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COMPATIBILITY OF ISLAMIC LAW WITH INTERNATIONALLY ACCEPTED HUMAN RIGHTS

Master thesis

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ABBREVIATIONS

AB	Appellate Body
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DSB	Dispute Settlement Body
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ESCR Committee	Economic, Social and Cultural Rights Committee
GATT	General Agreement on Tariffs and Trade
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ISESCR	International Covenant on Economic, Social and Cultural Rights
OAU	Organization of African Union
OIC	Organization of Islamic Conference
OP2	Second Optional Protocol
UDHR	Universal Declaration of Human Rights
UN	United Nations
WTO	World Trade Organization

INTRODUCTION

The effectiveness of international law depends on the consent of states, which means that sovereignty and its exercise determine the fate of international legal rules. The sovereignty of states threatens to formulating a global response to emerging violations of fundamental human rights, despite the fact that the process of globalization undermines the sovereignty of the states to deal nationally with these violations. The central importance of the state and its sovereignty constitutes a basic weakness in international law because the unwillingness of states to restrict their freedom of action through international law.

The other basic weakness follows from the lack of effective enforcement of international law. States often agree to an international legal obligation without any serious intent to fulfilling it. Neither international treaties nor organizations very often have any power to enforce compliance. If any major country or group of countries does not participate, a gap in the global control network appears.

The legal problems associated with using international law in a global strategy to combat emerging violations of human rights raise the question whether international law can provide an adequate foundation for the control of such violations. The answer to this question demands to evaluate the impact and the legal foundation of human rights law which is expanding beyond territorial borders.

Some scholars have raised serious challenges to the claim of universality, arguing that all moral values, including human rights, are relative to the cultural context in which they arise. Strangely, many human rights instruments explicitly encourage diversity through the norm of equal protection. The paradox is that those instruments seek to foster diversity and difference but do so only under the very liberal standards which are not negotiable. The possibility to difference appears to be accessible while in reality it is closed. This discrepancy of the human rights system needs to be revised so that the ideals of difference and diversity that are enshrined in the international treaties could be realized. Thus, in considering the various levels and types of relativism, it is obvious that the problem of cultural relativism and universal human rights cannot be reduced to either-or choice.

On the one hand, there is a general view, especially in the West,[1] that Islamic law is incompatible with the ideals of international human rights. On the other hand, there is also some pessimism, especially in the Muslim world, about the current international human rights

[1] Reference to ‘the West’ or ‘Western’ nations, culture or perspectives in human rights literature is not often specifically defined but connotes a generic reference to Western Europe and America. Traditionally, the notion of ‘the West’ in international relations did refer to the non-Communist States of Europe and North America.

principles and the objective of the UN in that regard. Due to the fact, that human rights are best protected by States within their different cultures and domestic laws, the relevance of Islamic law to the effective application of international human rights law in the Muslim world is of a great importance. States possess the sovereign right of applying Islamic law within their jurisdictions, the question of whether or not international human rights can be effectively protected within the application of Islamic law remains very important in the international human rights discourse.

Consequently, **the object of the thesis** is the comparison of certain internationally recognized human rights with Islamic law.

The subject of the thesis is the interpretation of universal standards which the States of different cultural, religious and social character have obliged themselves to. Usually, the interpretation of the legal norms, which is highly dependent on different cultural, religious and social characters of the State, indicates the legitimizing criteria for the State practice in the process of the implementation of international human rights.

The aim of the thesis is to evaluate the extent to which the Islamic law complies with international human rights law.

The tasks of the thesis:

To examine the universal nature of international human rights;

To analyze theories and doctrines confronting with the universalization of human rights norms;

To compare certain fundamental human rights with Islamic law in the light of the core human rights instruments which nearly have gained the universal acceptance;

To present the complementary methodologies in regard to create an optimal international human rights framework.

Thesis of the work is that generally, the Islamic law is not incompatible with international human rights law.

The relevance of the topic. This thesis examines the recent trend proposing that Islamic law and culture reflect a distinctive approach to human rights. Moreover, a number of international legal documents do not give a clear understanding of international standards for the implementation and protection of internationally recognized human rights. Furthermore, an examination reveals that there is no real consensus on the nature of universal human rights. In fact, the relationship of Islamic law with international human rights law is neither a simple nor a direct one, and therefore it is needed to present the range of attitudes and theories on the contemporary Islamic law in the light of the International Covenant on Civil and Political

Rights[2] and the International Covenant on Economic, Social and Cultural Rights[3]. When approached from this perspective Islamic law provides fascinating examples indicating the absence of its incompatibility with the current concept of international human rights.

As for **the novelty of the topic**, previous works on this subject have mostly emphasized some traditional interpretations of Islamic law and an exclusionist interpretation of international human rights law. This has continued to strengthen the theory of incompatibility between them. The thesis offers critical assessments and arguments of both the universality and cultural relativism theories in regard of international human rights. The constructs that have been presented by Muslims who reject the universality of civil and political rights – set up forth in the International Bill of Human Rights – will be contrasted with the views of Westerners who advocate the universality of human rights and who are inclined to review the rights as deriving from political, and not cultural, consideration. Unlike the classical era of Islam, contemporary Islamic law cannot be analyzed in isolation from the modern international human rights law. This is the reason why the thesis compares the fundamental human rights by analyzing the provisions of the Quran[4] and Sunnah[5], as well as Islamic jurists' views.

With respect to **the scope of the thesis**, author's analysis is mainly devoted to the core documents of international and regional human rights systems, and the main sources of the Islamic law – the Quran and Sunnah as well as the scholarly writings and the jurisprudence of the Human Rights Committee[6] and to the General Comments and practice of the Committee on Economic, Social, and Cultural Rights[7].

As for **the structure of the thesis**, it consists of 3 chapters.

The first chapter of this thesis provides a perspective for understanding how the contemporary international human rights regime developed, focuses on the impact of globalization process on the international human rights regime, and summarizes the different attitudes toward the universality of human rights.

Consequently, the second chapter is devoted to provide a brief review of the conception of cultural relativism and to specify the nature of the relationship and an approach that preserves

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[2] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; [therein after the ICCPR]. Available at the website of the Office of the United Nations High Commissioner for Human Rights: http://www2.ohchr.org/english/law/ccpr.htm [accessed 12 May 2011].

[3] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976; [therein after the ICESCR]. Available at the website of the Office of the United Nations High Commissioner for Human Rights: http://www2.ohchr.org/english/law/cescr.htm [accessed 12 May 2011].

[4] The Quran is the central religious text of Islam, which Muslims consider the verbatim word of God (Arabic: Allah). See further pp. 54-56.

[5] Sunnah refers in Muslim usage to the example of the sayings and living habits of Muhammad, the last prophet of Islam and his companions (Arabic: "habit", "custom" or "usual practice"). See further pp. 54-56.

[6] Hereinafter HRC.

[7] Hereinafter ESCR Committee.

the tension between both, relativism and universalism, and examines the probability of the use of the margin of appreciation doctrine internationally in the contemporary human rights regime.

Finally, after identifying and analyzing the recent debate over universal versus culture-bound human rights, the thesis analyzes the role of Islamic legal tradition to international human rights law and discusses the extent to which the Islamic law complies with international human rights Covenants. Also, this chapter examines the recent trend to promulgate Islamic human rights schemes through presenting the particular complementary methodologies including the application of the principles of the margin of appreciation doctrine.

Methodology of the thesis: due to particularity of the chosen topic, author in writing of the present thesis employs traditional theoretical methods: analysis, analogy, comparative, logical (generalization, deduction, induction), etc.

1. EMERGENCE OF HUMAN RIGHTS LAW BEYOND TERRITORIAL BORDERS

This chapter provides a perspective for understanding how the contemporary international human rights regime developed, why certain States began to appreciate the importance of protecting individuals, and in what ways this new kind of development has formed the basis of contemporary human rights model.

It is clear that the process of globalization has transformed the traditional understanding of sovereignty and exclusive jurisdiction over a given territorial area. Hence, it is the shift toward a global understanding and application of human rights law rather than territorial or regional one. These changes in the form of a new regulatory regime have been evident in the emergence of the international documents setting the standards, all of which are governed by a network of international organizations. These organizations function at the boundary between the domestic and the global understanding of human rights law and its standards. Thus, the international governance of human rights following the transformation of sovereignty has prevented States to regulate or govern human rights issues domestically.

These developments in international regulation of human rights, however, pose important challenges for implementation of settled standards. The emergent new international regulatory order increasingly relies on the formulation rather than on the implementation of international rules. Moreover, this international regulatory regime cannot easily be accommodated in every State because there are some strong critiques of universal approach on human rights. In other words, some States are trying to resist breaking down the boundary between the domestic and the international understanding of human rights implementation.

Much space remains to be left in this chapter for presenting the different approaches on the nature of human rights and its ability to actually be applied universally. However, this requires a fundamental rethinking of the basic assumptions about the universality of human rights. Understanding the fact that the universal approach to human rights is not the only and absolute way of looking into the concept of fundamental human rights is an important step in a new and innovative appreciation of internationally declared human rights.

1.1. Globalization and its Impact on International Human Rights Regime

As the globalization has an effect on democratic principles and practices, the democratic recognition of a broader range of human needs has assumed a global dimension towards the international recognition of human rights. Accordingly, the gradual emergence of the global human rights culture during the half of the last century led to a certain level of international recognition for justice. Like the concept of democracy, Gould asserts that the idea of human rights too should be context sensitive so that it can be applicable in any cross-cultural and transnational frame.[8] Moreover, although the principle of human rights was first formally articulated in the Western world, it is now relevant everywhere; in that sense, it has leaped geographically to affect domestic policy in nearly every country. From almost universal human rights lawlessness, global governance has evolved to universal human rights law. The principles supported by human rights laws have strong normative value, even when states attempt to sidestep them or ignore the very human rights treaties they sign.[9]

Firstly, it should be defined what it is meant by the term 'globalization'. Held and others have suggested an informal definition useful for this purpose: "Globalization may be thought of as the widening, deepening, and speeding up of worldwide interconnectedness in all aspects of contemporary social life, from the cultural to the criminal, the financial to the spiritual."[10]

However, there is a rising gap between the tendency by the States to join international human rights regime and to bring their human rights practice into compliance with that regime. This situation challenges the efficacy of international human rights law and questions the nature of legal commitments of the States. Scholars of international relations, particularly the representatives of the realist and neoliberal traditions, assume that States only comply with the principles of international law when it is in their national interest (Downs et al., 1996). Many scholars of international law and constructivist scholars of international relations argue forcefully to the contrary that States generally try to comply with the principles of international law that they agree upon (Henkin, 1979).

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[8] Chatterjee, D. K. *Democracy in a Global World. Human Rights and Political Participation in the 21st Century.* Rowman & Littlefield Publishers, Inc., 2008, p. 5.

[9] Howard-Hassmann R. *Can Globalization Promote Human Rights?* Penn State Press, 2010, p. 83.

[10] Held D., McGrew A., Goldblatt D., and Perraton J. *Global Transformations*. Stanford, CA: Stanford University Press, 1999, p. 2.

1. 1. 1. International Recognition and the Concept of Human Rights

The historic evolution of visions of international human rights that continues to this day started centuries ago. The English Magna Carta (1215)[11], the French Declaration of the Rights of Man (1789)[12], and the US Constitution's Bill of Rights (1791)[13] included inherent, inalienable rights of the individual. The French Declaration and the US Constitution[14] incorporated one of the most fundamental of all contemporary human rights: no person shall be deprived of life, liberty, or property without due process of law. The US Constitution's Bill of Rights was a series of constitutional amendments which guarantee freedom of religion, speech, press, and assembly – among other rights of the individual.[15]

Regional organizations such as the Council of Europe, the Organization of American States, the Organization of African Unity,[16] and the League of Arab States have also adopted different regional human rights treaties in recognition of the noble ideals of international human rights. The basic regional human rights treaties are the European Convention for the Protection of Human Rights and Fundamental Freedoms,[17] the European Social Charter,[18] the American Convention on Human Rights,[19] the African Charter on Human and People's Rights,[20] and the Arab Charter on Human Rights.[21] Also of relevance is the Cairo Declaration on Human Rights in

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[11] The 1215 Magna Carta (The Great Charter), translated from the Latin available at: http://www.constitution.org/eng/magnacar.htm (last visited April 3, 2011). It was in force for only a few months, when it was violated by the king. Just over a year later, with no resolution to the war, the king died, being succeeded by his 9-year old son, Henry III. The Charter (Carta) was reissued again, with some revisions, in 1216, 1217 and 1225; nearly all of it's provisions were soon superseded by other laws, and none of it is effective today.

[12] Declaration of the Rights of Man and of the Citizen, approved by the National Assembly of France, August 26, 1789. Available at: http://www.hrcr.org/docs/frenchdec.html [last visited April 4, 2011].

[13] United States Bill of Rights created by James Madison in September 25, 1879; ratified in December 15, 1791. The text with the annotations is available at: http://topics.law.cornell.edu/constitution/billofrights [last visited April 4, 2011]. Its purpose is to set limits on what the government can and cannot do in regard to personal liberties.

[14] Constitution of the United States (1787). Available at: http://en.wikisource.org/wiki/Constitution_of_the_United_States_of_America [last visited April 4, 2011]. The Constitution is the second of the three Charters of Freedom along with the Declaration of Independence and the Bill of Rights, with later amendments.

[15] Slomanson W. R. *Fundamental Perspectives on International Law*. United States: Wadsworth, 2007, 5th ed. p 530.

[16] The OAU has now been replaced by the African Union (AU); see Art. 28 of the Constitutive Act of the African Union which came into force on 26 May 2001.

[17] Adopted on 4 November 1950. E.T.S. No.005.

[18] Adopted on 18 October 1961. E.T.S. No.035.

[19] Adopted on 22 November 1969. O.A.S.T.S. No.36 at p. 1.

[20] Adopted on 27 June 1981. OAU Doc.CAB/LEG/67/3 rev. 5; (1982) 21 ILM 58.

[21] Adopted on 22 May 2004. It has been in force since 15 March 2008. A first version was adopted on 15 September 1994, but no state had ratified it.

Islam adopted by the Organization of Islamic Conference.[22] All the above international treaties and declarations on human rights confirm, as rightly observed by Henkin, the acceptance of the human rights idea by 'virtually all states and societies' of the contemporary world 'regardless of historical, cultural, ideological, economic or other differences'.[23]

Regardless all the documents that are mentioned above, the expression 'human rights' is relatively new, having come into everyday legal language only since World War II and the founding of the United Nations in 1945 (Steiner et al., 2000).[24]

What does the term "human rights" mean? Judges and scholars typically describe this cornerstone of International Law as "the protection of individuals and groups against violations by governments of their internationally guaranteed rights… referred to as … international human rights law."[25] According to Baderin (2005), "Human rights are the rights of humans. They are rights of all human beings in full equality". (p. 16). Human rights emanate from the 'inherent dignity of the human person'[26] In the words of Umozurike: Human rights are thus claims, which are invariably supported by ethics and which should be supported by law, made on society, especially on its official managers, by individuals or groups on the basis of their humanity. They apply regardless of race, color, sex or other distinction and may not be withdrawn or denied by governments, people or individuals.[27]

Human rights are difficult to define, notwithstanding that the term is used extensively and frequently. Generally, human rights are regarded as those fundamental and inalienable rights which are essential for life as a human being. There is, however, an absence of consensus as to what these rights are, and frequently it is easier to identify what it is human rights are intended to achieve rather than what they are. Human rights more than any other issue highlight the distinction between universalism and cultural relativism. Universalism reflects the position that human rights are common and the same for all the world communities. The relativist theory maintains the idea that human rights differ from State to State fashioned by a State's values, cultural and religious traditions. Adherence to the relativist theory frequently criticize international human rights instruments as simply reinforcing western concepts and values in the

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[22] Adopted on 5 August 1990. The Declaration was submitted by the OIC to the UN prior to the 2nd World Conference on Human Rights in Vienna as representing the view of the Muslim States on human rights in Islam. See UN Doc. A/CONF.157/PC/62/Add.18 (1993).

[23] Henkin, L. (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York (N.Y.): Columbia university press, 1981. p. 1.

[24] It replaces the phrase 'natural rights', which fell into disfavor in part because the concept of natural law (to which it was intimately linked) had become a matter of great controversy, and the later phrase 'the rights of Man'. Steiner H. J., Alston P. and Goodman R. (eds.) *International Human Rights in Context. Law, Politics, Morals.* Oxford University Press, 2007, 3rd ed.; p. 476.

[25] Slomanson W. R. *Fundamental Perspectives on International Law*. United States: Wadsworth, 2007, 5th ed. p. 530.

[26] See e. g. 2nd Preambular paragraphs of the ICESCR (1966) and ICCPR (1966) and 1st Preambular paragraph of the UDHR (1948).

[27] Umozurike, U. O., *The African Charter on Human and Peoples' Rights*. Martinus Nijhoff Publishers, 1997; p. 5.

name of universal rights. Some cultural relativists maintain human rights are inapplicable to non-western societies whereas others accept that human rights are universal but that differences in society should be reflected within international human rights instruments.

1. 1. 2. The Role of the United Nations in Promoting International Protection of Human Rights

The contemptuous treatment of individuals and groups during the period created international concerns for the general protection of human beings. The League of Nations was the first one, who performed a supervisory role over creating the obligations, which were considered of international concern.[28] The League's central mandate became the central mandate of the UN which was established in 1945 by the United Nations Charter: chapter I, article I of the United Nations Charter states that one of its central purposes is "to maintain international peace and security" (Brownlie and Goodwin-Gill, 2006; p. 4). The challenges posed by globalization for the promotion and protection of human rights were assumed as general goals for the United Nations.

The UN quickly expanded to embrace many other goals, including the promotion of human rights. Its member states wrote and endorsed human rights documents, and various UN organs were created both to encourage states to protect human rights and to monitor their progress in doing so. (Mertus, 2005). The UN also established many subsidiary institutions that helped to ensure that people enjoyed their rights; these include, for instance, the Commission on Human Rights which interpreted its competence as including the power to recommend and adopt general and specific measures to deal with violations of human rights.

The Charter of the United Nations is a treaty with a special legal status. It is the commonly accepted view that declarations per se do not necessarily entail binding obligations upon states while treaties, in principle, are binding only upon their respective States parties - except to the extent that provisions of a treaty may reflect or give rise to international customary law. The same proviso applies to declarations, namely, that their provisions may either reflect or give rise to international customary law.[29]

The signing of the United Nations Charter marked the formal realization that human rights is a matter for international concern. One of the purposes for which the United Nations was founded was "to achieve international co-operation… in promoting and encouraging respect for

[28] Cassese, A., *Human Rights in a Changing World*. Cambridge: Polity press, 1990, pp. 17-21.
[29] Ramcharan B. G. *The concept and Present Status of the International Protection of Human Rights – fourty years after the universal declaration*. Martinus Nijhoff Publishers, 1989. p. 39-40.

human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion,"[30] while Articles 55 and 56 charge the United Nations and Member States with achieving, inter alia, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion."[31]

In addition to definition, a major contributing difficulty has been that many States regard human rights as falling within domestic jurisdiction and, therefore, not a matter to be tackled by international law. In other words, treatment of one's own nationals should not, according to those States, be the focus of the external review. The international law position is that severe violations of human rights can no longer fall within the exclusive jurisdiction of States.[32]

1. 1. 3. International Human Rights Bill and its Impact on Internationalization of Human Rights

Because of the atrocities that occurred before and during World War II, the "United Nations" proclaimed a preliminary 1942 Declaration. It was the initial landmark in the evolution of the UN system. Forty-seven Allied Powers therein declared their conviction that "complete victory over their enemies is essential to defend life, liberty, independence and religious freedom… to preserve human rights and justice in their own lands as well as in other lands… ".[33] In 1945, the UN's charter members thus formulated a number of human rights provisions in the framework of this institution dedicated to worldwide peace.

The four cornerstones of the modern International Bill of Human Rights are: the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, its two optional protocols, and the 1966 International Covenant on Economic, Social, and Cultural Rights.[34]

The historical cornerstone in the UN program for elaborating a global human rights culture is the Universal Declaration of Human Rights. This Declaration was the first comprehensive human rights document to be formally declared on a global scale.[35] The Universal Declaration of Human Rights promotes two general categories of rights. The first of two, civil and political

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[30] Art. 1(3) of the UN Charter. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, [hereinafter the UN Charter] available at: http://www.un.org/en/documents/charter/chapter9.shtml [accessed 3 April 2011].

[31] Ibid. Art. 55 and 56.

[32] Wallace R. M. M. *International Law*. London: Sweet & Maxwell, 2002, 5th ed., p. 229.

[33] Slomanson W. R. *Fundamental Perspectives on International Law*. United States: Wadsworth, 2007, 5th ed. p. 536.

[34] Ibid. p. 540.

[35] Ibid. p. 541.

rights, includes the following: the rights to life, liberty, and security of the person, the rights to leave and enter one's own country; the prohibition of slavery and torture, freedom from discrimination, arbitrary arrest, and interferences with privacy; the right to vote; freedom of thought, peaceable assembly, religion, and marriage. The second category of Universal Declaration of Human Rights consists of economic, social, and cultural rights including: the right to own property, to work, to maintain an adequate standard of living and health, and the right to education.[36] The rights in the UDHR were stated in very general terms and some of its principles are today considered to have become part of customary international law because they lead to rights accepted by States generally.[37] The UDHR has served as a framework not only for subsequent international human rights treaties but also for many national and regional human rights documents which have been mentioned in the previous chapters.

