

HUMAN RIGHTS AND ISLAM

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Through a careful reading of the Koran, we can deduce that life, dignity, justice, free will, property and privacy are considered sacred, inviolable and inalienable. Similarly, life, religion, intellect, family and property are considered to be the five essential elements (*al-darùrat*) or the five foundations (*al-usul al-Khamsah*) of good governance. But it is clear that in an eminently God-centered society, based on the philosophy of the absolute and of the transcendence, the freedom of individuals is reflected in their servitude to God. This link between divine law and state laws, however, determines the endorsement of serious problems with respect to issues of equality between men and women, freedom of religion, discrimination on religious grounds and corporal punishment in many Islamic countries. The recent dramatic developments of the popular movements that inflamed the Mediterranean basin two years ago lead the observer to reflect deeply on Islamic culture about human rights and the compatibility between the Western standards on protection of those rights and *sharia* law.

1. State law, civil society and democracy in the Arab-Muslim world

The scientific debate on the nature of the Arab-Muslim State, the power structure, the relationship between law and the “revelation” of God is relatively old. Yet it experienced a renewed vigor in the second half of the 70s, through the

works of, among others, B. Ghalioun,¹ Dali El Din Hilal² and Khalid Ahmad Khalid,³ and through conferences organized by the Union of Arab Jurists,⁴ the Centre for Arab Unity Studies (CEUA)⁵ and the Arab thought Forum.⁶

The assumption is that Islamic law, meant as the law of the relationship between individuals and between individuals and power, is embodied in Shari'a. Shari'a is the organization of individual and collective life according to the imperatives of the divine positive law as it was given to and imposed on Muslims in the Qur'an and through the Summa, before being processed and interpreted by various canonical schools of Muslim law (*Fiqh*), in particular Sunni and Shia. Not only does Shari'a define the dynamics of worship and enumerate the essential articles of the creed, but it also points out the rules according to which the State should work both at home and abroad. In other words, in the Islamic world, rights and duties, prohibitions and contracts have religious roots, so that Shari'a, its individual interpretation (*ijithad*) and the predominance of duties over rights contribute to achieve full implementation of human rights in the Islamic political culture.⁷

The identification of Islamic law with Shari'a is, moreover, "codified" in different codes of Arab countries, such as the

¹ B. Ghalioun, *Manifesto per la democrazia*, Beyrouth, 1978.

² Ali El Din Hilal, *La democrazia e i diritti dell'uomo nella patria araba*, Le Caire et Beyrouth, 1983.

³ Khalid Ahmad, *Gli arabi e la democrazia*, Beyrouth, dar Al-hadathan, 1984.

⁴ Union Des Juristes Arabes, *Droits de l'homme et libertés fondamentales dans le monde arabe*, Bagdad, revue Al-Houquouki Al-Arabi, n. special, 1979.

⁵ CEUA, *La crise de la démocratie dans la patrie arabe*, Beyrouth, 1984.

⁶ Saad Eddine Ibrahim, *Pluralisme politique et démocratie dans la patrie arabe*, Forum de la pensée arabe, Amman, 1989.

⁷ Daniel Price, *Islamic Political Culture, Democracy and Human Rights*, Praeger Pub, Westport, 1999, p. 161.

Egyptian Civil Code of 1948.⁸ We can find similar references in the Algerian Civil Code of 1975 and in North Yemen Civil Code of 1979.⁹

Most of the Constitutions of the Arab countries also state that Islam is the state religion and that Shari'a is a main source of law, as proved by Article 2 of the Egyptian Constitution (as amended in 1980).¹⁰ There are two primary sources of Shari'a law: the Koran and the Sunna. The Koran, sum and main source of Islamic law, is embodied in the revelation sent by God to the Prophet (Muhammad) between 610 and 632. The Sunna is, instead, the set of words, facts, behaviors and interpretation attributed to Muhammad, as reported in the traditions (*hadith*).

Islamic jurists developed from these two sources, through the creation of specific legal principles (*usul al-fiqh*), a set of rules to regulate relations between human beings in certain social contexts and human beings with God.

1.1 *The issue of sovereignty*

The main problem for Islamic law scholars is the issue of sovereignty. Most of the authors believe, indeed, that the sovereignty of Islamic law (and the legislative power) belong to God expressed through the Koran, not to the people, it is right and good (*but 'roof*) what the divine law prescribed, and it is wrong and evil (*munqar*) what it condemns. After all, if human rationality were sufficient to regulate the right behavior, the revelation would be useless.¹¹

⁸ Which states that "in the absence of a legal disposition, judges (*qadi*) speak out according to the morals (*'urf*) and, in their absence, according to the principles (*mabadi*) of Islamic Shari'a".

⁹ In which it is asserted that "the rules of equity shall correspond to the fundamentals (*usul*) of Islamic Shari'a".

¹⁰ That states that "Islam is the state religion. The principles of Islamic law represent the main source of law."

¹¹ Chafik Chehata, *La religion et les fondaments du droit en Islam*, in *Archives de philosophie du droit*, 1973, p.22.

