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Conceptions of Legitimacy Under International Human Rights Law and Islamic Rights Law

Cover Page Footnote
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This article is available in Indonesian Journal of International Law: https://scholarhub.ui.ac.id/ijil/vol21/iss2/1
ratified by States at the international and regional levels.

While human rights are claimed to be universal, the ‘universality’ of these human rights has often been called into question by several States. The rights espoused in the International Covenants and most international human rights conventions are founded upon a Western positivist understanding of rights, placing the individual at the center of the rights relationship with the sovereign State. Within this sovereign-subject relationship, human rights prioritize protections for the individual and govern the limitations on the exercise of sovereign power.

This foundation of a rights system is seemingly at odds with the foundation of Islamic rights for a variety of reasons. The inherent correlation between religious and legal obligations in Islamic law means that the majority of Islamic legal obligations must be preserved in the form that they were originally revealed in seventh century Arabia. The unchangeability and finality of religious instruction often means that the nature of rights under Islamic law are seen as incompatible with the developing human rights norms of the Western political tradition. This contrasts with IHRL, which has undergone considerable development over time. In its current form, IHRL reflects contemporary understandings of human rights shared by (predominantly Western) States.

One must understand the different underpinning philosophies of the two distinct rights regimes to understand the complexity of the compatibility debate. To do so, one must understand how each framework establishes its legitimacy underpinning the relations between the sovereign and the subjects, particularly in the context of the notion of rights.

This paper will begin by outlining the philosophical bases for the two rights systems and highlighting the utility of this study in the wider rights discourse. It will then explore the differences between the two rights systems by focusing on three particular rights: the freedom of religion and the right to bodily dignity (or, in other terms, the prohibition of cruel, degrading and

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3 I caveat this point as Islamic law does provide for means to interpret the sources of Islamic law (the Quran and the Sunnah) in ways to adapt to changing modern circumstances, or to provide answers to questions about the application of Islam to contemporary times. An example of this is the process of *ijtihad*, which refers to the exercise of individual legal reasoning to derive a legal ruling that applies to a particular legal question.
inhumane treatment), and gender equality. It will explore approaches to each of these rights from both the IHRL and Islamic law perspectives according to how the structure of these rights is legitimate within their respective frameworks, despite the underlying differences in how these rights may have originated.

The utility of this study is multifold, from both academic and governance perspectives. Firstly, this study aims to establish the discursive legitimacy of human rights from the Islamic perspective, as this perspective is often neglected in favor of a ‘universal’ solution to human rights. This study gives credence to alternative understandings of human rights norms and their protection. By outlining that the shariah allows for the protection of certain rights, it becomes clear that Muslim States are not necessarily opposed to the concept of human rights inherently, but rather to how they have been implemented historically.

Secondly, this study emerges at a time when critical approaches to international law are gaining importance and momentum. The Global South, which includes the majority of the Muslim world, is unifying in solidarity over several common issues that pervade the global international legal order. The fracturing of the global world order since Russia’s war on Ukraine, and further amplified by Israel’s war on Gaza, has created a growing chasm between the Global North and the Global South on issues of the use of force, sanctions, human rights, and IHL. States that once dominated the international legal order receive greater criticism for their double standards, hypocrisy and ‘whatabouttery’ when it comes to their positions on certain areas of international law. It is within this fracturing of the Western utopic international legal order that emerging critical voices, such as TWAIL and Islamic international law, come into the fore.

Finally, and most importantly, this study will also highlight ways in which seemingly opposite interpretations of international human rights conventions can be harmonized. While a discussion of how to harmonize both interpretations is beyond the scope of this essay, it highlights the fundamental lack of understanding of each rights system within their own individual frameworks. One of the main issues that has resulted in the gap is an Orientalist interpretation of Islamic law, or an anti-Western imperialist interpretation of IHRL. On the contrary, through a comparison of rights, I exemplify that the primary issue is a lack of holistic understanding of the reasons why rights

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5 Third World approaches to international law.
are formulated in a certain way under each different system. Once this gap in understanding is bridged, it becomes easier for States and non-State actors to interpret the law in a mutually facilitative manner, such that international human rights commitments are not seen as at odds with Islamic law, but rather inherently cooperative.

Articulating how harmonization is to take place in different jurisdictions is beyond the scope of this article. Nevertheless, it is important to understand the theoretical framework of the two rights systems before determining how to practically coalesce them, which is what this article seeks to do.

II. RIGHTS AND LEGITIMACY

A. THE WESTERN POLITICAL TRADITION

Legitimacy is fundamental for a political system’s foundation. It facilitates the habitual obedience to the sovereign without the need for coercive sanctions, such as criminal penalties, for non-compliance with the law. For this, the subjects must believe in the veracity and validity of the sovereign state structure. This includes ways in which the sovereign entity can minimize its potential for abuse of power. One way in which it does this is the creation of an enforceable system of fundamental inviolable rights. However, there are different conceptions of rights even within the Western political tradition. The notion of rights must be understood from the two main branches of traditional Western jurisprudence, namely the natural law and positive law traditions. Both articulate the need for a rights-based system to protect the interests of the citizenry against the abuse of power of the State. However, the legitimacy frameworks of each differ.

Natural law dictates that morality and ethics are innate standards inherent to mankind. Some scholars, such as St. Thomas Aquinas, argue that this ‘innateness’ comes from a divine source, much like the Islamic philosophy of rights. The legitimacy of the rights framework under natural law is derived from religious texts, which are largely considered immutable and final authority on certain matters. Under Western jurisprudence, Biblical law comprises the majority of natural law theory, with jurists claiming that rights are inherently granted to humanity by God, and are therefore sacred. The sovereign entity on Earth, which is a King or Queen, also acts as a guardian of faith (such as in

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the United Kingdom, where the King is also the Head of the Church), and is inevitably accountable to the will of God. This relationship creates a system of rights that are vested in the citizenry by God, with the worldly sovereign responsible for enforcing said rights.

In contrast, the positive law theory dictates that rights are man-made entitlements and privileges, and that they are entirely the prerogative of the sovereign. This model of law is perhaps the closest to the current conception of rights under IHRL. The legitimacy of the positive legal theory and its conception of rights derives from the legitimacy of the sovereign that enforces said rights.\(^8\) Therefore, rights under the positive law theory also depend upon the relationship between the rightsholder and the sovereign; however, because the law is determined by the sovereign, and the sovereign determined by the subjects, there is greater mutability and subjectivity of what is considered a ‘right’ as opposed to the natural law tradition. The focus of this paper will largely be on the positive law theory as the predominant conception of rights under Western political philosophy.