As a resolution it is not, of course, legally binding. It was never intended to be, but rather, in the words of the United States representative to the General Assembly and Chairman of the United Nations Commission on Human Rights during the drafting of the Declaration, Mrs. Eleanor Roosevelt, was to act as a "common standard of achievement for all peoples of all nations." The Declaration has been tacitly accepted by all Member States and has served as the blueprint for the constitutions of many newly independent States. It is arguable that many, if not all, the rights and freedoms enunciated in the Charter have become accepted as customary international law.[38]

The view of the Working Group of Experts on Southern Africa, which was appointed by the Commission on Human Rights in 1967, was that 'it provides the United Nations General Assembly's interpretation of what is meant by 'human rights and fundamental freedoms' in… the Charter of the United Nations'[39] It is clear that the Ad Hoc Group of Experts relied on the Universal Declaration as interpreting the human rights and fundamental freedoms contained in the Charter, as well as representing general principles of international law.

In 1966, the UN General Assembly added two core documents to the International Bill of Human Rights. These are: ICCPR and ICESCR. Unlike the 1948 UDHR, they are not mere

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[36] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), [hereinafter the UDHR] available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html [accessed 3 April 2011].

[37] Lillich, R. B., *The Growing Importance of Customary International Human Rights Law* (1995-96) 25 Georgia Journal of International and Comparative Law, Nos. 1 & 2, pp. 1-30.

[38] Wallace R. M. M. *International Law*. London: Sweet & Maxwell, 2002, 5th ed., p. 231.

[39] Ramcharan B. G. *The concept and Present Status of the International Protection of Human Rights – fourty years after the universal declaration*. Martinus Nijhoff Publishers, 1989; pp. 47-48.

declarations of principle. Both covenants were expressly cast as multilateral treaties. Adopting States could thus ratify their legally binding provisions.[40]

These two covenants share a number of common substantive provisions. Both restate the human rights provisions contained in the Universal Declaration. The distinguishing feature of the Covenants, is that they obligate ratifying States to establish the effective machinery for filing charges and then dealing with alleged violations of human rights.[41,42]

The following legal positions would specifically seem to be asserted: the Universal Declaration and the International Covenants are of 'world-wide standing and validity'. They represent minimal standards of conduct for all peoples and all nations. Some parts of these documents represent international customary law. Some provisions might even constitute norms of Jus Cogens.

1. 2. Different Attitudes Toward the Universality of Human Rights

Human rights in the contemporary world are almost universally accepted, at least in word, or as ideal standards. All states regularly proclaim their acceptance of and adherence to international human rights norms[43], and charges of human rights violations are among the strongest complaints that can be made in international relations. Three quarters of the world's States have undertaken international legal obligations to implement these rights by becoming parties to the International Human Rights Covenants, and almost all other nations have otherwise expressed approval of and commitment to their content. Donnelly calls this international normative universality of human rights.[44]

'Universal' human rights imply that there should be cross-situational consistency in attitudes and behavior toward human rights. An alternative interpretation is that attitudes and behavior toward human rights may shift across contexts, as a function of ideology. This issue is being raised because of relation to international context, as human rights are most often discussed in relation to broad international divisions, such as East and West, or developed and developing countries.

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[40] Slomanson W. R. *Fundamental Perspectives on International Law*. United States: Wadsworth, 2007, 5th ed. p. 543.
[41] ICCPR.
[42] ICESCR.
[43] The most widely known international document, cited with almost universal approval by both states and human rights activists, is the Universal Declaration of Human Rights (1948).
[44] Donnelly J., *Universal Human Rights in Theory and Practice*. Cornell University Press, 2003, p. 1.

The question of universalism in international human rights law has been very intensely debated.[45] Baderin notes however that the 'universality of' human rights has often generally been confused with 'universalism in' human rights within the international human rights discourse. Although the two concepts are interrelated, each refers to a different aspect of the universalization of human rights. An appreciation of the distinction between the two concepts is very important for a realistic approach to the question of universalism in international law.[46]

According to Baderin, 'universality of' human rights refers to the universal quality or global acceptance of the human rights idea, while 'universalism in' human rights relates to the interpretation and application of the human rights idea. He further explains that the universality of human rights has been achieved over the years since the adoption of the UDHR in 1948, and is evidenced by the fact that there is no State today that will unequivocally accept that it is a violator of human rights. Today, all nations and societies do generally acknowledge the human rights idea, thereby establishing its universality. However, Baderin says, universalism in human rights has not been so achieved. Universalism connotes the existence of a common universal value consensus for the interpretation and application of international human rights law. The current lack of such universal consensus is evidenced by the fact that universalism continues to be a subject of debate within the international human rights objective of the UN.[47]

Universalism is often confronted by the cultural relativist argument at every opportunity in the international human rights discourse. For example, during the Vienna Conference on Human Rights, representatives of some African, Asian, and Muslim States challenged the present concept of universalism in international human rights as being West-centric and insensitive to non-Western cultures. Prior to the conference, a group of Asian States had adopted the Bangkok (Governmental) Declaration recognizing the contribution that can be made by Asian countries to the international human rights regime through their diverse but rich cultures and traditions.[48] Muslim States that apply Islamic law also often advance similar arguments in respect of Islamic law.[49]

One of the most serious problems facing the international community is the apparent gap between internationally proclaimed standards and actual performance. Human rights are

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[45] Steiner H. and J.,Alston P. (eds.) *International Human Rights in Context. Law, Politics, Morals.* Oxford University Press, 2nd ed., 2000; p. 366.

[46] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 23.

[47] Ibid. p. 23-24. See also Ghai, Y., *Human Rights and Governance: The Asia Debate*. 15 Autsralian Yaerbook of International Law, 1999; p.11. See also generally Bauer, J. R., and Bell, D. A., (eds), *The East Asian Challenge for Human Rights.* Cambridge University Press, 1999.

[48] See 'Report of the Regional Meeting for Asia of the World Conference on Human Rights' (Bangkok, 29 March-2 April 1993), UN Doc. A/Conf.157/ASRM/8, Preambular paragraph 2. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/125/95/PDF/G9312595.pdf?OpenElement [accessed 5 April 2011].

[49] See generally Baderin, M. A., *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?* (2001) 1 Human Rights Law Review, No. 2, pp. 265-303.

disrespected, or violated, for various reasons. Unfortunately, many of the standards proclaimed by the United Nations have not been incorporated into national governmental systems or have not yet become part of the national culture. As a result, Governments that apply local laws, religious or traditional percepts or that feel threatened often act in disregard of internationally proclaimed standards on human rights. The international community faces a major challenge to ensure that universally proclaimed standards become integrated into every national society not only within the governmental and judicial system but within the culture of each society as well.[50]

1. 2. 1. Reservations to International Human Rights Treaties

As it was mentioned above, the contemporary International Law of Human Rights had not been adopted by all social and political systems. Thus, some States continued to assert that the scope of human rights remained a matter of internal law. To defend this assertion the States often use the certain legal means, called reservations. However, to be legitimate, reservation must fulfil the definition in Article 2, paragraph 1(a), of the Vienna Convention on the Law of Treaties, which is as follows: "a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[51]

A continuing debate in international human rights law concerns the result of reservations to multilateral treaties. Reservations allow countries to become a state party to an international treaty exempting itself from certain obligations with which state parties are normally expected to comply. Reservations, understandings and declarations to international human rights treaties are very common.[52] Scholars of international law and international relations are deeply divided in their views of the role reservations play, their legitimacy, and their consequences for the international human rights regime (see, for example, Henkin, 1995; Lijnzaad 1995).

One can broadly distinguish two competing perspectives on reservations. From one perspective, reservations are a legitimate, perhaps even desirable, means of accounting for cultural, religious, or political value diversity across nations. Reservations, understandings, and declarations are set up by those countries that take human rights seriously, foremost the liberal democracies, while other countries need not bother because they have no intention of complying

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[50] Ramcharan B. G. *The concept and Present Status of the International Protection of Human Rights – fourty years after the universal declaration.* Martinus Nijhoff Publishers, 1989. Id., p. 242.

[51] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.unhcr.org/refworld/docid/3ae6b3a10.html [accessed 12 April 2011].

[52] This is corroborated by the number and an overview in core human rights treaties which are mentioned in this thesis.

anyway. From the competing second account, however, reservations are regarded with great concern. This is because of the supposed character of human rights as universally applicable, which is seen as being undermined if countries can opt out of their obligations. The widespread use of reservations or the use of wide-ranging reservations, which exempt state parties from almost any obligation, is regarded as devaluing and undermining the entire project of codifying human rights norms in international treaties.

If states can opt out of what are meant to be universally applicable, fundamental, and inalienable human rights as they please, then the international human rights regime loses a great deal of its moral appeal. Proponents of this perspective are therefore concerned that the widespread use of reservations will undermine the regime (Neumayer, 2007), perhaps even ruin it (Lijnzaad 1995).[53]

That is not to say that reservations are never acceptable. For example, it is recognized that human rights treaties are often aspirational in the sense that they set up norms with which the vast majority of countries cannot comply immediately, even if they wanted to, but that countries are supposed to slowly move toward compliance over time. Reservations, understandings, and declarations might be acceptable as temporary devices, to be revoked once a country is ready to assume its full obligations.[54] Although it is not very common, countries sometimes do renounce at a later stage reservations they have previously set up. The Human Rights Committee to the International Covenant on Civil and Political Rights (ICCPR) encouraged countries contemplating ratification of the treaty to make such use of reservations if they could present a plan for the future withdrawal of reservations[55]. Furthermore, in exceptional circumstances, reservations might be acceptable to widen participation if otherwise fewer countries would join or to deepen the treaty if some negotiating parties will accept more demanding norms only because of the knowledge that they can opt out of them at the stage of ratification (Lijnzaad 1995).

Very rarely, a country sets up a reservation to protect higher domestic human rights standards. For example, a reservation invoked by some state parties to the Convention on the Rights of the Child is to declare that the country will not recruit anyone below the age of 18 into

[53] Some state parties concur with this view. For example, Sweden objected to reservations to the International Covenant on Civil and Political Rights by the United States, stating that "reservations of this nature contribute to undermining the basis of international treaty law" (http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterIV/treaty5.asp).

[54] Neumayer, Eric (2007) *Qualified ratification: explaining reservations to international human rights treaties*. Journal of Legal Studies, 36 (2); pp. 397-430.

[55] See generally Baylis E. A., General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties. (1999) *Berkeley Journal of International Law* 17:277–329.

the armed forces, despite the fact that Article 38 of the convention allows recruitment from the age of 15 onward.[56]

It is not the aim of this chapter to judge on whether a reservation as such is legally permissible. However, The Vienna Convention on the Law of Treaties, which came into force in 1980, states in its Article 19(c) that reservation must not be "incompatible with the object and purpose of the treaty."[57] Other state parties can object to a reservation they regard as not permissible (Vienna Convention on the Law of Treaties, Art. 20), but taking this as the criterion for permissibility would grant any country the final say on this very contested issue.[58] Therefore, it is worth to mention that on the arena of the international human rights law it is being largely followed the wording of a judgment rendered by the International Court of Justice on reservations to the genocide convention, which, actually, was a cause of the content of Article 20 of the Vienna Convention on the Law of Treaties.[59]

Some countries set up reservations when treaty norms are in actual or perceived conflict with state religion or long-established cultural patterns and traditions. The reservations by predominantly Muslim countries have been particularly prominent in this respect. One could argue, of course, that these countries set up many reservations not because they are predominantly Muslim but because they tend to be authoritarian. One might wonder whether per capita income should be a control variable, which might have an ambiguous effect on reservations. On the one hand, poorer countries might set up more reservations to provisions in human rights treaties that would incur financial costs. However, countries often justify their reservations, and very few reservations are justified on the ground of insufficient resources or relate to provisions that have clear financial implications.[60]

1. 2. 2. Theories of Universalism in the Doctrine of International Human Rights Law

This chapter emphasizes the importance of universal recognition of human rights. According to Chatterjee (2008), universally recognized human rights are as important as the values of

[56] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.unhcr.org/refworld/docid/3ae6b38f0.html [accessed 12 April 2011].
[57] Similar language is often explicitly included in the drafting of human rights treaties.
[58] For the discussion on legal permissibility of reservations in specific human rights treaties, see, for example, Lijnzaad (1995) (from bibliography beneath).
[59] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. International Court of Justice, Advisory Opinion of 28 May 1951.
[60] Neumayer, Eric (2007), *Qualified ratification: explaining reservations to international human rights treaties*. Journal of Legal Studies, 36 (2). pp. 397-430.

international tolerance and autonomy of nation-state, therefore certain fundamental rights should not be overridden in any circumstances. However, it is not easy to accommodate demands of justice and human rights with tolerance for cultural and national autonomy as it requires a careful analysis of the rights, specific cultural practices, key constitutional provisions in various democracies, and the international treaties and obligations that bind nations together.[61]

As acknowledged by UN Secretary General Kofi Annan, without exception, a lot of multilateral treaties that have been deposited with the Secretary General, have been the result of meticulous negotiations and reflect a careful balance of national, regional, economic and other interests… The aspirations of nations and of individuals for a better world governed by clear and predictable rules agreed upon at the international level are reflected in these instruments. They constitute a comprehensive international legal framework covering the whole spectrum of human activity, including human rights.[62]

When UDHR was adopted by the UN General Assembly in 1948 it was very clear from the outset that the human rights it guaranteed were intended to be universal. Apart from it being titled a 'Universal Declaration', the General Assembly proclaimed it as 'a common standard of achievement for all peoples and all nations'. The need to promote respect for the rights through national and international measures and to secure their universal and effective recognition and observance was also identified in the Declaration.[63]

The strongest arguments for the universality of human rights are still hinged on moral arguments and the need for substantive justice in human relationships. This involves the question of values and beliefs, which do change over time and space. As Dunne and Wheeler state, the idea of human rights, for a liberal natural rights theorist, is that we all have rights as members of particular communities, but human rights belong to humanity and do not depend for their existence on the legal and moral practices of different communities. Thus, even if individuals are denied rights by the laws of a particular state, they still can make a claim to rights by virtue of their membership of common humanity. Moreover, they acknowledge that the idea of common morality historically has been made by the natural law tradition. At its core, natural law maintains that there is a unity among all peoples of the world irrespective of cultural difference.[64]

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[61] Chatterjee, D. K. *Democracy in a Global World. Human Rights and Political Participation in the 21st Century.* Rowman & Littlefield Publishers, Inc., 2008, p. 7.

[62] Slomanson W. R. *Fundamental Perspectives on International Law*. United States: Wadsworth, 2007, 5th ed. p. 360.

[63] See paragraph 8 of the Preamble of the UDHR.

[64] Dunne T. and Wheeler N. J. *Introduction: Human Rights and the Fifty Years' Crisis* in Dunne T. and Wheeler N. J. *Human Rights in Global Politics*. Cambridge University Press, 2000, p. 4.

Universalism sets standards, but that need not be the same as sameness or cultural homogeneity. Booth provides with the relative examples to describe the above mentioned statement: just because an examination sets standards (for example, requiring certain minimum levels of grammar, logic and knowledge) it does not mean that every essay on Shakespeare has to be identical. Furthermore, universal standards may indeed sustain diversity rather than the opposite. The spread of feminism and gay rights breaks up the universal trans-cultural presence of patriarchy, and without universal principles, it is difficult to see how indigenous peoples have any chance of surviving.[65]

To what extent can democracy and human rights be understood as universal values? For most people human rights are inherently universal, concerned with protecting and furthering the dignity and worth of all human beings. We are unavoidably dealing with rights that are enjoyed simply by virtue of being human. Yet the universality of both the notion of human rights and the nature of human rights has been, and remains, highly contested. The human rights regime that has emerged in the period since the Second World War is global in at least two senses: first, that the individual and collective rights defined in the increasing number of international legal instruments are indeed held to apply to all human beings; and secondly, that the UN has played a central role in the process of standard-setting, promotion, and to a clearly far less satisfactory extent protection of human rights. Moreover, on most core rights the scope of governments to exempt themselves or to raise the old claim of unlimited sovereignty has gone, or been very heavily constrained.[66]

1. 2. 3. Criticism on the Universalist Approach on Human Rights

Even today, western scholars acknowledge that a globally defined human rights regime does not flourish in certain national systems. The human rights of the individual do not prevail in a society where the rights of the State necessarily take priority over the rights of the individual. Internationally defined human rights are not common to all cultures and cannot be easily incorporated into all of the world's social and political systems. Critics have consistently objected to the "Western" (sometimes referred to as "northern") derivation by the 1948 UDHR.

[65] Booth K. in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p. 55.

[66] Hurrell A., *Power, principles and prudence: protecting human rights in a deeply divided world* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p. 291-292.

It lacked input from lesser-developed nations and those with more diverse political and social viewpoints.[67]

However, there are few questions which are of great importance regarding the topic of this thesis. As, for instance, why should we accept that the stated norms are universal? Are arguments about their universal character accepted worldwide? Or do some parts of the world view many important provisions in the basic human rights instruments as particular to the Western liberal tradition, hence inapplicable to radically different states and cultures?

Steiner with his colleagues (2000) question the universal norm by itself as it may be challenged, perhaps on the ground that it lacks universal validity, or that it conflicts with ultimate religious commands, or that it violates long-standing tradition that assures cultural integrity and survival. They conclude that the legitimacy or validity of the human rights norm is itself challenged. These problems have become acute within many developing countries. In recent decades, such countries experienced strong external and internal pressures to rethink and revise, sometimes radically, their traditional beliefs and practices.[68]

Renteln has observed notably that all the eighteen drafts considered for the UDHR 'came from the democratic West and that all but two were in English'. She concluded thus that 'the fact that there were no dissenting votes should not be taken to mean that complete value consensus had been achieved'.[69] The seventh preambular paragraph to the Declaration however stated that 'a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge'. But since the Declaration contained no ultimate interpretative organ, the interpretation of the rights declared was, more or less, left to the individual States, each interpreting the values within its cultural context.[70]

The overall analysis of the circumstances in which there was being adopted UDHR leads to the conclusion that Western scholarship was consequently projecting human rights as a strictly Western concept subject to complete West-oriented interpretations. And this, as Baderin says, was met by counter arguments advocating a culturally relative interpretation of international human rights norms. Thus began the contending theories of universalism versus cultural relativism within the universal human rights objective of the UN.[71]

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[67] Slomanson W. R. *Fundamental Perspectives on International Law.* United States: Wadsworth, 2007, 5th ed. p. 542.

[68] Steiner H. J., Alston P. and Goodman R. (eds.) *International Human Rights in Context.* 3rd ed. Law, Politics, Morals. Oxford University Press, 2007, p. 541.

[69] Renteln, A. D., *International Human Rights: Universalism Versus Relativism*. Newbury Park, California: Sage, 1990; p. 30.

[70] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 26.

[71] Ibid.

It clearly is the case that in the post-colonial world, different countries have different notions of what are the appropriate rights – if any – for their inhabitants. In parts of East Asia authoritarian regimes justify restrictions on individual liberty in the interests of economic development and, on their account, in accordance with local custom. Islamic regimes do not recognize certain rights regarded as crucial in Western liberal societies – the rights to change one's religion being an obvious case in point.[72] It is difficult to see how notions of human equality could be consistent with a caste system, or with social arrangements that privilege the family rather than the individual. In many respects these differences are greater than those to be found in Western societies. Furthermore, the absence of consensus in the modern world is not simply the product of differences between the major world cultures.[73]

It follows from this analysis that the international regime which attempts on a global scale to promote de-contextualized human rights is engaging in a near-impossible task. From the liberal perspective human rights are universals, from the other perspective, they are associated with a particular kind of society, and to promote these rights is to promote this kind of society. Proponents of universal human rights are, in effect, proposing the dissolution of all kinds of political regimes except those that fall within the broad category of 'liberal democracy. Although such a dissolution might be regarded as desirable, it is by no means clear that a majority of societies worldwide are actually capable of becoming liberal societies, and it is equally unclear on what moral authority those who require them to take this step can rely.[74]

Actually, it can be accepted that not all of those national leaders who resist the demands of the international human rights regime do so from a genuine desire to protect 'difference' and a way of life; many of them are simply concerned to protect their own position. However, normative work in international relations needs to be able to distinguish between those non-liberal regimes which are simply criminal conspiracies and those which are introduced by John Rawls in his essay on 'The Law of Peoples' as 'well-ordered' but non-liberal societies.[75] Finally, all of this highlights the immense difficulty of reaching a stable and sustained consensus on human rights in a world of cultural and religious diversity.

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[72] It was on this issue that Saudi Arabia abstained from the vote on the Universal Declaration of 1948.

[73] Brown C. *Universal Human Rights: A Critique* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p.p. 116-117.

[74] Ibid. pp. 120-121.

[75] See generally Rawls, J., *The law of peoples– with "The idea of public reason revisited"*. Harvard University Press, 2000.

1. 3. Concluding Remarks

Henkin has shortly described the global development of human rights as follows: The UN Charter led to a new international law of human rights. The new law buried the old dogma that the individual is not a 'subject' of international law and that a government's behavior toward its own nationals is a matter of domestic, not international concern… It gave the individual a part in international politics and rights in international law, independently of his government.[76] However, the importance of the state and its sovereignty remains to be a basic weakness in international law because the unwillingness of states to restrict their freedom of action according to international law.

