform the subcommission into a Commission on the status of women. Evidently, there were those who objected to this development, concerning it as discriminatory for the UN to have a separate body dealing with the rights of women.[20] It was not clear what activities the Subcommissions would be authorized to undertake. However, it gradually has enlarged its own powers beyond what the commission had previously approved. As it has turned out, the subcommisison has become a de facto Subcommissions on Human Rights despite its more narrow title.[21] The Subcommision has created working groups whose function it is to investigate specifics types of human rights abuses, such as slavery, the subjugation of indigenous populations, torture, child labor, and others. It ha not only tried to set

[18] Sinclair, I, *The international law commission*. Cambridge: Grotius Publications, 1987, 41-43.

[19] (Humprey, 1984,p.19).

[20] (Humphrey, 1984,p.19)

[21] (Tolley, 1987,p.168).

international standards but it has also attempted to influence world public opinion. Research has been a key priority for the subcommission, and its most controversial activities have, in fact, been its self efforts to investigate human-rights violations through fact finding. Alarmed by the Subcommission's "radical" nature, the commission tried to abolish it in 1951 but was prevented from doing so by the general Assembly, which cited an overriding commitment to the principle of nondiscrimination.

The first and most important task that the commission on Human rights faced was drafting an "International Bill of Rights" at its second session in 1947, the expectation was that this would include a declaration, a convention on human rights, and methods of implementation.[22] The Universal of Declaration of human rights is often referred to as the "central document for the cause of human rights", which explains why the date its adoption, December 10, 1948, has been designated "Human Rights Day" by the United Nations.[23] With its adoption, it became possible to interpret the formerly obscure human rights provisions of the UN charter and thus to substantiate claims of human rights violations.

The Division of human rights received numerous proposals for the declaration from individuals as well as organization. When the Commission began its work, it had eighteen drafts to consider.[24] It is noteworthy that all the drafts came from the democratic West and that all but two were in English.[25]

John Humprey, a director of the secretariat Division of Human Rights relied on the draft declaration that had been sponsored at the San Fransisco conference. He proposed that economic rights should be included in the draft. "Human rights without economics and social rights have little meaning for the most people, particularly on empty bellies. He takes credit for the fact that economic rights end up in the final text.[26] The dominant view now is that UDHR constitutes the authoritative interpretation of the human rights provisions of the UN Charter. As such, it is legally binding on member nations. Another widespread position is that

[22] Humphrey, 1984, p.260
[23] Szabo, 1982, p.21.
[24] Szabo, 1982, p.21
[25] Humphrey, 1984,p.3 l-3 l
[26] 1984,p.32.

the norms of the UDHR have become binding as part of customary international law, legal principles of the so-called civilized nations. This makes standard applicable to all nations, whether or not they have expressed consent.[27]

The UDHR contains primarily civil and political rights as well as a few economic, social and cultural rights. Evidently, it was because the Declaration was said to be without legal effect that western drafters were convinced to include economic, social, and cultural rights, as they would be nonjusticiable in character.[28] There was a considerable conflict surrounding the UDHR. Arab states for example, challenged the right to change religion, a norm according to them was contrary to the tenets in the Koran.[29] The soviet were opposed to the predominance of Western civil liberaration. Those acquainted with the debates are forced to conclude: "Deliberation by the Commission and its drafting committee revealed profound ideological differences over what constituted universal rights"[30]

There is an allegation that human rights concepts is a Western one, the reson will become transparent if one examines the draft of UDHR. The member ship of the drafting committee, the Commission on Human rights, and the UN as a whole were predominantly Western. It was not until the 1950s that anticolonialism prevailed, leading to the formation of new African and Asian states. The membership of the UN was most assuredly a critical factor in shaping the UDHR.

The movement to create a new international apparatus (device) for the promotion of human rights was led largely by Americans. The US department State arranged the early drafts of a proposed constitution.[31] The crucial meetings took place in the United States. American NGOs were extremely influential during the formative stages of the commission and the UDHR.[32] The efforts of more than forty

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[27] Alison Dundes Renteln, *International Human Rights Universalism Versus Relativism* (London: Sage Publication, 1990) p. 29.

[28] Tolley, 1987, p.21-22.
[29] Tolley, 1987, p.22.
[30] (Tolley, 1987,p.21).
[31] Tolley, 1987,p.3
[32] Humprey, 1979, 21

private organization brought in as consultants by the US ensured that the Charter would contain some references to human rights.[33]

Even the goal itself was described as drafting an "international Bill of Rights," language, which undeniably reflects an American flavor. Many writers refer to those who drafted the original human-rights documents as "founders".[34] Eleanor Rooselvet was said to favor a two-stage drafting process for a declaration and convention modeled after the US 'Declaration of Independence an Bill of Rights.[35] Considering the mindset of those most actively involved in the drafting of the original human rights instrument, it should not be surprising that many of the notions resemble western European and American political ideas:

Everyone has the right to:

* life, liberty and security of person (3)

"recognition everywhere as a person before the law (6)

"freedom of movement ... to leave any country, including his own (13)

*a nationality (15)

*freedom of thought, conscience and religion (18)

*freedom of peaceful assembly and association (article 20)

*take part in the government of his country (21)

No one shall be

*held in slavery (4)

"subjected to torture (5)

"subjected to arbitrary arrest, detention or exile (9).[36]

I submit to you that what the thinkers of the Enlighment did, and what the drafters of the UD also strove to do, was to present a set of ideals–of universal ideals on the limits of governmental authority, of goals to be attained, above all, to guarantee the individual respect for his dignity and a life of freedom from fear..

Is it not a truly a detestable form of racism to suggest that these should be the goals of Western civilization only and no bearing to the rest of the world'r[37]

[33] Farer, 1987, 554)
[34] Ibid
[35] Tolley, 1987, p.21.
[36] (Tolley, 1987,p.22-23.
[37] (Schifter, 1988,p.2-3)

The historical debates indicate that one of the major conflicts was the decision whether to have one or two covenants. Although some preferred to have one on civil and political rights and another on economic, social and cultural rights, others regarded this division as being highly artificial. For those subscribing to the latter view, the two sets of rights were perceived as interdependent.[38]

At first the UN decided to have all the rights incorporated in a single convention. This was the position officially taken at the fifth session of the General Assembly. A year later, however, responding to Western suggestion, the Assembly reversed itself, concluding that it was, after all, preferable to draft two separate conventions which would be completed concurrently and then open for signature by states on the same date. [39]

In 1966 the Covenants were finally presented in the General Assembly. The International Covenant on Civil and Political Rights (ICCPR) received 106 votes in favor with none; the International Covenant on Economic, Social and cultural might (ICESCR) received 105 votes with none against.[40] But, despite the fact that nations voted for the Covenants, this did not mean that they would ratify them promptly. Then years later, both Covenants finally had received the required thirty-five ratifications needed to enter into force. The delay has been attributed to the ideological diversity in the UN. [41]

Since the mainstream view now is that the declaration is customary international law and therefore binding on member states, the advantage of the Covenannts is their reporting and enforcement procedures.[42] Whereas the UDHR contained a combination of political and economic rights, each covenant was devoted to one kind only. Because Western opposition to economic rights was so entrenched, it seemed advisable to have separate documents:"Realistically it

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[38] (Szabo, 1982, p.29.
[39] (Szabo, 1982, p.29)
[40] (Farer, 1987,p.560).
[41] (Tolley,1987, p.24).
[42] Das, K. United Nations institutions and procedures founded on conventions on human rights and fundamental freedoms. In K. Vasak & P.Alston (Eds.), The International dimensions of human Rights vol.1, Westport, CT: Greenwood Press,1982, 330-334; 303-362).

appeared that if Western government would obstruct a comprehensive covenant, two agreements would be preferable to none." [43]

One provision incorporated into the ICCPR which may have contributed to the reluctance of the US to ratify the Covenant concerns free speech. Specifically, several states insisted on a prohibition of speech advocating racial hatred and war. Even France joined China and The Soviet Union among others in favor of the provision. Although the US managed to block the restrictive proposal for a few years, despite its having been recommended by the Subcommission, by 1953 supporters of the exceptions were in the majority.[44]

Western nations tried to prevent the amalgamation of the rights to self determination but proved unsuccessful in this enterprise. This right became Article 1 of both Covenants because of extensive support among the nations, which had fought colonialism. Western states had advance the argument that vague collective rights do not belong with the guarantees of individual freedom. They also failed to secure language ensuring just compensation for nationalized property.[45]

Enforcement of human rights standard also occurs at the regional level. The earliest and most established human-rights institutions at the regional level are found in Western Europe. The three major organs of the European human rights system are the European Commission of Human Rights, the European Court of human rights, and the Council of Ministers. They derive their authority from the European Convention for the protection of human rights and fundamental Freedoms, which was drafted by the Council of Europe and entered in to force in 1953. The Conventions allows states (article 24) as well as individuals and NGOs (article 25) to bring a complaint against a state. Application are initially reviewed by the Commission, which rules upon admissibility and facts. If the complaint is valid, the Commission can attempt a friendly settlement. If that fails, the case is

[43] (Tolley, 1987, p.25).
[44] Tolley, 1987, p.27
[45] {Tolley, 1987,p.27)

referred either to the court or the council of Ministers, whose decisions are binding.[46]

The organization of American States also set up human rights organization which was established in 1959. The inter-American Commission on Human rights issued two regional documents, which serve as guidelines: the American Declaration on the Rights and Duties of man (1948) and the American Convention on Human Rights (1969), which has not yet entered into force. In 1965 the commission's power were extended to permit it to screen individual complaints related to certain articles of the American declaration of the Rights and Duties of Man. As consequence, since 1966 the Commission has heard complaints against almost every OAS member state. This constitutes one.the most salient differences between the European Convention and the American Convention. Whereas the right of individual petition is optional under the former, it is automatic under the latter.[47]

The Arab Commission on Human rights was set up by the League of Arab States in 1968. Its main function has been drafting of agreement to submit to the Council of the League. To date it lacks any power to review complaints from states or individuals.[48]

The organization of African Unity adopted the African Charter of Human and People Rights and people rights in 1981. It entered into force on October 21, 1986, and according to article 45 authorizes the African Commission "to collect documents, undertake studies and researches on African problems in the field of human and people' rights

In Asia, proponents of regional human-rights tribunals attempted to orchestrate a series of seminars in Asia to replicate the successful regional seminars that led to the African charter, but their efforts met with little success.[49]

An advantage of regional human-rights organization over international ones is that the locally proposed standards can be more compatible with indigenous values.

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[46] Boyle, K. Practice and procedure on individual applications under the Europen conventions on human rights. In H.Hannum (ED.) *Guide to international human rights practice,* Philadelphia: University of Pennsylvania Press, 1984, pp.133-152 1984).

[47] Driscoll 1979, p.51-52.

[48] Driscoll, 1979, p.52).

[49] .Tolley, 1987, p.158)

Consequently, implementation of those standards is less likely to be regarded as cultural imperialism. States will be more inclined to comply with rules, which are concordant with their political culture. For those seeking universal human rights, however, this may present a problem. To the extent that regional standards conflict with international ones, claims to universality may be jeopardized. It is precisely this issue, which lies at the heart of the entire human-rights movement, namely the tension between universalism and relativism.i[50]

B. Concept of Human rights

The classic definition of human rights is a right, which is universal and held by all persons:

A human rights by definition is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human[51].

According to Wasserstrom, any true human rights must satisfy at least four requirements:

First, it must be possessed by all human beings, as well as only by human beings. Second, because it is the same right that all human rights are possessed by all human beings, we can rule out as possible candidates any of those rights which one might have in virtue of occupying any particular status or relationship, such as that of parent, president, or promise. And fourth, if there are any human rights, they have the additional characteristic of being assertable, in a manner of speaking," against the whole world."[52]

Natural law was considered to be the standard against which all other laws were to be judged. To contest the injustice of a man-made law, one could appeal to the higher authority of God or natural law. Eventually natural law evolved into natural rights, which are considered to be the modem manifestation of natural law. The change reflected a shift in emphasis from society to the individual. Where as natural law provided a basis for curbing excessive state power, natural rights

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50 Renteln, 37).

51 (Cranston, M. *What Are Human Rights*, London: Bodley Head, 1973, p.36.

52 Wassestrom, R., Rights, Human Rights and racial discrimination, Journal of Philosophy, 61, 1964, p.50, 628-641.

offered a means by which an individual could press claims against the government.[53]

Waldron notes that natural rights 'seemed peculiarly vulnerable to ethical skepticism' but concludes, that "it would be wrong to suggest that the discussion of human rights has been seriously impeded or obstructed by these difficulties."[54] Other conceptual devices which have provided tentative bases for human rights include; the ability to use language, reciprocity, the capacity to conform to moral requirements, self-motivated activity, self-consciousness, and purposive agency.[55] Just as some philosophers began to challenge the assumption that human nature could give rise to specific human rights.[56] Others question the ability of basic-needs theorists to delineate or describe in the abstract those needs which should give content to the idea of human rights. Presumably, adherents to this approach would not advocate the establishment of rights based on all needs. Someone must decide what needs are truly basic, and inasmuch as different judges will perceive different needs as taking highest priority, this approach does not circumvent the challenge of diversity.[57] There is no way to prove the validity of any particular interpretation because no procedure is established by which legitimacy of particular human rights can be judged. Indeed, there is some consensus among philosophers that up until the present, all attempts to provide solid philosophical foundations for human rights have failed.[58] Many philosophers employ Kantian notions as a vehicle to advance human rights. As Feinberg has observed, however, the claims that human beings are "ends in themselves" or sacred" or "of infinite value' are themselves in need of a foundation.[59] Kantian moral theory assumes the existence of a single pattern of moral reasoning. The abstract rational process is presumed to bear a single and universal result, irrespective of cultural differences.

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[53] (48).

[54] Waldom J. (ED.) Theories of Rights Oxford; Oxford University Press, 1984,p.3)

[55] Husak,D.N. Why there are no human rights. *Social Theory and Practice*, 10, 125-141. 1984, p.128)

[56] (Blackstone, W.T. Equality and Human Rights The Monist,52, 616-639. 1968, p,624),

[57] (Donnely,J. The Concept of Human Rights (New York: St.martins, 1985, p.28-30)

[58] (Feinberg,J. Social Philosophy NJ: Prentice Hall, 1973,p.90).

[59] (1973, p.92).

Individual behind the veil of ignorance stripped of their identity, will select principles of justice by which society should operate. One could make a strong case that the contractarian scenario, which Rawls has devised is rigged or fixed. For example, Rawls requires that persons in the original position be risk-averse and not be envious. By imposing constraints such as these, Rawls ensures that individuals in the original position will agree to the principles he advocates. Thus the device provides an ex post facto justification for his own personal moral convictions.

The most remarkable example of a scholar assuming that there is a single correct pattern of moral reasoning can be found in the work of Lawrence Kohlberg. His stage theory of moral development is perhaps the most blatantly universalistic moral theory one could imagine. Those surveyed who did not reason according to preconceived styles were considered to have retarded or hindered powers of moral reasoning. Among other things, his work has been challenged as failing to take into account gender differences. Its cross-cultural validity is still hotly debated. But, the astounding nature of Kohlberd's presumption of universality is typified by his conclusion in an article about capital punishment.[61] On his view, reaching the highest stage of moral development entails rejection of the death penalty. Even though Kohlberg never reveals his own convictions, it seems clear that these conclusions may reflect his own values. Kohlberg's moral theory represents a classic example of the fallacies, which accompany the presumption of universality. Needless to say, in the event one disagree with Kohlberg, e.g., on the defensibility of the death penalty, one's abilities in moral reasoning in moral reasoning are called into question. This kind of thinking typifies the universalist position, namely that alternative patterns of thought are dismissed from the outset.

Problem with International HR Documents

Several provisions from the UDHR should demonstrate the extent to which the presumed universality of some human-rights provisions is called into question.

[60] (Gilligan, C. *In a different of morals*. New York: Macmillan 1982)

[61] (Kohlberg, L.& Strodtbeck, F.T. The development of moral Judgment concerning capital punishment, *American journal of Orthopsychiatry*, 45, (1975), 614-640)

Article 17 provides that "Everyone has the right to own property alone as well as in association with others' and that "no one shall be arbitrarily deprived of his property." The values underlying this standard is hardly universal. One commentators refers to the problem with article 17 as one of cultural imperialism because it "... seeks to impose free enterprise and capitalism on the rest of the world".[62] Another human rights analyst rejects the universality of article 17 (91): "The community ideology does not admit of private property, except in consumer goods.[63]

Article 18, 19, 20 provide for rights to freedom of thought, religion, and association. Article 21 guarantees the right to participate in government, equal access to public service, and free elections. In article 2,l (3) the ideological basis of the human rights standard is made manifest:

The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held secret vote or by equivalent free voting procedures.

From the third world perspective, Article 21 seeks to 'universalize Western-style elections'[64], which are obviously not universal: "Monarchies, dictatorship, single-party rules, or single candidate elections are not non-existent in today's world".[65]

Article 16 provides for the right to marry and to found a family; article 16 (2) stipulates that marriage shall be entered into only with the free and full consent of the intending spouses. And, finally, article 16 (3) specifies that the family is the natural and fundamental unit of society, and is entitled to protection by society and the state.