B. THE SOCIAL CONTRACT THEORY

The notion of rights draws its roots in Western political philosophy from the social contract theory. Posited by the likes of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, the social contract underpins the concept of a rights system that protects individuals from the abuse of power by the state. The social contract and the transfer of rights to a sovereign enforcer is necessary to protect the ‘general will’, a common belief held by all citizens that would serve the common good and eliminate social and moral ills.\(^9\)

The existence of a social contract implies the existence of rights preceding the creation of a sovereign enforcer of these rights. According to all three philosophers, man’s existence precedes social existence. Similarly, natural rights proponents, such as St. Aquinas, believed that man had certain entitlements by virtue of his humanity even before the development of the modern state.\(^10\) In other words, individuals carry inherent rights by virtue of their existence as human beings under ‘natural law’, entailing moral injunctions that are specified and operationalized through judicial injunctions.\(^11\)


\(^11\) Ibid., 297.
notion of an ‘inherent’ right is present in modern IHRL instruments, claiming that all human beings are due their human rights by virtue of their humanity.\textsuperscript{12} Thus, the notion of having certain rights actually predates human civilization and is not inherently reliant upon the social contract.

According to Rousseau’s social contract theory, sovereignty is “nothing less than the exercise of the general will.”\textsuperscript{13} If the exercise of sovereign power deviates from the general will, it becomes illegitimate.\textsuperscript{14} The ‘general will’ does not remain stagnant, but is rather subject to change, which can affect the relations between the sovereign and its subjects.\textsuperscript{15} Thus, the sovereign remains subservient to the general will, which reflects the common desires of the polity. This underpins the concept of legitimacy as a self-reinforcing notion that predicates liberal democratic government: the sovereign is both subservient to the general will, but also exercises power over subjects that determine that general will.

C. THE SOCIAL CONTRACT AND MODERN GOVERNANCE

One manifestation of the social contract theory and the rule of law in political philosophy is the concept of constitutionalism, which is a key feature of modern-day democracies. Constitutionalism revolves around the ability of the sovereign to hold itself accountable according to a prescribed set of rules, thereby limiting the abuses of its own power. One form of this theory is the separation of powers doctrine, whereby the three organs of the state — the executive, legislature, and the judiciary — operate in a check-and-balance accountability mechanism.\textsuperscript{16} Under this system, the judiciary can strike down a piece of legislation as curbing fundamental rights. Similarly, it can make orders to curb the exercise of executive power that transgresses beyond prescribed limits to human rights. As a model adopted by many States worldwide, constitutional democratic government creates systems for individuals to seek redress for rights abuses, while also allowing for mechanisms to ensure that the sovereign actually implements the general will. This process remains ‘up to date’ with regular elections, law reform opportunities, and general political debate. Again, the basic principle is that legitimacy within such frameworks is self-reinforcing.

\textsuperscript{13} Rousseau, \textit{The Social Contract}, 31.
\textsuperscript{14} \textit{Ibid.}, 38.
\textsuperscript{15} \textit{Ibid.}, 36.
\textsuperscript{16} Charles de Secondat and Baron de Montesquieu, \textit{The Spirit of the Laws} (New York: Hafner Publisher, 1949).
The social contract theory has informed the structure of modern human rights law which has developed over several centuries. One of the earliest documents outlining a framework of rights is the Magna Carta of 1215, which held that the King is not above the law and is indeed subjected to it.\textsuperscript{17} The supremacy of the law is a necessary precondition to the enforcement of human rights, as the sovereign is equally subject to the law as are its subjects. Rights documents in the seventieth and eightieth centuries expanded upon this proposition. Challenges to monarchical and autocratic systems of government increased during the Enlightenment, with pushes for self-governance and increased sovereign accountability by political philosophers, such as Locke and Rousseau. The English Bill of Rights 1689 set out basic rights, such as freedom of speech, the right of subjects to petition the King, and prohibition against cruel and punishments.\textsuperscript{18} Similarly, the French Declaration on the Rights of Man and Citizen 1789 and the US Bill of Rights 1791 posited the equality of all under the eyes of God while imposing limits on governmental interference in private life, securing property rights and rights pertaining to the resistance of oppression, such as free speech.

It is this philosophy that underpins modern IHRL. The language of the UDHR and the International Bill of Rights, as well as subsequent human rights conventions, places the individual in a relationship with a sovereign that itself is accountable to a set of agreed norms. Furthermore, each human being, by virtue of their humanity, has a certain set of inalienable rights that must be protected and guaranteed by their State. This obligation upon the State stems primarily from its subjects, who are provided an additional layer of protection through the international legal system. This indicates that it is ultimately the general will of individual State societies that determines the success or failure of the creation, enforcement, and progression of IHRL. The general will does not remain static, but rather evolves as social and ethical norms evolve as well. However, the structure of rights and the sovereign-subject relationship can be juxtaposed with that of Islamic law.


III. THE ISLAMIC LEGAL TRADITION

A. THE AUTHORITY OF THE SOVEREIGN

Legitimacy under Islamic law functions in a different manner to the social contract. Under Islamic law, the sovereign is not from among the people. Rather, the sovereign is the deity to which human beings are subservient to. Therefore, God’s authority does not derive its legitimacy from a concept like the ‘general will’, as God is superior to humankind. Rather, the general will (or its equivalent) derives from God’s nature as all-knowing, all-wise, and free from all vice and fallibility, thus placing Him to be able to determine what is the best framework for societal existence for humankind.

The relationship between the sovereign and the subject is starkly different in the philosophy of human social existence under Islam. Ultimate sovereignty under Islam belongs to God. This challenges the conception of sovereignty under the Western political tradition of ultimate sovereignty belonging to individuals, who have the power to alter their sovereign government and thereby, the nature of the sovereign. In Islam, God’s sovereignty remains unchangeable and is not subject to the general will; rather, it is God who determines and informs the general will. Thus, the critical difference can be summarized as follows: whereas the sovereign is created by the subjects and their general will under the social contract, it is the sovereign who creates the subjects, and their general will be under Islamic law.

B. ISLAMIC LEGAL SOURCES

Islamic law (or the shariah) consists of two main sources: the Quran and the Sunnah. The Quran embodies the word of God as revealed to the Prophet Muhammad, containing both spiritual guidance and legislative instruction. The Sunnah consists of sayings, traditions, and practices of the Prophet Muhammad that constitute exemplar behavior for Muslims within society. The Sunnah provides clarity to the instructions provided in the Quran, with the Quran being the fundamental source of both religious and legal instruction under Islam. Thus, the rights afforded to humankind within the framework of Islamic law stem directly from God.