The revelation has come to solve controversial issues, therefore, Muslims do not need to look elsewhere for an answer, because Islam absolutely provides good, eternal answers.¹² Thus Islamic law covers all aspects of life.¹³ As quoted by Egyptian jurist 'Ayli, "in the Islamic system, the nation can not contradict a provision of the Koran or the Sunna or commit an act that would be contrary to them, regardless of the consent of the governors and the governed. Islam does not know bodies whose opinion prevails in case of conflict. It knows no minority or majority. It cannot refer to the opinion of the nation as a source of power (...). The nation and its leaders have no legislative power, they can only refer to God and His messenger to deduce the rules."¹⁴ The denial of the sovereignty of the people for the benefit of God, author of Islamic law, is supported, in particular, in the several constitutional models developed by Islamists to replace the existing Western-inspired Arab-Muslim constitutions. This concept is best summed up by Article 15 of the constitutional model of Wasfi of 1980 (prepared by the Vice Chairman of the Egyptian Council of State Mustafa Kamal Wasfi) that asserts that "expressing an opinion in accordance with Islam is an obligation guaranteed by the State, which facilitates all activities necessary for this purpose. No majority opinion shall be considered if that opinion disagrees with Islamic law. "To be fair it should be clarified that, despite the references to Islamic law mentioned above, currently most legal matters governed by Arab-Muslim codes are Western-inspired, in particular concerning the judicial system, civil law, commercial law, administrative

¹² Muhammad Mitwalli Al-Sha'rawi, *Qadaya islamiyyah, Dar al-shuruq, Beyrouth & LeCaire* 1977, p. 35-39.

¹³ Mahmud Al-Khaldi, *Naqd al-nizam al-dimuqrati, Dar al Galil & Maktabat al-Muh-tassib, Beyrouth & Amman*, 1984, p. 156-7.

¹⁴ Abd-Al Hakim Hassan Al-'Ayli, *Al-hurriyyat al-'ammah fil-fikr wal-nizam al siyassi fil-islam, dirassah muqaranah, Dar al-fikr al-'arabi, Le Caire* 1974, p. 205-206, 214-215.

law, criminal law and humanitarian law. Matters related to family law and successions are controversial.

It is clear that the Quran and the Sunnah alone can not be sufficient to govern the complex contemporary societies, they can only be supplemented with additional provisions that “actualize” the prophet’s message, and make the revelation feasible, not being the shiaritic law directly applicable. The Koran itself acknowledges the existence of two categories of verses: those that contain a clear and unambiguous interpretation (*muhkam*) and those susceptible to more than one interpretation (*mutashabh*). We must, in fact, make a distinction between laws that are fully consistent with the shiaritic law or from which they derive, laws that are not dissimilar or conflicting (basically the ones included in the civil, criminal, and trade codes) and laws disagreeing with Islamic law. Regarding this latter case, the doctors of Islamic law (*fuqaha*) have produced over the centuries, a multitude of treaties attributable to one or another school or school of thought that follow the extreme fragmentation of the Islamic-Muslim doctrine (and the law), primarily through the Sunnitic/Shiitic bipartition. Over the centuries, in fact, the message of Islam was mediated by multiple interpretations and applications, so that modern Islam still continues to substantiate in multifarious manifestations. For example, it was used to legitimate monarchies in Morocco and Saudi Arabia, military regimes in Pakistan, Libya and Sudan or theocracies (Iran).¹⁵ This heterogeneity is inevitably projected in the positive law of the Muslim-majority Countries and extends from full compliance with traditional Shari’a of Saudi Arabia to the Turkish secularism, from the conservatism of the Algerian legislation on family law to the cautious Moroccan reformism, to the modernity of the Tunisian law (except for the right of inheritance) etc.

¹⁵ Syed Jafar Alam, *Towards a New Discourse: Human Rights in Islam and Vice Versa*, in *Indian Journal of International Law*, Vol. 47, No. 2, p. 263.

2. Human Rights and Islam

Human rights within the Islamic conception are subordinate to divine revelation, like the rest of the law. It is superior to any other domestic or international positive law, either customary or covenantal, so that in case of conflict between a shiaritic precept and a provision dealing with human rights, a Muslim interpreter, if forced to choose, would not hesitate to give priority to Shari'a despite the binding nature of the subject of human rights.¹⁶

The Quranic principles of justice, fairness and human solidarity create duties for each member of the community taken individually. Islamic tradition recognizes the concept of "right" in the term "*huq.*"¹⁷ The Qur'an states "human dignity", in the sense that God chose man to "many other creatures."¹⁸ The acceptance of this principle is not only a moral faculty but reveals the obligatory consequence of respecting the dignity of others. Human beings in the Koranic tradition, in fact, have respectability, dignity, responsibility and freedom of choice. These awards are deducted, in particular, from the verses II, 30 (appointing the man "lieutenant of God on earth") and XII, 70: "Many of us already honored the children of Adam (...) and we gave them great preference over a lot of beings we created". The concept of human rights, in brief, dominates the Muslim consciousness as it is based on the teachings of God. For example, speaking about the Universal Declaration of Human Rights of 1948, the Iranian Sultanhussein Tabandeh

¹⁶ See *Le mémorandum du Gouvernement du Royaume d'Arabie Saoudite relatif au Dogme des droits de l'homme en Islam et à son application dans le Royaume*, adressé aux Organisations Internationales intéressées, in Muslim Worls League, *Colloques de Ryad sur le Dogme musulman et les droits de l'homme en Islam*, Beyrout, Dar al-kitab allubnani, 50-51.

¹⁷ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law; Equal Before Allah, Unequal Before Man?*, Kluwer Law International, 2000, p.15.