Although, the international normative consensus on human rights clearly has deepened during the period after the Second World War, there are still huge gaps between principle and practice in most countries. Following this outcome, there is a need to analyze the potential tension between legal and moral conceptions of rights, which is one of the consistent themes of the above stated chapters, and which might be the cause of the unquestionable incompatibility of legal framework and actual practice in implementation of internationally recognized human rights.

[76] Henkin, L. (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York (N.Y.): Columbia university press, 1981; p. 6.

2. CULTURAL RELATIVISM AND UNIVERSAL HUMAN RIGHTS

Cultural relativity is undeniable fact, moral rules and social institutions evidence an astonishing cultural and historical variability. Cultural relativism is a doctrine that holds that at least some of such variations are exempt from legitimate criticism by outsiders, a doctrine that is strongly supported by notions of communal autonomy and self-determination. And if human rights are, literally, the rights everyone has simply because one is a human being, they would seem to be universal by definition. So, how can we reconcile the enforcement of international, universal human rights standards with the protection of cultural diversity? It is obvious that cultural relativism is compelling Western-derived international law to undergo reconsideration and perhaps even substantial transformation.

In this chapter there will be tried to specify the nature of the relationship and an approach that preserves the tension between both, relativism and universalism, because there is a clear contradiction between the traditional anthropological view that human rights are completely relativised to particular cultures and the view of Western naturalistic philosophers claiming that human rights are universal – simply derived from a basic human nature that all share. As there was briefly presented universal conception of human rights above, here the attention will be paid to the conception of cultural relativism.

2.1. The Influence of the Diversity in Cultures on International Human Rights Law

There is an inherent tension in international human rights law between affirming a universal substantive vision of human dignity and respecting the diversity and freedom of human cultures. Traditional culture is not a substitute for human rights; it is a cultural context in which human rights must be established, integrated, promoted and protected. Human rights must be approached in a way that is meaningful and relevant in diverse cultural contexts.

The global-local divide is often conceptualized as the opposition between rights and culture, or even civilization and culture. Those who resist human rights often claim to be defending culture. For example, male lineage heads in the rural New Territories of Hong Kong claimed that giving women rights to inherit land would destroy the social fabric. These arguments depend on a very narrow understanding of culture and the political misuse of this concept. Although culture is a term which is very often mentioned, however, people rarely talk

about what they mean by it. The term has many meanings in the contemporary world. It is often seen as the basis of national, ethnic, or religious identities. Culture is sometimes romanticized as the opposite of globalization. In international human rights meetings, culture often refers to traditions and customs: ways of doing things that are justified by their roots in the past.[77]

Steiner with his colleagues raise the question: should the 'individual' be understood abstractly, similar everywhere, both within the same state and universally? Or do we understand the individual contextually, as influenced or even determined by ethnic, cultural, national, religious and other traditions and communities? He continues by stating that rights are no more determinate in meaning. The interpretations and disputes vary among states more often than any other moral, political or legal conception – for example, 'property', or 'sovereignty', or 'consent', or 'national security'. Within liberal states, different institutional solutions have been brought to the question of who should determine and develop the content of rights, and who should resolve the many of conflicts among rights.[78] In the international arena, this problem becomes all the more complex.

2. 1. 1. The Challenge of Human Rights and Cultural Diversity

The resulting merger of peoples and cultures is an increasingly global, multicultural world filling with tension, confusion and conflict. This climate of change raises new challenges to the ongoing pursuit of universal human rights. Cultural background is one of the primary sources of identity. This situation sharpens a long-standing dilemma: How can universal human rights exist in a culturally diverse world? As the international community becomes increasingly integrated, how can cultural diversity and integrity be respected? These are some of the issues, concerns and questions underlying the debate over universal human rights and cultural relativism.

Every human being has a right to culture, including the right to enjoy and develop cultural life and identity. Cultural rights, however, are not unlimited. The right to culture is limited at the point at which it infringes on another human right. No right can be used at the expense or destruction of another, in accordance with international law. This means that cultural rights cannot be invoked or interpreted in such a way as to justify any act leading to the denial or violation of other human rights and fundamental freedoms. As such, claiming cultural relativism as an excuse to violate or deny human rights is an abuse of the right to culture.

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[77] Steiner H. J., Alston P. and Goodman R. (eds.) *International Human Rights in Context. Law, Politics, Morals.* Oxford University Press, 2007, 3rd ed. p. 525.
[78] Ibid. pp. 515-516.

There is often heard that Islamization enjoys overwhelming popular support in Islamic countries and that Sharia and its principles provide solidarity and sociopolitical motivation to Muslims who demand "the immediate application of historical Sharia".[79] A majority of population in many Islamic countries reject the liberal approach of the UDHR that emphasizes political and civil and not economic and national rights. This argument urges recognition of the internal cultural values.[80]

While it is clear that the language of international human rights instruments generally supports the theory of universalism, present State practice hardly supports any suggestion that in adopting or ratifying international human rights instruments, non-Western State Parties were indicating an acceptance of a strict and exclusive Western perspective or interpretation of international human rights norms.[81]

It is indeed uncontroversial that universal human rights need to be given more specific interpretations depending on the local and national context and traditions. However, there is considerable disagreement on whether the very idea of human rights and the list of the recognized human rights can themselves be permitted to vary according to local cultures and practices. Beyond this, the political form of the solidarity requires actually hearing from others at a distance about their concerns and interests, and requires taking their views seriously into consideration.[82] It is likely, that in order to facilitate the input by other nation states in forming globally applicable human rights, new forms of transnational representation in the institutions of global governance will be needed to construct. This kind of agreements could emerge on the basis of open dialogue and intercultural respect, such that the understandings of the norms will lose much of their one-sided character and will be responsive to the new networks of interrelations in contemporary globalization.

2. 1. 2. Approaching Cultural Context as Partner to Promotion of International Human Rights System

Traditional cultures could be approached and recognized as partners to promote greater respect for and observance of human rights. Drawing on compatible practices and common values from traditional cultures would enhance and advance human rights promotions and

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[79] An-Na'im A. A., *Islamic Law, International Relations, and Human Rights: Challenge and Response*. Cornell International Law Journal 20 (1987); p. 319.

[80] For a full discussion of communalism and cultural relativism see Howard R. E., *Cultural Absolutism and the Nostalgia for Community.* Human Rights Quartely, 15 (May 1993); p. 315.

[81] Baderin, M. A., *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?* (2001) 1 Human Rights Law Review, No. 2, pp. 265-303.

[82] Gould has developed this connection further in *Globalizing Democracy and Human Rights*. Cambridge University Press, 2004.

protection. Such an approach would not only encourage greater tolerance, mutual respect and understanding, but also would promote more effective international cooperation for human rights. Greater understanding of the ways in which traditional cultures protect the well-being of their people would illuminate the common foundation of human dignity on which human rights promotion and protection stand. This insight would enable to assert the cultural relevance, as well as the legal obligation, of universal human rights in diverse cultural contexts. Recognition of particular cultural contexts would serve to facilitate, rather than reduce, human rights respect and observance. Working in this way with particular cultures recognizes cultural integrity and diversity, without compromising the universal standard of human rights.

If universal values are to enjoy widespread support, they should arise out of an open cross-cultural dialogue. Such a dialogue should include every culture with a point of view to express. Thus, it would be ensured that such values are born out of different historical experiences and cultural sensibilities, and thus genuinely universal. The dialogue occurs both in large international gatherings of governmental and non-governmental representatives and in small groups of academics and intellectuals. The former gives it political and moral authority based on the consensus of world opinion; the later gives it intellectual depth, provides forums for exchanging views, and helps generate a rational consensus that can be transferred into international gatherings.[83]

The point of a cross-cultural dialogue is to arrive at a body of values to which all the participants can be expected to agree. The main concern is not to discover values, because they have no objective basis, but to agree on them. Values are a matter of collective decision, and like any other decision it is based on reasons. Cross-cultural deliberation on moral values is an exceedingly complex activity. Participants do not share a common language, style of discourse, assumptions about the world, self-understanding, or even common values.[84]

Parekh puts as an example the practice of stoning a convicted rapist to death in some Muslim societies. For most outsiders it is inhuman and degrading, but not in the eyes of those societies who think it fully justified. As they understand it, the rapist has behaved like a beast and has lost his dignity. However, although the Muslim defence is not worthless, it is deeply flawed. It wrongly assumes that criminal looses his dignity. He retains his other human capacities, and can be reformed and reintegrated into the community or at least isolated and allowed to lead as worthwhile life as he is capable of. For these and other reasons he rightly argues that the practice is inhuman, has few if any compensating features and should be

[83] Parekh B., *Non-ethnocentric universalism* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p. 140.
[84] Ibid.

disconnected. Finally, there should be encouraged regional arrangements for defining and enforcing universal values. The cross-cultural dialogue could be replicated at the regional level, and different regional communities could develop charters of rights and freedoms and evolve mechanisms for their impartial enforcement in the light of their cultural traditions.[85]

The importance of a dialogical approach for achieving 'a common understanding'[86] of human rights is reflected in the conclusions adopted by the Council of Europe at the end of its inter-regional meeting organized in advance of the World Conference on Human Rights at Strasbourg in 1993, that:

> We must go back to listening. More thought and effort must be given to enriching the human rights discourse by explicit reference to other non-Western religions and cultural traditions. By tracing the linkages between constitutional values on the one hand and the concepts, ideas and institutions which are central to Islam or the Hindu-Buddhist tradition or other traditions, the base of support for fundamental rights can be expanded and the claim to universality vindicated. The Western World has no monopoly or patent on basic human rights. We must embrace cultural diversity but not at the expense of universal minimum standards.[87]

2.2. Theories and Doctrines Confronting with the Universalization of Human Rights Norms

The major authors of the human rights discourse seem to believe that all the most important human rights standards and norms have already been set and that what remains is elaboration and implementation. Debates about the universality of the system between the West and the countries of the other part of the world should not be viewed with concern of a lack of commitment to human rights. Attempts to question the normative framework of human rights, their cultural relevance, and the need for a cross-cultural recreation of norms should be rather complimented than rejected. However, the central issue of this chapter is whether looking at human rights from the various cultural perspectives that now coexist and interact in the world community promotes or undermines international standards.

This is particularly the case if the human rights system is seen purely as a liberal project with the overriding, though not explicitly stated, goal of imposing a Western-style liberal democracy. Taking it ultimately, the conclusion could be made that the theory of universalism

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[85] Parekh B., *Non-ethnocentric universalism* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p.p. 151-154.

[86] Baderin, M. A., *A Macroscopic Analysis of the Practice of Muslim States Parties to International Human Rights Treaties: Conflict or Congruence?* (2001) 1 Human Rights Law Review, No.2, pp.265-303.

[87] See Council of Europe Doc. CE/CMDH (93) 16, of 30 January 1993, at p.3.

seeks to destroy difference by creating legal background for various forms of intervention into other cultures with the intent of transforming them into the liberal model. This view legitimizes intervention whether in the form of military force or sanction systems. There should be respected cultural pluralism as a basis for finding common universality on some issues. A new approach should, first, to examine the social and cultural meaning and purposes of the practice, as well as its effects, and then investigate the conflicting positions over the practice in that society. Human rights are not a problem per se, nor is the human rights system irreparable. But it has to be realized that the current international human rights system mostly represents just one tradition which remains incomplete in non-Western societies. The universalization of human rights cannot succeed unless the system will be applicable in all the cultures of the world.

2. 2. 1. Increasing Acceptance of the Theory of Cultural Relativism

The obvious fact that different societies organize their moral lives differently. For the relativists, different societies raise different systems of moral beliefs depending on such things as their history, traditions, geographical circumstances, and views of the world. Every society profoundly shapes the personality, self-understanding, temperament and aspirations of its members. Therefore they are psychologically and morally equipped to live by these beliefs alone, and suffer a profound disorientation when required to live by others. Even if the beliefs are mistaken, which of course there are no means of knowing, they are their beliefs, tied up with their identity and moral constitution, and best suited to them. In one form or another, relativism has been a highly popular doctrine.[88]

Cultural relativism may be defined as the position according to which local cultural traditions including religious, political, and legal practices, properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.[89] A central idea of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.[90] Thus, relativists claim that substantive human rights standards vary among different cultures. What may be regarded as a human rights violation in one society may properly be considered lawful in another, and Western ideas of

[88] Parekh B., *Non-ethnocentric universalism* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p.p. 128-129.

[89] Many contemporary situations exemplify the tension between domestic cultural imperatives and international norms: mutilation and whipping as criminal punishment; the circumcision of women; the derogation of women; and various authoritarian methods of government. All of these examples of contemporary practices, while clearly unlawful by international standards, are defended by some as being required or permitted by cultural traditions. These examples are taken from the reports on human rights practices.

[90] Since the main concern of international human rights is the position of the individual vis-à-vis the government, the expression "human rights practices" encompasses, in addition to governmental acts, actions by groups or individuals that governments tolerate.

human rights should not be imposed upon Third World societies. Alternatively, the relativists thesis holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.[91] Some relativists would even agree that a few basic human rights, such as the right to life and the freedom from torture, are absolute in the sense that even cultural traditions may not override them. But relativists do not regard other rights, such as the rights to physical integrity, the right to participate in the election one's government, the right to a fair trial, freedom of expression, freedom of association, freedom of movement, or the prohibition of discrimination, as required by international law.[92] The argument of cultural relativism frequently includes or leads to the assertion that traditional culture is sufficient to protect human dignity, and therefore universal human rights are unnecessary.

The theory of cultural relativism is thus advocated mostly by non-Western States and scholars who contend that human rights are not exclusively rooted in Western culture, but are inherent in human nature and based on morality. Thus human rights, they claim, cannot be interpreted without regard to cultural differences of peoples. Advocates of cultural relativism assert that 'rights and rules about morality are encoded in and thus depend on cultural contexts'.[93] The theory emanates from the philosophy of the need to recognize the values set up by every society to guide its own life, the dignity inherent in every culture, and the need for tolerance of conventions.[94]

The idea against universal values Donnelly calls a 'radical cultural relativism' in which 'culture' becomes the supreme ethical value and 'sole source of the validity of a moral right or rule'.[95] What is emphasized by culturalism is the uniqueness and exclusivity of each culture. Booth developed a powerful argument that the particularity of each culture was such that 'its' values and ways of behaving can and should be interpreted only in terms of the particular values, beliefs and rationalities of the culture concerned. The aim was to try and understand each culture 'from the inside', so that those who belong to particular cultures are seen as they see themselves, or wish to be seen. Herskovits wrote that cultural relativism developed because of the problem of finding valid cross-cultural norms. Ethical relativism is generally conceived as standing at the

[91] Teson F. R., *International Human Rights and Cultural Relativism*. Journal of International Law 25 Va. 869 (1984-1985); p. 871.
[92] Murphy C. F., *Objections to Western Conceptions of Human Rights*. 9 Hofstra L. Rev. 433 (1980-1981).
[93] Steiner H. J. and Alston P. (eds.) *International Human Rights in Context. Law, Politics, Morals*. 2nd ed. Oxford University Press, 2000, p. 366.
[94] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 27.
[95] Donnelly J., *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press, 2003; p.109.

opposite pole from absolutism, which is the position that there is a set of moral principles that are universally valid as standards of judgment.[96]

Although, as Parekh has shown, some values are universally valid, they are by their very nature general and need to be interpreted, prioritized and applied to the particular circumstances of each society. Since different societies have different traditions and ways of understanding the world, they will naturally do so differently. For example, human life is a universal value, but different societies take different views on when it begins and ends and what respect for it entails. Respect for human dignity requires that we should not humiliate or degrade others or require them to do demeaning work. What constitutes humiliation, degradation or demeaning work, however, varies from society to society and cannot be universally legislated. In some societies an individual would rather be slapped on the face than coldly ignored or subjected to verbal abuse. In some, again, human dignity is deemed to be violated when parents interfere with the choice of the spouse; in others their intervention is a sign that they care enough for the dignity and well-being of their children to press their advice on them and save them from making a mess of their lives. Different societies might also articulate, defend and rely on different mechanisms to realize universal values. Some might prefer the language of claims and even rights, and maintain that human beings have rights to dignity and protection of their interests. Others might prefer the language of duties, imposing moral and social obligations on their members.[97] An-Na'im has reiterated that: 'Any concept of human rights that is to be universally accepted and globally enforced demands equal respect and mutual comprehension between rival cultures'.[98]

Since universal values can be defined, prioritized and realized differently by different societies, it is faced a problem. We cannot expect a society to live by our views on the matter if it ignores its cultural differences, disrespects its capacity for self-determination, and requires it to live by norms it might neither understand nor be able to accommodate in its way of life. However, we cannot leave it free to define and practice universal values as it pleases because it might interpret them out of existence, and even claim their authority to justify its unacceptable practices.[99] Some commentators have argued that in the absence of centralized international organs, one cannot give a manageable core of meaning to international human rights norms.[100] It

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[96] Steiner H. J., Alston P. and Goodman R. (eds.) *International Human Rights in Context. Law, Politics, Morals.* Oxford University Press, 2007, 3rd ed.; p. 521.

[97] Parekh B., *Non-ethnocentric universalism* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000; pp. 150-151.

[98] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005; pp. 28-29.

[99] Parekh B., *Non-ethnocentric universalism* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p. 150.

[100] Watson J. S., *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*. 1979 U. Ill. L.F. 609 (1979).

may be suggested along these lines that, relativism best accounts for the realities of contemporary international society.[101]

2. 2. 2. Critical Approach to Cultural Relativism as an Area of International Human Rights Law

Taken to its extreme, relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been constructed over the decades. If cultural tradition alone governs State compliance with international standards, then widespread disregard, abuse and violation of human rights would be given legitimacy. Accordingly, the promotion and protection of human rights perceived as culturally relative would only be subject to State discretion, rather than international legal imperative. By rejecting or disregarding their legal obligation to promote and protect universal human rights, States advocating cultural relativism could raise their own cultural norms and particularities above international law and standards.

Cultural relativism is a belief pursued by non-Western nations particularly by many Muslim nations. Poulter (1998) in arguing that cultural relativism is often used to justify suppression or despotism states that it ignores relativism where it is employed to protect religious purity. A clear example of class interest has been the perpetuation of the caste system in India.[102] Traditionalism was evident in the way Nazi Germany romanticized history to try and create an image of a continuous racial and national spirit, running through the heroes of the past to the Hitler regime. In such ways traditionalism is a means by which a particular political group, class, elite, gender or government seeks to achieve and maintain ascendancy. Culturalism must not be allowed to tyrannize human rights. At this point in history they are regressive in human rights terms, because the values and structures they perpetuate are those of patriarchy, class, religious traditionalism, ethnic values and so on.[103]

Cultural relativism is a parent of ethical relativism, however, it is ethically flawed. The later denies the appropriateness of anyone from one culture making meaningful moral judgments about behavior or attitudes in another. The relativist position is confused, and also infused with

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[101] Indeed, centralized systems for the protection of human rights aim to give uniform meaning to basic rights and freedoms in countries with disparate cultural and legal traditions. The system established by the European Convention provides a striking illustration. In the Sunday Times Case, the European Court of Human Rights held that the ancient British institution of contempt of court as applied by British courts was inconsistent with the freedom of speech guaranteed by the European Convention. *Sunday Times Case*, 23 Y.B. Eur. Conv. Human Rights 480 (1980) (Eur. Comm'n on Human Rights).

[102] Donnelly J., *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press, 2003; ch. 7 discusses caste in India.