One must differentiate between the shariah in the Quran and Sunnah with the shariah that manifests itself in certain States. Certain regimes perpetuate practices as Islamic which do not fall within the principles of humanity and mercy that are central to Islamic law, but rather distort certain practices and the language of the Quran and Sunnah for ulterior motives. This exercise

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19 Qur’an, 67:1.
primarily examines Islamic legal sources for its analysis, rather than primarily looking at the way ‘Islamic’ States may implement those provisions.

While God may ordain rights, and is thus the ultimate authority, Islam does not rule out the need to establish human sovereignty over a society to regulate affairs and matters between citizens and with other similar societies. Islamic history is a testament to the need for sovereign authority to regulate the worldly affairs of individuals in society, as well as the need to promote religious well-being. The institution of siyasa sharia (governance) envisions the need for political authority to manage the affairs of the state while also maintaining conformity with Islamic law.\textsuperscript{20} Historically, Islamic governance models have also seen the institution of a judiciary, with qadhis (judges) being appointed to solve disputes and passing fatwas (legal pronouncements) through the exercise of \textit{ijtihad} (independent exertion of legal reasoning) or taqlid (referring to existing \textit{ijtihad}).\textsuperscript{21} This indicates that while the Quran and Sunnah are the primary sources of Islamic law, the Islamic legal system necessitates the creation and interpretation of rules to regulate affairs between individuals within society, and, by extension, between the governors and the governed.

It is within this framework that God’s ultimate sovereignty serves as a check and balance on the actions of the worldly sovereigns, ensuring that their conduct is equally in conformity to religious instruction as is the conduct of the governed. This only contributes further to the legitimacy of the Islamic legal system, as the rulers are ultimately bound by Islamic principles to model their governance and are ultimately bound by a superior sovereign entity independent of the legal system.

C. CATEGORIES OF ISLAMIC \textit{HUQOOQ}

While the term ‘right’ is most closely translated in Arabic as ‘\textit{haqq}’, the concepts slightly differ. The word \textit{haqq} as used in Arabic could connote “right, claim, truth, reason, obligation, worth, price, reward.”\textsuperscript{22} In the Quran, it is used to connote both an obligation as well as a right, depending on the context.\textsuperscript{23} In the context of this discussion, an authoritative definition for the word \textit{haqq} is “the special authority by which the law (\textit{Shari’ah}) establishes power (over

\textsuperscript{23} \textit{Ibid.}, 83
something) or legal obligation (to do an act).”

Thus, under Islamic law, a right is not purely an entitlement or a privilege, but rather may “have some corresponding duties” even upon the rightsholder.

Islamic rights can broadly be classified into two categories. The Quran contains divinely ordained commandments that detail both huqooq Allah (the rights of Allah) and huqooq al ibad (rights of the creation). The rights of the sovereign under Islam are recognized which apply to all Muslims as huqooq Allah, which include the five pillars of Islam. These ‘rights of Allah’ must be fulfilled by all Muslims to the best of their abilities and assume greater precedence. On the other hand, huqooq ul ibad are commandments that create rights and obligations against other individuals and the wider community at large, such as rights of the parents over their children, rights of spouses under marriage, commercial rights and obligations, and general social rules.

Therefore, when comparing the two rights frameworks, one must acknowledge the fundamentally different foundation of the ‘right’ under each framework. Under IHRL, a right is an entitlement or privilege granted by the State which is responsible for ensuring the respect, protection and fulfilment of that right. Under Islamic law, a right can be either a privilege, obligation or both, depending on the context in which that haqq applies to. This dichotomy will be explored in greater detail in the comparison of the three aforementioned rights.

1. THE RIGHT TO RELIGIOUS FREEDOM

The freedom of religion debate, particularly as it pertains to Islam, has been misconstrued in light of recent religious extremist practices highlighted in popular media. Islam is often termed as a ‘restrictive’ religion as it prohibits and punishes conversion away from Islam (or apostasy), while promoting conversion into Islam. It is also misrepresented as a religion that is designed to persecute non-Muslims. The distinction between freedom of religion under IHRL and Islamic HRL must be clarified considering the legitimacy frameworks in underpinning each of them. This discussion will focus on the

24 Ibid., 86
25 Ibid., 91.
26 These are salah (the five daily prayers), sawm (fasting during the month of Ramadan), the payment of zakah (mandatory alms-giving of 2.5% of one’s wealth), the hajj pilgrimage once in a Muslim’s lifetime (if they are able to afford it), and the shahada (testimony that there is no god but Allah).
separation of church and state, the subordination of religion to the law, and the right to apostasy.

2. SECULARISM AND RELIGIOUS FREEDOM

The notion of ‘religious freedom’ is a product of the eventual separation between the church and state in Western Christian societies. Religion was the primary source of legitimacy for most empires before the Enlightenment period, where the absolute authority of the ruler was believed to come from God and was therefore unquestionable. The divine right of the King was a major element of state legitimacy in the Middle Ages, an era which witnessed the beginning of colonialism. The colonial agenda was masked under the guise of Christianity as a “form of imperialism based on a divine mandate and designed to bring liberation – spiritual, cultural, economic and political.” Indeed, the majority of Western colonialism into Asia, Africa, and South America was characterized by the forcible conversion of local populations to Christianity as part of the colonial enterprise, leading to a religious ethnic cleansing of several indigenous populations in these regions.

By the Enlightenment period, the divine right of the king, as well as the notion of theocracy, was slowly being challenged by scholars such as John Locke. The secularization of the state that soon followed was a result of growing political consciousness of the ability of the Christian state to limit the rights of those who did not ascribe to the same religious edicts. The church-state separation model is now the dominant form of government in the Global North and has greatly influenced the view of secular liberal societies towards religion and the observance of religious rights. With the separation of the church and state comes the parallel existence of dogma and law that are seemingly separate. The separation has also relegated religious matters to the private domain, leaving it up to individuals and communities to choose how to practice. However, it is the state that ultimately regulates religious institutions, as well as public manifestations of religious belief, which subordinates the church to the state, and therefore, religion to law.