¹⁸ *Corano*, versetto XVII,70.

asserts that it “did not promulgate anything new nor opened any innovation. Every Clause (...) already existed in Islam in a better and more perfect form”.

Many jurists and Islamic scholars claim the role of non-Western societies, and Islam in particular, as a source of epistemological concept of “human rights”¹⁹ (*Huqùq Adamiyyin*). This assertion is indeed shared by many Western scholars of Islamic law.²⁰ Ostrorog, for example, noted that “looking at the context of Islamic law, some theories inspired not only admiration but also surprise. These Eastern thinkers of the ninth century coined, on theological grounds, the principle of Human Rights, in terms that included the right to individual liberty, inviolability of person and property, (...) have drawn up laws of war (...) exposed a doctrine of tolerance toward non-Muslims so liberal that our West had to wait a

¹⁹ Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, F.T. Goulding and Company, London, 1985, p. 85.

²⁰ See: Mohammed Al-Ghazzali, *Human Rights in the Teachings of Islam*, al-Makhtabat al-Tijariyah, Cairo, 1992; Adib Al-Jadir, *Foreword to the Special Edition on Human Rights in the Arab World*, in *Journal of Arab Affairs*, Vo.3, p. 1-4.; Said Mohamed El-Sayed, *Human Rights in the Third World: The Question of Priorities*, in Adanabtua Pollis and Peter Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives*, Praeger, New York, 1979; Saad Eddin Ibrahim, *The future of Human Rights in the Arab World*, in Hisham Sharabi (ed.), *The Next Arab Decade: Alternative Futures*, Wstview, Colorado, 1988; Majid Khaddouri, *The Islamic Conception of Justice*, John Hopkins University Press, Baltimore, 1984; Maqbul Ilahi Malik, *The Concept of Human Rights in Islamic Jurisprudence*, in *Human Rights Quarterly*, Vol. 3, 1981, p. 56-67; Abu Al Ala Mawdudi, *Human Rights in Islam*, Al-Tawid, Vol.4, 1987, p.456-67; Sayyed H. Nasr, *The Concept and Reality of Freedom in Islam and Islamic Civilisation*, The Imperial Academy of Philosophy, Teheran, 1978; Abdul Aziz Said, *Human Rights in Islamic Perspectives*, in Adanabtua Pollis and Peter Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives*, Praeger, New York, 1979.

hundred years before seeing equivalent principles adopted".²¹ Fouad Zakaria argues that

"the concept of human rights in the contemporary Arab world is due to Islam. So, to understand the philosophical foundations on which all law is based in the contemporary Arab world, it is imperative to analyze the Islamic conception of these rights, their interpretation by the Muslim scholars, as well as the effect of this concept in the way these rights are rendered intelligible and practiced by the Arabs today".²²

2.1 *The theological basis*

In general terms, through a careful reading of the Koran, we can deduce that within that sacred text there are elements that define Islam as a religion capable of creating a society based on a deep sense of freedom, responsibility and justice in order to protect and preserve the human dignity of each individual. Life, dignity, justice, free will, property and privacy are considered sacred, inviolable and inalienable.²³ Similarly, life, religion, intellect, family and property are considered to be the five essential elements (*al-darurat*) or the five foundations (*al-usul al-Khamsah*) of good governance. The "sanctity" of private property, in particular, is an absolute rule in all Islamic schools of law, both in relation to private individuals and in their relations with the state.²⁴ Islamic

²¹ C.L. Ostorog, *The Angora Reform*, University of London Press, 1927, pp. 30-31, citato in A.A.A. FYZEE, *Outlines Of Muhammadan Law*, Oxford University Press, 3rd ed., 1964, pp. 53, 54.

²² Fouad Zakaria, *Human Rights in the Arab World: The Islamic Context, in Philosophical Foundation of Huma Rights*, United Nations, Geneva, 1985

²³ Mohamed Berween, *The Fundamental Human Rights: An Islamic Perspective*, in *The International Journal of Human Rights*, Vol. 1, 2002

²⁴ J. Schacht, *Islamic Law in Contemporary States*, Lahore: Sh. M. Ashraf, 1987, 7th Edn.

law also recognizes the rule of law expressed in the maxim: *'al-asl fi al-ash-yà ibahah* (every action is permitted until the contrary is established).²⁵ For Islamists the boundaries of *ijtihad* (individual interpretation of Islam) were already achieved in the ninth century and the shiaritic law is based on the traditions that have not changed in the last millennium.²⁶ It is clear that in an eminently God-centered society, based on the philosophy of the absolute and of the transcendence, the freedom of individuals is reflected in their servitude to God. This is the only thing that determines the value of an individual, and makes him worthy of this freedom. Only exclusive worship, directly and without intermediaries, determines the greatness of believers, ensuring their dignity. This concept derives from the same philosophy of Islamic sovereignty above, which denies the sovereignty of the people of the legislative power, prerogative power of God. It is not a coincidence, in this respect, that the Islamic conception of human rights, as we will see, consecrates also discriminations based on sex or religion under Islamic law and that the original main terms made by the Islamic countries to the International Conventions concern these two categories of protected rights.