[62] (Zvobgo, E.J.M. A Third World view. In D.P. Kommers & G>D> loescher (Eds.) Human Rights and American foreign policy, Notre Dame, IN: University of Notre Dame Press,1979, p.95).

[63] (Sinha, S.P., Human Rights philosophically.Indian *Journal of International law* 18, 1978b,p.144; 139-159).

[64] (Zvobgo, 1979, p.95)

[65] (sinha, 1978b, p.144).

The phraseology suggests that only the immediate family can be understood to be the basic unit, which would be appear to be insensitive to the many societies, which have different patterns of social organization. The provision guaranteeing voluntary choice of marriage partners runs counter to the practice of arranged marriages, which is an integral part of many value systems of the world. Even the first clause holding that there is a right to marry and found a family may be problematic when one considers that there have been many restrictions on the right to marry and procreate, which were at one time regarded as moral by American, e.g., compulsory sterilization, prohibition of homosexual marriages, and anti miscegenation laws.

The problem with the particular configuration of rights found in the UDHR is that some of the rights may not be compatible with the diverse value systems of the world. Consequently, the promulgation of the UDHR appears to many countries as the imposition of an alien value system:

Thus, to the extent these kinds of rights are concerned, we have the scenario of one particular culture, or one particular political system claiming to be imposed upon the entire world... .it is self-defeating for the human-rights movement to take the latter approach and say, force private property upon the Soviet Union or china, or abolish arrange marriages in India, or force general elections in Saudi Arabia, and then- and here is the greatest danger of all—retire in the smug delusion that having done that, justice has thereby been achieved for the individual."

Since it is not possible to conclude that all cultures do share the same concept of human rights on the basis of evidence currently available, this means that cultural differences may raise significant problems. The presumption of universality begins to totter when it confronts divergent interpretation of humanitarian standards. Nowhere is the contrast in values more striking in the cases of female circumcision and child labor.

There are 3 types of female circumcision. F.P. Hosken, one of the opponents of the practice, offers the typology:

[66] Sinha, 1978, pp.144, 159).

1 Sunna Circumcision: removal of the prepuce or tip of the clitoris.

2 Exicion or Clitoridectomy: Excision of the entire clitoris with the labia minora and some or most of the external genitalia.

3 Excision and infibulation (Pharaonic Circumcision): This means excision of the entire clitoris, labia minora, and parts of the labia majora. The two sides of the vulva are then fastened together in some way either by thorn or sewing with catgut. Alternatively, the vulva is scraped raw and the child's limbs are tied together for several weeks until the wound heals (or she dies). The purpose is to close the vaginal orifice. Only small opening is left (usually by inserting a slither of wood) so the urine or later the menstrual blood can be passed,[67]

The specter of relativism also rears its head in the case of child labor. Today anywhere from 52 to 150 million children (- age 15) work throughout the world. The conditions are often exploitative and unhealthy. As a consequence, many international community have focused their energies toward the complete eradication of all forms of child labor.

Despite the presumption that child labor is entirely wrong, it is an economic necessity. In many societies, children are expected to help with the family business or to bring home substantial portion of the family income. It is an accepted part of the way of life in much of the worlds, and perceived as natural and moral.

In most agrarian societies, children work is not only highly prized for its economic utility but as representing the highest ideals of the culture, viz. obedii,nce, respect or filial piety. Serving those above one in the domestic hierarchy of age statuses is conceptualized as moral duty, often a sacred obligation.[68]

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[67] Hosken, F.P, Women's International Network News, 2 (1)1976,p.30; 30-44).

[68] LeVine, R.A, Child labor and Ethical relativism. Paper presented at the Symposium on Ethical Relativism, American Anthropological Association, Washington D.C. 1984,p.3

CHAPTER II

THE ISLAMIC PHILOSOPHY OF HUMAN RIGHTS

A. Belief in one God

Belief in God is the most principle of Islamic teaching. The teaching of belief in one God is called tauhid in which Muslims belief that God is the only one who creates universe including human being. The Muslims believes in one God, eternal, creator, omnipotent, who sees all and knows all, infinitely good and merciful, who is harsh on those who oppose him, and who forgives those who ask him, but punished the wicked severely.

The existence of Allah is regarded as self-evident and the quran does not seek to prove it (even the prophet Muhammad did not necessarily prove it unlike other prophets) But the quran and Islam continually stress the oneness of God. Dr. Ismail Faruqi explains: The essence of Islam is its witness to the oneness of God (tauhid), or if one prefers it, the affirmation that there is no gods apart from ALLAH. This tawhid restores to man the dignity that certain religions have denied him by representing him as fallen or existentially wretched (heartbroken). In calling man to exercise these prerogatives given by God. Muslim preaching rehabilitates him and reestablishes him in his integrity, his innocence and his dignity. This moral vocation is the way to his success. Certainly, the Muslim is called to a new Theo centrism, but it will be that in which the cosmic dignity of man is applauded by God and by the angles.(Q.2:21)

Creation is at the forefront of Muslim thought. It is the great subject put forward by the quran for the continual meditation of the faithful. In the creation of the earth and the heavens, and in the alternation of night and the day, there are signs for men of sense; those that remember God when standing, sitting, and lying down, and reflect on the creation of the heavens and earth, saying:" Lord, you have not created these in vain. Glory to be you! Save us from the torment of hell-fire, Lord (3:188-191) in fact by its unity the creation shows us that the creator is one (23,

93:21, 22). It equally proves the vanity (narcissism) of the false gods, which are incapable of creating anything, even a fly (22, 73)

The quran also makes use of every possible argument to affirm and reaffirm this oneness of God. At one point, for example, it relates a story of Abraham who destroyed all family idols but one, which he accused of having broken the others. It is incapable of doing that, somebody rejoins. If it is incapable of doing that, then why do you worship it? Why do you worship an incompetent object? (21 :52-70).

Moreover, the creation reminds man of the mercy of God who frees him and supplies his needs. It also shows the power of God, which is adept of giving life and thus restoring it on the day when he raises the dead. God is the lord of the universe; this truth is carved in the hart of humankinds and they have no excuse to deny it. (Q, 7,172)

God calls men to worship only Him, and reminds them that He who creates them and those before them. And before that, he made the earth as a place to live and rest. He also made the sky as a structure and sends down rain from the sky. The rain brings water for the plants to grow and for the animal to live. All of this, God provides for us as a signal of His mercy and His compassionate for human being. He reminds us only worship Him. This is a duty for us and it is worthy to note that the worship has nothing to with God's glory, whether men worship Him or not, He is already full of Glory. He is the Greatest (Akbar). He does not need us to glorify Him. In fact, it is we, as Human being needs to worship Him. Why, it is very natural that a man always seeks for a model to be worshipped; it is embedded within their soul.

In the primitive era, men worship big trees, big rivers, big mountains, and big jungles, because, they needed it. The fear and the hope always occupied his mind, and he expected by worshiping something stronger and more powerful than them it would bring something good in life. In medieval times, people looked for a King to worship, because He had the power to determine the life and the death of his people, and, for that cause, they call the King a lord and they begged for his mercy.

During the renaissance Era, man began to worship reason and thought that the reason is powerful enough to increase the quality of human lives, and subsequently,

began to separate God from public affairs. Now in the modem and postmodern decades, people worshipped another God technology and industry. They believed in this era we did not need God to fulfill human needs. Technology can fulfill all of human needs.

It seemed true that they did not need God anymore; however, they replaced Him with another God that always was in human lives. They always need something over themselves and they worship it. That is why the quranic message still applies even today and will until the end of the world. Men always need something to worship whether he confess it or not. Moreover, the best One to worship is the One and the Only God Allah Taala, because everything will perish but His. So, it is better to worship the eternal one not the perish one.

Therefore, He tells us repeatedly not to set up partner, equals to Allah. Some western scholars and even Arab scholars like Ibn Warraq accused Allah as a Selfish God, an authoritarian God, since He commands people only to worship Him. This is a very wrong accusation. Some people perceived that the concept one God is sent down just for the sake of Allah, for His glory, for the sake his own name. In fact, in contrast to what they think, the concept of tauhid (oneness of God) has been revealed since Adam until Muhammad saw for the salvation of human soul. Imagine, How tired our soul would be if we had to worship, to serve so many Gods with so many requests. It is like having so many bosses or supervisors who watch us, evaluate us, and give us various tasks to fulfill. Then we are not freedom, and our soul will suffer because we have to please many bosses/gods.

Therefore, it is very safe to conclude that the concept of tauhid (oneness of God) aims to liberate human soul and to give them so much freedom that they will never have it in the rest of their lives, if they take other Gods beside ALLAH.

B. The Relationship between God will and Human freedom

Humans are, according to the Islamic perspective, created in "the image of God" and are also God's vicegerents (khalifah) on earth. But, they are both by virtue of their servitude to God which makes it possible for them to receive from

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heaven and to administer on earth. *By virtue of their centrality in the cosmic scheme, proven in reverse, if proof is necessary for the skeptic, by the nearly complete destruction they have brought upon the environment, they participate in the divine freedom, and by virtue of being early creatures they are beset by all the limitations that a lower degree of existence implies.* God is both pure freedom and pure necessity. Man as the theophany of the Divine names and qualities, or as the 'image of God" participates in both freedom and this necessity. Personal freedom lies, in fact, in surrendering to the Divine will and in purifying oneself to an ever-greater degree inwardly so as to become liberated from all external conditions, including those of the carnal soul (nafs), which press upon and limit one's freedom.

Pure freedom belongs to God alone; therefore the more we are, the more we are free. In addition, this intensity in the mode of existence cannot come, save through submission and conformity to the will of God, who alone is in the absolute sense. There is no freedom possible through flight from and rebellion against the Principle, which is the ontological source of human existence and which determines ourselves from on high. To rebel against our own ontological Principle in the name of freedom is to become enslaved to an ever-greater degree in the world of the spirit for the indefinitely extended labyrinth of the psychophysical world where the only freedom is to pursue an ever more accelerated life of action devoid of meaning and end.

Infinity resides in the center of our being, a center that is hidden from the vast majority of those who live on the periphery of the wheel of existence. Yet, only at the center are we free in an absolute and infinite manner. Otherwise, each of us is limited in both our powers and rights vis-a-vis God, nature, and other human beings. To seek infinity in the finite is the most dangerous of illusion, a chimera that cannot but result in the destruction of the finite itself. 'Infinite freedom' exist only in the proximity of the infinite. At all lower levels of existence, freedom is conditioned by the limitations of cosmic existence itself and is meaningful only

with respect to the limitations and obligations that the very structure of reality imposes upon us.[1]

In Islamic theologian perspective, the discourse of human freedom mostly debated among the famous schools. The Ash'arite negates human freedom (ikhtiyar) completely in favor of a determinism (jabr) that is all-embracing. Other theological school, such as the Mu'tazilite and most of the Shi'ite, do believe in human freedom and reject the total determinism of the Ash'arites. Altogether, the debate concerning free will and determinism is a central one to Kalam, and nearly theologian has participated in it. The debates are in many ways the reverse of what is seen today among philosophers; some seek to safeguard the free will of the individual in one form or another of materialistic determinism whether it be biological, behavioral, or something else, and others try to defend these forms of determinism. Among Muslim theologians there has been, of course, no question of an outward "material" factor determining human freedom. The problem is the relationship of human will to the Divine Will and the extent to which the latter determines the former.

Asharite tends toward a totalitarian voluntarism not usually seen in Christian theology, but there are many other views among Muslims. It is also important to remember that despite all the debates among theologians, men did and do continue to live with a consciousness of their free will and hence responsibility before God. As the remarkable dynamism of Islamic history proves, the Muslims are not at all fatalist they are made out to be in western sources. But their reliance upon the Divine Will and awareness of the operation of that will shown in their incessant use of the term insha Allah (If God wills) in daily discourse is more noticeable than in most other cultures. The debates of the theologian reflect this general religious concern for submission to the divine Will and conformity to its injunctions, although the shortcomings of all rational theologies in overcoming certain dichotomies and polarizations, which the theological debate of the subject created, pushed certain hardened positions to extremes and went so far as to deny human

[1] (Seyed Hosssein Nasr "The concept and reality of freedom in Islam and Islamic civilization' in the philosophy of Human rights International Perspectives, Alan S.Rosenbaum (Ed.), (Connecticut: Greenwood Press, 1980)95-101.

freedom against both the immediate experience of man and religious injunctions concerning man being held responsible before God for their actions.

As far as the realization of freedom in Islamic civilization is concerned, it too must be studies on several levels, especially those of an action and thought as well as the actual possibility of attaining inner freedom and deliverance. On the level of external action, the immediate question that arises is that of political freedom vis-a-vis forms of government that from Umayyad period onward, did not have a completely religious character and were supported by nearly unlimited military power. Much has been written about "Oriental despotism" and the lack of freedom of men in the face of the state. However, it must be remembered that for ages the divine law remained as a protective code worse whose bound even most ruthless ruler could not transgress. There remained within Islamic society a continuous tension between the political authority of the caliph, sultan, or amir and the religious scholars (ulama) who played a major role in protecting the shariah and therefore, those freedoms of the individual guaranteed by the shariah.

Early Islamic history the issue of God's political dominion was elevated by khawarij when they rebelled against the fourth Khalif Ali ib Abi Tahlib and also to his opponent Muawiyah. Initally the supporters of Ali, the Haruriyya turned against him when he agreed to arbitrate his political dispute with a competing political faction, which was led by Muawiya.

Ali himself agred to the arbitration on the pre-requirement that the arbitrators be bound by the quran and give full consideration to the supremacy of the shari'a. But the Khawarij believed that God's law clearly supported Ali, so they rejected arbitration as inherenly unlawful and, in effect, a challenge to God's sovereignty. They condemned Ali for his willing to compromise God's supremacy by transferring decision making to human agency. Then, they summoned Ali a traitor to God, and after efforts to reach a peaceful resolution failed, they killed him. After which, Muawiya seized power and established himself as the first leader of the Umayyad Dynasty.

The argument of Khawarij related to God's sovereignty is relied on the quranic verse "Allah the only judge" *(La hukma ilia Allah).* But considering the

historical context, the Khawarij's sloganeering was initially a call for the symbolism of legality and the supremacy of law that later descended into an unequivocal radicalized demand for fixed lines of demarcation between what is lawful and unlawful.

To a believer, God is all-powerful and the ultimate owner of the heavens and earth. But when it comes to the laws in a political system, argument claiming that God is the sole legislator endorse a fatal fiction that is indefensible from the point of view of Islamic theology. Such arguments pretend that some human agents have perfect access to God's will, and that human beings could become the perfect executors of the divine will without inserting their own human judgments and inclination in the process.

Moreover, claims about God's sovereignty assume that the divine legislative will seeks to regulate all human interactions, that sharia is complete moral code that prescribe for every eventually. But perhaps God does not seek to regulate all human affairs, and instead leaves human beings considerable latitude (freedom) in regulating their own affairs as long as they observe certain minimal standard of moral condut, including the preservation and promotion of human dignity and well-being. In the quranic discourse, God commanded creation to honor human beings because of the miracle of the human intellect-an expression of the abilities of the divine. Arguably, the fact that God honored the miracle of human intellect and human being as a symbol of divinity is sufficient to justify a moral commitment to protecting and preserving the integrity and dignity of that symbol of divinity. But-and this is Ali's central point-God's sovereignty provides no escape from the burden of human agency.(Khaled;9)

The idea of human freedom is well elaboratd by Muhammad Abduh who distinguished between two sorts of man's actions: a. an act which is done in emergency (by Coercion or unwillingly) and; b. an act which man can choose to do or not, i.e. acts initiated by man with his knowing and willing without being compelled by a necessity. Man's freedom of action does not mean that he can do what Allah does not like. Thus a free act accords with Allah's will. Yet ye will not, until Allah willeth". This indicates that man is granted a limited realm within which

he may exercise his ability of choice, and this extends also according to the capacity of his knowledge.

Since man is given this advantage he is entitled to use it. He is then rewards by Allah for his good deeds and punished for his wrong.

The matter of reckoning (reward and punishment) is considered by al-Qadi al-Jabbar as a just (fair) price which man deserves in correspondence with the freedom that is entitled to and in the way he uses it. The human mind is considered by Muhammad Rashid Ridha as a guide by which man distinguishes between right and wrong. This guidance (reason) is granted by Allah because He wishes us to avoid wrong. Moreover, he has sent messengers to show the way for man and to compensate for weaknesses of the human mind.

The relativity of freedom of man is confirmed as well as by the modem thinker such as Rifaat al-Tahtawi who says freedom in the sense of a permission to a lawful act without an unlawful obstacle or a prohibited obstruction, is divided into four categories; natural freedom, freedom of conduct, freedom of religion, political freedom. [2]

According to Muslim jurist acts are originally allowed unless a restriction is raised to bind that permission or prohibit an act.