[103] Booth K. *Theories of Human Rights* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p.p. 37-40.

moral nihilism.[104] From an ethical relativist perspective one could not easily describe some traditional practices as 'torture not culture', or argue that beheading, amputation or prolonged stays on 'death row' are not civilized ways of dealing with criminals. Relativism, taken to its ultimate asks one not to intervene, and leave judgment to those on the inside, who share the same values. It is a form of what Callinicos calls 'ethnocentric blindness'.[105] Furthermore, Donnelly states that numerous and regrettably common practices, such as disappearances, arbitrary arrest and detention, or torture, are entirely without cultural basis. Such practices can be condemned on the basis of both internal and external evaluations and thus are in no sense capable of defence. In traditional cultures, communal customs and practices usually provide each person with a place in society and a certain amount of dignity and protection. The conclusion can be drawn, that the human rights violations of most Third World regimes are as antithetical to such cultural traditions as they are to "western" human rights conceptions.[106]

The politics of cultural relativism can be expressed as 'the tolerance of diversity'. But the key question is: how much diversity should be tolerated? Cultural relativists argue against universal ideas while valuing tolerance as a universal. Parekh (2000) in his discussion arrives at a body of five universal moral values. They are human unity, human dignity, human worth, promotion of human well-being or fundamental human interests, and equality. They are values because they deserve to be pursued, moral because they relate to how we should live and conduct our relations with others, and universal because they have claims to the allegiance of all human beings. They are not specific to a particular culture or society, because they are grounded in an interculturally shared human identity and are capable of being defended by interculturally shareable good reasons. Since the values can be shown to be worthy of universal allegiance and are in that sense universally valid, all societies can be expected to respect them both in their internal organization and mutual relations. Thus the values would be unaffected by territorial borders.[107]

An obligation in international law indeed exists to respect the cultural identities of peoples, their local traditions, and customs.[108] For example, the classical international law on the

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[104] Wilson (ed.), *Human Rights, Culture and Context*. London : Pluto press, 1997; p. 8.
[105] Callinicos A., *Theories and Narratives: Reflections on the Philosophy of History*. Cambridge : Polity press, 1995; p. 198.
[106] Donnelly J., *Cultural Relativism and Universal Human Rights*. Human Rights Quarterly, Vol. 6, No. 4 (Nov., 1984), pp. 400-419.
[107] Parekh B., *Non-ethnocentric universalism* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p.p. 149-150.
[108] UN General Assembly, *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, 24 October 1970, available at: http://www.unhcr.org/refworld/docid/3dda1f104.html [accessed 23 April 2011]. ("Every state has an inalienable right to choose its political, economic, social, and cultural systems without interference in any form by another State") [hereinafter cited as Declaration on Principles].

treatment of aliens has long recognized that Westerners cannot expect to enjoy Western judicial procedures in non-Western states. Arbitral tribunals have consistently refused to accept the claim that partially non-adversary criminal procedures violate the international minimum standard concerning the right to a fair trial.[109]

However, to say that cultural identities should be respected does not mean that international human rights law lacks a substantive core.[110] Such a core can be seen from international human rights treaties, both regional and universal,[111] and diplomatic practice, including the relevant practices of international organizations. Indeed, human rights treaties offer a surprisingly uniform articulation of human rights law. They may safely be used as a reference, regardless of how many or which states are parties.[112] The rights to life, to physical integrity, to a fair trial, freedom of expression, freedom of thought and religion, freedom of association, and the prohibition against discrimination are all rights upon which international instruments agree. So, it seems that these rights should have essentially the same meaning regardless of local traditions.[113]

Clearly the most important controversies are likely to arise over practices that are defensible according to internal standards but unacceptable by external standards; these are the practices of concern in the discussion of cultural relativism and universal human rights. For example, an election in which people are allowed to choose an absolute dictator for life – "one man, one vote, once", – in no way represents a defensible interpretation of the right.[114] Also, it can be proved by some African illustrations. For example, in Malawi, President Hastings Kamuzu Ban utilizes "traditional" courts in order to deal with political opponents outside of the

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[109] *Salem Case* (Egypt v. US), 2 R. Int'l Arb. Awards 1161, 1197 (1932); *McCurdy Case* (US v. Mexico), 4 R. Int'l Arb. Awards 418 (1929).

[110] Schachter O. *The Charter and the Constitution: the Human Rights Provisions in American Law*. 4 Vand. L. Rev. 643 (1950-1951). McDougal M., Lasswell H. and Chen C. *Human Rights and World Public Order*. 72 Nw. U. L. Rev. 227 (1977-1978), (while different peoples may assert human rights demands in different modalities, a universal insistence on certain basic values exist among all cultures).

[111] See, e.g., African Charter on Human Rights and Peoples' Rights, Organization of African Unity, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (Jan. 1981), reprinted in 21 I.L.M. 58 (1982) [hereinafter cited as African Charter]; American Convention on Human Rights, O.A.S. Off. Records OEA/Ser. K/XVI/1.1, Doc. 65 (1969), reprinted in 9 I.L.M. 101 (1970), [hereinafter cited as American Convention]; ICCPR; European Convention on Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, 1950 Gr. Brit. T.S. No 71 (Cmd. 8969) (1950), [hereinafter cited as European Convention].

[112] As of December 2010, 167 states are parties to the ICCPR, all Council of Europe member states are parties to the European Convention, 24 of the 35 OAS's member states have ratified the American Convention. As of 15 June 2009, 53 countries have ratified the African Charter. For the view that the treaties themselves have created human rights obligations to third parties, see D'Amato, *The Concept of Human Rights in International Law*, 82 Colum. L. Rev. 1110 (1982).

[113] A growing number of Third World scholars reject the relativist approach. See, e.g., Haile M., *Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality.* 24 Va. J. Int'l L. 575 (1983-1984); (African traditions are not inconsistent with international human rights law).

[114] Donnelly J., *Cultural Relativism and Universal Human Rights*. Human Rights Quarterly, Vol. 6, No. 4 (Nov., 1984), pp. 400-419.

regular legal system. Orton and Vera Chirva, after being kidnapped from Zambia, were brought before a "traditional court" made up of five judges and three tribal chiefs, all appointed directly by Banda. While there was a prosecutor, no defence attorney was allowed, and the only possible appeal was to Banda personally.[115] Such procedures have not the slightest connection with authentic traditional practices.

Cultural relativists advance divergent positions. The most uncompromising is "the position according to which local cultural traditions, including religious, political, and legal practices, properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society". This position espouses the view that "culture is the supreme ethical value, more important than any other. Human rights, in particular, should not be promoted if their implementation might result in a change in a particular culture".[116] The views of most conservative Islamists are in harmony with this approach. They reject, explicitly or implicitly, the universal applicability of the UDHR.

2. 2. 3. Cultural Relativism in Regard to Customary International Law

It is necessary to determine whether customary international law supports the claims of the cultural relativists. The principles of self-determination and non-intervention offer, at first glance, possible legal support for the relativist doctrine. The democratic, anti-authoritarian view holds that internal self-determination requires internal democracy and respect for the human rights of all peoples.[117] This thesis finds support in the intent of the framers of the UN Charter.[118] Although a consideration of the concerns which prompted the development of the self-determination principle leads to a rejection of the relativist thesis. The self-determination principle has traditionally been directed against colonialism and various forms of foreign domination.[119] It primarily guarantees to people the right to establish their own government and pursue their cultural development without external interference.[120] Yet external pressure for

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[115] Donnelly J., *Cultural Relativism and Universal Human Rights*. Human Rights Quarterly, Vol. 6, No. 4 (Nov., 1984), pp. 400-419.

[116] Howard R. E., *Cultural Absolutism and the Nostalgia for Community*. Human Rights Quartely, 15 (May 1993); p. 319.

[117] Rosenstock R., *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey.* 65 Am. J. Int'l L. 713 (1971).

[118] Teson F. R., *International Human Rights and Cultural Relativism*. Journal of International Law 25 Va. 869 (1984-1985); p. 880.

[119] External self-determination means the right of peoples to decide their international status. It represents an expression of modern anti-colonialist values in the international community. The literature on external self-determination is very broad. See generally, Pomerance M., Self-determination in law and practice– the new doctrine in the United Nations. Martinus Nijhoff Publishers, 1982.

[120] See generally, Pomerance M., Self-determination in law and practice– the new doctrine in the United Nations. Martinus Nijhoff Publishers, 1982; pp. 9-28. Declaration on the Granting of Independence to Colonial Countries and

human rights compliance has nothing to do with colonial domination, imperialism and the other evils against which self-determination was conceived. This analysis provides no support for the relativist doctrine.

As to the non-intervention principle, there is broad support today for the proposition that discussing human rights does not amount to "intervention" within the meaning of article 2(7) of the UN Charter.[121] For the relativist, the non-intervention principle and internal self-determination have identical content. Saying that people may choose whatever government they want is the same as saying that other states may not intervene to criticize human rights violations.[122] In sum, under international law, all individuals, regardless of their state of origin, residence, and cultural environment, are entitled to fundamental human rights. International law does not relieve governments of the obligation to respect these rights simply because a particular right is inconsistent with local traditions.

However, the cultural basis of cultural relativism also must be considered. Standard arguments for cultural relativism rely on examples such as the pre-colonial African village, Native American tribes, and traditional Islamic social systems. Rights that are held elsewhere against society equally by all persons simply because they are human beings are foreign to such communities. The claims of communal self-determination are particularly strong here. It is important, however, to recognize the limits of such arguments. Where there is an indigenous cultural tradition and community, arguments of cultural relativism based on the principle of the self-determination of people offer a strong defence against outside interference – including disruptions that might be caused by the introduction of "universal" human rights. However, even most rural areas have been substantially penetrated, and the local culture "corrupted", by foreign practices and institutions ranging from the modern state, to "western" values, products, and practices. In the Third World[123] today, more often there are seen dual societies that seek to accommodate seemingly unrelated old and new ways. In other words, the traditional culture advanced to justify cultural relativism far too often no longer exists. Therefore, while

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Peoples - resolution 1514 (XV) [hereinafter cited as Declaration of Colonial Independence] emphasizes decolonization and independence, which suggest an "externalist" approach to self-determination.

[121] Article 2(7) of the UN Charter: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

[122] Teson F. R., *International Human Rights and Cultural Relativism*. Journal of International Law 25 Va. 869 (1984-1985); p. 884.

[123] The reference is made by the fact that arguments on cultural relativism today are made largely on behalf of practices in Third World countries.

recognizing the legitimate claims of self-determination and cultural relativism there must be paid attention to cynical manipulations of dying, lost or even mythical cultural past.[124]

As Donnelly argues, there are substantive human rights limits on even well-established cultural practices. For example, while slavery has been customary in numerous societies, today it is a practice that no custom can justify. Likewise, sexual, racial, ethnic, and religious discrimination have been widely practiced, but are indefensible today. However, this is not to say that certain cultural differences cannot justify even fundamental deviations from "universal" human rights standards.[125]

Nickel and Reidy state that respect for national self-determination and tolerance for cultural diversity are compatible with respect for universal human rights. Although sometimes a nation's policies may go against some rights of its citizens, if the violation does not involve the very core of fundamental human rights in a sustained and gross way, then those policies may still be tolerated out of respect for autonomy, though they need not be approved and can be targeted for international criticism, which may eventually bring changes in those policies. This shows that just as there are moral limits to tolerance toward cultural practices, likewise there are moral limits to tolerance toward autonomy of states depending on how they honor basic human rights of their own members.[126]

2. 2. 4. Intermediate Theories between Two Extremes

Howard suggests an attractive, and widely applicable, compromise strategy in a recent discussion. She argues strongly on a combination of practical and moral grounds for national legislation that permits women (and the families of female children) to "opt out" of traditional practices. Guaranteeing a rights to "opt out" of traditional practices in favor of "universal" human rights or alternative human rights interpretations permits an individual in effect to choose his or her culture, or the terms on which he or she will participate in traditional culture.[127]

Sometimes, however, allowing such choice is impossible, because the conflicting practices are incompatible. For example, a right to private ownership of the means of production is incompatible with the maintenance of a village society in which families hold only rights to use to communally owned land; allowing individuals to opt out and fully own their land would destroy the traditional system. Similarly, full freedom of religion is incompatible with certain

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[124] Donnelly J., *Cultural Relativism and Universal Human Rights.* Human Rights Quarterly, Vol. 6, No. 4 (Nov., 1984), pp. 400-419.
[125] Ibid.
[126] Slomanson W. R. *Fundamental Perspectives on International Law*. United States: Wadsworth, 2007, 5th ed., pp. 7-8.
[127] Donnelly J., *Cultural Relativism and Universal Human Rights*. Human Rights Quarterly, Vol. 6, No. 4 (Nov., 1984), pp. 400-419.

well-established traditional Islamic views.[128] Such cases, however, are the exceptions rather than the rule.

A more accommodating relativist argument, however, has gained respectability among many human rights scholars. In a recent study on universalism versus relativism Renteln distinguishes among a set of cultural relativist theories and adopts a version that is sensitive to today's intellectual-political climate and that is most relevant to human rights. She argues that the issues of human rights is best discussed within the concept of "ethical relativism, a subset of cultural relativism".[129] Quoting Schmidt, she writes that "There are or there can be no value judgments that are true, that is, objectively justifiable independent of specific cultures".[130] This much is shared by all cultural relativists. Renteln maintains, however, that cross-cultural study reveals that values exist, which all cultures share. In her view a set of truly universal human rights norms might be reconstructed based on values shared by all cultures.[131]

This approach aims at a discovery of a cross-cultural foundation for human rights. It accepts the UDHR but seeks to enhance its global adherence by discovering local values compatible with its assumed universal standards. Howard writes, "One can certainly accept Renteln's view that international human rights standards have a better chance of being put into practice if they reflect cultural ideas".[132] However, a lot of problems arise when one actually tries to locate or construct roots for human rights standards in local cultures. The paradoxical and contradictory practices of the Islamist rulers of Iran emanate from the fact that they reject the practical necessity of the universal human rights standards. The individual is left unprotected by a state that uses contrived, religiously-sanctioned, political rationales for a reincorporation of the individual into an imagined communitarian society.[133] Political-legal behaviors in Iran are often explained as based on a cultural foundation different from that of the West. For example, Tibi observes that "legal notion within 'Islamic intellectual tradition' differs considerably from the European one" and that international law lacks "a substantive cultural consensus" needed for an international legal order.[134]

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[128] Donnelly J., *Cultural Relativism and Universal Human Rights*. Human Rights Quarterly, Vol. 6, No. 4 (Nov., 1984), pp. 400-419.
[129] Renteln, A. D., *International Human Rights: Universalism Versus Relativism*, Newbury Park, California: Sage, 1990; p. 69.
[130] Ibid. p. 71.
[131] Ibid., p. 86.
[132] Howard R. E., *Cultural Absolutism and the Nostalgia for Community*. Human Rights Quartely, 15 (May 1993); p. 320.
[133] Afshari R., *Essay on Islamic Cultural Relativism in the Discourse of Human Rights*. Human Rights Quartely 16 (1994); p. 249.
[134] Afshari R., *Essay on Islamic Cultural Relativism in the Discourse of Human Rights*. Human Rights Quartely 16 (1994); p. 250. (Quoting Tibi B., "Islam and the Cultural Accommodation of Social Change". Boulder, CO: Westview Press, 1991; p. 61.)

Minimum universalism represents an intermediate position between relativism and monism. It agrees with relativism that moral life can be lived in several different ways, but insists that they can be judged on the basis of a universally valid body of values. While it thus agrees with monism, it differs from it in arguing that the values can be combined in several equally valid ways and that the later cannot be hierarchically graded. It rejects the monist ambition to show that one way of life is the best or truly human. For the minimum universalist, the universal values constitute a kind of moral threshold, which no way of life may trespass without denying its claim to be considered good or even tolerated. Once a society meets these basic principles, it is free to organize its way of life as it considers proper. Minimum universalism enjoys considerable popularity among contemporary writers. Hart's minimum content of natural law,[135] Walzer's appeal for rights to life, liberty and the satisfaction of basic human needs, [136] Rawls' primary goods,[137] and Nussbaum's and Sen – inspired list of functional capabilities[138] are all examples of this. There is considerable disagreement among contemporary writers as to how to arrive at universal principles. Whatever their mode of arriving at universal principles, these writers are all agreed that the principles specify the moral minimum which all societies should satisfy. It is only when it has done this that a society can enjoy what Hampshire calls a 'license for distinctiveness'.[139]

Parekh agrees with Booth that the fundamental problem with relativism is 'that we have no means of judging a society's moral beliefs and practices'. He identifies that between two extremes lies 'minimum universalism' which recognizes the fact of moral diversity but believes 'that moral life can be lived in several different ways, but insists that they can be judged on the basis of a universally valid body of values'. The same position is recalled by John Rawls and Marta Nussbaum. However, Parekh also argues that this position does not overcome some objections. First, it relies on an account of human nature which brings it critically close to monism; secondly, it is questionable whether there is a normative consensus on prohibiting even the most cruel and inhumane practices; and thirdly, universal principles are either too abstract or too weak to provide the possibility of judgment across cultures, which, he contends, can only be constructed by means of a dialogue between equals.

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[135] Hart H. L. A., *The Concept of Law*. Oxford: Clarendon press, 1981.

[136] Walzer M., *Nation and Universe*. The Tanner Lectures on Human Values. Delivered at Brasenose College, Oxford University, 1989. Walzer M., *Thick and Thin: Moral Argument at Home and Abroad*. Notre Dame (Ind.): University of Notre Dame press, 1994.

[137] Rawls J., *A theory of justice*, Harvard University Press, 1999.

[138] Nussbaum M., *Non-relative virtues: an Aristotelian approach*, in Nussbaum M. and Sen A. (eds.), *The Quality of Life*. Oxford University Press, 1993.

[139] Parekh B., *Non-ethnocentric universalism* in Dunne T. and Wheeler N. J. (eds.) *Human Rights in Global Politics*. Cambridge University Press, 2000, p. 132.

2. 2. 5. Use of Margin of Appreciation Doctrine Internationally

Some of authors stress out the need for the adoption of the margin of appreciation doctrine by the UN human rights treaty bodies in interpreting international human rights treaties.[140] The margin of appreciation doctrine exists within the European human rights regime and it has been defined as 'the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws'.[141] In practice, the UN Human Rights Committee has not formally adopted the margin of appreciation doctrine[142] but has alluded to it only on one occasion in *Herzberg and Others v. Finland*[143] where the authors had brought a complaint alleging violation of their freedom of expression under Article 19 of the ICCPR. The State Party had in that case censured TV programmes dealing with homosexuality. The State Party argued that the restrictions were for the protection of public morals. In finding that there had been no violation of Article 19, the HRC stated that: 'It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion ought to be accorded to the responsible national authorities.'[144] The Committee however rejected the doctrine later in *Ilmari Lansman et al. v. Finland*.[145] The HRC has obviously refrained from adopting the margin of appreciation doctrine due to the fear of its potential abuse by States Parties to limit important rights. Furthermore, three recent International Court of Justice decisions – Oil Platforms[146], Avena[147] *and* Wall in the Occupied Palestinian Territory[148] – highlight the uncertain status of the margin of appreciation doctrine in the Court's jurisprudence. However, the application on grounds of public sensibility and morality of this doctrine should be justifiable on the obvious accepted practice in the State or region concerned. The scope of margin of appreciation doctrine has to be determined by the circumstances of each case as has been demonstrated in the practice of the European Court.

The European Court of Human Rights has effectively applied the doctrine in a variety of cases under the European Convention on Human Rights. The conclusion made by Macdonald shows the relevance and rationality of the proposal for the adoption of the margin of appreciation

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[140] On the 'margin of appreciation' doctrine see e.g. Steiner H. J. and Alston P. (eds.) *International Human Rights in Context. Law, Politics, Morals*. 2nd ed. Oxford University Press, 2000, pp. 854-857; Harris D. J., O'Boyle M., and Warbrick C., *Law of the European Convention on Human Rights*. London : Butterworths, 1995, pp. 12-15; Clayton R. and Tomlinson H., *The Law of Human Rights.* Oxford: Oxford university press, 2000, pp. 273-278.

[141] Yourow H. C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*. Martinus Nijhoff Publishers, 1996, p. 13.

[142] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 231.

[143] *Herzberg and Others v. Finland.* Communication No. 61/1979: Finland. 02/04/82. CCPR/C/15/D/61/1979.

[144] Ibid.

[145] *Ilmari Lansman et al. v. Finland.* Communication No 511/1992 : Finland. 1994.11.08. CCPR/C/52/D/511/1992.

[146] *Oil Platforms (Iran v US)* [2003] ICJ Rep 90.

[147] *Avena (Mexico v US)* [2004] ICJ Rep (forthcoming).

[148] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Opinion of 9 July 2004 [2004] ICJ Rep (forthcoming), 43 ILM (2004) 1009 (hereinafter *OPT Wall*).

doctrine within the UN international human rights regime as follows: The margin of appreciation which is more principle of justification than interpretation, aims to help the Court show the proper degree of respect for the objectives that a Contracting Party may wish to pursue, while at the same time preventing unnecessary restrictions on the fullness of the protection which the Convention can provide. Practices within States vary. In one State a law viewed in the abstract outside other national circumstances might be seen as violating the Convention, but viewed in the light of some other national matter or practice it may not. The margin of appreciation has very much assisted in the realization of a European-wide system of human-rights protection, in which a uniform standard of protection is secured. The margin of appreciation enables the Court to balance the sovereignty of Contracting Parties with their obligation under the Convention.[149] Furthermore, Mahoney observes that in any system of international enforcement of human rights, 'some interpretational tool is needed to draw the line between what is properly a matter for each community to decide at a local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in traditions and culture'.[150]

Most renowned is the extensive application of the doctrine by the ECtHR in numerous cases.[151] For example, in the 1976 *Handyside* case[152] which concerned the publication of a book aimed at school children, a chapter of which discussed sexual behavior in explicit terms. The ECtHR was willing to allow a limitation of freedom of expression in the interests of the protection of public morals. In accepting the government's position that the measure in question was a legitimate restriction upon freedom of expression, the Court stated the main parameters of the margin of appreciation doctrine which were followed in the subsequent case law.

The subsequent case law of the ECtHR indicates that the manner of application of the doctrine depends on a variety of factors, which determine the scope of margin afforded to the national authorities. Three factors are particularly pertinent:[153] comparative advantage of local authorities - subjective norms or, in other words, circumstance-dependent, which domestic institutions are better situated to assess, should entail a broader margin than objective norms, whose manner of application the ECtHR can independently assess;[154] indeterminacy of the applicable standard – the greater is the degree of European consensus on the application of the

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[149] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p.p. 232-233.

[150] Steiner H. J. and Alston P. (eds.) *International Human Rights in Context. Law, Politics, Morals*. 2nd ed. Oxford University Press, 2000; p. 854.

