

Tensions Between Islamic Law and Human Rights from the Perspective of Comparative Law

The rights to exercise one's own culture and religion belong to our catalogue of fundamental constitutional rights and universal human rights. Because of the universality of these rights, we need to have a clear concept about the world context in which human rights are being realized.

World Context

I found on the internet such a clear description of our world context. I quote: "If we were to reduce the world population to 100 persons in a global village our world would look like this: There would be 57 Asians, 21 Europeans, 14 from North and South America, and 8 Africans. We would be 51 women and 49 men; 70 would be non-Christians, 30 would be Christians; 50% of the wealth would belong to 6 persons, all of whom would come from the USA. The housing of 80 would be in a bad condition; 70 would be illiterate; 50 would suffer from malnutrition; and one would have a university degree. No one would have a computer. (Bridge Overseas: <http://members.forfree.at/~rbo/index1.html>)

This is the kind of world in which human rights have to be implemented.

The International Human Rights Order and Islamic Law

The human rights order is part of the international legal system. That means that all states are obliged to follow human rights standards – either because they as states have signed and/or ratified the human rights conventions and covenants, or because human rights have attained the character of customary international law. Customary international law has to be followed by all states regardless of whether they have signed treaties or not. For example, Botswana did not sign the UN Women's Rights Convention. Nonetheless, the highest appellate court of the land declared a national law invalid on the basis of the argument that the standards for women's rights in the Convention have become international customary law.

Islamic law does not enjoy any particular recognition as such within this world system of international law. Islamic law is also not a state law as such. At most it is part of a state's legal system when expressly recognized. Islam is recognized as a state religion in many Arab countries, although in Islamic legal philosophy there cannot be a state that "believes". Only a single human being can be a Believer. Islamic law is codified in many Arabic and Muslim countries – with varying contents. It is mostly applied in family and succession matters and increasingly as criminal law and commercial law too. Islamic law also serves as an important source of national law in the case of ambiguities in the legislative texts.

When Islamic law is being interpreted and applied in a national context, two main sources are used: the Quran and the reports of the Prophet's sayings and doings, the ahadith. There are basically two approaches to interpretation: interpretations which take into consideration present-day circumstances and weltanschauungen, or interpretations which are blind acceptance of classical interpretations from the middle ages. Two countries in particular illustrate these two interpretative possibilities. They are Tunisia and Iran. Tunisia is an example of ijihad, that is new interpretations, new applications of minority opinions from the middle ages. By reason of new interpretations of the Quranic verses on polygamy and extra-

judicial divorce by the husband, Tunisia has forbidden polygamy and permitted only court divorces. Iran offers the opposite example. It sets an example for the older approach. At the same time it has to be mentioned that recently Iranian women have succeeded in achieving reforms in the divorce law so that the Quran has been interpreted to require the divorcing husband to compensate the wife for her household or business work she had performed for him during the marriage. (See http://www.sub.uni-goettingen.de/ebene_1/orient/womnislsm.htm)

Let us return to the human rights order. As known, there are various human rights declarations and conventions: the 1948 Declaration, the International Covenants on political, civil, economic, social, and cultural rights, the Convention against Genocide, the Treaties for the Abolition of Slavery and the Abolition of Every Form of Racial Discrimination, for the Rights of the Child, against Torture, against Trafficking in Women, against Every Form of Discrimination against Women, etc. Nearly all Islamic countries have ratified these conventions. The women's rights convention poses the most difficulties for the Islamic and Arabic governments. Most have ratified the convention with reservations – similar to the resistance which the Convention for the rights of migrant workers meets in Europe.

In addition to the global human rights agreements, there are in addition regional protection of human rights: the European Human Rights Convention, the American Convention on Human Rights, the African Charter for Human and Peoples' Rights, and the latest one, the Arab Charter for Human Rights.

Islamic and Arab Human Rights Declarations

I have prepared a "Table for Rights and Duties" (see appendix). You will see that there are presently two human rights instruments which apply under international law to Muslim populations and states. These are the 1948 Declaration of Human Rights and the Arab Charter (not yet ratified). The other two declarations -- the 1982 Declaration and the 1990 OIC Declaration -- are only guidelines for Muslims in the diaspora or in their home countries. The table compares the individual human rights of the four human rights declarations.