Hence the principle of personal liability is evidenced by some Muslim Jurists to prove the freedom of people. They say that principle is confirmed by all religions. Because people enjoy a certain extent of freedom then they may be held responsible for their acts. There may be no place for responsibility' in the absence of freedom. Moreover, alQuran indicates that man is created to be vicegerent on the earth. Such a great responsibility entitles man to enjoy certain capacities (mind, freedom, will power, etc). Consequently, man's practicing freedom in performing his duty is understood to be subject to Allah's will. Nonetheless, it is not exactly Allah's willing but it is in the capacity of his own willing.

Therefore, Islamic legislation undertakes to preserve human dignity as a fundamental principle, especially in the realization of rights and freedom for all

[2] al-Arwi, *Mafhum al-Hurriya* (Casablanca: al-Markaz al-Thaqafi al-Arabi, 1981), 49

mankind, and in disregard of their race or belief. Moreover, the individual freedom is regulated so as not to conflict with other's opportunity to enjoy human honour likewise.

C. **Human Dignity**

Al-Alusi said: "everyone and all members of the human race, including the pious and the sinner, are endowed with dignity, nobility and honour, which cannot be exclusively expounded and identified. lbn Abbas, has commented that God Most High has honoured mankind by endowing him with the faculty of reason.[3]

Mustafa al-Siba'l and Hasan al-'Ili have similarly remarked that dignity is a proven right of every human being regardless of colour, race or religion.[4] Ahmad Yusri has drawn the conclusion that 'dignity is established for every human being as of the moment of birth. Huquq al-Insan wa Asbab al-Unf fi'l Mujtama' allslami fi Daw' Ahkam al-shariah, Alexandria: Mansha'at al-Maarif, 1993, p.30.

Sayyid qutb stated dignity is the natural right of every individual. The children of Adam have been honoured not for their personal attributes or status in society, but for the fact that they are human beings. 'Dignity is therefore the a absolute right of everyone'.[5]

Al-Zuhaili said 'dignity is the natural right (haqq tabi'i) of every human being. Islam has upheld it as such and made it a principle of government and a criterion of interaction among people. It is not permissible to violate the personal dignity of anyone, regardless of whether the person is pious or of ill-refute, Muslim

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[3] Mahmud al-Alusi, *Ruh al-Maani fl tafsir al-Quran al-Azim,* Beirut: Dar al-Turats al-Arabi, n.d.,v.xv, p.117

[4] Mustafa al-Siba'I and Hasan al-'Ili, M.S, *Ishtirakiyat al-Islam,* 2nd edn, Damascus, al-Dar al-Qawmiyyah lil Tiba'ah wa alnashr, 1960, 66; Abd alhakim Hasan al-Ili, *al-Hurriyat al-Ammah,* Cairo: Dar al-Fikr, 1983, 361

[5] Sayyid Qutb, *Al-Ada/ah al-ljtimaiyyah fl l-Islam,* ed.4, Cairo: Isa Babi alHalabi, 1954,59.

or non-Muslim. Even a criminal is entitled to dignified treatment. For punishment is meant to be retribution and reform, not indignity and humiliation. [6]

alGhazali says:' we would like to see that our relations with other communities are founded on this kind of latitude (alsamahah). This is because we believe that Islam commands us to have good and peaceful relations with those who are not aggressive toward us.[7]

Weeramanty observes that the quran makes dignity intrinsic to the personality of every individual so that 'no regime, however powerful, could take it a way from him. This inherent human dignity also provides the basis of modern doctrines of human rights.[8] "He had showered His choicest blessings, could not be subject to a violation of that dignity by man.[9]

The quran confirms that man's creation was a unique act of creation. It was distinguished from God's creation of the rest of the heavens and the earth in that these were created by God's will and command, whereas man's creation was an expression of divine love. This is manifested, as the quran confirms, in God's direct involvement in the creation of man. Man is depicted as God's handiwork, whom He designed in the best image and form, and then breathed into him of his own spirit. God's love for mankind is also manifested in His command to the angles, and lblis, to prostrate themselves before Adam. Prostration is a supreme act of humility and devotion, something that God would normally reserve for Himself. God's direct involvement also signifies the intimacy and closeness of the God-man relationship, which did not cease with the first act of creation but continues to be expressed and unfolded as a reality through the religious experiences of the believers.

Since religion is the matrix of the God-man relationship, it is founded, in the case of Islam, on divine love, mercy and grace. The rituals of the faith, the prayer

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[6] Wahbah al-Zuhaili, *al-fiqh al-Islami Wa adillatuhu*, ed.3, v.6. Damaskus:Dar al-Fikr, 1989, 720.

[7] Muhammad alGhazali, Huquq *al-Insan bayn Taalim al-Islam wa J'lan alUmam al-Muttahidah*, Dar alDakwah lil nashr waltawzi' 1993, 37

[8] Weeramanty, *Islamic Jurisprudence: An International Perspective*, Basingstoke (UK),Macmillan, 1988, 64

[9] Ibid

and supplication, when engaged in with sincerity, are expressive of man's devotion to and love for God, which is, as God taught His beloved servants to feel, without intermediaries. This is witnessed by the fact that Islam does not have a church or a clergy that mediates between God and man, and no one exercises spiritual mediation of any kind in Islam. A Muslim relates directly to his Creator, at any time and any place.

It is a manifestation of the dignity of man that Islam has placed an infinite value on human life. This is expresses in the quran in the following terms:

We ordained for the children of Israel that if anyone a slew a person, unless it was for murder or of spreading mischief in the land, it would be as if he slew the whole of mankind. And if anyone saved a life, it would be as if he saved the whole of mankind (Q: al-Maidah: 32).

The reference to the children of Israel, that is, the Jews, represents the continuity of the basic values that are common to all revealed religions. Both Judaism and islam are committed to the protection of human life. It makes no difference whether the victim is a jew, a Muslim or anyone else. The value that is advocated is holistic and indivisible in that aggression against one is tantamount to aggression against all. Life is not only of infinite value, it is also sacred; Nor take life, which God has made sacred, except for a just cause' (al-Isra':33)

Al-Ghazali: in respect to the sanctity of life and the prohibition of aggression against it, Muslims and non-Muslims are equal. An attack on the personal safety of non-Muslims appeals to the same punishment in this world and the hereafter.

In times of military engagement. Combatants have a personal responsibility not to destroy civilian life. It is consequently unlawful to attack women and children, the elderly and the insane, the ill and the invalids. The exempted categories also include the priest and the monk and those engaged in worship, as well as farmers who occupy themselves with their works in the field provided that they are not involved in the conflict.

D. The Fundamental Human Rights

The term interest, al-maslaha may refer to either an essential or a minor matter of human concern. In this regard the expression al-maslaha al-rnutabara is used by Muslim jurist to identify a basic interest of man. Therefore, the law in its safeguarding of men' interests, observes the priority, or the graduated importance of each interest to be protected. Accordingly interest of rights are classified into three preferences as follows:

1. al-usul al-khamsa, the five fundamental (necessities)

These five elements are considered to be the prior goal to be maintained by the Islamic law, viz. the legal human purposes of the law, and which are also confirmed by the previous divine religions.

b. The religion: Religion is given careful consideration by all Muslim jurists and it is considered as the summit of the five elements because it is the divine framework within which man's life, rights and moralities are processed. It is not only concerned with worshipping, but it is also a legal system which protects all of human concerns, which may not be secured without a safe and a perfect legal system (religion). Hence it is the basis for the best life and therefore it safeguards itself in addition to maintaining its extraneous purposes. In modem terms it may be called the public order of a community.

Accordingly, protecting the rights to freedom of belief and thought is a part of religion's role in maintaining itself. Moreover, it is a realization of the religious purpose for which the religious system is established. In other words, this rights is an essential feature in the divine aim to perfect man.

In these terms the Islamic philosophy of the right to freedom of religion and the reason for which jihad was regulated may be more understandable and clear.

b. Individual soul (alnafs): the legal principle of protecting a soul is so comprehensive that it includes the right to life, safety of man's body, livehood, medication and whatever may be necessary for his existence or to defend himself from whatsoever may threaten his life and his dignity, in addition to the right of free movement and residence.

c. Mind (al'aql); security of mind constitutes a dual function: it confirms the safety of man's body because his mind is part of his body, moreover it protects his right to belief or thought, for his mind is the inds of his intellectual development.

d. procreation (al-nasl):

This right as well may be considered multipurposed. Thus it includes social rights such as enjoying a family life, the right to marriage and to procreate and the right of children to enjoy their lives with their parents. In addition the right to existence of human races, particularly of minorities is protected.

e. Property (al-mal): The protection of property implies comprehensively the right of people to obtain property and their right to protect it: economic rights and the right to work are covered by this protection.

The above five elements are the primary interests. These are highly esteemed and held sacred by the law so that everybody should be able to enjoy them as his essential rights, and as primary elements which are attached to man's life on earth. Furthermore, to make life easier, agreeable, and meaningful, two other categories of interest are considered to be maintained as follows.

2. al-Hawaij or alhajjiya al-asliya, the fundamental Needs.

According to some muslim jurist, al-hajjiyat are the interest without which difficulty is caused for peole in achieving are the interest without which difficulty is caused for people in achieving the five fundamental (necessities), that is they are assistant means to the element of people's enjoyment of their fundamental rights. Furthermore, they are protective elements of those rights even though they are themselves a range of rights for people.

For instance, legal exemption such as the permission given to a sick person to break hism fast during his sickness. This is a relief of his legal burden and a sort of precautionary measure to maintain his life.

3. The right to common Benefit and Luxury.

The facilitating means which improve individual or public conditions are called alumur altahsiniyya. Comparing these elements with the two above categories,these latter one (al-tahsinat) are not essential. They are the secondary elements for the luxury of life, so that the life becomes more enjoyable.

According to al-Shatibi, they are advantages additional to the necessity and the utilities. Nevertheless, the lack of luxurious should not constitute any diminishment of either of the tW-0 basic group. Moreover, it may be added that as a matter of fact, man according to his capacity, does not normally forego the basic livelihood. He tries his best to develop it to better level above that which is mere necessity.

E. Concept of Islam and Jihad

Referring to the Quran, the term Islam in the sense of surrenderto the only God, implies not only the mission of Muhammad (Saw), but also the previous divine religions which were also based on the unity of one God. These would include the missions of Abraham, Moses and Jesus (pbut), Consequently, the followers of those religions were known as Muslims, that is submitters, those who accordingly, surrendered to the Creator and accepted those missions.

Nonetheless, according to this view, those religion were later called Judaism, or Christianity imply the specification of each mission with its own messenger as a sort of historical categorization.

All the previous heavenly religions and Islam are based on one and the same principle which is the unity of the one God i.e. Allah. They are all originated from the same divine resource. Thus they are His Messages to His people as guidance for them.

So it is safe to say that there would no be conflict between those religions. Furthermore, each previous religion is given to the development of human society as such time to be grasped by people. In this regard the prophet Muhammad's mission was to complete the previous prophetic missions.

Accordingly, it is intelligible that Islam regards itself as a developed part and a final stage of the general religious framework started by the earliest Prophet Adam and completed by Muhammad. So, it is indisputable logically that a part of a

perfect thing will not contradict the whole body of that thing but is is always in harmony with that body.

Islam was revealed gradually to following messengers, step by step in response to the development made by succeeding of men until Muhammad's time. He then, received the final fulfilling part of the Islamic doctrine and for all mankind. Whosoever followed any of God's prophet in his own time was a Muslim, because he had accepted a specific Islamic stage. But, Islam as given to Muhammad is the final stage which should be accepted by all human beings willingly.

All the above religions are highly respected by Islam because Islam considers itself to be part of a unity of progressing belief. Islam also recognize other religion such as Shabean and Majusi. Therefore, no one shouldhave been forced accept any of God's religion. If a belief is imposed on a man it will not gain his true acceptance. He will conceal his real response. Consequently the aims and purpose of the religion cannot be realized by a community of those who do not really accept the religion even though they may feign acceptance.

Jihad is a peaceful method of inviting people to the religion. This has been conducted in similar way by earlier Prophet, such as Abraham, Moses, and Jesus. Moreover, all religions generally and most effectively spread peacefully among people, by their free consent.

But when some people are not satisfied with simply making a peaceful refusal and they attempt to fight a new thought or belief, then they are violating other's rights and freedom.

Jihad against persons who chooses to fight, may be considered as being against a certain regime, but not its people. Therefore, a Muslim army does not fight the non-combatant among that people. Rather it releases them from an sort of tenets which may be ideologically imposed on them by that regime. That is to say, it protects their freedom of belief and gives them the opportunity to embrace Islam freely if they wish, even though in the sight of Islam they must accept God's final revelation. This duty is considered something between people and God, which is to say that they are responsible before God, not before Muslims.

Muslims do not have to intervene by forcing Islam to others. Thus their duty is only to introduce it to non-Muslims and to fight any person who prevent this conveyance.

If Muslims defeat non-Muslims in a battle or campaign, then the latter party has to chose whether to pay jizya, or to embrace Islam and thus become like any other Muslims in respect of duties and rights.Therefore, it may be concluded that jihad in its military sense is a hateful means for realizing peace, for protecting a right or abolishing an evil, but under any circumstances it may not imply hostility or injustice. Thus God's law is absolutely free from any material purposes.

The criteria that guide the Islamic state are:

a. There is no compulsion in religion.."Q.2:256.
b. Allah enjoin justice and kindness...and forbid lewdness and abomination and wickedness..16:90
c. 0 you who believe fulfill your undertakings (covenants),Q.5:1

So, jihad is a defensive means which is imposed religiously on Muslims to protect their natural rights, such as freedom of religion or defending themselves and their homes against an alien threat. The practice of jihad involves justice, kindness and humanity. For it is not to uproot a certain group of people, but is only to stop their aggression.

Islamic international relations are based on the maintenance of peaceful relations. Therefore, covenants and treaties are considered very important and to be observed by Muslims. Moreover, treaties constitute an additional source of Islamic international law.

Chapter III
The Classical Islamic law on Human Rights

A. Basic Principles on Human Rights

The jurisprudence is concerned with the codification of Islamic law, and their discussion of freedom is naturally from a juridical point of view rather than a metaphysical one. Nevertheless, the metaphysical background is present in their juridical discussions, for they are dealing with the same *homo Islamicus* to who of the whole of the Islamic revelation is addressed. The jurisprudents envisage human freedom because of personal surrender to the Divine Will rather than as an innate personal right. For them since we are created by God and have no power to create anything by ourselves (in the sense of creation ex nihilo), we are ontologically dependent on God and therefore can only receive what is given to us by the source of own being.

Human rights are, according to sharia, a consequence of human obligations and not their antecedent. We possess certain obligations toward God, nature, and other humans, all of which are delineated by the shariah. As a result of fulfilling these obligations, we gain certain rights and freedoms that are again outlined by the divine law. Those who do not fulfill these obligations have no legitimate rights, and any claims of freedom that they make upon the environment or society is illegitimate and a usurpation of what does not belong to them, in the same way that those persons who effuse to recognize their theomorphic nature and act accordingly are only "accidentally' human and are usurping the human state which by definition implies centrality and divine vicegerency. Islam holds this conception not only for its own followers but also for all other religions that, therefore, as religious minorities are given rights under their own religious codes.

Islam's perception of human rights is not premised on the individual versus nation-state framework. The nation-state itself represent a superimposition which has little claim to authenticity in the authoritative sources of Islam. The quran and sunnah lend support to the creation of a political order and leadership that takes charge of community affairs and administers justice. However, the main actor and audience in all this is the individual, not the state. The Quran also address the individual and the community of believers when it speaks of the duty of hisbah, that is, the 'promotion of good and prevention of evil' (amr bi'l ma'ruf wa nahy an al munkar). The community of believers, the ummah, is consistently addressed in the quran as 'o you who believe' that is the plurality of individual believers, not a separate or corporate body of its own. The individual is required to obey the ulu al-amr, that is, persons who are entrusted with leadership but whoa re accountable to the community. The whole conception of Islamic political organization and the state is service oriented and humanitarian in the sense that the individual remains the principal actor in all its part. The state as a corporate entity is not the primary actor, nor is it the repository of supreme political authority. The ummah or the community of believers is the locus of political authority, which is often described as a form of executive sovereignty. This is a delegated sovereignty that is founded in the quranic doctrine of the vicegerency of man on earth, that is, the khilafah. It is by virtue of this derived, or delegated, sovereignty that the community is seen as the repository of political power.

Islam has devised a unitary system of law and government in which ultimate sovereignty belongs only to God. Both the individual and the state are subject to the same law and their basic rights and duties are predetermined by the sharia. The objective of justice, promotion of benefit (maslahah) and prevention of corruption and harm (mafsadah) are to be pursued by both, and the state has no authority to overrule or replace the sharia, or to violate any of its principles. Thus, duality of interest between

the individual and state envisaged in the modern theory of human rights does not present a dominant source of concern for the Muslims jurists. The jurist and ulama did not proceed on the assumption that the interest of the individual and state were potentially in conflict. The view has prevailed instead that Islam assumes a basic harmony between the individual and state, which is to be realized through the implementation of the sharia. This is a consequence partly of the quranic doctrine of unicity (tauhid), which has profoundly influenced Islamic thought and institution. When the state succeeds in enforcing the sharia, it satisfies the basic purpose of its existence. Since individual and state are expected to subscribe to the same set of values, and the state exists in order to administer justice, no necessary conflict is assumed to exist between the rights of the individual and the state power.