3. APOSTASY

The right to religious freedom under Western political philosophy recognizes the sub-right to apostasy. The Human Rights Committee elaborated upon the formulation of religious freedom under Article 18 of the ICCPR in General Comment 22, claiming that the right “protects theistic, non-theistic and atheistic beliefs, as well as the freedom not to profess any religion or belief.”\(^3^2\) The right to religious freedom under the UDHR and the ICCPR includes the right to convert into a religion of one’s choice and the right to leave a religion upon one’s choice as well. Under this right, conversion and apostasy are recognized as part of an individual’s exercise of their liberty to either change their religious beliefs or to denounce religion altogether. The decision is left entirely to the individual, with no involvement of the state or potential religious ramifications having any effect on this decision. However, the state has the authority to intervene if the practice of religious freedom may infringe upon the rights of others, or to protect state interests, such as public safety and order.

IV. RELIGIOUS FREEDOM AND FREEDOM OF SPEECH

Limitations on the right to religious freedom of others are most exercised through the exercise of freedom of expression. Recently, the United Nations Human Rights Council passed a resolution on religious hatred and bigotry after an incident involving the public burning of the Quran in Sweden.\(^3^3\) The States that voted ‘no’ were predominantly European States and the USA. This is an accurate microcosm of attitudes towards expression that may offend religious sentiments in secular societies.

As posited by some scholars, a fundamental aspect of secularism is that “no set of ideas, convictions, or beliefs is immune to criticism, no matter how popular, sacred, or entrenched it is.”\(^3^4\) With religious beliefs being subject to criticism and debate, religion is subordinate to free speech, with certain restrictions (such as hate speech). In turn, affording greater protection to a


particular religious group’s sentiments would constitute a violation of the strict religious neutrality that a secular state must exhibit.\textsuperscript{35} This has also translated into other restrictions on the expression of religious belief in public, including constraints on religious clothing and practicing religious worship in public spaces.

\textbf{A. THE STATE’S ROLE}

To contextualize these features of the right to religious freedom in terms of legitimacy, one must tie this debate back to the sovereign-subject relationship. The secular notion of religious freedom that IHRL adopts indicates that the sovereign entity in this case is the individual him/herself. The individual has the right to practice their religious beliefs which are subject to regulation by the state. Equally, the individual has the right to criticize religious beliefs. In trying to allow all citizens to practice religious freedom equally, the secular state requires sovereignty over religious belief.

This is particularly evident in the secular state’s separation of law and religion, and between church and state. In turn, the state is accountable to the individuals it regulates because the state’s policies must reflect the general will of the populous to maintain legitimacy. The state regulates religion insofar as it affects others, but largely leaves religion to the domain of the individual. Therefore, the conception of religious freedom under IHL entails that religion has become subject to the sovereignty of the individual both on a personal level, that is the freedom to choose one’s belief and how to practice it on a state regulatory and public level.

\textbf{B. BASIC TENETS OF RELIGIOUS RIGHTS UNDER ISLAM}

The term ‘right to religious belief’ is a more appropriate term to encapsulate the equivalent of religious freedom under Islam. Because the shariah combines the legal framework with religious obligations, a church-state separation is difficult. Most Muslim States incorporate shariah principles into their constitutional frameworks, indicating the superiority of Islamic law to secular positive law. The \textit{shariah} provides a holistic framework for regulating social relations according to Islamic principles; but it does leave room for positivist legislation and regulation in purely worldly matters.

Religious rights under Islamic law are fundamentally different to the secular approach to religious freedom under IHRL. Under Islamic law, the right to practice one’s religion holds a central place in the religious-legal framework. The practice and observance of one’s religious beliefs are part

\textsuperscript{35} \textit{Ibid.}
of one’s duty to fulfil the commands of God as laid down in the Quran and Sunnah. Religious rights under Islam operate both as rights (when enforced against other human beings) and as duties (towards God). This relationship of the notion of a ‘right’ complicates views on certain rules under Islamic law.

The religious rights of Muslims under the Islamic legal framework are of the utmost importance and add an additional layer of obligations beyond huqooq ul ibad, given that religious rights (such as practicing and manifesting one’s religious beliefs) can be framed as obligations to fulfil huqooq Allah. Thus, it is the sovereign’s right that He be worshipped in a manner that He has prescribed, more so than it is an individual’s right to practice their faith. This places an obligation upon the individual Muslim to ensure that they fulfil said obligations, which includes the various acts of worship that are prescribed in the Quran and affirmed in the Sunnah. Accordingly, these acts of worship cannot be subordinated to legislative limitations, as it infringes upon a domain of sovereignty that the latter has no right over.

C. APOSTASY

In contrast to the ICCPR right to religious freedom recognizes the right to apostasy, Islam does not. This dichotomy must be framed considering the nature of God’s sovereignty. Apostasy under Islamic law is one of the gravest violations of the rights of God, as in doing so, a person denounces the supremacy and the ultimate sovereignty of God over the world. By denouncing faith in God as the sole deity worthy of worship, one also denounces the various acts of worship that fall within the huqooq Allah. The denouncement of Islam equates to a denouncement of God’s ultimate sovereignty and undermines the legitimacy of the Islamic legal system.

This contention on apostasy was highlighted during the drafting of both the UDHR and the ICCPR’s provisions on the right to religious freedom. Several States, including Saudi Arabia, were uneasy with the explicit mention of the right to ‘change’ one’s religion, which was the originally proposed language for the provision. The language of the current provision, “to have or to adopt a religion”, is indicative of the compromise argued for by Saudi Arabia and other state delegates at the drafting process, as it does not outrightly protect the right to apostasy in a manner that would prevent Muslim-majority countries from ratifying the ICCPR.

36 Ibid.
D. ISLAM AND OTHER RELIGIOUS GROUPS

Another important dimension to Islamic religious rights is the prohibition of forced conversion. While Islam does promote the spreading of religion, it does not support the use of force to convert others. Indeed, the Quran states that “there is no compulsion in religion”, which indicates that non-Muslims cannot be forcibly converted to Islam. Thus, the essence of religious ‘freedom’ in Islam is the freedom from forced conversion, which ties in with the obligation to respect religious minority groups within the Islamic legal framework.