In my opinion, the Islamic human rights instruments emphasize much more economic rights and solidarity. For example, the poor have a right to a tax on the rich. This focus on solidarity can be explained by resentful sentiments in many Muslim countries. It is believed that a minority economy and culture -- namely, the industrial lands -- or specifically, the six rich USA citizens in the global village, which I mentioned at the start -- are oppressing the world. They are only a small part of world cultures. The rich, according to Islamic injunctions, are obliged to help the poor. The Islamic law of inheritance exemplifies Islamic economic morality. The inheritance rules are designed to distribute rather than to accumulate wealth. A person may decide freely over who shall inherit up to only one-third of her/his wealth. The remaining two-thirds must be distributed to all possible relatives: children, parents, uncles, aunts. This fragments ownership. Between spouses, the widow receives at most one-fourth of the wealth because the marriage couple should own their wealth separately. Each partner earns for her/himself and shares with the other in solidarity. This is not like in Europe, where the wife traditionally brought her own property into the marriage, and when the marriage contract did not provide otherwise, the husband received automatically the right to administer the wealth of his wife.

The examples I have given from Islamic inheritance law show a tendency towards a moral emphasis on economic solidarity rather than on an ever new creation of resources and wealth.

This contrast is further mirrored in the 1948 human rights declaration and the Islamic declaration. While the 1948 declaration ties the realization of human rights with political peace and the attainment of a higher material standard of living, the preamble of the Islamic human rights declaration considers human rights rather as a purely moral matter.

Legal Pluralism and Human Rights

I want now to concentrate on problems connected with the realisation of certain specific human rights: the rights to culture, to freedom of religious belief and conscience, and to gender equality.

We are all familiar with continued open violations of the right to freedom of belief. To mention only a few instances in Muslim lands and in Europe: There is the persecution of Islamic believers such as the Ahmadiyyas in Pakistan, the Bahai in Iran; there is the state prohibition against wearing headscarves in school in France or in Tunisia; and there are employment restrictions imposed by Bavaria against members of Scientology.

But I am not going to concentrate on these examples today. I want to concentrate on the legal structural difficulties that the application of the above-mentioned rights pose for European law in connection with the Muslim communities and for Islamic law in countries having religious minorities.

(i) Different concepts of legal pluralism

As a basic foundation of the democratic society, the right to freedom of belief results in a pluralistic society. The scope of this pluralism, however, is determined by the structure of legal pluralism in a given society. My question today is, just how much pluralism is tolerated in the democratic legal culture?

I have given you hand-outs with diagrams. I have portrayed the basic structure of legal pluralism in non-European (African, Asian, Middle Eastern) legal cultures, including Islamic law, and European legal culture, which I have divided into the continental and the anglo-saxon systems. My two theses on legal pluralism I have summarized for you in another handout. The first thesis is as follows: Although Europe proclaims to be a pluralistic society and tolerates pluralistic religious beliefs, it still does not grant the right to one's own legal culture in intimate family areas for Muslim non-citizens or citizens. In other words, it is religiously pluralistic, but not legally. My second is as follows: In pluralistic non-European countries (Africa, Asia, Middle East) there is a basic right to one's own family legal culture, although, as already noted, in some instances, free exercise of religious belief (e.g. the Ahmadiyyas and Bahai) can be curtailed. In countries where Muslims constitute a minority, the legal culture is based on the principle of free choice of law independent of one's own religious community. In other words, non-European societies are religiously and legally pluralistic.

Let us go into some of the details. One of the fundamentals of the non-European Islamic legal culture is the right to one's own legal culture especially in family and inheritance law. One finds an equivalent in the European continental system, which allows for the application of the law of the guest, for non-citizens residing in foreign territory. The law of nationality applies in family matters. It does not matter how long a person has been domiciled in the foreign territory. For example, in the Federal Republic of Germany, Iranians who had fled Iran and live in exile from the fundamentalist regime are shocked to learn when they are

involved in a divorce suit that the German courts apply to them the fundamentalist family law of Iran. I simply want to say with this example that not all members of a minority favour the application of group rights. For that reason the family law system of India offers in principle a choice of law, so that each person retains the fundamental right to decide her/himself what law shall apply to a marriage contract, whether one wants to be considered a member of a particularistic religious or ethnic legal culture, or as a member of a generalized national legal culture applicable to all groups. In the Federal Republic of Germany, the principle of choice applies basically only to the choice of religious education.