[151] See, e.g., *Engel v Netherlands,* 1 EHRR 647 (1976); *Golder v UK,* 1 EHRR 524 (1975); *De Wilde v Belgium,* 1 EHRR 373 (1971); *Goodwin v UK,* 22 EHRR (1996) 123; *Pretty v UK,* 35 EHRR (2002) 1; *Dudgeon v UK,* 4 EHRR (1981) 149.

[152] *Handyside v UK,* 1 EHRR 737 (1976).

[153] Brems, *The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights*, 56 Heidelberg J Int'l L (1996); p. 256; H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*. Martinus Nijhoff Publishers, 1996; pp. 186–196.

[154] See *Sunday Times v UK* (1980) 2 EHRR 245, at para. 59.

standard, the narrower is the margin that should be accorded to state parties;[155] and the nature of the contested interests – the importance of the national interest at stake ought to be balanced against the nature of the individual rights compromised by the reviewed limitation. The width of the margin to be granted to states should reflect the balancing formula comprised of the above mentioned factors.[156]

The purpose of this chapter is not only to present the doctrine, but also to identify and explain the principles developed with the application of the margin of appreciation doctrine for evaluating whether the national authorities overstep the margin or not. These principles can be extracted from the first case where the Court has discussed the margin of appreciation - Handyside[157]. Altogether, these principles form a test and without their full understanding, a clear explanation of the margin of appreciation doctrine remains impossible.

The first principle – the effective protection, inherent in the text, holds that, since the overriding function of the Convention is the effective protection of human rights rather than the enforcement of mutual obligations between States, its provisions should not be interpreted restrictively in deference to national sovereignty[158].

The principle of subsidiarity and review means that the state should itself decide democratically what it is appropriate for itself. Therefore, the main responsibility of ensuring the rights provided in the Convention rests with the Member States, and the role of the Strasbourg organs is limited to ensure whether the relevant authorities have remained within their limits. There is an obvious tension between subsidiarity and universality – the idea of insisting on the same European protection for everyone, by the developing of common standards.

Many of the rights contained in the Convention are conditional and may interfere with particular circumstances. However, these permitted infringements must possess certain characteristics if they are to be accepted within the Convention and its case-law. Namely, the interferences need to be prescribed by law or to be in accordance with law; they need to have legitimate aims; and they need to be necessary in a democratic society. Only with these three conditions they can be titled as permissible.

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[155] H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*. Martinus Nijhoff Publishers, 1996 p. 54. For criticism of the Court's emphasis on consensus, see Benvenisti, *Margin of Appreciation, Consensus and Universal Values*. 31 N.Y.U. J. Int'l L. & Pol. 843 (1998-1999); pp. 851–852;

[156] For example, see *Leander v Sweden,* 9 EHRR (1987) 433, at para. 59 ('[T]he national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life'). Note also that the Court held that no margin of appreciation exists at all in cases alleging torture or inhuman or degrading treatment or punishment. Benvenisti, 'Margin of Appreciation, Consensus and Universal Values. 31 N.Y.U. J. Int'l L. & Pol. 843 (1998-1999); p. 845;

[157] *Handyside v. The United Kingdom*, judgment of 7.12.1976, § 48-49.

[158] Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Martinus Nijhoff Publishers, 1998; p. 74.

The principle of proportionality is at the heart in the investigation of the reasonableness of the restriction by the Court. Although the Court offers a margin of appreciation to the Member State and its institutions, the main role of the Court is to ensure that the rights laid down in the Convention are not interfered with unnecessarily. The strict approach set out in Handyside consists of a four questions test: is there a pressing social need for some restriction of the Convention; if so, does the particular restriction correspond to this need; if so, is it a proportionate response to that need; and in any case, are the reasons presented by the authorities, relevant and sufficient.

However, in practice the Court appears to take account of a number of factors when deciding whether an interference with Convention rights is proportionate or not. The extent to which the interference restricts the right is important. The Court will regard interference as disproportionate if it impairs the very essence of the right and if the justification for the interference cannot be proved.[159] When dealing with interferences except those brought to property rights, the Court has often decided the question of proportionality by asking whether a particular measure could be achieved by a less restrictive means. For example, in the Campbell[160] case, the Court rejected the justification for opening and reading all correspondence between prisoners and their solicitors, pointing out that the prison service could open, but not read, to see if they contained illicit enclosures.

When the interrelationship between the proportionality and the margin of appreciation comes to be considered, the following factors appear to be important: first, the significance of the right in question as the Court has stated that some Convention rights have been characterised as fundamental (such as the right to a fair trial[161] or to private life[162] or to freedom of expression[163]); second, the objectivity of the restriction in question as, in *Sunday Times*, the Court distinguished between the objective nature of maintaining the authority of the judiciary (which left a narrower margin of appreciation for the state) and the subjective nature of the protection of morals, where the Court should defer to domestic views[164]; and third, when there is a consensus in law and practice among the member states as, in the *Marckx*[165] case, the Court acknowledged an emerging consensus about the legal treatment of illegitimate children and struck down inheritance laws which discriminated against them.

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[159] Case *"Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, judgment of 09.02.1967.
[160] Campbell v. The United Kingdom, judgment of 25.03.1992.
[161] *Delcourt v. Belgium*, judgment of 17.01.1970.
[162] Dudgeon v. The United Kingdom, judgment of 22.10.1981.
[163] Handyside v. The United Kingdom, judgment of 07.12.1976.
[164] *Muller v. Switzerland*, judgment of 24.05.1988.
[165] *Marckx v. Belgium*, judgment of 13.06.1979.

The 'European Consensus' standard is a generic label used to describe the inquiry of the Court into the existence or non-existence of a common ground, mostly in the law and practice of the Member States. This standard has played a key-role in the wider or narrower character which the application of the margin of appreciation adopts in practice. Generally speaking, the existence of similar patterns of practice or regulation across the different Member States will legitimize a narrower margin of appreciation for the State[166]. Against this background, the non-existence of a European consensus on the subject-matter will be normally accompanied by a wider margin of appreciation accorded to the State in question. The European consensus criterion has, however, been criticized on different accounts, including the lack of profound and detailed comparative research in which it claims to reside. In *Marckx*[167], the Court analysed the former distinction in Belgian law between the "legitimate" and "illegitimate" family. The Court noted that at the time when the Convention was drafted, such a distinction was regarded as permissive and normal in many European countries. However, the Court can only be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, at a similar pace with the relevant international instruments, towards a full juridical recognition. Nevertheless, in Handyside[168], where the "legitimate aim" was the protection of morals - the reason why a wider margin of appreciation was granted - was the lack of a European conception of morals.

The margin of appreciation doctrine has long been applied by courts other than the ICJ. An approach similar to that taken by the ECtHR has been adopted by the European Court of Justice (ECJ). For example, in *Leifer*,[169] it held that the Member States have discretion in invoking the security exception to Community legislation which generally bars the introduction of unilateral sanctions on third states: depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State. Similarly, in *Sirdar*,[170] dealing with the application of European gender equality regulations to elite military units, the Court held that: the competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question in the light of social developments, and without abusing the principle of proportionality, to come to the view that the specific conditions for deployment of the assault units of which the Royal Marines are composed ... justified their composition

[166] *Rasmussen v. Denmark*, judgment of 28.11.1984.
[167] *Marckx v. Belgium*, judgment of 13.06.1979.
[168] Handyside v. The United Kingdom, judgment of 7.12.1976.
[169] Case C-83/94, *Germany v Leifer* [1995] ECR I-3231.
[170] Case C-273/97, *Sirdar v Army Bd* [1999] ECR 7403, esp. at para. 27.

remaining exclusively male. Cumulatively, these and other ECJ cases[171] are indicative of an acceptance of a 'margin of appreciation type' decision-making methodology, especially in relation to exception clauses.

In a series of WTO cases, Dispute Settlement Body (DSB) panels and the Appellate Body (AB) have adopted a non-intrusive standard of review toward discretionary determinations made by the national authorities of the Member States.[172] For example, in the *Asbestos* case, the AB held that: 'it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation'.[173] This approach is generally consistent with the decision taken by a GATT panel in the 1994 *Tuna* case[174].

The case law of other international courts and tribunals on the application of the margin of appreciation doctrine is less explicit and extensive. Still, it seems to be generally supportive of the doctrine. While human rights courts and quasi-judicial bodies other than the ECtHR have usually refrained from adopting an explicit margin of appreciation vocabulary,[175] some exceptional decisions cited the doctrine with approval.[176] Further, many other decisions reveal methodological choices which are consistent with the doctrine – for example, they provide governments with latitude in the implementation of the relevant treaty norms – without explicitly invoking it.[177] In the same vein, a number of arbitral awards have also adopted 'margin of

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[171] Case C-186/01, *Dory v Bundesrepublik Deutschland* [2003] ECR I-2479, at para. 36; Case 131/79, *R v Secretary of State for Home Affairs, ex parte Santillo* [1980] ECR 1585, at 1600–1611; Case 34/79, *R v Henn* [1979] ECR 3795, at 3818–3814.

[172] See, e.g., *EC – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/R/USA (1997); *Argentina – Safeguard Measure on Imports of Footwear (Footwear)*, WTO Doc. WT/DS121/AB/R (2000).

[173] *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) at para. 168.

[174] *US – Restrictions on Imports of Tuna*, 33 ILM (1994) 839, at para. 3.73 ('The reasonableness inherent in the interpretation of "necessary" was not a test of what was reasonable for a government to do, but of what a reasonable government would or could do. In this way, the panel did not substitute its judgment for that of the government').

[175] It may be assumed that certain human rights bodies were concerned that explicit resort to the margin of appreciation doctrine might encourage states parties to challenge the universality of human rights. Arguably, the more confident ECtHR could afford to acknowledge normative pluralism.

[176] For example, the Inter-American Court of Human Rights (I/A CHR) has in one of its first Advisory Opinions accepted the doctrine in the context of the right of member states to regulate naturalization procedures: *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-AmCtHR, Series A, No 4 (1984), at para. 58 ('One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them'). See also *Hertzberg v Finland*, UN Doc. A/37/40 (1982), at para. 10.3 ('[P]ublic morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities').

[177] See, e.g., Comm. 547/1993, *Mahuika v New Zealand*, UN Doc. CCPR/C/70/D/547/1993 (2000), paras 9.10–9.11 (emphasizing the circumstantial context of the limitation upon the applicants' rights); Comm. 35/1978, *Aumeeruddy-Cziffra v Mauritius*, UN Doc. A/36/40 (1981), at para. 9.2(b)(2)(ii) ('[T]he legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions'). See also Benvenisti, *Margin of Appreciation, Consensus and Universal Values*. 31 N.Y.U. J. Int'l L. & Pol. 843 (1998-1999); pp. 844-845;

appreciation type' methodology. For example, the arbitral tribunal in *Heathrow Charges* held that the UK is entitled to a margin of appreciation in setting airport charges.[178]

If the European human rights regime is regarded as the most developed human rights regime, then the adoption of the doctrine in the international human rights regime, complemented with the Islamic regional approach, probably, could lead to a similar stability in relation to Muslim States. Moreover, the discussion undertaken reveals a growing acceptance on the part of many international courts and tribunals of the margin of appreciation doctrine. It is clear that the flexibility is needed to avoid confrontation between Islamic law and international human rights. In respect of International Bill of Rights, this doctrine could be a useful tool in addressing issues such as definition of family, homosexuality, abortion, and other moral questions in relation to Muslim States Parties that apply Islamic law. This could help to seek a common standard of universalism in human rights between international human rights law and Islamic law in the Muslim world.

2. 3. Concluding Remarks

This chapter represents an attempt by non-Western countries to respond to the current international human rights system at the level of critique and arguments for cultural relativism. The critique of universalism and current practices of the implementation of internationally recognized human rights by the countries shows the need of a cross-culturally legitimate and genuinely universal basis for human dignity and at the same time for human rights. The current official human rights system does not have enough of analytical and normative character to confront structurally and in a meaningful way with the oppressions which globalization now puts on individuals and communities. The doctrine of human rights is not matched by practice in a lot of the world's societies.

Cultural relativism holds that culture is the sole source of the validity of a moral right or rule. On the other hand, universalism holds that culture is irrelevant to the validity of moral rights and rules, which are universally valid. As international law becomes more responsible to the demands for individual freedom, however, it necessarily challenges the validity of certain state practices reflecting geographical and cultural particularities. This situation causes the tension between national sovereignty and the enforcement of international law.

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[178] Award on the First Question, *US/UK Arbitration concerning Heathrow Airport User Charges*, 30 Nov. 1992, ch 5, at 84 (para. 2.2.6), cited in Witten, *The US-UK Arbitration Award concerning Heathrow Airport User Charges*, 89 *AJIL* (1995) 174, at p. 187.

One of the most persistent theoretical debates concerning international human rights law is known as the "Universalism v. Cultural Relativism" problem. This debate proceeds on the assumption that the legitimacy of international law depends upon the existence of fundamental principles of justice that transcend culture, society, and politics. Thus, the debate presumes that to assert the cultural relativity of justice is to deny the legitimacy of international human rights law and to defend international human rights law is to assert the universal and transcendent validity of its norms. To understand the debate, it is necessary to recognize the background of international law as a product of the consent of sovereign states, whether manifested in treaties or in custom. If international law can only be created through the consent of sovereign states, no state needs answer to anyone concerning its treatment of its own people, unless it consents to do so. According to this view, human rights are culturally relative rather than universal. However, a critical evaluation of cultural relativism theory reveals that it might abuse and may be used to rationalize human rights violations by different regimes.[179]

[179] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 27.

3. CONGRUENCE BETWEEN ISLAMIC AND INTERNATIONAL HUMAN RIGHTS CONCEPTS

Certainly there are some differences of scope between Islamic law and international human rights law but that does not create a general antithesis between them. Although Islamic law is not uniformly applied today in all Muslim States, yet Islamic principles and norms constitute the principal legitimizing criteria for cultural-legal norms in most parts of the Muslim world. Also, since morality and substantive justice are important principles applicable to the philosophy of both Islamic law and international human rights law, the principle of justification needs to be accommodated in proposing practical harmonization of the conceptual differences between Islamic law and international human rights law. Thus, the jurisprudential arguments of Islamic jurists on relevant issues are herein analyzed in regard to the interpretations of modern international human rights law.

The important question is how far can international human rights law be interpreted in the light of Islamic law and vice versa? In that regard, there is need for a synthesis between two extremes and provision of an alternative perspective to the relationship between international human rights law and Islamic law.[180] This chapter contains the short presentation of Islamic law and the States which are applying it, the comparison of particular international human rights norms with Islamic jurisprudence, and a possible perspective in an enhancement of a better linkage between international human rights law and Islamic law.

3. 1. Influence of the Muslim World in the International Community

While the theoretic arguments concerning the foundations of human rights may be difficult to settle, the indisputable fact is that international human rights are today no a prerogative of a single nation. They are a universal affair that concerns the dignity and well-being of every human being. While the fragrant abuse of human rights in Muslim States under the pretext of cultural differences is unacceptable, the role and influence of the Muslim world in achieving a peaceful coexistence within the international community does permit Muslim States to question a universalism ‘within which Islamic law (generally) has no normative value and

[180] See further Baderin, M. A., *Dialogue Among Civilizations as a Paradigm for Achieving Universalism in International Human Rights: A Case Study with Islamic law* (2001) 2 Asia-Pacific Journal on Human Rights and the Law, No. 2, p.1 at pp. 13-17.

enjoys little prestige'.[181] Since human rights are best achieved through the domestic law of States, recognition of relevant Islamic law principles in that regard will enhance the realization of international human rights objectives in Muslim States that apply Islamic law fully or partly as State law.

Conversely, there is a need for the Muslim world also to acknowledge change as a necessary ingredient in law. The adaptability of the Sharia must be positively utilized to enhance human rights in the Muslim world.[182] While Muslims must be true to their heritage, the noble ideals of international human rights can shed new light on their interpretation of the Sharia, their international relations and self-awareness within the legal limits of Islamic law.[183]

3. 1. 1. Discourse of Human Rights from an Islamic Legal Perspective

Traditionally, a number of difficulties confront the discourse of human rights from an Islamic legal perspective.[184] On one hand is the domineering influence of the 'Western' perspective of human rights, which creates a tendency of always using 'Western' values as a yardstick in every human rights discourse.[185] While it is true that the impetus for the formulation of international human rights standards originated from the West, the same cannot be said of the whole concept of human rights, which is perceivable within different human civilizations.[186] Related to that, is the negative image of Islam in the West. Often, some of the criminal punishments under Islamic law in many parts of the Muslim world today are cited by some Western analysts as evidence of lack of provisions for respect for human rights in Islamic law. This is part of what has been termed 'Islamophobia'[187] in the West, which adversely affects the view about human rights in Islam generally. In the academic realm there is also what Strawson has called the 'orientalist problematique' by which 'Islamic law is represented within Anglo-

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[181] Mayer, A. E. *Islam and Human Rights, Tradition and Politics* in Gearon L. *Human Rights and Religion.* Sussex Academic Press, 2002; pp. 120-140.

[182] Yamani, A.Z., *The Eternal Shari'a* (1979) 12 New York University Journal of International Law and Politics, p.205.

[183] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 12.

[184] Ibid. p. 10.

[185] See e.g. Mayer, A. E., *Current Muslim Thinking on Human Rights* in An-Na'im, A. A. and Deng, F. M. (eds.), *Human Rights in Africa, Cross-Cultural Perspectives* (1990) p.133 at p.148 (asserts that human rights 'are principles that were developed in Western culture' and suggests that Western culture should serve as the universal normative model for the content of international human rights law).

[186] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 10.

[187] See e.g. 'Islamophobia' in BULLETIN, University of Sussex Newsletter, 7 November 1997. Available at: http://www.sussex.ac.uk/press_office/bulletin/07nov97/item12.html [accessed 30 April 2011].

American scholarships as an essentially defective legal system'[188], especially with regards to international law.[189]

Halliday has identified at least four classes of Islamic responses to the international human rights debate. The first is that Islam is compatible with international human rights. The second is that true human rights can only be fully realized under Islamic law. The third is that the international human rights objective is an imperialist agenda that must be rejected, and the fourth is that Islam is incompatible with international human rights.[190]

The view that Islam is compatible with human rights is the most sustainable within the principles of Islamic law. The sources and methods of Islamic law contain common principles of good government and human welfare that validate modern international human rights ideals. Respect for justice, protection of human life and dignity, are central principles inherent in the Shariah. They are the overall purpose of the Sharia, to which the Quran refers: God commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that you may receive admonition.[191]

The view that true human rights can only be fully realized under Islamic law is exclusionist and amounts to the same egoism of the criticized exclusive Western perspective to human rights. Islam is not egocentric with respect to temporal matters but rather encourages co-operation for the attainment of the common good of humanity. Islam encourages interaction and sharing of perception.[192] AbuSulayman has thus observed that: the Islamic call for social justice, human equality, and submission to the divine will and directions of the Creator requires the deepest and sharpest sense of responsibility, as well as the total absence of human arrogance and egoism, both in internal and external communication'.[193]

The view that the international human rights regime is an imperialist agenda is not particular to the Islamic discourse on human rights. It is common in the human rights discourse of all developing nations.[194] This results from the fear of neo-colonialism, and is a psychological effect of the past colonial experience of most developing nations under Western imperialism.

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[188] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 10.

[189] Such approaches to Islamic law were some of the barriers, which shut out Islamic law from contemporary international law discourses. See generally Said, E. W., *Orientalism, Western Conceptions of the Orient*. London: Routledge and Kegan Paul, 1978.

[190] Halliday, F., *Relativism and Universalism in Human Rights: The Case of the Islamic Middle East* in Beetham, D. (ed.), *Politics and Human Rights*. Wiley-Blackwell, 1995 pp. 154-155.

[191] Q16:90. See Baderin M. A., *Establishing Areas of Common Ground between Islamic Law and International Human Rights* (2001) 5 The International Journal of Human Rights, No. 2, pp. 72-113, for further analysis of the compatibility between human rights and Isalmic law.

[192] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 14.

[193] AbuSulayman A. A., *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought. Herndon*, VA: International Institute of Islamic Thought, 1987; p. 54.

[194] Mutua M. W. *The Ideology of Human Rights*. Virginia Journal of International Law, 1996; pp. 592-593.

That fear is sometimes strengthened by the Western nations' insistence of defining human rights only in the Western perspective without consideration for the contribution and understanding of other cultures.[195]

If we understand international human rights strictly as a universal humanitarian objective for the protection of individuals against the misuse of State authority and for the enhancement of human dignity, then the view that Islam is incompatible with it would amount to the irrational conclusion. The analysis of particular Quranic verses shows that the protection and enhancement of the dignity of human beings has always been a principle of Islamic political and legal theory. While there may be some areas of conceptual differences between Islamic law and international human rights law, this does not make them incompatible. The principle of legality is a fundamental principle of Islamic law whereby all actions are permitted except those clearly prohibited by the Sharia,[196] which means that human beings have inherent rights to everything except for things specifically prohibited. To hold that humans have no rights but only obligations to God expresses a principle of illegality, which makes life very restrictive and difficult. That will be inconsistent with the overall objective of the Sharia, which is the promotion of human welfare.[197]

3. 1. 2. The Notion of a Muslim State and the Core of Islamic Law

For purposes of clarity it is necessary to define the notion of 'Muslim States' as used in this and other chapters. The Muslim world is today divided into separate sovereign nation-states.[198] A few of these states have been specifically declared as Islamic Republics, some others indicate in their Constitutions that Islam is the religion of the state, while most are only identifiable as Muslim States on the basis of their predominant Muslim population and the allegiance of the people to Islam.[199] A different single criterion for defining modern Muslim States is membership of the Organization of Islamic Conference (OIC).[200] That all 57 Member States of the OIC are definable as Muslim States is supported by the first charter-objective of the Organization, which is the promotion of Islamic spiritual, ethical, social, and economic values

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[195] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 14.