It is good to clarify right away, nevertheless, that the discriminations which it refers to are not necessarily directly related to the subordination of positive law state to Islamic doctrine, being able to include cases of compatibility between revelation and a high degree of legal recognition of rights. We refer in particular to Countries such as Jordan, Egypt, Turkey or Tunisia that, despite the constitutional references to Shari'a, has succeeded in developing one of the most advanced codes of personal status of all Arab countries to the extent

²⁵ Mashood A. Baderin, *Identifying Possible Mechanisms within Islamic Law for the Promotion and Protection of Human Rights in Muslim States*, in Netherlands Quarterly of Human Rights, Vol. 2, 2004.

²⁶ G. H. Jansen, *Militant Islam*, Pan Book, London, 1979.

which prohibits polygamy and repudiation (Article 18, 30) and allows adoption. This does not mean that Islamic states have adopted blindly Western standards of human rights. It simply means that the extreme heterogeneity of the interpretation of the message of Islam has led to a different degree of protection from state to state. In confirmation of the absence of a direct link between political culture and Islamic human rights violations, it is important to mention the research by Daniel Price, who has developed a numerical index of the relationship between political culture and non-compliance with human rights. These studies involved 23 Islamic states and 23 non-Muslim developing countries and showed that the determining factor in the low level of protection of human rights in many Islamic countries is the presence of authoritarian regimes rather than Islamic political culture.²⁷ To this must we must add the extreme heterogeneity of Muslim majority countries. To quote the words of An-Na'im,

“although Islam is always considered to be the main factor in the presumed unity of the Arab culture, there are considerable differences in the way it is interpreted and practiced in various areas of the region, especially in terms of relations between the state and public life, from Tunisia to Saudi Arabia and from Somalia to Syria to Iraq”.²⁸

Therefore, given that the more than 60 states of Islamic tradition of the international community have extremely divergent regulations, very often influenced by different schools of thought, we try to sum up the Islamic-Muslim common vision about specific categories of rights, which have particular problems, such as equality between men and

²⁷ Daniel Price, *Islamic Political Culture, Democracy, and Human Rights: A Comparative Study*, Greenwood Publishing Group, 1999.

²⁸ Abdullahi A. An-Na'im, *Human Rights in the Arab World: A Regional Perspective*, in *Human Rights Quarterly*, 23, 2001, p.701.

women, freedom of religion, discrimination based on religion and corporal punishment.

3. Civil and Political Rights

As seen, the Law, according to Islamic tradition, is divine and already given (revealed). It is the only one allowed to govern relations between individuals in a community: no legislative body seems to be so necessary, possible or compatible. The concept of “political rights”, in this perspective, has no significance, as it is rather a set of “political duties”.

3.1 *The party system*

The interpretation of the verses LVIII, 19-22 and V, Article 56 of the Koran reveals a conception partly founded on the dichotomy between the party of the Devil (*Hizb al-shaytan*) and the party of God (*Hizb Allah*). It was clearly the party of God intended to bring the Muslim people to victory. Even today we see the spotlight of a Libyan party that follows the etymology: the Hizb Allah, better known as *Hezbollah*.

In general, now we can say that in no state, it is theoretically prohibited to create political parties as long as they are based on the Islamic dogma. To resume the constitutional models of the Islamic movements mentioned above, art. 19 of the constitutional model of the party of liberation asserts that “any group based on different principles of Islam is prohibited.” Article 38 of the constitutional model of Wasfi adds that “it is forbidden to set up positivist political parties”. Similarly, the constitutional model of the Islamic Council, Article 18a, although it recognizes the right of assembly and association, it is limited to cases in which it complies with the requirements of the divine law. This seems to explain the refusal to ratify the UN Covenant on Civil and Political Rights of 1966 by Brunei, Comoros, Guinea-Bissau, Malaysia, Oman, Pakistan, Katar, Saudi Arabia and United Arab Emirates. It is also

worth to underline that on a factual level, different countries of North Africa and sub-Saharan Africa have experienced periods of overt dictatorship or temporarily indefinite state of emergency that made political institutions move towards the single-party system. It is clear, however, that this conception of popular participation in political life affects freedom of association and, in particular non-discrimination on religious grounds.

3.2 *Religious discriminations*

As to religious discrimination, although only within the Code of Mauritania (Article 306) and the Code of Sudan (Article 126) apostasy is subject to death penalty, the classical Islamic law punishes apostasy with death if it is a man and life imprisonment if it is a woman. Death penalty for apostasy is based on a statement of the Prophet who said: "kill all those who change religion".²⁹ In Egypt and Morocco, the apostate is generally sentenced to life imprisonment, although there is not a law concerning this offense, and Article 6 of the Arab Charter of Human Rights of 1994, states: "no criminal offense may be punished and no penalty can be applied if not by virtue of a legal text."³⁰ The fury against apostasy affects civil rights as an atheist or an apostate or an adherent to secular current (*al-'ilmaniyyoun*) can be separated from his spouse, deprived of his children, his succession remains open, he loses his job and is generally persecuted by Islamic circles in various manners,³¹ in particular through judicial processes, as shown

²⁹ Mashood Baderin, *International Human Rights and Islamic Law*, Oxford Monographs in International Law, 2003, p.124.

³⁰ *Charte Arabe des Droits de l'Homme*, in *Revue universelle des droits de l'Homme*, vol. 7, n° 4-6, 2 giugno 1995.

