Human Rights in Islam: a pluralistic Approach

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The Concept of Human Right
To ensure the protection of individual rights of all persons, human rights were codified into a set of standards\(^1\) in a form of documents (bills). By the standards set in these documents, state laws are subjected to international concern on how citizens or people are treated. In December 1948, the General Assembly of the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR). Later on, other bills emerged under the UN to emphasize some specific human rights issues: In December 1966, members of the UN ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICPPR) etc. These documents form the recognized statements on human rights globally.

Human rights as specified in the articles of the UDHR document are rights that all human beings enjoy equally. Moreover, there shall be no discrimination whatsoever among human beings in the claim of these human rights (article 1 & 2). The following are some human rights stated in the UDHR document:

The right to life (article 3), this means the life of all human beings are their claim that the state should protect. The state must ensure that the life human beings are secured and free.

Human beings also have the right to recognition everywhere as human being and that every person is equal to the law of every state he or she finds him or herself, that is all human beings have equal protection of the law of the state (article 6 and 7). Meaning, no matter where a human being lives he or she has the right to be recognized equally as other human beings by the law of the state.

Human beings have the right to a competent tribunal (article 8), that is human beings must have equal remedy from the judiciary or courts of the state for acts violating their rights stated under the laws of the state.

\(^{1}\) Donnelly 1999, p. 71
The right to be presumed innocent until proved guilty (article 11), this means human beings have the right to public trial with all the guarantees for his defense before he can be guilty of an offence.

Human beings also have the right to freedom of movement (article 13), this means the right to move to where ever he or she wants, whether within or outside his or her country. Right to seek asylum from persecution (article 14), meaning human beings can move to another country from persecution by another.

Men, and women of full age have equal rights in marriage (article 16), meaning adults have equal right to marriage and divorce. No one is to be in a subordinate position because of his gender or position in society, the couple or husband and wife in this case are considered free and equal in the marriage relationship.

The right of to property (article 17), every human being can acquire property and no one shall be denied his or her property.

Additionally, human beings have the right to freedom of thought, conscience, and religion (article 18), the right to free expression of opinion (article 19), and the right of free association (article 20). Also, the right to take part in government of one’s country (article 21) and the right to education (article 26), the right to equal remuneration for equal work (article 23). Others human rights are the right to rest and leisure (article 24), the right to adequate standard of living for the (food, clothing, housing,) and the right to participation in cultural and international order (article 27 and 28).

The other categories of human rights are those that one shall not be subjected to and these include the right not to be subjected to slavery (article 4), the right not to be subjected to torture or inhuman punishment (article 5). Lastly, all human beings have the right to the protection of the law against interference of their privacy (article 12). These are common human rights mentioned in the UDHR document as individual rights of people. However, other human rights documents specifically emphasize on special or groups rights like women’s rights or political rights. For example, the ICCPR specifically outline social and political rights of a state and not the individual person per se.

According to Donnelly², the common understanding of human rights is that they are claims one has simply because he or she is a human being. They are universal meaning

² Donnelly 1999, p. 80
everyone has them. They are equal rights meaning one has these rights equally as all other human beings. Moreover, they are inalienable rights that is one cannot stop being a human being and thus cannot stop having these rights.

The individual person as the focus of human rights reflects in the preamble of the UDHR that human rights derive its claim “from the inherent dignity of the human person”. Meaning, the individual person have unqualified rights, for example, freedom to choose what constitutes a good life for him or her. What the state is expected to do therefore is to ensure that individuals are guaranteed equal rights through its laws.

The reality is that some policies of a state aimed at ensuring equality (for example gender balance in access to education) can appear to be discriminating to some individuals within the state. For example, a tuition free education policy for girls in a developing country aim at equality between boys and girls. This policy may appear to be a discriminating against boys of that country even though the aim is to correct inequality between boys and girls in terms of access to education. This explains how interpreting human rights only from the individual perspective, away from the general needs of a society could be inadequate. The reason is that education as a right must claimed equally without distinction of any kind (religion, gender etc) that means if the state should support education, it should do that equally and not favour particular group.

According to the UDHR States are supposed to implement human rights. However, states can also be a source of limiting rights. This is because some decisions of the state could affect some individuals; the aim could be to give equal opportunities to all citizens (a policy to correct gender imbalance) or to maintain order (in emergencies). From the foregoing, human rights can also be a reason also why states have to limit some individual rights. The aim though is to ensure that all other members in the society have equal access to their human rights like education.

According to Ignatieff, human rights are justified based on some form of religious foundation. According to him, without a religious view of human rights there is no reason

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3 Preamble of the UDHR “Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”. Available at http://www.udhr.org/UDHR/default.htm
why human beings are “entitled to … ultimate respect”⁴. Either this concern of a religious view calls for another way of justifying human rights (for example secular) or it implies that the various religions be allowed to define what constitutes human rights for them. However, since there are many religions, ensuring a common basis of human rights ought to be searched. Meaning that in as much as pluralism in justifying human rights is understandable, there must be common ground on which all various religions can agree. In order to resolve these concerns, Ignatieff suggests that human rights should be seen as a point “for the adjudication of conflicts”⁵ among various comprehensive doctrines. He argues that the foundation of human rights should be a psychological one⁶ that is the ability of all human being to appreciate the pain of others.

1.1 Background
Islam is a term used in reference to the religion and way of life of Muslims. It is Arabic word which submission. In addition, as a formal term for Muslims (al-Islam) means complete submission to the will of God⁷. The words Islam or Muslim are derived from the same Arabic roots slm, which also means peace, security, integrity etc. it is from this root word (slm) that the word Salaam (peace) originates. As a result, a Muslim is a person who enters into ‘the peace’ and submits to the will of God⁸.

There are five basic principles of practice in Islam⁹. They are:

i) The declaration of faith- that is the bearing witness that there is no deity besides God and that Mohammad is God’s servant and Messenger

ii) Prayer- that is to observe the formal five daily prayers

iii) Fasting- that is to observe the ‘Ramadan fast’. That is fasting for a number of period in a specified month

iv) Zakat- this means the giving of alms to the poor and needy out of one’s rightly acquired annual income

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⁴ Ignatieff 2001, p. 83.
⁵ Ignatieff 2001, p. 20.
⁶ Ignatieff 2001, p. 83.
⁸ Abdul-Haqq 2006, p. 9
⁹ Abdul-Haqq 2006, pp. 8-10
v) Hajj - that is the pilgrimage to the holy mosque (*kaba*), built by Abraham and his son Ishmael, in Mecca.

The Quran is the basic source of Islamic principles and according to the Quran, all previous Prophets were Muslims and that they all delivered portions of the same message of God just as Mohammad delivered the message of the Quran. Meaning that the term Islam or Muslim as used in the Quran is applicable to every revealed religion like Judaism and Christianity. For example, the relation between the previous revelation and the message of the Quran is reminded in Quran 42:13 as “God has ordained for you that religion which He has already commanded Noah, Abraham, Moses and Issah (Jesus)". In addition, in Quran 10:73 Noah is reported declaring “I was commanded to be among the Muslims”. It is again reported in Quran 2:128 that, when Abraham and his son Ishmael were constructing the *kaba* as a place of worship at Mecca, Abraham addressed God in these words “Our Lord! Make us Muslims unto thee and of our seed a nation of Muslims unto thee”. In addition, Moses is reported to be in the Quran as addressing his people in Quran 10:85 as “trust yourself to God if you are true Muslims”. Moreover in reporting about the conversation between Jesus and his disciples the Quran, in 3:19, states, “We have believed and you can be witness that we are Muslims”.

From the verses of the Quran cited above, one can say that the word Islam or Muslim according to the Quran includes all the previous religions that existed before Islam as preached by Mohammad, provided they were revelation from God according to the Quran. Again, the Quran makes it clear in 13:38 that “verily we have sent Messengers (to mankind) before thee”. Therefore, the verse of the Quran, 5:3, that states, “on this day I have perfected your religion for you and completed my favour unto you, and have approved for you as a religion al-Islam” means that Islam finally completed the mission of all the previous religions.

The Sharia is the result of a process of legal interpretation and logical derivation from the Quran and the Sunna. The Sharia or Islamic law to Muslims means the “whole duty

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10 These people according to the Quran were all Prophet who God sent at a point in time to guide people.

11 See An-Naim 1990, pp. 11-33 for the sources and development of Sharia.
of mankind”\textsuperscript{12}. It contains the details of moral and spiritual aspirations and details the ritual observances of Muslims; containing both public and private law.

The Quran (religious Scripture of Muslims) and the Sunna (the sayings and practices of the Prophet of Islam, Mohammad) are the first source of the Sharia. The belief among Muslims is that the Quran gives the broad principles and Mohammad establishes a model Islamic life through his sayings and practices.

The second source of Sharia is Ijma that is the consensus of Muslims (scholars) on an issue. The third source of the Sharia is, reasoning by analogy or concluding from a principle embodied in a precedent (Qiyas).

Lastly, Ijtihad as a source of Sharia means independent juristic reasoning. However, Ijtihad can only to be applied to a case or in a situation where there is no a definite Quran or Sunna position on an issue.

It is important to state that there were no any systematic rules like the Sharia until two centuries after the death of the Prophet. The reason for enacting the Sharia was due to the expansion and conversion of diverse cultural groups\textsuperscript{13} in to Islam coupled with the need for a uniform Islamic way of life at that time.

Consensus as a source of the Sharia was based on the saying of the prophet that, “my people shall never be unanimous in error”\textsuperscript{14}. The concern then with the Sharia is must the consensus or the Sharia of a single or earlier generation be binding on all or later generations? I hope to argue later in this paper that the Sharia as defined is not relevant today (as a public law in particular) because of pluralism in how Muslims approach the Sharia.

The legitimacy of Sunna as an Islamic source is in the Quran 59:7. It states, “…whatsoever the Messenger (Mohammad) gives you, take it, and whatsoever he forbids you, abstain from it…” The implication is that the Quran remains the basic and authoritative source of Islamic law.

By the process of Sharia outline above, the founding jurists of the Sharia categorized\textsuperscript{15} the field of Muslim activities into permissible, prohibited, recommended, and

\textsuperscript{12} An-Naim 1990, p. 11.
\textsuperscript{13} An-Naim 1990, p. 14.
\textsuperscript{14} An-Naim 1990, p. 23.
\textsuperscript{15} See An-Naim 1990, pp. 32-33 for the categorization of Sharia.
reprehensible acts. The other main categories were worship and social dealings. This means that the religious obligations of Muslims according to the Sharia cover all aspects of the individual-public and private.

1.2 The Problem

Human rights as a concept (UDHR) do not specify in detail what constitute rights beyond general ‘freedom and equality’ of all human beings in the way they claim these human rights, education, property, political participation etc. This implies that various states can define and clarify how they can achieve these human rights. Some Muslim authors argue for an Islamic version of human rights while other Muslim authors think differently and argue for reform of the Sharia in order to justify human rights in Islam.

Considering the fact that human rights allow for a plurality of views this thesis, address the following questions:

i) Is there a common Islamic view on human rights?

ii) Can application of the Sharia as the public law of a state justify human rights in Islam, amidst a plurality of views?

iii) What theory or principle would be able to ensure human rights in Islam while maintaining it as a source of legitimacy?

Even though human rights are universal concepts because people share a common humanity, however, more crucial in the promotion of human rights is how human rights are justified in a plural society. This means allowing diverse views on human rights, so that human beings can respect human rights from their own point of view.

1.3 Organization and Overview

Chapter 2 discusses views on how human rights can be justified in Islam according to some Muslim authors. The discussion reveals that, there are different Muslim views on human rights. Four categories of views discussed include:

i) Islamizing human rights or justifying human rights in Islam only through Islamic sources like the Quran.

ii) The pragmatic view that is applying principles of Islam in a practical way that is consistent with human rights standard.
iii) ‘Secularist view’ that is separation of the Islamic law from the public law of the state.

iv) A re-conceptualization view or understanding the Islamic law in way that is consistent with human rights standards.