In the Anglo-Saxon legal culture there is much more value placed on a uniform system of territorial law for all persons residing in that territory so that the fundamental rights of all persons are guaranteed. In this connection I should mention that the principle of uniform territorial law had important consequences historically. For example, in the 18th century as soon as an African slave set foot on English ground, s/he was immediately deemed emancipated because English soil did not tolerate such a fundamental violation of rights. Today in family law the principle of territoriality means that every person domiciled in Britain is subject to the general family law, regardless of religious belief. Culture is taken into account only when evaluating evidence of consent, such in the case of petitions for nullity of marriage on the grounds that the Muslim father under Islamic law must co-sign a marriage contract with his adult daughter.

ii) Tensions and contradictions in the application of the right to culture and religion

The implementation of the principles of pluralism in both the European and Islamic legal cultures reveals, however, many contradictions, whether it is in the case law or in the statutes themselves.

Let us start with examining the freedom to exercise religious belief. We stumble over a number of obstacles. The issue of blasphemy offers a good example.

In the anglo-saxon setting, the law of blasphemy was not uniformly applicable to all. In Britain the unwritten common law governed matters of blasphemy and this applied only to protect Christians (*R. v. Chief Metropolitan Stipendary Magistrate, ex Choudhury*, [1991] 1 All ER 306). This was one among other reasons why the Rushdie affair caused so much turbulence. Members of the Muslim community in Britain had gone to court in order to complain about the blasphemies in the *Satanic Verses*. The complaint was dismissed for the reason that the common law of blasphemy did not protect the Muslim belief. In the Federal Republic of Germany, the matter might have been dealt with in a different way under the law against insult of established religion since Islam is not recognized there officially as an established religion with certain privileges vis à vis the state. In addition, the latest constitutional case law confers on freedom of speech more protection than on the right of the official establishment to be protected against insults because such an insult does not in itself undermine the actual exercise of the right to freedom of belief.

In Islamic lands the principle of plurality that applies in family law has been compromised in the area of blasphemy. Blasphemy against Islam has been treated as a criminal offence punishable with death. In the course of history in these countries, this offence was particularly troublesome in religiously pluralistic Muslim societies. Riots between Muslims and the Christian and Hebrew minorities broke out whenever a drunken Christian or Jew ran through

the streets shouting insults against Islam. The death penalty for insulting Islam applied to any one regardless of religious belief. But the death penalty does not apply to persons who insult religions other than Islam. Indeed the death penalty for an insult is exaggerated. It is not listed in the Quran among the required hadd penalties. That means that it is not prescribed as an unchangeable Quranic penalty. The penalty has been prescribed more by local concepts of social order, power relationships, and protection against rebellion. If the principle of plurality were consistently applied, then a Christian or Hebrew whose religious law did not prescribe the death penalty for insulting any religion, including their own, could not be punished to death under Islamic law.

In the Federal Republic of Germany, as already mentioned, Islamic family law is applied to non-citizen residents as long as the applicable Islamic rule does not violate German *ordre public*. *Ordre public* normally means basic constitutional and human rights. The case law, however, is not consistent in the definition of *ordre public*, especially when the basic right to equality among the sexes is concerned. Often the inequalities in Islamic law regarding rights of men and women are tolerated. The right not to have a foreign culture imposed has been given priority over women's rights. (See C. Jones-Pauly, *Anwendung des islamischen Rechts in der Bundesrepublik Deutschland*, *Richterzeitung*, Bd. 74, H. 8, 196, 322-28) An exception is made for German citizens of Islamic belief. That is in the matter of marriage dowries. Under Islamic law only the husband has the duty to pay a dowry (*mahr*) to the wife. The German case law has regarded this duty wrongly as a matter of maintenance or as a matter of a contractual agreement (minority opinion). This contrasts with the Canadian and Tanzanian case law, which considers the *mahr* in principle (*obita dicta*) as a violation of the basic right of men and women to equality.

In a Muslim country like Pakistan (as well as Egypt, where many Christian Copts live) family law is not uniform. It is pluralistic. Every religious group has the right to its own family law. In Pakistan, Christian family law applies for Christians. But in criminal law, the principle of group law is not consistently upheld. The Islamic law that applies the death penalty or life-long imprisonment to adultery, rape or sexual relations between unmarried persons applies as a general law to all religious or ethnic groups. An exception is made for non-Muslims in so far as the death penalty for adultery or promiscuity is not applicable. It is replaced by life-long imprisonment. A problem arises, however, for Christians seeking divorce. One of the main grounds for divorce among Christians is adultery. Proof of adultery under Christian law does not have penal consequences. But because adultery is a general criminal offence in Pakistan, women are especially wary of seeking divorce from their adulterous husbands because they would subject them to life-imprisonment. Once imprisoned, their husbands would have no means to pay post-divorce maintenance as required by Christian law.