A similar scenario can be visualized with regard to modern constitutional law, which resembles the theory of human rights in that both are predicated on the duality of interest between the individual and stat Constitutionalism as a phenomenon emerged and developed on the assumption that the nation-state presented a menace to the rights and liberties of the citizens. These rights were potentially in conflict with state power and it relentless drive to control the lives and activities of its citizens. Constitutional law was then developed in the west as an instrument for regulating this conflict. More recently, however, this perception of duality in the fabric of constitutional law has been questioned and there has been growing recognition of the view that the state is a potential ally and protector of civil rights and liberties. This shift in the underlying perception of constitutional law would, in tum, seem to require parallel changes in the theory and practice of constitution in the nation-states as they stand, something which has evidently not yet materialized and which present a fresh challenge for future reform of constitutional law.

Islam's perception of leadership and political power that administers the affairs of the community is inherently individualist in the sense that leaders are committer to serve the best interest of the individual. The state is under duty to protect the five essential interest (i.e. daruriyat al-khamsah), namely faith, life, property, intellect and lineage, through the establishment of a just political order and government. The quran has proclaimed human dignity an inherent right of the individual in an absolute and unqualified sense, as discussed below, and this then provides a matrix for the rest oi'his'basic rights.

When human rights are seen as manifestation of respect for human dignity, human rights are likely to have a more authentic basis across cultural traditions. As one commentator noted, nothing could be more important than to underscore and defend the dignity of the human person.[1] To take dignity as the goal and purpose of human rights would be to enrich the caliber and substance of these rights.

Islam's perception of human rights is rooted in human dignity and it is, at the same time, intertwined with human obligations. Obligation is a primary concept, indeed the focus of the sharia, and it often takes priority over right. Indeed, it is through the acceptance and fulfillment of obligations that individuals acquire certain rights. Dignity thus becomes a reality when there is a balanced emphasis on rights and obligations.

World cultures and traditions tend to differ not only in the value-content of human rights but concerning many other variables that influence the place and priority that is given to those rights. The western tradition posits freedom in order mainly to avoid the outcome of a deposit system of government, while Islam emphasizes individual rights and interests, while Islam gives priority to collective good in the event where the latter conflicts with the interest of the individual. Having said this, the

[1] Raimondo Pannikar, ls the notion of Human Rights a Western Concept?"lnterculture (Montreal) Vol.17 no.l (l982). 28

individual remains the primary agent and focus of attention in Islamic law.[2]

B. Status of non-Muslims in relation to Muslims

There is general agreement among Muslim scholars that Islam recognizes equality in the essential dignity of human beings, but there is disagreement about whether Islam guarantees equality before the law to alike. Mutawali has thus observed that complete equality before the law is not the norm in the shariah. Despite the variable meanings of equality in different periods of history and in different cultural settings, if one takes equality before the law in the sense in which it now features in the constitutions of many Muslim countries, it evidently does not admit it accept slavery, or the superiority of men over women. Mutawalli has thus recorded one of the two opposing views outlined above that, the sharia recognizes these distinctions. The legal status of zimmis and non-Muslims is not equal to that of Muslim citizens, slavery is permitted, and women do not enjoy equal rights. This last point has been further elaborated by him in that the sharia permits a Muslim male to marry a Jewish or Christian woman, but the marriage of Muslim woman to a non-Muslim man is not permitted.

Two quranic verses have been quoted by the advocates of this view, namely Ali Imran: 110 and Tawbah: 29. Two basic conclusions have been drawn from these passages. First, Muslims are superior to members of all other religious groups, as they are designated 'the best community.' Second, Christians and Jews who have not accepted Islam should be conquered, brought down and subjected to the payment of the

[2](Hasim Kamali, The Dignity of Man, An Islamic Perspective(Cambridge: The Islamic Texts Society, 2002, p.xi)

tribute (jizyah), The advocate of this view has also referred to another verse of al-Maidah: 51.[3]

The distinction between Muslim and non-Muslims reflected in the juristic view of the schools on several issues such as retaliation in cases of homicide when the victim is a non-Muslim, and the testimony of non-Muslims before the sharia court.

In the areas of crime and punishment, including just retaliation (qisas), blood money (diyyah) in unintentional homicide, or diyyah for personal injuries, the most preferred position is that the sharia does not differentiate between Muslim and non-Muslims.

However, the majority of jurist in the leading schools have held that a Muslim may not be killed for killing a dhimmi, and have referred in support of this view to a hadith where it is stated, and have referred in support of this view to a hadith where it is stated that 'a Muslim is not killed for killing an unbeliever.'(Abu Dawud, sunan, vi, 328.) Imam Malik and the shiah Imamiyah held that a Muslim is retaliated for killing a dhimmi if the killing is with the purpose of taking his property and in cases where the killer is a habitual criminal. This view also refers to cases that were accordingly disposed in this way during the time of the Caliph Umar and Uthman, but many have disputed the accuracy and detail of the reports concerning them.

The Hanafi rulings tends to have a greater harmony with Quranic provision on justice, and specially the verse that provides that God does not forbid you from being good and just to those who have not waged war against you over your religion' (al-Mumtahinah,60:80).

To be just to the followers of other faiths must mean giving those equal rights and protection in all respects. This is also the essence of the covenant (dhimmah) that the Muslim state has offered them, and the Prophet clearly entitled them to equal rights. As for the hadith that a

[3] (Mutawalli, Abd al-Hamid, Mabadi Nizam alllukm fi'I lslam (Alexandria (Egypt): Mansha'at al-ma'arif, 1974, 391.

Muslim is not killed for a kafir, Imam Abu Hanifah has interpreted this by saying that kafir here means a harbi that is the belligerent non-Muslim who is not protected under the covenant of dhimmah.[4] The jurist have also differed on the diyyah (blood money) of a dhimmi in unintentional homicide (qatl al-khata'), which is payable to the next of kin of the deceased. There are three views on this, one of which is that the diyyah of a dhimmi is half that of a Muslim. This is the view of Imam Malik and the caliph Umar ibn abd. Aziz.[5]

The second view quantifies the diyyah of a dhimmi at one third that of Muslim. This view held by Imam Shafi'i. is attributed to the Caliph Umar and uthman, and number ulama among.the followers (tabi'un). The third view has it that the diyyah of a Muslim and non-Muslim is the same, and this is held by the Imam Abu hanifah and Sufyan al-Thawri. lbn Rushd, who has recorded these views, considers the Hanafi position to be preferable, and he cites the following quranic ayah in support (al-Nisa' ,4:92). This ruling applies equally to Muslims and to those who are in a treaty of alliance with them. Abu hanifah has also referred to a hadith in its support, related on the authority of al-zuhri, in which the Prophet said that 'the diyyah of a Jew, a Christian and every dhimmi is like the diyyah of a Muslim.'

This is also having been the practice of the four Caliphs until the first Umayyad Caliph Muawiyah, who began to pay half to the public treasury (bayt mal) and the other half to the relatives of the deceased. Then the caliph Umar ibn Abd. Aziz passed judgment in favor of the reduced diyyah, but he stopped payment to the public treasury and only made one-half of the diyah of a non-Muslim payable to the heirs of the deceased, Thus it is safe to say that the quantitative change in the diyyah of non-

"al-Kasani, bada'I al-Sana'I, Cairo: Matba'at al-istiqamah, 1956, vii, 237.

[5] Muhammad ibn Ahmad ibn Rushd alQurtubi, bidayat al-Mujtahid wa nihayat al-Muqtasid, Cairo: Mustafa al-babi al-halabi, 1981,11,310.

Muslims represents a later development that does not find support in the sources.[6]

Relevant Islamic international concepts are identified as follows:

a. dar alharb: a non-Muslim country which is fighting or threatening the Islamic state; dar al-Islam.

b.dar al-sulh : a non-Muslim nation which has peaceful relations with Islamic state.

c. dar al-harb: a non-Muslim citizen of dar-alharb

d. Foreigners (alien): non-Muslim people who live temporarily in an Islamic state, for trading or any other business. They may become citizensif their applications are accepted by the Islamic authorities. Aliens consist of two categories; a. al-Musta'manun: people of dar al-harb, who entered the Islamic state according to her permission (visa).b. People of dar al-muwadaa: this category does not need the entry visa because the treaty of peace or established relations between their country and the Islamic state entitle them to enter.

e. ahl dar-Islam: citizenry of the Islamic state also consists of two categories: a. Muslims, b. non-Muslims, ahl al-dzimmi.

The general principle is that this group of the Islamic state's citizens are equal in their rights and duties with muslim citizens, but they are exempted from some duties which religiously can be applied only to Muslims. According to the principle of freedom of religion approved by Islam, dhimmi for instance do not have to render military service, even if their lands or districts are attacked by a foreign power. Thus it is Muslims' duty to protect them (dhimmis) and their property. Dhimmi political, social, religious rights, their freedom of thought and their right to social security, etc, are secured similar to any normal Muslim citizen.

Non-Muslim citizens of the Islamic state are given important consideration in Islamic law. Moreover, the Muslim caliphs used to instruct their successors to take care of them (dhimmis).

[6] Ibid

C. Women and Children's rights

Once most women were humiliated, enslaved and passed from man by inheritance or purchase, not only in Arabia but perhaps everywhere in the world. Some Arabs buried newborn girls alive, for fear of poverty and disgrace.

Then, Islam promotes equality between girls and boys by instructing the parents to treat their children alike. Early Islamic history witnessed that women occupied various social, political and legal position. They exercised their rights so that the balance between theirs and men's rights was restored. That is to say, that since each man and women is half of the community, then the function of each of them is complementary to the other.

The main quranic principle here is that women have equal rights with men. But, concerning the family's affairs, men are given a degree of greater authority. That may be taken to indicate a necessary authority to enable man to perform his legal duty as a guardian and an economic provider for the family. That is to say, the law entitles him authority commensurate with to the responsibility which is placed on him for the purpose of managing his family. In this he is not given freedom to behave whatever he pleases, rather he is in charge of performing legal duties. Accordingly, the relationship between man and his wife is based on the principle of legal and moral justice. This is expressed by the holy quran as kindness. In case where man abuses his authority, the law establishes necessary measures against him.

1. Woman has a right of maintenance from male agnate. This is due to a. A valid marriage contract; b. She performs her marital duties and c. If she is not married, her father is responsible for maintaining her. In case the father is incapable or ceased, the responsibility is undertaken by her other male kin or by public treasury.

2. Women under Islamic law is not part of her husband's personality, a fact which entitles her the right to keep her own family name whether she is married or not, that is on the same standing as a man. Accordingly three implications are drawn from that principle, a. the economic and civil rights which entitle a women the legal competence to have her own property, to invest her wealth and to be a party in business contract; b. Her right to inherit from her husband; c. Her right to be satisfied sexually by her husband, just as she would satisfy him.

3. Woman's right to have education has been undisputable in Islamic history. The Prophet himself always points Aisha to be consulted for her knowledge in religious matters.

4. Woman's right to dignity, honor, and purity is highly esteemed by sharia. According to the Islamic concept of dignity, a woman's right to honor is formulated in a practical framework of regulations. Those regulations as also precautionary measure to protect her against any suspicion that might detract from her honour. In other words, it is to secure her purity fro the abuse of some vicious people. The above purposes of the law are approved by both the holly quran and the sunna, particularly by their regulations concerning the decent dressing of women and that they should keep distance from men who are strangers to them, unless it is otherwise necessary. The same regulations also applied to men.

5.Woman has right to work so as she may respond to either her financial necessity or to satisfy the need of the Muslim community for female workers, particularly in educational and medical fields.

6. Most jurist uphold that the supreme leader or the head of state should be male. They consider the capability of a Muslim ruler to take part in Jihad is one of the pivotal conditions qualifying him to possess the presidential office. They consider a Muslim caliph as the supreme army leader as well as political leader. And since women are exempted from performing of jihad then they lack the important condition of the state headship. Women are not qualified to be the supreme ruler.

Referring to Islamic restriction concerning a woman's dressing and her avoidance of male community, some other scholars add that in the case that she is a ruler, she will not be able to stay far from strange men, that is, she has to deal mostly with them and such involvement is not permitted by the law. That opinion extends to include the judicial office as well. Abu Hanifa, however, allows a woman to be a judge in certain condition, while al-Tabari reasons that because a woman has the right to make a legal opinion, she should have the right to be a judge.

A woman's right to be member of parliament is rejected, nevertheless they participated in al-bay'a (election), in the sense of voting or electing the supreme ruler: a fact which may be extended to include their voting in parliamentary or presidential elections and in rejecting certain decisions of the government.

A divorce women has a prior right of having her child in her custody. In the case she is not capable or is dead, then a certain level of maternal, female relative is preferred as the child's custodian rather than those of the same level of paternal relationship. This is because younger children's welfare is realized more by being with their capable mothers.

According to Muslim jurists, a child remains in the custody of the mother until he or she is 7-9 years old. The reason is that majority of jurists do not specify a fixed age in which the child is transferred to the father's custody, is that not all children attain discretion in the same age, namely, discretion is considered the criterion by which a child is entitled to the option of chosing either of his or her competent parents. Proceeding from the child's welfare, the above option does not exist in a case of disability of one of the parents. The child is kept in the custody of the other parent. A mentally incapable child also does not enjoy the option. Such a child is kept in the custody of his or her mother. In this concern, al-Shafi'I considers the child as if he or she is under seven years because of the lack of discretion.

In this connection also, the legal restriction for woman based on;

a. The law exempts a woman from seeking a livelihood because physically she performs a greater function; she gives birth to her baby and feeds it with the sap of life, a fact which cost her suffering and pain. Therefore her legitimate maintenance is levied on man. Accordingly, he is assessed financially by a double share of his kin's inheritance while she is given a single share in general, but without any financial obligation. Moreover, she wins the priority of custody of her child.

b. A woman is exempted from jihad because she share in it by producing brave fighters who defend the nation. Likewise, it may be understood that a non Muslim woman is not obliged to pay al-jizya tax because she is the producer of tax-payer men. That is because that tax is paid in lieu of fighting.

c. Comparing the above two points with the grave responsibilities of governing, judging and representing people in parliament, it may be argued that those responsibilities are not privileges. The women are exempted from a duty such as maintenance of jihad. Then logically it is their right to be exempted from the heavier burden of governing or judging, etc.

4. It is also justified that those legal restrictions are not for underestimating a woman. They are rather a sort of distribution of provinces between people, so that a certain distributed role is more suitable to a particular person, concerning his or her natural capacity of sex. Then it could be said that the law is more reasonable and fair. Namely, even people of the same sex have different functions according to their various capabilities. Therefore it would be wise to put a suitable person is a suitable job. Accordingly, it may be understood that a woman's responsibilities should be less than a man's, because he is not capable, naturally to undertake her function of procreation etc.

It may be concluded that the above justifications are more suitable to the Islamic social structure of community. From modem views those restrictions are considered as a sort of deprivation of women rights.

However, it may be said that those are the areas in which there is a different perceptual understanding and they are not comparable to the modem ones.

Islam guarantees the right of child to live since the stage of embryo. An embryo's right to life is strictly protected. So, abortion is illegal and any sort of miscarriage which may caused by another person is punishable. A pregnant woman should never be punished for the crime she committed until a reasonable time after she delivered her baby so that the baby's life is safe and she has recovered her normal health.

CHAPTER IV THEORIES OF ISLAMIC LAW ON HUMAN RIGHTS

A. Determining Rights of Man

According to the Universal Islamic Declaration of human rights, al-haqq (right) is defined as an opposite or correlative of duty that is, a person's rights is another's duty. This is to say that rights of people are government's duties Abdul Razaq al-Sanhury states that al-haqq is an interest which is protected by the law; while Ahmad F. Abu Sinna indicates that it is something which is established by the law fro man or for God, vis-s-vis another person.

Accordingly, it can be understood that anything which is not prohibited by the law may constitute a right. Things, that is, are permitted unless a prohibition is raised. That permission may be understood as people's liberty, namely they are entitled to exercise it or not, according to their desires, needs or interest. Consequently, their exercise is sanctioned by the law so that their enjoying or benefiting from that exercise them a privilege which is again safeguarded by the law. Therefore, it may be deduced that a law may be guardian even if it does not legislate certain areas of human concerns.

A right is divided by Muslim jurist into three categories:

1. Allah's rights

This group of rights is public rights for all and it is called (haqqu allah) because it is considered most important. There fore, the doctrinal provision which is applied by law, legal alms, giving, and managing the public wealth by public authority, although they realize public interest, are called Allah's rights. Hence people have no option to choose whether they perform a public legal duty (right) or not; they are obliged to fulfill it. They will otherwise threaten the public interest so that the law has to react, taking sanction against them. Haqq Allah is an obligatory matter on individuals for the public welfare.

2. Joint right

This is a right which is common between Allah and man. In this concern, Al-Mawardi considers that a guardian's failure to fulfill his duty toward a foundling who is under his care is a breach of joint right.