[196] See e.g. Q16:90 '… God commands justice, the doing of good,… and He forbids all shameful deeds, and injustice and rebellion…'.

[197] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, pp. 14-15.

[198] For analysis of the evolution of the Muslim world into modern nation-states see e.g. Khadduri M., *The Islamic law of nations / Shaybani's Siyar*. Baltimore (Md.): Johns Hopkins university press, 1966, pp. 19-20.

[199] Currently, 4 States are specifically designated as Islamic Republics, 15 States constitutionally declare Islam as the religion of the State and 47 States have majority Muslim populations.

[200] The OIC has 57 Member States. See the OIC Website: http://www.oic-un.org/about/members.htm [accessed 30 April, 2011].

among the Member States.[201] While the OIC Member States exist as independent sovereign States, they are theoretically linked by their Islamic heritage, traditions, and solidarity.

Islam is one of the major civilizations of the world, and it is the fastest growing religion in the world today. Many Members States of the UN are Muslim States that apply Islamic law either fully or partly as domestic law. Also, Islamic law influences, one way or another, the way of life of more than one billion Muslims globally.[202] While Muslim States participate in the international human rights objective of the UN, they do enter declarations and reservations on grounds of the Sharia or Islamic law when they ratify international human rights treaties. Also, in their periodic reports to UN human rights treaty and Charter bodies, many Muslim States do refer to Sharia or to Islamic law in their arguments.[203]

Historical formulations of Islamic religious law, commonly known as Sharia, include a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of Sharia to regulate the behavior of Muslims derives from its moral and religious authority as well as the formal enforcement of its legal norms. Muslims are obliged, as a matter of faith, to conduct their private and public affairs in accordance with the dictates of Islam.[204]

To millions Muslims of the world, the Quran is the literal and final word of God and Muhammad is the final Prophet. Sharia is not a formally enacted legal code. It consists of a vast body of jurisprudence in which individual jurists express their views on the meaning of the Quran and Sunnah. All fields of human activity are categorized as permissible and impermissible and recommended or reprehensible. In other words, Sharia addresses the conscience of the individual Muslim, whether in a private, or public and official, capacity, and not the institutions and corporate entities of society and the state.[205]

The Quran and the Sunnah primarily constitute both formal and material sources of Islamic law. Their nature as formal sources of Islamic law emanates from their being divine which Muslims must religiously obey and follow. The Sunnah as a source of law consists of the Prophet's lifetime sayings, deeds and tacit approvals on different issues, both spiritual and temporal. The Sunnah developed from some Quranic verses, as a supply of details to some general provisions of the Quran and instructions on some other aspects of life not expressly

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[201] See The Preamble and Article II(A) (1) of the OIC Charter. See also Moinuddin H., *The charter of the Islamic conference and legal framework of economic co-operation among its member states*. Oxford : Clarendon press, 1987; pp. 10-11.

[202] Freamon, B. K., *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence* (1998) 11 Harward Human Rights Journal, p.1 n.2 for a list of citations on the fast growth of Islam and importance of Islamic law in the world today.

[203] See Baderin, M. A., *A Macroscopic Analysis of the Practice of Muslim States Parties to International Human Rights Treaties: Conflict or Congruence?* (2001) 1 Human Rights Law Review, No.2, pp.265-303.

[204] An-Na'im A. A., *Human Rights in the Muslim World* in Steiner H. J., Alston P. and Goodman R. (eds.) *International Human Rights in Context*. 3rd ed. Law, Politics, Morals. Oxford University Press, 2007; pp. 531-532.

[205] Ibid. pp. 532-533.

covered by Quranic texts.[206] The Quran is the principal source and is believed by Muslims to be the exact words of God revealed to the Prophet Muhammed.[207] It is not strictly a constitutional code, but more specifically described by God as a book of guidance.[208] Out of its approximately 6,666 verses, which cover both the spiritual and temporal aspects of life, Muslim jurists estimate between 350 to 500 verses as containing legal elements.[209] However, while legal texts are very significant as material sources in every legal system, their interpretation is what actually constitutes law.

Today, Islamic law continues to be formally applied in many parts of the Muslim world. In the analysis of the scope and the equity of Islamic law, Ramadan identified some important characteristics, which are worth to mention. Firstly, the formal sources of Islamic law, namely the Quran and Sunnah 'are basically inclined towards establishing general rules without indulging in much detail'. Secondly, 'As a rule, everything that is not prohibited is permissible.' Thirdly, 'All the Quran and the Sunnah have prohibited becomes permissible whenever a pressing necessity arises.' This is based on the doctrine of necessity by which all Islamic jurists generally agree that 'necessity renders the prohibited permissible'. Fourthly, 'The door is wide-open to the adoption of anything so long as it does not go against the texts of the Quran and the Sunnah.'[210] The scope of harmonization between Islamic law and international human rights law depends largely upon whether a hard-line or moderate approach is adopted in the interpretation of the Sharia and the application of classical Islamic jurisprudence.

3. 2. The ICCPR and the ICESCR in the Light of Islamic Law

There will be examined some provisions of the ICCPR and one particular of the ICESCR in the light of Islamic law to determine their scope of compatibility. There will be referred to the jurisprudence of the Human Rights Committee (HRC) and to the General Comments and practice of the Committee on Economic, Social, and Cultural Rights (ESCR Committee), and other scholarly writings with the purpose to present the particular rights as currently interpreted under international human rights law, and there will be also referred to the main sources of Islamic law, namely, the Quran and Sunnah, as well as Islamic juristic views for an Islamic

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[206] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 35.
[207] See e.g. Q26:192 which says: 'Verily this is a Revelation from the Lord of the Worlds' and Q45:2 which says 'The revelation of the Book is from God, The Exalted in Power, Full of Wisdom'.
[208] See Q2:2 which says: 'This is the Book; In it is guidance sure, without doubt, to those who fear God'.
[209] Kamali M. H., *Principles of Islamic Jurisprudence*. 1991; available at: http://www.bandung2.co.uk/books/Files/Law/Principles%20of%20Islamic%20Jurisprudence%20-%20Hashim%20Kamali.pdf [accessed 11 May 2011]; pp. 19-20.
[210] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 41.

perspective of the rights guaranteed under the ICCPR and the ICESCR. The practices and the reports of relevant Muslim States are also cited for necessary illustration where relevant.[211] The Cairo Declaration on Human Rights in Islam is cited as well as current codified Islamic human rights standards recognized by Muslim States.

What regards the ICCPR, the States Parties undertake 'to respect' and 'to ensure' the effective and appropriate national implementation of all the rights guaranteed under the covenant 'without distinction of any kind'.[212] On the other hand, the ICESCR represents the positive law on economic, social, and cultural rights under the international human rights objective of the UN. As of May 2011 it has been ratified by 160 States, including 41 of the 57 Member States of the Organization of Islamic Conference.[213] Under Islamic law, the legislative power of the State is not totally unlimited. Islamic jurists generally consider any State legislation that makes lawful what God has prohibited in the Qur'an or prohibits what God has made lawful in the Qur'an as exceeding the limits of human legislation allowed under Islamic law. For instance, during the consideration of Sudan's periodic report on the ICCPR, the Sudanese representatives stated before HRC that: The Sudanese parliament had decided against abolition of the death penalty. The jurisprudential argument for its continued existence was that the death penalty was mandatory for certain offences under Islamic law.[214] So, it is worth to examine whether or not the Sharia contradicts the provisions of these Covenants regarding the fundamental human rights.

3. 2. 1. The Equal Right of Men and Women

The States Parties under the Article 3 undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the ICCPR.[215] Equality and non-discrimination are very fundamental principles of human rights. The HRC has issued General Comment in which it re-emphasized the need for ensuring the equality of rights between men and women and states that 'States parties should take account of the factors which impede the equal enjoyment of women and men of each right specified in the Covenant'.[216] The Committee further observed that:

> Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes… States parties should ensure that

[211] See also Baderin, M. A., *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?* (2001) 1 Human Rights Law Review, No. 2, pp. 265-303.
[212] Art. 2(1) ICCPR.
[213] See the Status of Ratification of the ICESCR at the UN Treaty Collection website at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en [accessed 4 May 2011].
[214] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 52.
[215] Art. 3 ICCPR.
[216] General Comment No. 28: Equality of rights between men and women (article 3) para16: 2000.03.29.

> traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.[217]

The obligation under Article 3 is understood to require both measures of protection and affirmative action for women through legislation, enlightenment and education to effect the positive and equal enjoyment of the rights between men and women under the Covenant. This derives from the concept that total elimination of discrimination against women and the achievement of total equality between the genders form an important aspect of international human rights law.[218]

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. The Cairo Declaration on Human Rights in Islam states that: Woman is equal to man in human dignity and has rights to enjoy 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.[219]

Mayer has argued that the guarantee of equality 'in human dignity' under the Cairo Declaration falls short of the guarantee of equality to the enjoyment of all civil and political rights under the ICCPR.[220] The HRC has however observed that: 'Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family'.[221] The provision in the Cairo Declaration seems to foreclose women's right of equality in responsibility within the family under Islamic law.[222]

Equality of women is recognized in Islam on the principle of 'equal but not equivalent'. Although males and females are regarded as equal, that may not imply equivalence or a total identity in roles, especially within the family.[223] Qutb has observed that while the demand for equality between man and woman as human beings is both natural and reasonable, this should not extend to a transformation of rules and functions.[224] This creates instances of differentiation in gender roles under Islamic law that may amount to discrimination according to international

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[217] General Comment No. 28: Equality of rights between men and women (article 3) para5: 2000.03.29.
[218] See e.g. the Convention on the Elimination of all Forms of Discrimination against Women. New York, 18 December 1979.
[219] *Cairo Declaration on Human Rights in Islam*, 5 August 1990.
[220] Mayer A. M., *Islam and human rights: tradition and politics*. Boulder (Colo.): Westview press, 1999. p. 120; and Mayer A. M., *Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct*. 15 Mich. J. Int'l L. 307 (1993-1994).
[221] General Comment No. 28: Equality of rights between men and women (article 3) para25: 2000.03.29.
[222] *Cairo Declaration on Human Rights in Islam*, 5 August 1990.
[223] al-Faruqi I. R. and al-Faruqi L. L., *The cultural atlas of Islam*. New York (N.Y.) : Macmillan, 1986; p. 150.
[224] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 60.

human rights law. Although the UN annotations on the draft of the 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 traditions could be overridden, that conditions which were inherent in the nature and growth of families and organized societies could be immediately changed, or that articles of faith and religion could be altered, merely by treaty legislation',[225] the HRC now seems convinced that 'in the light of the experience it has gathered in its activities',[226] 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.

In its concluding observations on the Islamic Republic of Iran in 1993 the Committee had observed that 'the punishment and harassment of women who do not conform with a strict dress code; the need for women to obtain their husband's permission to leave home; their exclusion from the magistracy; discriminatory treatment in respect of the payment of compensation to the families of murder victims, depending on the victim's gender and in respect of the inheritance rights of women; prohibition against the practice of sports in public; and segregation from men in public transportation' were incompatible with Article 3 of the ICCPR.[227]

Under Islamic law, clothing is generally for the enhancement of human dignity. It serves as cover for private parts, adornment, and protection against atmospheric hazards.[228] The Prophet Muhammad had stated that women are full sisters of men which is an expression of equality. Women are therefore equally entitled to the rights and liberties of today's world, subject to respect for the principles of public morality as applicable to both men and women under Islamic law.[229]

3. 2. 2. The Right to Life

Life is mankind's most valuable asset from which all other human possibilities arise. There is thus agreement on the fact that the right to life is the supreme and the most fundamental

[225] UN Doc. A/2929 Annotation of the Draft International Covenants on Human Rights prepared by the Secretary General (1955); p. 62; and Ramcharan B. G., *Equality and Non-discrimination* in Henkin L. *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York (N.Y.): Columbia university press, 1981; pp. 258-259.
[226] General Comment No. 28: Equality of rights between men and women (article 3) para.1: 2000.03.29.
[227] Concluding Observations on Islamic Republic of Iran (1993) UN Doc. CCPR/C/79/Add.25., para.13.
[228] Q7:26 – ‚Oh Children of Adam! We have bestowed raiment upon you to cover your Shame, as well as to be an adornment to you, but the raiment of righteousness... is the best.'; and Q16:81 – ‚... He made you garments to protect you from heat...'.
[229] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 65.

human right without which all other human rights will be meaningless.[230] There is even acknowledged the view that right to life is jus cogens under international law. It is a non-derogable right under the ICCPR,[231] and the HRC has stated that 'it is a right which should not be interpreted narrowly'.[232] Article 6(1) provides for the sanctity of human life and it imposes a positive obligation on the State to protect life and a negative obligation not to take life arbitrarily.[233] While the term 'arbitrarily' is not defined by the Covenant, it generally connotes that the deprivation of life by the State is strictly limited.[234] It must be in full accordance with due process of law and strictly proportionate on the facts. The State must also prevent arbitrary killing by its security forces and law enforcement agents.[235]

Both the substantive provision and general interpretation of Article 6(1) are in concordance with Islamic law. There are many verses of Quran that acknowledge the sanctity of human life, enjoin its protection and prohibit its arbitrary deprivation. The Sharia provisions on the sanctity and protection of human life are so fundamental that they cannot be denied. The following Quranic verses are examples in that respect: ,...Take not life which God has made sacred, except by way of justice and law; thus does He (God) command you that you may learn wisdom.[236] These verses apply to the State as much as to individuals. Islamic jurists are unanimous on the sacredness of human life and that there is an obligation on the ruling authority of the State to protect the right of life of every individual. The protection of life in Islamic law also includes the prohibition of suicide, thus neglecting the notion of a 'right to die' under Islamic law.[237] The Cairo Declaration on Human Rights in Islam thus provides that: 'Life is a God-given and the right to life is guaranteed to every human being. It is the duty of the individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Sharia prescribed reason'.[238] The 'Sharia prescribed reason' provision on the right to life in the Cairo Declaration is in respect of crimes attracting the death penalty under Islamic law, which must be strictly in accordance with the due process of law.

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[230] General Comment No. 06: The right to life (art. 6): 1982.04.30; Dinstein Y., *The Right to Life, Physical Integrity and Liberty* in Henkin L. *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York (N.Y.): Columbia university press, 1981; p. 114.
[231] See Art. 4(2) ICCPR.
[232] General Comment No. 06: The right to life (art. 6) para.1: 1982.04.30.
[233] Art. 6(1) ICCPR.
[234] UN Doc. A/2929 Annotation of the Draft International Covenants on Human Rights prepared by the Secretary General (1955); p. 83, para.3 where it is stated that the term 'arbitrarily' was explained to mean both 'illegally' and 'unjustly' during the drafting.
[235] General Comment No. 06: The right to life (art. 6) para.3: 1982.04.30; See also the cases of *Suarez de Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979); and *Rickly Burrell v. Jamaica*, Communication No. 546/1993, UN Doc. CCPR/C/53/D/546/1993 (1996).
[236] Q6:151.
[237] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 68.
[238] Art. 2 OIC Cairo Declaration on Human Rights in Islam.

Although Article 6(1) does not prohibit the death penalty, other provisions of the Covenant place some restrictions on its imposition. One of them is that the 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.[239] 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 puts all these offences, except murder, outside the Committee‘s definition 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.[240]

The HRC has also observed that the provisions of Article 6 suggest the desirability of abolishing the death penalty under international law.[241] 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‘ other are considered as ‘non-abolitionist States‘ in respect of the death penalty. Muslim States generally belong to the group of ‘non-abolitionist States‘. Apart from the Republic of Azerbaijan, and recently Turkey[242] 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.[243]

Since the Quran specifically prescribes the death penalty as punishment for certain crimes, Islamic jurists would consider any direct legislation against the legality as being outside the scope of human legislation under the Sharia.[244] Islamic jurists often cite the Quranic verse which says that 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.[245] 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. Thus Sudan stated during consideration of its second periodic report on the ICCPR that: ‘... since 1973... execution had been avoided in cases involving the death sentence, either because

[239] Art. 6(2) ICCPR.
[240] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, pp. 69-70.
[241] General Comment No. 06: The right to life (art. 6) para.6: 1982.04.30; See also Robertson, A. H., *The United Nations Covenant on Civil and Political Rights and The European Convention on Human Rights* (1968-69) 43 British Yearbook of International Law, p. 31.
[242] Turkey abolished the death penalty in peace time in August 2002.
[243] Azerbaijan acceded to the OP2 on 22 January 1999.
[244] Human Rights Committee Summary Record of the 1629the Meeting: Sudan 1997. *Acta resumida de la 1629ª sesion : Sudan. 1997.10.31. CCPR/C/SR.1629.*
[245] Q2:179.

the higher court or the President has not confirmed the sentence or because blood money[246] – had been paid instead'.[247]

3. 2. 3. The Prohibition of Torture

The prohibition of torture is quite well established and is considered as a peremptory norm of international law. The ICCPR does not define torture, but Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[248] contains a widely accepted definition of torture which provides that:

> ‚For the purposes of this Convention, the term ‚torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

Torture is usually distinguished from ‚cruel, inhuman or degrading treatment and punishment on intent, severity, and intensity of pain or suffering,[249,250] which are all prohibited under the Covenant. The underlying aim of the Article 7 of the ICCPR is "to protect both the dignity and the physical and mental integrity of the individual".[251]

Based on the dignified nature of the human person under the Sharia, there is no conflict under Islamic law with the general prohibition of torture or cruel, inhuman or degrading treatment or the prohibition of subjecting a human being to scientific experimentation without consent. There are many verses of the Quran that enjoin compassion and prohibit cruelty and

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[246] In the case of murder, the Sharia allows for the alternative payment of blood money by the offender to the heirs of the victim instead of the death penalty.

[247] Human Rights Committee Summary Record of the 1628the Meeting: Sudan; UN Doc. CCPR/C/SR.1628 of 02 October 1998, para.15.

[248] See also Art, 7(2) (E) of the Statute of the International Criminal Court. (U.N. Doc. A/CONF.183/9 of 17 July 1998).

[249] In *Ireland v. UK*, the European Court of Human Rights observed that the term ‚torture' attaches ‚a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'. [1978] ECHRR, Series A, No. 3, para.167.

[250] Also in *Tyrer v. UK*, the same court held that the intensity of suffering justifying the use of the term ‚inhuman' is higher than in what may be described as ‚degrading'. Inhuman relates to pain and suffering while degrading relates to humiliation. [1978] ECHRR, Series A, No.28, para.30.

[251] General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7), para.1: 1982.05.30; and General Comment No. 20: Replaces general comment 7concerning prohibition of torture and cruel treatment or punishment (Art. 7), para.2: 1992.03.10.

oppression even to animals.[252] Article 20 of the Cairo Declaration on Human Rights in Islam thus provides that: "It is not permitted to subject an individual to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor it is permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor it is permitted to promulgate emergency laws that would provide executive authority for such actions."[253]

The severity of some criminal punishments 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 according to Mayer "laws imposing penalties like amputations, cross amputations, and crucifixions would seem to be in obvious violation of Article 7 of the ICCPR". The UN Rapporteur on Sudan had in his February 1994 Report also criticized the application of the Islamic law punishments in the Sudan as violating the prohibition of cruel, inhuman, and degrading punishment under international law.[254] Likewise, the HRC has observed in its consideration of the report of some Muslim States that punishments under Islamic law such as amputation, flogging, and stoning are incompatible with Article 7 of the ICCPR.[255] Some Muslim States have consistently objected to those criticisms.[256] Sudan for example has argued that this was "an unwarranted interpretation of the international human rights instruments since they excluded from such category all punishments provided for in national legislation".[257]

3. 2. 4. The Right to Freedom of Thought, Conscience, and Religion

Despite the diversity of ideological and religious learning within the international community there has been an identified need, since the UN was founded, for an acceptance in modern society of the basic notion of the right to freedom of thought, conscience, and religion as contained in the first sentence of Article 18 of the ICCPR.[258] Article 18 of the UDHR also

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[252] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 76.
[253] Art. 20 OIC Cairo Declaration on Human Rights in Islam.
[254] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 77; See also Dudley, J., *Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values*. 12 Ga. J. Int'l & Comp. L. 55 (1982); p. 74.
[255] Concluding observations of the Human Rights Committee: Sudan. 1997.11.19. CCPR/C/79/Add.85. (Concluding Observations/Comments); para.9; Concluding observations of the Human Rights Committee: Iran (Islamic Republic of): Iran (Islamic Republic of). 1993.08.03. CCPR/C/79/Add.25. (Concluding Observations/Comments); para.11.
[256] Baderin, M. A., *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?* (2001) 1 Human Rights Law Review, No. 2, pp. 288-293.
[257] Human Rights Committee Summary record of the 1628th meeting: Sudan. 1998.02.02. UN Doc. CCPR/C/SR.1628. of 02 October 1998.
[258] Tahzib B. G., *Freedom of religion or belief: ensuring effective international legal protection*. The Hague: Nijhoff, 1996; pp. 63-94.

provides for this right.[259] However, the attempt to define the content of Article 18 of the ICCPR in terms of Article 18 of the UDHR to include the clause that "this right includes freedom to change one's religion or belief" met with opposition principally from Muslim countries such as Egypt, Saudi Arabia, Yemen, and Afghanistan, which pressed for its deletion.[260] Instead of a complete deletion of that clause, a compromise was achieved in the change of the language to "this right shall include freedom to have or to adopt a religion or belief of one's choice", after which the Article was unanimously adopted without reservations. The HRC has however indicated that the freedom "to have or to adopt" includes the freedom 'to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief'.[261]

The trend among contemporary Islamic scholars on the issue of religious freedom under Islamic law has mostly been towards emphasizing the Quranic provisions. Thus the Muslim is obliged by his faith, which he believes to be the only true one, to present its claims to humanity not dogmatically nor by coercion but rationally through intellectual persuasion, wise argument, and fair preaching.[262] 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.[263] Uthman has also observed that 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 a 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 status of non-Muslims within the Islamic State indicates that Islamic law does not advocate forced conversions to Islam.[264] Thus Article 10 of the Cairo Declaration on Human Rights in Islam states that: '... It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.[265]

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[259] Art. 18 UDHR.