³¹ K. Walhler, *Zur Behandlung des Religionswechsels im heutigen Recht islamischer Staaten*, in *Mélanges Fritz Sturm*, Vol. II, Liège University, 1999, p. 1297.

in the school-case of the Egyptian Court of Cassation in the Aboud Zayd affair.³²

Moreover, the classical Islamic law recognizes only to the followers of other monotheistic religions based on revelation (Christians, Jews and Samaritans) a limited religious freedom with severe restrictions in terms of access to public offices, limited construction of churches and sanctuaries, prohibition of criticism of Islam, the prohibition to marry a Muslim woman and the payment of a special tax (*gizyah*). We must add, however, that despite this, the general condition of religious minorities (Christians in particular) in the recent years has greatly improved so as to void parts of such discrimination. This seems to support the thesis by the Representative of Sudan in the second periodic report of the International Covenant on Civil and Political Rights, which stated that “conversion from Islam in Sudan is not an offense in itself, it is only the manifestation of such conversion when it attempts to public safety.”³³ “In fact, many scholars have emphasized over the years a certain openness to religious freedom of the Islamic message. With regard to the treatment of religious minorities, for example, Mayer maintains that the treatment of the Jews in particular, by the Islamic societies, has been particularly “enlightened” when compared to the persecution of the Christians of the last century.”³⁴ Others maintain that the standard of religious freedom guaranteed

³² The case concerned the case of Prof. Abu Zayd accused of apostasy and for which the prosecution demanded the separation from his wife because of the illegality of a marriage between an apostate and a Muslim woman. By judgment of 5 August 1996 the Supreme Court gave effect to requests from the prosecution and ordered a death sentence that forced the defendant to repair the Netherlands. M. Charfi, *Islam et liberté*, Paris, Albin Michel, 1998, p. 86.

³³ Sudan's 2nd ICCPR Periodic Report of 1997, par.127 e 133 (UN Doc. CCPR/C/75/Add.2 of 13/03/97).

³⁴ Anne Elisabeth Mayer, *Islam and Human Rights*, in *Tradition and Politics*, 3rd ed., 1999, p.136.

by Shari'a on non-Muslims living in Islamic states has never been reached by other religions,³⁵ and others maintain that the Christian minorities in the nineteenth century preferred to live according to Islamic rules rather than being persecuted by the Byzantines or the Hapsburgs.³⁶ However, religious minorities in Islamic countries today still feel the weight of an orthodox, uncompromising shiaritic interpretation which, as seen, limits freedoms, *inter alia*, granted only to monotheistic revelation-based religions. This condition is constantly threatened by the Islamist rise to power, as it recently happened in Tunisia.

3.3 Criminal Law

Regarding the global harmonization of criminal law, important according to the UN, especially with regard to the death penalty and torture, although most of the Arab countries have recently adopted codes in line with Western standards, classical Islamic law provided forms of punishment in stark contrast to the most elementary requirements of prohibition to cruel, inhuman and degrading treatment, in particular: stoning, crucifixion, amputation of limbs, flogging, torture and the law of retaliation. In this regard, it is necessary to point out that the UN Convention against Torture and Other Cruel, Inhuman and Degrading treatments of 1984 reported the defections of Brunei, Iran, Iraq, Malaysia, Oman, Somalia and Suriname. We must add that among the states that did not sign the optional Protocol of this Treaty (establishing an international system of inspections in places of detention), 16 are Arab-Muslim, namely: Albania, Azerbaijan, Beni, Burkina Faso, Gabon, Guinea, Kazakhstan, Kyrgyzstan, Lebanon,

³⁵ Abdur Rahman I Doi, *Non-Muslims under Shari'a (in Islamic Law)*, 3rd ed., 1983.

³⁶ Heiner Bielefeldt, *Muslim Voice in the Human Rights Debate*, in *Human Rights Quarterly* 17, 1995, p. 597.

Maldives, Mali, Nigeria, Senegal, Sierra Leone, Togo and Turkey.³⁷

The Koranic conception of punishment is certainly interesting, as it allows us to make the dimensions of Islamic justice more intelligible. Although the Koran does not totally exclude justice based on "retaliation", the institution of blood revenge, prevalent in pre-Islamic Arabia, was almost totally abolished by Islam. In this regard, the Koranic verse XVI, 120 says: "if you beat someone, do it as you were beaten, but if you are patient it is better." However, some of the corporal punishments mentioned above haven't yet been abolished *de facto* in Sudan, Iran, Afghanistan and Saudi Arabia. Regarding slavery, finally, there is no doubt that the Koran recognizes this practice. Slavery, however, is considered as an accidental exception and it must be limited so that it will gradually disappear. It is therefore recognized as a temporary and contingent occurrence. Not surprisingly, the Koranic text limits the possibility of slavery only to the capture of prisoners during a war or in cases of hereditary descent. There is no reference to the practice of buying slaves, as it wasn't considered a legal power at the time of Muhammed nor under his four immediate successors.³⁸ The Koran orders, also, the immediate liberation of the slaves by a believer convicted of murder (verse IV, 92), of perjury (V, 89), or in case of an illegal divorce (LVIII, 30). Other reasons for the liberation of slaves are: the violation of the Ramadan fast, and any cruel and degrading treatment perpetrated to a slave, according to the Prophet who said: those who beat or inflict excessive punishments to their slave can atone for their sin through liberation".

Muslims were also obliged to assist the slave financially in the view of his liberation, ensuring his personal safety and a

³⁷ UNTS 1465, 85, 10/12/1984.