Some other early and contemporary jurist point out that a slanderous allegation of the crime of unchastity, alqadhf, when it is committed by someone, constitute a violation of the above right, so that it threatens both a public interest and a private one. That is, it defames a person and creates an atmosphere of mistrust among family and community members. Therefore, the slandered person can not forgive the criminal person because the degree of the public interest violated here is more than the private one.

Nonetheless, when such a violation takes place in a joint right which consists of larger private portion and a smaller public one, i.e. it is more private than being public, then the victim is entitled to waive his right if he wishes. A murder crime for instance, although it threatens the public security, it concerns even more one's life i.e. a private right. Consequently, this entitles the victims relatives to demand retaliation, compensation or forgiveness.

3. Private right

This category of rights is the pure right of a person regarding his property and it is his absolute right to demand or to waive it, unless another right is harmed by this procedure. Accordingly it may be deduced that right is a material or moral interest which is recognized and protected by the law.

Perhaps the most intriguing discourse on the subject in the juristic tradition concerns the rights of God and the rights of people. The rights of God *(huquq Allah)* are rights retained by God in the sense that only God can say how the violation of these rights may be punished and only God has the right to forgive such violation. These rights are subject to the exclusiveness jurisdiction and dominion of God, and human beings have no choice but to follow the explicit and detailed rules that God set out for handling acts that fall within God's jurisdiction. However, all rights not explicitly retained by God are retained by people. And while violations of God's rights are forgiven only by God through adequate acts of repentance, the

rights of people may be forgiven only by the people. Thus, according to the juristic tradition, a right to compensation is retained individually by a human being and may be forgiven only by the aggrieved individual. Neither the government nor God has the right to forgive or compromise such right of compensation if it is designated as part of the rights of human beings.

Most of the discourse taken by jurists occurs in the context of addressing personal monetary and property rights, but they have not been extended to other civil rights, such as the right to due process or the right to listen, reflect, and study, which may not be violated by the government under any circumstances. This is not because the range of people's rights was narrow–quite the contrary; it is because the range of these rights was too broad. It should be recalled that people retain any rights not explicitly reserved by God. Effectively, since the rights retained by God are quite narrow, the rights accruing to the benefit of people are numerous. The juristic practice has tended to focus on narrow legal claims that may be addressed through the processes of law rather than broad theoretical categories that were perceived as nonjusticiable before a court. As such, the jurist tended to focus on tangible property rights for compensation instead of moral claims. Therefore, for instance, if one person burns another person's books, the aggrieved part may seek compensation for the destruction of the property but cannot bring an action for injunctive relief preventing the burning of the books in the first place. Despite this limitation, the juristic tradition, in fact, develop a notion of individual claims that are immune from government or social limitation or alienation.

Muslim jurist also asserted the rather surprising position that if the rights of God and of people overlap, in most cases, the rights of people should prevail. The justification for this was that human need their rights and need to vindicate those rights on earth. God, By contrast, asserts God' rights only for the benefit of human beings, and, in all cases, God vindicate His rights in the Hereafter if need be. However, Muslim jurists did not imagine a set of unwavering and generalizable rights for each individual at all time. Rather, they thought of individual rights as arising from a legal cause brought about by the suffering of a legal wrong. A person does not possess a right until he or she has been wronged and obtains a claim for

retribution or compensation as a result. To shift paradigms would require a transformation of traditional conceptions of rights, so that rights become the property of individual holders, regardless of whether there is a legal cause of action. The set of rights recognized as immutable are those that are necessary to achieve a just society while promoting the element of mercy. These must be the rights that guarantee the physical safety and moral dignity of every human being. It is quite possible that the relevant individual rights are the five values, but this issue needs to be reanalyzed in light of the current diversity of human existence. The fact that rights of people take priority over the rights of God, on this earth, necessarily mean that a claimed right of God may not be used to violate the rights of human beings. God is capable of vindicating whichever rights God wishes to vindicate in the hereafter. On this earth, we concern ourselves only with discovering and establishing the rights that are needed to enable human beings to achieve a just life while, to the extent possible, honoring the asserted rights of God. In this context, the commitment to human rights does not signify a lack of commitment to God or a lack willingness to obey God, but is instead a necessary part of celebrating human diversity, honoring God's vicegerents, achieving mercy and pursuing the ultimate goal of justice.

In the second half of the last century, Muslims have made the unfounded assumption that Islamic law is concerned primarily with duties, not rights, and that Islamic conception of rights is collectivist not individualist. Both assumption, however, are based only on cultural suppositions about the non-Western "other". It is as if these interpreters fixed on a judeo-Christian or perhaps Western conception of rights and assumed that Islam must be different.

In reality, Claims about both individual and collective rights are largely anachronistic. Premodem jurists did not assert a collectivist vision of rights or individualist vision. They did speak of alhaqq-al'amm (public rights) and often asserted that public rights ought to be given precedence over private entitlements. However, this amounted to no more than an assertion that many should not be made to suffer for the entitlement of the few. For example, as a legal maxim, this was utilized to justify the notion of public takings or the right to public easement over

private property. This principle was also utilized in prohibiting unqualified doctors from participating medicine. However, Muslim Jurist did not justify the killing or torture of individuals in order to promote the welfare of the sate or the public interest.

The notion of individual rights is actually easier to justify in Islam than a collectivist orientation. God created human beings as individuals, and their liability in the hereafter is individually determined as well. To commit oneself to safeguarding and protecting the wellbeing of individuals is to take God's creation seriously. Each individual embodies a virtual universe of divine miracles. Why should a Muslim commit to the rights and well-being of a fellow human being? The answer is that God already made such a commitment when God invested so much of the God-self in each and every person. This is why the quran asserts that whoever kills a fellow human being unjustly has in effect murdered all of humanity; it is as if the killer has murdered all of humanity; it is as if the killer has murdered the divine sanctity and defiled the very meaning of divinity (5:32).

Moreover, the quran does not differentiate between the sanctity of a Muslim and that of a non-Muslim. The measure of moral virtue on this earth is a person's proximity to divinity through justice, and not a religious label. The measure in the Hereafter is a different matter. However, that matter is God's exclusive jurisdiction. God will most certainly vindicate God's rights in the hereafter in the fashion that God deems most fitting. However, our primary moral responsibility on earth is the vindication of the rights of human beings. A commitment in favor of human rights is a commitment in favor's of God's creation and, ultimately, a favor of God.[1]

B. Equality among citizens regardless religion

The fiqh discourse on *dhimmis* must be viewed as the responses to the period where Islam was politically being superior. Nowadays, Muslims should be back to the broad principle of the sharia, as Mahmud Saltut noted that sharia endorses the equality of all people in respect of the right to life. No one's blood is more precious than anyone else's is, and the law does not recognize any distinction between

[1] Khaled Abou El Fadel, *Islam and the challenge of Democracy* (New Jersey: Princeton University Press,2002), 25-30.

people in this regard. Shaltut adds that different of opinion among jurists are known to exist on the subject cf *diyyah* and retaliation *(qisas),* not only with reference to non-Muslims but also with regard to certain other categories of individuals, such as father and son, master and slave, and even man and women. However, these are, as he put it, 'matters of personal understanding concerning only the fuqaha who have expressed the views in question and not necessarily a statement of general principles of the shariah'.[2] Shaltut further comments that the fuqaha may have deduced these exceptional rules by bearing in mind the prevailing circumstances of their times. They are often in agreement on basic principles but tend to vary in other respects: with reference to the same subjects, that is, blood-money and retaliation, it may be noted that fuqaha are all in agreement on the criminal responsibility of the perpetrator in crimes of violence, regardless of the religion of the victim, but they differ in their approach to the determination of punishment.

Abd alQadr Awdah has looked into some of these scholastic differences and reached the conclusion that the Hanafi position, which subscribes to equality among individuals regardless of their religion, is more acceptable to and bears more harmony with the applied law of the present-day in Muslim countries, and is therefore generally considered preferable.[3] Mawdudi has in turn drawn attention to the point that shariah does not differentiate, about the application of penalties, especially the prescribed (hudud) penalties, between Muslims and non-Muslims, and these penalties are applied equally to all. Whether one talks of the punishment for adultery, or, theft, or slanderous accusation, etc., no distinction is made on the grounds of the religious of the perpetrator. This should also be the case about retaliation and diyah.[4]

[2] Mahmud Shaltut, al-Islam, *Aqidah wa Shariah,(* Kuwait: Matabi dar alqalam, n.d. 326

[3] Abd. Qadir Awdah, *al-Tashri' al-Jina'i,* (Beirut: Mu'assasat al-Risalah, 1983) II, 123.

[4] Sayyid Abu A'la al-Mawdudi, *Nazariyyat al-Islam al-Siyasiyyah,* translated from Urdu by Khalil hasan al_slahi, Beirut: Dar al-Fikr,n.d. p.443.

M. Abu Zahrah has highlighted the egalitarian spirit of this quranic declaration (49:13) and observed that this verse has laid down the foundation of the equality of all citizens before the law without discrimination on the basis of wealth colour, race or religion. The only criterion of superiority that Islam accepts is moral excellence *(taqwā)* and righteous conduct. Referring to the same verse Mahmud Saltut has observed that Islam has declared mankind a single unity and a requirement of that unity is the equality of all human beings in respect of their rights and obligations, which is also the only way for the establishment of justice. Justice, being the overriding objective of Islam, cannot be achieved without equality.[6]

Mahmassani has also observed that the brotherhood of man is one of the fundamental postulates of Islam, which contemplates the whole of mankind as a single nation. He stated that Islam abolished the tribalism and social discrimination based on lineage and nobility of descent that were so common in pre-Islamic Arabis. Islam invited people to unite on the basis of tawhid. The prophet endorsed this Unitarian message and called for the social transformation of Arab society when he said unequivocally in a hadith.[7]

Rashid al-Ghanoushi observed that Islam did not command justice only for Muslims but for mankind generally, and this is perfectly clear in the Quran, where justice is an obligation that must be observed even when one is dealing with one's enemy. He further observed that Islam basic commitment to equality is not at all in doubt either generally or in respect of the rights and obligations of non-Muslims. There are, however, differences of detail among jurist concerning the status of non-Muslims, which have largely been due to differences of religious belief and it is not unreasonable that some of these should be accepted. To attempt to establish total equality among people who subscribe to different values, might amount to injustice.

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[5] M. abu Zahrah, *Tanzim al-Islam lii mujtama'* Cairo: dar Fikr Al-Arabi, 1965, 31)

[6] Saltut, *al-Islam*, 464.

[7] Subhi Rajab Mahmassani, *Arkan Huquq al-Insan fi 'l Islam* (Beirut: Dar al-Ilmi lil-Malayin, 1979) , p.260-261

To impose on non-Muslims, in other words, something that is disagreeable to their religions is likely to go against the essence of equality and justice.[8]

Muhammad Salam Madkur has commented that nationality and religion are now separate matters, and are treated as such under the prevailing laws of contemporary Muslim states. People belonging to different religion enjoy equal rights, just as they also share equally in the duties of military service and taxation. It would be quite reasonable to depart from the earlier criteria of religion-based distinctions, and treat the issue from the wider perspective of equality and justice.[9]

Al-Qaradawi has distinguished two types of fraternity in Islam, namely the fraternity of man and religious fraternity, both of which are recognized in the quran. The believers are brethren (49: 10) is a clear and unequivocal affirmation of the religious fraternity of Muslims. He then adds that this level of fraternity of Muslims is not in conflict with the wider fraternity of man, and the two should in fact be seen as complementary, and not contradictory, to one another. [10]

C. Women and Men Have Equal Rights

Men and women are equal in Islam related to the essence of human dignity> reward and accountability for personal conduct, and matters pertaining to property rights, morality and religion.

The quranic evidence on the fundamental equality of the sexes refers, in the first place, to their equality in their essential humanity. One reference to this is the following Q,75:37-39; 17:70.

The progeny of Adam includes both men and women, who are equal in the way they are created and in their inherent dignity. The divine grace from which they emanated does not discriminate between the male and the female. The egalitarian

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[8]Rashid al-Ghanoushi ,*Huquq al-Muwatanah: Huqud ghayr al-Muslim fl-I Mujtama' al-Islami,* 2"d edn., Herdon,VA: International Institute of Islamic Thought, 1993, p.48.

[9] Muhanunad Salam Madkur, *Ma 'alim al-Daw/ah al-Islamiyah,* Maktabat al-Falah, 1983, 104.

[10] Yusuf al-Qaradawi, *Al-Khasa 'is al-Ammah Iii-Islam* (Cairo: Maktabat Wahbah, 1989),p. 84.

call of the Quran is confirmed in several places, in reference, for instance, to personal accountability and reward for good work.

As for women's equality in matters of employment and eligibility to public office, there are those who maintain that men and women are equal only in regard to what is known as the domain of private authority but not in respect of public authority.

The hijab is a wajib (duty) in Islam. Several men were enraged because he suggested that veiling is not a faridah (one of the basic requirement of Islam, the denial of which leads to the charge of apostasy (The Hanafi school and some jurist from other schools distinguish between a faridah and wajib. Most Jurists from other schools did not. Kamali, Principle of Islamic Jurisprudence, 321,324-325. Another speaker alleged that hijab is the sixth pillar of Islam *(rukn)*, which is unprecedented claim in Islamic juristic history. Particularly among Muslims of the Wahhabi or puritan orientation and Muslims in the West, it is fair to say that no single topic is so heavily stressed and emphasized as that of the requirement of veiling for women.

The practice of hijab is part of a complex social and political dynamic particularly in Muslim societies. It is, at times, adopted as a form of affirmation of identity or as a from of social protest against the dilution of Islamic culture and against the Westernized secular dictatorships that rule most Muslim countries

The most worrisome aspect about this debate, is that hijab is virulently espoused by men, and that these espousals seem to affirm the stereotype about women as a seething source *offi.tnah* (seduction).

Fitnah might very well be an empirical issue and not a legal determination. What is unduly sexually arousing and how, when, and where, might pose difficult socially based empirical questions. For instance, if we assume that there is a community that endures on a fetish according to which veiling women are considered particularly seductive, should that mean that women ought to discard their veils, or should we ignore the empirical reality in favor of juristically-constructed reality? Alternatively, assume that in a particular desirable by women and men. Should these blond men cover their hair of faces so as not to be a source of*fitnah?* If the focal issue in hijab determination is the issue of*fitnah*, arguably in

the first hypothetical, the solution should be to uncover, and in the second hypothetical, it ought to be to cover.

Alternatively, one could argue that hijab is not *aboutfitnah,* but about awrah (the private parts that a person must cover). If the hijab is about covering the awrah of a woman, and not necessarily about *fitnah,* then the empirical issue of what causes or does not cause sexual enticement becomes largely immaterial. In other words, the empirical question of whether, for example, the hair or arms of a woman cause sexual enticement become largely irrelevant. These body parts must be covered because they are private, not because they are private, not because they sexually arouse. Most classical sources state that the issue of covering is a matter of *awrah,* but most modem discourses deal with it as a matter *offitnah.* This leaves the position of empirical inquiries into realities of seduction quite ambiguous. Interestingly, what becomes known in modem discourses as the hijab is discussed in classical juristic sources in the chapter on prayer. In that chapter, among other things, the jurists discuss of *awrah* (private parts that ought to be covered by clothing) is discussed as well. In prayer, a Muslim man or woman must cover their full *awrah,* or what the law considers to be the private parts of human being. Presumably, what is considered to be the awrah while in prayer also needs to be covered outside of prayer. This is at the heart of the debates on hijab–the hijab, in that sense, is whatever covers the private parts *(ma yastur al-awrah).*

The quran commands Muslim men and women to lower their gaze, be modest, and not to flash their adornment *(zinah)* except when appropriate, such as with husbands or wife. Early Islamic reports do not tie the issue of what eventually becomes known as the hijab to the problem of *fitnah,* but they do tie it to social status and the physical safety of women.

The issue of *awrah* is complex partly because it is extremely difficult to retrace and reclaim the historical process that produced the determinations as to *awrah.* The *awrah* of women was a complex matter. The majority argued that all a woman's body except the hands and face is *awrah.* Abu Hanifa held that the feet are not *awrah,* and some argued that half the arm up to the elbow or the full arm, is not an *awrah.* A minority view that even face and hands are *awrah* and therefore

must be covered as well. An early minority view held that the hair and calves are not *awrah.* In addition some argued that women must cover their hair at prayer, but not outside the prayer. Importantly, the jurist disagreed on whether the covering of the *awrah* is a condition precedent for the validity of prayer. The majority held that covering the *awrah* is *afard* (basic and necessary requirement), so that the failure to cover the *awrah* would invalidate a person's prayers. The minority view (mostly but not exclusively, Maliki jurists) held that covering the *awrah* is not a condition precedent for prayer –accordingly, this scholar argued that covering the *awrah* is among the *sunan* of prayer, and that the failure to cover the *awrah* would not void a person/s prayer. A large number of Hanafi jurist argued that as long as three-fourths of the body is covered, the prayer is valid.[11]

Six materials point related to *awrah* according to Khaled Abou fadel:[12]

One, early jurist disagreed on the meaning of zinah (adornment) that women are commanded to cover. Some jurist argued that it is all the body including the hair and face except for one eye. The majority argued that women must cover their full body except for the face and hands. Some jurist held that women may expose their feet and their arms up to the elbow. Importantly, someone such as Said b. Jubair asserted that revealing the hair is reprehensible, but also stated that the Quranic verses did not explicitly say anything about women's hair.