In chapter 3, I will discuss some controversial human rights issues in Islam that invited the different views on how to resolve those issues discussed in the previous chapter. The controversial issues include women’s equality, the position of non-Muslim minorities in an Islamic state, the issue of apostasy in Islam and the issue of slavery in Islam. The traditional Sharia position will be presented and the views of some Muslim human rights authors on those issues discussed in relation to human rights standards.

Chapter 4 will discuss the proposed reform by An-Naim, which argues for a reform to the Islamic law in order to apply Islamic law as the public law of the Muslim state. In addition, to discussing his arguments I will discuss some criticisms of the proposed reform as well.

Chapter 5 will argue for Rawls theory of overlapping consensus as a principle to justify human rights in Islam. The reason for applying the theory of overlapping consensus is due to the fact of pluralism in a modern state. In addition, because human rights are justified by various individual human beings from their different own points of view.

Finally, chapter 6 ends this paper by a conclusion, summary of the main arguments advanced in the paper.

1.4 Method and Materials

The materials of this thesis are gathered based on reading of documents related to Islam and human rights. That is through reviewing of books, journal articles, legal acts, etc concerning Islam and Human Rights.

This thesis is mainly a theoretical discussion on how human rights can be justified in Islam; nevertheless, some points are clarified with practical examples. The facts of the discussions are mainly based on the article of the UDHR and verses of the Quran.

The main books reviewed for this thesis include Mayer A. 1999. *Islam and Human Rights: Traditions and Politics*. The reason for using Mayer’s book is that it contains a
compilation of the various Islamic views on human rights and the traditional Islamic law and politics as practiced in different Islamic states toady.

Another material used in this thesis is An-Naim A. 1990. Towards Islamic Reformation: civil Liberties, Human Rights, and International Law. An-Naim book is chosen because it also reviews the various views on how human rights can be justified in Islam. In addition, An-Naim discusses the limitations of the Sharia and the various views justifying human rights in Islam. He proposes a reform of the Sharia as a way of justifying human rights in Islam.

Another material reviewed is by Bielefeldt H. 2000. Western versus Islamic Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights. This article of Bielefeldt discusses the various views of human rights in Islam and argues against any exclusive claim of human rights on either religious or cultural grounds. Bielefeldt argues that human rights are political concept and should be point of consensus for various the religions and cultures within any society.

Another material reviewed in this thesis is Rawls J. 1993. Political Liberalism. The reason for reviewing Rawls is to present his theory of ‘overlapping consensus’ as an alternative to the various views reviewed as a way of justifying human rights in Islam. The theory consider the fact that there many comprehensive doctrines that are incompatible in a modern state. In addition, it argues that it is possible for people to affirm the political conception of justice (freedom and equality) from their various comprehensive doctrines.


The views of the Muslim human rights authors used in this thesis are Mawdudi A., Zaid A., Abdarraziq A., Abduh M., Ashmawy, and Rahman R. However, their arguments are cited as secondary source through authors like Mayer, An-Naim, Bielefeldt and Esposito.
Others include Sajjad I. (2003) who wrote mainly on Mawdudi views on human rights, and Sachedina A. who also wrote a response to An-Naim’s proposed reform. The reason is for citing these authors through a secondary source is that access to their original materials was not available.

On the concept of human rights, I reviewed material by Donnelly J. Ignatieff M. and Both K. The reason for using these materials is that they discussed the human rights as a universal concept. They also discuss challenges of human rights as a concept faces within a state.

Some of the Quran verses cited in this thesis are secondary sources from An-Naim, Mayer and Bielefeldt that I confirmed with Yusuf Ali’s *The Holy Quran, Texts, Translation, and Commentary*. Other verses are cited directly from *The Noble Quran* translated by Dr. Mohammad Tag-ul-Din Al-Hilali and Mohammad Muhsin Kan (2001-2002) in order to confirm some Islamic position or some arguments made in this thesis. The Quran is cited by chapter and verse; for example, the fifth verse of Quran chapter nine is cited as 9:5.

Because most Islamic terms are in Arabic, some of the Arabic terms used are *italicized* in order not to confuse the reader. However, the commonly used terms like Quran, Sunna, and Sharia are not italicized.
Chapter 2

**Justifying human rights in Islam**

In this chapter, four views on how human rights are justified in Islam are discussed. These include Islamizing human rights, pragmatic interpretation of principles of Islam to conform to human rights, a critical re-conceptualization of the message of Islam and those who argue for secularism as way of ensuring human rights in Islam.

The discussion in this chapter reveals that there is no one Islamic view on how human rights are justified in Islam also, the discussions reveals the shortcomings of these views. According to the UDHR, human rights\(^{16}\) are guaranteed by the state through its law. This makes the law of every state an important factor in discussing human rights. Muslim rights authors rely on the Quran and Sunna to develop their positions supporting or condemning human rights\(^{17}\) because, justifying human rights in Islam will depend on how consistent human rights are with Islamic doctrines. This means that the Quran and Sunna are important factors to consider when discussing human rights in Islam.

According Bielefeldt, people should expect conflicts of human rights with Islam because of the differences in their normative nature\(^{18}\) or origin. That is one based on freedom of the individual and the other on absolute obedience of believers to religious injunctions. Therefore, according to Bielefeldt, various attempts by Muslims (authors) at constructing human rights in Islam are attempts to reconcile the two\(^{19}\) that is resolving the conflicts between Islam and human rights. (The issues in Islam that conflicts with human rights are discussed in chapter 3).

2.1 Islamizing view

Muslim authors holding this view argue that, Islam, due to its divine origin provides an absolute foundation for protecting rights of all human beings\(^{20}\) (as collective). They then outline an Islamic version of human rights in contrast to the human rights as in the UDHR.

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\(^{16}\) See Preamble of the UDHR of 1948.

\(^{17}\) Mayer 1999, p. xii.

\(^{18}\) Bielefeldt 2000, p. 103.

\(^{19}\) Bielefeldt 2000, p. 103.

\(^{20}\) Bielefeldt 2000, pp. 103-4
A review of these authors’ views will reveal that they do not offer a solution to resolve conflicts between Islam and human rights. The assumption is that there are exclusive Islamic human rights for Muslims.

One author representing this view is Abu’ Ala Mawdudi, whose purpose is to “rationalize Islam into a belief system predicated upon absolute obedience to the will of God”\textsuperscript{21}. This means that a concept like human rights must have its roots in the Quran and Sunna. In his book, \textit{Human Right in Islam}, Mawdudi argues that Islam guarantees human rights because, its doctrines are free from nationalist bias and do not set limits on where Muslims may search for wisdom. Also, on Equality he argues that Islam precludes distinction in rights based on ‘colour, race, language or nationality’ and regarding liberties he makes reference to the Quran verse 2:256 which forbids coercion in matters of faith\textsuperscript{22}.

According to Mayer, the difficulty with constructing rights based on distinctive Islamic sources, as Mawdudi’s is that such rights do not meet human rights standards\textsuperscript{23}. For example, after justifying equality in Islam as ‘precluding distinction’ of any kind, Mawdudi did not include distinction based on “gender” and “religion”. Also after citing Quran 2:256 to justify freedom of religion and liberty, he did not touch on issues of apostasy and restrictions on inter religious marriage.

By emphasizing on exclusive Islamic rights, Mawdudi tend to present Islamic values as rights. For example, a woman’s ‘right to her chastity’ is considered a woman’s right however, in its application it justifies some form restrictions on women by confining women to their homes\textsuperscript{24}. Even though the aim of confining the woman is to protect the woman from losing her chastity it violates a woman right to freedom of movement for example.

According Sajjad\textsuperscript{25}, Mawdudi’s absolute insistence on the supremacy of Islam caused him to see any concept outside Islam as necessarily inferior. This coupled with his aim for appropriating Islamic human rights compromised the universality of his human rights schemes.

\textsuperscript{21} Esposito 1997, p. 74. \\
\textsuperscript{22} Bielefeldt 1995, p. 603. \\
\textsuperscript{23} Mayer 1999, p. xv. \\
\textsuperscript{24} Mayer 1999, p. 103. \\
\textsuperscript{25} See Sajjad 2003, pp. 547-562
Apart from Mawdudi, documents expressing Islamizing of human rights include Universal Islamic Declaration of Human Rights (UIDHR) issued in 1981 by Islamic Council of Europe. And the Declaration of ‘Human Right in Islam’ (Cairo Declaration) adopted by the foreign ministers of the Organization of Islamic Conference (OIC) at the 1990 annual session of the OIC held in Cairo, Egypt. These documents integrate the language of human rights into Islamic framework as a way appropriating an Islamic version of human rights. This tendency reflects in the preamble of the UIDHR as

\[\textit{WHEREAS}\] by virtue of their Divine source and sanction these rights can neither be curtailed, abrogated nor disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated.\(^{26}\)

The aim of this article is to emphasize the divine source of human rights in Islam to establish their legitimacy and inalienability. In addition, article 25 of the Cairo Declaration emphasizes on the importance of Islamic law for the guarantee of human rights, the article reads “… Sharia is the only source of reference for the explanation or clarification of any of the articles of this Declaration”. What can be said about these authors or articles of Islamizing human rights is that they are aimed at projecting Islamic views more than human rights. The clarifying of rights only through Sharia is inconsistent with religious liberty of UDHR. The reason is that interpreting human rights within the Sharia understanding will deny other religions equal chance of interpreting from their own religious point of view.

Bielefeldt in analyzing the views of ‘Islamizing human rights’ authors came to the conclusion that their views “amounts to a one-sided and uncritical Islamization of human rights language at the expense of both the universalism and the emancipatory spirit of human rights”.\(^{27}\) For example, the authors of this view do not consider freedom of movement important human rights since they do not consider the restriction of women movement as a violation of their human rights, provided the aim is to protect them from losing their chastity for instance.

\(^{26}\) See preamble of UIDHR

\(^{27}\) Bielefeldt 2000, p 106.
Article 1 of the ICCPR emphasizes on the right of people to self-determination. That includes the right to “determine and define their own cultural and political development”, which of course may validate appropriating Islamic rights. However, the validity of these Islamic rights is subjected to the UDHR, which in article 2 prohibits distinction among persons on any kind. The challenge to Muslim authors on human rights is how to maintain Islamic identity in their Islamic rights schemes while ensuring equal freedom of all human beings without distinction of any kind. The Islamizing human rights authors discussed above do not address this requirement of equal freedom.

2.2 Pragmatic view

To address the practical challenges of Muslim societies some Muslim authors argue for adopting of principles that may not necessarily be of Islamic origin into some general principles of Islam, like maslaha or welfare. Here it appears that the guiding ethical principle is consequential or utilitarian in a sense that a principle that, what produces a good result in a particular context is justified. On the other hand, principles (Islamic or not) which application will lead to bad results are suspended. According to Bielefeldt, pragmatic attitude can be justified by referring direct to some Quranic verses. For example, Quran 2:185 emphasizes that God intend every facility for you; “He does not want to put you to difficulties”29. Meaning Muslims must avoid any interpretation of God’s message that might put human beings into difficulties. Therefore, the conclusion of the pragmatic view is that the benefits or utility of Islamic rules should be considered before they are applied practically.

One Muslim human rights author who argues for a pragmatic application of Islamic laws is Mohammad Abduh30. Abduh applied pragmatic way of interpreting the Quran verses to argue against the practice of polygamy in order to ensure equality between the husband and the wife in marriage. He argues that in Quran 4:129, it is stated, "it is not possible to be fair and just between women (wives) even if that is your ardent desire". Based on this verse, Abduh concludes that the Quran implicitly forbids polygamy. By

28 Bielefeldt 2000, p 106.
29 Bielefeldt 2000, p.106.
this analysis, polygamy should be made illegal as a way of ensuring equality between women and men in marriage.