[260] Partsch K. J., *Freedom of Conscience and Expression, and Political Freedoms* in Henkin, L. (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York (N.Y.): Columbia university press, 1981; p. 211.

[261] General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) para.5: 1993.07.30. CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments). See also Human Rights Committee, Annual Report to the U.N. General Assembly, U.N. Doc. A/49/40 vol. 2 (1994).

[262] See e.g., Q16:125.

[263] See e.g., Q10:108.

[264] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, pp. 120-121.

[265] Art. 10 the OIC Cairo Declaration on Human Rights in Islam.

3. 2. 5. Freedom of Opinion and Expression

Freedom of opinion and expression has been long recognized as ‘one of the most precious rights of man‘[266] and also of ‘great importance for all other rights and freedoms‘.[267] The right to hold opinions, being internal and private, is absolute and is separated from the right to freedom of expression. Freedom of expression is thus not absolute. During the drafting of Article 19, it was appreciated that while ‘freedom of expression was a precious heritage‘ it could also be ‘a dangerous instrument‘ against public order and the personality of others.[268] Thus while the right to freedom of expression was made as comprehensive as possible to cover the seeking, receiving, and imparting of information and ideas of all kinds through any media of one‘s choice, it carried with it ‘special duties and responsibilities‘[269] and was also subjected to certain restrictions under Article 19 of the ICCPR.[270]

The recognition of freedom of expression under Islamic law as a birthright of every human being is confirmed by Quran which states that: ‘The most Gracious!; He Taught the Quran; He Created Man and Taught him speech‘.[271] Kamali has observed that ‘it is generally acknowledged that freedom of expression in Islam is in many ways complementary to freedom of religion; that it is an extension and a logical consequence of the freedom of conscience and belief which the Sharia has validated and upholds‘. Under the Sharia, the main objective of this right is the ‘discovery of truth and upholding human dignity‘.[272] While the Quran affirms that God gave mankind the power and freedom of expression, it also directs mankind to be always apposite in speech. It states clearly that: ‘God loves not the public utterance of evil speech‘[273] and that ‚Those who love (to see) scandal broadcasted among the believers will have a grievous penalty in this life and in the hereafter‘.[274] Thus the freedom of expression under Islamic law is also not absolute but restricted to apposite speech and expression. Under Islamic law, examples of expressions and speech that amount to abuse of this right are specifically stated by the Quran. Maududi has pointed out in that regard that Islam does not prohibit decent intellectual debate and religious discussions: what it prohibits is evil speech that encourages upon the religious beliefs

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[266] Art. XI French Declaration of the Rights of Man and of Citizen (1789).
[267] Partsch K. J., *Freedom of Conscience and Expression, and Political Freedoms* in Henkin, L. (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York (N.Y.): Columbia university press, 1981; p. 216.
[268] UN Doc. A/2929 Annotation of the Draft International Covenants on Human Rights prepared by the Secretary General (1955); pp. 147-152.
[269] These duties and responsibilities were however not defined.
[270] Art. 19(3) ICCPR.
[271] Q55:1-4.
[272] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 127.
[273] Q4:148.
[274] Q24:19.

of others.[275] Article 22 of the Cairo Declaration on Human Rights in Islam provides that: 'Everyone shall have the right to express his opinion freely in such manners as would not be contrary to the principles of the Sharia'.[276]

3. 2. 6. The Legal Protection of Family

The recognition of the family as an important natural unit of society and its role in the positive development of the individual can be found in most human rights instruments. For example, the African Charter identifies the family as 'the custodian of morals and traditional values recognized by the community'[277], and the European Social Charter identifies the family as 'a fundamental unit of society'.[278] Also Article 17 of the American Convention on Human Rights[279], Article 16 of the UDHR[280] and Article 23 of the ICCPR[281] all recognize that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. Article 10 of the ICESCR not only recognizes the family as 'the natural and fundamental group unit of society', but also recognizes it as 'responsible for the care and education of dependent children'.[282]

There is however no treaty definition for the term 'family' in international human rights law. This raises the problem of identifying which model or family structure would be entitled to the protection by society and the State. Apart from the traditional type of classification of family, new notions of 'family' have emerged in many societies other than those based on natural and traditional heterosexual biological relations. There are today new reproductive means like artificial insemination, surrogacy and, more controversially, same-sex relationships through which 'families' are formed. The ESCR Committee has not adopted any specific definition of family under the ICESCR, but seems to appreciate the possibility of differences in the concept of family because it requires States Parties to indicate in their report 'what meaning is given in your society to the term „family"'.[283] The HRC has also noted in its General Comment on Article 23 of the ICCPR that: 'the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the

[275] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 129.
[276] Art. 22 OIC Cairo Declaration on Human Rights in Islam.
[277] Art. 18(2) African Charter of Human and Peoples' Rights (1981).
[278] Art. 16 European Social Charter (1961).
[279] Art. 17(1) the American Convention on Human Rights.
[280] Art. 16(3) the UDHR.
[281] Art. 23(1) ICCPR.
[282] Art. 10(1) the ICESCR.
[283] Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights; para.2: 1991.06.17. UN Doc. E/C.12/1991/1.

concept of a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23'.[284]

Also in the case of Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius[285] the HRC had observed that the 'legal protection or measures that a society can afford to the family may vary from country to country and depend on different social, economic or cultural conditions and traditions'.[286] The HRC has however moved further from that view in its General Comment that: '... in giving effect to the recognition of the family... it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children and to ensure the equal treatment of women in these contexts...'.[287]

This broad interpretation is however contrary to the concept of family under Islamic law. Generally, the importance of the family and its protection is very well established under Islamic law. It is an important institution within Islamic society that is closely guarded, and family rights and duties are specifically defined under Islamic family law and jurisprudence.[288] The Shariah also places responsibility on both the society and State in respect of protecting the family institution. There should therefore be no problem in reconciling the general protection and assistance of the family recognized under the ICESCR with Islamic law principles. In Muslim societies the definition of family is based o principles prescribed by the religion, reinforced by law, and observed by individuals as a religious obligation. For example, the Egyptian Constitution provides that 'The family is the basis of the society founded on religion, morality and patriotism'.[289]

The concept of family is strictly limited within the confines of legitimate marriage under Islamic law. Article 5 of the Cairo Declaration on Human Rights in Islam provides that: 'Society and the State shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare'.[290] There are defined rules for legitimate marriage through which a legitimate family may be formed.[291] Same-sex relationships and sexual relationships outside marriage are prohibited and not tolerated as a basis for family under Islamic

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[284] General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23); para.2: 1990.07.27. CCPR General Comment No. 19.

[285] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* , Communication No. 35/1978, U.N. Doc. CCPR/C/OP/1 at 67 (1984).

[286] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* , Communication No. 35/1978, U.N. Doc. CCPR/C/OP/1 at 67 (1984); para. 9.2(b)2(ii)1.

[287] General Comment No. 28: Equality of rights between men and women (article 3); para.27: 2000.03.29.

[288] See generally e.g. Pearl D. and Menski W., *Muslim family law*. London : Sweet and Maxwell, 1998; and Abd al 'Ati H., *The family structure in Islam*. Plainfield: American trust publications, 1995.

[289] Art.9 The Constitution of the Arab Republic Of Egypt (1971).

[290] Art.5 the OIC Cairo Declaration on Human Rights in Islam.

[291] Abd al 'Ati H., *The family structure in Islam*. Plainfield : American trust publications, 1995; pp. 50-145.

law.[292] Interpreted within an appreciation of the different concepts of family from State to State, as acknowledged by the HRC[293], this Islamic conception of family would generally raise no problem under the provisions of Article 10 of the ICESCR.

The current view however raises questions about recognizing unmarried couples and their children as a family. The ICESCR also provides that all children and young persons should enjoy special protection and assistance 'without any discrimination for reasons of parentage or other conditions'.[294] This also raises the issue of the right of children conceived out of wedlock to enjoy such protection and assistance under Islamic law. For example, the Committee on the Rights of the Child observed in its concluding observation on Kuwait's initial report on the Convention on the Right of the Child that: 'The Committee is concerned at the potential for stigmatization of a woman or couple who decide to keep a child born out of wedlock, and at the impact of this stigmatization on the enjoyment by such children of their rights.[295] In response, the Kuwait representative indicated that: 'extramarital sex was proscribed by Islamic law, and sex with a minor under 18 years of age was considered a crime, even with the girl's consent. In cases where it did occur and a child was born as a result, the tendency was for the parents to rid themselves of the child, since they were forbidden under Islamic law to keep a child conceived out of wedlock. In that event, the child was initially provided for by the Ministry of Public Health, and subsequently by the Ministry of Social Affairs and Labour.[296] Marriage is thus an important institution on the basis of which family rights are determined under Islamic law. While unmarried persons and children conceived out of wedlock may, as individuals, be entitled to other guaranteed individual rights they will not qualify for family rights under Islamic law because family rights can only be claimed through the link of an Islamically legitimate marriage.[297]

3. 3. Development of the Complementary Methodologies between Two Legal Regimes

The analysis above denies the complete incompatibility theory and reveals the existence of a wide positive common ground between international human rights and Islamic law. This

[292] Abd al 'Ati H., *The family structure in Islam*. Plainfield : American trust publications, 1995; pp. 50-145.
[293] General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23); para.2: 1990.07.27. CCPR General Comment No. 19.
[294] Art.10(3) ICESCR.
[295] Concluding Observations of the Committee on the Rights of the Child: Kuwait (1998) UN Doc. CRC/C/15/Add.96, para.23.
[296] Summary Record of the 489th meeting : Kuwait; para.2. 1998.10.02. CRC/C/SR.489.
[297] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 199.

does not however cover some areas of differences in scope and application, but rather advocates a positive basis for managing such differences through the development of complementary methodologies between the two legal regimes. Only an inclusive, evolutionary, and constructive method of interpretation can bring the best out of the two regimes for the enrichment of human rights universally and especially in the Muslim world.

Both international human rights and Islamic law jurists and scholars need to adopt an accommodative and complementary approach to achieve the noble objective of enhancing human dignity. The objective must be towards combining the best in both systems for all humanity.

3. 3. 1. Representation of Different Forms of Communities through the Application of Margin of Appreciation Doctrine

To encourage the promotion and realization of international human rights in the Muslim world, the UN international human rights treaty bodies must develop consideration for Islamic values when dealing with States that apply Islamic law. This is possible through the adoption of the margin of appreciation doctrine on moral issues relating especially to Islamic religious-ethical and family norms.[298] As the practice of ECtHR shows, the limits of the margin of appreciation are incapable of an abstract definition. The margin of appreciation is thus "context dependent" and its limits can be drawn only within a specific case. For this reason, this part of the present chapter will show the way in which the principles of the margin of appreciation doctrine analysed in the previous chapter could be applied for the fundamental rights analyzed above from the Islamic legal perspective.

Analyzing the justification for margin of appreciation permitted under Article 14 of the ECHR, namely for the protection of the enjoyment of the rights and freedoms set forth without discrimination on any ground, the Court looks for an objective and reasonable justification for the unequal treatment, a legitimate aim and a reasonable relationship of proportionality between means and goals. In the *Belgian Linguistics case*[299] the Court pointed out that a distinction between difference and discrimination must be made and also stated that a difference in treatment was not necessarily discriminatory, provided a reasonable and objective basis could be found. Therefore, a fair balance had been struck between protecting the interests of the community and respecting fundamental rights. For example, in the *Petrov* case[300] the Court held that a certain margin of appreciation may be allowed 'to treat differently' married and unmarried

[298] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 221.
[299] Case "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium. Judgment of 23-07-1968.*
[300] *Petrov v. Bulgaria,* judgment of 22.05.2008, § 55.

couples in the fields of, for instance, taxation, social security or social policy, but not as regards the possibility to maintain contact by telephone while one of them is in custody , which was seen as discriminatory.

Following this reasoning, it seems that the Muslim states would be given some margin of appreciation regarding not equivalent roles of men and women in the family relationship or strictly defined dressing rules for women. However, there certainly would be ascertained an inconsistency due to the exclusion of women from the magistracy, discriminatory treatment in respect of the payment of compensation to the families of murder victims, depending on the gender of the victim and in respect of the inheritance rights of women, and segregation from men in public transportation. An inconsistency would be ascertained, especially, in the context of gender discrimination where the Court takes an explicitly progressive point of view. For example, in *the Abdulaziz, Cabales and Balkandaly*[301] case the Court relates to the policy goals of the member state rather than the achievements in the laws and states that "the advancement of the equality of the sexes is today a major goal".

In drawing the line between difference and discrimination the Court also took into consideration whether the practice in question is regarded as non-discriminatory in other states. For example, in the *Rasmussen* case the Court stated that: "The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States"[302]. However, in cases where the evolution is seen as less uniform, the Court does not take this progressive approach. In the *Engel and others case*[303] concerning distinctions in disciplinary treatment between officers and ordinary servicemen the Court said that "inequalities are traditionally encountered in the states and at the time in question the distinctions attacked by the three applicants had their equivalent in the internal legal system of practically all the Contracting states". The factor of common consensus of the other states would cause problems in regard of application of margin of appreciation doctrine internationally, because there would have to be compared to many and to different systems where the common consensus would hardly appear. Where the distinction between difference and discrimination is hard to draw there could be used the common consensus principle among the states of the same region instead of all the States Parties to international treaties, which would be a more practical

[301] *Abdulaziz, Cabales and Balkandaly v. The United Kingdom*, judgment of 28.05.1985, § 78. The applicants complained that they had been victims of a practice of discrimination on the grounds of sex, race and birth because their husbands were refused permission to remain with or join them in The United Kingdom.
[302] See also case of *Runkee and White v. The United Kingdom,* judgment of 10.05.2007, § 35.
[303] Engel and others v. The United Kingdom, judgment of 8.06.1976.

view bearing in mind the very different cultural, traditional and social background of the states among each other.

The right to life protected under Article 2 and the prohibition of torture or cruel, inhuman or degrading treatment or punishment enacted in the Article 3 of the ECHR have been considered as absolute rights, generating absolute obligations for the Member States and banning an incomplete application. The right to life cannot be balanced either against other rights or against the lawful pursuit of law enforcement goals, because it is strongly prioritized by the "absolute necessity" test. Yet, like in the context of other provisions of the Convention, the lack of consensus among Member States determines the opinion of the Court that the matter is best left to individual states. One example of such a case is *Pretty v. U.K.*, concerning the right to assisted suicide, where the Court refused to acknowledge a right to die under Article 2 of the ECHR. Although the Court did not explicitly discuss or apply the margin of appreciation, in the lack of a European consensus on the subject matter, the balance of interests weighed in favour of the UK, and thus, the discretion afforded to the State was wide[304].

Based on the prohibition of torture, the Court has held on several cases that "the absolute nature of the protection" afforded by Article 3 is such that, in determining whether the issue of state responsibility arises there is no room for "balancing the risk of ill-treatment against the reasons for expulsion"[305]. Balancing the rights protected by this article against other rights or against any public interest is therefore not appropriate[306].

The ECtHR is a unique tribunal that faces many issues that are not traditionally handled in an international forum[307]. The margin of appreciation allows for, and sometimes requires the Court, as in Ms. Pretty's case, to fulfil both the duty of protecting the human rights and the one of respecting its subsidiary role. Analyzing the text of the Sharia it can be noted that Islamic law acknowledges the right to life. Furthermore, the Muslim States would be given the margin of appreciation regarding the death penalty and the prohibition of suicide as long as there is no common consensus in other States regarding these matters. However, some criminal punishments under Islamic law would be excluded from the application of margin of appreciation doctrine and thus would cause the violation of international treaties as there are states in the same region, for instance, Sudan, which has excluded the category of severe punishments from its national legislation. And thus the common consensus on prohibition of

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[304] *Pretty v. The United Kingdom,* judgment of 29.07.2002, § 41.
[305] *Chahal v. The United Kingdom*, judgment of 15 November 1996, § 81; *Ahmed v. Austria*, judgment of 17.12.1996, § 38-41.
[306] Greer S. C., *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge, Studies in European Law and Policy. Cambridge University Press, 2006; p. 234.
[307] E. Wada, *A pretty picture: the Margin of Appreciation and the Right to Assisted Suicide*, 27 Loy. L.A. Int'l & Comp. L. Rev. 275 (2005), p. 287.

severe corporal punishments would indicate the factor of wrong interpretation and application of international legal norms.

Regarding the right to freedom of thought, conscience and religion, and the right to freedom of opinion and expression it has to be noted that these rights are not absolute and have limitations expressed within the rights itself in the European legal regime as well as in the Islamic law. An essential element in determining the limits of the margin of appreciation regarding these rights is the aim that the limitation in question is intended to pursue. States have been allowed a wide margin of appreciation with respect to the protection of morals on the grounds that this notion varies between Member States.

One of the cases in which the Court has analysed the limits of the margin of appreciation in the context of public morals justification is *Handyside* case. The Court did not find a violation on the ground that the state had a legitimate aim to protect morals. The Court could not identify a uniform conception of morals in the domestic law of the various Member States because "the requirements of morals vary from time to time and from place to place, especially in our era, which is characterised by a rapid and far-reaching evolution of opinions on the subject"[308]. It then added that the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements because of their "direct and continuous contact with the vital forces of their countries"[309]. The same concept of the national authorities being better placed to decide on questions of morals because there was no uniform European conception is met in the *Muller* case[310] – where the Court did not find the seizure of the paintings depicting sexual acts, including homosexuality and bestiality, as a violation of right to freedom of expression. To the contrary, the Court did not follow the judgment presented in the *Open Door and Dublin Well Woman* case. It considered that the restraining of the provisions of information to pregnant women about abortion facilities abroad violated the right to freedom of expression.[311]

After analysis of the ECtHR case law, it can be concluded that the margin of appreciation doctrine could be well established on the international level with the purpose of reasonable evaluation of the practice in the Muslim states. As the ECtHR has stated, and not for once, that protection of state morals should be allowed to have a wide margin of appreciation because the notion of public morals differs widely between the States. So, the prohibition of expression and

[308] *Handyside v. The United Kingdom*, judgment of 07.12.1976, § 48.
[309] Ibid.
[310] *Müller v. Switzerland*, judgment of 24.05.1988, § 36, 43.
[311] *Open Door and Dublin Well Woman v. Ireland*, 64/1991/316/387-388 , Council of Europe: European Court of Human Rights, 23 September 1992.

speech that amounts to abuse of this right which is specifically stated by the Quran would not constitute a violation under the particular norms of the ICCPR.

Applying the margin of appreciation doctrine to a case of blasphemy under Article 10 of the ECHR, the ECtHR held in the case of Otto-Preminger-Institut v. Austria[312] that the seizure and forfeiture of a blasphemous film in which God, Jesus Christ, and the Virgin Mary were ridiculed did not violate the right of author to freedom of expression guaranteed under Article 10 of the European Convention. The Court observed that:

> The Court cannot disregard the fact that the 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 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 the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.[313]

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 would facilitate an appropriate balance between the respect for religious beliefs and the right to freedom of expression under international human rights law.

Marriage is an important institution on the basis of which family rights are determined under Islamic law. Unmarried persons or children conceived out of wedlock do not qualify for family rights under Islamic law because family rights can only be claimed through the link of an Islamically legitimate marriage. This is a religious-moral principle that is evidently incompatible with the broad interpretation adopted by the HRC on the concept of family, and is reflected of the need for the adoption of the margin of appreciation doctrine by the UN human rights treaty bodies in resolving such differences with relevant States Parties to international human rights treaties.