In earlier Islamic civilization, non-Muslims were categorized as dhimmi. The term dhimmi stems from dhimmat-Allah wa rasulih, which translates to “the protection of God and His Prophet.” The ahl-ul dhimmah (the people under protection) received the protection of the Muslim state in exchange for the payment of jizya, a specific tax for non-Muslims choosing to live in Muslim states which exempted them from military conscription. The Quran makes explicit reference to the concept of jizya as the basis of protection of non-Muslim subjects of the Muslim state. This protection also came with the protection of their freedom to observe their religious practices. This is evidenced by the Charter of Madina that was contracted by Prophet Muhammad (pbuh) upon his arrival in the city of Madina to establish “rights and responsibilities between the various Muslim groups and the Jewish tribes.” This indicates that Islam respects the rights of non-Muslims, and prohibits the forcible imposition of Islamic rules on them. Accordingly, non-Muslims are exempt from punishments that are prescribed for Muslims, such as punishments for hudood offences.

E. RELIGION AND EXPRESSION

The relationship between religious freedom and free speech is also different under Islamic law. Islam places great emphasis on positive expression, rather than ‘free’ speech: “And speak to people good [words] and establish prayer and give zakah.” In this verse, positive speech is connected to two important

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37 Qur’an, 2:256.
39 Ibid. Military battles and wars were often fought in the name of God and for the protection of Islam.
40 Qur’an, 9:29.
41 Ibid.
42 Ibid.
43 Qur’an 2:83.
acts of worship, indicating the place that positive expression holds in the ideal Muslim character. Because the Islamic moral code is associated with promoting good character, the religious-legal structure altogether enjoins good character through legal incentives and forbids evil through legal sanctions. This extends to harmful expression towards others which includes backbiting,\textsuperscript{44} disrespectful debate with non-Muslims,\textsuperscript{45} mockery, slander, and bearing false witness. Thus, while Islam is not inherently anti-expression, an Islamic legal system cannot condone or promote activities that may fall under these prohibited forms of expression, nor can it allow the creation of such conditions that would facilitate such speech as this would allow for the violation of \textit{huqooq ul ibad}.

Expression that challenges God’s authority or that insults the Prophet Muhammad (pbut) is also prohibited under Islam. Islamic law does not tolerate such expression as it insults sacred elements of the faith. There is often outcry and outrage from Muslim States over caricatures of the Prophet Muhammad (pbut), as such are prohibited under Islam, or displays of discontent towards the Quran, such as through public burnings of its physical copies.\textsuperscript{46} At the same time, however, there is disagreement over the prescribed punishment for blasphemous expression, as there is no clear instruction provided in the Quran and Sunnah. Nevertheless, Islamic countries around the world criminalize such speech because it is an insult to the sacred tenets of Islam. This principle indicates that religious belief is protected by law, giving the former more importance in contrast to more secular societies, where the line between acceptable and unacceptable speech regarding religion is far blurrier.

In summary, the contention between religious freedom under IHRL and Islamic law can be analyzed by looking at the sovereign-subject frameworks they operate under. Under IHRL, religious freedom seeks to regulate the practice and manifestation of religion between individuals. Individuals are only answerable and accountable to a worldly sovereign, who is often not characterized by a religious affiliation. Therefore, the state does not interfere with actions that may either constitute a religious ‘moral’ or ‘immoral’, but rather only insofar as those actions have consequences on other individuals. In contrasts, religious freedom in Islamic law has certain defined characteristics that stem from the sovereign, which is God. Islamic law does not accept apostasy as a valid exercise of this religious freedom as it would undermine

\textsuperscript{44} Qur’an 49:12.
\textsuperscript{45} Qur’an 29:46.
the crux of the religion itself. Nevertheless, Islamic religious freedom does promote the tolerance and respect of religious minorities and does not exercise the same control over their spiritual matters.

V. THE RIGHT TO BODILY INTEGRITY AND THE FREEDOM FROM CRUEL, INHUMAN AND DEGRADING TREATMENT

Certain criticism on Islamic law highlights the use of both capital and corporal punishment that is condoned by Islamic law. Capital punishment refers to the death penalty, whereas corporal punishment refers to the infliction of punishment on the body not amounting to death. This criticism indicates that such practices are ‘retrogressive’ and incompatible with modern understandings of human rights.47 Other misrepresentations also argue that such treatment is central to the shariah and that such punishments are routinely awarded for even minor offences.48 However, to understand the institution of criminal sanctioning under Islamic law, one must examine these provisions as legitimate within their own legal framework.

A. THE CONCEPTS OF HUMAN DIGNITY AND CRUEL, INHUMAN AND DEGRADING PUNISHMENT

The inviolability of human dignity of all persons is the fundamental premise of most human rights instruments. The preamble of the ICCPR states that all rights “derive from the inherent dignity of the human person”.49 While the right to dignity itself is not outrightly recognized in the ICCPR, it is mentioned under Article 10(1): “All persons deprived of their liberty shall be treated with humanity and with respect of the inherent dignity of the human person.”50 This right protects those who have been deprived of their liberty, normally referring to those who have been criminally charged, by entitling them to humane treatment. The HRC’s General Comment No. 21 states that this complements “the ban on torture or other cruel, inhuman or degrading treatment or punishment” espoused under Article 7 of the ICCPR.51 General

49 ICCPR, Preamble.
50 Ibid., Article 10(1).
Comment No. 20 on Article 7 explains the notion of human dignity to refer to both physical and mental dignity and provides no limitation on such protection either.\(^2\)

**B. HISTORICAL VIEWS ON PUNISHMENT**

While the prohibition on cruel, inhuman, and degrading punishment is an absolute right, it has not always been considered as such. One must look at the history of judicial corporal punishment (JCP) to understand particularly Western society’s evolution away from corporal punishment. During the Middle Ages, Medieval Europe witnessed significant corporal punishment. Such punishments were often held in public as a spectacle, intended to deter others from committing similar offences. They were also intended to deter recidivism due to the degrading and humiliating nature of the punishment.\(^3\)

Indeed, some States in the West only passed laws outlawing JCP in the twentieth century: the United Kingdom abolished JCP in 1948 by the Criminal Justice Act 1967.

The relatively recent outlawing of judicial corporal punishment indicates a shift of the legitimacy of the practice. When enforced by the state through JCP, the sovereign exercised authority over the body of criminals. The continued practice of the regime indicates a tacit consent to the practice. The incremental growth of criticism indicates the shifting of the general will to the norms that can be seen in several treaties today, including the UN Convention Against Torture. Furthermore, several States have abolished the death penalty, particularly under the First Optional Protocol to the ICCPR, as well as under certain regional instruments like the European Convention on Human Rights. In other States, the death penalty is often reserved for the most heinous of crimes, such as treason and murder. Even in such cases, the use of the death penalty is limited to those individuals for whom alternative punishments, such as life imprisonment, may be considered insufficient as a means of retribution.