³⁸ Robert Roberts, *The Social Laws of the Qoran. Considered and Compared with those of the Hebrew and other ancient codes*, London, Carzon, riedizione della pubblicazione del 1925, 1971, X/126, p. 54.

real prospect of emancipation.³⁹ It should be emphasized, in this regard, that apart from the traditional forms of slavery, servitude and forced labor, new forms of modern slavery, such as trafficking in women for prostitution, child labor, forced labor (including children) and exploitation migrant workers have been convicted by a famous UN Report on slavery in 1984.⁴⁰ Although it has been officially abolished by the Arab-Muslim states, disturbing episodes prove that, until the '90s, it still existed in countries like Mauritania and Sudan.⁴¹ And the return to this practice was explicitly advocated, in a very recent past, by eminent luminaries of Islamic culture in support of an orthodox interpretation of shiaritic tradition, such as Professor Saudi Islamic University of Medina Fayid,⁴² the Egyptian Sheikh and parliamentary Abu-ISMA,⁴³ the Pakistani religious ideologue Mawdudi and the Egyptian Professor Doctor of the Sorbonne Ahmad.⁴⁴

Nevertheless, we can deduce that, being the most "modern" Muslim countries *de jure* Parties of the major international conventions pertaining to the prohibition of slavery and the slave trade, there is still a general consensus about the compatibility between the inhibition of this practice and the principles of Islamic law. This thesis is attested by Article 11 (a) of the Cairo Declaration on Human Rights in Islam claiming that "all men were born free, and no one has the

³⁹ Marcel A. Boisard, *Les Droits de l'Homme en Islam*, in *Islam e droits de l'Homme*, a cura di Marc Agi, Des Idées & des Hommes, pp.82-86.

⁴⁰ See Report on Slavery, UN Doc E/CN.4/Sub.2/1982/20/Rev.1, UN Sales No. E.84.XIV.1,p.10.

⁴¹ See *The flourishing business of slavery*, in *The Economist* del 21 settembre 1996; Nhial Bol, *Sudan Human Rights: Khartoum accused of selling slaves for arms*, in *Inter Press Service*, 12/07/1996.

⁴² Mamud 'Abd-Al-Wahhab Fayid, *Al-riq fil-islam*, Dar al-i' tissam, Le Caire 1989.

⁴³ Salah Abu-Isma'il, *Al-shahadah*, Dar al-i' tissam, Le Caire 1984.

⁴⁴ Hamad Ahmad Ahmad, *Nahwa qanun muwahhad ili-giyush al-islamiyyah*, Makta-bat al Malik Faysal al-islaiyyah, 1988.

right to be enslaved, humiliated, abused or exploited, and there can be no other submission but to God.”

4. Women's rights and sexual discrimination

According to the Koran, women are made of the same essence of men, they were not created from a man's rib, as in the Christian revelation, but women are the “twin halves” of men. The Prophet Muhammad said, that “women are sisters of men.”⁴⁵ This sacred text also grants the gift of perfection to two women: Asiya, the wife of the Pharaoh, and Marie, the daughter of Imran. To them the prophetic tradition adds Khadiga and Fatma: bride and daughter of Muhammed. Shari'a orders to treat spouses with justice, goodness and kindness, and grant them sacred rights such as equality before the law, private property and personal rights of inheritance. Under the shiaritic precepts women have the right to marry through a civil contract legalizing sexual relations and procreation. As believers, women are, at the same time, equal to men on a spiritual and intellectual level, but are different from a physical and juridical point of view. Men, as enshrined in the Koranic verse II, 228, have a certain area of “eminence”. It states, indeed, that “women have rights similar to their obligations and in accordance with customs.

However, “*men predominate over them*”⁴⁶: in other words there was an equal dignity but with different rights. As mentioned above, the original model of Islamic protection of women's rights is extremely lower than the one in the West. This is proved by the terms inserted by many Arab-Muslim countries in the main international conventions in this field. In particular, art. 16 of the UN Convention on the

⁴⁵ *Memorandum of the Government of the Kingdom of Saudi Arabia on the doctrine of human rights in Islam and its application in the territory of the United Arab Saudi addressed to the secretary general of the League of Arab States, the Saudi Ministry of Foreign Affairs.*

⁴⁶ Italics added

Elimination of All Forms of Discrimination Against Women, for which states commit themselves to ensure “the same rights and the same responsibilities during marriage and during its dissolution (...) *on the basis of equality between ‘men and women’*”,⁴⁷ reported terms of Egypt, Iraq, Jordan, Libya and Tunisia and was never signed by Brunei, Iran, Somalia and Sudan. In addition, the Optional Protocol to the treaty in question, which recognized the competence of a *ad hoc* body in the UN to receive individual complaints about gender discrimination cases was opposed by Albania, Azerbaijan, Bangladesh, Benin, Burkina Faso, Gabon, Guinea Bissau, Indonesia, Kazakhstan, Kyrgyzstan, Libya, Maldives, Mali, Niger, Senegal, Sierra Leone, Tajikistan, Tunisia, Turkey, and Turkmenistan.⁴⁸