According to Bielefeldt\textsuperscript{31}, the pragmatic interpretation of the Sharia has helped bring about a tradition of religious tolerance. This achievement is realized through relying on the internal frame of Islam to derive their validity that is justifying pragmatic view from the Quran verses. Nevertheless, Bielefeldt concedes that this “tolerance should not be equated to equality with religious liberty in the modern understanding of human rights”\textsuperscript{32}. This observation means that one cannot rely on pragmatic interpretation as conclusive since they depend on isolated verses and context to justify human rights in Islam.

An-Naim, after commending pragmatic interpretations of human rights in Islam observes, however, that the problem with that view is “it is selective…. As such fails to confront those perspectives which are not consistent with….human rights”\textsuperscript{33}. For example Quran 4:34 (men have guardianship over women), that is interpreted as authorizing superiority of man over woman will still remain a legitimate source of women subordinate position to men in Islam. An-Naim states that pragmatic view overlooks the problem of slavery and discrimination that are inherent in the Quran\textsuperscript{34}. In addition, one cannot be sure in his or her assumption that people will always interpret all the Quran verses in a pragmatic way, since the Quran is subject to varied interpretations. Therefore, a method that avoids the possibility of a contrary interpretation to the pragmatic method of interpretation, for example, will be necessary in order to justify human rights in Islam.

2.3 Re-conceptualization view

Muslim authors of this view propose a change in the understanding of the eternal message of Islam as being consistent with human rights. The position of this view is that as long as the perception that the traditional Sharia is a divine law of Muslims remains human rights cannot be justified in Islam\textsuperscript{35}. Their first aim is to argue that the traditional Sharia is not divine law in the way that the Quran and Sunna is and then argue for the enacting of a new Sharia in order to justify human rights in Islam.

\textsuperscript{31} Bielefeldt 2000, p. 107.
\textsuperscript{32} Bielefeldt 2000, p. 107.
\textsuperscript{33} An-Naim 1990, P. 171.
\textsuperscript{34} An-Naim 1990, P. 171.
\textsuperscript{35} An-Naim p. x. also Bielefeldt 2000, p. 108
According to An-Naim, the earlier verses of the Quran are to provide the source of this new Sharia. The earlier verses of the Quran received when the Prophet was still in Mecca, contain the main teachings of Islam—toleration, spiritual life etc. while the verses of the later period in Medina were addressing the socio-political issues of the Muslim community in Medina. According to An-Naim, the Medina verses were responses to a community beset by war in an age where no one recognized equality. An-Naim continues to argue, “Unless the basis of modern Islamic law is shifted away from the Medina stage….there is no way of avoiding drastic serious violations of universal standards of human rights”. A detail discussion of this reform in Chapter 4 will clarify the arguments.

Another Muslim author of this view is Abu Zaid, who also argues for reform in the area of Islamic inheritance or Muslim family law. According Zaid, the Quran raised the legal standing of women that they could not enjoy before the advent of Islam. In this light he proposes that difference between men and women in their inheritance claims should be seen as appropriate in that historically context. However, that “should not prevent Muslims from going further in the direction of justice and equality” to achieve total equality. This means, enacting a new Sharia to render inequality between men and women in terms of inheritance and marriage rights illegal in Islam.

The aim of this view is to confront the underlying causes of human rights violations and substitute it by a scheme that makes violation of human rights illegal in Islam through a legal process. According to Bielefeldt, by distinguishing between the traditional Sharia and the theological intent of Islam, this “opens up the conceptual space for….political reforms in accordance to….human rights”. He cites some verses that make this view possible within Islam, especially those that emphasizes the dignity of the human person. For example, Quran 2:30 men are referred as “Gods deputy” -khalifa – on earth, in 17:70 God has “honored all children of Adam”. It should be noted that, when the Quran is talking about theological doctrines it uses the phrase ‘believers’ and when referring to humanity as a whole it uses phrases such as ‘Children of Adam’ or ‘Humankind’. By this

36 An-Naim 1990, Pp. 52 - 57
37 An-Naim 1990, p. 179
38 Cited in Bielefeldt 2000, p. 111.
insight, of separate phrases used to address people in the Quran, the verses that address all human beings become the eternal message of Islam and therefore consistent with human rights.

2.4 Secularist view
The final view on how human rights are justified in Islam is to argue for separation of the religious laws of Islam from the public law of the state, by this, the state is ruled by human made law rather than divine law. This means, the divine law, or various religious laws are protected by the state as the private matters of the citizens of the state. According to Mayer, “Muslims are entitled to the full measure of human rights protections”\textsuperscript{40}. She further argues that, “human rights are assumed to be implemented within the laws of a democratic state”\textsuperscript{41}. This means principles of the UDHR that protect human dignity and freedom (article 1&2) and the right of all people to political participation (article 21) are Secular ideals that ensure equal protection for all human beings in a state. This implies the state law should be separate from the religious law while offering all religions equal chance of participating in the political process of the state.

One Muslim author representing this view is Ali Abdaraziq, who argues that Islamic laws should be separated from public laws of the state. He argues that Mohammad played only religious and spiritual roles as a Prophet. He then concludes, “Modern Muslim states are free to organize their governments in a manner they considered appropriate”\textsuperscript{42} to their needs. Like other arguments for reform, Abdaraziq distinguishes between the religious and political roles of the Prophet. He argues that “where as Mohammad is a timeless religious authority, his political role was due to the historic circumstance of the first Islamic community in Medina”\textsuperscript{43}. Meaning, Muslim should separate the political role of Mohammad from the religious role. The reason is that the political role of Mohammad was due to contingencies that compelled the Muslims to migrate to Medina.

\textsuperscript{40} Mayer 1995, P. xvi.
\textsuperscript{41} See articles 21 and 8 of UDHR
\textsuperscript{42} An-Naim 1990, p. 43. Raziqs argument cited
\textsuperscript{43} Bielefeldt 2000, p. 112.
Another Muslim author representing the secularist view is Ashmawy, who criticizes the merger of religion and politics as a “perversity”\textsuperscript{44}. Because, it debases religion by rendering it an instrument for every day power politics and necessarily result in deifying of political leaders. The merger of religion with politics has the effect of absolving politics from critical public discourse, which, according to Ashmawy, is close to polytheism or worship of man - the gravest sin in Islam. This is because once the political leaders are issuing the divine law; citizens must accept the law as the command of God. Meaning decisions political leaders are not to be questioned by the individual members of the state.

Implicit in the secularist view is the assumption that secularism is able to offer a more equitable form of governance than a religiously based law like the Sharia. Can secularism support a political community that agrees (through election for example) to apply a religious doctrine as the public law of the state. According to Rahman, “the difficulty before the secularist is to have to prove the impossible, namely that Mohammad, when he acted as a law giver and political leader, acted extra religiously and secularly”\textsuperscript{45}. Citing this question of Rahman, An-Naim observes that this will be difficult to proof and even if possible at all may deny Muslims an important cultural resource “for self identity”\textsuperscript{46}. Meaning according to An-Naim, the Sharia is an important aspect of Islamic identity and therefore any problem with Islam has to be resolved through the Sharia.

2.5 Summary

The review of Muslim authors on human rights reveals that there are different views on how human rights are justified in Islam. The four views identified by Bielefeldt, which form the basis of the discussion, are summarized below.

Islamizing view on rights argues that human rights are justified in Islam when they are consistent with Islamic principles. This view does not address the conflicts between human rights and Islamic principles regarding equal freedom of human beings.

\textsuperscript{44} Bielefeldt 2000, p. 113
\textsuperscript{45} An-Naim 1990, p. 44.
\textsuperscript{46} An-Naim 1990, p. 44.
Pragmatic view is the interpretation of principles in a way that they do not violate human rights standards. This approach leaves other Islamic principles that conflicts human rights standards, as such, this views do not resolve the human rights conflicts completely. Because, there is the possibility of interpreting some principles in a different way that may not cohere with human rights standard.

The third position is a critical understanding of the basic message of Islam, by constructing a new Sharia based on the eternal Islamic message. The understanding is that today’s context demand a new Sharia based on the main message of Islam in order to achieve coherency with human rights. The implication of this view is that some Islamic principles conflicts with human rights and unless a reform to Islamic law is applied there is no way human right can be justified in Islam.

Finally, a view justifying human rights in Islam by way of separating the Sharia as public law of the state as a way of resolving the conflicts with Islam. The argument of this view is that state governance did not form the main message of Islam. In addition, Islam is against uncritical obedience to human judgment a situation that will be unavoidable when the Sharia is used as a public law of the state. The reason is that people critical of some decisions of the political leaders may appear as disobeying the commands of God since the state would be conceived as implementing the divine law of God.

By comparing the above views, some Muslim authors (Islamizing view) ignore the conflicts between Islam and human rights by enacting human rights that assume the existence of an Islamic version of human rights. Their assumption is that human rights can only be valid in Islam as long as it originates from Islamic sources.

The pragmatic Muslim human rights authors argue for flexibility in the interpretation of Islamic principles in order to justify human rights in Islam. By this position, applying general principles depends on the utility they produce as a way of justifying their relevance today. By this view, human rights become the standard of measuring the validity of Islamic principles.

Finally, some Muslim authors argue for a re-understanding of the eternal message of Islam as being consistent with human rights. They propose a legal process to render incidents of human rights violation illegal in Islam.
All the four views discussed on how to justify human rights in Islam based their arguments on the Quran and the Sunna. What is different is the emphasis of each view, while some hold the view that justifying human rights in Islam depends on how they conform to Islamic principles, others hold the contrary view that human rights should be a source for the justification or reform to Islamic principles. One view appears neutral on its emphasis as to which should be the standard of reform of the other. As such, it argues for the separation of political and religious laws as a way of avoiding conflicts between Islam and human rights.
Chapter 3

Controversial Human Right Issues in Islam

In this chapter, the controversial human rights issues in Islam will be discussed. These issues include women equality, the issue of apostasy, non-Muslims minorities, and slavery in Islam. The position of the Sharia on these issues, views of some Muslim human rights authors like those of Mawdudi and An-Naim are discussed. The reason for choosing these two authors is that one argues for reform to the Sharia while the other argue for maintaining the Sharia as a way of justifying human rights in Islam.

The concept of human rights assumes that just being a human is sufficient for the claim of human rights. This fact is confirmed in the preamble of UDHR that the UDHR reaffirms its faith “in the dignity and worth of the human person and in the equal rights of men and women”. This means people are free and equal and therefore there should not be any distinction among people regarding their human rights. However, according to Mayer, Islamic sources (Quran and Sunna) provide a warrant for unequal treatment of people by distinguishing between women and men, Muslims and non-Muslims, free persons and slaves. These distinctions remain a feature of the Sharia as will be discussed below.

3.1 Women Equality in Islam

Some passage from the Quran is interpreted, rather quickly, to mean women cannot hold public offices because women could not exercise authority over men. For example chapter 4 of the Quran verse 34 states “men have guardianship and authority over women because of the advantage they enjoy over them”. Sharia holds the view that, the superiority of man over woman is normal in Islam. This attitude of male superiority according to Mayer is a common cultural feature of most civilization. The problem of this cultural condition coupled with explicit religious injunction as in the case of Islam, appears to legitimize the already disadvantaged position of women.

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47 See the paragraph of the preamble of the UDHR
48 Mayer 1999, p. 83
49 Mayer 1999, p. 83.
As far as the issue of women equality is concerned, the Sharia position include

(i) A woman could only be married to one man (a Muslim) but a man could marry up to four (under stated conditions).

(ii) wives owed obedience to their husbands, who were entitled to keep them home,

(iii) the husband can terminate the marriage at his own discretion, but a woman must seek her husband’s consent or that of a jury,

(iv) in succession, females gets half of a male’s share in the inheritance irrespective of them being of the same lineage to the deceased,

(v) In judicial status, two women judicial evidence in court equals that of a single man in civil cases; in criminal cases, a woman testimony is not considered.