The infliction of bodily punishment indicates that the individual is not the ultimate sovereign over their body. Rather, it indicates that the individual possessed conditional sovereignty over their body – the condition being that they abide by the laws of the land. The legality of JCP indicates that the freedom to enjoy one’s body in a manner s/he pleases is subject, ultimately, to

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\(^2\) UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 2, https://www.refworld.org/docid/453883fb0.html.

the law. Thus, bodily sovereignty was subject to more legitimate interference by the state, particularly concerning the state’s ability to exercise coercive force on a person.

C. A SHIFT IN ATTITUDES

However, changing attitudes towards the role of the state, and the restrictions on its power over the individual, fall squarely in line with the evolving ideology of human rights, which ultimately serve to increase protection of the individual against the abuse of power by the state. One must also recall the link between the ruler and the divine that underpinned the legitimacy of medieval Europe, where corporal punishment was common and legitimate form of punishment. If ordered on royal authority, such punishment would reinforce the conditional, limited sovereignty that one assumes over one’s own body.

With JCP no longer considered a legitimate form of punishment under modern human rights law, it can be inferred that the nature of state sovereignty has changed. While the individual retains sovereignty over their body, the state retains sovereignty over an individual’s freedom. Nevertheless, one must be reminded of the connection between the sovereign and the subject: because the subject can influence and ultimately change the sovereign, it is still the individual who retains this sovereignty. Even as a criminal sanction, theoretically, a polity can decide that the state does not have the right to restrict an individual’s freedom, as legal norms under secular forms of government that form the basis of IHRL do not necessarily conform to objective moral standards of bodily autonomy, as indicated by their evolution and flexibility. Therefore, capital and corporal punishment are not inherently unjust, but are subject to changing norms of bodily dignity and sovereignty over the corporal subject.

D. BASIC TENETS IN ISLAMIC LAW

Whereas criminal law and the related notion of acceptable punishment is influenced by social logic, which is subject to change, Islamic criminal law and acceptable punishments are derived from the Quran and the Sunnah. Though subject to severe criticism, such criticism views Islamic punishments through the superimposed lens of the Western legal tradition. The Islamic penal code is complex yet offers perspective on the dual nature of a crime being an offence against both God and against society. There are three types of punishments under Islam: hudud, qisas, and ta’zir.
A central tenet of Islamic belief is the liminality of worldly existence. Part of this means that the body does not necessarily belong to the individual, but is rather temporarily provided to the individual by God in the form of a trust, where the individual is entitled to use the corporal body for both worldly and spiritual matters. One is required to take care of one’s body and not to engage in excess. It is because of this that certain rights of God have distinct requirements of the body: for example, the five daily prayers require the prostration of the body in submission to God, and fasting during the month of Ramadan requires one to refrain from food, drink, and other desires as an act of worship. Given this relationship, the enjoyment of one’s body is subject to how one’s character conforms to the will of God, particularly whether one affirms or violates the rights of God.

E. PUNISHMENTS IN ISLAM

The sovereignty of God over the body is pertinent in the punishment for certain criminal offences. The Quran contains certain provisions which inflict corporal punishment and the death penalty for expressly particular offences, which constitute the ‘hadd’ or ‘hudood’ offences. These offences carry punishments that are explicitly provided for in the Quranic text, and are thus divinely ordained punishments to which derogation is unacceptable. These punishments involve corporal elements: for example, the punishment for theft is the amputation of the thief’s hands. However, this punishment is not awarded in all cases of theft, but only when certain conditions are met. Where the conditions for each of the hudood punishments are not met, a judge may exercise discretion in awarding a ta ’zir punishment.

It is also under this logical framework that the crossing of certain limits brings with it punishments of the body as ordained by the sovereign of that body; however, those punishments can only be given where the conditions of hudud punishment are met, and where the offender does not sincerely repent for his/her crimes. In modern times, the nature of these conditions often means that hudud punishments are relatively rare, with most punishments being ta ’zir in nature. However, when looking at the complete legal framework, one must understand that a prerequisite of each punishment is that the offender is given the chance to seek forgiveness for his/her crimes – either from God (in cases

54 Qur’an 7:31.
55 These offences include causing mischief or spreading terror, turmoil and general disorder (fasaad fil ard), adultery, slander, theft, highway robbery, drinking alcohol, and apostasy.
56 Quran 5:38.
of *hudud*), from the heirs of the victim (in cases of *qisas*), or from the judge (in cases of *ta’zir*). Overall, the Islamic penal system does not, in fact, revolve around cruel, inhuman, and degrading punishments, as the offender is given the chance to have his punishment waived through repentance; and there are strict requirements that must be met for the *hudud* punishments.

The second category of punishments in Islam is *qisas*, which can be defined as retributive justice, based on the principle of ‘an eye for an eye’. This applies to cases of murder, manslaughter and criminal assault. Its operation can be illustrated with the following example: where individual A kills individual B, individual B’s heirs or family members may choose to punish individual A by inflicting the death penalty on him. Alternatively, B’s heirs may seek blood money, or *diyat*, in place of the death penalty, or may entirely forgive the killer. In these cases, the power of punishment is delegated to the heirs of the victim and murder is a violation of the right to life of the individual. These particular crimes exist in a unique category as they are considered a violation of both the right of God, as well as the rights of individuals as part of the community. The right to punish as well as to forgive is delegated to the heirs of the victim rather than to a State authority, which complicates the punishment of such crimes in modern criminal law.

The third category of punishment is *ta’zir*, which refers to discretionary punishments passed by a competent *qadi* (judge). This can be analogized to modern-day punishments passed down by the judiciary. These apply to crimes that do not fall under *hudud* or *qisas*. Therefore, positive criminal or penal codes can be designed to regulate *ta’zir* punishments. Although the Quran and Sunnah do not mention the word *ta’zir*, there are several crimes for which no specific punishment is stipulated but require a punishment to be given, indicating that such authority has been delegated to humankind. *Ta’zir* punishments may involve capital punishment or corporal punishment, and have done so in the past; however, the majority of contemporary penal codes in Islamic countries resort to imprisonment and fines as the primary punishments, with a considerable minority allowing judges to authorize

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58 The same applies in cases of criminal assault for example, if A assaults B such that B loses a limb, B’s heirs may choose either retributive justice, choose the payment of blood-money, or complete forgiveness.