4.1 *The Islamic family law*

The concept of Islamic family law includes all those shiaritic dispositions relates to marriage, divorce, maintenance, child custody and inheritance. The discrepancies between Shari’a and modern standards of human rights regarding the family law essentially concern the repetition of polygamy, punishments (and aggressions) against adulterers and homosexuals, the concept of *talaq* (repudiation), post-divorce maintenance and the rejection of adoption. We must immediately clear that, basically, the Islamic conception of marriage, divorce, marital relationship, affiliation, and inheritance is different from the western one and this helps us understand the shock of a Westerner approaching to practices such as polygamy or repudiation. Unlike western thought, for which marriage is an intimate union with God, a “solemn covenant” or a “mystical union of souls,” according to Islam it is only a legal act, it’s

⁴⁷ Italics added

⁴⁸ *Traités multilatéraux déposés auprès du secrétaire général, Nations Unies, New York, 1992. Pp. 174-175 ss.*

just a contract that can be terminated in the even of failing to comply with any term, despite the Koran encourages, in its multiple verses, conscientious respect for the commitments taken. This interpretation depends on the more general trend of shiaritic revelation to approaching issues in a more realistic rather than idealistic way, inspired by a very pragmatic spirit, taking into account the real nature of human beings.⁴⁹ According to an orthodox interpretation of the Koranic verse II, 221, traditional Shari'a envisages that Muslim men, can not marry a polytheist, but they can marry a "woman of the Book", ie Christian, Jewish and Zoroastrian, unlike Muslim women, who can marry only Muslim men.

A valid marriage can be contracted from the age of puberty, because the classical Shari'a identifies puberty with adult age. Similarly, the revelation allows polygamy to men only, and they are permitted to marry up to 4 women provided they can support them. Polygamy within the Islamic family law raises, primarily, the problem of its *ratio* in the light of the opposite ban on the international level. We must note that in the context in which the Koran first appeared, through the prayers of the Prophet Muhammad, polygamy was basically justified through a paternalistic logic, according to which this practice was used to provide justice and security to those women who were doomed to be in serious trouble because condemned, abandoned, repudiated or orphan.

The Koranic philosophy tended to perceive monogamy as the ideal form of association and to discourage believers from this type of practice through verses such as IV, 130 which state: "you will never reach a perfect emotional balance between your wives, as you wish." Secondly, over the years, Islamic jurists, following extensive interpretative paths, have identified in the Koranic legal source the methodological

⁴⁹ Marcel A. Boisard, *Les Droits de l'Homme en Islam*, in *Islam et droits de l'Homme*, a cura di Marc Agi, Des Idées & des Hommes, pp. 77,78.

basis to limit polygamy, like in Pakistan,⁵⁰ Syria,⁵¹ Iraq⁵² and Tunisia⁵³ (where polygamy has been totally prohibited, and offenders may be subject to a one year detention or to the payment of a fine). These amendments do not find their "ratio" in a sterile emulation of the Western system, but are made possible through a "progressive" interpretation of the original message of the Koran. We refer, for example, to the legal doctrine of *takhayyar* (eclectic choice). The implementation of *takhayyar* in Islamic family law has led to the incorporation of specific voluntary inhibitory clauses, within the marriage contract, which prohibit husbands from marrying other women or injuring their wife.

4.2 *The practice of divorce*

To this we must add the practice of divorce to which the Koran devotes an entire chapter (LXV), establishing the details of the procedure. Islamic law includes 4 types of dissolution of marriage: the unilateral repudiation by the husband (*talaq*), divorce upon a wife's request (*khul'a*), the dissolution by mutual consent (*mubara'ah*) and the termination following a court order (*faskh*). Despite being considered a social pathology, this practice is expressly permitted, although limited. As mentioned, a wife can ask for a divorce only under specific conditions and, despite her legal position, she is disadvantaged in many aspects. Nevertheless she has the right to material compensation. Moreover, although women have the right to remarry, men in many Muslim states still consider such unions as a taboo, and they often condemn these women to poverty and marginalization. In case of dissolution of marriage, child custody is rarely

⁵⁰ Muslim Family Law Ordinance (1961).

⁵¹ Law of Personal Status 1953, art. 17 (Decree No. 59 of 1953).

⁵² Law of Personal Status, 1959, art.3.

⁵³ Tunisian Code of Personal Status, 1956, art.18.

based on the child's interest, whereas the right of paternal education is privileged.

Another particularly contentious issue is the practice of *talaq*, which both the Koran and the Sunna oppose (verse LXVI, 1), but which is recognized by all Islamic schools. According to *talaq* a Muslim man has the absolute and extra-judicial right to legally divorce without having to give a reason and without having to ask nor obtain the consent of his wife. In addition, the *talaq* can be pronounced even in the absence of his wife. It has been said that "the Koran grants men total freedom of divorce does not ask any justification for it. So he can even divorce on a whim, whereas a wife does not have the same right".⁵⁴ Nevertheless, some countries have recently gone through a gradual process of amendment or repeal of the traditional Islamic rules of dissolution of marriage (in particular in relation to *talaq*), as in the case of Article 30 of the Tunisian Code of Personal Status of 1956 which states that "a divorce outside the Court has no legal effect" and Article 49 of the Algerian Code of personal Status of 1984 which states that "a divorce should be determined by a judge only after a period of reconciliation"; both based on the Koranic verse IV, 35 which states that "if you fear a breach between the two (husband and wife) appoint two arbiters".