Two, the jurist frequently repeat that the veiling verse was revealed in response to a very specific situation. As explained above, corrupt young men would harass and, at times, assault women at nights as these women headed to the wild to relieve themselves. Apparently, when confronted, these men would claim that they did not realize that these women were Muslim women. Rather, they claimed that they thought that these were non-Muslim slave girls, and therefore not under the protection of the Muslim community. In Medinan society, and any individual was

[11] Abd. Razaq alSan'ani, al-Musannaf, ed Habib al-Rahman al-Azami (Beirut; alMaktab al-lslami, 1983)3; 128-136.

[12] Khaled M.Abou elFadel. *And God knows the Soldiers The authoritative and Authoritarian in Islamic discourses* (Oxford: University press of America, 2001), 121-132.

under the protection of either a clan or, if the individual was Muslim, he or she would be under the protection of Muslims. Therefore, these verses seem to address a very specific, and even peculiar, historical dynamic. The interaction between the text and the text's social context is not easily transferable or projectable to other contexts.

Three, Muslim jurist consistently argued that the laws mandating the covering of the full body did not apply to slave girls. In fact, it is reported that Umar prohibited slave girls from imitating free women by covering their hair. Apparently, Muslim jurists channeled the historical context of the verses into legal determinations that promulgated a particular social stratification. However, it is not clear whether the social stratification addressed by the.quran are the same as the stratification endorsed by the jurists.

Four, the jurists often argued that what could be lawfully exposed in a woman's body was that would ordinarily appear, according to custom *('adah)*, nature *(jibillah)*, and necessity *(darurah)*. Relying on this, they argued that slave girls do not need to cover their hair, face, or arms because they live an active economic life that requires mobility, and because they live an active economic life that requires mobility, and because by nature and custom, slave girls do not ordinarily cover of the law custom and functionality. Arguably, however, women in the modem age live an economically active life that requires mobility and, arguably, custom varies with time and place. In other worlds, if the rules prescribing veiling were mandated to deal with a specific type of harm, and slave girls were exempted because of the nature of their social role and function, arguably this means that the rules of veiling are contingent and contextual in nature.

Five, several reports state that women in Medina, Muslim or non-Muslim, normally would wear long head covers-the cloth usually would be thrown behind ears and shoulders. Women also wear vests open in the front, leaving their chests exposed. Reportedly, the practice of exposing the breasts was common until late into Islam. Several early authorities state that quranic verse primarily sought to have women cover their chests up to the beginning of the cleavage area.

Six, there is a sharp disjunction between the veiling verses and the notion of seduction. Seduction could be caused by slave girls, or could be between woman and man, woman and woman, or man and man. A man could be seduced by slave girls, and woman could be seduced by a good looking man, yet neither slave girls nor men are required to cover their hair or faces. Does the fact that a man might sexually enticing to women affect the obligations of concealment as to this man?.

In order to properly evaluate the interpretive enterprise that generated the juristic determination relevant to women and their role in society, it is essential to evaluate the history of gender dynamics in various episodes of Islam. Focusing on gender dynamics in history will permit us to understand the motivations behind determinations related to gender roles, and the way .these determinations were understood and practiced. For instance, there is evidence that as late as the 3rd/9th century, the meaning and role of the veil was still contested in Islam. In wonderfully eloquent epistles, the Mu'tazili scholar al-Jahiz (d.255/869) launches an attack against men who he accuses of attempting to seclude and repress women. Al-Jahiz claims that pre-Islamic Arabia did not seclude women from men, and that the practice of seclusion, in general, was unknown until the quran commanded the wives of the Prophet, in particular, to adopt the hijab. Al-Jahiz critizes the zealots who forbid what God has permitted, therefore implying that the rule of seclusion should have been applied only to the wives of the prophet. al j ahiz makes this point explicit by arguing that early Islamic authorities such as al-Husayn b. Ali, al-Shu'bi, Umar b.Khatab and Muawiyya did not forbid speaking or mixing with women (Kitab al-Qiyan). To this point, al-Jahiz discussion is rather unremarkable: there are many jurists who made this same argwnent in Islamic history. Al-Jahiz polemic becomes interesting when he starts talking about the attitude of some men towards women. Al-jahiz strongly critizes the attitude of the Hashawiyah towards women, accusing them of espousing unduly oppressive laws. In an explicitly critical passage, alJahiz states the following: "we do not say, and any reasonable person cannot say, that women are above men or lower than men a degree or two more. But, we have seen people who revile (women) the works revilement and disdain them and deny them most of their rights. Most certainly, it is true impotence for

man to be incapable of fulfilling the rights of fathers or uncle unless he disparages the rights of mothers and aunts. Al-Jahiz contends that it is a misguided sense of male jealously over pride and honor that accounts for the tendency to oppress women. Zeal in the protection of honor, he argues, is admirable unless it forbids what God has allowed. Some have used modesty as an excuse to prohibit women from speaking or dealing with men. Al-Jahiz sums up the attitude and practice of who he calls the transgressors with the following statement, "This is a matter where they have transgressed beyond the zeal for honor to the realm of bad manners and the lack of probity."

At a minimum, al-Jahiz discourse indicates that gender relations were contested and that the implication of the hijab continued to be the subject of debate in the 3rd;9th century. Furthermore, evidence from later Islamic countries demonstrates that the role played by women in Islamic history was complex and multi-faceted. We find that later jurist such as al-Sakhawi (d.902) Ibn Hajr al-Asqalani (d.852) and al-Suyuti (911) has studied with a large number of women. Ibn Hajar studied with 53 women, al-Sakhawi studied with 46, and al-Suyuti 33. [13]

The public role and function of women in various Islamic periods have not been adequately studied. However, it is unlikely that there would have been such a large number of licensed women teachers if the hijab was interpreted to mean the seclusion of women. As noted above, women were educated by men, and in turn educated men. At the very least, this points to the fact that the dynamics and practices of the hijab continued to be complex late into Islamic history. Importantly, this evidence also indicates that the practice behind the idea of fitnah was not as dogmatic and puritanical as many contemporary Muslims seem to assume.

Islamic law also recognizes equality of men and women as human beings but does not advocate absolute equality of roles between them, especially in the family relationship. Article 6 of the OIC Cairo Declaration on Human Rights in Islam states that:

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[13] Ruth Roded, *Women in Islamic Biography collection: From Ibn Sa'd to who's who* (Boulder, colo: Lynne Rienner Publishers, 1994), 68.

Woman is equal to man in human dignity and has rights to enjoys as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

The husband is responsible for the support and welfare of the family. Mayer has argued that the guarantee of equality 'in human dignity' under the OIC Cairo Declaration falls short of guarantee of equality to the enjoyment of all civil and political rights to enjoyment of all civil and political rights under the ICCPR. That will be true with a narrow interpretation of human dignity. Abroad interpretation of human dignity will, of course, imply the enjoyment of all rights incidental to human dignity. The OIC Cairo Declaration has not, in any case, been subjected to any judicial or quasi-judicial interpretation to ascertain the scope of its provisions. The HRC has however observed that: 'Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family'. The provision in Article 6b of the OIC Cairo Declaration above seems to foreclose women's rights of equality in responsibility within the family under Islamic law.

While the wife is not debarred from providing support and welfare for the family under Islamic law, it is the husband that is legally bound to do so, as will be further expatiated under family rights in Article 23 below. Equality of women is recognized in Islam on the principle equal but not equivalent'. Although males and females are regarded as equal, that may not imply equivalence or total identity in roles, especially within the family. Muhammad Qutb has observed that while the demand for equality between man and woman as human being is both natural and reasonable, this should not extend to a transformation of roles and functions.[14] This creates instances of differentiation in gender roles under Islamic law that may amount to discrimination by the threshold of international human rights law. Although the UN annotations on the draft of article 3 on equal rights of men and women recorded an appreciation of the drafters that it was difficult to share the assumption that legal systems and tradition could be overridden, that conditions which were inherent in nature and growth of families and organized societies could

[14] M. Qutb ,Islam Misunderstood Religion (Dacca: Adhunik Prokashani, 1978),p.129

be immediately changed, or that articles of faith and religion could be altered, merely by treaty legislations'. (UN Doc.A/2929 at p.62) the HRC (Human Rights Committee) now seems convinced that 'in the light of the experience it has gathered in its activities over the last 20 years', it intends to push through a universal standard of complete gender equality under the covenant aimed at changing traditional, cultural, and religious attitudes that subordinate women universally.

Muslim scholars argue that Islamic law had, over fourteen centuries ago, addressed the problem of gender discrimination and established the woman's position as dignified human being sharing equal rights with her male counterpart in almost all spheres of life. However due to factors such as patriarchal conservatism, illiteracy, and poverty, women in most parts of the Muslim world still suffer one form of gender discrimination or the other. Mayer has observed that 'the most extensive conflicts between the past interpretations of Islamic requirements and international human rights norms lie in the area of women's rights and that 'conservative interpretations of the requirement of Islamic law' may result in many disadvantages for women, especially in the enjoyment of civil and political rights.[15] Apart from the prohibition of discrimination on grounds of sex in nearly all international human right instruments, the Convention on the elimination of all Forms of Discrimination against Women specifically advocates equality for women and prohibits all forms of discrimination against them. It is noteworthy however that even Muslim countries such as Tunisia, considered today as having adopted a most liberal approach in their interpretation of Islamic law, entered reservations to the women's Convention.[16] The recognition and importance of family institutions under Islamic law cannot be overemphasized. However, marriage is the legitimate means of founding a family under Islamic law. In that paragraphs 1,2, and 3 of

[15] Mayer, p.323.

[16] Cook, R., 'Reservation to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International law*, p.643,688.

Article 23 are in full consonant with Islamic law, they in fact re-echo important principles of Islamic law.

There are however some apparent differences between the thresholds of Islamic law and international human rights law regarding equality of rights and responsibilities of spouses during marriage and its dissolution under Article 23 (4). Similar provision is found in Article 16 of the Convention on the Elimination of all forms of Discrimination Against Women.

The first important issue in this regard is the presumed concept of superiority of the male over the female in Islamic law. 'Abd al /Ati has observed that almost all writers have variously interpreted the following Quranic verses to mean the superiority of men (husband) over women (wives) in Islamic law:

I addressing this question, Ibn Qudamah in his highly esteemed legal treatise, al-Mughni, began by indicating the complementary role of the two genders, but went on to state that the husband's rights were greater than the wife's because God says that men have a degree above them'.

The idea of superiority of men over women is inferred from the 'degree' that men are stated to have above women in the Quran 2:228. But what is meant by this degree, a degree of what? One observes that both classical and contemporary interprets of the 'degree' is found for instance, Yusuf Ali who says,"..men have a degree (of advantage) over them'. Men have a degree (of responsibility) over them. The parenthesizing of the phrases 'of advantage' and 'of responsibility' by the respective interpreters indicate that those are not express statements of the Quran but the understanding of the content by the interpreters. Abd al-Ati has therefore pointed out that such interpretations are 'probably better understood as a reflection of certain psychological dispositions or of the actual status of women, which has been low on the whole, at least on the surface', and that the 'idea that men are superior to women and have power over them without reciprocity or qualifications stemmed from sources apparently alien to the spirit as well as the letter of the quranic verse.[17]

[17] Abd al' Ati. *The Family Structure in Islam* (Indianapolis: American Trust Publications, 1977),p.178-182

It is noteworthy that both quran 2:228; 4:34 revolve around the family institution. Rather than advocating the superiority of one gender above the other, the verse must be understood in the context of the Islamic appreciation of role differentiation within the family. From sociological perspective, authority and power are necessary elements of any group structure. The family structure is not an exception. Bernard quoting all port, pointed out that the concepts of status, authority, power, etc, run through all human and animal relationships', and that 'the social psychologist sees ascendance submission or dominance-compliance wherever two persons are in contact with each other.[18] This explains why Islam required leadership in every group activity to ensure cohesion in human relationships. For instance in acts of worship involving two or more people together, Islam instruct that one of them must be selected as leader of the group. In all these situations the leader is not considered as being superior to the others, it is only to ensure cohesion in the group. To enhance the success of the family life therefore, there arises the need to differentiate and identify roles within the family structure. The husband would necessarily be more influential in certain roles while the wife would be in others. Zeldich has pointed out that in most societies the instrumental and protective roles are played by the husband-father, while the wife-mother plays the expressive roles. It is in exceptional cases that the wife-mother assumes the protective role within the family structure. That perhaps explains the degree of responsibility that men have above women and which is consistent with Q,4: 34.

The word interpreted here as protectors and maintainers (*qawwamun)* is also sometimes translated as 'guardians' which in that case involves some element of authority on the part of the husband. However the role of a guardian, protector or maintainer is substantially rather that of responsibility than of authority. It would be more consistent therefore to understand the degree that men are stated to have above women in Q,2:228 as degree of responsibility. It is clear that neither the two verses under examination nor any other verse of the Quran mentions specifically those men are superior to women. It is also not mentioned directly that men have absolute authority over women.

[18] Bernard, J., *American family Behaviour* (New York: Harper and Brothers, 1942),p.420.

Where the husband/father adequately discharges of responsibility placed upon him, some reflective rights will reciprocally ensue to him from the wife/mother in the family relationship. Thus the authority of the male is at best inferred only as a consequence of the structural role of the husband/father in the family. Authority and leadership is thus not really generalized or attached per se to the idea of the male being superior to the female. It relates to specific roles in the family structures and is delegated to the gender better suited for that role within Islamic teachings. Whether men are better suited for that role than women is an open question subject to diverse cultural arguments.

Marriage and the family institution are very strong traditions of Islam that cannot be neglected except for valid necessities. Islamic law does not promote celibacy and also generally prohibits sexual relations outside wedlock. The Prophet is reported to have said that marriage is part of his Tradition which should not be neglected. Esposito has thus pointed out that:

Islam considers marriage, which is an important safeguard for chastity, to be incumbent on every Muslim man and woman unless they are physically or financially unable to lead conjugal life.[19]

Muslim jurist therefore tend to protect the family institution resolutely and are cautions in accommodating any norms that would tend to disrupt that tradition of Islam. To urge to protect the family institution while guaranteeing equality of the spouses is not peculiar to Islamic law. Allude

Based on quran 2:22land 60:10 there is consensus among both sunni and shi'i jurists that a Muslim woman is prohibited under Islamic law from marrying any non-Muslim man. Conversely, Quran 5:5 permits Muslim men to marry 'women of the people of the book' (Christian and Jewish women). In international human rights law this will be considered discriminatory against women.