According to Mawdudi, women should be able to sue for divorce on liberal grounds, unlike the Sharia position that women do not have a unilateral right to divorce. Apart from the right to sue for divorce, Mawdudi argues that, the most important human right for women is the respect for their chastity. He does not see anything wrong in confining women to their home in order to protect them from losing their chastity. As a result, he proposes total covering of women body as a way of achieving this right (protecting women chastity). Mawdudi further argues that roles assigned to each gender (according to the Sharia) are based on their ‘fitrah’-inborn nature. That explains, why there are restrictions on women in terms of their job, dress etc. According to Mawdudi, there are physical and emotional differences between male and female that are due to their inborn nature. Some natural or biological changes that occur in women do not occur in men, for example pregnancy, limits the woman’s ability to equal responsibility as the man. These biological changes do not occur in men hence men advantage over women in terms of the responsibilities and authority. According to Sajjad, Mawdudi sees the inherent different nature of the two respective genders as establishing a principle to govern their relationship, the principle that a man is superior to a woman.

Therefore, he does not see real equality between men and women as possible or necessary. As a result, he did not mention women among whom discrimination of any

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51 Mayer 1999, P. 104.
52 Sajjad 2003, pp. 547-562
53 Sajjad 2003, pp. 547-562
kind (job, education etc) is a violation of their human rights in his human rights schemes. This means that generally Mawdudi is affirming the Sharia position on women. However, An-Naim, as already be mentioned, argues that in the Sharia unequal treatment of women could be justified in the historical context and unacceptable today. Today, women no longer need to depend on men for sustenance once they are able to educate themselves. They can be educated and through the knowledge acquired, sustain themselves. Therefore, Muslims through a new Sharia must render all incidence of the subordinate position of women to men illegal today.

To sum up, the subordinate position of women as far as exercise of authority is concerned is reflected in the relationship between men and women: wives do not have equal right in marriage, and women can be confined to their home, women do not have the same legal standing as men according to the Sharia etc. These examples fall short of freedom, and equality of human beings without distinction of any kind. For example, article 2 of UDHR emphasizes everyone’s entitlement to all rights and freedoms “without distinction of any kind, such as race, colour, gender…” Sharia seems to be contravening this article because women do not have the same rights as men. Also by limiting Muslim women choice of marriage to a Muslim man and in the case of divorce, the Sharia is contravening article 16 of the UDHR which states “Men and women of full age, without any limitation due ….religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”. This article guarantees unqualified rights to people (adults) as far as marriage and divorce are concerned.

3.2 Non-Muslim Minorities

According to Mayer, the historical Sharia position on non-Muslims is that the ‘people of the book’ are tolerated in return for a pledge of security and safe conduct. The non-

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54 Mayer 1999, p. 85.
55 How Sharia could be justified under the historical context would be discussed in the next chapter, when discussing An-Naim reform to Islamic law.
56 An-Naim 1990, pp. 176-177
57 UDHR at http://www.udhr.org/UDHR/default.htm
58 A woman cannot proceed on divorce without the consent of the husband, but the husband can proceed without her consent.
59 UDHR at http://www.udhr.org/UDHR/default.htm
60 Mayer 1999, p. 135.
Muslim minorities cannot hold high political office and are not to serve in the military service. They are to practice their own law in personal matters provided it did not involve a Muslim; in which case the Sharia is applied. A Muslim man can marry a Christian woman but a Christian man cannot marry a Muslim woman\(^\text{62}\). Furthermore, other people without a divine scripture as a guide are not considered. Finally, a difference in religion is enough for a total bar to inheritance; Muslims neither inherit from nor leave inheritance to a non-Muslim regardless of their relation\(^\text{63}\).

Mawdudi\(^\text{64}\) position on non-Muslim minorities is that “Islam does not permit them to meddle with the affairs of the state” and that Sharia prohibition of inter-religious marriage is retained\(^\text{65}\). By this, one can conclude that Mawdudi’s views are not different from the Sharia position. He thinks religion is enough reason for people to hold high political office in a Muslim state.

According to An-Naim, the traditional Sharia position on non-Muslims as outlined above is “morally repugnant and politically untenable today”\(^\text{66}\). The reason is that it implies violation of the most fundamental human rights in terms of equal freedoms that includes freedom to political participation and to marriage. Therefore, a legal solution has to be found to resolve these conflicts in order to allow all people within the state equal freedom within Islam.

Marriage under UDHR (article 16) is not restricted according to religion provided one reach the age of maturity. However, Sharia limits marriage of Muslim women to only Muslim men. In addition, Non-Muslims cannot hold high political office within an Islamic state according to Sharia. This also is against article 21 of UDHR that offers equal rights in terms of freedom to participate in political activities either directly through standing for public offices or indirectly through choosing a representative. From the above discussion, one can say that the Sharia limits people rights to political participation and marriage based on religion and therefore, a violation of their human rights.

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\(^{61}\) ‘People of the Book’ refers to other monotheistic religions like Christianity and Judaism because they are by divine Scriptures.

\(^{62}\) Mayer 1999, pp. 131-134

\(^{63}\) Mayer 1999, pp. 131-148

\(^{64}\) Mayer 1999, p. 137.

\(^{65}\) Mayer 1999, p.145

\(^{66}\) An-Naim 1990, P. 177.
3.3 Freedom of Religion – Apostasy in Islam

Article 18 of the UDHR states that, “everyone has the right to freedom of thought, conscience, and religion; this includes freedom to change his religion…” In addition, article 18.1 of the ICCPR emphasizes the right to freedom of conscience. This set the standard for freedom of religion that guarantees everybody the free exercise of conscience.

Apostasy or abandonment of faith means a change of one’s religion. The traditional Sharia view is that apostasy is not seen as the expression of one’s freedom and attempts at leaving Islam are discouraged. This presents a restriction on the freedom of Muslims in the exercise of their conscience. According to Sharia, conversion from Islam is equated to treason in the original sense; in Medina, the Muslims were sent to war and tricks were applied to bring disunity among the Muslims, including the conversion from Islam. Therefore, a religious defection in this respect (Medina example) was synonymous to treason. The position of the apostate according to the Sharia is the apostate loses civil status as Muslim and becomes a non-Muslim. Moreover, execution of the apostate is accepted within the Sharia.

The controversy of apostasy has a different emphasis from the earlier human rights issues in Islam. The reason is that, while the earlier issues discussed limit human rights based on religion or gender, apostasy focuses on the Muslims. However, Quran 2:256 states, “there shall be no compulsion in matters of faith” by this verse, people should free to decide their own religion. However, there are other verses that imply conversion from Islam is discouraged or not a right as such; Quran 3:90 states “but those who reject faith after they accepted it….never will their repentance be accepted (by God)”, 4:48 states “those who…. back away of Allah and die…. Allah shall not forgive them”. By these verses of the Quran, it is clear that apostasy though not encouraged in Islam, religion is a personal obligation between the believer and God. The Sharia position on apostasy looks different

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67 Mayer 1999, p. 149.
68 Mayer 1999, p. 149.
69 Mayer 1999, p. 158. Mayer reports that the Prophet Mohammad never applied apostasy as a capital crime unless when the act of apostasy was linked to an act of political betrayal of the community.
from the verses as discussed above. This despite the fact that apostasy is against Quran 2:256; a contravention of not only this verse but also of human rights prescriptions, such as article 18 of the UDHR. (One of the aim of this thesis is to separate Sharia as a public law to a personal relation between the believer and his or her God).

The controversy of apostasy is that, there is no difference between expressing an opinion on a religious doctrine and apostasy in the way apostasy is applied according to the Sharia. The lack distinction between apostasy and expression of opinion manifested in the case of Abu Zaid\textsuperscript{70} of Egypt. In this example, after reviewing his writings (which calls for revising the conventional approach to Quran interpretation to cohere with modernity), the court agreed that his theories made him apostate. Based on the court’s decision his marriage to his Muslim wife dissolved. The reason was that since he ceases to be a Muslim, his marriage to his Muslim wife becomes illegal. Even though Zaid did not consider himself as abandoning Islam, the court thought otherwise. Again, this verdict was against article 18 of the UDHR that states that freedom of thought, conscience, and religion is human rights not to be limited whatsoever.

3.4 Slavery in Islam

Despite advocating for the humane treatment of slaves in Islam,\textsuperscript{71} An-Naim\textsuperscript{72} thinks Islam condones slavery because there is a verse in the Quran that speaks of Muslim right to cohabitmate with his slave concubine, presupposing the existence of slave woman. For example, Quran 33:50 states, “we have made lawful to you the wives to whom you have granted dowries and the slave girls whom God has given you as booty”. Moreover, by this verse, slavery is allowed in Islam and that taking slaves in war is justified as booty of war, spoils.

The condoning of slavery in Islam is unacceptable for An-Naim and unless a new interpretation of Sharia is offered to abolish slavery in an authoritative manner\textsuperscript{73}, it will

\textsuperscript{70} Mayer 1999, p. 155. Abu Zaid in the mid 1990s was charged under Sharia for expressing the view that, Islam did not deal with areas like human right. And this was considered against the established view that Islam had dealt with every issue of man.

\textsuperscript{71} for example, Quran 2:177 “…it is righteousness…to spend of your income…for the ransom of slave”, 9:6 “alms are for the poor and needy….for those in bondage”,

\textsuperscript{72} An-Naim 1990, P. 173.

\textsuperscript{73} This is a repeated conclusion of An-Naim in resolving the human rights conflicts in Islam; his reform is discussed in the next chapter (4).
continue to be a legal practice in Islam. For example in Sudan, incidence of slavery in various forms is reported. One report states that the “abduction of persons, mainly women and children, belonging to racial, ethnic and religious minorities from southern Sudan..., their subjection to slavery, servitude, forced labour .... Are taking place with the full knowledge of the government of Sudan.” Meanwhile, Sudan is one of the few countries applying the Sharia as a public law of the state. This incidence cited clearly contravenes article 4 of the UDHR, which states, “no one shall be held in slavery and servitude; slavery and the slave-trade shall be prohibited in all forms”. In addition, article 7 of ICCPR states, “no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment”. Both of these views offer unconditional protection against any form of slavery. Meaning that, all states laws should equally render slavery illegal within its laws.

To sum up, I have discussed the controversial issues in Islam: women equality, non-Muslim minorities, the issue of apostasy and slavery. The views of some Muslim human rights authors on those issues are reviewed. The conclusion from the discussion is that these issues do not meet the human rights and as such, a principle to resolve these conflicts of human rights in Islam continues in this thesis.

3.5 Implications of human right issues in Islam

Each of the controversial human rights issues in Islam discussed has a different emphasis from the other, as result an approach to resolving the issues will need to consider the fact that each issue has its own emphasis therefore, this plurality, or diversity is to be taken into account when proposing a principle to resolve these conflicts. The reason is that some of these controversies relate to Muslims (Muslim women and apostasy) and some non-Muslims (non-Muslim minorities). Therefore, a principle to resolve these conflicts has to take into account these factors. The reason is that a principle that only aims at resolving the inequality between women and men may ignore the issue of apostasy-freedom of conscience. An-Naim did not address the issue of apostasy but the issue of slavery is highly emphasized. The selective emphasis of human rights conflicts with

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Islam can have an effect on a principle proposed to resolve the conflicts. Because, (will be clearer in chapter 4) An-Naim argues for the application of the Sharia as the public law of a Muslim state. What is implied is that by emphasizing on some human rights conflicts little attention is paid to equally controversial human rights issues. In this case, pluralism of comprehensive doctrines as a fact of a modern state is ignored.