Conclusion

No culture -- not even a religious or legal culture -- is without internal contradictions. And certainly no legal culture stems exclusively from its own soil. All cultures are the result of syncretic processes (cf. James Frazer, *The Golden Bough*). I am aware that my position excites controversy, since every national culture and religion likes to believe that it is a unique incarnation of the national or folk spirit or of godly truth itself. To avoid the tensions caused by such self-appropriation, I suggest that we uphold one human or constitutional right in particular, namely the right (and the duty) to become knowledgeable about international human rights culture, as is prescribed in the Guatemala constitution. What might be gained by focus on this right? In Europe, such a right would mean, for example, in the Federal Republic of Germany that the focus of religious curriculum would not be on one's own religious

doctrine, but rather on knowledge of all religions and philosophies of the world. For Islamic law as applied in Europe, this would mean a focus of the courts on the plurality of interpretations of Islamic legal sources rather than their tying themselves to fundamentalist interpretations written down in any one state statute. This in itself would help to break the efforts of Muslim fundamentalists to construct a monolithic monopolistic legal authority in the image of Catholicism for the entire Muslim world.

TABLE OF RIGHTS/DUTIES FROM:

1948 UN Declaration of Human Rights De

1981 Declaration of Islamic Human Rights (European Islamic Council)

1990 Cairo Declaration of Human Rights in Islam (worldwide Organisation of the Islamic Council)

1994 Arab Human Rights Charter (Arab League)

	1948	1981(Islam)	1990 (Cairo)	1994 (League)
Human Dignity	yes	yes	yes	yes
Source of human dignity	Inalienable natural law	God	God	God
Freedom of Speech	yes	yes	yes (dependent on Sharia rules of blasphemy)	
Duty to Speak Out		Yes (against injustice)		
Freedom of belief and conversion	yes	yes; no coerced conversions	No conversions for reasons of economic vulnerability	Freedom of belief
No religious contempt		yes		
Freedom from fear	yes	yes		
Freedom from exploitation		yes		
Right to rebel against oppression of fundamental rights	yes	Right of disobedience		

	1948	1981 (Islam)	1990 (Cairo)	1994 (League)
Right to life	yes (Death penalty not mentioned)	yes (Death penalty not mentioned)	yes (Sharia death penalties allowed)	yes (death penalty allowed)
Right to security	yes		yes	yes
No slavery	yes	yes		
No torture, humiliation	yes		yes	yes
No arbitrary arrest	yes		yes	
Right to due process	yes		yes	
Right to impartial court hearing	yes	yes	yes	
Right to honour and reputation	yes	yes	yes	
Right of movement within a state	yes	yes plus freedom of movement for all Muslims in the Muslim world		
Right to a nationality	yes			
Right of assembly	yes	yes		yes
No compulsory membership in any association	yes			
Right to free choice of political representatives	yes	Reciprocal consulting between people and the governing		Right to political participation
Right to trade unions	yes			yes

	1948	1981 (Islam)	1990 (Cairo)	1994 (League)
Right to work	yes		State duty to settle employee/employer dispute impartially	yes
Right to just family wage	yes	Generous treatment for each worker (female and male)	Yes, plus right of choice	Just living wage
Right to healthy life	yes		Right to just living wage	
Right to education	yes, only to primary schooling	yes, plus duty to educate oneself	yes	Yes, to primary and higher education
Right to participate in cultural life of a community	yes	yes	Yes, plus right to religious education	yes
Right to cultural freedom (individual and group)		yes		
Minorities' rights to own civil law		yes		Right to religious education
No nationalistic or racial agitation			yes	
Right to private property	yes		yes	yes
Right to economic freedom (individual and group)		Yes, if in interest of community	yes	

	1948	1981 (Islam)	1990 (Cairo)	1994 (League)
International legal right of peoples to self-determination over own resources		Use of resources in interest of humankind		yes
Right of the poor to support from the rich (zakat)		yes		
Right of relatives to reciprocal support				
Sexual equality	yes	Equal dignity for both sexes	yes	
No discrimination for reasons of sex	yes	yes		yes
Maintenance right of the wife		yes	yes	
Right of women to financial independence and to own name			yes	
Duty of individual towards communities promoting freedom	yes		yes	
Duty of community to promote free development of personality	yes (indirect)	yes		For young persons

	1948	1981 (Islam)	1990 (Cairo)	1994 (League)
Connection between human rights and higher living standard	yes			
Connection between human rights and world peace	yes			
Connection between human rights and morality			yes	
Right to healthy moral environment			yes	
Peoples' right to self-determination				yes
No destruction of fields or animals in war			yes	
State duty to fight colonialism			yes	yes, plus Zionism, racism

Annex 1