Muslim jurists have advanced some justifications for this provision under Islamic law. The foremost being that, under Islamic law a Muslim man who marries

[19] Esposito, J. L., Women in Muslim Family Law (Syracuse: Syracuse University Press, 1982), 15.

a Christian or Jewish woman has a religious obligation to honour and respect both Christianity and Judaism. Thus the woman's religious beliefs and rights are not in jeopardy through the marriage, because she would be free to maintain and practice her religion as a Christian or Jew. Conversely, a Christian or Jewish man who marries a Muslim woman is not under such obligation within his own faith, so allowing a Muslim woman to marry a Christian or a Jewish man may expose her religious beliefs and rights to jeopardy. This justification is therefore hinged mainly on wanting to protect the religious beliefs and rights of Muslim women. Al-Qaradawi has thus argued that:

... While Islam guarantees freedom of belief and practice to the Christian or Jewish wife of a Muslim, safeguarding her rights according to her own faith, other religions, such as Judaism and Christianity, do not guarantee the wife of a different faith freedom of belief and practice, nor do they safeguard her rights. Since this is the case, how can Islam take chances on the future of its daughters by giving them into the hands of people who neither honor their religion nor are concerned to protect their rights.? [20]

On grounds of the guarantee of freedom of thought, conscience, and religion under international human rights law, it could be argued that other religions, such as Judaism and Christianity, would now also under an international obligation to guarantee the freedom of belief and religion to a Muslim wife and thus safeguarding her rights according to her own faith. If so, will this remove the prohibition of Muslim women from marrying men of the people of the book' Abd. Al-Ati has observed that the honor and reverence that the Muslim must give to the faith of his Christian or Jewish counterpart is an integral part of the Islamic faith while the same 'reciprocity' is not an integral part of either the Christian or Jewish faith. The required unreserved honor and reverence is a matter of faith that cannot be imposed by law. For the same reason the Muslim male is prohibited in Islamic law from marrying an idolatress because of the psychological factors involved. Faith, is the

[20] Yusuf al-Qaradawi *The lawful and the Prohibited in Islam* (Kuwait: International Islamic Federation of Students Organisations:' 1984),p.184-186.

most private relationship between man and God; it cannot be imposed or conferred. Nor is it the question of discrimination between men and women in Islam.[21]

However, the juristic view of some contemporary Muslim jurists is that since Muslim women are prohibited completely from marrying non-Muslim men, the Muslim men would also be temporarily prohibited from marrying women of the people of the book' in a situation where there is apprehension of a high number of Muslim women remaining unmarried, until the situation is remedied. This is based on the doctrine of public welfare *(maslahah)* under Islamic law.[22]

Muslims scholars and jurist have advanced reasons such as demographic needs, economic factors, barrenness of the wife, chronic illness of the wife, higher sexual needs of men, etc., in their attempt to justify the conditional permissibility of polygamy in Islamic law. Most of these justifications may be stiffly contested in the lights of present day circumstances. Problems like the barrenness of the wife are however quite tenacious in the arguments for the justification of condition polygamy in Islamic law. Similar arguments are for the justification of conditional polygamy in Islamic law. Similar arguments exist also in other cultures. In traditional African society for instance, procreation is usually the main purpose of marriage. Thus where the wife is found barren, the husband is usually inclined towards taking another wife, even though he does not divorce his barren wife. The obvious question here is, what of when the man is the one barren? It is often assumed albeit wrongly, amongst the local populace in many developing countries, that the fault for lack of conception in marriage is always with the wife. Islamic law however recognizes defects of the husband such as impotence, lack of semen or ejaculation during intercourse, lack of testicles and amputated sexual organ, all of which constitute grounds on which the wife seek dissolution of the marriage. al-Zayla'i, the twelfth century Hanafi, that is to say, satisfaction of sexual urge and

[21] Abd Al' Ati,H. *The Family Structure in Islam* (Indianapolis:: American Trust Publications, 1977),p. 143

[22] Qaradawi, 184.

procreation of children, the wife has rights to demand for dissolution.[23] Thus, the woman may seek dissolution where the man is found barren. The question then would be, why a right to dissolution for the woman and not a right to polyandry like her male counterpart? The medieval Islamic jurist, Ibn Qayyim has responded with a list of socio-legal arguments to this question, the most compelling perhaps of which is that polyandry can easily lead to family and societal disintegration because both the concepts of legitimacy of offspring and family lineage would be impaired. There would be always be a contest for legitimacy between the male spouses each time a child is born in a polyandrous union, which is not the case in a polygamous marriage.[24]

In case of a barren woman it is often argued that totake a second wife is better than either divorcing the barren wife or having offspring outside the marriage through adulterous relationships with other women. For such exceptional reasons, some Muslim scholars have argued that 'Islam permitted polygamy –as a remedy for some social diseases- under certain conditions without which plurality of wives shall be prohibited... (because) Islam, since the very beginning, favours monogamy. Abd.al-Ati says, polygamy should not be regarded plainly as a blessing for one sex and a curse for the other, but 'as a legitimate alternative applicable to some difficult, "crisis" situations.

The permissibility of polygamy in Islamic law is based on Q: 4:3, Men are thus allowed to have a maximum of four wives at a time. Both classical and contemporary Muslim jurists generally agree that the ability to treat co wives justly, is a perquisite to this permissibility of polygamy. Imam Shafi'i did not consider the requirement for doing justice between co-wives as an essential legal requirement but only as a 'moral exhortation binding on the husband's conscience. Many contemporary Islamic scholars and jurist however hold the mere apprehension of

[23] Al-Zayla'i, U, *Tabyin al-Haqaiq: Sharh kanz al-Daqaiq* (Cairo: Matba'ah al-Amiriyyah al-Kubra,1313, vol.3.p.25.)

[24] Ibn al-Qayyim al-Jawziyyah, *Kitab al-Akhbar al-Nisa*, v.2 (Cairo: Matbaah al-Taqadurn, 1900), p.85-87

not being able to deal justly between co-wives removes the permissibility of polygamy and advocates monogamy. They refer to the concluding sentence of Q.4:3,...is nearer to prevent you from doing injustice', and conclude that monogamy is the rule while polygamy is only an exception.

The view that the ability to deal justly between co-wives is a legal pre-requisite to polygamy had been further argued by other scholars and taken together with Quran 4:129, which says 'You will. .." to reach a conclusion that polygamy is actually prohibited under Islamic law. Advocates of that view argue that the quran itself confirms the inability of men to fulfill the prerequisite of dealing justly with co-wives. However, that view was and still strongly opposed by Muslims scholars who support the traditional interpretation that permits polygamy provided that justice is ensured between co-wives, since the prophet and his companions exemplified for having many wives. Therefore, it is relied upon by some Muslims States either to restrict or to abrogate polygamy. Ibn Qayyim stated that polygamy in Islam is no more and no less than that of a permissible act, like any other act lawful in principle, it becomes forbidden if it involves unlawful things or leads to unlawful consequences such as injustice. It is arguable on the above ground that the permissibility could be controlled under Islamic law for reasons of maslahah.

D. Freedom of Religion, Opinion and Expression

It is interesting to note that Islam through quranic verse guarantee the freedom of having religion. However, during the Caliph Abu Bakar, there was a policy that whoever changes his or her religion, should be punished to death. So, we will discuss both perspective and will come up with some conclusion.

Here, we do not focus our discussion of freedom from theological and spiritual perspective rather we focus on legal discourse.

The verse of the quran states that "there is no compulsion in religion". The reader must decide on the meaning of the text. Arguably, this verse means that no one should be forced to become a Muslim. Alternatively, this verse could mean that while one may be forced to become Muslim, one could not be compelled to believe. The verse also means that one may not be forced to pray, fast, or wear jilbab.

Possibly, the verse also means that one may not be punished for apostasy. Furthermore, one might argue that since there is no compulsion in religion, there should be no compulsion as to anything else. Therefore, one may conclude that contracts entered into under compulsion are invalid. [25]

For apostasy to attract the death penalty, many Islamic scholars now denies it in the context of sedition or treason against the State, and not merely as apostasy simpliciter.

The interpretation of the right to freedom of thought, conscience, and religion to include freedom to change one's religion or even to adopt atheistic views has not been without controversy among Islamic scholars in relation to the question of apostasy under Islamic law.

Elaborating on the principle of non-compulsion of religion under Islamic law, Ismail Faruqi had emphasized that by the wording of the quran every human is endowed with the capacity to know God if the intellect is exercised with candidness and integrity.

The Muslim is obliged by his faith, which he believes to be the only true, to present its claims to humanity not dogmatically nor by coercion but rationally through intellectual persuasion, wise argument, and fair preaching. The quran points out that whoever accepts it does so for his own good and whoever rejects it does so at his own loss and none may be compelled. To advocate thought or religion by coercion is to tamper with the process of intellectual and constitute a threat to man's integrity and authenticity and is null and void from the stand point of the shariah. [26] Although the Islamic state has a duty to promote the religion of Islam, it is not allowed to force anyone to embrace Islam, but rather has duty to monitor and prevent those who seek to deny people their freedom of belief.

Under Islamic law, a Muslim male who marries a Christian or Jewish wife cannot compel her into Islam. Also, the recognition of the statues of non Muslims

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[25] Khaled, And God, 84.

[26] Siddiqui.A (ed) Ismail Raji el-Faruqi, *Islam and other faith.* (Markfield: the Islamic Foundation/IIIT, 1998) 129-160,281-302.

within the Islamic state indicates that Islamic law does not advocate forced conversions to Islam. According to the twelfth century Hanbali jurist, Ibn Qudamah:

It is not permissible to force a non-believer into embracing Islam. For instance if a non-Muslim citizen (Dhimmi) or a protected alien (Musta'min) is forced to embrace Islam, he will not be considered as a Muslim except his embrace of Islam is of his own choice... The authority for this prohibition of coercion is the words of God Most High that says: There is no compulsion in Religion.[27] Apostasy from Islam is a topical issue under the concept of freedom of thought, conscience, and religion because of its classification as a crime punishable with death under traditional Islamic law. This apparently contradicts the basic principle of non-compulsion advanced above. It also conflicts with the international human rights understanding of freedom of thought, conscience, and religion.

Ibn Taimiyyah had observed that some of successors to the companions of the Prophet Muhammad known as al-Tabi'un such as Ibrahim al-Nakha'I (d.95.A.H) and Sufyan al-Tsauri (d.161.A.H) held the view that a Muslim apostate must never be sentenced to death but should be invited back to Islam.[28] Both el-Awa and Kamali seek to establish that apostasy simpliciter neither constituted a hadd-type offence nor attracted the death penalty. They both cited the twelfth century Maliki jurist, Abu AL-Walid alBaji as stating that apostasy is 'a sin for which there is no hadd punishment.[29]. Although Hamidullah included the crime of apostasy in his Muslim Conduct State, he went to indicate that: 'The basis of Muslim polity being

[27] Ibn Qudama, al-Mughni (9V), vol.8, (Riyadh: Maktabat al-Riyadh al-Hadithah: 1981) p.144.

[28] Ibn Qudama, *al-Mughni*, vol.8.126.

[29] Mohamed Salim, el-Awa, *Punishment in Islamic law* (Indianapolis: American trust Publications, 1982), 50-56.; M.Hasim Kamali, *Freedom of Expression in Islam* (Cambridge: The Islamic text Society, 1997), p.88.

religious and not ethnological or linguistic to appreciate the reason for penalizing this act of apostasy. For it constitutes a politico-religious rebellion. [30]

Contemporary Muslims jurists and scholars thus differ as to whether apostasy simpliciter in the form of a person denouncing the Islamic faith is a *hadd*-type offence at all, and also as to whether it attracted the death penalty. Many of the scholars and jurist define apostasy in terms of rebellion against state, where a Muslim-subject of the Islamic state after denouncing Islam joins with those who take arms against the Islamic state and thus commits a political offence against the State.[31]

The contention is that apostasy simpliciter, in the sense of an individual denouncing Islam without more, wherever mentioned in the quran does not stipulate any worldly punishment for apostasy was based on a report Tradition of the prophet that said: 'anyone who changes his religion, kill him. Some Muslim scholars have however identified this tradition as a solitary *(ahad)* tradition while others allege weakness in its transmission *(isnad)*. It has been contended also that there is no precedent of the Prophet compelling anyone into Islam or sentencing anyone to death for apostasy simpliciter. El-Awa thus concluded that the quran prescribes no punishment in this life for apostasy, and The Prophet recognized apostasy as a sin for which there was *ta'zir* (discretionary) punishment.[32] Thus this placed the matter within the legislative discretion of the Islamic State.

Under Islamic law, examples of expressions and speech that amount to abuse of the right are specifically stated by the quran and some prophetic tradition. Kamali classified these sharia limitations on freedom of expression into 'moral restraints and 'legal restraints. The former are essentially 'addressed to be the conscience of the believer; and include, *inter alia*, defamation, backbiting, lying, derision, exposing the weakness of others, and acrimonious disputation. The latter

[30] Hamidullah, *The Muslim Conduct of state* (Lahore: Ashraf Printing Press, 1981) p.174.

[31] M.Abduh & M.Rida, *Tafsir al-Manar* vol.5. (Cairo; Dar al Manar, 1947-48) p.327.

[32] EI.Aww, Punishment, 64.

are backed by specific sanctions include, *inter alia,* public utterance of evil or hurtful speech, slanderous accusation, libel, insult, cursing, seditious speech, and blasphemy.[33] Of all these sharia restraints, blasphemy is perhaps portrayed as the most controversial limitation on freedom of expression under international human rights law as was demonstrated through the reactions attracted by the Salman Rushdie affair from both international human rights advocates and Islamic jurists and scholars worldwide.

Blasphemy is broadly referred to under Islamic law as sabb Allah aw sabb al- rasul, meaning 'Reviling God or Reviling the Messenger'. Blasphemy overlaps with apostasy in the sense that an act of blasphemy by a Muslim also amounts to apostasy. Thus classical Islamic jurists often paired the two together in their legal treatises and prescribed the death penalty for both under traditional Islamic law. Blasphemy is however separable from apostasy especially when committed by a non-Muslim against Islam. Kamali concluded that the quran has made no reference to the death penalty for blasphemy, and the text does not warrant the conclusion that it is a quranic obligation, or a prescribed punishment or a mandate. On the contrary, we would submit that the general language of the Quran can only sustain the broad conclusion that the perpetrator of blasphemy disgraces himself and invokes the curse of God upon himself, and that it is a criminal offence which carries no [illegible] prescribed mandatory punishment, and as such, automatically falls under the category of *ta 'zir* offences, whose punishment may be determined by the head of state in competent judicial authorities.[34]

The Encyclopedia of Religion and Ethics defines blasphemy in Islam broadly as 'All utterances expressive of contempt for Allah (God) Himself, for His names, attributes, laws, commands or prohibitions (and) All scoffing at Muhammad or any other prophets or apostles of Allah.[35] Being a religious law, Kamali points out that the prohibition of blasphemy under Islamic law is mainly to 'defend the dogma and belief-structure of Islam'. (217) It is noteworthy that Islam recognizes reciprocally

[33] M.Hasim Kamali, *Freedom of Expression,* p.117-258.

[34] Kamali, *Freedom,* 217.

[35] Hasting,J., (Ed.), *Encyclopedia of religion and Ethics (*1909), vol.2.p.672.

respect to other faiths under its prohibition of blasphemy. The quran enjoins Muslims also 'not to revile those whom they worship beside God, lest they revile God wrongfully without knowledge. Thus We (God) have made fair-seeming to each people its own doing; to their lord is their final return and He shall inform them of all that they did'.(Q.6:108).

The sharia prohibition of blasphemy as a limitation to freedom of expression thus aims at protecting the sensibilities and beliefs of the Muslim community in particular and that of other faiths in general. Seen in that perspective, that limitation is explicable within the proviso of article 19 (3) of the ICCPR on the protection of public order or morals. The ability of blasphemous expressions to incite Muslims to public disorder is evidence, for example, by the upheavals in many parts of the world that followed the publication of Salmand Rushdie's Satanic Verses, which was considered as being offensive to the religious sensibilities of Muslims not only by Muslims, but even by non-Muslim religious leaders. There is need however in this realm always carefully and objectively to distinguish constructive reasonable intellectual critiques of religious interpretation from expressions that insult or revile the sensibilities of reasonable of expression. Maududi has pointed out in that regard that Islam does not prohibits decent intellectual debate and religious discussion, what it prohibits is evil speech that encroaches upon the religious beliefs of others.[36]

Applying the margin of appreciation doctrine to a case of blasphemy under Article 10 of the European Convention, the European Court of Human Rights held in the case of Otto-Preminger-Institut v. Austria that seizure and forfeiture of a blasphemous film in which God, Jesus Christ, and the Virgin May were ridiculed did not violate the author's right to freedom of expression guaranteed under article 10 of the European Convention. The Court observed, *inter alia*, that:

The Court cannot disregard the fact that Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that

[36] A.A; al-Maududi, *Human Rights in Islam* (Markfield: The Islamic Foundation, 1980) p.30.

some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the court does not consider that Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.[37]

It is submitted that the HRC should follow a similar approach in considering issues of moral and religious sensibilities, especially in its interpretation of Article 19 of the ICCPR. This will facilitate an appropriate balance between respect for religious beliefs and right to freedom of expression under international human rights law. [38]

E. Forgiveness is prioritized than punishment

Five specific restrictions on the death penalty may be identified from the provisions of article 6 (2) to (6). The first is that death penalty may not be imposed except only for the most serious crimes and in accordance with the law in force at the time of the commission of the crime. The second restriction on the death penalty under article 6 is that no deprivation of life must be contrary to the provisions of the covenant and to the Convention on the Prevention and Punishment of the crime of Genocide. Third restriction is that the death penalty can only be carried out pursuant to a final judgment rendered by a competent court. The fourth restriction is that anyone sentenced and may be granted amnesty, pardon, or commutation of sentence. The fifth restriction is that the death penalty shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out pregnant women.

Under traditional Islamic law the death penalty is prescribed basically for the offences of murder, adultery, apostasy, and armed/highway robbery. The views of the HRC put all these offences, except murder, outside the Committee's definition

[37] ECHRR (1994), series A,vol.295-A.

[38] Bederin, *International*, 129.

of most serious crimes' under the Covenant. The argument of Muslim jurists and scholars is that the manner and circumstances in which the stated offences must be committed to attract the death penalty makes them very serious offences under Islamic law. Murder attracts the death penalty on retaliatory grounds of life for life. Armed/highway robbery attracts the death penalty where it results in the death of the victim. Adultery, basically, requires the unanimous eyewitness evidence of four, sane, Muslim adult male witnesses to the sexual act. For apostasy to attract the death penalty, many scholars now define it in the context of sedition or treason against the State, and not merely as apostasy simpliciter.

The HRC has also observed that the provisions of Article 6 (2) and (6) suggest the desirability of abolishing the death penalty under international law. There is however no unanimity amongst the States of the world yet on the abolition of the death penalty. While some states are considered as 'abolitionist States' others are considered as non-abolitionist States. Apart from the republic of Azerbaijan, and recently Turkey no other Muslim state has abolished the death penalty or become a Party to the Second Optional Protocol (OP2) to the ICCPR adopted in 1989 specifically aimed at abolishing the death penalty. Since the quran specifically prescribes the death penalty as punishment for certain crimes, Islamic jurist would consider any direct legislation against its legality as being outside the scope of human legislation under the sharia.