There are some strong religious foundations for some human rights violations in Islam; Quran 24:2 instructs “hundred stripes” as a punishment for fornication. Given this fact, simply outlawing all human rights conflicts in a Muslim state through a legal process would seem to some Muslims as a loss of their values. Therefore, the need to find a way of supporting human rights while not alienating Muslims values becomes necessary. A principle that balances the fact of pluralism (not alienating other views) in resolving the controversies in Islam is the main aim of this paper.

Finally, as An-Naim\textsuperscript{75} argues, modern Islamic law cannot disregard the present conception of human rights. Moreover, human rights ensure freedom and equality that protects all people and religions. Therefore, in order to be consistent with human rights the traditional Sharia need to be reformed. According to Guillaume, the Prophet Mohammad has set a precedent of achieving consensus with other religious doctrines in Islamic history. He reports that, Prophet Mohammad was able to achieve agreement, thus ensuring religious freedom by signing a covenant with the Jews

Mohammad wrote a document concerning the emigrants (Muslims from Mecca) and the helpers (their host in Medina) in which he made a friendly agreement with the Jews and established them in their religion and their property and stated the reciprocal obligations\textsuperscript{76}.

In this precedent of the Prophet Mohammad lies a potential solution to human rights conflicts with Islam. That is ensuring reciprocal obligations among different religions and people of the society with the aim of achieving a form consensus on what constitutes human rights for them. In this case, reciprocal obligation will mean that Islam accommodates human rights through a principle or reform. As noted by Guillaume above, reciprocity that guided the relation between Muslims and non-Muslims in the

\textsuperscript{75} An-Naim 1990, P. 170.
\textsuperscript{76} Guillaume 1982, P. 231. For the covenant between Muslims and the Medina people - non-Muslims.
discharge of their obligation establishes precedence for Muslims to follow\textsuperscript{77}. The question is what reform or principle that can overcome the human rights conflicts in Islam while at the same time maintaining Islamic identity.

\textsuperscript{77} Guillaume 1982, P. 231
Chapter 4
Reforming Islamic law

In this chapter, I will discuss the proposed reform of the Sharia advanced by An-Naim. I will present the arguments on the need for a reform to the Sharia, followed by the proposed reform. In presenting the proposed reform, examples of the historical context and contents of Islam is separately discussed to explain the proposed reform. What I mean by separating the theoretical presentation of the reform from the historical context is that examples of the verses of the Quran and the historical events in Islam will be specifically presented separately to clarify the proposed reform. Lastly, I will discuss some criticisms of the proposed reform.

An-Naim set his purpose as “to enable Muslims right to self-determination without violating the rights of others”\(^\text{78}\). By this, he proposes a reform of the Sharia as a way of resolving the human rights conflicts in Islam. This means, the Sharia must be applied as a public law of ‘Muslim state’ while at the same time the Sharia must be able to respect the principles of human rights. Put differently, Muslims ought to apply the Sharia as a public law and yet balance it with the modern demands of human rights.

An-Naim contends that, both the ‘secularist’ and ‘Islamizing’ positions on human rights are not conclusive. The reason is that secularism is not an Islamic prescription but a “desperate response to the challenges facing Muslims societies”\(^\text{79}\). That is, Muslims resorted to secularism out of desperation to meet modern demands of constitutional democracy and human rights. He also argues that the approach of the Islamizing rights authors like Mawdudi did not help to achieve human rights standards in Islam because they overlook the issue of discrimination\(^\text{80}\) on gender and religious ground in the Sharia.

According to An-Naim, the only way to resolve the conflicts of human rights in Islam is to enact a new Sharia today. Nevertheless, due to the perception among some Muslims that Sharia represents a divine guide for Muslims, An-Naim\(^\text{81}\) has to disprove this perception before he can propose his reform. Realizing this, he set his main hypothesis as, “it is possible to achieve a balance within the framework of Islam to develop

\(^{79}\) An-Naim 1990, P. 48  
\(^{80}\) An-Naim 1990, p. 171  
\(^{81}\) An-Naim 1990, p. xiv.
appropriate principles of modern Sharia”\(^82\). Once this (principles to for a new Sharia) is possible within Islam, a new Sharia enacted will then overcome the conflicts with human rights.

4.1 Why Reform is important in Islam

According to An-Naim, in order resolve human rights conflicts today, reform of the Sharia is both possible and necessary. However, according him, before a reform to the Sharia can be legitimate it has to meet the requirements indicated by John Voll\(^83\), these include

i) strict application of Quran and Sunna, this means a reform should not be seen as conflicting with any of the clear message of the Quran and Sunna because they are the primary sources of Islamic doctrines.

ii) Ijtihad or independent judicial reasoning on issues, that is people should be able to apply reason to enact Islamic laws and

iii) Doing away with any form of alien principles in Islam and following the laid down ‘Islamic’ procedures.

If these three procedures are followed, then enacting a new Sharia will be legal in Islam.

I will now discuss how An-Naim argues for these concerns.

An-Naim\(^84\) starts by citing Quran 29:49 where the Quran describes itself (its message) “as clear signs or meaning in the heart and minds of those who have been granted knowledge”. He then supports the verse (29:49) with a reported saying of the fourth caliph of Islam- Ali- that “the Quran does not speak but men speak for the Quran”. Therefore, he concludes that the way people speak for the Quran is what people take as Islam or the Sharia. Thus to An-Naim\(^85\) what is crucial as a criterion for judging the Islamicity of any principle is whether it is consistent with the Quran and Sunna.

However, since some verses of the Quran and Sunna are inconsistent with others (Mecca verses and Medina verses conflicts each other in content), he recall that in reconciling

\(\text{\^{82} An-Naim 1990, p. 161.} \)
\(\text{\^{83} An-Naim 1990, pp. 46-48} \)
\(\text{\^{84} An-Naim 1990, P. 148.} \)
\(\text{\^{85} An-Naim 1990, Pp. 48-49} \)
these inconsistencies the founding jurist\textsuperscript{86} engaged in a process of ‘\textit{naskh}’\textsuperscript{87} or abrogation. An-Naim maintains that applying the same principle of \textit{naskh} to enact a new Sharia to address modern demands\textsuperscript{88} of human rights and constitutional democracy is possible. The reason is that, once Muslims accepted the principle of \textit{naskh} as a judicial principle, it is legitimate to apply it today. A new Sharia is important today because, the context of the historical Sharia is different from today’s context and as such cannot be applied today without problems.

According to the procedure of Voll, \textit{Ijtihad}\textsuperscript{89} is another issue to consider in establishing a legitimate reform of the Sharia. An-Naim argues that, \textit{Ijtihad} as defined within the framework of the historical Sharia is inadequate. The reason is that by the historical definition, \textit{Ijtihad} is not applied on clear and definite verses of the Quran and Sunna. To him that definition is inadequate because some verses of the Quran warrants subordinate position of women to men and discrimination on religious grounds. Therefore, leaving these verses intact will not help in resolving human rights conflicts in Islam.

The founding jurist assumed that the verses that authorize compulsion were binding since the Prophet left them operative; changing them through the exercise of reason becomes unacceptable\textsuperscript{90}. An-Naim, proposes that a relevant requirement in this regard is to address the question put by Esposito\textsuperscript{91} that is how the imperative of the Quran read, “When translated into the language of Obligation pertinent to the concrete situations of real life”. This means that he is against \textit{Ijtihad} as technically defined since by that definition, it will not be possible to resolve the conflicts with human rights. That is since some verses in the Quran warrants human rights violation and \textit{Ijtihad} cannot be exercised on those verses, then the use of \textit{Ijtihad} to resolve human rights conflicts in Islam is not possible.

According to An-Naim’s, the three options for Muslims is either to reinterpret Sharia based on ‘\textit{naskh}’ or disregard the Sharia as an Islamic law of the state or implement it regardless of its human rights objections. The last two possibilities An-Naim objects because, in the case of disregarding Sharia in public life of Muslims he says, “It violates

\textsuperscript{86} The founding Jurists refer the Muslims who enacted the historical Sharia.

\textsuperscript{87} The repeal of Quran verses for other verses for judicial purposes.

\textsuperscript{88} An-Naim 1990, P. 49.

\textsuperscript{89} \textit{Ijtihad} means exercising of independent juristic reasoning to provide answers where the Quran and Sunna are silent.

\textsuperscript{90} An-Naim, 1990, P. 49.

\textsuperscript{91} An-Naim 1990, p. 50.
the religious obligation of Muslims”\textsuperscript{92}. This means that Muslims must apply the Sharia as a private as well as a public law of a Muslim state. On the option of implementing historical Sharia he argues that reciprocity makes that unacceptable today because, the Sharia do not offer equality to women and non-Muslims. Therefore, a better option is to enact a new Sharia by abrogating verses in the Quran that are the source of human rights violations in Islam.

In sum, An-Naim argues that the legitimacy of Islamic response to human rights must be derived from the Quran and Sunna. This necessarily means an interpretation of the Sharia in a way that is consistent with the Quran and Sunna. Nevertheless, this does not exclude a reinterpretation of the aim of the principles employed by the founding Muslim jurist to achieve the same purpose (enacting Sharia for their time). Moreover, since the meaning of \textit{Ijtihad} precludes exercising discretion on definite verses of the Quran, reform within the framework of \textit{Ijtihad} will be inadequate in justifying human rights in Islam.

4.2 The Reform-‘The Evolutionary Approach’

An-Naim proposes the enacting of a new Sharia by applying the principle of \textit{naskh} through a careful study of the content of the Quran verses, a method espoused already by the late Sudanese author, Mahmoud M. Taha\textsuperscript{93} as an adequate reform that will resolve the conflicts between Sharia and human rights.

According to Taha, “close examination of the content of the Quran and Sunna reveals two .... Messages”\textsuperscript{94} the earlier Mecca period and the subsequent Medina stage. The earlier message of Mecca contains the fundamental message of Islam, emphasizing the inherent dignity of human being, regardless of gender or religion. The manner of propagation of the message of Islam was based on the principle of ‘\textit{ismah}’- freedom of choice without any shade of coercion (for example, Quran 16:125-127 ask Muslims to preach with wisdom and be patient and tolerate the aggression of the unbelievers). On the other hand, the messages of the Medina stage address the socio-political issues of the Muslim community in Medina. It address human beings according to their gender or

\textsuperscript{92} An-Naim 1990, P. 58.
\textsuperscript{93} An-Naim 1990, p. 52. Taha was executed for proposing this reform in Sudan in 1994, on the charge of apostasy.
\textsuperscript{94} An-Naim 1990, p. 52.
religion for example, ‘believers’ and ‘non-believers’ and ‘women’ and ‘men’. Apart from these distinctions, it also sanctioned the use of force (for example, Quran 9:5 ask Muslims to attack the unbelievers wherever they might be).

However, by this reform the Mecca verses are considered postponed for implementation under today’s context. The reason is that the Medina context does not exist today\(^\text{95}\) therefore; the verses of Medina cannot be the bases of the Sharia as the case is now. To An-Naim Mecca verses forms the fundamental message of Islam, as such must now be the basis of a new Sharia to address modern needs.

4.3 Explaining the Content of the Reform

To clarify this reform, it will be necessary to review the historical context and contents of the verses of the Quran in order to discuss how that explains the proposed reform.

For the first thirteen years of his mission (610–622), the prophet (Mohammad) propagated Islam in around Mecca\(^\text{96}\). This appears in the verses received during that period, for example Quran 16:125 instruct Mohammad to, “Invite all people to the path of your lord with wisdom and good preaching; and argue with them in ways that are best and most gracious…” This verse makes it clear that, the choice of converting to a religion is not within the purview of the prophet; his duty is to put good arguments and leave the rest to the discretion of the person concerned. Again, in Quran 18:29 the Prophet is again instructed “…let him who wishes to believe to do so and he who wishes to disbelieve to do so also.” These verses clearly endorse freedom of choice in matters of faith as those espoused in article 18 of the UDHR document.