The attempts of the most "enlightened" Arab countries to balance the rights of women, in respect to *talaq*, have shown how it is possible for the legislature to bypass the tenets of Islamic law schools by appealing directly to the Shari'a primary sources. In particular, we refer to the reforms introduced in recent decades, even in Egypt, where, in 1979, President Saddat proposed a rule that introduced compulsory registration for each *talaq* and demanded that a wife was informed if a husband intended to divorce by *talaq*, so that it was not effective until it was notified. Husbands were also

⁵⁴ Arthur Jeffery, *The Family in Islam*, R.N. (ed.), *The Family: Its Future and Destiny*, 1949, p.39 e 60.

obliged to inform wives of every new polygamous marriage, which would have given wives the right to ask for a divorce.⁵⁵ In May 1985, however, the Egyptian Supreme Court revoked this law as it was considered *ultra vires* to the Constitution. Another reformist season took place in 2000, under the reign of President Mubarak, that completed the legislation with some innovations, like the introduction of the principle that the consent of a husband to divorce is not a necessary condition for his wife to obtain it.⁵⁶ For centuries, Muslim societies were convinced of the closure and inflexibility of *ijtihad*, thus betraying the real essence of Islam, which, instead, is based on change, contextualization, reforms and reinterpretations.⁵⁷

4.3 Child custody and inheritance

Although there are remarkable differences between the Sunni and the Shiite interpretation, the Koran lays down the right of succession sanctioning, in verses IV 11 and IV, 12, that the inheritance of a daughter is half the one of a son with regards to the offspring of a Muslim departed and that, in case of widows, the inheritance of a husband is twice the inheritance of a wife.⁵⁸ Yet the scriptures also recognize that a father and a mother inherit an equivalent sum in case of death of one of the children, the children (of both sexes) inherit in equal measure from parents and that, in the event that the heirs were a father and his daughter, they inherit

⁵⁵ Law No.44 of 1979.

⁵⁶ Law No. 2000 on the Re-Organisation of Certain Terms and Procedures of litigation in Personal Status.

⁵⁷ Javaid Rehman, *The Sharia, Islamic Family Law and International Human Rights Law: Examining the Theory and Practice of Poligamy and Talaq*, in *International Journal of Law, Policy and the Family* 21, 108-127 (2007), pp. 110-124.

⁵⁸ Patrick Kinsch, *Le droit musulman de la famille, les droits de l'homme (ou de la femme) et l'ordre public des Etats européens*, in *Bulletin des Droits de l'Homme*, n. 14 (2009), pp. 30, 31.

an equal sum.⁵⁹ Muslim jurists maintain that the original differences of treatment are not discriminatory since the duty to provide for the needs of the family belongs to the men. In conclusion, to tell the truth, it must be added that in recent decades there has been a significant positive evolution of women's conditions in most of the Arab states. Intransigent positions related to repudiation and to the right to work have been almost totally abrogated. Women have achieved the right to vote, access to public office, the right to work, the right to education and the right to dress as they choose. As to the right to work, Islam allows women to undertake lawful activities that are compatible with her natural characteristics. During the lifetime of the Prophet, Muslim women were engaged in many occupations outside the home.

5. Conclusions. Comparative study of the concept of human rights in Islam and in the West.

We can conclude, therefore, that the main difference between the two cultures investigated lies not so much in the group or the essence of the rights protected, as in their basic inspiration. As it is known, in the western Conventions, religion is recognized as a freedom, not as a source of inspiration. In Islamic texts, however, the meta-historical and eschatological element is omnipresent, the primordial and universal power of God is the origin of all the regulatory system, the revelation is the source and the legal framework of all practices, so that the observer defines these instruments, without fear of contradiction, "confessional" rather than universal.⁶⁰ In other words, the concept of human rights in Islam is different from the western

⁵⁹ Quran verses IV:11 E IV:12 in Mashood Baderin, *International Human Rights and Islamic Law*, Oxford Monographs in International Law, 2003, p.146.

⁶⁰ Mustapha Benchenane, *Les Droits de l'Homme en Islam et en Occident*, in *Islam et droits de l'Homme*, (sous la direction de) Marc Agi, La Librairie des Libertés, p. 296-302.

one for at least one evidence. This evidence is the fact that the doctrine of Islamic human rights refers primarily to God and to his relationship with men; it opposes a comprehensive theocentrism to the traditional enlightened anthropocentrism. This doctrine does not develop on a horizontal axis (drawn from the relationship between individuals) but on a vertical axis (formed by the relationship between an individual and God). In this regard, we may fully justify those who assert that imagining a dichotomous relationship between secular and religious spheres is totally misleading. This report should be developed on a complementary rather than dialectical plan.⁶¹

In essence, the key to the interpretation of Islamic practice for the protection of human rights lies in the recognition of the structures of legal pluralism, understood as heterogeneity of regulatory systems, influenced by their contexts of reference. Being the subject of human rights, alleging moral sensibilities and values of a community is at a such sensitivity must refer in order to "empower the system in front of his axiological pluralism".⁶²

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¹ Syed Jafar Alam, *Towards a New Discourse: Human Rights in Islam and Vice Versa*, in *Indian Journal of International Law*, Vol. 47, No. 2, p. 267.

⁶² Surya Prakash Sinha, *Legal Polycentricity*, in *Legal Policentricity: Consequences of Pluralism in Law*, (edited by) Hanne Petersen and Henrik Zahle, Dartmouth, 1995, p.43.

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