59 Islamic countries that have adopted *qisas*, *diyat* and related concepts do strike a balance between secular state interests to regulate crime, as well as the need to fulfill Islamic instruction. Thus, while heirs of a victim may require the payment of blood money, or may decide to forgive the individual, the State may reserve the right to pass a sentence of imprisonment if that individual is deemed to be a danger to society. This structure serves to protect society from repeat offenders who may abuse the loophole within the law for their own benefit.

60 Qur’an 4:16.
corporal punishments such as public floggings. *Ta’zir* may also involve the complete forgiveness of the crime by the judge. Thus, *ta’zir* finds its legitimacy in Islamic legal sources, and allows Muslim States to strike a balance between punishing crimes that have been mentioned in the Quran and Sunnah while also choosing appropriate means of punishment which reflect current attitudes of acceptable punishment.

To summarize, the protection of bodily integrity and the freedom from cruel, inhuman and degrading punishment are aspects of both IHRL and Islamic law, although they manifest differently. What constitutes ‘cruel’ and ‘inhuman’ under IHRL is not necessarily the same under Islamic law. The former argues that violation of bodily dignity amounting to the use of pain, torture or corporal punishment constitutes a violation of said right.

However, under Islamic law, the prescribed *hudood* offences enforce God’s ultimate sovereignty over the individual’s body. Where an individual crosses the prescribed limits set down by God, it is within God’s authority to exact punishment to said individual’s body. However, one must bear in mind the difficulty of actually achieving said threshold of criminal conviction, and the chances for repentance that may preclude an individual from undergoing said punishments. Thus, the latter cannot be said to be ‘cruel’ or ‘inhuman’ as they are often last resort punishments for heinous offenders who do not wish to seek rehabilitation, and thus pose a threat to public order, decency and security of a particular society.

VI. THE RIGHT TO GENDER EQUALITY

Gender equality is one of the defining points of contention between IHRL and Islamic human rights. Several critics have argued that the shariah is inherently misogynistic due to the unequal treatment of the sexes, without understanding the moral and philosophical underpinnings for those rulings which legitimize such distribution of rights and responsibilities. Many mischaracterize Islam as oppressive to women as it curtails their freedoms and inhibits their progress; according to critics, all of this is predicated on the inherent subordination of the woman to the man under Islam. However, one

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must analyze the relationship between the right-holder and the right-granter to understand why gender relations, specifically rights for women, are framed the way they are under both rights regimes.

A. THE EVOLUTION OF GENDER EQUALITY

The notion of gender equality has gone through considerable evolution. The movement for gender equality in the West began in the late 19th and early 20th centuries. Propelled largely by white women of the urban elite, the feminist movement’s focus on the right to vote was a struggle to be recognized as equal citizens able to participate in public life. The Seneca Falls Declaration indicates the extent of the disadvantaged position of women in society, such as the inability to own property, including ‘the wages she earns’; the inability to exercise ‘elective franchise’; lack of access to education and much more. Efforts to tackle these inequalities were seen in the UDHR, as well as the ICCPR and ICESCR. Under Article 2 of the UDHR, all forms of discrimination, including based on sex, run counter to the human rights framework, with equality and non-discrimination being a central facet of IHRL. The preambular affirmation of the “equal rights of men and women” also highlights the first attempts at outlining a human rights document that protects men and women equally.

However, the International Bill of Human Rights did not do enough to mainstream gender equality through human rights law. The feminist movement post-1960s, which included other marginalized groups of women, such as racial and ethnic minorities, started questioning the underlying reasons for this discrimination by questioning the concepts of ‘femininity’ and ‘womanhood’. This involved criticism of traditional gender roles in society, the role of women in economic life, and issues of political participation.

B. CEDAW

It is against this backdrop that the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was drafted in 1979.

66 Rampton, “Four Waves of .”
and formally adopted in 1981.\textsuperscript{67} The CEDAW encapsulates a much more all-encompassing range of rights to be afforded to women. The CEDAW focuses on the elimination of discrimination in ‘political, social, economic and cultural fields’, and demands States to create the conditions necessary for realizing this equality.\textsuperscript{68}

However, CEDAW has reservations from 48 different States citing “religious, cultural, and legal reasons”, preventing its complete application to their jurisdictions.\textsuperscript{69} This indicates that its norms have not yet achieved universal status, as gender relations are often affected by these religious, cultural, and legal considerations. The CEDAW aims to embody a cohesive framework for eliminating women’s discrimination. However, it struggles to embody a representation of women’s rights that conforms to the individual social and cultural fabrics of individual States’ societies. Therefore, States have had to resort to reservations to certain provisions to indicate the incompatibility of those norms to their general will.

The CEDAW Committee has commented on the invocation of Islam in reservations against the treaty’s provisions. In many instances, it has criticized States for lodging reservations that are “incompatible with the object and purpose of the treaty.”\textsuperscript{70} It has sought clarifications from several States on how domestic legal systems will reconcile a conflict between shariah and the CEDAW, urging States to harmonize the two sources of law rather than focusing on their contrasts.\textsuperscript{71} It has also engaged religious and traditional leaders for awareness-raising programs, as well as explore more expansive interpretations of the Quran and Sunnah that will allow a balance between the two allegedly competing sources of law.\textsuperscript{72} The CEDAW Committee has taken a proactive role in ensuring that reservations do not serve as a carte blanche to deny women’s rights in domestic jurisdictions after signing the CEDAW. Nevertheless, this does highlight an inherent tension between concepts of gender equity under the 	extit{shariah} and under IHRL. It also reinforces the State’s


\textsuperscript{71} Musawah, \textit{CEDAW and Muslim Family Laws: In Search of Common Ground} (Selangor: Musawah, 2011), 7.

\textsuperscript{72} \textit{Ibid.}
prerogative in defining its rights paradigm despite its international legal obligations.

The CEDAW is also a product of its time. One cannot equate societal views on gender relations from the 19th century with that of the 21st century. Discourse about feminism, gender equality, and gender equity arose from a growth in female political and social consciousness, particularly through collective action. This development of norms surrounding gender relations indicates that what is currently a part of CEDAW is a reflection of present views on gender relations, as opposed to a reflection of an objective and holistic belief in gender equality. This emphasizes the subjective nature of gender equality that is embodied in IHRL, which allows States to prioritize their own general wills as opposed to being bound by a set body of norms.

C. RIGHTS UNDER THE SHARIAH

In Islamic law, gender relations and gender rights stem directly from the Quran and Sunnah. As opposed to IHRL, gender relations do not reflect the general will of individuals, but rather what God has ordained to embody an equitable distribution of rights and responsibilities.