Another feature of the Mecca verses is the importance they attach to the inherent dignity of human beings, for instance in Quran 17:70 God speaks that He has “honored children of Adam…. Preferred them over many parts of his creations” again in Quran 49:13 “oh humankind, we (God) have created you into male and female, and made you into peoples and tribes so that you may be acquainted and cooperate with each other...”. The emphasis on the inherent dignity of the ‘children of Adam’ was without regard to any

\(^{95}\) I will present the historical context and contents of the Quran verses to clarify the proposed reform below.

\(^{96}\) An-Naim 1999, p.53.
distinction but common humanity. This is the style and content of Mecca verses when the prophet started to propagate his religion.

However, the Arabs of Mecca and their allies persecuted the Prophet and his followers and conspired to kill him\(^{97}\) the outcome of which was, for him to migrate out of Mecca to Medina. Guillaume describes how the Mecca leadership rejected and persecuted Mohammad and his followers. Guillaume states, “then the Quraysh incited people against the companions of the apostle (Mohammad) who had become Muslims: every tribe fell upon the Muslims among them, beating them and seducing them from their religion”\(^{98}\).

This certainly was too much for the Muslims to stay in Mecca because, the Quraysh were the political leaders of Mecca and the tribe of the prophet, if he was opposed by his own tribesmen then it means that his security could not be guaranteed in Mecca. Therefore, the reasonable thing to do was for him to migrate out to a safer place-Medina.

From this period onwards, the Quranic texts changed from preaching unity and love to practical issues facing the new Muslim community. Apart from the change in content, the style of the message also changed from addressing people as either ‘Oh Mankind’ or ‘Children of Adam’ to ‘believers’ or ‘non-believer’ and ‘men’ or ‘women’. For instance Quran 4:34 states, “men have authority over women…” This verse is interpreted to mean that a woman must be in a subordinate position to a man according to the Sharia.

The Quran at the Medina stage authorizes the use of force first for self-defense and retaliation and subsequently in propagating and spreading the domain of the Muslim state\(^{99}\). Also Quran from this period (example 3:28\(^{100}\)) contained instructions prohibiting Muslims from taking non-believers as friends or helpers, which entrenched the distinction based on religion. In short, most verses received during Medina stage of the prophet mission sanction varying degrees of coercion on non-Muslims\(^{101}\).

This change in the message of the Quran was due to the violent attack that the Muslims received at the hand of the Mecca Arabs. In addition, when this attack continued to Medina, the right thing to do in that context was to respond to a people who continuously rejected the principle of freedom and equality (especially of worship).

\(^{97}\) An-Naim 1990, p. 54.
\(^{98}\) Guillaume 1982, P. 120.
\(^{100}\) Quran 3:28 states “let not the Believers take for friends or helpers unbelievers rather than Believers”
\(^{101}\) An-Naim 1990, p. 145.
By the proposed reform under discussion, this shift in style is justified under the historical context of Medina since that period was violent, a reason why the prophet had to leave Mecca. According to Taha\textsuperscript{102}, the difference in the text of Mecca and Medina stage was essentially due to the audience to which they were addressing. To him the phrase ‘Oh believers’ used frequently in Medina was addressing a Muslim nation and the phrase ‘Oh humankind’ characteristic of the Mecca verses indicate that they were addressing all humanity. Therefore, a Sharia based on Mecca verses can address human beings as one people since the Mecca verses did not distinguish among people whatsoever (women or men, believers or non-believers).

Sharia as we have it today is based on the verses of the Medina period through the application of the principle of ‘\textit{naskh}’. The jurist upheld that the subsequent Medina verses abrogated the Mecca verses based on chronological importance of emerging socio-political challenges.\textsuperscript{103}

Reversing the process of \textit{naskh} or abrogation to the Mecca verses according to An-Naim\textsuperscript{104} proposed reform under discussion is also justified by Quran 2:106. It states, “when ever we abrogate any verse or postpone it, we bring a similar or better one.” According to An-Naim, the Medina verses replaced the Mecca ones because, the Medina verses were response to the practical challenges face by the Muslims. Moreover, that the use of the word ‘postponed’ in the verse means that there is the possibility of reintroduction of the verses in an appropriate context. Thus, Muslims have to reverse back to the Mecca verses in enacting a new Sharia because the Medina context is different from today context.

4.4 Applying the Reform

In applying this reform on women equality, the Quran verses for example 4:34\textsuperscript{105} that warrant women subordinate position to men be considered justified under the historical

\textsuperscript{102} An-Naim 1990, p. 55
\textsuperscript{103} An-Naim 1990, p. 56
\textsuperscript{104} An-Naim 1990, p. 59 An-Naim citing Taha referring Quran source to justify his propose reform.
\textsuperscript{105} The verse states that “men have authority and guardianship over women because of the advantages they enjoy over them”.

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context. However, since today’s context and perception of women is different\textsuperscript{106}, men guardianship over women should be terminated. This means both men and women should now be equally free and responsible before the law. This understanding will be possible and legal in Islam, when the verses that preached the inherent dignity of human beings are the bases of the Sharia.

In addition, applying this reform to instances of discrimination against women and non-Muslims can be illustrated by the rule of the Sharia prohibiting marriage between a Muslim woman and non-Muslim man. Therefore, if women were now equally responsible before the law, “there would be no justification for prohibiting marriage between a Muslim woman and a non-Muslim man”\textsuperscript{107}. Since a woman is equal to a man, she is free to choose the man she wants just like a Muslim man. This by extension renders the assumption that women lack the necessary integrity and good judgment reflected in their legal status as far as evidence for judicial purposes is concerned. According to Sharia, two women’s evidence in a civil case equals that of one man and in criminal cases women evidences are not considered (refer chapter 3.1).

According to An-Naim’s proposed reform, slavery will be made illegal within Islamic law. This according to him is the ultimate aim of the Quran\textsuperscript{108} that is Muslims implementing a legislative process to render slavery illegal. He argues that modern Sharia must now implement the “fundamental legislative intent to prohibit slavery forever”\textsuperscript{109}. The understanding of this proposed reform is that the historical situation was not ready to declare slavery illegal but modern demands calls on all states laws to make slavery illegal (article 4 of the UDHR).

To conclude, a new Sharia must be able guarantee human rights in Islam by basing the Sharia on the Mecca verses. The historical Sharia was based on the Medina verses that aimed at protecting only the Muslims. Since this situation (Muslim aggression) no longer exist today a new Sharia must be enacted based on the Mecca verses.

\textsuperscript{106} Article 1 and 2 of the UDHR state categorical that discrimination on gender, race etc are human rights violations.
\textsuperscript{107} An-Naim. 1990, P. 181.
\textsuperscript{108} He is referring to Quran 47:4 that suggest that Muslim should either “free slaves for ransom or free”.
\textsuperscript{109} An-Naim 1990, P. 175.
4.5 Criticism of the Reform
I will now criticize An-Naim’s reform along its Islamic legitimacy and on the need for a narrow meaning of human rights rather than a comprehensive way of life like the Sharia—to ensure plurality in how human rights are justified from diverse points of view.

On Islamic Legitimacy and Acceptability
An-Naim expresses the opinion that “one must be able to establish a technique for interpreting the basic sources, Quran and Sunna, in a way that enable us to remove the basis of discrimination...”\textsuperscript{110} What makes the search for this ‘technique’ important for Muslims, according to him, the principle of reciprocity (tolerating other people equally as ourselves). He maintains that, toleration is beneficial for both the spiritual and intellectual vitality of Islam\textsuperscript{111}. For example, he attributes the rise of Muslim fundamentalism in some Islamic societies to the lack of reform to the Sharia.
The focus of An-Naim’s proposed reform is on the principle of ‘naskh’ (abrogation) and that of \textit{Ijtihad} (exercise of independent judicial discretion). That is he is revising the meaning of \textit{Ijtihad} and reversing the process of abrogation (refer 4.2 and 4.3). However, the founding jurist of the Sharia argued for the Medina verses as the basis of the Sharia based on a precedent of Prophet Mohammad. The Prophet at one time instructed that a later verse cancelled an earlier verse\textsuperscript{112}. Later on in enacting the Sharia, the founding jurists realized apparent contradictions in the Quran verses. As a solution, they also considered the earlier Mecca verses abrogated in place of the later Medina verses. They did this following the interpretation that the later legal intents of the Quran superseded the earlier texts. The jurist based their position on chronological order of abrogation applied by the Prophet therefore; they enacted the Sharia based on the Medina verses and Sunna.
The founding jurist bases their argument on the chronological order on the authority of the Prophet. By proposing, a reverse of Sharia to the Mecca verses one can ask on whose authority is An-Naim basing the reverse to the Mecca verses. He argues for Islamic legitimacy, which is on the authority of the Quran and Sunna (the Prophet saying and

\textsuperscript{110} An-Naim 1990, p.163.
\textsuperscript{111} An-Naim 1990, p. 184.
\textsuperscript{112} An-Naim 1990, p. 57.
actions). The answer to the question of authority is relevant to the validity of the arguments he advances as far as following of Sunna is concerned. If precedence is important in the legitimacy of Islamic law, then the founding jurist rather appear to follow the Prophet (Sunna) to the logical conclusion than An-Naim. The founding jurist applied the principle of ‘abrogation’ with the chronological preference of the later verses, while An-Naim accepts the principle of abrogation yet rejecting the chronological preference of the later Medina verses.

From the above it follows that the acceptability of the reform among some Muslims is unlikely. The question of authority according to Sachedina\textsuperscript{113} is very important to the acceptability of Islamic reform. In brief, this reform could face difficulties in terms of actual application among Muslim societies because it departs from the principle established in the Prophet’s precedence (of later verses canceling the earlier ones).

Another problem the reform faces is its consequences in terms of what criterion is left for determining abrogated and abrogating verses of the Quran\textsuperscript{114} (if the traditional chronological method is rejected). Can the list of the cancelled verses be consistent with the earlier abrogated verses? These questions point to the difficulties that will result in terms of a method of determining actually abrogated verses of the Quran and verses that are not.

Moreover, the Medina verses dealing with practical issues provide more insights into practical issues faced by people. For example, Quran chapter 2 provides rules on marriage, inheritance, and divorce. The Mecca verses on the other hand addressed how human beings ought to relate but not how they actually relate. This could make enacting an objective law based on the Mecca verses face practical difficulties due to their assumption of a common humanity with little regard to the complex realities of life on how to achieve this common humanity. Therefore, the Medina verses where the practical issues came up provided a practical context for the Prophet to apply the verses and can be seen as more realistic than the Mecca verses.

Furthermore, it is problematic to assume that the only solution in overcoming conflicts of human rights within Islam is enacting a new Sharia based on the Mecca verses. For

\textsuperscript{113} Sachedina 1990, pp. 155- 157
\textsuperscript{114} Sachedina 1990, pp. 156- 157
example Quran chapter 2, Medina verse, states, “there is no compulsion in religion”. As such, it is also it is possible to enact Sharia from this verse to support human rights. Meaning, the solution to human rights conflicts with Islam do not necessarily depend on avoiding Medina verses per se. Therefore, a principle to justify human rights in Islam must be able allow Muslims to justify human rights within Islam in a way all other religions or people of the state can accept (in a public way).

Lastly, some Quran verse could be interpreted against the selective acceptance of Quran verses as An-Naim’s proposed reform. For example, in Quran 3:7 it is states

It is He (God) who send down to you the book (Quran). In it are verses that clear, they form the foundation of the book, and others not entirely clear. So as for those in whose hearts there is a deviation (from the truth) they follow that which is not entirely clear….seeking for its hidden meanings….and those grounded in knowledge say: “we believe in it (clear and unclear)…

The reason for citing this verse is to emphasize the Quran position against any selective derivation of Islamic principles and therefore this can legitimate Islamic position against a principle that argues for both Islamic legitimacy and justifying human rights. Therefore, to overcome some of these conflicts it is better to look for a different principle that will not conflict with any Quran principle while at the same time can justify human rights. The position here is that once that principle does not conflict with any Islamic principle it can be consistent with the Islam.