Islamic jurist often cite the quran verses which says: 'In the law of qisas (retribution) there is (saving of) life for you, O people of understanding; that you may restrain yourselves', to argue that the death penalty for murder is itself a deterrent and a legal protection for the right to life and thus it will impugn the right to life to abolish it. Most Muslim States who apply Islamic criminal law only try to avoid the death penalty through either procedural or commutative provisions available within the sharia instead of direct prohibition of it. Islamic law demands strict evidential requirement for capital offences. This would often lead, for instance, to payment of blood money for murder, and discretionary (ta'zir) punishment for the other capital offences in place of affecting the death penalty. In the case of murder, the sharia allows for the alternative of blood money by the

offender to the heirs of the victim in lieu of the death penalty. The Prophet Muhammad is also reported to have recommended that the death penalty should be avoided as much as possible.

Islamic law indeed recognize fair hearing is all aspect of court, including capital offence cases. The Hanafi jurist contended that since Islamic law does not discriminate between Muslims and non-Muslims in the punishment for theft and other offences, the same rule must apply in the case of murder. The Hanafi view is more consistent with other traditions of the Prophet on equality of human beings and also compatible with the principle of non-discrimination under the covenant. The prohibitions of genocidal capital punishment under the Covenant is also in full concordance with the sanctity of life under Islamic law, Article 2 (b) of the OIC Cairo Declaration on Human rights in Islam provides that: 'It is forbidden to resort to such means as may result in the genocidal annihilation of mankind'.

Islamic law differentiates the judgment *(qada)* of a competent court from a legal opinion (given) by a jurisconsult *(mufti)* on a particular issue. A final and executable judgment can only be given by a competent judge after the full consideration of a case in accordance with due process of law. A *fatwa*, on the other hand, is only a legal opinion given by a mufti, which is neither legally binding nor executable. On legal matters of public law, only competent judges may consult a mufti for a legal opinion to help them reach a legal decision on matters before court. Thus under Islamic law, a mufti or any Islamic leaders has no legal competence to give a binding fatwa Imposing the death penalty or any other punishment for any offence without the case first being tried by a competent court and affording the accused person opportunity to defend himself in accordance with the law.

Based on Quranic verse that recommend and extol the act of pardoning the wrongdoer, Islamic law also recognize the principle of amnesty. Under Islamic law amnesty may be granted by the Ruler under the principle of *haqq al-afw an al-uqubah* (The right to pardon from punishment). The state may pardon any *ta'zir* punishment provided that the victim's right is not undermined. According to the Hanafi school, hudud punishment cannot be pardoned by the State because it is 'right of God'. The other schools however hold that only the hudud punishment for

zina and theft may not be pardoned by the State after the court is seized of the case. Their argument in the case of *zina* is that the difficulty of proving *zina* through eyewitnesses is enough mitigation on the crime requiring no additional amnesty if an offender could be so heinous to commit the offence in the broad glare of four male witnesses.[39] Based on the quranic provision on homicide, some Islamic jurists consider remission as the better alternative to the death penalty in homicide cases. While the right to commute the death penalty in homicide cases for blood money lies principally with the victim's heirs, the State may encourage such amnesty on the part of the heirs. It was reported in one tradition that whenever a case of *qisas* was brought before the prophet Muhammad, he recommended pardon/[40] Since, the head of state in democratic system chosen by people, than the rights of pardon may be carried out by the head of the state. This taking over is not contradict to any Islamic tenet.

The execution of the death penalty against pregnant women is also prohibited under Islamic law. The same exemption extends even to a woman breast-feeding a child until the child is weaned. A child will not also be liable to death penalty under Islamic law based on a tradition in which the Prophet Muhammad stated, inter alia, that a child is free from responsibility until he attains maturity. The only difference is that it is possible for a child to attain maturity before the age of eighteen years under traditional Islamic jurisprudence.

Article (7) no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The severity of some criminal punishment under Islamic law has however been brought into issue within international human rights discourse. Bannerman has observed for example that 'it would be foolish to deny that in western eyes today, amputations, executions, stoning, and corporal punishment are brutal'. And

[39] A.R, al-Jaziri, *Kitab Fiqh ala mazahib al-Arba'ah* ,v.5 (Beirut: Dar al-Fikr, 1997) 224-227.

[40] Wahbah al-Zuhayli, *Fiqh al-Islami wa adillatuhu,v.7* (Pittsburgh: Dar al-Fikr, 11.v.) p.5689

according to Mayer 'laws imposing penalties like amputations, cross amputations, and crucifixions would seem to be in obvious violation of article 7 (ICCPR).

Islamic law prescribes fixed punishment called hudud for certain offences, retributive punishment called *qisas* for other offences and discretionary punishment called *ta'zir* for certain others. The *qisas* and *ta'zir* are variable punishment and within the discretion of the victim of the offence (or the heirs) and the judge 9or State) respectively. A Muslim State's conformity to an international standard of punishment in crimes that attract *qisas* or *ta'zir* punishment under Islamic law therefore depends on the political will and other international consideration of a particular State. The tension with international human rights law is essentially in respect of the hudud punishment which are fixed and invariable as long as the crime is fully established as provided by the Islamic law.

The hudud punishment are generally prescribed for six offences under traditional Islamic law. They are amputation of a hand for theft, death, crucifixion, cross amputation of hand and foot or banishment for rebellion or armed robbery (hirabah); stoning to death for adultery and one hundred slash for cornification (zina); eighty lashes for false accusation of unchastity (qadhf); death for apostasy (riddah); and forty or eighty lashes for intoxication (sharb al-khamr). While there is consensus among Islamic jurists on the first four punishments, there are some differences about the offences of intoxication and apostasy.

While the need to punish those guilty of crimes is appreciated under international human rights law, the contention has been that offenders and criminals are still human beings and must therefore be treated with some dignity. Thus the punishment for crimes must not be excessively severe, degrading, or inhuman but rather aim at reforming the offender. While Muslims are under religious obligations to believe in the divine nature of the hudud punishment and not question its severity, the same cannot be said of non-Muslims. Since criminal punishment are generally not restricted to Muslims alone within the Muslim State it becomes necessary to examine the principle of the Islamic criminal punishment outside the scope of strict divine penology.

From a pragmatic perspective, the factors that are usually considered in the prescription of punishment for crime are: the interest of the society, that of the victim, and that of the offender. Thus, penological policy is usually based on the theories of deterrence, retribution, and reform. Although there may be some overlapping, basically deterrence may be viewed as serving the interest of society, retribution that of the victim, and reform that of the offender, There could be indeed be a difficulty in defining a balance between these interests in the prescription of punishment for particular offences. For instance, while a generality of opinion in a particular society may reveal that a particular punishment is too severe for a particular offence, the opinion of victims of that offence in the same society, depending on their ordeals, might reveal that no punishment is too severe for perpetrators of such offences. It may be argued too that offenders are products of the society, so it is their reform that must be given priority in the determination of a penal policy.

Islamic law aims at an ideal society. But if, despite the deterrent nature of the severe punishment, the offences still occur, there would then arise the question of whether or not the society has played a contributory role for the commitment of the offence. Thus, even in the enforcement of the hudud, the rule also is that there must exist an ideal Islamic society. Where it can be reasonably proved that the offender was a product of the society's sociological problems then his interest must be taken into consideration and the hudud punishment may be mitigated. There is evidence that the Prophet suspended the *hadd* punishment for the theft during war, and the second caliph Umar suspended its enforcement at a time of widespread famine in Medina. Abu Yusuf indicates that circumstances could make it necessary to relax or suspend the enforcement of the hudud punishment by the ruling authority. It could be argued therefore that, while to Muslims the prescription of the hudud punishment is not questionable; its application by the state is however not in isolation of other sociological factors within the State. The determination of the enabling or inhibiting sociological factors for the application of the hudud punishment is, as shown by the examples above, left to the discretion of the State to be exercised in good faith and the best interest of society and the populace *(maslahah).*

While the hudud punishment is deterrent in nature for the public interest, the ta'zir punishment, due to the wide authority that the state has in its prescription, provide means for punishment that aim for criminal's reform. The qisas punishment complete the cycle by taking the interest of the victim into consideration in the enforcement of retributive punishment. It could be argued therefore that the three tiers of punishment under Islamic law are interpretable pragmatically to accommodate modem enological principles depending on the political and humanitarian will of the ruling authority.

Against the foregoing background, the conflict between criminal punishment under Islamic law and the prohibition of cruel, inhuman, and degrading punishment under international human rights law can be addressed from two dimensions. The first dimension concerns the punishment of non-hudud offences. Since the State has discretion under Islamic law to impose less harsh punishment for non-hudud offences, Muslim States can thus effectively exercise that discretion in cognizance of their international human rights law obligations, and directly proscribe their non-hudud punishment that violate the prohibition of cruel, inhuman, and degrading punishment. It must be observed however those apart from religious factors, developing nations, for many reasons that include resource limitations, do often prefer an effectively deterrent, 'harsh' criminal punishment over a 'humane' reformative one even where the legislative authority lies completely within the prerogative of the State.

The second dimension concerns the hudud offences, which are specifically prescribed by direct injunctions of the quran. Al-Nairn has observed in respect of the hudud punishment that' in all Muslim societies, the possibility of human judgment regarding the appropriateness or cruelty of a punishment decreed by God is simply out of the question', and that neither Islamic re-interpretation nor cross-cultural dialogue is likely *to lead to their total abolition... as a matter of Islamic* /aw.[41] Questioning the hudud punishment is considered as questioning the divine wisdom underlying them and impugning the divinity of the Quran and the Theo centric nature of Islamic law. From an Islamic legal perspective the conflict may

[41] Al-Nairn, *Towards,* 35-36.

however be addressed indirectly through procedural means. Islamic legalist concede the fact that it is lawful to utilize procedural device to delay the hudud without impugning the law, the Prophet having advised that one should avert the hudud punishment in case of doubt because error in clemency is better than error in imposing punishment[42]. Mayer has however raised the question that 'if one attempts such a compromise, how does one go about defending it against fundamentalist critics, who are likely to accuse one of failing to take divine commands seriously?" That question highlights the susceptibility of the issue, but can be addressed through internal dialogue within Muslim States and among Muslim Jurists. It is established by reference to classical jurisprudence that averting hudud punishment through procedural means does not amount to impugning divine commands. Such aversion does not necessarily mean that there would be no punishment at all, but that through adherence to strict and lawful procedural rules of Islamic law ta'zir punishment are applied instead of the hudud punishments for difficulty of proof.[43]

Although the obligations parties under international human rights instrument often require direct legislation abolishing punishment considered cruel, inhuman, and degrading, such direct legislation can divest a ruling authority of its Islamic legitimacy in many parts of the Muslim world today. While most Muslim States do not currently apply the hudud punishment they also do not have legislation specifically prohibiting the punishments. The reverence of the Quranic injunctions by Muslims thus puts at a crossroads the human Rights Committee's demand on Muslim States to abolish the hudud punishment directly. With the current resurgence and restoration of Islamic law in many Muslim States, it is more feasible to seek for reconciliation between the hudud punishments and the prohibition of cruel, inhuman, and degrading punishment under international human rights law indirectly through legal procedural shields available within Islamic law.[44]

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[42] al-Zuhayli, *al-fiqh,vol.7.p.5307.*

[43] Mayer, *Human Rights,* 47.

[44] Baderin, *International,* 85

D. Recognition of International Boundaries

Unlike in Islamic classical history, at this time the world is divided into nation-states with view virgin tracts of land to be claimed, so it seems easy to define territorial boundaries. But, the task becomes somewhat arduous when we try to approach it in terms of ethical perspective that has religious sanction.

With the rise of an international system based on sovereign nation-states, Muslims have been forced to adapt Islamic principles to modem conditions. Dar Islam is today largely a cultural-religious construct, an ideal of the spiritual, if not political, unity of Muslims around the world. The political reality is of the existence of some fifty six independent Muslim states which frequently find themselves bitterly divided and sometimes at war with each other.

Still, significant moral issues arise in any attempt to reconcile a world of sovereign territorial states with the Islamic ideals of a universal commonwealth including diverse races, religions, and linguistic groups.

In the early centuries of Islam, Muslim communities traveled easily from one geographical boundary to another in search of their livelihood. Political frontiers meant little in their search for food and water. Individual Muslims also traveled easily and widely, sometimes holding positions in government of various states without the complications of immigration and naturalization laws and regulations. Even non-Muslims were allowed to travel freely within and between the Muslim states. The Muslim center of learning in Cordova, Granada, Fez, Salemo, Cairo, Baghdad, Damascus, and Bukhara were frequented by scholars and students of various religious persuasions from all over the world. It was not uncommon for a noted religious personality or jurist to wander easily from one center to another, an itinerant scholar whose passport was his scholastic reputation. Two of the best known figures from Islamic history are Ibnu Khaldun, historian and jurist who taught and held government posts in Tunis, Fez, Granada, and Cairo, and Ibn Batuta, whose name is synonymous in the Muslim World with the irrepressible traveler.

The classical Islamic approach to questions of diversity and political autonomy beyond dar-Islam must be studied with reference to the Islamic theory of

international relations, known as siyar. This worldview was the product of persistent persecution of Muslims, first by the Meccan idolaters, principally by the rich tribe of Quraish and its allies; then by the frequent betrayals of non-Muslim tribes of Medina; followed in the final years of the Prophet's life by conflict with the Byzantine Empire to the north. The unceasing hostility towards the Muslims by their non-Muslims neighbor forced the early Muslims to struggle for survival and thus, war and fighting became an integral part of the relationship with non-Muslims. As a by product of struggle, Muslim jurists took excessive recourse of the concept of naskh (abrogation0 in formulating their views on external relations with non-Muslim enemies, and ignored some of the very basic quranic verses dealing with persuasion (husna), patience (sabr), tolerance (la ikrah), and the right to self determination (lasta alayhim bi-musaytir), in favor of an aggressive conception of jihad.

Since fiqh is the interpretation of the quran and sunna, there has not been unanimity of opinion among various schools of thought on all issues, especially regarding siyar and jihad. Siyar describes the rules of conduct for Muslims in dealing with the unbelievers of enemy territory or those with whom they have established treaties of nonaggression. The quranic verses and the prophetic traditions on jihad address how Muslims should respond to the hostilities of the enemies of Islam. The principles of siyar follow from them.

The conditions for and conduct of jihad are issues that have historically created controversy among Muslim jurists. Islamic legal precedents that were set during the time of the Prophet and his immediate successors, the four caliphs served the Muslim community well until the advent of the Umayyad dynasty in A.D.661. The people of the newly conquered territories could not shed entirely their pre-Islamic customs and culture and acted, in some cases, contrary to the standard set forth by the jurists and the government. For all practical purposes, from the rise of the Umayyad through the rest of dynasties of Muslim history, fiqh more often than not ceased to represent actual policies or regulations of the Muslim state. Fiqh essentially has been nothing more than legal opinions of various scholars of

divergent schools of jurisprudence, and they differ on the nature of jihad and the conduct of international relations generally.

A few additional related concepts need to be defined here before we investigate the principles of jihad and siyar. Beyond the frontiers of dar Islam, medieval jurist conceived the existence of other territories or realms, including dar alharb, dar al-aman, and dar al-ahd, otherwise referred to as dar al-sulh (non-Muslim territory which pledges through treaty to acknowledge Muslim sovereignty, but maintain local autonomy by paying some land taxes in lieu of jizya, or poll tax).

The harbis, or inhabitants of dar al-harb, are enemies of Islam and, as such, have no right to enter into Muslims territories without express permission. However, a harbi who receives a guarantee of safe passage *(aman)* from even the poorest and the weak.est Muslim is secure from harm for at least one year. At the expiry of that date, the harbi is bound to depart—unless, of course he or she converts to Islam and becomes a part of the Muslim umma (community or society). The inhabitants of dar al-aman, the must'mins, are treated according to the conditions of treaty between them and the Muslim state. The musta'mins are governed by their own laws, are exempt from taxes, and enjoy other privileges.

Historically, the question of whether or not the Islamic state *(dar al-Islam)* is obligated to wage jihad against dar al-harb raised contradictory opinions from the various sunni schools. Abu Hanifa, and Sufyan al-Tsauri state that fighting against non-Muslims is not obligatory obligator unless they themselves initiate it, in which case it becomes obligatory on Muslims to fight back.

The jurist are also divided on the issue of whether or not a harbi who is granted aman to enter dar al-Islam but who commits a crime while in Islamic territory is subject to Islamic legal punishment; Abu Hanifa asserts that such harbis are not subject to Muslim legal punishment, al-Shafi'i says they are. Abu Sulayman, a contemporary scholars of Islamic approaches to international relations said; "The parts of fiqh on al-jihad and related matters such as al-Jizyah-actually deal with matters that are highly political and can hardly be looked upon as simply enforcement or the carrying out of opinions of the ulama, who had become more

and more removed from the center of power and decision making.[45] Ironically, though, in modem times some of the Muslim countries even treat Muslims from outside their political boundaries as if they are harbis.

[45] Abdulhamid A. Abu Sulayrnan, *The Islamic theory of International Relations: New directions for Islamic Methodology and Thought* (Herndon,Va.: International Institute of Islamic thought, 1987), p.11.