Women and men have the same basic obligations to fulfill the five pillars of Islam which constitute the rights of God.73 The obligation to fulfil these apply equally to all human beings, irrespective of any differences (including sex), as indicated by the following Quranic verse:

“O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.”72

The Quran also makes explicit mention that women have been created with the capacity for childbearing, whereas men have been endowed with greater physical strength.14 These differences translate into different economic, social and cultural rights for the genders, particularly within the family unit. Nevertheless, one must note that the shariah provided a significantly progressive framework for women’s rights, particularly in 7th century Arabia. As Abdullahi an-Na’im and Louis Henkin points out:

73 Qur’an 4:124.
from the very beginning, sharia was understood to require an independent legal personality for women, and the protection of certain minimum rights for them in inheritance and family relations, beyond what was possible under other major normative systems until the nineteenth century.\textsuperscript{74}

Under the shariah, women are entitled to inherit property and maintain their own legal title over it, as opposed to their husbands owning legal title over it.\textsuperscript{75} Women were also encouraged to participate in social and public affairs, with "sufficient historical evidence of participation by Muslim women in the choice of rulers, in public issues, in lawmaking, in administrative positions, in scholarship and teaching, and even in the battlefield."\textsuperscript{76} The development of such an extensive corpus of rights in 7th century Arabia indicates a far more progressive attitude towards gender relations compared to that of 19th and 20th century Global North countries.

D. RIGHTS WITHIN THE FAMILY UNIT

Islam provides an equitable system for financial matters within the family. It is obligatory for men to work and provide financial support, the means for livelihood, and attentive care to his wife and their family. While this does not preclude the wife from working and earning a living, she is not obliged to provide financial support for her husband or her family. Similarly, in inheritance matters, female relations to the deceased have prescribed shares of inheritance. However, where there are brothers, the brothers will receive double the share of the sisters for this very logic: as male members of the family, the brothers must use that inherited wealth to provide for their families and to contribute to their financial security, whereas the same obligation is not upon the sisters; rather, they have a right over such wealth through their husbands.\textsuperscript{77} The structure conforms to the equitable distribution of rights and obligations entailed by the sovereign under Islamic law.

Thus, the inheritance distribution system must be interpreted in line with the rights-obligations relationship that underpin gender relations in Islamic society, particularly in the context of the family. The system seems to relieve


\textsuperscript{77} Ibid.
women of that burden given the responsibilities of looking after her family, therefore transferring that obligation to the more physically-capable man. Again, given that these are prescribed in the Quran and affirmed by the Sunnah, the inheritance obligations are fixed and reflect the distribution of responsibilities between the sexes.

E. MARRIAGE RIGHTS

Within marriage, Islamic law provides rights to both men and women according to their differences in capabilities and power. At the time of the nikkah (the solemnization of marriage), the husband must give his wife mahr (dower), without which the marriage is considered invalid.\textsuperscript{78} This mahr remains the property of the wife until she initiates a dissolution of the marriage through khula.\textsuperscript{79} Islam also recognizes rights of the divorcee, who continues to receive financial help from her ex-husband until the end of her iddah\textsuperscript{80} period, while a child is entitled to financial maintenance even after the divorce and if he/she is in the custody of the ex-wife. Such rights have always existed as part of the Islamic legal system as these stem from religious instruction from the Quran, rather than from concepts developed through human agency.

Gender equality under IHRL and Islamic law manifest themselves differently while being premised on similar bases. Gender equality under IHRL has not been a static concept but has evolved as gender relations have evolved over time. This is because the ultimate sovereign under IHRL is the individual who, as a part of a collective, can influence the general will of a polity. This general will is then reflected by the sovereign who formulates rights and responsibilities accordingly; this is apparent in the continuously evolving jurisprudence on gender equality that has seen significant change over the past two centuries alone.

Given the unchangeable and unchallengeable nature of the sovereign under Islam, gender relations under Islamic law must be preserved in the manner that they were originally mandated. This does not mean that such relations are outdated or unsuited to modern times. Indeed, the philosophy upon which gender relations are shaped reflect the manner in which God created both man and woman, with one more physically capable than the other. Because of these differences, different rights and responsibilities have been created in

\textsuperscript{78} Qur’an 4:4.
\textsuperscript{79} Sahih al-Bukhari, 5273, Chapter 12: Al-Khul’ and how a divorce is given according to it, Book 68: Divorce, https://sunnah.com/bukhari:5273.
\textsuperscript{80} A prescribed period for a woman who is either divorced or widowed during which she may not marry another man in order to prevent confusions of the fatherhood of a child born after the divorce/widowhood.
the *huqooq ul ibad*, as opposed to the *huqooq Allah*, which remain altogether the same across genders.

**VII. CONCLUSION**

This study has attempted to examine two different rights frameworks under the notion of sovereignty. Human rights operate in a complex web of sovereign-subject relationships that inform how society must be governed. The advent of IHRL has attempted to harmonize global efforts towards enhancing protections for individuals against the State, which may not necessarily always have their best interests in mind.

However, by reflecting approaches to human rights from the Western political tradition, IHRL can be seen as alienating and subordinating alternative human rights frameworks that seem to be at odds with its own structure. While the CEDAW Committee and other organizations have been proactive in trying to harmonize the two interpretations of gender equity, the normalization of human rights from the Western political tradition must not be used to delegitimize other approaches to human rights, particularly where those approaches are based on differing notions of legitimacy. While IHRL is a major achievement in international law and the fight for greater protections and entitlements of the individual, the formulation of rights in these frameworks do not constitute an absolute benchmark. Therefore, the universality of human rights should actually be framed on a more foundational level, that is the purpose of human rights, rather than emphasizing on the universal acceptance of a particular conception of human rights.

It is also because of this that the majority of criticisms of rights under Islamic law are not objective criticisms. Rather, they involve the superimposition of Western political philosophical ideals onto a pre-established legitimate rights framework. Both rights frameworks place the individual in a particular relationship with the sovereign; however, it is this relationship with the sovereign, along with the nature of the sovereign, that differentiate how those rights manifest themselves. Given that these rights frameworks follow from their respective sovereignty relationships, one cannot fault them through the lens of the other as they logically follow from the nature of the sovereign they seek to serve. Given that these rights operate under two disparate sovereignties, one must understand the difficulty of subsuming Islamic rights under ‘universal’ human rights: while foundational concepts may be similar, certain rights and rights-relationships will differ for reasons that are no more or less legitimate than the other.
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