The concerns discussed about An-Naim reform points to the difficulties in arguing for a religious law like the Sharia as a public law of a state. I will argue later that the Sharia should not be a public law of the state today.

Human Rights and Plurality

According to Both\textsuperscript{115}, the emphasis of human rights bills on dignity of the human being links religion to human rights because, both human rights and religion believe in the sacredness of the human being. Therefore, Muslims are allowed to define what constitutes rights for them. The reason is that the human rights assume that the individual

\textsuperscript{115} Both 1999, P. 58
person has rights stated in the UDHR, what the state must do is to protect all its citizens to enjoy these rights. However, the need for plural views on what constitutes human rights means that various religions in a state can define in detail what constitutes human rights for them. The reason for allowing plural views on human rights is due to the realization that it is possible for various comprehensive doctrines to interpret human rights differently even within the same state. According to Ignatieff human rights as modern construct assumes that people (individuals) are best suited to choose the good life for themselves. Meaning, human rights do not exclude plurality in the way different people choose to apply human rights provisions.

However, the Sharia as defined contains a detail interpretation of how a Muslim should live. It does not allow the individual to define what constitutes a good life is for him or her. All aspects of the Muslim life are determined within the Sharia in advance, what the individual Muslim can do therefore is to accept the principles as a believer. Nevertheless, there are various religions in a modern state, which means they are not suppose to believe in the Sharia let alone respect its principles. These various religions have different concepts on the essence of human being and rather prefer their own views on human rights in a state. Therefore, once the Sharia is a comprehensive way of life for Muslims, it denies individual Muslims to choose how they use their freedoms. In addition, those who are not Muslims will feel alienated in the sense that their comprehensive views are not included in the laws of the state. Therefore, applying the Sharia as a public law of the state today will be problematic as far as justifying human rights is concerned.

What I have done so far is to discuss the difficulties and some problematic assumptions of An-Naim’s proposed reform. I argue that the reform did not follow the precedent of the prophet to its conclusion and as a result not be acceptable among some Muslims. I have also discussed the consequence of the proposed reform in terms of consistency of the principle of abrogated verses to Muslims.

In addition, human rights allow plural views in defining in detail what constitutes human rights therefore individual in a Muslim state be allowed to interpret religious according to their own point of view as a way of justifying human rights.

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116 Ignatieff (b) 2001, p. 110.
The position of this paper is that the Sharia should not be the public law of a state. Because, it will be difficult to justify human rights in Islam instead Islamic principles should be a private affair between the Muslim and his or her God. The reason is that there are different views among Muslims as to the legitimate source of the Sharia. If the argument for the Sharia is that “Islam and Islamic laws are universal”\textsuperscript{117}, then the argument will not hold today in terms of the Sharia. The reason is that as it is today there are differences in the source and legitimacy of the Sharia between the two main groups of Muslims, the Shia, and the Sunni today.

These two groups or sects of Muslims hold fundamentally different positions about the meaning of the message of Islam. The Shia\textsuperscript{118} are group of Muslims who derives their religious code and inspiration from the descendents of Prophet Mohammad. The Sunni\textsuperscript{119} on the other hand, are those who want to go back to Quran and Sunna in order to renew Islamic thought. According to Abdul-Haqq\textsuperscript{120}, there are two important differences between Shia and Sunni Muslims. The Shia believes that the leadership of the Muslim community must be a man who is a descendant of Prophet Mohammad. They await the emergence of a Muslim leader from the line of Prophet Mohammad who will embody the wisdom and power of the hidden Imam, who went into hiding at the age of four in 873 CE. Absents of which his representatives, Ayatollahs, provides interim leadership. Sunni on the other hand, impose no precondition of physical lineage to the prophet Mohammad for the position of leadership or laws of Islam. Another important difference is that the Shia recognize and allows independent reasoning as legitimate source of Islamic law, while the Sunni do not recognize current use of independent reasoning as a legitimate source of Islamic law.

By the basic difference between these two groups of Muslims on the source of Islamic law and direction, and the fact that in every Muslim society one finds both groups using the Sharia as the public law will be problematic for the other whose view is not considered. Therefore, it will be appropriate to look for a way in which all these groups

\textsuperscript{117} A-Naim 1990, p. xiv
\textsuperscript{118} Esposito 1995, (vol.3) p. 59.
\textsuperscript{119} Esposito 1995, (vol. 3) pp. 139-140
\textsuperscript{120} Abdul-Haqq 2006, p. 9.
of Muslim and other doctrines in the state will be able to agree on common principles that regulating the way they relate to each other in the state.

A popular saying of the Prophet Mohammad is that “seek knowledge even though it is in China”\textsuperscript{121}. Two things are important to note in this saying, knowledge, and China. At the time of Prophet Mohammad Islam was not a practice in China, so he could not have been encouraging only Islamic knowledge. This means that Knowledge (skills or principles) is important no matter where it comes from. Therefore, avoiding alien ideas as assumed by An-Naim as an important factor for reform to Islam is not the only way to justify human rights in Islam (refer to 4.1) especially as regard the use of the Sharia as the public law of the state. Meaning, once a principle that will regulate the state is able to accommodate the pluralism among Muslims and other comprehensive doctrines within the state, it can be applied. The reason is that since Islam was not a practice in China then Prophet Mohammad encourage seeking knowledge even outside a Muslim state and one can not expect China which is not an Islamic state to be practicing Islamic law. Therefore, a knowledge that is able to accommodate and facilitate the freedom and wellbeing of all Muslims can be considered justified by this saying of the Prophet whether it originates in an Islamic state or not.

\textsuperscript{121} Cited by Hassan, available at http://www.religiousconsultation.org/hassan2.htm
Chapter 5
Towards Overlapping Consensus on Human Rights

The previous chapter discussed the reform proposed by An-Naim as a way of justifying human rights in Islam. In addition, some criticism of the proposed reform in terms of arguing for religious legitimacy and applying the Sharia as a public law of the Muslim state was discussed. In this chapter, I will argue for Rawls principle ‘Overlapping Consensus’ as an alternative to An-Naim’s proposed reform as a way of justifying human rights in Islam. The concept of overlapping consensus will be discussed follow by why and how it justifies human rights in Islam today.

5.1 Explaining Rawls Overlapping Consensus

According to Rawls, the ideal of overlapping consensus consists of each citizen affirming both a comprehensive doctrine and the political conception as somehow related. In addition, that overlapping consensus consists of various reasonable comprehensive doctrines agreeing from within their religious, philosophical and moral doctrines on a regime in which the criteria of justice is political. Meaning that overlapping consensus describe the process whereby a state is able to achieve agreement between different doctrines on certain basic political rights and liberties. The concept of overlapping consensus relies on the possibility that each comprehensive doctrine in the state supports the concepts of political rights and liberties for its own sake based on its own doctrines. According to Rawls “political value….does not deny there being other values that apply….nor does it say that political values are separate from, or discontinuous, with, other values”. Meaning that the political values of rights and liberties are values shared by the different comprehensive doctrines in every society, as such it is possible for each doctrine to agree on the political concept within their own doctrines.

Rawls argues that comprehensive doctrines are the source of citizen’s practical reason, however, due to the fact of pluralism of comprehensive doctrines in a state, Rawls

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122 Rawls 1993, p. xix
123 Rawls 1993, p. 15
125 Rawls 1993, p. 59. Practical reason according to Rawls means singling out which values to count as especially significant and how to balance or resolve them when they conflicts.
concludes that, “no comprehensive doctrine is appropriate as a political conception”\textsuperscript{126}. The reason is that there are other competing doctrines within the state therefore only political rights and liberties can provide a common principle on which the various comprehensive doctrines can justify based on their own doctrines.

Moreover, since the assumption is that political power “is always coercive power backed by the government use of sanctions”\textsuperscript{127}, the question of legitimacy becomes important. Granted that a plurality of comprehensive doctrines is a permanent feature of a modern state, and seeing political power as the power of the citizens as a collective body, Rawls thinks a legitimate power is the one exercised in the light of principles acceptable to citizens common human reason\textsuperscript{128}. Meaning, a legitimate government is established when citizens are free to settle how they think the political values of liberties and rights are related to their comprehensive doctrines\textsuperscript{129}. The reason is that if a government backed by power applies comprehensive doctrines principles that conflicts with other doctrines, then the citizens’ allegiance to such principles are not based on their own doctrines.

According to Rawls, stability for the right reasons results, when citizens over time acquire a sense of justice (equal right and liberties) that inclines them not only to accept but also to act upon them\textsuperscript{130}. Meaning citizens are motivated to respect the concept of political rights and liberties not out of coercive force of the state but because it is consistent with their own conception of justice. This leads to a situation where by those who accept the concept of justice continue to uphold them for a long time.

To sum up, equal liberties and rights justified from different background ensure a stable society. This is achieved through limiting the possibility of disagreement among incompatible religious doctrines within a modern state. In addition, since human rights are conceived to guaranteed within a state and the fact of pluralism of comprehensive doctrines is a reality, it is more reasonable that to ensure stability of the political state citizens agree on the basic liberties and rights. Citizens are able to sustain these basic political concepts of liberties and rights because, these concepts are continuous with or does not conflict with their comprehensive doctrines. These points sum up the reasons for

\textsuperscript{126} Rawls 1993, p. 135.  
\textsuperscript{127} Rawls 1993, p. 137  
\textsuperscript{128} Rawls 1993, p. 137.  
\textsuperscript{129} Rawls 1993, p. 140  
\textsuperscript{130} Rawls 1999, p. 45.
arguing for a political concept of justice as the focus of consensus between the diverse doctrines among even Muslims as a way of justifying human rights in Islam today.

5.2 Justifying Human Rights in Islam

The term ‘Islamic nation’ refers to an idea of all Muslims wherever they may be living. The need for a uniform law is one of the reason why the Sharia was enacted in Islamic history (refer to 1.1). This idea of Islamic nation does not exist in reality today because; laws from one Muslim nation do not bind a Muslim in a different nation today. The reason is that each state has its own laws and conditions different from the other. According to Bielefeldt “No society, culture, or religion can claim to comply with human rights unless it is willing to undertake political and intellectual reforms”\(^\text{131}\). This means, in applying the Sharia as a public law, for example, reform of certain laws is important in order to achieve a from of agreement with other doctrines. In this direction, An-Naim proposed reform must be seen as one way of achieving overlapping consensus on human rights. According to Rawls, An-Naim’s reform “…supports equality of men and women, and complete freedom of choice in matters of faith and religion, both of which are…. principle of equality before the law”\(^\text{132}\). Meaning, once the Sharia is the political law of the state it has to undergo reform to support equality of men and women and the freedom of choice as a way of achieving overlapping consensus on political concept of justice.

An alternative to An-Naim proposed reform is for the state to be regulated by a political concept of justice. The reason is that there are conflicting comprehensive doctrines in a state and that this situation will persist for a long time\(^\text{133}\), therefore, to ensure that citizens do not only obey but also act upon the laws of the state, Rawls argues that each comprehensive doctrine endorse a political conception of justice from its point of view”\(^\text{134}\). Overlapping consensus therefore means that the citizens of the state support the equal liberty of all from their own point of view.

The position of this thesis is that Islamic reform should focus on separating the Sharia from the public law of the state. By this, the Quran verses that support human rights;

\(^{131}\) Bielefeldt 2000, p. 115.
\(^{132}\) Rawls 1999, p. 151.
\(^{133}\) Rawls 1993, pp. 14-15
\(^{134}\) Rawls 1993, p. 133
Quran 2:256 “no compulsion in religion”, 2:187 “they (women) are your libas (garments) and you are the same (garments) to them”, etc. can be the base to develop human rights among Muslims. Quran 2:187 refers to the symbiotic relationship between man and women based on equality. Moreover, Quran 2:256 emphasizes freedom of religion and conscience.