However, it must be stressed that the margin of appreciation afforded to states is never unlimited – there is no total deference to the national decision-making process.[314] First, states must always exercise their discretion in good faith.[315] Second, international courts are ultimately authorized to review whether national decisions are reasonable – namely, whether the course of action selected by the state conforms to the object and purpose of the governing norm. This

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[312] *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994.
[313] *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994.; para.56.
[314] See *EC – Measures Concerning Meat and Meat Products (Hormones)*, WTO WT/DS26/AB/R (1998), at para. 117.
[315] See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311, Art. 26.

might include an assessment of the national decision-making process (for instance, whether all pertinent considerations were taken into account) and the substantive outcome (for instance, whether the decision promotes the attainment of the overarching norms).[316]

Due to the obvious relevance of Islamic law in the universalism of international human rights in the Muslim world, there is a positive need for the inclusion of highly qualified experts in Islamic international law and jurisprudence on the membership of international human rights treaty bodies to reflect the 'representation of the different forms of civilization and of the principal legal systems' of the world on the Communities.[317] This would boost the confidence of Muslim States and Islamic legalists in the international human rights treaty bodies and lead to a more positive inclination towards interpretations and general comments of the relevant Committees of the international human rights treaties. It might also encourage the ratification by Muslim States not only of substantive human rights treaties but also Optional Protocols that provide for individual complaints systems within the international human rights regime.

3. 3. 2. Reinterpretation of the Tradition

The Sudanese human rights scholar An-Na'im in his works is attentive to the relation between the international system and religious tradition, and suggests the reconciliation through reinterpretation of the tradition, rather than through identification of cross-cultural values among different systems. There is room for legitimate disagreement over the precise nature of these dictates in the modern context. Religious texts, like all other texts, are open to a variety of interpretations, he says. Human rights advocates in the Muslim world could struggle to have their interpretations of the relevant texts adopted as the new Islamic imperatives for the contemporary world.[318]

An-Na'im bases his approach with the view that human rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society. He argues that this cultural legitimacy derives from the historical conditions surrounding the creation of the particular human rights instruments. Most African and Asian countries did not participate in the formulation of the Universal Declaration of Human Rights because, as victims of colonization, they were not members of the United Nations. When they did participate in the formulation of

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[316] See *US – Restrictions on Imports of Cotton and Man-Made Fiber Underwear*, WTO Doc. WT/DS24/R (1996), at para. 7.13 ('[A]n objective assessment would entail an examination of whether the [US Committee for the Implementation of Textiles Agreements] had examined all relevant facts before it..., whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States").

[317] See e.g. Art. 31(2) of the ICCPR and Art. 8 of the International Convention on the Elimination of All Forms of Discrimination (ICERD) (1965).

[318] An-Na'im A. A., *Human Rights in the Muslim World* in Steiner H. J., Alston P. and Goodman R. (eds.) International Human Rights in Context. *3rd ed. Law, Politics, Morals. Oxford University Press,* 2007; pp. 531-532.

subsequent instruments, they so did on the basis of an established framework and philosophical assumptions adopted in their absence. For example, the pre-existing framework and assumptions favored individual civil and political rights over collective solidarity rights. Some authors argue that inherent differences exist between the Western notion of human rights as reflected in the international instruments and non-Western notions of human dignity. In the Muslim world, for instance, there are obvious conflicts between Sharia and certain human rights, especially of women and children.[319]

An-Na'im believes that a modern version of Islamic law can and should be developed. Such a modern 'Sharia' could be entirely consistent with current standards of human rights. However, to the overwhelming majority of Muslims today, Sharia is the sole valid interpretation of Islam, and as such prevails over international human law or policy. Islamic reform should be based on the Quran and Sunnah which are the primary sources of Islam. These sources have to be understood in accordance with the radically transformed circumstances of today. Such an understanding would qualify for Islamic legitimacy.[320] Governments of Muslim countries, like many other governments, formally subscribe to international human rights instruments because they find the human rights idea an important legitimizing force.

3. 3. 3. Accommodation of Cultural-Religious Reforms

The relationships between religion and human rights are complex.[321] In some sense they can appear to be in normative competition because they both assert a particular worldview.[322] Each has its own ideology and they are sometimes opposed.[323] For example, the public/private distinction is quite strong in international human rights law, whereas 'The idea that religion belongs only to the private sphere is meaningless to the vast majority believers of all religions in the world'.[324] Also, the presence of religion in debates over rights can make matters particularly difficult for governments because they appear to create a situation in which one of the parties either wins or looses.

A good illustration of this problem is the case of Quranic punishments in Islamic societies. The practice of amputation of the right hand for theft is morally abhorrent in the West,

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[319] An-Na'im A. A., *Human Rights in the Muslim World* in Steiner H. J., Alston P. and Goodman R. (eds.) International Human Rights in Context. *3rd ed. Law, Politics, Morals. Oxford University Press,* 2007; p. 532.
[320] Ibid. pp. 534-538.
[321] Marks S. and Clapham A. *International Human Rights Lexicon*. Oxford University Press, 2005. pp. 309-26.
[322] Witte Jr., *Law, Religion, and Human Rights*. 28 Colum. Hum. Rts. L. Rev. 1 (1996-1997); pp. 1-31.
[323] See generally Witte J. and Van der Vyver J., *Religious human rights in global perspective– religious perspectives*. Martinus Nijhoff Publishers, 1996.
[324] Boyle K. and Sheen J. *Freedom of religion and belief– a world report.* Routledge, 1997; p. 10. ,The usual assumption is that, in Islam, politics and religion cannot be separated.'

but Muslim societies defend this cultural practice on the grounds that however severe the punishment might seem, 'it is in fact extremely merciful in comparison to what the offender will suffer in the next life'.[325] The Sudanese human rights scholar An-Na'im argues that while the values of the Quran are open to interpretation and contestation in relation to some practices, there is no interpretation of Islam which would prohibit this religious punishment for theft.[326] This view of Islam is open to the critique by the defenders of universally established human rights norms.

Whether religion is a positive force for human rights is an issue on which views reasonably differ. One view is that religious freedom and religious tolerance can reinforce democratic governance and a culture of human rights by encouraging acceptance of collective laws, respect for institutions, community responsibilities and a public debate.[327] Another view is that religions have been responsible for centuries of oppression, conflict and violence. Whatever one's view of the relationship, the reality is that in many parts of the world religion has not gone away in the face of modernity and secular reason.

Tibi believes that if Muslims are to embrace international human rights law standards fully, they need to achieve cultural-religious reforms in Islam – not as faith but as cultural and legal system. In fact, Islam is a distinct cultural system in which the collective, not the individual, lies at the center of the respective world view.[328] The concept of human rights, as Mayer rightfully stresses, is "individualistic" in the sense "that it generally expresses claims of a part against the whole".[329] The part pointed out by Mayer is the individual who lives in a civil society and the whole is the state as an overall political structure. Islam makes no such distinction. In Islamic doctrine, the individual is considered a limb of a collectivity, which is the community of believers.[330]

Establishing human rights in Islam as individual rights seems to be necessary to introduce the concept of rights and to shift away from the concept of duties. To achieve this, drastic

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[325] An-Na'im A. A., *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: the Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment* in An-Na'im A. A., *Human rights in cross-cultural perspectives– a quest for consensus*. University of Pennsylvania Press, 1995; p. 35.

[326] Dunne T. and Wheeler N. J. *Introduction: Human Rights and the Fifty Years' Crisis* in Dunne T. and Wheeler N. J. *Human Rights in Global Politics*. Cambridge University Press, 2000; p. 12.

[327] Wallace J. C., *Challenges and Opportunities Facing Religious Freedom in the Public Square*. Brigham Young University Law Review (2005); pp. 597-610.

[328] Tibi B., *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations*. Human Rights Quarterly, Vol. 16, No. 2 (May, 1994), pp. 277-299.

[329] Mayer A. M., *Islam and human rights: tradition and politics*. Boulder (Colo.): Westview press, 1999; p. 198.

[330] Tibi B., *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations*. Human Rights Quarterly, Vol. 16, No. 2 (May, 1994), pp. 277-299.

religious-cultural reforms are required. In fact, it is not simply a reform, but rather the accommodation of cultural modernity[331] in Islam.

First of all, there is not any single religion, but rather a plurality of religions. Different religious traditions obviously relay differently to human rights. Secondly, each of the major religious traditions itself relates to human rights in a variety of ways. The same religion can be invoked to support widely divergent practices. Finally, those religious practices are experienced and explained in ways that are diverse in their implications for human rights. To give an example, the wearing of the Muslim headscarf is for some a symbol of female subordination; for others, on the contrary, it is a mark of empowerment and an aid to the active involvement of women in public life. Whatever is the view of the relationship between religion and human rights, the reality is that in many parts of the world religion has not disappeared because of modernity and secular reason.

3. 4. Concluding Remarks

It seems beyond question that many tensions between traditional Islamic norms and international human rights standards exist. While the political and legal philosophy of Islam may differ in certain respects from that of the secular international order, it does not necessarily mean a complete discord with the international human rights regime. Removing the traditional barriers of distrust and apathy could reveal that diversity is not synonymous to incompatibility.[332]

There were examined some substantive guarantees of the ICCPR in the light of Islamic law, and it is more or less clear that the Covenant is for the most part not inconsistent with Islamic law. According to Baderin, the right by right investigative approach could lead to a better understanding of legal problems and to the solution how to handle them in a manner that promotes the noble objective of enhancing human dignity, which is common objective of both the Sharia and international human rights law.[333] It is very important that the Muslim States would not only consider themselves under an international legal duty but also under a religious obligation to respect and ensure the civil and political rights.

It can be deduced from the analysis that the actual problem areas concern the issues of the family and children out of wedlock and that Islamic law is not compatible in regard to this right

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[331] Modernity has two dimensions: on the one hand, it is a cultural concept, on the other hand, it has a structural-institutional dimension. See generally Habermas J., The philosophical discourse of modernity– twelve lectures. Lawrence F. G. (trans.) MIT Press, 1990.

[332] Mayer, A. E. *Islam and Human Rights, Tradition and Politics in Gearon L. Human Rights and Religion*. Sussex Academic Press, 2002.

[333] Baderin M. A. *International Human Rights and Islamic Law*. Oxford Univeristy Press, 2005, p. 167.

with the ICESCR. The issue of the family and children out of wedlock is strictly dictated by the Islamic religion and regulated by Islamic law. However, those Muslim States that have ratified the ICESCR have an obligation under Islamic law as they do have under international law to respect and ensure all the economic, social, and cultural rights recognized under the Covenant.

The most practical approach supposes that the both: HRC and ESCR Committee should take into consideration the different character of religious, cultural and social values of the UN Member States while interpreting the rights enshrined in the international Covenants. The use of margin of appreciation doctrine internationally would enable the Committees to identify a reasonable universal standard and at the same time to respect justifiable social and moral values of all the State Parties. Aside, Muslim States that apply Islamic law also have a duty to contribute in respect of the protection of universally established human rights. This obligation demands the constructive and adequate interpretation of the Sharia including the reinterpretation of the Islamic tradition and an accommodation of specific cultural-religious reform.

CONCLUSIONS

1. There is an enormous impact of globalization on international human rights regime. The process of globalization provided an opportunity for States, international organizations, and civil society actors to place human rights on the international legal agenda.

2. Notwithstanding that the term of human rights is used extensively and frequently, it is difficult to define. Generally, human rights are regarded as those fundamental and inalienable rights which are essential for life as a human being. There is, however, an absence of consensus as to what these rights are, and frequently it is easier to identify what it is human rights are intended to achieve rather than what they are.

3. At the interstate level, the existence of global human rights culture is evident from growing body of human rights standards and conventions which the vast majority of states have signed. The strongest arguments for the universality of human rights are still hinged on moral arguments and the need for substantive justice in human relationships. Thus, even if individuals are denied rights by the laws of a particular state, they still can make a claim to rights by virtue of their membership of common humanity.

4. However, there is a rising gap between the tendency by the States to join international human rights regime and to bring their human rights practice into compliance with that regime. This situation challenges the efficacy of international human rights law and questions the nature of legal commitments of the States. Arguing that the various legal instruments which constitute the international bill of rights command ‘a remarkable international normative consensus’, Donnelly recognizes that states do not always uphold these standards. Thus, some States continued to assert that the scope of human rights remained a matter of internal law. To defend this assertion the States often use the reservations to multilateral treaties.

5. Cultural relativity is an undeniable fact, moral rules and social institutions evidence an astonishing cultural and historical variability. Cultural relativism is a doctrine that holds that at least some of such variations are exempt from legitimate criticism by outsiders. This implies that cultural relativism may be defined as the position according to which local cultural traditions including religious, political, and legal practices, properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society. A central idea of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.

6. Taken to its extreme, relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights. Therefore there is a need for the

adoption of the margin of appreciation doctrine by the UN human rights treaty bodies in interpreting international human rights treaties.

7. Many Members States of the UN are Muslim States that apply Islamic law either fully or partly as domestic law. While Muslim States participate in the international human rights objective of the UN, they do enter declarations and reservations on grounds of the Sharia or Islamic law when they ratify international human rights treaties. The Quran and the Sunnah primarily constitute both formal and material sources of Islamic law.

8. The relationships between religion and human rights are complex. In some sense they can appear to be in a normative competition because they both assert a particular worldview. Also, the presence of religion in debates over rights can make matters particularly difficult for governments.

9. It seems beyond question that many tensions between traditional Islamic norms and international human rights standards exist. However, the analysis shows that the Islamic law does not oppose or prohibit the guarantee of civil and political rights of individuals in relation to the State. On the other hand, it can be deduced from the analysis that the actual problem areas concern the issues of the family and children out of wedlock and that Islamic law is not compatible in regard to this right with the ICESCR.

10. Certainly there are some differences of scope between Islamic law and international human rights law but that does not create a general antithesis between them. The analysis denies the complete incompatibility theory and reveals the existence of a wide positive common ground between international human rights and Islamic law. This does not however cover some areas of differences in scope and application, but rather advocates a positive basis for managing such differences through the development of complementary methodologies between the two legal regimes.

11. To encourage the promotion and realization of international human rights in the Muslim world, the UN international human rights treaty bodies must develop consideration for Islamic values when dealing with States that apply Islamic law. This is possible through the adoption of the margin of appreciation doctrine on moral issues relating especially to Islamic religious-ethical and family norms.

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ANNOTATION

Valeiša T. Compatibility of Islamic Law with Internationally Accepted Human Rights/ Joint Programm International Law master thesis. Supervisor: Doc. dr. L. Biekša. Vilnius: Mykolas Romeris University, Faculty of Law, 2011.

The key words: universal human rights, cultural relativism, International law, Islamic law, margin of appreciation doctrine.

This thesis summarizes the recent debate over universal versus culture-bound human rights, provides a brief review of the role of Islamic legal tradition to international human rights law, examines how Islamic elements have been combined with international human rights principles, and discusses the recent trend to promulgate Islamic human rights schemes. The thesis is aimed to construct a dialogue between international human rights law and Islamic law in regard to promote the realization of human rights within the context of the application of Islamic law in the Muslim States. The traditional arguments on the subject are examined and responded to from both international human rights and Islamic legal perspectives. The thesis asserts that Islamic law can serve as an important vehicle for the guarantee and enforcement of international human rights law in the Muslim world and puts forward some recommendations to that effect, as for instance, the importance of the implementation of margin of appreciation doctrine internationally.

SUMMARY

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Despite its popularity and universal acceptance however, opinions still differ considerably about the conceptual interpretation and scope of human rights. This has generated the paradox of universalism and cultural relativism in international human rights discourse. The drafters of the Universal Declaration of Human Rights had correctly identified that a common understanding of these rights and freedoms is of the great importance for their full realization. This demands a continued attempt at harmonizing the different concepts, to achieve, despite the complexity and diversity of human society, a common universal understanding that ensures the full guarantee of human rights to every human being everywhere.

The need to pay attention to the diversity of cultures and legal traditions is more discussed than fulfilled. This need is addressed through a detailed and specific analysis of the relationship between international human rights law and Islamic law. The thesis examines the important question of whether or not international human rights and Islamic law are compatible and whether Muslim States can comply with international human rights law while they still adhere to Islamic law.

The approach in this thesis differs significantly from the one adopted in the previous works on this subject. The argument has often been that when Muslim States ratify international human rights treaties they are bound by the international law rule that a State Party to a treaty 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In practice however, Muslim States do not generally plead the Islamic law as justification for 'failure to perform' their international human rights obligations. They often argue not against the letter of the law but against some interpretation of international human rights law which, they contend, does not take Islamic values into consideration.

The thesis formulates an inter-relation between two extremes and argues that although there are some differences of scope and application, this, however, does not create a general state of dissonance between international human rights law and Islamic law. The thesis concludes that it is possible to harmonize the differences between international human rights law and Islamic law through the adoption of the 'margin of appreciation' doctrine by international human rights treaty bodies.

ANOTACIJA

Valeiša T. Islamo teisės suderinamumas su tarptautinėmis žmogaus teisėmis / Tarptautinės teisės Jungtinės Programos magistro baigiamasis darbas. Vadovas: Doc. dr. L. Biekša. Vilnius: Mykolo Romerio Universitetas, Teisės fakultetas, 2011.

Pagrindinės sąvokos: universalios žmogaus teisės, kultūrinis reliatyvizmas, tarptautinė teisė, Islamo teisė, aiškinimo laisvės doktrina.

Šis magistro baigiamasis darbas apibendrina pastaruoju metu plačiai minimą priešpriešą tarp, iš vienos pusės universalių, iš kitos – kultūra ir tradicijomis pagrįstų žmogaus teisių. Darbe yra nagrinėjama, kokiu būdu tam tikri Islamo religijos elementai yra suderinami su tarptautiniais žmogaus teisių principais, ir aptariamos pozicijos, remiančios kultūrinį reliatyvizmą ir, tuo pačiu, Islamo žmogaus teisių sistemą. Magistro baigiamojo darbo tema buvo nagrinėjama siekiant atskleisti tarptautinių žmogaus teisių ir Islamo teisės tarpusavio ryšį, kuris turėtų teigiamos įtakos gerinant žmogaus teisių įgyvendinimą muslmonų šalyse, taikančiose Islamo teisę. Agumentai, susiję su darbe nagrinėjama tema, yra nagrinėjami tiek iš tarptautinių žmogaus teisių sistemos, tiek iš Islamo teisės perspektyvų. Magistro baigiamasis darbas suponuoja išvadą, kad atitinkamai interpretuojama Islamo teisė gali pasitarnauti garantuojant ir įgyvendinant tarptautiniu lygiu pripažintas žmogaus teises musulmoniškoje pasaulio dalyje, ir šiuo tikslu pateikia tam tikras rekomendacijas, pavyzdžiui, valstybėms suteikiamos tarptautinių žmogaus teisių aiškinimo laisvės doktrinos pritaikymą tarptautiniu lygiu.

SANTRAUKA

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Nepaisant žmogaus teisių sąvokos populiarumo ir universalaus jų pripažinimo, visgi požiūriai dėl jų konceptualaus interpretativimo ir apimties labai skiriasi. Šie skirtumai sukėlė tam tikrą tarptautinių žmogaus teisių universalumo ir kultūrinio reliatyvizmo diskurso paradoksą. Universalios žmogaus teisių deklaracijos rengėjai pagrįstai pripažino, kad bendras tarptautinių teisių ir laisvių suvokimas bei aiškinimas yra labai svarbūs jų pilnam įgyvendinimui. Visa tai reikalauja nuolatinio bandymo ir pastangų harmonizuoti skirtingas žmogaus teisių sampratas, nepaisant visuomenių kompleksiškumo ir įvairovės, siekti bendro universalaus supratimo, kuris užtikrintų visišką žmogaus teisių apsaugą, nepriklausomai nuo to, kurioje pasaulioje dalyje jis būtų.

Poreikis labiau atkreipti dėmesį į kultūrų ir teisinių tradicijų įvairovę bei svarbą yra atskleidžiami detaliai analizuojant santykį tarp tarptautinių žmogaus teisių sistemos ir Islamo teisės. Magistro baigiamasis darbas nagrinėja svarbų klausimą, ar Islamo teisė yra suderinama su tarptautinėmis žmogaus teisėmis, ir ar musulmonų šalys, atsidavusios Islamo teisei, geba įgyvendinti tarptautinių žmogaus teisių sutarčių nuostatas.

Šio darbo požiūris gerokai skiriasi nuo to, kuris yra pristatomas kituose panašaus pobūdžio darbuose. Labai dažnai yra išreiškiamas argumentas, kad kai musulmonų šalys ratifikuoja tarptautines žmogaus teisių sutartis, jos įsipareigoja įgyvendinti ratifikuotų sutarčių nuostatas, ir negali įgyvendinimo apribojimų pateisinti nacionalinės teisės normomis. Visgi, musulmonų šalys, atsakydamos į priekaištus dėl nepakankamo žmogaus teisių įgyvendinimo ir jų užtikrinimo, remiasi ne Islamo teise, kaip pateisinamąja priežastimi, bet esamu tarptautinių žmogaus teisių aiškinimu ir jų suvokimu, kuris, anot Islamo šalių atstovų, neatspindi islamiškųjų vertybių.

Magistro baigiamajame darbe yra analizuojama tarpusavio sąveika tarp dviejų kraštutinumų ir teigiama, kad, nors ir yra pastebimi tam tikri skirtumai žmogaus teisių apimtyje ir jų pritaikyme, tai savaime neimplikuoja tarptautinių žmogaus teisių sistemos ir Islamo teisės nesuderinamumo. Darbe yra pateikiama išvada, kad aiškinimo laisvės doktrinos taikymas tarptautiniu lygiu galėtų įtakoti stipresnės sąveikos ir suderinamumo atsiradimą tarp Islamo teisės ir tarptautinių žmogaus teisių.

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