How the Sharia must be a private rather than a public law is what is worth answering. This will mean establishing that Islam without the Sharia as the public law does not violate Muslims right to self-determination. Arguing how Islam was a continuation of the most important cultural development of the late antiquity, Berkey states, “it is true that Islam itself only took shape through a process of dialogue with other faiths and traditions”135. This means that Islam did not develop its own unique way of life, rather, other traditions that facilitated its mission added up to the practices of Islam. For example, Islam had to seek some form of agreement with other religions like Judaism and Christianity especially in Medina (refer to 4.3) to be able overcome the adversities of the Mecca Arabs. The Muslims had to agree with the people of Medina on equal terms in the way that ensure freedom and equality of the people and religions in Medina136.

Arguing for Islam support for human rights is due to the realization that diverse doctrines can agree in support of human rights from their different points of view. The assumption of this paper is that human rights are political issues rather than religious and that the primary aim of Islam is religious. According to Coulson, the primary purpose of the Quran is to regulate man’s relation with his Creator. He argues that on the fact that out of “about 6,219 verses (of the Quran) only 80 deal with legal issues, most (the remaining verses) deals with worship rituals”137. Moreover, the political role of Mohammad in Medina as discussed in chapter 4 was too exceptional a case to be a useful model for a political Islamic state today (again refer to 4.3) especially when talking about justifying human rights in Islam.

135 Berkey 2003, p. 57.
136 See Guillaume 1982, p. 231.
I will now discuss how human rights in Islam are justified through an overlapping consensus. The discussion follows the advantages of Rawls principle of overlapping consensus, as indicated by Bielefeldt:\(^{138}\):

i) The normative and critical claim of political justice,

ii) Limited scope of political justice and

iii) Appreciating political justice from different perspectives.

(i) The idea of political justice, in Rawls’ terms, goes beyond just a compromise of views in a society; it demands, when need be, some form of adjustments. According to Bielefeldt, “what is at stake is not a factual consensus but rather a normative consensus in the sense that people holding different convictions should nevertheless be enabled to agree on some basic principles of justice…”\(^{139}\). Meaning, as much as overlapping consensus allows plural views, it also leaves open the possibility of further interpretations in accordance to general principles of justice. That means, views on how Muslims interprets apostasy, for instance, is still open to interpretation within the general political concept of justice. Moreover, if this does not meet the common sense understanding of freedom then the issue of apostasy must change to meet the political criteria of freedom. This revision would not be possible, for example, if the Sharia was the public law of the state and included apostasy as an Islamic law.

I wish to argue how equality between men and women from the Quran ought to be understood. The purpose of allowing polygamy was to protect orphans and widows that came about as results of the constant wars fought between Muslims and the Mecca Arabs. In Quran 4:2-3 it is stated, “And give unto the orphans their property….and if you fear that you shall not be able to deal justly with the orphan girls then marry…” The aim of the verse was to make sure that the surviving Muslims treated those who lost their husbands fairly. If this was becoming difficult, then they could marry the girls in order to feel attached to them and treat them equally. With this understanding, current practice of polygamy, and all instances of women inequality are contrary to the original purpose of ensuring equal treatment of women. This understanding is possible without necessarily

\(^{138}\) Bielefeldt 2000, pp. 115-117

\(^{139}\) Bielefeldt 2000, p. 115.
imposing any legal procedure or prescribing how Muslims must marry in order to justify human rights in Islam.

ii) Human rights as political concepts are limited in scope because they do not entail a comprehensive guidance as to how to lead one’s life and not give answers to the existential questions of the meaning of life and death. As such, human rights do not compete with any religion in the way it develops or defines its doctrines. This makes human rights an acceptable point of consensus of various comprehensive doctrines. The reason is that overlapping consensus arises because various comprehensive doctrines must seek a common ground for reaching agreement about principles justice. However issues becomes controversial when a particular or detail position is given beyond the general meaning of rights and liberty. For instance, article 3 of the UDHR states that every human being has the right to life. This article is non-controversial because all citizens share the general view that human beings have the right to life. In addition, article 18 of the UDHR mention freedom of religion but it does not state when or how to worship, which are the main concern of comprehensive doctrines. Therefore, human rights are the point on which various comprehensive doctrines can agree as being consistent with their own comprehensive doctrines.

Contentious issues such as abortion can be settled for the purpose of policy and consensus on the narrow definition that all human beings have the right to life. However, if a detail meaning of when life begins, for instance, is given there are bound to be different views. Due to pluralism of how people define the meaning and essence of life, human rights do not offer detail meanings of what constitutes rights.

iii) Human rights are assumed as not disconnected from various comprehensive doctrines because; the idea of human dignity connects the two. According to Bielefeldt, the concept of the inalienable dignity of every human being as reflected in the preamble of the UDHR, constitute both the basic ethical principle of human rights and a central element of the teachings of various religions and philosophies.

By the continuity of the idea of the inherent dignity of the human being, human rights can be a focus of overlapping consensus in Islam. The verses of the Quran that recognize the dignity of all human

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140 Bielefeldt 2000, p. 166
beings will then be the foundation on which individual Muslims can justify human rights in Islam. For example Quran 17:70 states “indeed we have honored children of Adam”, 49:13 “Oh Mankind we have created you from a single male and female…” All these verses support the universality of human dignity. For example, Quran 17:70 that speaks about God honoring human beings obviously did not distinguish which kind of human beings. Therefore, Muslims can offer equal respect to all human beings based on this verse. Any distinction is condemned as unethical by Quran 49:13 because, by the exclamation ‘Oh’ preceding ‘Mankind’ in the verse indicates Gods disgust or surprise at any form of discrimination among human beings. Following this understanding is the expectation of human beings to treat each other’s as brothers (from a single male and female), meaning no discrimination whatsoever allowed within Islam and which will also be consistent with the political concept of justice.

Having argued that Islam provides support for human rights, however, an exclusive Islamic claim to human rights can lead to conflicts with other comprehensive doctrines like Christianity, for example. The caution therefore, according to Bielefeldt, in the use of religion to promote human rights is, if not handled properly, it can lead to claims that affect the universality of rights. Such awareness has to guide all religions in order to prevent any “essentialist appropriation of human rights by which their inherent universalism would be swallowed up”.142 The concern of ‘essentialist appropriation’ can be avoided when human rights are the point of consensus of various comprehensive doctrines rather than a total application of the Sharia as the public law of the state. The reason is that the alternative (advocating for the Sharia) will make human rights appear as an Islamic claim thus compromising the universality of human rights. When this situation happens, the right to self-determination becomes a hindrance rather than a facilitator of human rights as a universal concept. The need for maintaining the universality of human rights is the reason why human rights are political concepts and should be justified from various comprehensive doctrines of the state since human rights are conceived to be guaranteed by the state143, rather than the state applying one comprehensive view of human rights.

142 Bielefeldt 2000, p. 117.
143 Preamble of the UDHR- the last paragraph.
Chapter 6

Conclusion

The main objective of this thesis is to examine how human rights can be justified in Islam. With this aim, I have discussed various Muslim authors’ views on how human rights can be justified in Islam. The discussion reveals some limitations of the various views discussed. As a result, a principle that overcomes those limitations has to be presented as a way of justifying human rights in Islam.

The position of this paper is that the Sharia if used as a public law of state would come into conflict with human rights. I have argued that no matter the reform to the Sharia in attempt to accommodate human rights once it is used as public law of a state, it denies other reasonable doctrines equal opportunity in applying their doctrines. The reason for this position is the fact of plurality of comprehensive doctrines in a modern state. These doctrines can be either religious or non-religious doctrines. Therefore, human rights as political concepts should be justified by offering various doctrines equal participation in the political process of the state.

In addition, there is pluralism in the way the Sharia is interpreted today among various Muslims. Therefore, applying one view of the Sharia will be problematic among Muslims. For example, the Sunni interpretation of the Sharia is different from the Shia interpretation. Meanwhile, the original purpose of the Sharia was uniformity in order to have a common Islamic way of life or Islamic identity. Therefore, the issue of the Sharia being Islamic identity today will imply that there are many Islamic identities. The question then is which of the many Sharia in each state that represents Islam. Due to the fact of plurality in the way the Sharia is defined, I argue against equating the Sharia to Islamic identity. The alternative of separating Islamic identity to the Sharia (and to equate the Sharia to Islamic identity) leaves people lost as to which is the authentic Islam today.

In addition, Islamic principles must be seen as private laws to regulate Muslims relationship with their Creator rather than the public law of the state. I cited Coulson studies of the verses of the Quran to confirm this religious position. The position of this thesis is that since the main purpose of the Quran is religious in nature, then Islamic laws are religious guide for Muslims.
The aim of this thesis is to propose a principle that would be able to justify human rights in Islam while at the same time accommodate pluralism of views in a modern state. In doing this and realizing the limitations of applying the Sharia as a public law of the state, the discussions in this paper address the following questions:

i) What are the limitations of Sharia as far as universal human rights is concern?

ii) Is a plural view or interpretations of human rights possible?

iii) Can Islam provide a foundation for the development and support of human rights?

iv) What theory or principle would ensure human rights in Islam and ensure pluralism of views?

In addressing these questions, I have argued that reform to the Sharia will be difficult to yield acceptance among some Muslims because, of the religious believe attached to the Sharia based on the authority of the Prophet. The reform departs from the methodology that Muslims have come to accept as consistent with the Quran and Sunna (through a consensus of a generation of Muslims). Nevertheless, I argue later that once the proposed reform advocate for the application of the Sharia as a public law, it denies other religious doctrines equal participation in the political process as such a violation of their rights. The political concept is not in conflict with any comprehensive doctrine, it ensures that citizens appreciate rights and feel motivated to act upon them. This ensures a stable society where human rights are respected because they are aware that the principles of liberty and equality do not conflict with their own comprehensive doctrines.

In discussing the issues of this paper, references are mostly from verses of the Quran and articles of human rights documents. The reason is that they are the basic and authoritative documents and reference point on Islam or Human Rights.

The position of this paper is that various comprehensive doctrines should be able to justify human rights from their own point of view. This is the reason why Rawls theory of overlapping consensus is offered as an alternative to the Sharia as a way of justifying human rights in Islam today.

In addition, human rights and religion ought to complements each other because religion provides a foundation that develops human rights. In this direction, I presented views of
human rights authors like Ignatieff and Both as far as allowing religious views in
definition of human rights is concern. The verses of the Quran that can provide the
foundation to develop human rights in Islam are discussed.
Finally, overlapping consensus on human rights aims at making the support of human
rights in Muslim societies an appealing universal imperative rather than an alien doctrine.
However, I am equally mindful of the possibility that universal human rights should not
be displaced or compromised with the particularity of diverse religious doctrines. This is
the reason why I propose a principle that offers a political conception of justice as a way
of mediating between diverse comprehensive doctrines in a state. Once the state is
neutral, violating of human rights is prevented through the general concept of justice or
rights agreed by all citizens of the state.
Human rights are universal standard for measuring how a state acts towards its people.
Moreover, no matter the approaches to justify human rights in Islam, there is no room for
denying other people equal rights based on Islam. There are several ways human rights
are justified as a universal principle. For example, Quran verses that address the inherent
dignity of human beings without distinction on either gender or religion like 17:70 that
talk about ‘God honoring children of Adam’ can be the base to justify human rights in
Islam. There is also a natural or emotional aspect of human beings that can be a
justification for human rights. This emotional aspect of human beings enables people to
have feeling for each other. This emotional component makes human beings feels what
others suffer. Therefore, from the emotional point, human rights are justified because no
human being will want to be discriminated against therefore he or she must not also
discriminate against other human beings.
In addition, human rights can be justified for creating the condition through which all
individuals and groups are free to go about their life. Therefore, respect for human rights
is justified because it ensures the wellbeing of each individual as well as groups.
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